



If you're in police custody, then you can't consent to sex with them

Jarvis DeBerry

February 22, 2018

An 18-year-old New York woman says she was sitting in a parked car with two guys in September when two plain-clothes detectives approached them, found marijuana in the cup holder and took her and only her into custody. The woman says the detectives took turns driving the unmarked police van and raping her. She says she told them no, but how could she have said yes? She says she was in the backseat handcuffed. The detectives say the teenager agreed to sex with them. A graphic accompanying BuzzFeed's report about that woman's ordeal says "Laws in 35 states allow cops to have sex with someone in their custody." It counts Louisiana among the 35.

Buzzfeed is being a bit sensational. New Orleanians will remember that in 2011 police officer Henry Hollins was convicted and sentenced to a 45-year prison term after a woman he picked up while patrolling Central City says he raped her inside a Tchoupitoulas Street warehouse. That woman was never booked with a crime but was dumped back out on the street by Hollins. Similarly, the New York teenager wasn't taken to the station or booked with a crime but, instead, she says, was put out on the side of a road. And the two detectives she accuses have appropriately been charged with rape.

Those two prosecutions demonstrate that neither New York nor Louisiana *allows* the police to have sex with people they've taken into custody.

"No state allows rape by the police," Tania Tetlow, a Tulane Law School professor and the former director of the law school's Domestic Violence Clinic, said in a Monday email. "General rape laws apply to every person," she wrote, "including police officers. Instead, the question is whether the law should go further and make clear that a person in the custody of the police cannot legally consent, in the way that many states make that clear for prisoners serving time."

What that BuzzFeed graphic ought to say is that in 35 states, police can make the claim - however ridiculous - that a person they had trapped, maybe even handcuffed, freely consented to sex with them. Fifteen states prohibit such a defense.

Buzzfeed, citing a database compiled by The Buffalo News, counts at least 158 police officers charged since 2006 with some kind of sexual offense against people "under their control" and "at least 26 (who) have been acquitted or had charges dropped based on the consent defense."

Does Louisiana need a law that says explicitly that any sex on-duty police have with a person in custody is presumed to be rape because a person in custody is, well, in custody? Do we need to take away the consent defense?

Yeah, why not? Some might think it unnecessary. Some might call it redundant. But such arguments weren't persuasive when the Louisiana Legislature was debating the so-called "Blue Lives Matter" law. It was already the case that an attack on a law enforcement official was considered a worse offense than an attack on a civilian. There was no reason to give the police and district attorneys the discretion to label certain attacks on law enforcement officers hate crimes. But Gov. John Bel Edwards, a Democrat leading a red state, made a show of standing with the police.

If that's what we're doing here - making laws to let certain groups know they're valued - then why not make a political statement for all the people who have been or will be sexually assaulted? If this depressingly large class of people is considered important enough, then a bill that bars police officers from claiming consensual sex with people in their custody will fly through the Legislature with no opposition and be enthusiastically signed by the governor.

According to a 2013 report from The Cato Institute, sexual abuse complaints against police officers are second only to complaints alleging excessive force. At a 2007 gathering of the nation's police chiefs in 2007, almost all of the more than 70 chiefs present raised a hand when asked if they'd had to deal with an officer accused of sexual misdeeds.

Tetlow said every state has a list of people who cannot legally give consent to sex - "children, seriously disabled people, or those temporarily incapacitated by alcohol." She said that "at a minimum" the Louisiana law barring prison staff from sex with inmates should apply to police and those in their custody.

It's worth noting, though, that Louisiana Revised Statute 14:134.1 doesn't define a prison guard having sex with an inmate as rape but defines it instead as "malfeasance." The maximum fine is \$10,000, and the maximum prison term is ten years.

Preventing the police from claiming consensual sex with those they detained is an idea our state's lawmakers should run with. There are already things that accused rapists can't say in court. They can't say an alleged victim is promiscuous. And if they're police who had an alleged victim in custody, they ought not be able to say their victim consented.