

Rape, Legal Definitions of

A recent United Nations report suggests that, on average, over 250,000 cases of rape or attempted rape are reported each year worldwide, while the U.S. Department of Justice estimates that nearly 200,000 incidents of rape or sexual assault occurred in 2005 in the United States alone. Because most rape victims are women, these data suggest that approximately one in six women in the United States become the victims of actual or attempted rape each year, excluding the countless rapes that go unreported. Although rape is a serious offense punishable by law, there exists no consensus regarding the precise definition of this crime. Legal definitions of rape vary from state to state and are subject to continual debate. Conflicting understandings of exactly what constitutes "rape" highlight the inevitable difficulties that arise in any attempt to legislate the sexual encounter. English common law defined rape as the carnal knowledge of a woman forcibly and against her will. In contemporary legal usage, rape generally refers to unwanted sexual intercourse that involves the use of force and the lack of **consent**. Yet there is widespread disagreement regarding the meanings of "penetration," "force," and "**consent**"—the primary elements of this legal definition.

Defining Rape

Disagreement also prevails with respect to the manner in which a rape victim is expected to behave or respond to the perpetrator. Women who dress a certain way or behave aggressively are often either blamed for or perceived to enjoy rape. In addition, a range of special conditions and circumstances necessarily modify the legal definition of rape. For example, sexual intercourse with a child under the age of 18 is considered statutory rape, as the child is legally regarded as unable to **consent**. Rape may also be found when a person has sex with someone deemed legally incapable of **consenting** due to mental illness, impairment, or intoxication. Other types of rape include acquaintance rape, spousal rape, prison rape, gang rape, incest, and rape during wartime. Despite the formal legal classification of rape as a criminal offense, many cases that seem to adhere to this legal definition are either not perceived as such or not prosecuted by their victims. Rape victims often fear that they will experience additional humiliation, exposure, and violation within the legal system. This leads to the phenomenon of underreporting, which thwarts official attempts to collect accurate data regarding the incidence of sexual assault. The growing use of date-rape drugs also impedes rape victims' ability to resist or recall unwanted sex. Collectively, these issues complicate the prosecution of rape charges within the U.S. legal system and compound the emotional, legal, and psychological implications of rape for survivors.

Etymologically, the word *rape* derives from the Latin verb *rapere*, to seize or take by force. The legal history of rape yields a complex and shifting patchwork of meanings rather than a linear progression of definitions. Under Roman law, rape was classified as a crime of assault. By late antiquity, rape was regarded instead as a crime against male property. Through this gradual transformation of meaning, rape came to be understood as an attack against the victim's husband or father and as a crime that devalued women through their presumed loss of virginity.

Since the 1970s, feminist scholars have sought to expose the masculinist biases of these historical as well as contemporary definitions of rape. Noteworthy are the efforts of Susan Brownmiller, Andrea Dworkin, Catherine MacKinnon, Sharon Marcus, and Susan Estrich to demystify rape as a crime of power and control rather than one motivated solely by sexual desire or passion. Through their scholarship and legal activism, these and other

scholars have consistently exposed the masculinist underpinnings of traditional notions of penetration, force, and **consent**. They have also critiqued the popular characterization of rape victims as “damaged goods” as well as the primacy of penetration to legal definitions of rape. The women's liberation movement of the 1970s also led to the establishment of the first rape crisis centers in the United States.

Rape Versus Sexual Assault

Although rape is closely related to sexual assault, state laws often distinguish between the two with respect to the details of penetration. While some jurisdictions explicitly define “rape” as an act that involves penile penetration of the vagina, other jurisdictions define all nonconsensual sex as rape. Similarly, some legal definitions of rape encompass oral sex, masturbation, and penetration with any foreign object, including, but not limited to, the penis. Other definitions of rape are gender specific. In Scotland, for example, male rape was not officially recognized as a form of “rape” until 2009. Similarly, Brazil narrowly defines rape as nonconsensual vaginal sex. As a result, nonconsensual male, oral, and anal sex are not recognized as “rape,” contrary to prevalent European and American definitions. These definitional distinctions have important implications for whether or not certain forms of rape, such as gay and lesbian rape, will “count” as rape and be recognized as such under the law. Penetration-based definitions of rape are especially consequential in specific national and cultural contexts. Until 2006, for example, Pakistan's Hudood Ordinance required four male witnesses to attest to a woman's penetration in order to establish the occurrence of rape.

Debates about the precise nature and degree of force involved in rape also contribute to ongoing ambiguities of definition. Yet perhaps the most controversial aspect of contemporary legal definitions of rape is the notion of **consent**. What exactly does it mean to “**consent**” to sexual intercourse, and what happens when initial **consent** is subsequently withdrawn? In an effort to resolve these questions following a surge of acquaintance rape on campus, Antioch College drafted a Sexual Offense Prevention Policy in 1993. The objective of Antioch's policy was to highlight the imperative to obtain and recognize **consent** in every step of the sexual encounter. Although this effort attracted nationwide ridicule, it nonetheless highlighted the importance of subjecting familiar concepts to ongoing efforts of critical inquiry.

Rape in War

Legal definitions of rape have proven no less controversial in the international sphere. Rape myths continue to inform understandings of rape worldwide, as in South Africa, Zambia, and Nigeria, where common belief holds that sexual intercourse with a virgin will cure a man of human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS). For centuries, rape has been used as an instrument of war. Japanese soldiers raped approximately 80,000 women during the Nanking Massacre. Rape was a common practice in Japanese “comfort stations” during World War II, where thousands of women, most of whom were Korean, were coerced into various forms of sexual servitude.

The International Criminal Tribunal for the former Yugoslavia similarly confirmed rape as a crime against humanity in 2001 and thereby challenged mainstream understandings of rape as an inevitable by-product of war. Hopefully, these significant efforts to redefine and bring new visibility to the crime of rape in the international sphere will gradually arrest ongoing campaigns of mass rape in places like Darfur and the Democratic Republic of Congo.

In the context of armed conflict including war, rape has been defined within the international community as a crime against humanity and an integral component of genocide if it is part of a widespread or systematic practice. Serbian soldiers raped at least 20,000 Bosnian Muslim women in mass rape camps during the Bosnian civil war in conjunction with a military campaign of ethnic cleansing. Rape was first recognized as a crime against humanity in 1992, when the International Criminal Tribunal for the former Yugoslavia issued arrest warrants on the basis of the systematic and widespread gang rape of Muslim women by Bosnian Serb soldiers. A

major breakthrough in international women's human rights law came in 1998 in response to atrocities in Rwanda, where the International Criminal Tribunal for Rwanda found that systematic rape had been used as a means of forced pregnancy and a tool of genocide during the protracted civil war. The International Criminal Tribunal for Rwanda found that the systematic rape of Tutsi women was a deliberate strategy within the Rwandan genocide. An estimated half million women were raped during the 1994 Rwandan genocide. A few years later, in 2001, the International Criminal Tribunal for the former Yugoslavia similarly defined rape as a crime against humanity.

In the Democratic Republic of Congo, where the prevalence of rape is described as the worst in the world, analysts also define rape as a weapon of war. Despite increased public awareness of the widespread use of rape in the Congo, rape has continued at a staggering rate. In 2006, Congo's parliament passed a law on sexual violence that broadened the legal definition of rape and increased the penalties against it. Yet enforcement of the new law has been weak and has led to the convictions of no senior military officers or commanders.

Today, mass rape—often instigated by military officers—is endemic in the Darfur region of Sudan. Yet rape victims lack legal recourse, as the government is more likely to prosecute those who report and document the crime of rape than those who commit it. Sudanese laws, regulations, and customs offer inadequate measures with which to address rape in the region. In particular, Sudan's legal definitions of rape often expose victims to further abuse. Rape is defined as the offense of *zina*, or intercourse between a man and a woman who are not married to one another.

Blurred Boundaries

This legal definition effectively blurs the boundaries between sex and rape. If a woman voices a rape accusation in the Sudan, she herself may be charged with *zina* because she has confessed to an act of extramarital sex. Unmarried women convicted of *zina* in the Sudan receive 100 lashes; married women are sentenced to death by stoning. In 2001, two women were sentenced to death by stoning for committing adultery. If a woman chooses to prosecute for rape, many judges require the sexual act to have been witnessed by four competent men—evidence that is extremely difficult to obtain. It is virtually impossible to prosecute rape in the Sudan because Sudan grants immunity to individuals with government affiliations, including military officers. Within this climate, few women come forward to report rape or to access vital medical, legal, and psychosocial services.

The precise acts and organs associated with rape vary across jurisdictions as well as national and cultural borders. Some jurisdictions define “rape” exclusively as penile penetration of the vagina. For example, rape in Brazil is defined as nonconsensual vaginal sex. As a result, male rape, anal rape, and oral rape are defined not as rape, but as a violation of modesty (*atentado violento ao pudor*).

Although rape is defined primarily in relation to lack of **consent** within adversarial legal systems, the International Criminal Tribunal for Rwanda, in its landmark 1998 ruling, used a definition of rape that did not explicitly use the word **consent**. Instead, it described rape as “a physical invasion of a sexual nature committed on a person *under circumstances which are coercive*.”

Rape in Marriage

Historically, marriage has been construed as a form of implicit **consent** to sexual intercourse. Today, however, nations are increasingly contesting this understanding of marriage as a defense to rape. Most nation-states now formally recognize rape in the context of marriage.

Pakistani law defines rape as sexual intercourse in the absence of a valid marriage and without the **consent** of the victim. Pakistani law does not recognize marital rape as a criminal offense. Yet sexual intercourse with a girl under the age of 16 is always construed as rape, whether or not she is a **consenting** partner. Female victims of rape are ostracized in Pakistani society, where rape is traditionally perceived as a source of dishonor to the

victim's family.

In France, rape is defined as any act of sexual penetration committed against another person using violence, restraint, threats, or surprise. Although the law mandates up to 20 years in prison for rape, the average punishment for rapists is six years in prison. The General Civil Penal Code of Norway (2000) expansively defines rape to include a broader spectrum of unwanted sex, including sexual activity by means of violence or threat, or sexual activity with a person who is unconscious or otherwise incapable of resisting. Following conviction, rapists in Norway may be imprisoned for a maximum of 10 years. Longer sentences apply in the case of prior convictions, extreme brutality, gang rape, and serious injury or death of the victim.

Whereas countries like the United States with adversarial legal systems define rape in relation to the absence of **consent**, investigative systems define rape in terms of force. Yet both of these legal definitions have evolved significantly over the past decade or so. States have increasingly defined rape as a genderneutral offense and have broadened their legal definitions to include male rape. Norway recently convicted a woman of rape (2005) after she performed oral sex on a man who was asleep on a sofa in her apartment. Norwegian government officials explained that amendments to the legal definition of rape in 2000 permitted more expansive interpretations of "unwanted sexual contact." Other states have similarly expanded their legal definitions of rape by opening them up to include multiple forms of penetration.

—Karina Eileraas

Further Readings

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