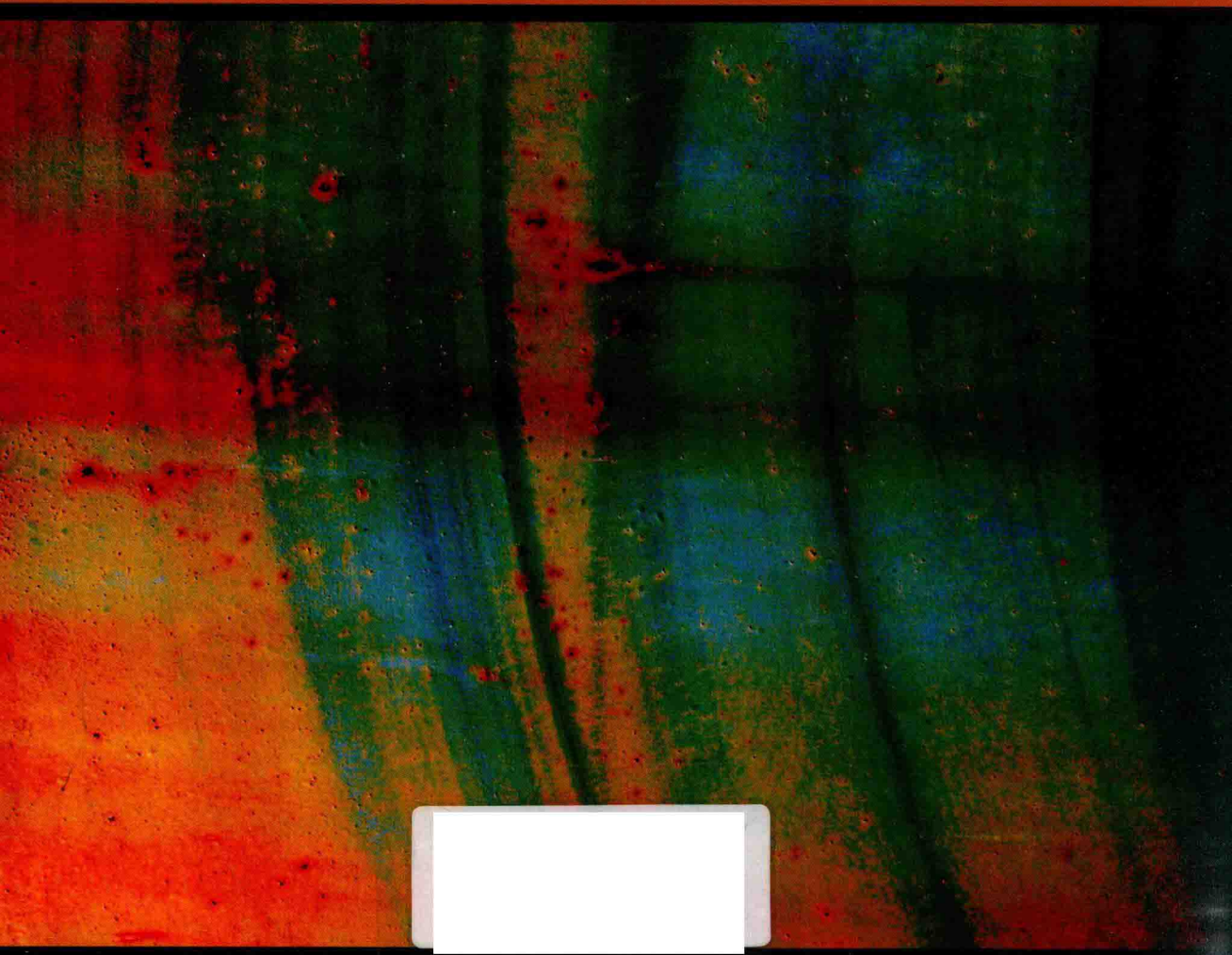
Sexual Victimization

Then and Now



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SAGE Publications Ltd.
1 Oliver's Yard
55 City Road
London EC1Y 1SP
United Kingdom

SAGE Publications India Pvt. Ltd.
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road, New Delhi 110 044
India

SAGE Publications Asia-Pacific Pte. Ltd.
3 Church Street
#10-04 Samsung Hub
Singapore 049483

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Sexual victimization : then and now / [edited by]
Tara N. Richards, University of Baltimore, Catherine D. Marcum, Appalachian State University.

pages cm
Includes bibliographical references and index.

ISBN 978-1-4833-0817-3 (pbk.)

1. Sex crimes—United States. 2. Sexual abuse victims—United States. 3. Criminal justice, Administration of—United States. I. Richards, Tara N. II. Marcum, Catherine Davis

HV6592.S4864 2015
362.8830973—dc23 2013036560

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14 15 16 17 18 10 9 8 7 6 5 4 3 2 1

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Sexual Victimization

I would like to dedicate this book to my nephews: Landon, Chase, and Wesley. Each of you continually surprise and amaze me.

—Tara N. Richards

I would like to dedicate this book to my goddaughters, Lydia and Katie. I look forward to seeing you grow and mature into beautiful and strong young women—I love you and am proud of you.

—Catherine D. Marcum

Preface

After almost three decades of activism and legal reform, the criminal justice system, with the help of non–criminal justice system partners, has made great strides regarding the handling of cases of sexual victimization, including how sexual victimization is defined, how evidence is collected, and how cases are prosecuted as well as how victims are treated by criminal justice system actors. Every state now includes rape and sexual assault in its penal code, and many states' definitions of forcible rape include language pertaining to diverse groups of victims, including special populations of victims such as prisoners and the elderly. In addition, many police departments now assist in the facilitation of victims' court advocates and counseling services post–sexual assault. However, there are still ways in which criminal justice practitioners, activists, and scholars could advance their understandings of sexual victimization and improve the treatment of victims as they move through the criminal justice process. This continuum of change, as well as the lack thereof, was inspiration for the development of this book. We as the editors felt as if the academic community, as well as practitioners, could benefit from a text that outlined the various facets of "then and now" in regard to sexual victimization as a whole.

The purpose of this project is to produce a book that provides scholars easy access to information that specifically examines the continuum of change in the sexual victimization field. It is the desire of the editors to educate and enlighten a wide audience, from those who are completely unfamiliar with the topic to individuals who need more specific information on a particular type of sexual victimization. This text should be a useful guide to students, academics, and practitioners alike.

Acknowledgments

We would like to extend a huge thank you to all the contributors of this book. Your expertise in the field will provide enlightenment and insight to academics and students alike. All your hard work is appreciated.

Thank you to Jerry Westby, MaryAnn Vail, and the staff at SAGE for their assistance and patience with the preparation of this manuscript. It was wonderful to work with a group of individuals who shared the same vision for this book. We hope it is a great success.

Finally, thank you very much to the following reviewers of this text for their thoughts and insight on improving the book:

Kelley Christopher, University of West Georgia

Wendy Perkins Gilbert, Urbana University

Sheri Jenkins Keenan, Cameron University

Rebecca Loftus, Arizona State University

Stephanie P. Manzi, Roger Williams University

Christine L. McClure, Cape Cod Community College

Elizabeth Quinn, Fayetteville State University

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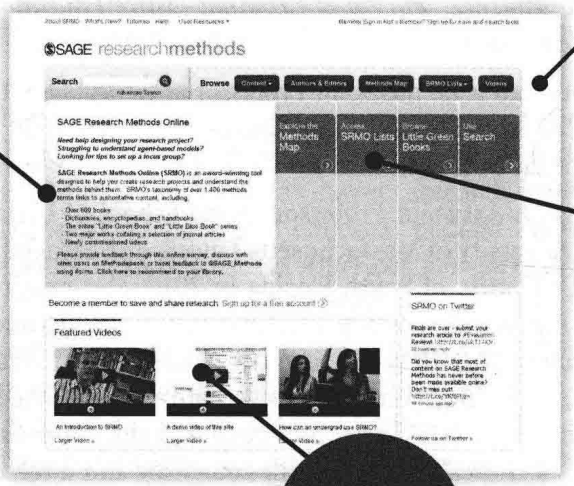

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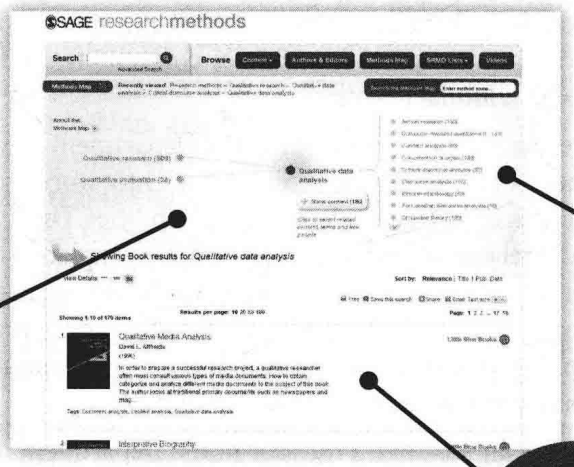

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Brief Contents

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1

State Variations on Definition of Sexual Assault

Amanda Burgess-Proctor and Christopher G. Urban

The task of evaluating state sexual assault statutes is more complicated than it might appear at first. States have long ago abandoned a solitary "rape" law in favor of more nuanced and multilayered sets of laws. Even a cursory exploration of sexual assault legislation demonstrates that these laws address a wide variety of proscribed behaviors, including (but not limited to) child sexual assault; adult sexual assault; statutory rape; rape occurring within correctional, educational, and other specific populations; sodomy; and bestiality. There is also tremendous variation in the terminology states use to describe sexual assault ("sexual abuse," "criminal sexual conduct," "sexual battery," "sexual torture," etc.), and there likewise exists no necessary consistency in the definitions of these terms across states. Even the language states use to define "consent" varies considerably, as does the standard by which consent (or lack thereof) is measured.

Thus, a tidy summary of state legislative definitions of rape and sexual assault remains elusive, particularly within the context of this brief essay. In addition, we elected to focus solely on adult offenses, as child sexual assault brings with it a category of offenses (child pornography, pedophilia, incest, and so on) that would broaden our analysis beyond the intended scope of this essay. As a result, we do not address statutory rape or the development of age-of-consent laws, though analyses of these laws are readily available elsewhere (see Davis & Twombly, 2000; NIC, 2006; Oberman, 1994).

With those caveats offered, this chapter presents a general overview of the current status of sexual assault legislation in the United States. First, we begin by

summarizing U.S. rape law reform over the last three decades. We then examine how states define sexual assault in the contemporary era. We do so by examining four important targets of rape law reform: force, non-consent, and corroboration requirements; rape shield laws; gender-neutral language; and marital exemptions. Ours is not an exhaustive legal analysis (for that, see AEquitas, 2012; and Decker & Baroni, 2011) but instead is intended to provide a "state of the statutes" summary along these four dimensions. As a counterexample to statutory definitions, we also examine definitions of sexual assault used in federal legislation and in national sources of crime data. Next, we consider the importance of legal definitions of rape and sexual assault and their impact on reporting, arrest, and prosecution patterns, and we briefly assess the extent to which rape law reforms have been fully achieved. Finally, we offer suggestions for continued advancement in states' responses to sexual assault.

Overview of Rape Law Reform: Evolving Definitions and Legal Standards in State Statutes

At common law, rape was defined as "carnal knowledge of a female, by a man, not his wife, forcibly and against her will" (Caringella, 2009, p. 12), where the term *carnal knowledge* refers to penile–vaginal penetration (Spohn & Horney, 1992). Historically, then, the legal definition of rape considered only male perpetrators and female victims; excluded digital, object, oral, and anal penetration, as well as contact offenses such as kissing, fondling, or frottage; excluded spouses; and required both that the perpetrator use force and that the victim withhold consent. Thus, the legal standard defining "rape" was sufficiently narrow as to exclude a whole host of behaviors involving intimate partners, male victims (and/or female perpetrators), nonpenile vaginal penetration, and the like. Moreover, Lord Chief Justice Sir Matthew Hale suggested that rape was "an accusation easy to be made, hard to be proved, and harder to be defended by the party accused though ever so innocent" (as quoted in Bachman & Paternoster, 1993, p. 558; Caringella, p. 16) cultivated a social response to rape that was reflexively protective of the accused (Bachman & Paternoster). As a result, victims' moral character and sexual history often were presented as mitigating evidence. This climate of suspicion and skepticism persisted for centuries, as accusers routinely were questioned at trial about their previous sexual encounters well into the mid-20th century.

Beginning in 1970s, reformers and activists began agitating for legal reform that would make state rape statutes both more progressive and more inclusive (Caringella, 2009). These reform efforts had two separate but aligned sources: feminist groups, for whom legal reform was intended to serve a largely ideological function aimed at dispelling popularly held rape myths and reducing victim stereotyping and stigmatization, and victims' rights and "law and order" groups, for whom legal reform was intended to serve a more instrumental function aimed at

increasing the processing and adjudication of perpetrators (Bachman & Paternoster, 1993, p. 555). Despite their somewhat divergent orientations, both groups hoped legal reform would, among other advances, broaden definitions of rape beyond the narrow, antiquated common-law standard.

Over the decades that followed, a series of legal reforms did indeed occur. Some of the most important of these reforms were (a) expansion of the terminology used from *rape* to *sexual assault* or *criminal sexual conduct*, (b) inclusion of additional offenses beyond penile–vaginal penetration, (c) removal of requirements for corroborating evidence (which existed only for rape) and statutory requirements of resistance and non-consent, (d) forbiddance of accusers' sexual history or character evidence at trial (i.e., "rape shield" laws), (e) elimination of the marital/spousal exemption, (f) adoption of gender-neutral language for victims and offenders, and (g) creation of age-of-consent laws (Caringella, 2009; Horney & Spohn, 1991; Koss, 1996).

Michigan enacted the first and most comprehensive rape reform legislation with the creation of its Criminal Sexual Conduct statute (Bachman & Paternoster, 1993), which replaced the existing "carnal knowledge" rape statute in 1975. Indeed, Michigan's statute was regarded as a model for state sexual assault legislation (Caringella, 2009). In addition to creating a four-pronged statute that considered penetration and contact offenses as well as a victim's capacity to consent, it also included the nation's first rape shield law (Anderson, 2002).

Throughout the 1970s and 1980s, other states followed Michigan's lead, albeit to varying degrees and with varying speed. For example, while most states had adopted rape shield laws by the mid-1980s (Anderson, 2002), it was not until 1993 that all 50 states had included some statutory recognition of marital rape, whether through repeal of spousal exemptions or through creation of statutes explicitly allowing spouses to be prosecuted (AEquitas, 2012).

Examining Statutory Definitions Past and Present Using Four Targets of Rape Law Reform

Given the tremendous breadth and complexity of state rape and sexual assault statutes, we have selected four issues targeted by early rape law reformers to serve as examples for use in evaluating statutory definitions of rape both past and present. Below, we discuss four of the most prominent targets of rape law reform—force, non-consent, and corroboration requirements; rape shield laws; gender-neutral language; and marital exemptions—and we evaluate the evolution of statutory definitions and standards for each of those targets over the last three decades.

FORCE, NON-CONSENT, AND CORROBORATION

Historically, sexual offenses were categorized as "rapes" only when the perpetrator used force and the victim actively resisted the attack; moreover, successful

prosecution for rape generally required corroborating evidence to demonstrate that the offense occurred against the victim's will (Caringella, 2009; Decker & Baroni, 2011). First, most U.S. jurisdictions adopted a definition of rape that included a "forcible compulsion" requirement, and a successful conviction could occur only when the victim withheld consent (e.g., "against her will"; Decker & Baroni). Is it important to observe that the standards to which victims were expected to resist the attack were extremely high: "to the utmost," "throughout the duration of the attack," etc. (Caringella). Similarly, drawing upon the "hue and cry" standard, corroborating evidence of the victim's lack of consent was required for successful conviction for rape (Decker & Baroni). This corroboration requirement existed for no crime other than rape (Caringella). However, as the force and non-consent requirements slowly became obsolete, many states began abandoning corroboration requirements. "Today, for the most part, testimony of an alleged rape victim is sufficient to uphold a conviction for rape without the need for corroborating evidence" (Decker & Baroni, p. 1148).

That said, a careful reading of contemporary state statutes reveals that the force, non-consent, and corroboration requirements have not been completely eliminated in practice. For example, only 28 states currently criminalize nonconsensual sex acts, including both contact and penetration offenses, committed without force (AEquitas, 2012). Decker and Baroni (2011) called these "true non-consent states," in which a defendant can be convicted on the basis of victim non-consent alone. However, of those 28 states, only 17 have non-consent provisions for penetration offenses; in the other 11 states, the non-consent language applies only to contact offenses, and, therefore, they "still require a showing of 'forcible compulsion' or 'incapacity to consent' for sexual penetration offenses" (Decker & Baroni, pp. 1084–1085). The remaining 22 states have statutory definitions that conflict with non-consent standards. Some of those states ("contradictory non-consent states") have statutory definitions that require a lack of capacity to consent, while others ("force states") lack non-consent statutes altogether (Decker & Baroni). As for corroboration, it appears that much of the advancement in this arena has actually occurred in the judiciary through case law, as only 17 states have statutorily dismissed or otherwise addressed common-law corroboration requirements (Decker & Baroni).

RAPE SHIELD LAWS

The criminal justice processing of rape cases historically focused not on the actions of the accused, but on the actions of the victim. For example, offenses in which victims did not resist "to the utmost" and/or "throughout the entire duration of the attack" (Caringella, 2009; Horney & Spohn, 1991) did not meet original statutory definitions of rape, so victims who could not demonstrate that level of resistance were unlikely to receive legal protection and have their cases prosecuted. This view shifted during the 1970s, but as legislation caught up with these more progressive views, new methods of victim blaming emerged—and with them new legal practices aimed at discrediting victims.