



HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA  
HARRISBURG

October 25, 1974

Honorable Richard A. McClatchy, Jr.  
Haverford & Rugby Roads  
Bryn Mawr, Pennsylvania 19010

Dear Mr. McClatchy:

Today is my last official day on the job here, and I am trying to tie up some of the loose ends. I have finally finished that analysis of House Bill 2708, and I am enclosing a copy of it.

I will be starting at the Chamber one week from today on November 1. As I have already mentioned to you, I would like to continue to serve in some capacity to the committee.

If you should want to contact me at my new office, my number will be 238-0441. Also, any messages for me can be easily handled by Susie.

Sincerely,

A handwritten signature in cursive script, appearing to read "John C. Shirvinsky".

John C. Shirvinsky

JCS:srs

Enclosure



**HOUSE OF REPRESENTATIVES**

**COMMONWEALTH OF PENNSYLVANIA**

**HARRISBURG**

Pennsylvania's Proposed Rape Reform Legislation

H.B. 2708

A COMPARATIVE ANALYSIS

Prepared for:

The Select House Committee to Study the  
Situations and Circumstances of Victims of Rape

The Honorable Richard A. McClatchy, Jr., Chairman

By: John C. Shirvinsky, Staff Assistant

Rape Reform in Pennsylvania

House Bill 2708

A Comparative Analysis

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## Background

On July 11, 1974, the Pennsylvania House of Representatives voted to adopt House Resolution 207, thereby creating the Select House Committee to Study the Situations and Circumstances of Victims of Rape.

In keeping with the charge of the resolution, the committee, under the chairmanship of Representative Richard A. McClatchy, Jr., scheduled a series of statewide hearings. Included among the hearing sites were the high-crime urban centers of Philadelphia and Pittsburgh.

The agenda of witnesses for the hearings typically included district attorneys, physicians, police officials, judges, psychiatrists, psychologists, various women's organizations, and most importantly, actual victims of rape. While the participating individuals all spoke to the rape issue from the viewpoint of their respective interest groups, everyone eventually recognized at least one of the following areas of concern:

- The alarming increase in the incidence of rape ( FBI statistics show that the number of rapes has increased 62% between 1968 and 1973)
- The high percentage of rapes that go unreported (estimates range from 30 to 90 percent)
- The violent - not sexual - nature of the offense
- The need for an efficient medical examination by personnel sensitive to the feelings of the victims
- The assignment of policewomen for the questioning of rape victims and the sensitization of police attitudes as they relate to rape victims
- The unjustified use of a victim's prior sexual activities as a means of defense for rapists
- The relief of traditional societal attitudes about victims of rape
- The revision of the Pennsylvania Crime Code for crimes of sexual assault.

As a result of these and other recommendations, a series of "Rape Reform" bills has been developed. This report will attempt to analyze the major piece of legislation which has been developed as a result of the hearings; and which for the most part deals with the three final recommendations listed on the preceding page.

This measure, House Bill 2708, has been adapted from a new Michigan law which has been receiving nationwide acclaim for the steps it has taken in correcting a long-standing injustice. In signing the bill into law, Michigan Governor William G. Milliken called it a model for the nation. He went on to say that "This legislation will provide a more realistic and humanistic deterrent to the violent crime of rape - especially in view of the fact that it attempts to change society's attitudes by recognizing rape as a violent crime first and a sexual act second."

Purdon's Consolidated Pennsylvania Statutes defines rape in Section 3121 as follows:

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.

Although this law is relatively new, it is not very specific, and as such, Pennsylvania rape laws are found largely in judicial interpretation. There are several key features of the law as presently interpreted which the proposed reform bills will change. These areas shall be enumerated in the following pages.

## PROVISIONS

### I. Sex-Neutral Application

It is clear from the face of the statute, that rape is a crime which only a male can commit, and then only if the victim is female. The reform would change this and substitute for both rape and sodomy laws the single sex-neutral crime of criminal sexual conduct. This change will bring Pennsylvania law into conformity with the probable requirements of the Equal Rights Amendment.

That Amendment has now been approved by Congress and 33 states. Only five more state ratifications are required for it to be passed. The Amendment provides:

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Legal scholars are not certain whether rape laws such as Section 3121 will be held unconstitutional under the Equal Rights Amendment, and interesting arguments can be made each side (see Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE LAW J. 871, 893, and 954 (1971)). The proposed reform is in complete conformity with the Equal Rights Amendment because it is sex-neutral in its application. Its passage will end all doubts about whether the rape laws will be valid under the Equal Rights Amendment.

### II. Degrees of Sexual Assault

Under the present law there is a confusing overlap between rape, deviate sexual intercourse, assault with intent to commit rape or deviate sexual intercourse, indecent assault, etc. The key distinction between these various offenses turns on whether or not there was sexual penetration.

Under the proposed reform, degrees of criminal sexual conduct will be determined by both the factor of penetration and the factor of actual injury to the victim. The new scheme will permit a closer tailoring of the charge to the actual seriousness of the deed in the case at hand, thereby more specifically implementing society's goals in criminalizing the behavior involved. Thus, personal injury coupled with penetration would constitute first

egree assault. In the case of a child under twelve, the injury is presumed; in the case of threat with a dangerous weapon, the potential for death justifies removing the injury requirement. So also with the remaining degrees: the seriousness of the offense is determined by the two factors of penetration and injury rather than penetration alone, as under present law.

### III. Force

The present Pennsylvania statute requires that carnal knowledge be achieved by "force" or "threat of forcible compulsion". No further definition is set forth.

For the most part, the judicial interpretations of this section have been wise, flexible, and humane. The proposed reform law has incorporated the thrust of these decisions in a concerted effort to clarify both "force" and "threat of forcible compulsion".

The legislation deals with these complex terms in several ways. First, it lists coercive situations in which the element of force will be presumed to exist. These include the potentially fatal occasion when the actor is armed with a dangerous weapon, cases where the actor threatens the victim with force or violence or retaliation, cases where the actor forcibly confines, kidnaps, robs or assaults the victim. Secondly, the reform will give the victim the right to rationally assess her danger and act accordingly and will require only that there be a showing that the victim believed the actor had the ability to execute his threats. Third, the reform lists situations where no showing of force will be required because the victim is incapable of resisting. Those include situations where the victim is physically helpless, mentally defective (and the actor has reason to believe this), mentally incapacitated as a result of conduct by the actor, or taken by concealment or surprise. Fourth, in the traditional "forcible" rape situation, the reform will redefine the element of force as overcoming the victim through the actual application of physical force, physical violence, or superior physical strength. Finally, the proposed reform adopts the Michigan provision that makes sexual penetration a crime when the actor "engages

in medical treatment or examination of a victim in a manner or for purposes which are not medically recognized as ethical or acceptable." (See Don Moran v. People, 25 Mich. 356, 12 Mich.R. 183 (1872))\*

#### IV. Statutory Rape

Statutory rape is often discussed under the rubric of "age of consent" because the rationale usually asserted for prohibiting sexual activity with girls below a certain age is that they are not capable of intelligently and knowingly consenting. Other rationale and state legislative purposes can be easily postulated for criminalizing this activity.

The proposed reform in the law takes advantage of its scheme of degrees of sexual assault to differentiate cases in which the societal concern for the victim is greater than it is in other cases. The reform has retained the age of 16 as the age below which any penetration or contact is criminal even though the victim willingly participates. This is made only third degree assault because, regardless of one's personal view of the morality of the conduct, the fact is that many teenagers today are sexually active before 16. Sexual activity by children under 12, on the other hand, presents a different and more compelling set of societal concerns and is therefore classified as first degree sexual assault. Also classified as first degree are those tragic situations where a young person between 12 and 16 is victimized by a relative or member of the same household or by a person in authority over him or her.

#### V. Married Couples

Another aspect of the common law of rape often discussed under rubrics about presumed consent or nonconsent is the rule that a husband cannot rape his wife. Some scholars suggest that the marriage contract renders the wife's consent irrevocable; others see the rule as a holdover of old common law notions that the wife belonged to the husband in a near-property relationship. See R.V. Jackson, 1 Q.B. 671 (1891). Modern legal commentators worry about rights of marital privacy were the rule to be otherwise.

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\*In this unusual case, a defendant physician induced his patient to submit to intercourse in lieu of an allegedly dangerous operation. The courts held that the facts did not appear to meet the legal requirements of "force". This section has therefore been included as a safeguard.



As social and legal ideas about marriage as a partnership continue their present development, it may be that the spousal immunity from sexual assault soon will become unacceptable. The common law rule has already received some judicial modification in England. R. V. Clarence, 2 Q.B. 23 (1889) (wife can refuse husband if he has venereal disease); R. V. Clarke, 2 All E.R. 448 (1949) (after decree of separation, husband can be guilty of raping wife) R. V. Miller, 2 Q.B. 282 (1954) (after a petition for divorce has been filed, forced intercourse will constitute an assault even though the only injury was a hysterical and nervous condition).

The proposed reform would modify the common law rule only in those situations where two certain and provable events have occurred: (1) the couple are living apart, and (2) one of them has filed for legal separation or divorce. This would protect marital privacy when the marriage is still viable and ongoing, but also would protect a large and seriously victimized group of women presently ignored by the law, those in the process of obtaining a divorce.

#### VI. Corroboration

The proposed reform legislation, stating that there shall be no requirement of corroboration, merely incorporates the present Pennsylvania law. It is well-settled that there is no requirement in Pennsylvania that a rape conviction requires independent corroborating evidence. In *Commonwealth v. Ebert*, 22 A 2d 610, 146 Pa. Super. 362, (1942), for example the court held that "the testimony of the injured person alone may be sufficient to sustain conviction for rape, either common law or statutory."

Traditionally, corroboration requirements have been highly disfavored by the law. Thus, at common law the only use of it was the rule that the evidence of one witness, without corroborating circumstances, could not sustain a conviction for perjury. There are a variety of other situations where "the motivation for falsehood or occasion for inaccuracy is . . . great, and the disproof difficult," such as cases of fraud, prostitution, illegitimacy and paternity hearings, transactions between a decedent and one in a confidential relationship, and sexual offenses of all kinds. (*People v. Radunovic*, 21 N.Y.2d 186, 287 N.Y.S.2d 33, 234 N.E.2d 212 (1967)). But in none of those circumstances did the common

law impose a requirement that the issue of fact could not get to the jury without independent corroborating evidence.

The asserted justification for corroboration rules is that they protect against the danger of false accusations. Yet many scholars state that in terms of that objective the requirement is of miniscule practical value. Its overall affect produces mischievous consequences, placing an unrealistic premium on legal niceties. "In imposing an evidentiary standard more befitting a public event, the law necessarily frustrates the prosecution of an inherently furtive act." *People v Linzy*, 31 N.Y.2d 99, 335 N.Y.S.2d 45, 286 N.E.2d 440 (1972).

The imposition of a corroboration requirement in rape cases, but no others, raises substantial equal protection issues about the treatment of female victims. In a recent Washington, D.C., case Superior Judge Theodore R. Newman, Jr., stated that the only reason behind the D.C. corroboration requirement is "blatant male chauvinistic sexism. The time has come for the law to stop being a sexist ass . . ." (Detroit Free Press, Feb. 1, 1974). In *People v. Linzy*, supra, Court of Appeals Judge Scileppi said: by contemporary standards the corroboration requirement "expresses an almost irrational doubt toward the claims of women who have been victimized sexually, with virtually nothing to commend its continued use." (The New York legislature repealed the corroboration requirement earlier this year).

The Pennsylvania courts, in refusing to impose any artificial requirement of corroboration, have relied on the traditional safeguards against false charges to which the law always looks: police investigation, prosecutorial discretion, the "reasonable doubt" burden of proof, and the ability of the jury to evaluate the issue of credibility.

#### VII. Chastity of the Victim

Under the present Pennsylvania law, "it is a defense to prosecution . . . 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". (§ 3104).

The proposed reform law specifically precludes the admissibility of evidence of a victim's prior sexual activity except as it relates to the actor. This is one of the most

important features of H.B. 2708 because it remedies one of the principal causes for the low rates of reporting, complaining and convicting of rape cases.

Today, rape victims with a past involving any extra-marital sex are very reluctant to come forward and testify because they know their private lives will be dragged into the open on cross-examination. In addition, this sort of evidence is so inflammatory and prejudicial that it often results in jury acquittals, even in cases where the victim has been seriously beaten.

There are two issues in a rape trial as to which the victim's prior sex life is said to have some bearing. The first is the issue of consent and the second is the issue of credibility.

As a threshold matter, it is important to recognize a fundamental premise on which both the present law and the proposed reform rest. That is, as a matter of substantive law, every person has a right to decline sexual activity and every victim of forcible, unwanted sexual penetration is intended to be protected by the law.

From the earliest cases, the victim's prior reputation for chastity has been thought relevant on the issue of whether or not she consented. In *Commonwealth v. McCarty*, 2 Clark 351, 1844, it was decided:

"A female of bad reputation at the time the defendant obtained connection with her, whether such reputation was acquired by crime, or imprudence only was not within the protection of former 4510 (18 P.S.). But a single error would not place her beyond its protection, if she had repented, and was walking in the path of virtue, and enjoying the esteem of her acquaintance, when she was led astray."

In 1974, it is hard for women to accept the burden of a judgment made by male jurists over 100 years ago. Certainly today no woman would agree that there is any logical connection between her relationships with one man in the past and her likelihood of consenting to another man in the future. Even the judicial presumption that a virgin will fight harder than an unchaste woman if she is truly "nonconsenting", would not find general support today.

Therefore, the proposed reform would eliminate evidence of prior consensual sexual activity in light of its very dubious probative value on the issue of consent, and in light of its

highly prejudicial effect on the prosecution's case, and in light of the fact that permitting  
is the principal inhibiting factor in the enforcement of the rape law.

The proposed reform would take away from defendants in rape cases an opportunity not available to defendants in any other case to escape punishment by the strategem of smearing the victim's reputation and making her previous personal life the key and deciding issue in the case. The proposed reform would not deny to rape defendants any opportunity now accorded persons charged with other crimes. To reiterate a previous statement, they would still have available all the traditional safeguards against false charges on which the law rightly relies; police investigation, prosecutorial discretion, the reasonable doubt burden of proof, and the ability of the jury to evaluate the issue of credibility.