THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY

STANLEY N. KATZ

EDITOR IN CHIEF

VOLUME 5

Prussian Allgemeines Landrecht–Torture

OXFORD

UNIVERSITY PRESS

2009

sex with a girl under 12 *sui* (about 10.5 years) was automatically punished as rape, even if consensual. Status distinctions continued to be important in the definition of illicit sex during the Ming Dynasty. Punishment for slaves who raped commoners was one degree more than that for status equals, while commoners who raped slaves were punished one degree less. A slave who raped his master's wife, daughter, or relative within the five degrees of mourning was decapitated. As in the Tang code, there was no mention of a master raping a slave, since this was not considered to be a criminal act, although some Ming jurists expressed contempt for such behavior.

In the sixteenth century, a commentary appended to the Ming code codified for the first time specific criteria for providing evidence that illicit sex was coerced. The commentary argued that even if an encounter began with coercion, if the woman consented to the act in the end, the act was not to be prosecuted as rape. Hence, to prosecute a rape, there had to be evidence, in the form of witnesses, physical injury, or torn clothing, of violent coercion and of the woman struggling to the end. Instituting a new definition of rape as the violation of chastity, the commentary noted that a woman who had already committed an offense of illicit sex could not, in effect, be raped. Accordingly, the commentary stipulated that if an offender saw a woman engaging in illicit sex with another man and then subsequently raped her himself, he was not to be sentenced for rape, but rather that he and the woman were to be sentenced in accordance with the substatute on luring a woman away from home for sex.

The Qing code (1644–1911) carried over the basic Ming laws on rape and incorporated the commentary on evidence of coercion into the illicit-sex statute as interlinear commentary. The most important change in Qing rape law was further development of the definition of rape as a violation not of status distinction, but of chastity, a crime that could be perpetrated upon any chaste woman regardless of status. During the late seventeenth and early eighteenth centuries, Qing lawmakers steadily diminished masters' privileged sexual access to their female servants, first criminalizing sexual relations with married servants, then requiring masters to arrange marriages for servants, and finally prosecuting a master's rape of a servant under the general rape substatute. By the mid-1740s, the only areas of rape law shaped by status distinctions other than familial relationships were the sections on an official raping a woman in his jurisdiction and a slave raping his master's wife or close relative.

The Qing code also added numerous new substatutes mandating more serious punishment for rape under certain conditions. During the Yongzheng reign (1723–1735) substatutes were added on rootless rascals who mandated punishment by immediate beheading for gang rape or rape of a girl under 10 *sui*. New substatutes under the illicit-sex statute mandated beheading after the assizes for rape of a girl between 10 and 12 *sui* and for rape in which the victim was injured with an edged weapon. These substatutes reflect a broader concern among lawmakers with violence and disorderly behavior that undermined social and family order.

[*See also* Incest in Chinese Law; Sexual Intercourse, Illicit in Chinese Law; *and* Sexual Offenses in Chinese Law.]

BIBLIOGRAPHY

Hulsewé, A. F. P. *Remnants of Ch'in Law: An Annotated Translation of the Ch'in Legal and Administrative Rules of the 3rd Century* B.C.E. *Discovered in Yün-meng Prefecture, Hu-pei Province, in 1975*. Leiden, Netherlands: E. J. Brill, 1985.

Jiang, Yonglin, trans. *The Great Ming Code*. Seattle: University of Washington Press, 2005.

Johnson, Wallace, trans. *The T'ang Code*. Princeton, N.J.: Princeton University Press, 1979.

Jones, William C., trans. *The Great Qing Code*. Oxford: Oxford University Press, 1994.

MacCormack, Geoffrey. *Traditional Chinese Penal Law*. Edinburgh: Edinburgh University Press, 1990.

Meijer, M. J. *Murder and Adultery in Late Imperial China*. Leiden, Netherlands: E. J. Brill, 1991.

Sommer, Matthew H. *Sex, Law, and Society in Late Imperial China*. Stanford, Calif.: Stanford University Press, 2000.

Theiss, Janet M. *Disgraceful Matters: The Politics of Chastity in Eighteenth-Century China*. Berkeley: University of California Press, 2004.

Janet Theiss

English Common Law

The law of rape has protected two distinct interests: husbands', fathers', and other males' interest in controlling women's sexuality; and women's interest in bodily autonomy. At times, the law has favored the former interest; at other times, the latter. Nevertheless, in all periods, the law's effectiveness has been undermined by infrequent prosecution and low conviction rates.

Early Middle Ages. It is very difficult to ascertain the law of rape before the end of the twelfth century. The legislation of the Anglo-Saxon kings is our near-exclusive source. Unfortunately, these laws are difficult to interpret, and their relation to practice is often uncertain. The earliest codes seem to proscribe only "abduction" (seizure, marriage, and/or sex contrary to the will of a father or guardian), not rape as that crime is now understood. Whether the woman consented was irrelevant. The penalty was monetary compensation to the father or guardian. Later legislation is sometimes interpreted similarly as referring to "abduction," although that view is debatable. Consider, for example, chapter 11 of Alfred's late-ninth-century code:

> If anyone seizes a maiden of the ceorl class by the breast, he is to pay her 5 shillings' compensation. If he throws her down and does not lie with her, he is to pay 10 shillings' compensation. If he lies with her, he is to pay 60 shillings' compensation.

This provision probably pertains to sexual assault and rape in the more modern sense. The fact that compensation seems to be paid to the woman implies that lack of consent was a prerequisite, as it would surely be strange for her to receive compensation if she consented to the offense.

Unfortunately, it is difficult to ascertain how, or indeed whether, this or similar legislation was enforced. The Domesday Book gives us a few clues as to practice in 1086. Several entries mention the fine for rape or abduction and who received it. This implies that monetary penalties were, in fact, paid, because otherwise it would not be worth recording the fines or negotiating who received them. In addition, the entry for Worcester states that the penalty was corporal punishment, which suggests that, at least in some parts of the country, the movement away from monetary penalties started around the time of the Norman Conquest or perhaps even earlier.

Later Middle Ages. In the late twelfth and thirteenth centuries, a very different picture can be documented by treatises, such as *Glanvill* and *Bracton*, and from the plea rolls. Rape was clearly defined as "forcible sex against the victim's will." Rape was prosecuted by appeal (private prosecution), and the woman herself was the prosecutor. To succeed, the woman was supposed to show her injured body and torn clothes immediately to reputable men in the nearest village. There is some ambiguity about whether married women and other nonvirgins could sue. According to *Bracton*, the penalty for violation of a virgin was castration, unless the woman consented to marry the rapist. The plea rolls present a somewhat more complex picture. Rape appeals were invariably dropped by the appellor (prosecutor) before trial or quashed by the court for procedural reasons. Many of the dropped cases were settled by marriage or compensation. Starting in the mid-thirteenth century, appeals that were dropped or quashed were usually prosecuted at the king's suit. That is, juries were asked to render a verdict, even though the private prosecution had failed. Nevertheless, even when offenders were convicted by that procedure, the penalty was a monetary fine, often a relatively small one. Women prosecuted about one rape per county per year in the early thirteenth century, but the rate dropped precipitously in the late thirteenth century, when prosecution at the king's suit undercut offenders' incentives to settle, and thus reduced the benefit of prosecution.

The Statutes of Westminster brought several important changes. The first Statute of Westminster (1275) made sex with an underage girl a misdemeanor, regardless of consent. Whether the relevant age was twelve or fourteen, however, was the subject of debate. In addition, that statute provided that rape could be prosecuted by indictment as well as appeal. The Statute of Westminster II (1285) changed the penalty for rape to hanging, although courts were reluctant to impose that sanction. Prosecution continued to be relatively rare—about 1 per county every five years in the early fourteenth century. Conviction rates were also very low—about 10 percent. Some medieval doctors believed that pregnancy could occur only if both man and woman achieved orgasm. This view contributed to the low prosecution and conviction rates, because pregnancy was viewed as proof of consent.

Westminster II also gave the king suit for property taken when a wife was abducted. In addition, a married woman who lived with a paramour lost her dower, unless she was reconciled to her husband at the time of his death. From at least the turn of the thirteenth century, feudal guardians could bring a civil action against those who ravished (abducted) wards, whether male or female, for the purpose of marriage. Similar actions for ravishment of wives and daughters began appearing in the 1290s and were probably inspired by Westminster II. These civil actions were brought by fathers and husbands against men who abducted or eloped with their daughters or wives. These actions were sometimes used to thwart a woman's marital choice and to punish consensual, albeit adulterous, sexual relations. Successful civil actions for ravishment resulted primarily in monetary compensation to the husband, father, or guardian. A 1382 statute stipulated that ravishers and women who consented to ravishment lost their inheritance rights. In addition, the statute provided that the woman's husband or kinsmen had the right to appeal (prosecute) the ravisher for the felony of rape. In the seventeenth century, civil actions for ravishment were replaced by actions for loss of consortium, seduction, enticement, and criminal conversation.

Early Modern England. A 1576 statute fortified the penalty for rape by removing benefit of clergy, which from the mid-fourteenth century had allowed literate defendants to escape punishment. The same statute also made it a felony to have sexual relations with a girl under the age of ten, even if she consented. Although this statute showed how seriously authorities viewed rape, enforcement was undercut by concern for false conviction and distrust of the victim's testimony. Matthew Hale, the great seventeenth-century judge, famously wrote in volume 1, chapter 58 of his *History of the Pleas of the Crown*:

> It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.

Judges and juries were instructed to consider the character of the victim, the location where the offense took place, and whether the woman was bruised or showed other signs of physical injury. Because the woman's character was a legitimate issue, defendants could use rape trials to embarrass the victim by inquiring into her sex-ual history. Although corroboration was not technically required for conviction, prosecution, not to mention conviction, was unusual unless the crime had been interrupted by a third-party witness or the woman had been seriously injured in the attack. As a result, rates of prosecution continued to be dismally low, less than one indictment per county per year, although the rate may have been rising in the eighteenth century. Conviction rates were also less than 20 percent. Attempted rape, a misdemeanor, was easier to prove, and was more often prosecuted, even when the facts might suggest that the rape had been completed.

Reform. In 1841, as part of the larger movement to reform the criminal law, the penalty for rape was reduced from death to "transportation beyond the seas" (that is, exile to the Australian penal colonies). Later statutes substituted imprisonment for transportation. Several nineteenth-century cases made clear that lack of consent, rather than force, was the essence of rape, and thus that sex with a woman who was asleep or too drunk to consent could be rape.

The biggest changes to rape law came in the late twentieth century, with the rise of the women's rights movement. The marital rape exemption, which had previously meant that a husband could not be convicted of raping his wife, was abolished by court decision and statute in the early 1990s. Advocates for women pushed for societal recognition and punishment of rape where the offender and victim were acquaintances or intimates. Prosecution was encouraged by statutory restriction of inquiries into the victim's sexual history. Efforts were also made to educate police and other law enforcement officials so that women were not further traumatized by their contact with the justice system. These efforts resulted in a marked increased in the prosecution of acquaintance and other nonstranger rape. On the other hand, perhaps as a result of the difficulties involved in proving lack of consent in such cases, the conviction rate (convictions as a percentage of offenses reported to the police) plummeted from 25 percent in 1985 to only 7 percent in 2000. A 2002 study estimated that, even with recent improvements, only 20 percent of rapes were reported to the police.

[*See also* Bracton, Henry de; Criminal Law, *subentry on* English Common Law; English Law; English Legal Treatises; Family, *subentry on* English Common Law; Feminist Legal Theory; Marriage, *subentry on* English Common Law; Punishment, *subentries on* English Common Law *and* United States Law; *and* Women, *subentry on* English Common Law.]

BIBLIOGRAPHY

Beattie, J. M. *Crime and the Courts in England, 1660–1800*. Princeton, N.J.: Princeton University Press, 1986.

Hough, Carole. "Alfred's *Domboc* and the Language of Rape: A Reconsideration of Alfred Ch. 11." *Medium Aevum* 66 (1997): 1–27.

Klerman, Daniel. "Settlement and the Decline of Private Prosecution in Thirteenth-Century England." *Law and History Review* 19 (2001): 1–65.

Myhill, Andy, and Jonathan Allen. *Rape and Sexual Assault of Women: The Extent and Nature of the Problem: Findings from the British Crime Survey*. Home Office Research Study *237*. London: Home Office, 2002.

Post, J. B. "Ravishment of Women and the Statutes of Westminster." In *Legal Records and the Historian*, edited by Baker, J. H. pp. 150–164. London: Royal Historical Society, 1978.

Temkin, Jennifer. *Rape and the Legal Process*. 2d ed. New York: Oxford University Press, 2002.

DANIEL M. KLERMAN

REAL ACTIONS. Real actions were actions at common law in which a plaintiff claimed land in freehold and the remedy for a successful plaintiff was for the court to order the sheriff to put plaintiff into possession. This was accomplished by the writ of right.

The Writ of Right. At the center of real actions was the writ of right. This was routinized in the early years of Henry II's reign (1154–1189). The plaintiff took the writ to the lord from whom he claimed to hold the land, and the writ commanded the lord to do right to the plaintiff. If the lord failed to do right, which usually meant that he was unwilling or, because of limits to his jurisdiction, unable to hear the case, the plaintiff could remove the case to county court, from where it could be removed to the king's court. The plaintiff based his claim on his having been seised, or, more frequently, on his ancestor's having been seised of the land, and on descent to himself from that ancestor according to the rules of inheritance. After stating his claim, the plaintiff had to offer to prove his claim by the battle of a champion who had seen the ancestral seisin on which rested plaintiff's claim (or had been told of it by his father).

Parallel to the writ of right was the praecipe writ, which initiated proceedings immediately in the king's court. The rule for the praecipe writ was that either (1) both parties held directly of the king or (2) the parties held of different lords. If the parties held of the same lord and the plaintiff, in contravention of the rules for its use, nevertheless brought a praecipe writ, it was up to his lord to claim his court. Complaints about the misuse of the praecipe writ prompted Chapter 34 of Magna Carta, which provided that praecipe writs were not to be issued in cases in which a lord lost his court. This provision was implemented by a