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Women and the Law: Rape - Legal Remedies

Jane E. Swanson

tion, the power remains unexercised. After ratification, there is no further constitutional power for the state to exercise. Also, the stategy used by ERA proponents in the various states was predicated on the necessity to pass the amendment only once. J. William Heckman, Counsel, Subcommittee on Constitutional Amendments, Senate Committee on the Judiciary, in a letter to State Senator Shirley Marsh, Nebraska State Senate, Feb. 20, 1973 said:

"Congress...has expressed itself quite definitely on the question. It is my legal opinion as Counsel of the Subcommittee on Constitutional Amendments of the United States Senate that once a state has exercised its only power under Article V of the United States Constitution and ratified an Amendment thereto, it has exhausted such power, and that any attempt subsequently to rescind such ratification is null and void."

Considerably less emphasis was placed upon the ERA in this conference than in a previous regional conference which I attended two years ago and I believe this reflects the confidence that the ERA will be ratified and women will achieve full equality at last. Anyone wishing to participate in the national campaign may contact ERAmerica, Suite 605, 1525 M Street, N.W., Washington, D.C., 20036.

1. Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.
2. Nebraska, Tennessee.
3. Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington and Wyoming.
4. Material in this section is taken from a "Memorandum on Efficacy of a State's Attempt to Withdraw Ratification of ERA" prepared by Jane Booth, third year student at Columbia Law School under the supervision of Professor Ruth Bader Ginsburg, General Counsel ACLU, and distributed at the conference.

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Rape — Legal Remedies

by Jane E. Swanson

The rape workshop was chaired by Virginia Nordby and offered a sharp contrast with that of the 1974 conference, at which she also presided. Dr. Nordby was an architect of the rape-reform legislation in the state of Michigan and served on the legislative committee that saw it through lengthy and turbulent committee sessions, floor fights, and eventual passage amazingly intact. The bill was maintained in its original form as, not rape reform, but a sexual assault statute repealing all other sexually-oriented laws of the state. It is a sex-neutral statute and does not mention "rape" nor describe it in its traditional male-against-female definition. This is perhaps the most important aspect of reform legislation: stripping the offense of its "normal" sexual aggression connotation that tends to get male court officers and jury members hung up in their own fantasies or guilty feelings, and placing the offense where it belongs — in the same position with other crimes of violence. It also offers the proper forum to nonfemale victims of sex-oriented assault.

The new statute's sex-neutrality also allows prosecution of females for sexually defined crimes, particularly appropriate for crimes against children, as it defines penetration in the victim's terms, rather than in the perpetrator's; it addresses "objects" and "orifices," rather than "penis" and "vagina," thereby allowing proper prosecution of a host of offenses often far more brutal than traditionally defined rape.

Much of this previously apparent inadequacy in the law stems from the fact that traditional rape was viewed by the male establishment as a crime against their property rather than being based on concern for the victim. The woman was more or less the conduit for a man-against-man crime, with the question of paternity of resulting offspring being the ultimate affront to the concerned male. Therefore, common law and early statutes are written in terms of penetration of vagina by penis and, in some cases, on ejaculation, although it is obvious to most women that in the face of pain, mutilation, or death, either of those two factors are of the *least* importance to use as victims — particularly at the time of attack.

The specific objectives of the new legislation in Michigan were as follows:

- to shift the focus from victim to the defendant
- to establish rape as violence, not sex
- to extend the scope of protection of the law to males (part of requirement for reform under E.R.A.)
- to consolidate all sex-offense laws under a single sexual assault statute, to include repeal of existing laws on the subject of sexual violence (It did not affect several other antiquated statutes, e.g., abandonment after promise of marriage, seduction, etc., only addressing

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those classifiable as assualt)

- to "normalize" the crime of rape, to place it in its proper context of other crimes before the court.

That last item, along with the first, includes abolishing the "victim as defendant" atmosphere surrounding the crime, removing the victim's actions or reactions from the elements of the crime, and bringing the rules of evidence in line robbed at gunpoint or under threat of bodily harm, you would not be called upon to prove that in fact you did not give your money to the robber voluntarily, nor that you had resisted him (as some states put it, with your "last ounce of strength"). As a matter of fact the public is warned against just such resistance, to protect their lives, not their wallets. Nor would you be called upon to justify your being on that dark street in the first place; it may be ill advised, but it does not make you a *legal* target.

Along the same lines, the requirement for a corroborating witness was specifically precluded, although that was one absurdity lacking in the Michigan law anyway. Most rapists do not jump people in front of convenient witnesses, but some states require such eye-witness corroboration just the same. The requirement for outcry during the crime itself (even if the victim had a knife at her throat!) and for prompt reporting (within twenty-four hours in some jurisdictions) has also been absolished in the Michigan statute. This finally takes into account what any female could have told you along — namely, that the male-held belief that immediate screaming to the heavens and crying to one's mother, father, or husband, and reporting to the authorities is the "normal" reaction of all raped females is a myth. Based on the conditioning that most females received while growing up, a far more authentic reaction is for the victim (particularly if very young, or timid, or raised to believe that bad things don't happen to nice girls and if something bad happened to her...) to keep it a dirty secret until her battered condition or emotional trauma is noticed and questioned. Just plain old fear — of the rapist himself, or what will happen to her if she tells, or guilt/fear involved with telling parents or husband, or a felt need to protect those close to her from the attendant publicity and pain or even their own retaliatory reactions can all be sufficient to delay a victim's report. Cases of children or young teenagers raped, forcibly, not just "statutorily," by family members or other close to them or in a position of authority or guardianship may never be reported at all, unless the truth is unearthed by a therapist or a social worker. This may represent a recurring abuse over the course of years. Prompt report by the victim as an element of the *crime?* Absurd. But it still exists. But no longer in Michigan.

The Michigan statute, not perfect from a women's viewpoint, but virtually a model of what it is possible to get through a conservative legislature, establishes degrees of sexual assault, neutrally defined. The degrees are basically as follows:

- First Degree — *penetration* combined with an *aggravating factor* (serious injury, "gang bang" circumstances, family member under sixteen, etc.)
- Second Degree — above aggravating factor(s) without penetration
- Third Degree — penetration without aggravating factor.

Penalties range from third degree as a misdemeanor, to a maximum of life imprisonment.

"Penetration" is defined as by "any object" including but not limited to genital or other part of perpetrator's anatomy, into "any orifice" of the victim's anatomy, *by force or with threat of force.* "Force or threat of force" or coersion is defined without requirement to prove or even assert resistance on the part of the victim.

According to Dr. Nordby they had a difficult time restraining prosecutors during the committee discussions on the proposed legislation. She said that they, "had to resist efforts (on the part of state's attorneys) to open up all aspects of defendants' lives." Apparently sensing that the tide was turning in their direction, they tried for an extra bite out of the rights of defendants. However, the intent of the reformers was not lynchings, but simply a reasonable balance, and the effort was contained.

Some additional problems or comments by Nordby on the current status of the law in Michigan were that there is some controversy over the right of the legislature to change the rules of evidence in state courts; likewise the removal of virtually all judicial discretion in the handling of rape cases. The law still does not provide for medical compensation for victims. And in a rather amusing side-comment on the difficulty in drafting the perfect bill, Dr. Nordby confided that it was now technically felonious in the state of Michigan to take the temperature of a resisting infant.

In the beginning of these notes, reference was made to the "sharp contrast" between this workshop and the one in 1974. This contrast lies in the fact that the only matters addressed in this workshop were the aspects directly relating to the bill. Little background information such as furnished above was considered necessary for the current sophistication level of this group, and Nordby right in with the description of the legislation as passed. The background included above was gleaned from the 1974 meeting in which the problem and its severity were stressed, illustrated with horror stories that would not be believed by the public, nor by us were it not for the cities served up with each. Most of the cases were from Michigan and New York, the latter being the home range of Sybil Landau, Associate Professor of Law,

Vicki Eslinger

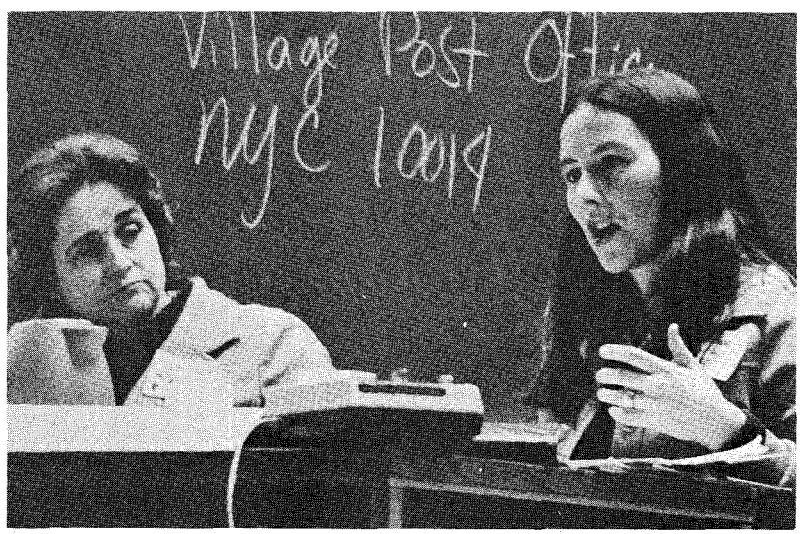
then at Hofstra, who co-chaired the 1974 workshop.

This year the entire emphasis was on results achieved, and even discounting the reformation in Michigan, the changes have been tremendous in just those two years. Leigh Bienen, working as a research attorney for the *Women's Rights Law Reporter* (on our library shelves, by the way) ran down the statistical gains in this area — all law changes being in the direction of aid to victims and mitigation of their pain subsequent to the attack. The astounding fact is that forty of the fifty states have amended their rape or sexual assault laws in 1974 and 1975. Most notable gains have been in the West and Midwest; almost none in the South. Eight have passed sexual assault laws, while thirty-one retained traditionally defined rape. Seventeen states now have sex-neutral laws. Some twenty-two states passed legislation limiting abuse of the victim as witness — nineteen of them in 1975! Bienen credits these dramatic results directly to the effect of extremely skillful, knowledgeable, and effective lobbying by women's organizations. As Nordby advised in '74, "When you're talking to liberals, the subject is women's rights; when you're talking to conservations, the subject is law and order. In truth, it is both, and you are foolish not to accept support from whatever legitimate direction it presents itself." Therein lies the reason for the success of this lobbying; the idea's time had come, and no one could field a reasonable argument *against* any of these points. It only remained to prove that the problems existed, and that was done.

Among some of the states whose reform legislation notably exceeded the customary half-moves were the following: Nevada, which instituted compensation for victims, including damages for emotional injury; Louisiana, which now includes both hetero- and homosexual rape/assault; Ohio, which now guarantees victims legal representation in all in camera conferences, hearings, etc.; Nebraska, stating specific legislative intent to protect the dignity of the victim; and South Dakota, abolishing the spousal exception which absolutely legally precludes a man's rape of his wife in almost all states. South Dakota is the only one to have such an exception, although the new Michigan statute allows an exception in the case of legal separation when a divorce action has been filed prior to the attack. Pennsylvania has a new bill in process modeled directly upon the Michigan legislation.

An interesting aspect of failure, however, lay in the area of statutory rape, according to Nordby. Now, it might be supposed that at first glance this was a form of protective legislation, and that women's groups should favor such measures to prevent our young girls from being importuned by dirty old men. Nordby's position, however, is that this is rather a form of control exercised over youth by the very dominant paternal establishment. The cases brought are generally the father's revenge being taken against his daughter's boyfriend, directly, and against his daughter, indirectly, for having slipped beyond his control. If this interpretation is given credence, Freudians could have a field-day with the implications. Dr. Nordby claims, from probably hundreds of hours of discussion and debate over the past few years, that this is the case. She has encountered an emotionally-charged atmosphere and an absolute refusal to consider or even to discuss rationally the possibility of lowering the age of consent. According to her assessment, "The question was summarily tossed out of the judiciary committee...(because they)...confused their legislative and parental functions. They refused to lower the age, as it would seem to condone youthful sexual activity." However, she added, dryly, that the law as now written would make *both* parties subject to criminal sanctions, as she expects to see a sharp drop in the number of fathers pressing charges.

The tone of this workshop, then, was one of hope and encouragement, of dragons already slain and others sinking to their knees. One incredulous legal aid worker volunteered a present-day hor-



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ror story from upstate New York, where prosecutorial discretion resulted in virtually no prosecutions for rape, with cases quietly nol prossed without the victim even being informed of the disposition. She was "kept after school" for encouragement and advice on strategy from Vicki Eslinger and Rhonda Copeland, attorneys from North Carolina and Brooklyn, New York, respectively. They were the final speakers on this content-packed panel, and shared practical experience and strategy in handling rape cases as friends of the victim, since they can have no official capacity (except in Ohio, which now permits — guarantees — counsel to the victim). They claim that in their jurisdictions if they merely move in and assert themselves as official "friend of the victim" that the prosecutors generally accept them as such and permit them to make inputs to his case. Since they have usually done their homework more thoroughly than the state's attorney has been able to, due to the caseload, they say that most are receptive and grateful for the help that is volunteered. In addition, all panel members agreed that a long-term benefit can be realized simply by seating a group of women in the courtroom as observers *at every rape trial,* formally identified to the court as "friends of the victim." This is said to have a remarkable tendency, over the long haul, to bring balance into these trials. The Bench in the particular court becomes aware that it is being observed by interested and legally knowledgeable women, and the effect seems to be similar to that pressure exerted on a teacher by having an "observer" in the classroom. It sounds like an inexpensive and certainly educational project for law students to undertake.

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Chris Michael

Title IX

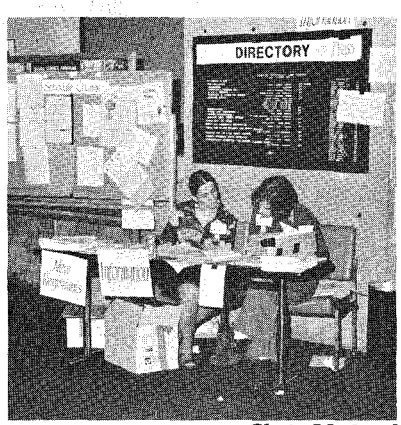
by Jana Guy

In keeping with its general purpose of analyzing the various means by which discrimination on the basis of sex can be alleviated, and remedied, the National Conference on Women and the Law devoted a special seminar to Title IX of the Education Amendments of 1972, codified at 20 U.S.C. SS 1681 *et seq.* (1974), which prohibits sex discrimination in federally-assisted education programs. A panel discussion focusing on the major problems involved in implementing the Title IX requirements was presented by three women who are currently involved in the implementation process: Ms. Colquitt Meacham, Branch Chief for Higher Education Office, General Counsel, Civil Rights Division of the United States Department of Health, Education and Welfare; Dr Joyce A. Clampitt, Director of Affirmative Action Programs for the North Carolina Community College System; and Ms. Jean King, an Ann Arbor, Mich., attorney involved in Title IX litigation.

Ms. Meacham began the discussion with an overview of the Title IX requirements and exceptions, emphasizing the HEW regulations for implementation which became effective on July 21, 1975.

Ms. Meacham pointed out that Title IX is the first, and to date, the only federal legislation dealing with student admissions and services. Title IX also covers employment, and to this extent, it overlaps with Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Men as well as women are covered by Title IX which provides in Section 1681 that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under an education program or activity receiving Federal financial assistance."

There are certain exceptions to Title IX. With regard to admissions, Section 1681 applies only to "institutions of vocational education, professional education, and to public institutions of undergraduate higher education...." Thus,



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