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Beyond Akin: Current U.S. Law Is Failing Sexual Assault Victims

By James Warren

The failed Missouri candidate isn't the only one with a twisted conception of rape. Our laws about force and consent need a major revamp.

Sarah Conard/Reuters

Election day post-mortems have included, briefly, how Republicans blew U.S. Senate races they once seemed to have in the bag. Prominently, there was Missouri, where Representative Todd Akin imploded against a weak incumbent, Democrat Claire McCaskill, via those comments on "legitimate rape" that drew instant national scorn.

But in "'No' Still Means 'Yes,'" a law review article on the inadequacy of rape laws, two Chicago lawyers essentially suggest how we'd be smart to again place a spotlight on Akin's remarks. When they were made, few of us stopped to think how they also reveal glaring weaknesses in the way the legal system continues to treat rape.

According to Peter Baroni and John Decker, the phrase "forcible rape," which Akin claimed he ought to have used after his initial remarks became controversial, is just as wayward as his original phrase. Both the notion of "legitimate" rape and that of "forcible" rape fail to recognize that force shouldn't be required to conclude that a rape takes place. But in too many courts across the land, it is.

The article has at least quickly caught the attention of Richard Posner, the prolific federal appeals court judge and academic and the most influential jurist not on the Supreme Court. He cites its briefly (without giving his take on it) in ruling that a Navy veteran can't sue the government over sexual abuse by a Veterans Affairs therapist who treated him for mental illness.

The Chicago lawyers, one of whom is a Republican lawyer-lobbyist, argue that the frequent debate about rape "reflects the failure of current rape and sexual assault laws across the United States to prohibit non-consensual sexual acts. It should be understood that a 'real' rape is any sexual conduct committed without the consent of the victim, without regard to the use of force."

Akin's incendiary comments should be looked at not just for the dim-witted politics they constituted, but also as an indicator of a far larger problem in how the American legal system generally views the topic.

Their overview of changing laws over two decades does underscores a movement to replace antiquated rape and sexual assault laws, including statutes that said a victim must actively resist in order to claim rape; that victim testimony be corroborated; and that the rapist threaten the use of physical force. But it's a movement that generally failed, say Baroni and Decker, for three reasons.

First, changes to rape and sexual assault laws by legislatures did not result in definitions of these crimes that are really and truly based in "non-consent." That's because in many states, the definition of rape continued to be tied to a requirement of force.

Second, law enforcement has generally failed to prosecute the truly non-consent offenses that take place.

Finally, judges continue to adhere to musty common-law notions, generally placing the burden on the victim to object to unwanted advances. That often results in the rejection of a victim's claims of rape or assault.

The bottom line, say the authors, is that "sex crime laws across the country continue to require evidence that the perpetrator used force or threats to obtain sex from the victim, unless some other circumstances exists, such as evidence that the victim was a minor or had a mental defect."

For sure, a large number of new laws criminalize mental health therapists, prison guards, clergymen, teachers, probation officers or parole officers taking sexual advantage of a position of authority. But those laws, the authors note, often tend to bar sexual liaison with minors or inmates specifically. The free, adult population needs similar protection from the abuse of positions of trust and power.

It's this status quo that, in ways perhaps not fully appreciated by many, flies in the face of the "non-consent" movement: mainly, the idea espoused by this movement that an individual shouldn't initiate a sexual encounter without some objective manifestation of agreement by the other party. Under this logic, a sexual encounter initiated without clear approval should be prohibited by our criminal laws, if the aim of our laws is actually to bar unwanted sex.

Further, note the authors, "despite the abandonment of the traditional force or threat of force requirement in many states, virtually all of these states place the onus on the victim to offer verbal or physical resistance in the face of overt touching, fondling or other sexual overtures."

So the burden in a potential case of rape still largely rests on the victim, to resist, rather than on the aggressor, to solicit consent. Just a few states define consent as arising only after a freely given agreement between the parties. Most states assume consent until and unless a victim resists.

It is not only wrong that these states do so; it is also illogical, in the context of the rest of our body of law. As the authors note, we routinely criminalize various schemes to take money and property, but don't do likewise for schemes that take advantage of a person's sexual dignity. Declarations like "sleep with me if you want a promotion" may be legion, but in our criminal statutes, they encounter silence. "If it is a crime," the authors write, "to use deception in order to take control over another's property without that person's consent, then why is it perfectly legal to utilize deception to take control of what is arguably the most intimate thing" we possess, our sexual autonomy?

The painful irony of our current sexual assault law becomes obvious in the simplest hypothetical, say Decker, an emeritus professor at DePaul University College of Law, and Baroni, a Republican lawyer-lobbyist who teaches at Loyola University School of Law.

Assume, they say, that John Doe ambles into a corner grocery, where the owner spies Doe picking up an apple, sticking it in his pocket and walking out the door. Clearly, a crime of theft just took place, even if Doe didn't use or threaten force, and even if the owner neither shouted disapproval nor in any other way resisted Doe's action.

It's totally different with sex. In cases where the victim doesn't resist, we often allow aggressors to steal a victim's sexual intimacy and go unpunished. "American legal norms," Baroni and Decker write, "suggest we place a lesser value on one's sexual dignity and independence that a shopkeeper's interest in an apple wrongly take from his shelf."

The authors conclude by noting that a vast majority of rapes or sexual assaults are perpetrated by men. The refusal of most states to enact laws that criminalize such conduct in the case of a non-consenting victim "reveals a profoundly sexist status quo in this country: 'no' means 'yes.' ... The limitation of rape and sexual assault to scenarios involving force trivializes one of the most pervasive problems in our society, undermining a woman's free will and suggesting that somehow without force, it's the victim's fault."