Rape I

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I. Introduction

Work on Rape I and Rape II began in the fall of 1975. Research was started with the specific intention of designing a chart which would summarize the rapidly changing rape laws in every jurisdiction in the United States. The chart was to be a reference tool for practicing attorneys, lobbyists, and those interested in the women's movement. The commentary was intended to be no more than a brief history of recent reform in an area central to the concerns of the women's movement. As always, research proved to be more difficult, cumbersome and technical than anticipated. If the *Women's Rights Law Reporter* had not had the foresight to commit the magazine to publication early in the project, this research probably would never have been made generally available.

The compilation of the laws clearly required some commentary. Since research was conducted in both Pennsylvania and New Jersey, at the time it seemed reasonable to include a brief legislative history of the rape laws in those two states. However, the New Jersey State Library, the official library of the New Jersey State Legislature, had nothing on record, although complete legislative histories of many other New Jersey laws were on file. Also, I discovered that the legislative history in both the New Jersey and Pennsylvania annotated statutes was in neither case strictly accurate and in both cases incomplete.

What is included in Sections II and III is a tracing of the two rape statutes back to the earliest rape and sex offense statutes in the two jurisdictions. And, since both statutes originated in English law, some research on the common and statutory law in England is included. I did not attempt to look at historical accounts, debates surrounding the passage of statutes, or the developments of other parts of the law. Rather, the rape laws are chronicled with the relevant amendments and repealing statutes, concluding with the law currently in force. These legislative histories raised so many questions that a section detailing the difference in statutory development in the two states, focusing on the impact of the Model Penal Code, is added in Section IV.

Finally, commentary would have been incomplete without some reference to federal law. The rape laws, like most criminal laws, are matters of state law jurisdiction. The federal laws regarding rape are summarized in Section V, and the recent Supreme Court cases directly related to rape are discussed in Section VI. Commentary upon the recent important Virginia sodomy statute decision is reserved for a later issue.

While the *Women's Rights Law Reporter* has published the material in two parts, the issues are meant to be read together. The commentary to the rape laws included in Rape I is background to the material presented in the chart and commentary in Rape II. Discussion of the developments in Pennsylvania and New Jersey indicates that the chart and commentary only begin to scratch the surface in detailing the history and development of the law in the 53 American jurisdictions.

II. Legislative History of Rape Law in New Jersey

When New Jersey enacted its first criminal code in 1796, rape was essentially the same as the English common law offense codified in the statute of 18 Elizabeth I.[1] However, the New Jersey formulation

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[1]Crimes Act of March 18, 1796, § 8, [1821] N.J. Rev. Laws (Pennington) 246:

> [A]ny person, who shall have carnal knowledge of a woman, forcibly and against her will, or who shall aid, abet, counsel, hire, cause or procure any person or persons, to commit the offence; or who, being of the age of fourteen years, shall unlawfully and carnally know and abuse any woman child, under the age of ten years, with or without her consent, shall, on conviction, be adjudged guilty of a high misdemeanor, and be punished by fine and solitary imprisonment at hard labor, for any term not exceeding fifteen years.

Compare An act to take away clergy from the offenders in rape or burglary, and an order for the delivery of clerks convict without purgation, 18 Eliz. I, c. 7, § 1 (1576):

> For the repressing of the most wicked and felonious rapes or ravishments of women, maids, wives and damosels, . . . be it enacted and ordained by the authority of this present parliament, . . . that in every such case, every person and persons so being found guilty, outlawed or confessing any of the said felonious rapes or burglaries, shall suffer pains of death, and forfeit as in cases of felony hath been used and accustomed by the common laws of this realm, without any allowance of the privilege or benefit of clergy; any law, custom or usage heretofore had, made or used to the contrary notwithstanding.

Compare also id. § 4:

> And for plain declaration of law, be it enacted, That if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as a felon without allowance of clergy.

For those of our readers not versed in Elizabethan law, "benefit of clergy" originally applied to criminal process jurisdiction, exempting certain offenders from arrest, attachment or conviction. Later the term came to mean exemption

defined the offense and included aiding and abetting. Rape was considered a high misdemeanor punishable by fine and imprisonment, rather than a capital felony as in Elizabethan times. Surrounding sections of the New Jersey code prohibited polygamy,[2] abduction,[3] concealing pregnancy,[4] incest[5] and sodomy.[6] Sodomy was considered a higher crime and carried a heavier penalty than rape.[7]

In 1820 the legislature enacted a supplementary statute providing different punishment for slaves convicted of "arson, burglary, rape or robbery, or assault and battery, with intent to commit murder, rape, burglary or robbery."[8] The convicting court, in its discretion, could either inflict the prescribed sentence or deport the offending slave at his owner's expense. New Jersey, unlike Pennsylvania, did not distinguish between black and white female victims in defining the punishment for rape.[9]

The original 1796 formulation was re-enacted without major change in revisions of the criminal code in 1846 and 1874.[10] However, in 1887 important changes in the carnal abuse section (in New Jersey, statutory rape) were made as amendments to the 1874 statute. The age of the offender was changed from 14 to 16, and the age of the woman (formerly "woman child") was changed from under 10 to under 16.[11] Unlike Pennsylvania, however, New Jersey did not introduce a chaste character provision[12] when the statutory age was raised. Subsequently, this amendment was judicially interpreted to include the offense of attempted rape.[13] A recodification in 1898 renumbered the sections and made minor changes in language.[14] Rape was placed between kidnapping and abduction, although still a part of the code dealing with seductions,[15] void marriage[16] and concealing pregnancy.[17]

The 1905 amendments to the statute of 1898 reduced the age of the female victim from 16 to 12 for carnal abuse, reintroduced the term "woman child" for such female and raised the penalties from a maximum fine of $1,000 to $5,000 and from a maximum prison term of 15 to 30 years.[18] In addition, the 1905 act created a new offense, carnal abuse of a "woman" between the ages of 12 and 16 "with her consent."[19] This offense was also a high misdemeanor, but with lesser penalties than for forcible rape or carnal abuse: a fine not exceeding $2,000 and imprisonment not exceeding 15 years.[20] Thus for the first time in New Jersey there was a special category of "rape with consent." Judging from the penalties prescribed, this form of statutory rape was considered a less serious offense than rape of adult women or carnal abuse of young girls. The provision "with her consent" made it similar to a fornication statute or morality provision.

Perhaps the legislature was concerned about this when they amended the statute in 1910, changing the terminology to "with or without her consent" with reference to women between 12 and 16.[21] The legis-

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from penalty, especially the death penalty. The benefit of clergy was extended to everyone connected with the church and to everyone who could read and write ("clerks"). There came to be such abuse of the privilege that a number of statutes were enacted denying benefit of clergy for felons convicted of certain crimes (*e.g.*, 18 Eliz. 1, c. 7 (1576)). The privilege was abolished altogether in England by 7 & 8 Geo. 4, c. 28, § 6 (1827), and in the United States by Act of April 30, 1790, ch. 9, § 31, 1 Stat. 119. BLACK'S LAW DICTIONARY 200-01 (4th ed. 1957).

[2]Crimes Act of March 18, 1796, § 11, [1821] N.J. Rev. Laws (Pennington) 247.

[3]*Id.* § 9.

[4]*Id.* § 12.

[5]*Id.* § 13.

[6]*Id.* § 7.

[7]*Id.* "[S]odomy, or the infamous crime against nature, committed with mankind or beast, shall be adjudged a high crime and misdemeanor, and be punished by fine and solitary imprisonment at hard labor, for any term not exceeding twenty-one years."

[8]Law of May 31, 1820, § 5, [1821] N.J. Rev. Laws (Pennington) 736, *supplementing* Crimes Act of March 18, 1796, § 8, *id.* at 246.

[9]*See* note 45 *infra* for the comparative Pennsylvania provisions.

[10]The 1846 revision renumbered the section, deleted some commas, removed the term "solitary" imprisonment and set a maximum fine of $1,000. Crimes Act, April 16, 1836, ch. 1, § 10, [1847] N.J. Rev. Laws 259. The 1874 revision renumbered the section, removed the initial word "That" and changed "any woman child" to "a woman child." Act for the Punishment of Crimes, March 27, 1874, ch. 2, § 80, [1874] N.J. Rev. Stat. 148, [1877] N.J. Rev. Stat. 241.

[11]Act of April 28, 1887, ch. 169, § 80, [1887] N.J. Laws 230, *supplementing* Act for the Punishment of Crimes, March 27, 1874, ch. 2, § 80, [1874] N.J. Rev. Stat. 148.

[12]*See* note 65 *infra*, and surrounding text.

[13]Farrell v. State, 54 N.J.L. 421, 24 A. 725 (1892).

[14]The following words were deleted: "That," "on conviction," "adjudged," "be," and "for any term." Act for the Punishment of Crimes, June 14, 1898, ch. 235, § 115, [1898] N.J. Laws 826.

[15]*Id.* § 117.

[16]*Id.* § 116.

[17]*Id.* § 118.

[18]Act of April 17, 1905, ch. 159, § 115, [1905] N.J. Laws 306-07, *amending* Act of June 14, 1898, ch. 235, § 115, [1898] N.J. Laws 826.

[19]*Id.*

> Any person . . . who, being the age of sixteen or over, shall unlawfully and carnally abuse a woman over the age of twelve years and under the age of sixteen years, with her consent, shall only be guilty of a high misdemeanor, and punished by a fine not exceeding two thousand dollars, or imprisonment at hard labor not exceeding fifteen years, or both.

[20]*Id.*

[21]Act of April 9, 1910, ch. 161, § 115, [1910] N.J. Laws

lature could also have been correcting an inadvertent omission, since there was no provision for forcible or unconsented-to carnal abuse of females between these ages. The statute was otherwise unchanged.

In 1921 a provision prohibiting carnal knowledge of female inmates of homes or institutions for the feeble-minded was added to the code of 1898.[22] Consent was irrelevant, presumably because a feeble-minded victim would be deemed incapable of consenting. Conviction resulted in a simple, not a high, misdemeanor, and the penalties were lower than for carnal abuse.[23]

The Revision of the Law in 1937 renumbered the rape section and divided it into two parts, putting it in a separate chapter between Receiving Stolen Property and Railroads and Railways. The revision made only one minor change in language, from "said offense" to "such offense." The section dealing with carnal knowledge of inmates was re-enacted in its original 1921 form.[24] However, by separating out the two sections, in effect the section dealing with inmates became an unused part of the code. There are no reported cases listed in the annotated statutes.

In 1949 the New Jersey Sex Offender Act was passed, requiring a mental examination for all convicted sex offenders.[25] The Act stipulates the terms of treatment, probation and parole for all convicted sex offenders, including rapists.

The 1951 Revision of the Criminal Code renumbered the rape section, deleted language regarding aiding and abetting and "at hard labor" and raised the fine for statutory rape of females between 12 and 16 from $2,000 to $5,000.[26] Statutory language dealing with inmates was modernized and set penalties removed.[27] Penalties are now governed by the general statute covering misdemeanors.[28] Assault with intent to rape was defined as a separate offense in a separate section.[29]

A 1952 amendment added a provision for women under the influence of drugs.[30] No additional revisions or amendments have since been enacted, although there are a multitude of rape-related bills currently pending in the New Jersey legislature.[31]

Although the New Jersey rape statute has been amended ten times, the statute in effect in 1976 is essentially the same as the one enacted in 1796, which in turn was derived from an Elizabethan statute first

271, *amending* Act of June 14, 1898, ch. 235, § 115, [1898] N.J. Laws 826. In addition, the amendment deleted the word "also" before "guilty of a high misdemeanor."

[22]Act of April 12, 1921, ch. 341, [1921] N.J. Laws 939, *amending* Act of June 14, 1898, ch. 235, § 115, [1898] N.J. Laws 826:

> Any person who shall have carnal knowledge of any female who is an inmate of any home for feeble-minded women, or of any home or training school for feeble-minded girls and boys in this State, with or without her consent, shall be guilty of a misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment at hard labor not exceeding two years, or both.

[23]Beyond this, the statute raises a further problem. Under this and similar formulations it is illegal for inmates to engage in any sexual activity, even consensual. In theory at least, the institutionalized mentally deficient are condemned to celibacy. Some of the newer statutes do not confine the prohibition against sexual intercourse to mentally deficient women in institutions, but would reach even connubial privileges. *See, e.g.*, P.A. No. 75-619, [1975] Conn. Public Acts, § 53a-71 (a): "A person is guilty of sexual assault in the second degree when . . . (3) such person engages in sexual intercourse with another person and such other person is . . . (2) mentally defective, mentally incapacitated or physically helpless . . . ."

[24]N.J. REV. STAT. §§ 2:163-1 & -2 (1937) (superseded).

[25]N.J. STAT. ANN. §§ 2A:164-3 *et seq.* (1971).

[26]*Id.* § 2A:138-1 (1969).

> *Rape and carnal abuse; penalty.* Any person who has carnal knowledge of a woman forcibly and against her will, or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child under the age of 12 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 30 years, or both; or who, being the age of 16 or over, unlawfully and carnally abuses a woman-child of the age of 12 years or over, but under the age of 16 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment of not more than 15 years, or both.

[27]*Id.* § 2A:138-2:

> *Carnal knowledge of inmates of homes or institutions for the feeble-minded or mentally ill.* Any persons who has carnal knowledge of a female inmate of any home or institution for feeble-minded or mentally ill females, or of any home or training school for the feeble-minded, with or without her consent, is guilty of a misdemeanor.

[28]*Id.* § 2A:85-7.

[29]*Id.* § 2A:90-2.

[30]Act of April 24, 1952, ch. 94, [1952] N.J. Laws 428-29, *amending* N.J. STAT. ANN. § 2A:138-1 (1951).

[31]Simply keeping track of new bills is difficult. A recent survey of the New Jersey Legislative Index indicated the following bills had been introduced into the New Jersey legislature in 1974-75: Assembly No. 3461, June 16, 1975 (comprehensive revision of the rape statute); Assembly No. 3359, April 28, 1975 (regarding admissibility of evidence of victim's prior sexual conduct; different from Assembly No. 2383, *infra*); Senate No. 3189, April 28, 1975 (Dep't of Education to establish guidelines for teaching rape prevention techniques in the schools); Senate No. 3067, Feb. 24, 1975 (prohibiting publication of the identity of victims of sex offenses, including sodomy); Assembly No. 3095, Feb. 10, 1975 (authorizing Violent Crimes Compensation Board to pay for hospital emergency room costs for rape and sodomy victims); Assembly No. 2386, Dec. 19, 1974 (resistance not required); Assembly No. 2383, Dec. 19, 1974 (excluding evidence of victim's prior sexual conduct, unless judge has determined its relevance); Assembly No. 1576, April 22, 1974 (excluding evidence of victim's prior conduct or reputation for chastity from rape trial); Senate Concurrent Resolution No. 107, March 25, 1974 (creating commission to hold hearings on the subject of rape).

enacted in 1576. The ages of victim and offender have been changed, and ancillary provisions regarding drugs and women in institutions have been added, but the definition of the offense and the terminology are basically unchanged. The lack of reform in the late 1950's and early 1960's may have prevented the institution of provisions such as prompt complaint and corroboration, which are extremely unfavorable to victims. Substantive change in the rape law is, however, long overdue in New Jersey.

III. Legislative History of Rape Law in Pennsylvania

The earliest Pennsylvania rape statute on record was included in the Duke of York's codification of 1682,[32] together with sodomy,[33] bigamy,[34] drunkenness[35] and incest.[36] The offense defined was "Rape or Ravishment, that is, forcing a Maid, Widow or Wife."[37] Rape was not a capital offense; the penalty was whipping, one year's imprisonment and the forfeiture of property. The penalty depended upon the victim's status as widow, maid or wife, not to grade seriousness, but rather to indicate whether the forfeiture was to be paid to the victim, her parents or her husband. In this respect it was similar to a tort rather than a criminal statute. The penalty for the second offense, however, was life imprisonment.

This statute was repealed in 1693,[38] and another was enacted in 1700,[39] together with statutes proscribing bigamy[40] and "incest, sodomy and bestiality."[41] The offense was the same, but the penalties were changed dramatically. The punishment for a first offense was public whipping, "thirty-one lashes on his bare back, well laid on,"[42] with the term of imprisonment raised from one year to seven. Property forfeiture was still exacted, although the amount depended upon the offender's marital status, and it went not to the victim but to the "governor and . . . the poor,"[43] *i.e.*, the state. Thus, the tort aspect of damages was gone, and the forfeiture was a criminal fine. For the second offense the offender suffered castration and was branded with the letter R "in his forehead."[44] Different penalties for "negroes" were enacted for the first time in 1700.[45] The offense could

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[32]Act of December 7, 1682, ch. 10, [1682] Charter to Wm. Penn & Laws of the Province of Pennsylvania 110 (1879):

> That Whosoever shall be Convicted of Rape or Ravishment, that is, forcing a Maid, Widow, or Wife, shall forfeit One third of his Estate to the parent of the said maid, and for want of a parent, to the said maid, And if a Widow, to the said Widow, and if a Wife, to the husband of the said Wife, and be whipt, and suffer a year's imprisonment in the house of Correction, at hard Labour and for the second offense, imprisonment, in manner aforesaid, during Life.

Since the laws of England were in effect in the colony of Pennsylvania at that time, the common law crime also would have been recognized. Annotations to the present law, Pa. Stat. Ann. tit. 18, § 3121 (1973), cite for legislative history prior to 1860 the case of Commonwealth *ex rel.* Case v. Smith, Warden, 134 Pa. Super. 183, 3 A.2d 1007 (1939). *Smith* includes a discussion of prior statutory and common law, but incorrectly cites the statute of 1718 as the first recorded rape statute in Pennsylvania.

[33]Act of December 7, 1682, ch. 9, [1682] Charter to Wm. Penn & Laws of the Province of Pennsylvania 110 (1879) (repealed 1693):

> That if any person shall be Legally Convicted of the unnatural sin of Sodomy or joining with beasts, Such person shall be whipt, and forfeit one third of his or her estate, and work six months in the house of Correction, at hard labour, and for the Second offense, imprisonment, as aforesaid, during life.

Note that sodomy was a slightly less serious crime than rape, and the statute allowed for both male and female offenders.

[34]*Id.*, ch. 11.

[35]*Id.*, ch. 12.

[36]*Id.*, ch. 8.

[37]*Id.*, ch. 10.

[38]*Id.*

[39]An Act Against Rape or Ravishment, November 27, 1700, ch. 4, § 1, [1896] II Pa. Stat. at Large, from 1682-1801, at 7 (repealed by the Queen in Council, February 7, 1705-6):

> Be it enacted by the Proprietary and Governor, by and with the advice and consent of the freemen of this Province and Territories in General Assembly met, and by the authority of the same, That whosoever shall commit a rape, or ravish any maid or woman, within this province or territories, being convicted thereof, shall, for the first offense, be publicly whipped with thirty-one lashes on his bare back, well laid on, and shall suffer seven years' imprisonment at hard labor. And if he be an unmarried person he shall forfeit all his estate; and if married, one-third part thereof, one-half of such forfeiture to the proprietary and governor and the other half to the use of the poor. And for the second offense, he shall suffer castration and be branded with the letter R in his forehead.

[40]*Id.*, ch. 6.

[41]*Id.*, ch. 5.

[42]*Id.*, ch. 4.

[43]*Id.*

[44]*Id.* There is something particularly gruesome to this modern reader about branding "in" as opposed to, perhaps, "on his forehead." It is interesting that New Jersey never had this kind of physical penalty. In general, the New Jersey formulations seem to avoid the strain of puritanism which can be found even in the present Pennsylvania law.

[45]An Act for the Trial of Negroes, November 27, 1700, ch. 61, § 4, [1896] II Pa. Stat. at Large, from 1682-1801, at 79 (repealed by the Queen in Council, February 7, 1705-6):

> [I]f any negro or negroes within this government shall commit a rape or ravishment upon any white woman or maid, or shall commit murder, buggery or burglary, they shall be tried . . . , and shall be punished by death; and if any negro shall attempt a rape or ravishment on any white woman or maid, they shall be tried . . . . and shall be punished by castration . . . .

be committed only "upon a white woman or maid,"[46] and the penalty was death. The penalty for attempted rape by a black man was castration.

All of these statutes were repealed by the Queen in Council, February 7, 1705-6.[47] Virtually the same statutes were re-enacted the same year and "allowed to become . . . law by lapse of time, in accordance with the proprietary charter . . . ."[48] The only major change of note was that castration was eliminated as a penalty. For a second offense a white man suffered life imprisonment, instead of castration, but the penalty of branding was still imposed.[49] The black offender was whipped, branded and deported,[50] but not castrated, for an attempt.

In 1718 a new crimes act was passed, defining offenses in accordance with the common law of England.[51] The statute of 18 Elizabeth I[52] was thereby in effect in Pennsylvania as well as in England. The crimes act formulation put rape with other assaults and trespasses and included aiding and abetting.[53] A later commentator noted that originally the crime was one for which there was no benefit of clergy,[54] that is, the convicted felon could not claim to be a member of clergy and thus out of the jurisdiction of the criminal court and exempt from punishment. This same commentator included a paraphrase of Lord Hale's cautionary instruction under his notes to "Sodomy, or B_gg_ry."[55]

The recodification of 1794 abolished the death penalty except for first degree murder.[56] The penalty for rape was changed to imprisonment at hard labor or solitary confinement for a minimum of ten and a maximum of 21 years, and life imprisonment for a second offense.[57] The recodification of 1829 reduced the penalty to a minimum of two and a maximum of 12 years.[58] The penalty for a second offense remained life.[59]

The Code of 1860 redefined the offense in the Pennsylvania statutes, by essentially spelling out the common law definition, using the terminology "unlawful carnal knowledge."[60] The age requirements for statutory rape were 14 for offenders and 10 for fe-

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[46]*Id.*

[47]*Id.*

[48]An Act Against Rape or Ravishment, January 12, 1705-6, ch. 120, § 1, [1896] II Pa. Stat. at Large, from 1682-1801, at 178.

[49]*Id.*

[50]An Act for the Trial of Negroes, January 12, 1705-6, ch. 143, § 4, [1896] II Pa. Stat. at Large, from 1682-1801, at 235 (repealed March 1, 1780).

[51]An Act for the Advancement of Justice, and More Certain Administration Thereof, May 31, 1718, ch. 236, [1896] III Pa. Stat. at Large, from 1682-1801, at 199 *et seq.*: "[W]hereas it is a settled point that as the common law is the birthright of English subjects, so it ought to be their rule in British dominions." *Id.* § 3 allowed for procedural differences between the province and England, since "the greatest part of the inhabitants of this province are such who, for conscience' sake [Quakers], cannot take an oath . . . ." Section 2 also declared all crimes to be "capital or felonies of death." Section 4 provided for counsel to be assigned to those accused of such offenses.

[52]18 Eliz. 1, c. 7. *See* note 1 *supra.*

[53]An Act for the Advancement of Justice, and More Certain Administration Thereof, May 31, 1718, ch. 236, § 7, [1896] III Pa. Stat. at Large, from 1682-1801, at 202:

> [I]f any person or persons shall commit sodomy or buggery, or rape or robbery, . . . he or they so offending, or committing any of the said crimes within this province, their counsellors, aiders, comforters, and abettors, being convicted thereof as abovesaid, shall suffer as felons, according to the tenor, direction, form and effect of the several statutes in such cases respectively made and provided in Great Britain, any act of law of this province to the contrary notwithstanding.

[54]*See* note 1 *supra.*

> Rape is another of the private felonies against the body of the subject. The statute of 18 *Eliz.* I excluded it from the benefit of clergy. . . . It is defined to be, "the carnal knowledge of a woman, forcibly, and against her will." The subject, says *Blackstone*, is highly improper to be publicly discussed, except only in a court of justice. Nothing more will therefore be added here. The nature of the crime is as well understood, as the crime itself is detested.

Note, 2 Smith's Laws 574 (1810).

[55]*Id.* "[I]t is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for if false, it deserves a punishment inferior only to the crime itself. . . ."

[56]An ACT for the better preventing of crimes, and for abolishing the punishment of death in certain cases, April 22, 1794, ch. 1766, § 1, [1810] 3 Smith's Laws 187. Murder in the perpetration of rape or attempted rape was murder of the first degree, *id.* § 2, and therefore a capital offense.

[57]*Id.* § 4.

[58]A further supplement to an act entitled "An act to reform the penal laws of this commonwealth," April 23, 1829, ch. 6517, § 4, [1844] 10 Smith's Laws 436. The penalties were also reduced for sodomy, or as the crime is listed, "S_____y or B_____y." The penalty for the unspeakable offense was a minimum of one and a maximum of five years, and for the second offense a ten year maximum. *Id.* at 437.

[59]*Id.* at 436.

[60]Act of March 31, 1860, Pub. L. No. 405, §§ 91-93, in I A Digest of the Laws of Pennsylvania from 1700-1883, at 432 (11th ed. rev. by F. C. Brighton, 1885):

> If any person shall have unlawful carnal knowledge of a woman, forcibly and against her will; or, who, being of the age of fourteen years and upwards, shall unlawfully and carnally know and abuse any woman child under the age of ten years, with or without her consent; such person shall be adjudged guilty of felonious rape, and on conviction, be sentenced to pay a fine, not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding fifteen years.

Id. § 91.

male victims.[61] It was not necessary to prove emission for female victims under 10.[62] The penalty was a fine not exceeding $1,000 and imprisonment for up to 15 years.[63] The penalty for attempts was a maximum of five years and the same fine.[64]

The 1887 amendments added a number of important provisions, which restructured the law by setting off offenses involving underage victims.[65] For statutory rape the ages of both victim and offender were raised to 16. Most importantly, for the first time "chaste character" and consent provisions were introduced. However, they were quite different from the same provisions in later statutes.

First, the character provision applied only to victims under 16, not to all victims. Moreover, it was linked to, but separate from, the consent provision. If the defense proved consent, the defendant was acquitted of rape but found guilty of fornication. Thus, consent was not a total and complete defense, as it later became; proof of consent simply acted as an automatic charge reduction. By linking reputation and consent, however, the inescapable inference is that if a victim could be shown to be of other than good repute, then she probably consented.

The wording of the consent and character provisions is itself noteworthy: "if the jury shall find that such woman child was not of good repute, and that carnal knowledge was with her consent, the defendant shall be acquitted of rape . . . ."[66] Thus, if an underage victim were not of good repute, there would always be a consent defense. Therefore, the consent defense is bound up with the victim's general reputation. The logical presumption, given the wording of this statute, is that the question of the female's reputation for chastity and prior sexual conduct is always relevant, because consent is always a possible defense. At common law, the victim's conduct was admissible in cases of rape, assault and homicide. However, under this statute, in any case involving a victim under 16, an offer of character evidence would be the first item set out by the defense. With this clause the outcome of the rape trial turns upon the victim's reputation and prior conduct, two forms of evidence which traditionally have undermined victim credibility on the stand.

Except for an amendment in 1939 which raised the fine from $1,000 to $7,000,[67] the rape statutes were left untouched until 1972 when the entire criminal code was reviewed.[68] The revision followed the

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[61]*Id.* This statutory age-presumption regarding offenders here applied only to carnal abuse. The English common law presumption applied to all felonies. 2 Smith's Laws 563 (1810). In the colonies and later in the United States the presumption, if enacted, usually was done so only with regard to rape statutes. *See, e.g.*, ALA. CODE tit. 14, § 399 (1959); CAL. PENAL CODE § 262 (1970); IDAHO CODE § 18-6102 (1972); V.I. CODE ANN. § 1705 (1964). Recently some states have abolished such presumptions. *See; e.g.*, FLA. STAT. ANN. § 794.02 (Supp. 1975). Long ago Louisiana abolished the presumption by decision, in State v. Jones, 39 La. Ann. 935, 3 So. 57 (1887): "Common law rule that a male less than 14 was conclusively presumed incapable of rape was based entirely on physiological fact that climatic conditions of England prevent puberty at that age. The contrary being unquestionably the fact in Louisiana, the rule has no application."

[62]Act of March 31, 1860, Pub. L. No. 405, § 92, in I A Digest of the Laws of Pennsylvania from 1700-1883, at 432 (11th ed. rev. by F. C. Brighton, 1885): "It shall not be necessary, in any case of rape, sodomy or carnal abuse of a female child, under the age of ten years, to prove the actual emission of seed, in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only." *Id.* note "e" comments that "the 92d section settles a question which is sometimes agitated in courts, as to the evidence necessary to establish the consummation of the crime."

[63]*Id.* § 91.

[64]*Id.* § 93: "If any person shall be guilty of committing an assault and battery upon a female, with intent, forcibly and against her will, to have unlawful carnal knowledge of such female, every such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine, not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years."

[65]Act of May 19, 1887, No. 69, § 1, [1887] Laws of Pennsylvania 128-29, *amending* Act of March 31, 1860, Pub. L. No. 405, § 91, in I A Digest of the Laws of Pennsylvania from 1700-1883, at 432 (11th ed. rev. by F. C. Brighton, 1885), added the following proviso:

> *Provided however*, That upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen years, if the jury shall find that such woman child was not of good repute and that the carnal knowledge was with her consent, the defendant shall be acquitted of the felonious rape and convicted of fornication only.

[66]*Id.*

[67]Act of June 24, 1939, art. 7, § 721, [1939] Pa. Laws 959 (repealed 1972).

[68]PA. STAT. tit. 18, § 3101 *et seq.* (1972) bears little resemblance to the prior law.

> 3101. Definitions.
>
> Subject to additional definitions in subsequent provisions of this chapter which are applicable to specific provisions of this chapter, the following words and phrases, when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:
>
> "Deviate sexual intercourse". Sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal.
>
> "Indecent contact". Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person.
>
> "Sexual intercourse". In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.

Model Penal Code rape statute,[69] although it did not explicitly provide for the crime to be committed by a male upon a female, as stipulated by the Model Penal Code. However, the mere use of the term person has

3102. Mistake as to age.
Whenever in this chapter the criminality of conduct depends on a child's being below the age of 15 years, it is no defense that the actor did not know the age of the child, or reasonably believed the child to be older than 15 years. When criminality depends on the child's being below a critical age other than 15 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

3103. Spouse relationships.
Whenever in this chapter the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.

3104. Sexually promiscuous complainants.
It is a defense to prosecution under section 3125 of this title (relating to corruption of minors) and section 3126 (5) of this title (relating to indecent assault) for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

3105. Prompt complaint.
No prosecution may be instituted or maintained under this chapter unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than 16 years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

3106. Testimony of complainants.
In any prosecution before a jury for an offense under this chapter, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

3121. Rape.
A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:
(1) by forcible compulsion;
(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
(3) who is unconscious; or
(4) who is so mentally deranged or deficient that such person is incapable of consent.

3122. Statutory rape.
A person who is 16 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 16 years of age.

See also id. § 3123 (involuntary deviate sexual intercourse); *id.* § 3124 (voluntary deviate sexual intercourse); *id.* § 3125 (corruption of minors); *id.* § 3126 (indecent assault); *id.* § 3127 (indecent exposure).

[69] MODEL PENAL CODE, Art. 213 (Final Draft, 1962):

Section 213.1—Rape and Related Offenses
(1) *Rape.* A male who has sexual intercourse with a female not his wife is guilty of rape if:
(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
(c) the female is unconscious; or
(d) the female is less than 10 years old.
Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree. Sexual intercourse includes intercourse per os or per anum, with some penetration however slight; emission is not required.

Section 213.6 Provisions Generally Applicable to Article 213
(1) *Mistake as to Age.* Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is not a defense that the actor did not know the child's age, or reasonably believed her to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove that he reasonably believed the child to be above the critical age.
(2) *Spouse Relationships.* Whenever in this Article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.
(4) *Sexually Promiscuous Complainants.* It is a defense to prosecution under Section 213.3 and paragraphs (6), (7) and (8) of Section 213.4 for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.
(5) *Prompt Complaint.* No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent or guardian or other competent person specially interested in the victim learns of the offense.
(6) *Testimony of Complainants.* No person shall be

not made the 1972 Pennsylvania statute sex-neutral. No women have been convicted as principals under the statute, nor have any cases been brought in which male victims were involved.

In 1973 requirements mandating Lord Hale's cautionary instruction and corroboration were repealed.[70] No further amendments have become law, although a bill modeled after the pro-victim Michigan statute was introduced in the Pennsylvania House[71] in 1975. A series of amendments and deletions have taken place, and all the provisions based upon the Michigan statute were deleted.[72] The law in effect remains a formulation based upon the Model Penal Code. A 1976 statute[73] removes the prompt complaint requirement, changes the spousal exception to exclude spouses living apart under a decree of separation, and institutes restrictions on the admissibility of evidence of the victim's prior sexual conduct. This legislation took two years to pass, and it is unlikely that radical changes will be enacted in Pennsylvania in the near future. The Senate is currently considering a bill which would establish a state commission to study the causes and prevention of rape.[74]

IV. A Comparison of the Development of Rape Laws in New Jersey and Pennsylvania

Rape laws in Pennsylvania and New Jersey derived from the same colonial source: the statute of 18 Elizabeth I. Today both states are similar in that neither has adopted a radically pro-victim statute. As their rape laws developed over almost three hundred years, however, significant differences have emerged.

New Jersey never had a chaste character provision, enacted in Pennsylvania in 1887. New Jersey never required corroboration. New Jersey never branded offenders with the letter R, although both states had corporal punishments. New Jersey distinguished between slaves and free men at one point, but never between black and white victims. Pennsylvania, on the other hand, never enacted any sex offense statutes regarding inmates in homes and institutions. The present New Jersey law on this topic is an example of the odd or singular formulations which appear in and remain part of the sex offense law by default, because no one bothers to repeal them. As noted *supra*, there are no reported cases under this section in New Jersey's annotated statutes.

Both states have statutes which are unfavorable to the victim, in comparison to the new statutes enacted in Michigan, Minnesota, Nevada and New Mexico. Neither has yet passed a strong evidence bill, although both are considering various versions. The two states are typical of the way rape law has developed, or failed to develop, in the northeastern and southern parts of the United States. The most radical reform has taken place in the western and midwestern states.[75]

The single most important difference in the development of rape laws in New Jersey and Pennsylvania, however, seems to be the relative influence of the Model Penal Code (occasionally referred to herein as the MPC). New Jersey reformed its entire criminal code in 1939 and then again in 1951 before the Model Penal Code had become widely distributed and accepted. Once New Jersey had twice undertaken law reform, it was not, perhaps, ready to reconsider the question. Pennsylvania, on the other hand, undertook reform of its criminal code in the early 1970's. A thorough revision of the criminal code was enacted in 1972, closely following the Model Penal Code. Some of the features in the Pennsylvania law most unfavorable to victims can be directly traced to the MPC, such as the requirement of prompt complaint. The authors of the MPC prompt complaint section were well aware that this was a departure from the common law tradition and from the law in most jurisdictions:

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convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

See also id. § 213.1 (deviate sexual intercourse by force or imposition); *id.* § 213.3 (corruption of minors and seduction); *id.* § 213.4 (sexual assault); *id.* § 213.5 (indecent exposure); *id.* § 213.1(2) (gross sexual imposition).

Compare especially the Model Penal Code and the Pennsylvania provisions regarding mistake as to age, spouse relationships, sexually promiscuous complainants, prompt complaint and testimony of complainants. The Pennsylvania law generally is not as unfavorable to the victim as the equivalent Model Penal Code provisions.

[70]Pa. Stat. Ann. tit. 18, § 3106 (1972).

[71]House Bill 580, Printer's No. 2242.

[72]September 23, 1975 amendments to House Bill 580, (new) Printer's No. 649, and further amendments of March 1976, Senate Judiciary Committee.

[73]Act No. 53 (May 18, 1976) (introduced as House Bill 580).

[74]Senate Bill 101, Printer's No. 101.

[75]An exception is Conn. Pub. Acts 75-619 (1975), *repealing* Conn. Gen. Stat. Ann. § 53a-65 *et seq.* (1958). Maine revised its rape law in 1975, Me. Rev. Stat. Ann. tit. 17-A, § 251 *et seq.* (Supp. 1975), including many provisions lobbied against by reformers. Massachusetts recently amended parts of its rape law, Mass. Gen. Laws Ann. ch. 265, §§ 22-23 (Supp. 1975), but has not enacted a new, comprehensive statute. New York passed a new evidence provision, N.Y. Penal Law § 130.16 (McKinney Supp. 1975), but the sex offense statute, *id.* § 130.00 *et seq.*, remains otherwise unchanged from its Model Penal Code origins.

> The specific requirement under subsection (5) of the text that the offense be brought to the attention of the public authorities within six months is an innovation in Anglo-American law. A prosecutor would, however, hesitate to institute prosecution on a stale complaint. The possibility that pregnancy might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing the offense to the attention of the authorities, are sufficient grounds for setting some time limit upon the right to complain. Likewise, the dangers of blackmail or psychopathy of the complainant make objective standards imperative.[76]

Clinical experience at the Center for Rape Concern indicating that victims do not always immediately report is in direct contradiction to this line of reasoning. To that effect the Center's Model Sex Offense Statute[77] proscribes a prompt complaint requirement.

Pennsylvania's requirement of implied corroboration, the statutory requirement of Lord Hale's cautionary instruction, comes directly from the Model Penal Code.[78] Similarly, the mistake-as-to-age provision and the section dealing with sexually promiscuous complainants are based upon MPC provisions. While it is not possible to generalize without examining the legislative history of other states, it seems likely that comparable prompt complaint, corroboration and mistake-as-to-age provisions enacted in the late 1950's through 1960's can be attributed to the MPC's spreading influence.

Whether the Model Penal Code is a repressive document with regard to the treatment of women who are victims of sex offenses because the American Law Institute was a very conservative organization, or whether the Code took its particularly unsympathetic stance because of the period in which it was drafted, is now impossible to determine. Most of the research and drafting were accomplished in the 1950's, when there was little awareness of the legal inequities facing women in the criminal courts or elsewhere. It is perhaps not surprising that the officers and council of the American Law Institute in that period included no women.[79] Nor is it surprising that the Model Penal Code's Criminal Law Advisory Committee contained the name of only a single woman,[80] although Lionel Trilling and others outside of the legal profession were asked to serve. Whether the general absence of women advisors was cause, effect, circumstance or constraint, it at least deserves remarking upon here. It is unquestionably the case that, at least from the perspective of 1976, the Model Penal Code sections involving corroboration, prompt complaint and sexually promiscuous complainants, among others, were not influences which instituted changes favorable or sympathetic to the victims of sexual assault.

If the provisions of the Model Penal Code itself do not make this clear, the comments to the tentative drafts are an unmistakable reflection of the predisposition of the committee. In 1976 it is startling, to say the least, to read comments such as the following:

> [T]he offense is typically committed in privacy, so that conviction often rests upon little more than testimony of the complainant . . . [footnote citing without comment and with apparent approval Lord Hale's instruction and Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,*[62] YALE L.J.[55] (1952), an article which today seems inordinately concerned with protecting males against false accusation.] [T]he central issue is likely to be the question of consent on the part of the female, a subtle psychological problem in view of social and religious pressures [*sic*] upon the woman to conceive of herself as victim rather than collaborator . . . .[81]

Ploscowe comments upon the good sense of courts, prosecutors and juries in their attempts to mitigate the harshness of the rape statutes, and suggests that the older law which "limited the fact situations [in rape] . . . to those which were heinous in character," was more realistic and more easily enforced. He recommends that the core of our modern rape law consist in "brutal violations of women against their will and the abnormality inherent in sex play with young children."[82] The commentators then quote a study showing that out of 25 forcible rape indictments in Kings County, N.Y., only two sentences involved over ten years' imprisonment.[83] Again, on the subject of requiring proof of penetration:

> The rule of "slightest penetration" has been

[76]MODEL PENAL CODE, § 207.4, Comment (Tent. Draft No. 4, 1955).

[77]Reprinted in 3 WOMEN'S RIGHTS LAW REPORTER (forthcoming, March 1976).

[78]Pennsylvania adopted only part of MODEL PENAL CODE, § 6, which includes both the corroboration requirement and the requirement mandating Lord Hale's cautionary instruction. However, I would argue that Lord Hale's instruction is itself a corroboration requirement, since it asks that the victim's testimony be regarded with special suspicion, or that the victim's testimony needs additional (*i.e.*, corroborative) evidence to be trustworthy.

[79]MODEL PENAL CODE at iii (Tent. Draft No. 1, 1953).

[80]Florence M. Kelly, Attorney-in-Charge, Legal Aid Society, Criminal Courts Branch, New York, N.Y., *id.* at v.

[81]*Id.* § 207.4, Comment (footnotes and internal numbering omitted).

[82]*Id.* at 243.

[83]*Id.* n.100.

> criticized by Ploscowe, as punishing attempt rather than the completed offense. He also points out that giving this scope to the crime of rape makes it cover activity quite outside the common understanding of sexual intercourse, *viz.*, a kind of sexual foreplay that some females engage in voluntarily who would strenuously resist any effort to penetrate the vagina. Under the "any penetration" rule there is no legal obstacle to convicting a man of raping a woman who, nevertheless, remains a "virgin" in the sense that her hymen is intact. This legal paradox would be largely resolved by requiring proof of penetration beyond the hymen. However, even the stricter rule would not preclude conviction where the victim's hymen has not been broken, since some membranes are sufficiently elastic or have natural openings large enough to permit penetration without rupture.[84]

The comment then proceeds to endorse the "any penetration" standard with reservations. Such worries only become paramount if one believes the purpose of rape laws is to protect virginity.

Not surprisingly the Model Penal Code limits first degree rape to

> cases where the victim suffers serious physical injury or where in effect she is attacked by a stranger. These circumstances mark the most brutal assaults, and, in addition, furnish some objective indication in support of the complainant's testimony that she did not consent. The community's sense of insecurity (and consequently the demand for retributive justice) is especially sharp in relation to the character who lurks on the highway or alley to assault whatever woman appears, or who commits rape in the course of burglary.[85]

Yet the most recent research, including that done by the Philadelphia Center for Rape Concern,[86] indicates that the greatest psychological harm is experienced when the rape is by an acquaintance or family member.

In a similar vein is the following:

> However, one can envision cases of precocious 14 year old girls and even prostitutes of this age who might themselves be the victimizers. Accordingly the draft while rejecting the concepts of "virtue," "chastity" or "good repute" permits the defense that the girl is a prostitute defined in subsection (6) to *include anyone engaging in promiscuous sex relations.*[87]

Again, the predominant interest seems to be protecting men from false complaints, not protecting females from being sexually assaulted or convicting those who are guilty of sexual assault.

After reforming its entire criminal code along the lines of the Model Penal Code, Pennsylvania seems to be unwilling to abandon its formulation, although the legislature did repeal the implicit corroboration requirement, the requirement mandating Lord Hale's instruction, in 1973.

Both New Jersey and Pennsylvania are considering reforms to their rape statutes and evidence laws. Whether they will be able to enact radically different statutes remains to be seen.

V. Federal Laws Regarding Rape

Although criminal acts are usually a matter of state court jurisdiction, there are a surprisingly large number of federal statutes dealing with rape. Some are arcane, for instance, prohibiting seduction of a female passenger on board any American vessel.[88] Some are concerned with jurisdiction over the Indian population[89] and fugitives.[90] Some cover assaults within the maritime and territorial jurisdiction.[91] Finally, there is the Code of Military Justice.[92]

The Federal Commission for the Reform of the

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[84] *Id.* at 244 (footnotes omitted).

[85] *Id.* at 246 (footnotes omitted).

[86] *See* Bienen & Meyer, *Rape II, § II,* 3 Women's Rights Law Reporter (forthcoming, March 1976).

[87] Model Penal Code at 254 (Tent. Draft No. 4, 1955) (footnotes omitted; emphasis added).

[88] 18 U.S.C. § 2198 (1970).

[89] *Id.* § 1153 (Supp. 1976). Note that

> the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

See also id. § 3242 (federal jurisdiction granted over Indians committing certain offenses on reservations, including rape, carnal knowledge, incest and assault with intent to rape); *id.* § 3243 (jurisdiction granted to the state of Kansas over offenses committed by or against Indians on reservations within the state).

[90] *Id.* § 3185 (fugitives from a country under the control of the United States who enter this country having committed certain enumerated offenses, including rape, shall be extradited).

[91] *Id.* § 2031: "Whoever, within the special maritime and territorial jurisdiction of the Unted States, commits rape shall suffer death, or imprisonment for any term of years or for life;" *id.* § 2032 (carnal knowledge of a female under 16 punishable by a maximum prison term of 15 years); *id.* § 113 (assault with intent to commit rape punishable by a maximum prison term of 20 years).

[92] 10 U.S.C. § 920 (1970) (rape and carnal knowledge). *Id.* § 920(b), dealing with carnal knowledge, bears a striking resemblance to New Jersey's provisions, *supra* note 19. *See also id.* § 925 (sodomy, defined as "unnatural carnal copula-

Criminal Laws, which has been concerned with redrafting all of Title 18, has suggested a federal rape statute closely following the Model Penal Code.[93] The anti-victim tenor of many of its provisions, discussed *supra,* would make its adoption inadvisable in view of more recent pro-victim state legislation. However, the working papers are dated 1968,[94] the final draft is dated 1971,[95] and there appears to be no current indication that the proposed bill will pass in Congress.

VI. Recent Developments in Constitutional Law

Two recent Supreme Court cases, *Chambers v. Mississippi*[96] and *Cox Broadcasting Corp. v. Cohn,*[97] bear upon recently enacted rape statutes, although the former has received surprisingly little attention.[98] In *Chambers* the application of Mississippi evidence rules, the hearsay rule and the rule that a party may not impeach her/his own witness (the "voucher" rule), was held to be a denial of the defendant's due process rights under the fifth and fourteenth amendments. The exclusion of exculpatory and relevant evidence on the grounds of state evidentiary rules was held to have made the trial fundamentally unfair. The defendant was denied the constitutionally protected rights to confront and cross-examine adverse witnesses and to present witnesses on his own behalf. Thus *Chambers* could be considered precedent for a challenge to some of the new state evidence provisions which exclude all evidence of a rape victim's character and conduct except conduct with the defendant or evidence of the source of pregnancy or disease.[99]

Chambers is unusual not only because evidence issues rarely come before the Court, but also because of its facts. At issue was the confession of a third party to the murder for which Chambers was on trial. The written confession was admitted into evidence and then repudiated on the stand when the witness offered an alibi. Chambers was not allowed to cross-examine this witness, nor was he allowed to introduce the testimony of three other witnesses to whom the first witness had confessed. Thus, evidence regarding a confession to a crime for which Chambers was charged was ruled inadmissible on four separate occasions. If ever there was a case in which the exclusion of evidence was clearly not harmless error, *Chambers* was that case.

The particular difficulty came from the interaction of two Mississippi evidence rules: two aspects of the hearsay rule and the so-called party witness or voucher rule, which did not allow Chambers to cross-examine the witness he had called. Rather than accepting a challenge to a particular statute, however, the Court saw itself as protecting a generalized right to a fair trial, the right to confront and cross-examine witnesses and the right to present witnesses on one's own behalf. This is evident in the Court's concern with excessive formalism:

> We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against." The "voucher" rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.[100]

With regard to the exclusion of the hearsay statements concerning the third party confession, the Court did not make a blanket ruling about all declarations against penal interest in criminal trials, nor did it say that certain forms of hearsay should now be admissible. What the Court did say is that if there is excluded highly relevant, reliable and exculpatory evidence, or if the defendant is denied the right to confront, present or cross-examine witnesses, the

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tion with another person of the same or opposite sex or with an animal . . .").

[93]Nat'l Comm'n on Reform of Fed. Criminal Laws, Final Report (1971), *published in Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 129 *et seq.* (1971).

[94]Stein, *Comment on Rape, Sodomy, Sexual Abuse, and Related Offenses: Sections 1641-1650* (Nov. 20, 1968), in Nat'l Comm'n on Reform of Fed. Criminal Laws, Working Papers, Vol. II (July 1970).

[95]See note 93 *supra.*

[96]410 U.S. 284 (1973).

[97]420 U.S. 469 (1975).

[98]The most thorough discussion of *Chambers* appears in E. Imwinkelried, Chambers v. Mississippi, ___U.S.___(1973) *The Constitutional Right to Present Defense Evidence,* 62 Mil. L. Rev. 225 (1973), although the author is primarily concerned with the decision's impact on military law. This author agrees with the following interpretation from 62 Ill. B.J. 158 (1973): "The decision did not serve to void the rule; it only prohibited its application on the given facts. In this sense, the decision is of limited and narrow effect . . . for its reasoning could render any rule of evidence vulnerable to suspension in those situations where the courts deem it justified." *Id.* at 159. *See also,* L. Natali, Jr., Green, Dutton *and* Chambers: *Three Cases in Search of a Theory,* 7 Rutgers-Camden L.J. 43 (1975); 59 A.B.A.J. 532 (1973) (reporting decision); *Impeaching the Credibility of a Hearsay Declarant: The Foundation Prerequisite,* 22 U.C.L.A. L. Rev. 452 (1974) (not strictly relevant to issues raised here); and 35 U. Pitt. L. Rev. 725 (1974).

Cox is discussed in 24 Emory L.J. 1205 (1975) and 9 Ga. L. Rev. 963 (1975).

[99]*E.g.,* Mich. Comp. Laws § 750.520j (Supp. 1975) (Mich. Stat. Ann. § 28.788(10) (Supp. 1975)).

[100]410 U.S. at 298.

criminal trial may not have met due process requirements.

This ruling, for those able to put forward a subtle constitutional argument, might suggest that trial courts should let in exculpatory evidence when there is doubt about either the constitutional validity of a state statute or the relevance of the evidence. An unsympathetic judge could conceivably declare some of the newly enacted evidence rules, which totally exclude certain evidence regarding the rape victim, unconstitutional on the basis of *Chambers*.

An attorney faced with such an argument could counter by distinguishing *Chambers* on its extraordinary facts and by pointing out that the Court did not overrule any state evidentiary rules. In fact, the Court explicitly recognized the states' rights to autonomy in matters of evidence and criminal procedure: "Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."[101] The state's interest supporting the evidence rule therefore must be examined closely. In this case, since evidence provisions regarding rape are all relatively new enactments, they should be regarded as recent expressions of the legislative will, as opposed to antiquated and outmoded "voucher" and strict hearsay rules. Finally, it should be remembered that the Court which reached for *Chambers* and split its members on jurisdictional grounds is not the present Supreme Court.

Cox Broadcasting Corp. v. Cohn[102] involved a damage suit based upon a Georgia statute which made publication of a rape victim's name a misdemeanor.[103] The trial court granted summary judgment as to liability on the theory that this criminal statute gave rise to a civil cause of action as a matter of law. On appeal the Georgia Supreme Court held that the trial court erred in interpreting the statute, which was penal and did not create civil liability or a civil cause of action for damages.[104] However, a common law action in tort, public disclosure of private facts,[105] was created. Without considering the constitutional issues, the Georgia court nevertheless declared that as a matter of law the first and fourteenth amendments did not require judgment for the broadcaster. The court issued an additional opinion on a motion for rehearing[106] in which it determined that the statute was a legitimate limitation of the first amendment. It is this ruling which was reversed by the Supreme Court.[107]

The question of civil liability premised upon the existence or validity of a criminal statute frames the issue in an unusual perspective. Thus *Cox* is more interesting as an example of how the Burger Court is developing first amendment doctrines than in terms of its impact on the adjudication of sex offenses. Since only six states currently have such statutes in effect,[108] and very few cases have been brought under them, the practical effect of the decision is marginal.

Those suits which have been brought have tended to be unusual on their facts. The first female victim to bring an action against a communications medium for invasion of privacy was in *Hubbard v. Journal Publishing Co.*[109] The victim herself was not named, only identified by inference. The court held for the newspaper, suggesting that public records are of legitimate public interest. When the Wisconsin Supreme Court received a similar challenge and upheld the Wisconsin statute,[110] the court recognized the possible impact that publication of the victim's name had upon the willingness to report. One commentator has suggested that the statutory aim of encouraging the victim to report was irrelevant in the *Cox* case, since the victim was already dead.[111] This of course neglects the important demonstrated effect which adverse publicity has upon people who may in the future be victims and become, therefore, hesitant to report. *Nappier v. Jefferson Standard Life Insurance Co.*[112] arose under the South Carolina statute, but no constitutional challenge was raised. Again, the issues were framed in an

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[101] *Id.* at 302-03.

[102] 420 U.S. 469 (1975).

[103] GA. CODE ANN. § 26-9901 (1972). The statute makes it a misdemeanor for any news medium or any other persons to print, publish, broadcast or disseminate the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. The dissemination in *Cox* was a television broadcast.

[104] Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 200 S.E.2d 127 (1973).

[105] *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 396 (1960): "[T]he matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities." The *Cox* opinion picks up this exact terminology. 420 U.S. at 496.

[106] 231 Ga. at 68, 200 S.E.2d at 133-34.

[107] 420 U.S. at 469.

[108] Five other states besides Georgia have similar provisions: FLA. STAT. ANN. § 794.03 (Supp. 1975); MICH. COMP. LAWS § 750.520k (Supp. 1975) (MICH. STAT. ANN. § 28.788 (11) (Supp. 1975)); OHIO REV. CODE ANN. § 2907.11 (Supp. 1975); S.C. CODE ANN. § 16-81 (1962); WIS. STAT. ANN. § 942.02 (1958). The Michigan and Ohio provisions are not strictly analogous. They provide for suppression of the name of the victim and the actor and details of the offense pending adjudication, upon request. South Carolina provides for withholding the victim's name only. All other formulations refer to the name and identity.

[109] 69 N.M. 473, 368 P.2d 147 (1962).

[110] State v. Evjue, 253 Wis. 146, 33 N.W.2d 305 (1948). *Hubbard* was the first case of a civil action brought by the victim.

[111] 24 EMORY L.J. 1205, 1224 n.120 (1975).

[112] 213 F. Supp. 174 (E.D.S.C.), *rev'd*, 322 F.2d 502 (4th Cir. 1963).

unusual fashion, since plaintiffs were objecting to the fact that their stage names had been published. The court used this oddity to rule that there had been no violation of the statute, which forbids publication of names, not names and identity.

Courts have on occasion held that the name of a person was not newsworthy, although the event involving the person was a matter of public interest or concern.[113] One commentator has suggested that the entire problem could be solved by relying upon the newspaper editor's discretion, since a survey of newspaper editors indicated they personally didn't think the name of a victim was newsworthy.[114] This seems to be a slim basis for protection of privacy. On the other hand, those who argue that rape should become more like other crimes are against statutes such as Georgia's on the ground that it singles out the rape victim for special treatment.

The *Cox* decision is most noteworthy for what it did not decide and for its ambiguity. *Cox* did not decide whether truth was a defense in a defamation action brought by a private person. It did not decide whether truthful publication of very private matters unrelated to public affairs could be constitutionally prohibited. And it did not decide whether truthful publications may ever be subjected to civil or criminal liability consistent with the guarantees of the first and fourteenth amendments.

Cox did find that the events of a rape trial are legitimate matters for public concern, relying heavily on the fact that the events reported took place in open court. *Cox* holds that a state may not impose sanctions upon the publication of truthful knowledge obtained from public records. The Court did not address itself to the constitutional validity of the statute, nor did it declare it void in violation of the first and fourteenth amendments. Indeed, the present status of the statute is ambiguous.[115] What was held unconstitutional was predicating civil damages upon a statute prohibiting publication, when the information had been received from a public trial and from freely available records of indictment. The narrowness of this ruling is easier to understand if one imagines the opposite result. News media would not know which public records were available for publication and which were not, an intolerable situation under first amendment doctrines.[116]

Cox leaves open the question of whether a state can decide that information concerning a rape victim's identity or the details of the incident constitutionally can be kept out of the public record. For instance, New Jersey is considering a bill specifically drafted to avoid the *Cox* holding, which states that the identity of any living person who is the victim of rape, attempted rape; sodomy or carnal abuse shall not be part of the public records of any court or law enforcement agency. It further stipulates that such information shall be available only upon a court order for good cause shown.[117]

The newer statutes,[118] perhaps in anticipation of *Cox*, provide that the name of the victim be suppressed only pending adjudication. By focusing on suppression of the names of victim and offender upon request, the Ohio and Michigan statutes presumably try to avoid constitutional problems by making the procedure an extraordinary one. The fact that the names of both victim and offender can be withheld presumably anticipates an equal protection challenge. Nevertheless, several questions remain unanswered. What if only the victim or only the offender requests suppression? Would it be granted only for her or his own name? Should a news medium be allowed to publish the address of a victim who is afraid of retaliation? If the victim's name and address both are published, this can be tantamount to publication of the phone number, and s/he may receive obscene phone calls. What about publication of the phone number itself, which can be a matter of public record? While the first amendment problems are substantial, the ethical standards of sensational journalism may very well cause victims and their families to have some doubts about the desirability of no restrictions whatsoever on publication.

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[113]Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).

[114]Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963).

[115]The author of 24 EMORY L.J. 1205 (1975) is of the opinion that the Georgia statute was declared unconstitutionally broad. *Id.* at 1226. This author agrees with the author of 9 GA. L. REV. 963 (1975) that the status of the statute is undetermined. It is "in limbo." *Id.* at 978.

[116]"Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship." 420 U.S. at 496.

[117]New Jersey Senate No. 1084 (introduced Feb. 9, 1976).

[118]*E.g.*, MICH. COMP. LAWS § 750.520k (Supp. 1975) (MICH. STAT. ANN. § 28.788(11) (Supp. 1975)); OHIO REV. CODE ANN. § 2907.11 (Supp. 1975).