

Utmost Resistance

Utmost Resistance

*Examining Sexual Violence Law
in the United States*

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*To my sons, who have been my best teachers.
And to Mom, Jill, and Liza — we were always in this together.
— Amy*

*To my parents, for their extraordinary love and support.
To my sister, for staying fierce. To my sons — my joys.
And especially to my husband, always.
— Jessica DS*

*To my Public Defender Girl Gang.
Especially to Pam Hanglin and Christine Haydinger,
who are deeply missed.
— Jessica B.*

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Introduction

“Nature had given her feet and hands with which she could kick and strike, teeth to bite and a voice to cry out; all these should have been put in requisition in defence of her chastity.”

—*People v. Morrison*, 1 PARK. CRIM. REP. 625
(N.Y. Oyer & Terminer 1854)

Why “Utmost Resistance”?

Utmost Resistance became the title of this text when we realized the term had meaning and significance beyond just the statutory language explicitly applied in rape cases. Historically, the term described what a woman had to do to prove she was raped. Unlike every other crime of violence, a rape crime could only occur if the victim had “resisted to the utmost.” Why? Because the onus for rape was placed on women, who were expected to fight, to their deaths if necessary, to protect their chastity. Without proof of utmost resistance, the victim was considered to have consented to the conduct. The focus of culpability was on the victim’s reactions, not the perpetrator’s misconduct. The long-lasting and layered societal harm that this standard inflicted is the subject of much of this book.

But utmost resistance also represents how change came about—change that chipped away at the archaic sexist and racist notions underlying rape law. Resistance by enslaved women who risked their lives to reveal their

stories of sexual violence;¹ resistance during the Jim Crow era by Black activists, including Black women's groups, who relied on a "tradition of testimony and truth-telling that stretched back to slavery";² resistance during the feminist movement of the 1970s; resistance by advocates in indigenous communities fighting to shed light on and reduce sexual violence; resistance by Asian and Latinx women and members of the LGBTQI+ community who have fought back against stereotyping and fetishization that puts them at high risk of sexual violence; resistance by Tarana Burke, who founded the #MeToo movement; and resistance by survivors who were inspired by #MeToo to reveal their victimization.³ These are just a few powerful examples of a series of resistance efforts that have been employed to bring needed changes to laws that for centuries have failed to protect victims of sexual violence.

First, if you're reading this text, thank you. It's an indication that you are interested in the subject and willing to learn about topics that are hard to study. Second, we know that some people reading this book are victims of sexual violence or have a personal experience with sexual violence. That you have signed on to read and study the subject is an act of courage.

Why Did We Write This Book?

We are three law professors with backgrounds in prosecution, criminal public defense, women's studies, and corrections. We are cisgender women who have experienced sexual violence and harassment ourselves. The idea for the book came after we taught a course to undergraduate students about sexual violence. As we put together materials for the class, we realized that there was no comprehensive textbook that covered the history and the law of sexual violence along with other societal influ-

1. DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER XIX* (2011); HARRIET A. JACOBS, *LIFE OF A SLAVE GIRL* (1987); CRYSTAL N. FEIMSTER, *SOUTHERN HORRORS, WOMEN AND THE POLITICS OF RAPE AND LYNCHING* 89 (2009).

2. MCGUIRE, *supra* note 1 at 35.

3. TARANA BURKE, *UNBOUND: MY STORY OF LIBERATION AND THE BIRTH OF THE ME TOO MOVEMENT* 224 (2021).

ences that helped to shape sexual violence law. While there are a multitude of scholars, writers, and activists who have written about sexual violence (and we have cited many of them), we saw that no one had yet written a textbook that brought together a range of topics all focused on educating the reader about the law of sexual violence in the United States and how the law developed to where it is today. In deciding to write a book to fill this void, we wanted to include coverage of sexual violence in different contexts, such as that occurring in indigenous communities and the LGBTQI+ community as well as that involving male victims.

We know that our decision to write this book comes with risk. Students, scholars, and activists will assuredly find holes in our coverage and gaps in our perspective. We look forward to receiving input, new ideas, corrections, and (hopefully) positive feedback from our readers. The next edition of this text will be better for it.

What Can You Expect?

The book is structured to first cover foundational topics before moving on to specific aspects of sexual violence law. The book topics generally go from early sexual violence law to modern law. Most chapters have questions and additional notes at the end. These are designed to spark deeper thinking or to flag important but adjacent issues.

Chapter 1 begins with a quick primer on how to read and understand the law. For law students, this chapter will be a review; for others, the information will provide context on how statutes are organized and how common law is made. This book focuses specifically on statutes prohibiting crimes of sexual violence, and it's helpful to see how the laws are broken down to address a variety of factual situations and grades of seriousness.

Chapter 2 covers the history of sexual violence law in the United States. This chapter, by necessity, explains the sexism and racism that framed laws prohibiting rape. Current law, though much advanced, is still rooted in enslavement, white supremacy, and patriarchy. Vestiges of those forces remain in sexual violence law today. The background provided will help to put into perspective laws discussed in later chapters, such as Chapter 6 on sexual violence and prosecution, where the relatively recent development of rape shield laws—provisions that prevent

victims from being questioned about their sexual history—is explained. Their origins are rooted in early notions that a woman’s chastity is connected to her credibility.

The next two chapters look at specific laws relevant to sexual violence. Chapter 3 on force and Chapter 4 on consent together cover the culpable conduct constituting sexual assault and rape. The former chapter examines the historical background of force as the main element of rape and tracks its development through current law. The latter reviews where we are today and discusses “yes means yes” and affirmative consent laws.

Chapter 5’s discussion of media and sexual violence may seem like a departure in a book about the law, but the reality is that media coverage and pop culture influence us all, including stakeholders such as judges, jurors, prosecutors, and police. It’s true that we can’t always know for sure when media has influenced the law or vice versa, or whether they have influenced each other. But there’s little doubt that how sexual violence is reported and conveyed to society plays a role in how the legal system reacts. This chapter was the subject of many additions and edits due to the ever- and rapidly changing sexual assault stories in the media. It is as up to date as possible as of the time of this writing.

Chapter 6 on sexual violence and prosecution focuses on examples of more recent developments aimed at protecting victims’ privacy. It also covers topics such as rape trauma syndrome and repressed memory evidence, among others. Chapter 7 addresses the topic of children and sexual violence. It examines special carve-outs in the law intended to protect children, including laws related to statutory rape, as well as critiques of these laws. As noted throughout the text, some of the topics covered could easily fill a whole book, and this chapter is certainly one of them.

Chapter 8 on sentencing shifts the focus to perpetrators. It looks at the nature of sentencing and which forces are at play when judges issue sentences in rape and sexual assault cases. It also examines restorative justice, a relatively recent movement that is just beginning to be considered in cases of sexual assault.

No book about sexual violence would be complete without a chapter on pornography and sex work because both topics have been integral to shaping law and societal attitudes toward sexual violence. Chapter 9 contains substantial information and statistics so that the reader can better appreciate just how influential the sex industry is on our culture.

Chapter 10 discusses male victims of sexual violence. While data tells us that most rape and sexual assault victims are women, the rate of sexual violence perpetrated against male victims is significant. Additionally, the statistics undoubtedly do not reflect actual numbers, as men are even more reluctant to report victimization than are women. The chapter also examines the terrible harm of prison rape as well as recent programs aimed at reducing its incidence.

Chapter 11 provides an overview of two federal civil statutes, Title VII and Title IX. Their evolution and application acknowledge the negative effects of sexual assault and sexual harassment in the workplace and in educational settings.

Chapter 12 flags what we call “emerging issues.” The underlying conduct covered is not necessarily new, but awareness of and new laws designed to address the conduct are more recent. For example, the chapter looks at technology-based crimes like non-consensual pornography, which is the distribution of sexually explicit images without their subjects’ consent. It also examines sexual violence and victims with disabilities.

What We Hope You Take Away

In addition to our pedagogical reasons for creating this textbook, we were also motivated to write it because we believe that knowledge is power, and power is a vehicle for change. Perhaps taking a course on sexual violence and reading this textbook will become a catalyst for students (or anyone who reads the text) to want to use their foundational understanding of the problem to effect change. Whether you’re a future lawyer, police officer, judge, prosecutor, defense attorney, advocate, politician, or ordinary citizen, we hope the information we provide here will generate new ideas, discussion, motivation, and innovation that result in reducing sexual violence.

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