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THE NEW ILLINOIS SEX CRIMES ACT: THE CONSTITUTIONAL RAMIFICATIONS OF REDEFINING RAPE*

In June of 1973, the House of Representatives of the Illinois General Assembly formed the Rape Study Committee to determine whether existing law was adequately addressing the problem of sexual attacks. The committee concluded that the old statute was greatly in need of revision. Much of the language was archaic in that it failed to address the growing perception of rape as a crime of violence rather than of passion.[1] Victims were often reluctant to report attacks, and when they did, convictions were difficult to obtain. In an attempt to remedy these problems, the Illinois General Assembly enacted the New Illinois Sex Crimes Act.

The Act seeks not only to simplify and modernize Illinois' sex crimes statutes, but also to facilitate convictions. It divides sex offenses into four categories, incorporating the crimes formerly referred to as rape and deviate sexual assault.[2] The Act also makes it possible for women as well as men to be convicted of rape by incorporating language that is gender neutral.[3] Criminal sexual penetration can now be accomplished through the use of objects and nonsexual body parts.[4] Also the spousal exemption for rape has been modified so that a spouse may now be prosecuted under the Act for aggravated criminal sexual assault.[5]

Although these provisions help to simplify and modernize Illinois law concerning sexual attacks, the legislature's attempt to facilitate convictions by eliminating the element relating to the lack of the victim's consent is constitutionally infirm. Of all the controversial aspects of the new statute, none will be as potentially far-reaching as the elimination of lack of the victim's consent as an element

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* ILL REV. STAT. ch. 38, §§ 12-12 to 12-18 (Supp. 1984) (P.A. 83-1067 as amended by P.A. 83-117, eff. July 1, 1984).

1. *See infra* notes 2 - 5 and accompanying text.

2. The four categories are criminal sexual abuse, aggravated criminal sexual abuse, criminal sexual assault, and aggravated criminal sexual assault. *Compare* ILL. REV. STAT. ch. 38, §§ 12-13 to 12-16 (Supp. 1984) *with* ILL. REV. STAT. ch. 38 §§ 11-1 and 11-3 (1983).

3. *Compare* ILL. REV. STAT. ch. 38, § 12-14 (Supp. 1984) *with* ILL. REV. STAT. ch. 38, § 11-1 (1983).

4. *Compare* ILL. REV. STAT. ch. 38, § 12-12(f) (Supp. 1984) *with* ILL. REV. STAT. ch. 38, § 11-1 (1983).

5. *Compare* ILL. REV. STAT. ch. 38, § 12-14 (Supp. 1984) *with* ILL. REV. STAT. ch. 38, § 11-1 (1983).

of criminal and aggravated criminal sexual assault.[6] This change was in response to concerns that placing the burden of proving the victim's lack of consent on the prosecution made convictions too difficult to obtain.[7] No other crime required proof that the victim did not consent to be victimized. The legislature's elimination of the element of lack of consent was the result of much debate. Sponsors of the bill and members of the Rape Study Committee contended that requiring the prosecution in a rape case to prove that the victim did not consent placed an unfair burden on the prosecution.[8] In fact, an articulated thrust of the new statute was "taking the onus off of the victim and putting it on the offender."[9] Toward this end, the bill's sponsors originally made consent an affirmative defense.[10] This would have required the accused to raise the issue and present some evidence in support of it.[11] The defendant would have been compelled to take the stand and claim that the victim had consented, thus implicating himself as to his participation in the sexual act. Consequently, there was concern that making consent an affirmative defense would unduly compromise the accused's fifth amendment right to be free from self-incrimination.[12]

The legislative history of House Bill 606 is replete with inconsistencies. The sponsors admit that the prosecution must still prove every element of the crime beyond a reasonable doubt.[13] Yet, the new statute still seeks to place the burden on the offender.[14] In an attempt to remedy these conflicting goals, the issue of consent evolved as a "hybrid" type of defense rather than an affirmative defense.[15] There is, however, no definition of the word "defense" in the Illinois statutes when it is not modified by the word affirmative.[16]

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6. *Compare* ILL. REV. STAT. ch. 38, § 12-17(a) (Supp. 1984) *with* ILL. REV. STAT. ch. 38, § 11-1 (1983).

7. RAPE STUDY COMM., REPORT TO THE HOUSE OF REPRESENTATIVES AND THE 78TH GEN. ASSEMBLY OF THE STATE OF ILLINOIS (Dec. 1978) at 97.

The Illinois House of Representatives formed the Rape Study Committee in June of 1973. The members of the committee published a report in December of 1974, and in December of every even numbered year thereafter until 1982.

8. *Id.*

9. Jaffe & Becker, *Four New Basic Sex Offenses: A Fundamental Shift in Emphasis*, 72 ILL. B.J. 400 (1984).

10. ILL. REV. STAT. ch. 38, § 3-2 (1983).

11. *Id.*

12. U.S. CONST. amend. V. In terms of the Act's constitutionality, this paper addresses only possible violations of the fourteenth amendment right to due process. Some critics of the Act claim that requiring the accused to prove that the victim consented may infringe upon his fifth amendment right to be free from self-incrimination.

13. *Hearings on H.B. 606 Before the House Judiciary Comm.*, 83rd General Assembly, April 15, 1983 (statement of Julie Hamos).

14. Jaffe & Becker, *supra* note 10, at 403.

15. *Id.*

16. Inman & Lewis, *H.B. 606: New Problems of Policy and Enforcement*, 72 ILL. B.J. 404, 406 (1984).

Classifying consent as a defense gives rise to the inference that the defendant may be required to prove his innocence by asserting that the victim consented, rather than requiring the prosecution to prove that the victim did not consent. Eliminating the word affirmative from the definition of defense cannot cure this unconstitutional shift in the burden of proof or bring the statute in line with Supreme Court precedent.

The United States Supreme Court has made its position clear as to the prosecution's burden in a criminal case. In *In re Winship*,[17] the Court held that the due process clause of the fourteenth amendment requires that before an accused can be convicted of a crime, the prosecution must prove, beyond a reasonable doubt, every fact necessary to constitute the crime. The accused in *Winship* was a minor, adjudicated delinquent, based on a "preponderance of the evidence" against him. In reversing the trial court's decision, the Supreme Court emphasized that the requirement of proof "beyond a reasonable doubt" dated back to 1881.[18]

The *Winship* Court noted that the requirement of proof beyond a reasonable doubt had "developed to safeguard men from dubious conviction, with resulting forfeitures of life, liberty and property."[19] Along with these basic rights, the Court was concerned with the stigmatizing effect a conviction for a criminal offense could have on an accused. Consequently, the Court held that before an accused could be so stigmatized and deprived of life, liberty or property, he must be proven guilty beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

The accused in a rape case would be particularly stigmatized by an erroneous conviction. Every effort should be made, therefore, to ensure that the accused is not convicted unless the prosecution has proven him guilty beyond a reasonable doubt. This necessarily strict standard set forth in *Winship* is simply not met when the burden of proving that the victim consented is placed on the accused. It is the prosecution's burden to prove every fact necessary to constitute the crime with which the accused is charged. The question of the victim's consent in a rape case is crucial to the determination of the accused's culpability. It is one that cannot fairly be shifted to the defense.

The United States Supreme Court has already faced the issue of whether a state may, through statutory language, shift the burden

17. 397 U.S. 358 (1970).

18. *See, e.g.*, Miles v. United States, 103 U.S. 304, 312 (1881) (the evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt to the exclusion of all doubt).

19. *Winship*, 397 U.S. at 362.

of proof in a criminal case. In *Mullaney v. Wilbur*,[20] a Maine statute provided that all intentional or criminally reckless homocides be punished as murder unless the defendant could mitigate the charge by proving that he acted in the heat of passion or on sudden provocation. The Supreme Court held that such a shifting of the burden of proof did not comply with the due process clause of the fourteenth amendment. The *Mullaney* Court noted a distinction between the concept of facts necessary to constitute a crime and facts constituting a crime *as defined by statute*. The *Mullaney* Court stated that if the reasoning in *Winship* was limited only to those facts which constituted a crime as defined by statute, a state could simply redefine the elements constituting certain crimes. In short, the prosecution in a homocide case has to prove the *absence* of heat of passion or sudden provocation to secure a murder conviction. Similarly, the prosecution in a rape case has to prove the *absence* of the victim's consent. *Mullaney* makes clear that states may not circumvent due process considerations by manipulating the statutory definition of a crime.

In an effort to facilitate convictions and take the burden off of the victim in a rape case and place it on the accused, the Illinois legislature eliminated the element requiring lack of the victim's consent for the crimes of criminal and aggravated criminal sexual assault. Consent is now listed as a defense to these crimes. Removing the element of lack of consent from the prosecution's case and placing it on the defendant, however, violates an accused's right to due process of law. Lack of the victim's consent is an essential element of criminal and aggravated criminal sexual assault. The prosecution is required to prove beyond a reasonable doubt every fact necessary to constitute a crime, whether that element is a part of a crime's statutory definition or not.

The Illinois General Assembly should have retained the element of lack of the victim's consent when it drafted its new Sex Crimes Act. In an attempt to facilitate convictions, the legislature has impermissibly shifted the burden of proof. In its zeal to modernize an archaic statute and ease the burden on the prosecution in cases involving sexual attacks, the Illinois legislature has failed to achieve the result it sought to obtain. Rather than resulting in increased convictions, an otherwise improved statute will be found unconstitutional.

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20. 421 U.S. 684 (1975).