Journal of Criminal Law and Criminology

Volume 84
Issue 3 *Fall*

Article 4

Fall 1993

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0091-4169/93/8403-0554
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 84, No. 3

Printed in U.S.A.

A CONTEMPORARY LOOK AT THE EFFECTS OF RAPE LAW REFORM: HOW FAR HAVE WE REALLY COME?*

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I. INTRODUCTION

The reform of state and federal rape statutes has been the product of a fragile alliance among feminist groups, victim's rights groups, and organizations promoting more general "law and order" themes.[1] As can be expected from such a diverse coalition, the intended goals of rape law reform have not always been clear, and different reform groups have had somewhat different agendas. For example, feminist groups were largely motivated by ideological issues. These organizations focused on societal perceptions about rape and rape victims.[2] Such perceptions included: (a) the belief that rape was not a serious and violent offense; (b) the notion that acquaintance rapes or rapes perpetrated by intimates[3] were less serious than and different from "real rapes"—those that fit a cultural

* An earlier version of this Article was presented at the 1992 meeting of the American Society of Criminology in New Orleans, Louisiana. Points of view and opinions expressed herein are those of the authors and do not necessarily represent the official position or policies of the United States Department of Justice. The authors would like to thank Patsy Klaus for providing a supportive environment in which to work on this project, Pat Langan for supplying data from the National Prisoner Statistics reporting program, and Lawrence Greenfeld for assistance with the prison survey data.

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1 *See generally* JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM (1982); Ronald J. Berger et al., *The Social and Political Context of Rape Law Reform: An Aggregate Analysis*, 72 SOC. SCI. Q. 221 (1991); Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170 (1980); Vicki M. Rose, *Rape as a Social Problem: A By-product of the Feminist Movement*, 25 SOC. PROBS. 75 (1977).

2 *See* Rose, *supra* note 1, at 76.

3 "Intimates," as used in this Article, refers to either husbands, common-law spouses or boyfriends.

stereotype involving a stranger jumping out from a place of hiding and violently raping a physically resisting woman; and (c) the various "rape myths" which suggested, among other things, that rape victims were somehow partially to blame for their own victimization.[4] For feminist groups, then, a very important intended consequence of rape law reform was largely symbolic and ideological—to educate the public about the seriousness of all forms of sexual assault, to reduce the stigma experienced by victims of rape, and to neutralize rape myth stereotypes.[5]

Different concerns motivated victim's rights and "law and order" groups. Their intentions were somewhat more pragmatic and instrumental. The problem with extant rape statutes for these groups was that, too frequently, rape offenders were not arrested for their crime because many victims were reluctant to report the offense. These groups also believed that many offenders arrested for rape were not convicted or were convicted of a less serious offense because frequently the victim rather than the offender was put on trial.[6] For instance, the defense would use the victim's own sexual history to question her lack of consent. Further, they perceived that many offenders who were convicted of rape or sexual assault did not receive prison sentences because the sexual assaulter was known to the victim, and that therefore the public did not view the victimization by an acquaintance or intimate as real rape.[7] In addition to changing the public's conceptualization of the crime of rape and of the victims of sexual assault, rape law reformers also intended to modify existing criminal justice practices.

Although differing in emphasis, the impact of the symbolic and instrumental effects of rape law reform were intended to be complementary. Changes in public conceptions about what rape "really is" and who rape "really victimizes" were expected to lead to more reports of rape. Simultaneously, jurors were expected to become more sensitive to both the victimization and stigmatization of rape victims. Consequently, rape reports, arrests, convictions and rates of imprisonment (especially for "non-stereotypical" acquaintance rapes) were all expected to increase.[8]

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4 *See* Rose, *supra* note 1, at 78.

5 *Id.* at 78-79; *see generally* Mary Ann Largen, *Rape-law reform: An Analysis, in* RAPE AND SEXUAL ASSAULT II 271 (A.W. Burgess ed., 1988).

6 *See* Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 LAW & SOC'Y REV. 117, 119-21 (1991). *See generally* MARSH ET AL., *supra* note 1; Berger et al., *supra* note 1; Bienen, *supra* note 1.

7 *See* SUSAN ESTRICH, REAL RAPE 8-26 (1987).

8 For a detailed discussion of rape law reform, see generally CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASS ROOTS REVOLUTION AND ITS IMPACT (1992).

Significant questions still exist, however, regarding the extent to which the reporting and handling of rape cases has actually changed within the legal system subsequent to rape law reforms. That is, questions remain as to whether rape law reforms have actually produced the more instrumental public policy reforms that their proponents envisioned. At least four important public policy questions exist. First, are victims of sexual assault more likely to report their victimization now than they were in the past? Second, has there been an increase in the number of rape arrests and convictions from pre- to post-reform years? Third, are those convicted of rape more likely to do some prison time? Finally, are non-stereotypical rapes being handled as seriously as those rapes which more closely approximate a stereotypical sexual assault by a stranger?

Surprisingly, there has been little research to address these important public policy issues, and the results of the few studies which have been undertaken remain somewhat equivocal. Many of these studies find weak and inconsistent support for the assumption that rape law reform has had a significant impact on the criminal justice system's processing of rape cases. In Michigan, for example, where the first and most comprehensive reforms were implemented, researchers have found increases in the number of arrests and convictions for rape, but no change in the number of rapes reported to the police.[9] Statistics from other jurisdictions have shown even less of an impact for rape law reform. In fact, except for a few jurisdictions that experienced extremely zealous reforms, research has demonstrated that in the vast majority of jurisdictions, legal reforms have *not* been followed by significant increases in either the reporting of rape cases or the arrest and conviction probabilities for rape.[10]

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9 Marsh et al. performed an interrupted time-series analysis for data before and after rape law reforms were implemented in Michigan. These investigators found increases in the number of arrests and convictions for rape, but found no change in the number of rapes that were reported to the police. MARSH ET AL., *supra* note 1. Susan Caringella-MacDonald compared pre- and post-reform attrition (the extent to which cases were dropped) and conviction rates from two jurisdictions in Michigan (Kalamazoo county and Detroit). She found decreases in rates of attrition and increases in rates of conviction for both Michigan jurisdictions after reforms had been implemented. Susan Caringella-MacDonald, *Sexual Assault Prosecution: An Examination of Model Rape Legislation in Michigan*, 4 WOMEN & POL. 65 (1984).

10 Polk examined data for the entire state of California from 1975 to 1982. Although he found an increase in the probability that those convicted of rape would be sentenced to a state institution, his data revealed that police clearance rates for rape and the rate of court filings for rape remained relatively unchanged during this time period. *See* Kenneth Polk, *Rape Reform and Criminal Justice Processing*, 31 CRIME & DELINQ. 191 (1985). Horney and Spohn studied the impact of rape law reforms in six jurisdictions: Detroit, Chicago, Philadelphia, Atlanta, Houston, and Washington, D.C. Only two jurisdictions displayed significant increases in rape adjudication outcomes. Detroit data showed in-

Horney and Spohn conducted the most recent and perhaps most extensive study to date to address these issues.[11] After evaluating the impact of rape law reforms on reports of rape and on the processing of rape cases in six urban jurisdictions, these authors pessimistically concluded that, "[o]ur primary finding was the overall lack of impact of rape law reforms. . . . [w]e have shown that the ability of rape reform legislation to produce instrumental change is limited."[12] While this study and others have provided important information regarding the effects of rape law reform in particular jurisdictions, they all have several limitations. Perhaps the foremost limitation is the fact that, except for Horney and Spohn, who investigated six jurisdictions, all the others have relied on single states or jurisdictions. The available knowledge base, therefore, is very restricted and precludes any general conclusion about the effects of rape law reform. In addition, all of the studies have confined their inquiries to data from the late 1970s or early 1980s, thereby leaving a large gap in our understanding about what has occurred with rape reporting and processing during the last decade. Finally, all of the above studies have examined changes in rape reporting and adjudication in isolation, not in comparison to other violent crimes.[13] Necessarily, one must examine rape in relation to other crimes of violence in order to control for extraneous factors, such as an increase in the general efficiency or punitiveness of the criminal justice system. These and other extraneous factors may be affecting the reporting and processing of *all* crimes, not simply the crime of rape. Only if the reporting and adjudication of rape increases relative to other violent crimes can any researcher attribute this trend to the influence of rape law reforms.

For these reasons, it is clear that, in order to advance our understanding of the effects of rape law reforms, it is necessary to conduct a *national* accounting of the *recent* trends in rape reporting and adjudication *relative* to other crimes of violence. Horney and Spohn adopted this very position after their recent review of the rape reform literature. "These empirical studies provide some evidence of

creases in reports and indictments of rape, and Houston data revealed slight increases in reporting and sentence lengths for rapes. *See* Horney & Spohn, *supra* note 6, at 117. In another study, Loh found no significant changes in conviction rates for rape in King County, Washington (Seattle). *See* Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543 (1981). *See also* Largen, *supra* note 5.

11 Horney & Spohn, *supra* note 6.

12 *Id.* at 149-50.

13 *See supra* notes 9-13 and accompanying text for a brief overview of previous rape reform studies.

the impact of rape law reforms in four jurisdictions but leave many unanswered questions about the *nationwide* effect of the reforms."[14]

This Article both contributes to and extends the previous literature on the effectiveness of rape law reforms in this country. Using a number of national data sources, we investigate the degree to which there has been a change in three aspects of the rape adjudication process relative to two other crimes of violence—robbery and aggravated assault. We will address three questions regarding rape: (a) to what extent has reporting rape to the police changed from the 1970s to the present; (b) to what extent has the probability of going to prison for rape (conditioned on arrest) changed from the 1970s to the present; and (c) to what extent does the victim/offender relationship composition of rape victimizations reflect the composition of offenders going to prison for rape, and to what extent has this composition changed from the 1970s to the present? Specifically, has there been an increase in the number of "date" or "acquaintance" rape offenders who have been imprisoned?

II. Rape Law Reform

Perhaps the most illuminating characterization of rape laws in this country was provided by Sir Matthew Hale, Lord Chief Justice of the King's Bench: " 'rape is an accusation easy to be made, hard to be proved, and harder to be defended by the party accused though ever so innocent.' "[15] This concern with protecting men from false accusations of rape went beyond the "not guilty until proven innocent" standard, and led to arguments for nearly unlimited admissibility of evidence regarding the accused's character.[16] This, combined with cultural conceptions of rape and early rape laws, placed serious impediments on the adjudication of rape cases.[17] Such offender-bias affected the entire adjudication sequence of rape cases, from the victim's reporting of the attack to the state's prosecution of the event.

Pressure from various organizations in the early seventies led to a growing societal awareness that rape laws in this country were an-

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14 Horney & Spohn, *supra* note 6, at 122 (emphasis added).

15 Matthew Hale, The History of the Pleas of the Crown 634-35 (1847), *quoted in* Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. Crim. L. & Criminology 644, 650 (1987).

16 *See* I.A. John Henry Wigmore, Evidence 62 (Tiller's rev. ed. 1983).

17 *See* Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. Crim. L. & Criminology 644, 649 (1987).

tiquated at best.[18] This awareness, in turn, provided the impetus for the enactment of some form of rape law reform in all fifty states.[19] Michigan was the first state to modify its rape statute when it enacted a comprehensive criminal sexual assault law in 1974.[20] Several other states soon followed by reforming their own rape statutes. The reform of state rape statutes also had a "spill over" effect on procedural law, as evidenced by Congress' 1978 enactment of Rule 412 of the Federal Rules of Evidence.[21] This rule excluded from evidence all reputation and opinion testimony concerning a rape complainant's prior sexual conduct, but still allowed for the limited admissibility of evidence of a complainant's specific prior sexual acts.[22]

Although the nature of rape law reforms varied across jurisdictions in comprehensiveness and specific detail,[23] Horney and Spohn identified four common reform themes:

> (1) Many states replaced the single crime of rape with a series of offenses graded by seriousness and with commensurate penalties . . . . Traditional rape laws did not include attacks on male victims, acts other than sexual intercourse, sexual assaults with an object, or sexual assaults by a spouse [or an intimate]. The new crimes typically are gender neutral and include a range of sexual assaults.
> (2) A number of jurisdictions changed the consent standard by modifying or eliminating the requirement that the victim resist her attacker. Under traditional rape statutes, the victim, to demonstrate her lack of consent, was required to 'resist to the utmost' or, at the very least, exhibit, 'such earnest resistance as might reasonably be expected under the circumstances. Reformers challenged these standards, arguing not only that resistance could lead to serious injury but also that the law should focus on the behavior of the offender rather than on that of the victim.
> (3) The third type of statutory reform was elimination of the corroboration requirement—the rule prohibiting conviction for forcible rape on the uncorroborated testimony of the victim. Critics cited the diffi-

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18 *Id.* at 651.

19 *See id.* at 644 nn.1-3; Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 22-39 (1977); Abraham P. Ordover, *Admissibility Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 62 CORNELL L. REV. 90 95-102 (1977).

20 *See* Act of August 12, 1974, Pub. L. No. 266, 1974 Mich. Pub. Acts 1025 (codified as amended at MICH. COMP. LAWS ANN. §§ 750.520a-.520l (West Supp. 1987)).

21 The Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, was signed into law on October 28, 1978, and as FED. R. EVID. 412 applies to all trials conducted after November 29, 1978.

22 FED. R. EVID. 412.

23 *See generally* Berger et al., *supra* note 1; Jack E. Call et al., *An Analysis of State Rape Shield Laws*, 72 SOC. SCI. Q. 774 (1991); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986); Horney & Spohn, *supra* note 6.

> culty in obtaining evidence concerning an act that typically takes place in a private place without witnesses. They also objected to rape being singled out as the only crime with such a requirement.
> (4) Most states enacted rape shield laws that placed restrictions on the introduction of evidence of the victim's prior sexual conduct. Under common law, evidence of the victim's sexual history was admissible to prove she had consented to intercourse and to impeach her credibility . . . . Critics argued that the rule was archaic in light of changes in attitudes toward sexual relations and women's role in society . . . . [S]tate legislatures enacted rape shield laws designed to limit the admissibility of evidence of the victim's past sexual conduct.[24]

Advocates of the new statutes expected a number of positive outcomes from the reforms. First, they expected the treatment of rape victims to improve and, in turn, increase the reporting of rape. Second, they expected an increase in the arrest, conviction and imprisonment rates of all types of rape, including date and marital rape. As noted earlier, however, there is a paucity of research attempting to measure the success of these reforms, but the literature which does exist remains somewhat equivocal.[25]

The primary objective of this Article is to provide a national accounting of the extent to which rape reforms have succeeded in producing three expected outcomes. First, if such procedural reforms as rape shield laws have reduced the reluctance of victims of rape to report their victimizations to the police, then we should see an increase in the number of these victimizations reported to police during the past decade. Second, if statutes aimed at eliminating the resistance and corroboration requirements have indeed increased the probability that rapists will be convicted and sent to prison, then the probability of going to prison for rape should have increased relative to other violent crimes over the past twenty years. Third, if new criminal codes which replaced the single crime of rape with a series of offenses have indeed increased the probability that rape offenders who victimize intimates or acquaintances will be convicted and go to prison, then we should see an increased incarceration rate for these types of rapists as compared to the late seventies and early eighties.

III. METHODS

To address the research questions posed above, this study relies on several data sources: the National Crime Victimization Survey ("NCVS"),[26] the Uniform Crime Reports ("UCR"),[27] the

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24 Horney & Spohn, *supra* note 6, at 118-19 (citations omitted).

25 *See supra* notes 9-13 and accompanying text.

26 BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY (1991).

National Prisoner Statistics program ("NPS"),[28] and the National Corrections Reporting Program ("NCRP").[29] While we are primarily interested in the extent to which there has been a change in rape reporting and rape case adjudication, it is important to control for other factors which may also affect trends in these outcomes, such as the increased efficiency or punitiveness of the criminal justice system over time. To control for these factors, rape data will be compared to both robbery and assault data in all analyses. If rape law reforms have increased the effectiveness of the criminal justice system's handling of rape cases and of rape victims' willingness to report to the police, then we should expect to see increases in these measures for rape, over and above those increases observed for robbery and assault.

IV. DEPENDENT VARIABLES

A. POLICE REPORTS

This study focused on two indicators to examine trends in the reporting of rape, robbery and assault incidents to the police: the NCVS tally of victims who reported their victimization to the police, and the UCR tally of the same group. Both of these reporting trends are traced from 1973-1990.[30]

The Bureau of Justice Statistics ("BJS") sponsored and the U.S. Census Bureau conducted both the NCVS and prison inmate surveys. For a more detailed discussion of the methodologies employed in the NCVS, see BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES (1973-91).

27 FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1991). The Uniform Crime Reporting program is sponsored by the Federal Bureau of Investigation ("FBI"). For a detailed description of this data, see FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (1990). For a critical evaluation of the UCR data, see LARRY BARON & MURRAY A. STRAUS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY 26-32 (1989).

28 BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME REPORTS (1991). The collection of admissions data for the NPS is also sponsored by BJS. For a more detailed discussion of this program, see PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, NCJ-125618, RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926-86 (1991).

29 BUREAU OF JUSTICE STATISTICS, NATIONAL CORRECTIONS REPORTING PROGRAM (1991). Data tapes and technical documentation for each of the data sets utilized in this Article can be obtained from the National Archive of Criminal Justice Data at the University of Michigan, Ann Arbor.

30 It is important to note that the definitions of rape used by the UCR and the NCVS are not the same. The UCR defines rape as "carnal knowledge of a female against her will." UNIFORM CRIME REPORTS, *supra* note 27, at 23. The NCVS, for the time period studied here, relied on a respondent's self-classification of an incident as rape. That is, in response to a series of questions related to being attacked, threatened, or harmed, those women who voluntarily reported that they had been raped comprise the NCVS

B. PROBABILITY OF GOING TO PRISON

To estimate the probability of going to prison for rape, robbery and assault, this study divided the number of individuals admitted to prison for each of the three crimes by the number of individuals arrested for that same crime during a given year. In making this probability estimate we utilized two sources of data: admission series data from the NPS and arrest data from the UCR. As part of the NPS data, the admission series obtains information on each individual admitted to prison during a given year. Because of budgetary concerns, however, the federal government sporadically collected this data during the 1970s. Consequently, for that decade we can only estimate the probability of going to prison for the years 1970, 1974, 1978 and 1979. Thereafter, however, we have continuous trend data from 1981 to 1989.

C. VICTIM/OFFENDER RELATIONSHIP FOR THOSE COMMITTING OFFENSES AND THOSE IMPRISONED

In order to investigate the extent to which the relationship between the victim and offender for the crimes of rape, robbery and assault reflects the victim/offender relationship for those offenders in prison for these same crimes, and to determine whether there has been increased correspondence between these two measures during the past decade, we have utilized two sources of data: the NCVS for the time periods of 1979-1986 and 1987-1990, and a survey of inmates in state correctional facilities conducted in 1986 and in 1991

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sample. RONET BACHMAN, U.S. DEP'T OF JUSTICE, NCJ-145325, VIOLENCE AGAINST WOMEN 1 (1994).

The accuracy of both data sources have been criticized for the extent to which they estimate incident rates of rape in this country. *See* Mary P. Koss, *The Underdetection of Rape: Methodological Choices Influence Incidence Estimates*, 48 J. SOC. ISSUES 61 (1992). This Article, however, *does not* purport in any way to estimate incidence rates of rape victimization in the United States. Because the objective of this study was to discern national trends in rape reporting behavior and in the adjudication process of rape cases by the criminal justice system, it was important to utilize *consistent* sources of data that were available at the national level. We believe these data are reasonably consistent over time.

It should also be noted that the NCVS procedures for measuring rape have changed as a result of a 10-year redesign project. The survey now asks direct questions about sexual assault, including rapes involving family members or other intimates. For example, NCVS interviewers now ask the following screening question: "Incidents involving forced or unwanted sexual acts are often difficult to talk about. Have you been forced or coerced to engage in unwanted sexual activity by (a) someone you didn't know before, (b) a casual acquaintance, or (c) someone you know well?" This, along with other questions that specifically address sexual assault victimization, were implemented into 100% of the NCVS sample in July of 1993. Estimates of rape and sexual assault from these new questions will be available in the fall of 1994.

as part of the NCRP. In both sources, analysis was restricted first to female victims and victimizations; second, to those incidents which involved single offenders and single victims; and third, to those victimizations involving adults over 18 years of age.[31]

D. TIME PERIODS

Constructing a perfect interrupted time-series model to evaluate the national impact of rape law reforms was virtually impossible for several reasons. Most important, perhaps, is the fact that even though most state level statutes were enacted during the late seventies,[32] the majority of these statutes have undergone numerous revisions based on appellate court decisions in virtually every state. In fact, these revisions and amendments to original reform statutes continue in states across the country today.

Some have noted that this proliferation of litigation has been necessary because most statutes were hastily enacted by state legislatures in response to constituent pressures.[33] As a result of their hasty construction, many statutes were ambiguous and vague, if not incomprehensible. As Galvin explains, "[u]nder pressure from powerful interest groups to proceed with haste and to embrace a symbol of sexual autonomy and equality with one quick stroke of the legislative pen, drafters of rape-shield legislation failed to approach the task of evidentiary reform functionally."[34] Perhaps the most noteworthy example of these reformulations occurred in 1989 when Steven Lord was acquitted of rape and kidnapping charges in Brow-

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31 Analyses were restricted in these ways to obtain the purest sample possible. While many sexual assault statutes today are written in gender-neutral terms, the vast majority of victims still remain female. Throughout this Article, the male gender will be used to refer to the perpetrator and the female gender will be used to refer to a victim of rape. The sample was restricted to adult victims as well because crimes of rape involving juveniles are also much different in circumstance, for example incest, compared to rapes involving adults.

In addition, because there may have been differential proportions of strangers and acquaintances in prison due to the fact that victims differentially report these types of victimizations to the police, analyses were replicated using *only* those victims from the NCVS who reported their victimization to the police. As there were no significant differences between analyses in which only reported cases were used and the total sample, results presented in this Article are those obtained for the total sample. The fact that the victim/offender relationship does not have a significant effect on reporting behavior of rape victims is supported by recent research as well. *See* Ronet Bachman, *Predicting the Reporting of Rape Victimization: Have Rape Reforms Made a Difference?*, 20 CRIM. JUST. & BEHAV. 254 (1993).

32 For a detailed account of these early state reform statutes, see HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY OF PSYCHOLOGY AND LAW (1980).

33 Soshnick, *supra* note 17, at 646.

34 Galvin, *supra* note 23, at 776.

ard County, Florida. During Mr. Lord's trial, the jury was repeatedly shown the clothes worn by the alleged victim: a lacy white miniskirt with no underwear and a green tanktop. Newspapers nationwide published accounts of this trial, including the following statement made by the jury foreman: " '[w]e all felt she asked for it, the way she was dressed.' "[35] After this trial, Florida revised its existing rape shield statute to preclude the presentation of evidence at trial which suggests that an alleged victim's manner of dress incited a sexual assault.[36]

Because most state rape reform statutes have undergone so many reformulations since their implementation, it would be virtually impossible to establish a single time point by which to distinguish between pre- and post-reform periods. Therefore, we refer to pre- and post-reform periods in the sections that follow very loosely.

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[35] Elinor J. Brecher, *The Whole Story*, MIAMI HERALD, Nov. 26, 1989, at 10.

[36] *See* FLA. STAT. ANN. § 794.022 (West 1993). A glance through virtually every state's penal and evidentiary codes will reveal numerous changes to original rape and sexual assault statutes. It is not our purpose to delineate them all here; a few examples will suffice.

Pennsylvania did not address the proper interpretation of its rape shield statute until 1983 in Commonwealth v. Majorana, 470 A.2d 80 (Pa. 1983). In that case, the defense counsel sought to introduce evidence that the alleged victim had engaged in consensual intercourse with a codefendant two hours prior to the alleged incident. The Commonwealth of Pennsylvania objected on the ground that the evidence was inadmissible under Pennsylvania's rape shield statute. *Id.* at 82. After a lower court sustained the Commonwealth's objection, the Supreme Court reversed the trial court's decision that "evidence which directly contradicts the act or occurrence at issue is not barred by [the rape shield] statute." *Id.* at 83, *cited in* Soshnick, *supra* note 17, at 681. More recently, in Commonwealth v. Johnson, 566 A.2d 1197 (Pa. Super. Ct.), *appeal granted*, 581 A.2d 569 (Pa. 1990), the appellate court ruled that a trial court should conduct an in camera hearing to determine whether the probative value of exculpatory evidence of prior sexual conduct involving the victim outweighs the prejudicial effect. *Id.* at 1202.

Other states, such as California, have made recent changes in their rape reform statutes through legislation. For example, the following changes were made to the California Penal Code § 1127d in 1990:

> (a) In any criminal prosecution for the crime of rape, or for violation of Section 261.5, or for an attempt to commit, or assault with intent to commit, any such crime, the jury shall not be instructed that it may be inferred that a person who has previously consented to sexual intercourse with persons other than the defendant *or with the defendant* would be therefore more likely to consent to sexual intercourse again. *However, if evidence was received that the victim consented to and did engage in sexual intercourse with the defendant on one or more occasions prior to that charged against the defendant in this case, the jury shall be instructed that this evidence may be considered only as it relates to the question of whether the victim consented to the act of intercourse charged against the defendant in the case, or whether the defendant had a good faith reasonable belief that the victim consented to the act of sexual intercourse. The jury shall be instructed that it shall not consider this evidence for any other purpose.*
>
> (b) A jury shall not be instructed that the prior sexual conduct in and of itself of the complaining witness may be considered in determining the credibility of the witness
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> . . . .

CAL. PENAL CODE § 1127d (West 1988) (emphasis indicates amendments).

Keep in mind that we are simply assuming that, over the time period analyzed, there should be increases in the reporting, convicting and incarcerating of rape offenders, particularly those who rape someone known to them.

It should also be noted that, because the data we utilized were taken from several different nationally representative samples, we were not able to make pre- and post-periods completely consistent across all sources. With these data limitations in mind, however, we believe the important information to be gained from the analyses reported in this Article is a contemporary picture of the criminal justice system as it relates both to rape victims and to the adjudication of rape offenders since the years of reform.

V. RESULTS

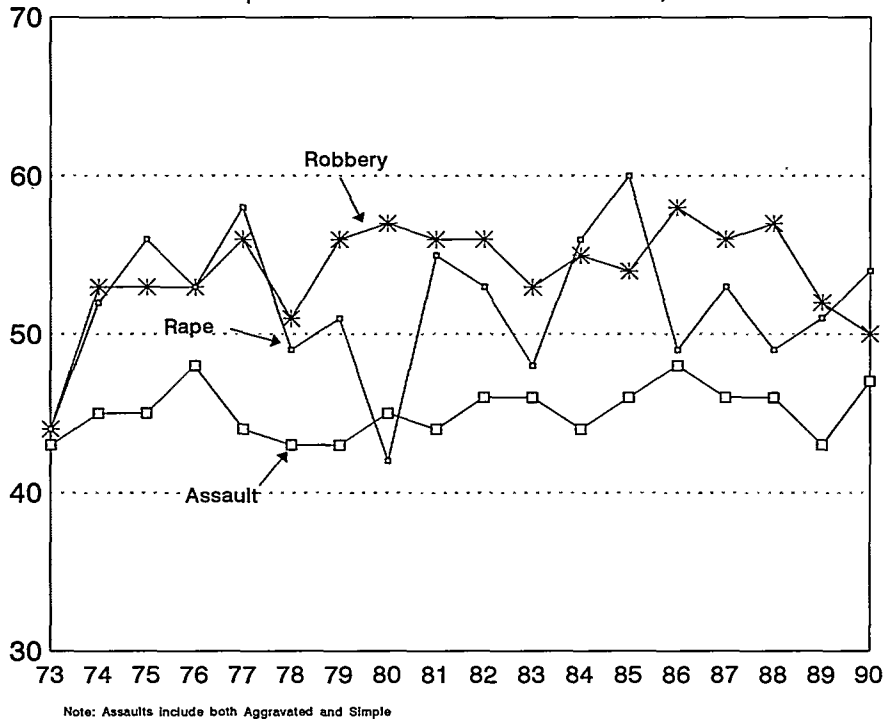
A. POLICE REPORTS

This Section will examine the extent to which rape law reforms such as rape shield laws and modifications in the consent standard have, in fact, increased the probability that victims of rape will report their victimization to the police. To investigate this question, we will first examine the NCVS' violent crime victimization data for the years 1973 to 1990. Figure 1 displays the proportion of rape, robbery and assault victims who reported their victimization to the police. As this figure demonstrates, the proportion of victims who reported to the police is far more variable for rape than for both robbery and assault. One reason for this may be the relatively small sample size of rapes in the NCVS. With such small numbers, minor variations in reporting will produce seemingly large effects. To reduce the influence of extreme annual fluctuations, we smoothed the proportion of police reports by rape victims using a moving average span of three.[37] Both the original data proportions of rape victimizations reported to the police and the computed smoothed proportions are presented in Figure 2.

From both Figures 1 and 2, it appears that the proportion of rape victims who reported their victimization to the police has increased slightly since 1980. Looking at the original data points,

[37] Smoothing is a technique often done to time series data in order to detect visual patterns in data from original data points which change in a rapid and sporadic fashion. We adopted a moving average span of three. After basing both axes at their true values, a moving average span of three involves replacing each year value with the average of the previous year, the current year and the next year. For example, the smoothed data point for the year 1981 would be ascertained by computing the average of the proportion of police reports for the years 1980, 1981 and 1982. For a detailed explanation of smoothing techniques, see LAWRENCE C. HAMILTON, MODERN DATA ANALYSIS (1990).

Figure 1. Proportion of NCVS Rape, Robbery and Assault Victims Who Reported Their Victimization to Police, 1973-90.

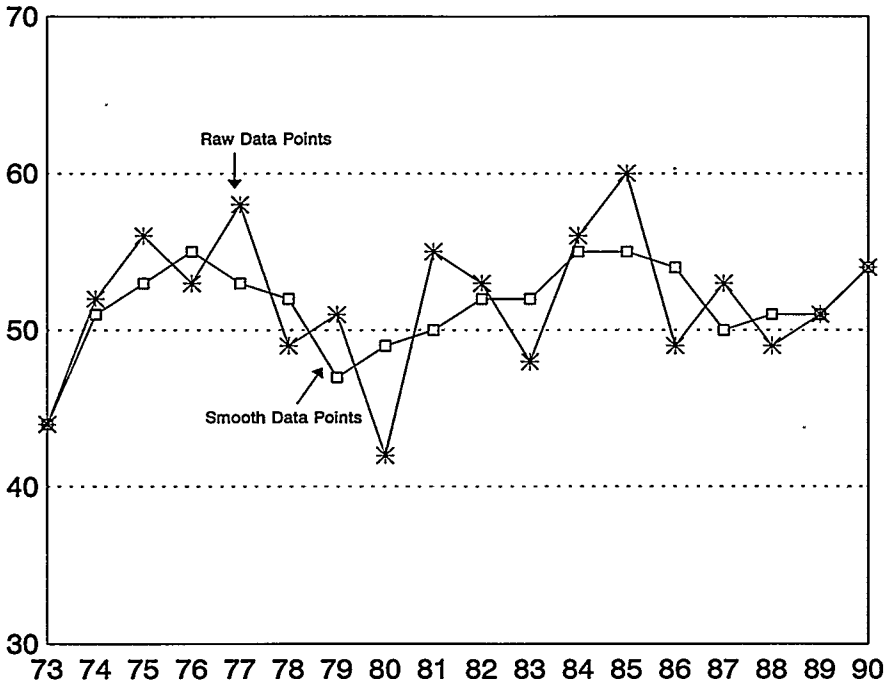


Note: Assaults include both Aggravated and Simple

there was a 28% increase in rape victims who reported to the police from 1980 to 1990. When these data are smoothed, however, the increase in victim reporting is only 10%. In spite of this small increase, it is greater than the increases for assault (4%) and robbery (a 12% decrease). On the basis of NCVS data, then, it appears that rape reform legislation may have slightly increased the willingness of rape victims to report their victimization to the police. UCR data corroborates this small increase of 10% in rape victim reporting.

Figure 3 displays UCR data on the rates of rape, robbery, and assaults reported to police departments for the years 1973-1990. The UCR data reveals a 13% increase in rape reporting from 1980 to 1990. Rates of reported robbery increased by only 6% over the same time period, while assault reports increased 46%. Thus, the NCVS and UCR data together paint a comparable picture concerning the impact of rape reform legislation on rape reporting. Both data sources show that rape victims were slightly more likely to report their victimizations after statutory reforms were in place.

Figure 2. Raw and Smoothed Proportion of NCVS Rape Victims Who Reported to Police, 1973-90.



Note: Raw Proportions were smoothed using a moving average span of 3

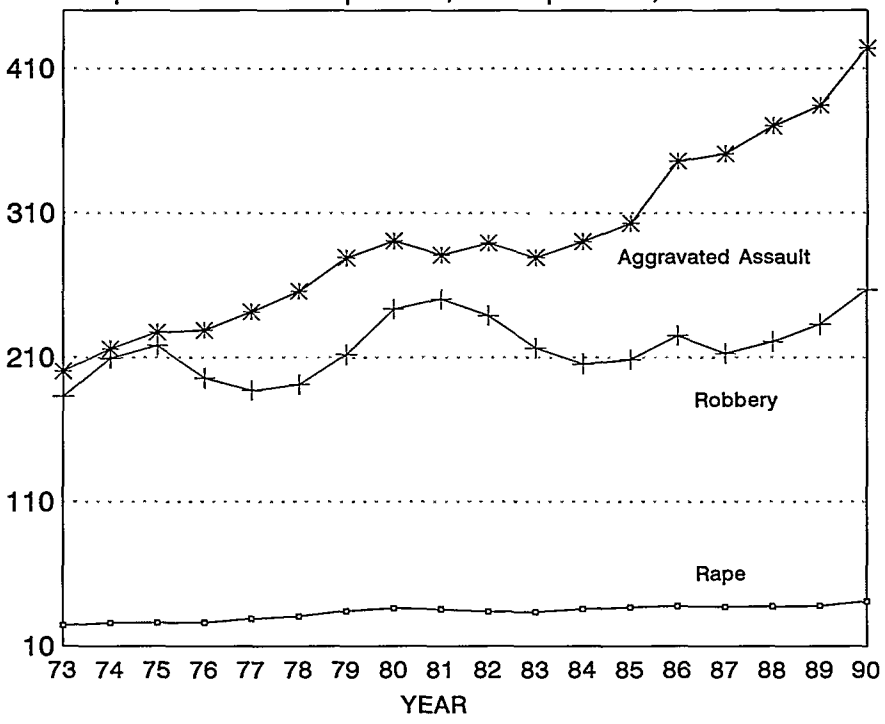
B. PROBABILITY OF GOING TO PRISON FOR CRIMES OF VIOLENCE

This section of the Article will examine the extent to which there has been an increase over time in an arrestee's probability of going to prison for rape, robbery or assault. If rape law reforms have achieved their intended goal, we should observe an increase over time in the probability that arrested rape offenders will serve time in prison relative to either robbery or assault offenders.

Recall that the probabilities used here were computed at the national level by dividing the number of individuals admitted to prison for rape, robbery and assault (NPS) by the number of individuals arrested for that same crime during a given year (UCR). The estimated probabilities of going to prison for rape, robbery and assault are presented in Figure 4.

It appears from Figure 4 that the probability of going to prison for rape has increased over the 1970 to 1989 period. In fact, with only a few exceptions, there has been a monotonically increasing probability of imprisonment for arrested rapists since 1981. It also appears that the greater probability of imprisonment for arrested

Figure 3. Rape, Robbery and Aggravated Assault Reports to the UCR per 100,000 Population, 1973-90.



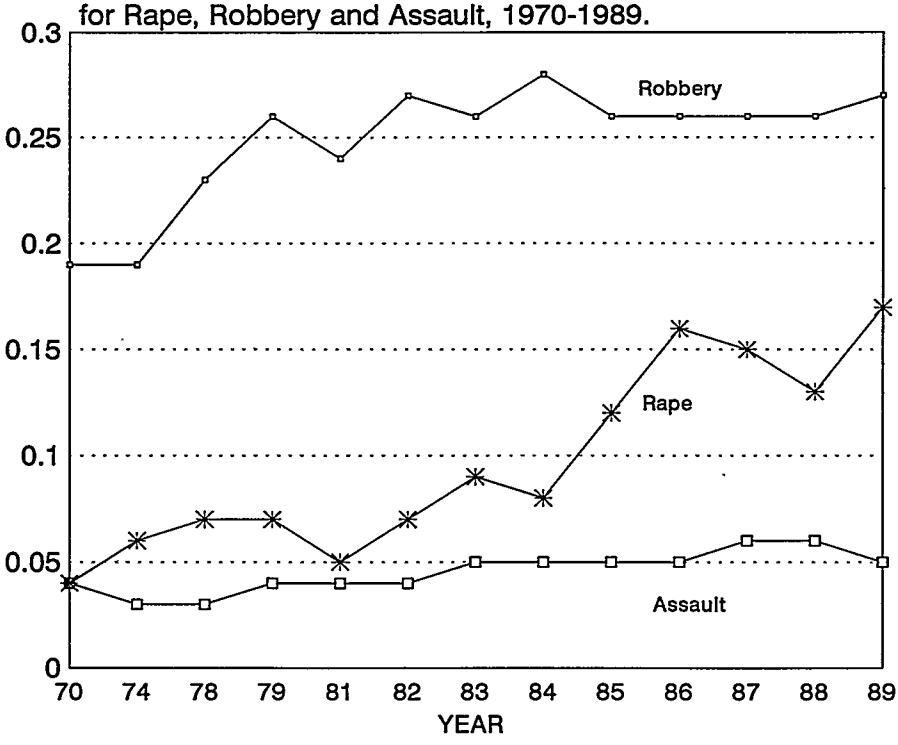
rapists over time is not due to the growing general punitiveness of the criminal justice system, since the likelihood of imprisonment for arrested rapists has increased at a faster rate than that for either robbery or assault. In fact, since 1981 the probability that an arrested rapist will go to prison has increased by over 200% compared with a 9% increase for robbery and a 25% increase for assault.

C. VICTIM/OFFENDER COMPOSITION OF CRIMINAL ACTIVITY VERSUS COMPOSITION OF PRISON POPULATION

Earlier we alluded to the symbolic impact of rape law reform. One dimension of this was the expectation that persons would begin to consider "non-traditional" or non-stereotypical forms of sexual assault as real rape.[38] One type of "non-traditional" sexual assault is an assault occurring between acquaintances. If the educational purpose of rape law reform has been successful, rapists who victimized acquaintances should be as likely to be imprisoned as those who victimized strangers (the stereotypical rape). The final issue to

[38] *See* ESTRICH, *supra* note 7, at 826.

Figure 4. Probability of Going to Prison if Arrested for Rape, Robbery and Assault, 1970-1989.



be examined here is the extent to which rape law reforms have increased the probability that those who rape acquaintances will be sent to prison relative to those who rape strangers.

Our inquiry focuses on the correspondence between crime victims' descriptions of their relationships with their respective attackers (NCVS) and imprisoned violent crime offenders' descriptions of their relationships with their respective victims (NCRP). We make a few assumptions. First, because acquaintance rapes have historically been treated by the legal system as less serious than those involving strangers, we first assume that rape events (victimization incidents) will involve a larger proportion of acquaintance relationships than sanction events (incarcerations). Thus, we would expect to see a higher proportion of acquaintance rapes in the victimization data than the incarceration data. Second, we assume that if rape reforms have had their intended effect, this difference in proportions involving acquaintances between victimization events and sanction events will decrease over time. As a result of rape law reform, then, a larger proportion of acquaintance rapists will be incarcerated in the latter years of the time period than in earlier years.

In testing this latter hypothesis, two additional issues should be kept in mind. First, while the victimization data includes annual reports of victimization over the years 1979-1986 and 1987-1990, the NCRP compiled incarceration data at only two points in time, 1986 and again in 1991. We will, therefore, consider the first time period (1979-1986) as the "pre-reform" period and the second time period (1987-1992) as the "post-reform" period. Second, because of these data limitations, we are conducting a very conservative test for the impact of rape law reform. Many states began to revise their rape statutes to some degree during what we are calling the pre-reform period. If the effect of these reforms was relatively instantaneous, our comparison over the two time periods may minimize the observed impact of rape reform legislation on this outcome variable.

Table 1 compares the proportion of rape, robbery and assault victimizations who were strangers, acquaintances or relatives/intimates as reported by crime victims to the same proportions for the crimes committed by incarcerated offenders.

TABLE 1. PERCENTAGE OF STRANGER, ACQUAINTANCE AND RELATIVE OFFENDERS BASED ON VICTIM'S REPORTS TO THE NCVS COMPARED WITH THE PERCENTAGE OF STRANGER, ACQUAINTANCE AND RELATIVE OFFENDERS IN PRISON ACCORDING TO NATIONAL PRISONER STATISTICS

Crime	NCVS Proportion*			NPS Proportion		
	Years: 1979-1986 - "Pre-Reform" Period			Year: 1986 - "Pre-Reform" Period		
	Stranger	Acquaintance	Relative	Stranger	Acquaintance	Relative
Rape	45%	41%	14%	56%	29%	15%
Robbery	70	18	12	85	14	1
Assault	38	46	16	45	36	19
	Years: 1987-1990 - "Post-Reform" Period			Year: 1991 - "Post-Reform" Period		
	Stranger	Acquaintance	Relative	Stranger	Acquaintance	Relative
Rape	36%	48%	16%	43%	40%	17%
Robbery	83	13	4	86	12	1
Assault	52	36	12	48	32	20

* Proportions for the NCVS are based on all single-offender victimizations.

Table 1 indicates that in the pre-reform period (1979-1986) the proportion of rape crimes that involved a victim who was acquainted with her offender was higher (41%) than the proportion found for those offenders who were incarcerated (29%). Given their propor-

tion in offense data, then, we find an underrepresentation of rapists who victimized acquaintances in the incarceration data. There is a corresponding overrepresentation of rapes involving stranger victims in the incarceration data (56%) relative to their proportion in the victimization data (45%). It is probable that juries during this period did not view acquaintance rapes to be as serious as rape by strangers, and were therefore less likely to send an acquaintance to prison. This is precisely the understanding of sexual assault that rape law reform attempted to modify. A similar and comparable "acquaintance discount" seems to be at work for assault. Acquaintance victims are more likely to be found in the victimization data (46%) than the incarceration data (36%).

The fact that rapists who victimize acquaintances are less likely to be incarcerated than those who victimize strangers may not be due to the fact that the former are perceived to be less serious than the latter. Rather, it may be that objectively *they are* less serious. Rapes committed against acquaintances may be less brutal and violent and less likely to involve another felony (such as kidnapping) than those committed against strangers. These factors may explain the underrepresentation of acquaintance rapists in the incarceration data. If, however, the underrepresentation of acquaintance rapists declines subsequent to rape reform legislation, we may speculate that such crimes are, more likely than in the past, being viewed by juries as "real rape"—in other words, viewed as comparable in seriousness to those rapes involving strangers.

The second panel of Table 1 shows the representation of acquaintance rapists in victimization and incarceration data during the post-reform period. In comparison to pre-reform years (1979-1986), the correspondence between victimization data and incarceration data with regard to acquaintance rapes is slightly closer in the post-reform period (12% as opposed to 8%). In the latter years, 48% of rape victims identified their offender as an acquaintance, as did 40% of those incarcerated. Another indication that rape law reform may have had an impact on how acquaintance rapes were being handled by the legal system can be seen in the increase in acquaintance rapists in prison from pre- to post-reform years. In 1986, 29% of those incarcerated for rape victimized an acquaintance. In 1991, this had grown to 40%. There was, then, an 11% increase in the number of acquaintance rapists who were in prison while the number of acquaintance rape victimizations increased by only 7% (41% versus 48%) over this same period. Correspondingly, the proportion of incarcerated offenders who victimized acquaintances in robberies and assaults declined by 2% and 4%

respectively, while the proportion victimized by acquaintances for these same two offenses declined by 5% (robbery) and 10% (assault). At the end of the reform period, then, there is some evidence to indicate that those who raped acquaintances were treated more comparably to those who victimized strangers. Although consistent, we must note that the observed changes are not very substantial.

There is yet another way to examine whether acquaintance rapists are being incarcerated with the same consistency as stranger rapists. Using a demographer's technique which Blumstein introduced to criminological research in 1982 and which Langan reinforced in 1985,[39] we explored the extent to which the criminal justice system differentially handles cases of stranger and acquaintance rape by calculating the proportion of acquaintance rapists expected to be in prison based on the probability of a stranger rapist being in prison. Table 2 describes these expected proportions and the supporting mathematical calculations.

For both pre- and post-reform periods, the observed proportion of incarcerated offenders who had raped an acquaintance was significantly lower (.01 level, two-tailed) than the proportion expected. In what we have termed the pre-reform period (1979-1986), the expected proportion of imprisoned acquaintance rapists was 49%, but the proportion of those incarcerated who actually did victimize an acquaintance was only 29%. This difference of 20% between expected and observed proportions is much greater for rape than for both robbery (7%) and assault (14%).

More importantly, however, is whether the difference between the expected and observed proportion of acquaintance offenders in prison narrowed at the end of the reform period. The bottom half of Table 2 demonstrates that the discrepancy for robbery and assault offenses has improved and, in fact, has almost disappeared. In other words, for these two offenses, the observed proportion of acquaintance offenders in prison nearly matches the expected proportion. In contrast, there is still a large discrepancy between expected and observed proportions for the offenses of rape. Of those incarcerated for rape in 1991, 58% should have involved acquaintance rapes, but only 40% of them actually did. This 18% difference is only slightly lower than the 20% difference observed during the pre-reform period. In spite of legal reforms, then, a strong "acquaintance discount" continues to exist for those who rape.

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[39] Alfred Blumstein, *On the Racial Disproportionality of United States Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666 (1985).

TABLE 2. EXPECTED VERSUS OBSERVED PROPORTION OF ACQUAINTANCE OFFENDERS IN THE NATION'S STATE PRISONS BASED ON THE PROBABILITY OF GOING TO PRISON IF THE OFFENDER IS A STRANGER

	Years: 1979-1986 - "Pre-Reform" Period					
	(a)	(b)	(c=b/a)	(d)	(e=c × d)	(f)
Type of Crime	% of Stranger Offender	% of Stranger Offenders in Prison	Probability of a Stranger Going to Prison	% of Acquaint. Offenders	Expected % of Acquaint. Offenders in Prison	Observed % of Acquaint. Offenders in Prison
Rape	45%	56%	1.2	41%	49%	29%
Robbery	70	85	1.2	18	21	14
Assault	38	45	1.1	46	50	36
	Years: 1987-1991 - "Post-Reform" Period					
	(a)	(b)	(c=b/a)	(d)	(e=c × d)	(f)
Type of Crime	% of Stranger Offender	% of Stranger Offenders in Prison	Probability of a Stranger Going to Prison	% of Acquaint. Offenders	Expected % of Acquaint. Offenders in Prison	Observed % of Acquaint. Offenders in Prison
Rape	36%	43%	1.2	48%	58%	40%
Robbery	83	86	1.0	13	13	12
Assault	52	48	.92	36	33	32

VI. DISCUSSION

Proponents of rape law reform intended that revisions of state rape statutes would produce a number of specific outcomes.[40] Our empirical examination of the extent to which these expected outcomes have been achieved reveals mixed results. The most obvious impression from these data is that statutory rape law reform has not had a very substantial effect on either victim behavior or actual practices in the criminal justice system. We found no large increase over time in the proportion of victims who reported being raped, and a very small change in the likelihood that individuals who raped an acquaintance would be imprisoned. In this regard, our generally null findings are consistent with other research concerning the impact of rape law reform.[41]

We would like to emphasize, however, that we observed some

40 *See supra* notes 2-7 and accompanying text.

41 *See supra* notes 9-13 and accompanying text.

partial success. Although not dramatic, both victim-based (NCVS) and law enforcement (UCR) data suggest that from the 1970s to 1990 there was a slight (approximately 10%) increase in the proportion of women who reported being the victim of a rape. One symbolic effect that rape law reform may have had, then, is a reduction in rape victims' perceptions that the legal process would stigmatize them, which in turn made them more likely to report their victimization. We also found that, subsequent to rape law reforms, rape offenders were more likely to be sent to prison. This increased probability of incarceration in recent years was not due to the general punitiveness of the criminal justice system, because we did not observe comparable increases for robbery or assault. Finally, we also found a small increase in the likelihood that the legal system would sanction acquaintance rapes and stranger rapes similarly. While there continues to be a large "acquaintance discount," treatment of rapes committed against an acquaintance in the post-reform period more closely approximate the treatment of stranger-perpetrated cases of rape.

There is, then, a silver lining to the general clouds revealed by our empirical analyses. In spite of this partial success, however, proponents of rape law reform must be disappointed with the results of our study and those of others before us. Although attitudes about rape and rape victimization may have become more enlightened over the past two decades, there is little evidence to suggest that these attitudes have been translated into significant performance changes in the criminal justice system. Our generally null findings, however, may in part be due to methodological imperfections. For example, our examination of national data over a long period of time may somewhat confound "pre-reform" and "post-reform" periods. In addition, this national analysis may also mask any impact reforms may have had at state-specific levels. The consistency of our findings with previous research, however, would suggest that although statutory revisions of rape laws have had some effect, significant progress still awaits us.