



Sexual Assault Case Processing: The More Things Change, the More They Stay the Same

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Abstract

One of the goals of the United Nations Commission on the Status of Women is to end violence against women and girls in all countries. An important component of this goal is ensuring that all crimes of violence against women and girls are taken seriously by the criminal justice system and that police, prosecutors, judges and jurors respond appropriately. However, research detailing how cases of sexual assault proceed in the criminal justice system reveals that this goal remains elusive, both in the United States and elsewhere. The rape reform movement ushered in changes to traditional rape law that were designed to encourage victims to report to the police and to remove barriers to arrest and successful prosecution. However, four decades after this reform, victims are still reluctant to report sexual assaults to the police, and arrest, prosecution and conviction rates for sexual assault cases are shockingly low. Reversing these trends will require policy changes that are designed to counteract the stereotypes and myths underpinning sexual assault and sexual assault victims.

Keywords

United Nations Commission on the Status of Women; sexual assault; criminal justice system; rape.

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Introduction

In 1975, Susan Brownmiller wrote a detailed and sobering account of rape—about its origins, the myths surrounding it and about how laws and practices would make it likely that only a few of those who committed this crime of violence would be held accountable. She also charged that those who were held accountable would not be representative of the many who engaged in this type of criminal behaviour. Twelve years later, Susan Estrich (1987), a law professor and the author of *Real Rape*, reached a similar conclusion. Like Brownmiller and others, she argued that all rapes were not treated equally and that the criminal justice system's response was predicated on stereotypes and myths about rape and rape victims. Estrich (1987) also asserted that the most serious dispositions were reserved for the atypical aggravated stranger rapes. These two feminist critics—among many others—argued that under traditional rape law, it was often the victim who was placed on trial (Bohmer 1974; Field and Bienen 1980; Holmstrom and Burgess 1978; Kalven and Zeisel 1966; LaFree 1981, 1989; Reskin and Visher 1986).

The Rape Reform Movement

Criticisms such as these led to a rape reform movement that emerged in the 1970s and that quickly became a key item on the feminist agenda in the United States (US) (Caringella 2009; Horney and Spohn 1991; Marsh, Geist and Caplan 1982; Spohn and Horney 1992), Canada (Johnson 2012; Roberts, Grossman and Gebotys 1996), the United Kingdom (UK) (Hinchliffe 2000; Temkin 2000) and other countries (Frank, Hardinge and Wosick-Correa 2009). Women's groups throughout the world lobbied legislative bodies to revise antiquated rape laws that resulted in a pervasive scepticism towards the allegations of rape victims. These laws also allowed criminal justice officials to use legally irrelevant assessments of the victim's character, behaviour and relationship with the accused when making decisions about the criminal processing and disposition of rape cases. Women's groups were joined in their efforts by crime control advocates, who sought reform as a method for encouraging more victims to report rapes to the police and to cooperate with criminal justice officials in the investigation and prosecution of rape cases. Together, these groups formed a powerful, though perhaps ill-matched, coalition for change. By the mid-1980s, most states in the US and many countries outside the US had enacted some type of rape reform legislation (Berger, Searles and Neuman 1988; Frank, Hardinge and Wosick-Correa 2009; Spohn and Horney 1992). In fact, as Frank, Hardinge and Wosick-Correa (2009: 273) noted, between 1945 and 2005, there were 122 statutory changes enacted in 77 different countries.

The advocates for rape law reform lobbied for changes designed to produce both symbolic and instrumental effects. They argued that traditional rape law was not designed to protect women from sexual violence, but to preserve male rights to possess and subjugate women as sexual objects. They suggested that changing the definition of rape and the evidentiary rules that are applied in rape cases would symbolise a rejection of this patriarchal view; it would embody, in law, the notion that rape is a crime of violence (Estrich 1987). Reformers also expected the statutory changes to achieve several instrumental goals. They predicted that these changes would reduce the scepticism of criminal justice officials towards rape victims, as well as their reliance on legally irrelevant considerations in their decision-making. Reformers anticipated that improving the treatment of rape victims would ultimately lead to an increase in the number of rape reports. They also expected that the reforms would remove legal barriers to effective prosecution and that they would make arrests, prosecution and conviction for rape more likely (Cobb and Schauer 1974; Marsh et al. 1982; Sasko and Sesek 1975).

The types of reforms adopted by jurisdictions throughout the world differed on several dimensions, but the most common entailed 1) changes to the definition of rape, 2) elimination of the resistance requirement, 3) elimination of the corroboration requirement and 4) enactment of a rape shield law¹ (Marsh et al. 1982; Spohn and Horney 1992). Some jurisdictions also increased

the penalties for those convicted of rape (Frank, Hardinge and Wosick-Correa 2009). Many jurisdictions began the reform process by replacing the single crime of rape with a series of gender-neutral graded offences that were defined by the presence or absence of aggravating circumstances and that had commensurate penalties. Rape was historically defined as 'carnal knowledge of a woman, not one's wife, by force and against her will' (Meriam-Webster 2020: rape entry) Carnal knowledge included only penile-vaginal penetration—it did not include attacks on male victims, acts other than sexual intercourse or rapes committed with an object. It also did not include sexual violence by a spouse. The new laws were designed to remedy these problems.

Legislatures in the US and in other common-law countries also changed the consent standard by modifying or eliminating the requirement that the victim physically resist her attacker. Under common-law rape statutes—which included the phrase 'by force and against her will'—non-consent was an essential element of the crime. To demonstrate her non-consent, the victim was required under many statutes to 'resist to the utmost' or, at the very least, to exhibit 'such earnest resistance as might reasonably be expected under the circumstances' (Texas Penal Code 1980). This requirement was attacked on several grounds, and jurisdictions either eliminated it or specified the respective circumstances that constituted force, such as the use of a weapon, serious injury to the victim or threats.

Another focus of the rape reform movement was the corroboration requirement, which prohibited a conviction for rape on the uncorroborated testimony of the victim. This evidentiary rule reflected the fear that vindictive or mentally disturbed women would file false charges, as well as the notion that fabrications in rape cases would be more difficult to disprove than other unwarranted accusations. Critics argued that requiring corroboration substantially reduced the odds of successful prosecution.

Reformers in the US, Canada, the UK and other countries also lobbied for the passage of rape shield laws that precluded the defense attorney from introducing evidence of the victim's prior sexual conduct. Under English common law, this evidence was admissible both to prove that the victim had consented to intercourse and to impeach her credibility. Reformers were particularly critical of this two-pronged evidentiary rule and insisted that it be eliminated or modified. The result was the passage of rape shield laws that were designed to limit the admissibility of evidence regarding the victim's past sexual conduct. It is important to note that these laws vary widely in terms of their restrictiveness and in terms of the exceptions that are allowed.

The statutory changes that were enacted during the rape reform movement were designed to encourage more rape victims to report their crimes to the police and to enhance the likelihood of arrest and successful prosecution. However, as demonstrated by decades of legal impact research abounding with examples of 'the remarkable capacity of criminal courts to adjust to and effectively thwart reforms' (Eisenstein, Flemming and Nardulli 1988: 296), changes like these are not necessarily implemented as reformers had intended. Moreover, changing the law does not necessarily change the beliefs and behavior of the victims, police, prosecutors, judges and jurors. This is the exact point made by a study of the rape reform movement's impact in six major urban jurisdictions in the US. Spohn and Horney (1992) found that definitional and evidentiary changes yielded symbolic but not instrumental effects. These statutory changes refuted the antiquated notions regarding chastity and the willingness of women to lie about being raped. They also may have led to more sensitive treatment of women, but they did not lead to increases in the odds of reporting, arrest, prosecution or conviction. As Spohn and Horney (1992: 150) noted, one reason why the rape law reforms did not have the predicted effects in the jurisdictions the researchers examined was because they 'placed few constraints on the tremendous discretion exercised by decision makers in the criminal justice system'.

However, a study of the global dimensions of rape law reform found that rape law reforms *were* associated with increases in the number of rape incidents reported to the police (Frank, Hardinge

and Wosick-Correa 2009). The authors of this study examined changes in the number of cases reported to the police before and after the reforms in 40 different countries, finding that reports increased by 75 per cent during the reform periods. They also found that levels of reporting increased the most dramatically in wealthier countries with higher levels of women's mobilisation and higher-than-average levels of education. Frank, Hardidnge and Wosick-Correa (2009: 279) concluded that their findings 'discredit the notion, still common in the literature, that rape-law reforms represent nothing more than symbolic or ceremonial gestures that are not meant to be enacted'.

Rape case processing in the twenty-first century

Research conducted throughout the past several decades confirms that many of the rape reform movement's instrumental goals have not been attained. Rape is the most under-reported violent crime, and the criminal justice system's response to crimes that are reported remains highly problematic, both in the US (Alderden and Long 2016; Alderden and Ullman 2012; Bachman 1998; Bouffard 2000; Horney and Spohn 1996; Kerstetter 1990; LaFree 1981, 1989; Spohn, White and Tellis 2014) and elsewhere (Cheung, Andry and Tam 1990; DuBois 2012; du Mont and Myhr 2000; Dylan, Regehr and Alaggia 2008; Johnson 2012; Johnson, Ollus and Nevala 2008; Jordan 2004; Kelly, Lovett and Regan 2005; Lea, Lanvers and Shaw 2003; Lovett and Kelly 2009; Rumney 2006; Stanko and Williams 2009). For example, the International Violence Against Women Survey found that victimized women in the 11 countries surveyed most often reported the incident if the violence was considered serious or life-threatening (Johnson, Ollus and Nevala 2008). Additionally, victims reporting the incident were often met with scepticism and suspicion on the part of police and prosecutors, which resulted in a substantial number of cases being unfounded—that is, categorized as false, baseless or 'no-crimed'—as well as low arrest rates and shockingly low rates of prosecution and conviction.

Research on the criminal justice system's response to the crime of rape consistently reveals that police and prosecutors play an important role—arguably, the most important role—in producing these high rates of case attrition. The police decide whether a victim's allegations are credible enough to be investigated thoroughly, whether an identified suspect should be arrested and whether the case should be forwarded to the prosecutor for a filing decision. Prosecutors then decide whether to file charges and, if so, whether to file misdemeanour or felony charges; they also decide whether to engage in plea negotiations as the case moves towards trial. As the gatekeepers of the criminal justice system, police and prosecutors determine which rape victims might eventually have their day in court.

Research conducted in various US jurisdictions suggests that the outcomes of rape cases are affected by both legally relevant and legally irrelevant factors.² Legal factors, especially the seriousness of the crime and the strength of evidence in the case, play an important role in the processing decisions for rape cases. However, victim characteristics—especially the victim's relationship with the offender and whether the victim engaged in any risky behaviour at the time of the incident—also influence these decisions. International research in Israel (Ajzenstadt and Steinberg 2001), Australia (Dylan, Regehr and Alaggia 2008), New Zealand (Jordan 2004), the UK (Kelly, Lovett and Regan 2005; Stanko and Williams 2009), Hong Kong (Cheung, Andry and Tam 1990), South Africa (Basdeo 2018) and in another 11 European countries (Lovett and Kelly 2009) uncovers similar findings. These findings suggest that the goal of the United Nations Commission on the Status of Women of ensuring gender equality and empowering women and girls by ending violence against women remains elusive.

Compelling evidence of this surfaced in Spohn and Tellis's (2014) study of policing and prosecuting rape in Los Angeles. In this mixed methods study, the authors obtained case outcome data on all rape cases that were reported to the Los Angeles Police Department and the Los Angeles County Sheriff's Department from 2005 to 2009. Consistent with the evidence from prior

research, Spohn and Tellis (2014) concluded that there was substantial attrition in rape cases reported to law enforcement—very few rape reports led to the arrest, prosecution and conviction of a suspect. As Spohn and Tellis (2014) reported, from 2005 to 2009, there were 5031 rape and attempted rape cases reported to the Los Angeles Police Department. Of these cases, only 11.7 per cent led to the arrest of a suspect, 9.7 per cent resulted in the filing of charges against the suspect and 7.8 per cent resulted in a conviction. There was a similar pattern of case attrition for the Los Angeles County Sheriff's Department.

Spohn and Tellis (2014) also found that stereotypes of 'real' rapes and 'genuine' victims, as well as the pervasive myths underlying rape and rape victims, affected the decision-making in rape cases.³ Many of the detectives that the researchers interviewed displayed cynical attitudes; they used the term 'righteous victim' to refer to victims who deserved protection under the law, and they implied that many of the victims they encountered were not righteous victims. One of the detectives they interviewed stated that 'most of the rapes I see are party rapes', with another saying, 'We see a lot of self-victimization [in these cases]—Girls who go to Hollywood clubs and drink alone' (Spohn and Tellis 2014: 54).

What can we conclude from the evidence produced by social scientists and legal scholars regarding the criminal justice system's response to the crime of rape and to rape victims? It has been more than four decades since the publication of Susan Brownmiller's (1975) book on men, women and rape, and more than three decades since Susan Estrich (1987) argued that only aggravated stranger rapes are taken seriously by the criminal justice system. It has been almost four decades since jurisdictions worldwide began adopting legal reforms designed to prompt more rape victims to report their crimes to the police and to increase the odds of arrest, prosecution and conviction in rape cases. Research from the US, Canada, the UK and many other jurisdictions continues to reveal that rape and other forms of sexual violence have extremely low reporting rates and shockingly high rates of case attrition. Very few cases, especially those that involve non-strangers, result in the arrest, prosecution and conviction of the suspect. It thus appears that the more things change, the more they stay the same.

The evidence produced by social scientists and legal scholars over the past three decades is consistent with Spohn and Horney's (1992) conclusion that the rape law reforms enacted in the 1970s and 1980s produced largely symbolic rather than instrumental changes in the processing of rape cases and in the attitudes displayed towards rape and rape victims.⁴ This can be evidenced by the fact that in the second decade of the twenty-first century, people are still noting the criminal justice system's inadequate response to the crime of rape. Rape within the context of intimate relationships, on college campuses, in the military and in international conflict are all, once again, on the public and political agendas. An important question to be asked is why the criminal justice system's response to the crime of rape has not improved—at least not significantly—in the past half century. Why, in 2020, are people still talking about legitimate rapes and righteous victims.

Recommendations to Improve Sexual Assault Case Processing

An even more important question is what can be done to reduce the shockingly high rates of attrition in rape cases, as well as to improve the treatment of rape victims. Counteracting the stereotypes and myths underlying the crime of rape will require ongoing, specialized training of law enforcement officials and prosecutors—the kind of training that focuses on appropriate and effective techniques for interviewing victims, interrogating suspects and investigating and prosecuting rape cases. Because non-stranger rape is the most frequent type of case handled by law enforcement, training should specifically address techniques to improve the investigation of this type of crime. These cases are difficult, but not impossible, to prosecute successfully, and decision-makers should be trained in the use of pre-textual phone calls, social networking sites

and mobile phone text messages so they can gather adequate evidence to corroborate the victim's allegations.

Both police and prosecutors require specialized training because a poorly written report, the inability to build rapport with victims, and the failure to gather information and ask appropriate questions often create the inconsistencies in victims' accounts that damage their credibility and contribute to case attrition. Officers should be taught techniques that are designed to engage victims as allies in the investigation and to encourage their cooperation. Such techniques include learning to identify, and appropriately respond to, symptoms of psychological trauma, especially post-traumatic stress disorder, shame and self-blame. Additionally, training should emphasise that delayed reporting is the norm in rape cases and that inconsistencies in the victim's account do not necessarily signal that the allegation is false.

All officers handling sexual assault cases should be trained in addressing the pervasive rape myths, traditional gender role attitudes and sexism found in these cases, as the attitudes and expectations of first responders (patrol officers) may affect the decisions of better trained officers later in the case-processing process. All officers should learn appropriate report-writing skills and how to identify rape myths and victim-blaming statements in reports; they also should be disciplined for using such statements in their investigation reports. Better communication must also be established between patrol officers, detectives and prosecutors, as knowing that a case originally perceived as being ambiguous or false eventually resulted in a conviction can help alter these decision-makers' perceptions of, and responses to, rape. Realizing that even weak cases can be successfully investigated and prosecuted may reduce police and prosecutors' cynicism towards victims and allegations, as well as encourage them to allocate resources more fairly across case types.

In addition to this training, there is also an urgent need to reduce the backlog of untested rape kits in jurisdictions throughout the US, Canada, the UK and other countries (Campbell, Shaw and Fehler-Cabral 2015). Moreover, testing should not be limited to cases involving strangers. Although jurisdictions with large backlogs of untested kits may have to prioritize testing certain types of kits, there are compelling reasons for implementing a 'test all kits' policy once this backlog has been eliminated (Campbell et al. 2016). This policy would convey an important symbolic message to the sexual assault victims who agree to undergo a forensic medical examination, with the expectation that their examinations might produce evidence that could enhance the odds of successfully prosecuting their attackers. Testing all kits in a timely manner also yields important instrumental effects: forensic evidence that potentially corroborates the victim's allegations would be obtained early in the investigative process, not when the statute of limitations has already expired, and detectives can use the corroborative evidence to develop a more convincing case for prosecution, with the result that fewer cases will be rejected at charging. Law enforcement agencies and prosecutors' offices should be encouraged to establish specialized sexual violence units to manage all rape cases. Although this may not be feasible in smaller jurisdictions who receive relatively few rape reports, larger jurisdictions would benefit from having a cadre of officers who are specifically trained in effective techniques for investigating rape cases, interviewing and establishing rapport with victims and overcoming evidentiary issues that are common in these types of cases (Beichner and Spohn 2005). These units should be adequately funded and staffed with personnel who want to work these types of cases; moreover, selection into these specialized units must be based on the skills and experiences of the officers and prosecutors, not on their sex.

Conclusion

One of the goals of the United Nations Commission on the Status of Women is to end violence against women and girls. An important component of this is ensuring that all violent crimes against women and girls are taken seriously—that all police, prosecutors, judges and jurors

respond appropriately to these crimes. We cannot end violence against women and girls until all rape incidents are considered legitimate, and all rape victims are considered righteous victims.

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¹ See Frank, Hardinge and Wosick-Correa (2009) for changes that were adopted internationally in terms of these dimensions.

² For a recent review of this research, see Spohn and Tellis (2014).

³ See Ehrlich (2012) for a discussion of rape myths in trial discourses in Canada; see Parratt and Pina (2017) and Sleath and Bull (2017) for two recent reviews of police officers' rape myths, beliefs and perceptions of rape victims.

⁴ For a somewhat contrasting view, see Frank, Hardinge and Wosick-Correa (2009).

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