

What is the law on Rape?

For decades the crime of rape has been known as the easiest criminal allegation to make by the alleged victim and the hardest to disprove by the defendant. In the 1960's the victims of this brutal crime were able to take advantage of significant changes in the law that made it easier to obtain convictions and justice. Unfortunately, these changes also made it easier for those who were falsely accused of rape to be convicted as well.

Adding to the defendant's difficulty is the controversial rape trauma syndrome. A psychological theory that has been rejected by behavioral science. Unfortunately this idea is still being used by prosecutors and junk science witnesses as so called evidence in cases against the defendant accused of the crime of rape. A series of biased laws are making it easier to obtain convictions.

First, jury instructions are the law that is read to the jury. Courts have long known that rape is an easy allegation to make, but one that is hard to disprove. In fact, the biggest threat of being falsely accused of a crime was that of being accused of rape until child molestation became a significant national issue flooding the legal system with cases. It is now the most likely false allegation. Courts perceive the potential threat of false allegations of rape and fashion jury instructions to inform members of the jury that such allegations were easy to be made but difficult to disprove. Today in most states this jury instruction is no longer allowed to be given as a result of changes in the law. Changes that also mandate giving a very different set of jury instructions.

In many states the judge now informs the jury that (1) an allegation of rape does not require any evidence of corroboration, (2) there is no requirement for medical evidence, (3) there is no requirement for DNA evidence, and (4) there is no requirement for a second witness. In short, the only requirement for a conviction is the bare allegation made by a complainant. Even the manner in which the jury is selected is tainted with this attitude that evidence doesn't matter. In many states prosecutors can demand that during jury selection each prospective juror must agree that he would not require corroboration of a crime. If the juror disagrees with this demand he or she can be excused.

We then have the rape shield laws. Consensual sex is still legal. Being able to prove consent however has become more difficult for the defendant. For example, if a man meets a woman at a bar and has sex with her that night and later she claims she was raped, the man used to be able to introduce evidence to help establish a pattern of consensual sexual behavior on the woman's part. That might be the testimony by witnesses that a woman routinely came to the bar every night, engaged a man's companionship and went home and had sexual relations with him. Such evidence is relevant to show the sex on the night in question is consensual. But now is not admissible. Victim's rights advocates were rightly concerned with the legal strategies that put the victim's personal life

on trial. Unfortunately, highly relevant evidence that could have protected an innocent defendant is no longer allowed because politics has obscured justice and powerful lobbies have helped to pass what is now called the “rape shield laws”. Under these rape shield laws a defendant in today’s courtroom is forbidden from introducing the prior sexual conduct of the complainant on the issue of consent. Curiously no one has successfully shown that the evidence of prior sexual conduct is not relevant in determining consent. While the rape shield laws were intended to encourage more women to come forward and testify, it simply has made it easier to falsely accuse and convict an innocent individual.

Many states also allow the prosecution to introduce allegations made by other women allegedly assaulted on previous occasions by the defendant to prove that a rape occurred in the current charged offense. In these circumstances no corroborating evidence is required to introduce these alleged crimes. There does not even have to be a conviction. Nor does there even have to exist a criminal charge or even a police report. The uncorroborated word of a single individual is sufficient. As you see many state legislators are creating new victims by keeping out the sexual history of the complainant on the issue of consent but allowing into evidence the sexual history of the defendant. This is sheer politics and not based upon relevancy or fair play. This kind of legislation is systematically making it easier to obtain convictions and while those guilty of rape should be convicted, those who are falsely accused should be allowed to defend themselves adequately in court.

Next, let’s look at rape trauma syndrome. The members of the jury are the trier of fact. They hear the account of the complainant and if the defendant elects to testify they hear the testimony of the defendant. This is the classic “she said, he said” situation in which jury members must decide who is telling the truth. In an attempt to provide greater credibility of the complainant and thereby tip the scales of justice in favor of conviction Ann Burgess and Lynn Holstrom wrote a psychological description of what they term the “rape trauma syndrome”. This was written in 1974. A true syndrome is a constellation of symptoms that when presented by an individual leads to a diagnosis of an illness.

First of all the rape trauma syndrome is not really a syndrome because no diagnosis can be made from the syndrome. Secondly, there was no scientifically controlled study done by behavioral science professionals that support the theory of the rape trauma syndrome. The fact is that his highly questionable theory is not recognized in DSM IV . The DSM IV is a diagnostic and statistical manual of the American Psychiatric Association and it is the current group of recognized diagnosis by behavioral science professionals. It includes all the current recognized diagnosis and recognized syndromes. Rape trauma syndrome is not in this DSM IV because it was rejected by the behavioral science community, psychiatrists, psychologists, clinical social workers and others.

One reason rape trauma syndrome is unscientific is that Burgess and Holstrom

assumed that any allegation of rape was true and on that foundation devised an explanation of whatever the alleged victim might say or do. It seems their rape trauma explanation does not constitute a description of symptoms of an illness, but rather a way of manipulating evidence in favor of a complainant. For example, if a woman recants her story and admits that she was not raped and that she lied the prosecution can put on a supposed rape trauma expert on the stand to testify that this behavior was consistent with being raped. The implication is that the original rape story should be believed and the admission of lying should not. This demonstrates why we refer to the rape trauma syndrome as confirmatory biased based description. What is meant is that the syndrome demonstrates a built in bias toward confirming that a rape happened. In a process like this all symptoms lead to the conclusion that it happened consistent with testimony from prosecution experts usually illustrates this confirmatory bias.

Our office has never witnessed a so called rape trauma expert testify that the complainant's behavior is also consistent with false allegations of rape. This is true even though it is widely known and accepted by legitimate researchers in the behavioral sciences. Other descriptions found in the rape trauma syndrome explain that if a woman immediately reports such action is consistent with the typical reaction of a rape victim. Curiously this same so called syndrome explains that if a woman waits for years to report that is also consistent with a typical reaction of a rape victim. The rape trauma syndrome folks also explain that if a woman is flirtatious such behavior is consistent with the typical reaction of a rape victim. But if the woman is withdrawn that too is consistent with the typical reaction of a rape victim. Should the woman cry when testifying that behavior is consistent with the reaction of a rape victim, but if a woman doesn't cry that is also consistent with the typical reaction of a rape victim. The list of descriptions covers almost every conceivable behavior that a human being might have over the course of a lifetime.

As you see this makes any behavior evidence support the charge of an alleged rape victim. Burgess and Holstrom's assumption that all allegations are true is not only unscientific but it's dangerous. Such thinking is also contrary to the US Constitutional principle that a person is innocent until proven guilty beyond a reasonable doubt. Rape trauma syndrome is not science, but unfortunately the courts in many states have given it legitimacy by allowing the testimony of supposed experts to be heard and by allowing the prosecution to misuse the word syndrome. This pseudo-evidence makes it easier to mislead the jury in order to obtain convictions. Not just of those who are guilty, but of those that are falsely accused as well.

Let's talk for a moment about defenses. When an individual is falsely accused of rape the defenses fall into three basic categories. Number 1, defendant did not have sex with the complainant, this means that either the complainant was lying about having sex or the complainant has misidentified her assailant. 2, the defendant had sex with the complainant, but the sex was actually consensual

and 3, the defendant had sex with the complainant and the defendant had a good faith belief that the complainant consented, whether or not there was actual consent.

Because the crime of rape has become a political hot button issue, many state legislatures have passed laws which make it more difficult for anyone falsely accused of rape to introduce evidence on any of these three defenses. Being concerned with the rights of someone falsely accused of this terrible crime doesn't make politicians popular in the polls. That is why the fate of the falsely accused rests in the trial skills of the defense team to overcome this biased system.

What about sentencing? There is one thing worse than being falsely accused of rape and that's being falsely convicted of rape. As a convicted rapist, a person falsely convicted faces registration as a sex offender for the remainder of his life. In many states the sentencing laws have become much more restrictive and severe. For example in California the law used to state the defendant could be sentenced up to 8 years on one count of rape with two years for each subsequent count. That law was changed to punish the convicted individual with an 8 year sentence for each count and all counts to be served consecutively. In other words, two counts of rape can be punished with a 16 year prison term instead of an 8 year plus 2 year add on for a total of 10 years. More disturbing is the prosecutor's ability to turn a single alleged rape into numerous counts because different sexual acts allegedly occurred during one encounter which now can be filed as separate crimes. For example, the falsely convicted can be sentenced to 8 years for intercourse, 8 years for rape with a foreign object, in other words finger insertion, 8 years for sodomy, if the jury finds the defendant guilty. If the complainant alleges that the accused stopped the rape and then a few seconds later started over each new act becomes an additional count. Extreme sentences of 30 years or more have become common place as a result of these charges.

Finally, someone convicted of this crime was once given 50% credit, half off on his sentence for good behavior and doing a job in prison. Many states have now reduced credit for good behavior and work time behavior to only 15%. Think about that, that is the equivalent of increasing actual sentences by 70% just by changing the method by which good time work time is calculated.

Where does that leave us, because of the nature of the crime and the victim's who felt that they did not obtain justice, the rape complainant has an army of lobbyists pressuring different state legislatures to pass laws that favor the alleged victim at the expense of the defendant's rights to defend themselves. Those who are falsely accused rarely have representation when new laws are being proposed. Even if the falsely accused do have a few lay spokesmen attempting to educate their state legislature, the typical politician does not want to become involved with such an explosive issue. There are few people in office willing to

risk a political career for a few people who have been falsely accused of rape. The only way to overcome judicial and legal inequity is through a thorough professional investigation and with evidence presented by a highly skilled defense team. It is a matter of educating the jurors so that they can make informed decisions about what is and what is not true in an allegation of rape.