Rape Reform: An Appreciative-Critical Review

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The amount of legal, psychiatric, and social change that has taken place within the past few years in regard to the criminal offense of forcible rape is stunning. Scientific studies, polemical treatises, government reports, popular articles, and other materials have flooded library shelves and newstands. A television drama, "A Case of Rape," became the most widely viewed made-for-television movie in the media's history when it was presented in 1974.[1] Concurrently, new laws have been enacted that redefine the statutory offense of rape, and the way it is to be prosecuted. Hospital and law enforcement agencies have altered their manner of dealing with rape victims. Rape crisis centers, concerned with counseling women who report sexual assaults, have proliferated. All told, more has been written and more has been done in regard to the criminal offense of forcible rape during the past 48 months than during the previous 480 years.

The present paper attempts to pause momentarily within the rapid whirl of change and to examine critically some major developments that have taken place as the result of the feminist campaign for public and scientific acceptance of the view that rape is the "quintessential"[2] expression of male exploitation of women. The present writers are keenly sympathetic to the feminist position on rape and to the achievements of the women's movement in pushing through long-overdue reforms. The occasional stridency of the campaign was probably politically essential. The considerable redundancy of feminist rhetoric on rape undoubtedly duplicates similar patterns associated with many productive social movements. We believe that the rape reform drive spurred by feminist agitation was, and is, a worthy cause. How to firm up and refine its accomplishments are matters that shall occupy much of the remainder of this paper.

That scientific work on rape followed so closely upon feminist interest raises absorbing questions about the relationship between popular causes and scholarly endeavor. Hundreds of investigations on rape have poured forth where before only a few had existed.[3] Legal scholars had in an earlier period largely confined their interest in rape to the juridical implications of exotic cases, such as those involving midnight crawlers who copulated with women who sleepily presumed that they were their husbands, and doctors who prescribed sexual intercourse (with themselves) to relieve the complaints of their patients.[4] But in recent times, legal analysts have turned their attention

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to fundamental matters that bear upon the definition and prosecution of the larger mass of everyday kinds of rape events. Psychiatrists too have moved away from earlier anecdotal reports of cases in which their main interest seemed to be to point to the "seductive" behavior of the victim as explaining the aggression of the rapist. Today, attempts are being made to derive and to evaluate a variety of treatment regimens which focus more directly than talk-therapy does on the sexual and hostile impulses of the offender.

The following pages will review briefly some basic legal and behavioral science matters that have arisen in recent years in regard to the crime of rape. We will at times go out of our way to challenge newly-popular feminist wisdom about rape, not because we know or even necessarily believe that such wisdom is incorrect, but because we think it essential that the ideas be forced to fend for themselves in the intellectual arena, away from political protection. The feminist movement has become powerful but we believe that at times its protagonists mistake self-righteousness for rightness. Judges, such as one recalled by Wisconsin voters, have learned to hold their tongues or to sacrifice their jobs when they are moved to utter some banality about rape gleaned from male tribal confabulations or to put forward an honestly held but politically unpopular view on the subject. Scholars may be less constrained – though we rather doubt it. This paper has been prompted, then, by the striking absence of "now-wait-a-minute" kinds of writing in regard to rape, despite the routine contentiousness of most professionals about popular political and social phenomena. We regard the need to put rape reform into a critical perspective as essential if that reform is to flourish and to be refined so that it is not unduly vulnerable if political winds shift.

Legal Developments

Almost four hundred years ago, a legally learned but intellectually rigid and misogynistic judge – Sir Matthew Hale (1609-1676), Chief Justice of the King's Bench[5] – set forth in a profoundly important treatise, *Historia Placitorum Coronae*, the view that rape was an easy charge to allege, but a most difficult one against which to defend. Hale underlined this dictum with a brace of anecdotal tales of men who had been accused falsely of rape. One, for instance, cleared himself by demonstrating that he suffered from an ailment that made it "impossible that he should have to do with any woman in that kind, much less to commit a rape, for all his bowels seemed to be fallen down into those parts, that they could scarce discern his privities, the rupture being full as big as the crown of a hat."[6] (Hale's skepticism about the validity of criminal allegations of rape, however, totally deserted him when it came to presentments against women for witchcraft. In 1662, for instance, Hale presided at Bury St. Edmunds in the trial of two widows accused as witches, and directed their conviction despite extremely powerful evidence impeaching the testimony of their 9- and 11-year old accusers.[7])

The Hale stricture on rape found its way over time into American criminal jurisprudence as a "cautionary instruction" transmitted by judges to juries. In California, for instance, it became mandatory in all cases of sexual assault that the jury be told: "A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent."[8]

The feminist campaign for reform soon brought about the demise of the cautionary instruction, by statute in Minnesota, and by appellate court decisions in most of the remaining jurisdictions that used the rule.[9] Two of the cases involved in this development are particularly notable for the light they throw on problematic matters in regard to rape offenses.

In the California case of *Rincon-Pineda*[10] it took two trials for the state to gain a conviction. In the first trial, which resulted in a hung jury (with a strong majority favoring acquittal), the complainant was exposed to a piercing cross-examination exploring details of her past sexual experience, and the jury charge included the customary cautionary instruction. In the subsequent trial, the complainant refused to answer questions about her sexual history, and the judge refused to give the Hale instruction. Stray bits of evidence also were introduced at the second trial that had not come forth in the initial session. The conviction of the defendant after the second trial suggests (though by no means satisfactorily demonstrates) that changes in the ground rules under which rape trials are conducted may have considerable significance for conviction rates.

In Iowa, the cautionary instruction was put to rest by the State Supreme Court's decision in 1975 in the *Feddersen* case.[11] David Feddersen was convicted on the testimony of a woman who had been raped in her house by a predawn intruder. She later escaped and ran into the street, with the assailant allegedly in pursuit. Her cries alerted the police, and she identified Feddersen, who was picked up on the street at the time, as the man who had raped her. He claimed unsuccessfully at his trial that he had spent the evening drinking, and was innocently on his way homeward when he was arrested. On appeal, Feddersen asked for a reversal on the ground, among others, that the cautionary instruction had not been given to the jury. The appellate court disagreed with his contention that it should have, and specifically indicated that the instruction no longer was to be used in Iowa, since, among other things, "it arbitrarily singles out rape victims as a class whose credibility is suspect."

The *denouement* of the *Feddersen* case was not to occur until almost two years after the crime. A witness surfaced who had been in a self-service laundry across the street from where the rape victim had run. She saw the woman being chased by her assailant, then saw the rapist veer off into an alley as Feddersen approached from a different direction. The woman signed an affidavit to this effect, and the county attorney asked that the charge against Feddersen be dismissed. He was released from the penitentiary after having been incarcerated for 22 months. "During the trial I expected to be cleared any minute because I wasn't guilty," he said. "But I wasn't cleared. Then, finally, I was found guilty and I couldn't believe it." The judge who had presided over the case said that the fact that a man could be found guilty though apparently he was innocent "is scary." Then he tried to put the matter into a calming context: "It shows we're all mortals," he told a reporter for the Des Moines *Register*.[12]

Some doubt also exists about the persuasiveness of the testimony that convicted Rincon-Pineda. John Kaplan, a former federal prosecutor, notes in the revised edition of his criminal law textbook that "aside from the testimony of the victim, the evidence against the defendant was quite weak,"

and observes that "it is remarkable that the jury convicted the defendant under the evidence in this case." Kaplan suggests that "it is *conceivable* that the victim might lie for some reasons we do not know," and then asks his readers to respond to two questions: "Is it likely in the . . . case that the defendant was actually guilty?" and "Is it absolutely certain?" [13]

What points might be derived from the abandonment of the cautionary instruction in *Feddersen* and in *Rincon-Pineda?* First, we would endorse the idea that the instruction itself is an anachronistic bit of juridical nonsense, its excision from court proceedings a matter long overdue. Second, we would suggest that the innocence of David Feddersen and the arguability of the guilt of Leonardo Rincon-Pineda may be merely coincidence, having little to do with the cautionary instruction. But third, we would emphasize that the cases seem to provide some clue to the fact that rape cases in significant ways may be different from other major crimes of violence, and may require special kinds of procedural regulations. The two cautionary instruction cases underline the importance of research probes that proceed backward from outcomes such as that in *Feddersen* to a determination of what had gone wrong with the original judicial process, so that we can understand and perhaps remedy flawed procedures. The present authors over the past few years have gathered an array of press clippings that tell of the release from confinement of rapists because of emergent evidence of their innocence. In Everett, Washington, for instance, early in 1978 a second person confessed to a rape for which another man had received a 50-year sentence. Prosecutors were both defensive and nonchalant. "Nobody is entitled to a perfect trial," one said, "just a fair trial." Another noted: "In a stress situation good faith mistakes can be made."[14] We do not know if mistaken convictions occur more or less often for rape than for other crimes, but we believe that studies to determine such matters are essential for better understanding of possible changes in court procedures in order to avoid miscarriages of justice.

The cautionary instruction is only one of the traditional ingredients of rape trials that has fallen by the wayside in recent years. Corroboration requirements for rape have been dropped,[15] though some evidence suggests that statutory change in this regard has little impact upon actual practice because prosecutors will not move forward with a case unless some elements of corroboration are present.[16] It also has been noted that New York, which had a very strict corroboration statute, had a rape conviction rate well below the national average, but that Iowa and Georgia, with a law similar to New York's, both had better conviction rates than the national average.[17]

Cross-examination probes into the complainant's background also have been eliminated in many jurisdictions, though in some they may be allowed to a limited extent if the judge decides after an *in camera* hearing that they could provide relevant material, and in others they are permitted if they bear upon relationships with the defendant.[18] Feminist protests against cross-examination inquiries of a far-ranging nature focused on two items: first, that such examination often represented a besmirching by innuendo; and second, that they constituted a trial of the victim rather than one of the alleged offender. The key assumption is that it does not matter in this day whether a woman might or might not have had previous intercourse or

engaged in any of a host of other sexual activities: the issue is whether she consented to intercourse in this particular instance, and her previous consensual experiences bear no relationship to the issue under adjudication.[19] The most categoric and extreme statement of the feminist view on the matter is that of Germaine Greer:

> There is only one kind of testimony which is relevant in rape – the testimony of the woman who alone can know if she consented or not . . . yet no man or group of men would place the freedom of another man in jeopardy upon such testimony.[20]

Support for the feminist position on severely truncating cross-examinations of victims seems to us to be arguable. There may be (and we believe that there are) good grounds for circumscribing the range of cross-examination in rape cases – the doctrine of privacy provides one such ground – but the empirical evidence seems irrefutable that persons who do certain things once are more apt to do them again than persons who have never done them, and that there are correlations between kinds of behavior, most certainly in the sexual realm. In one of the few critiques of recent changes in rape law, an American Civil Liberties attorney has argued that a categoric ban on cross-examination into the complainant's background goes too far:

> Evidence is relevant, if it tends, even slightly, to increase or decrease the probability that a certain event occurred, or that it occurred in a certain way. This means that evidence of prior sexual history is relevant if it slightly tends to increase the probability that the complainant consented or that the complainant lied in testifying that there was no consent. The key words are "increase the probability."[21]

The determination of the parameters of this issue represents a challenge to sociolegal researchers.

There are various other social and statutory developments that make it important that the new rape law provisions be viewed in a wide context. For one thing, the growing freedom of sexual activity and expression in the present period makes somewhat less abhorrent a necessity to disclose information on matters that in an earlier period were regarded more strongly as personal and even disgraceful. Compare the public notoriety of Ingrid Bergman's adulterous romance with an Italian film director with the public indifference (if not esteem) accorded to similar goings-on today. It might be argued, putting issues of privacy or none-of-your-business aside for the moment, that it is wholesome to be able to air matters that earlier were hidden and taboo, and that such unashamed airing tends to promote a healthier social atmosphere. Sagarin[22] and the Scarpittis[23] offer the argument too that historically the crime of rape has been used most viciously in southern courtrooms for the purpose of oppressing black men, and that truncation of the right of cross-examination serves to make such convictions more readily obtainable. On the other side of the controversy is the fact that juries notoriously become more lenient to the rape offender, despite his

culpability, when they learn that the victim has had what they regard as a checkered sexual background, however irrelevant that background may be.[24]

The cross-examination issue is further complicated by questions of proper mass media policy in regard to forcible rape. This is a subject that has received little attention in the United States, but which two years ago was highlighted in Parliamentary debate in Great Britain, and resulted in the passage of a law forbidding the media from identifying either the victim or the defendant prior to the conclusion of the rape trial. If the offender is convicted only then may he be identified; if he is acquitted, the victim may be named, but only if the judge agrees to remove the shield of anonymity.[25] In the United States, the *Cox* decision in 1975 by the Supreme Court declared that the names of rape victims are public property if they are contained in public records, and that statutes declaring otherwise were unconstitutional.[26] Most newspapers, however, maintain a policy of not disclosing the identity of a rape victim – unless the case involves well-known persons, competing media reveal the information, or they find other "compelling" reasons to abrogate their self-imposed procedure. No American media shield the alleged offender.

A law mandating anonymity for a rape victim might help to restrict somewhat the trauma of wide-ranging cross-examination, for the information brought out would be less widely disseminated. Indeed, the courtroom itself could be run under rules of restricted access. Neither of these provisions, however, would go to the most basic objection to free-ranging cross-examinations: that they are insulting and demeaning to the victim and prejudicial to her case. It is not impossible that some formula might be evolved under which victims who personally choose to respond to personal sex history questions deemed tangentially relevant are allowed to do so, while others might be permitted silence on such matters, with the jury being instructed in a very carefully worded statement that this is the complainant's right and privilege. The inference that the victim is hiding something significant would have to be downplayed, though how best to do so is another empirical question. That such a procedure would be unique to a rape trial would have to be supported or fall upon acceptance or rejection of the position that rape trials indeed are different in some ways from other kinds of trials. Where the pendulum ought to settle in terms of maximal fairness and decency remains uncertain at this time.

There are a number of other legal issues that seem noteworthy in regard to rape. There is a move afoot, for instance, to redefine the offense so that husbands are not exempted from conviction for the rape of their wives. The exemption of husbands, like the cautionary instruction, goes back to the writings of Sir Matthew Hale. The federal Congress' sweeping (but as yet not enacted) revision of the federal criminal code includes a rape-in-marriage provision and, among the states, Delaware, Oregon, Iowa, and South Dakota have legislated such a provision, though in the last-mentioned jurisdiction it was repealed during the following legislative session. South Australia recently included husbands within the definitional ambit of rape, and all of the Scandinavian and most of the Communist bloc countries do the same. The rape-in-marriage law reforms largely seem dictated by a drive for equity,

since evidence indicates that a rape-in-marriage statute would produce very few prosecutions.[27] A similar interest in legal fairness, symmetry, and victim protection underlies the move to extend rape laws to members of both sexes as victims and to include as rape forced fellatio and cunnilingus as well as acts of vaginal and anal penetration by other than a penis.[28]

In some American jurisdictions, too, rape cases are being processed through the grand jury rather than by means of preliminary hearings so that the victim is not as much exposed to cross-examination. If the grand jury, with its secret proceedings, returns an indictment, the chances of plea-bargaining undoubtedly increase, and the victim may be spared totally from having to participate in a trial.[29] It is arguable, though, that rape defendants ought to have to overcome barriers – such as their inability to use the preliminary hearing process – that are not set up for other felony defendants.

A crucial issue in regard to recent rape law reforms involves clear determination of their effects. Psychologists recently have published a number of simulation studies of the relationship between characteristics of the rape victim and the trial outcome, but most often these inquiries are seriously flawed by the artificiality of the experimental conditions and the unrepresentative nature of the respondent group, which usually is made up of university psychology students.[30]

One of the most direct (though far from uncomplicated) methods of determining the impact of law changes is to try to discover the discrepant outcomes among jurisdictions that do and those that do not include an innovative approach. It is always very difficult to control the variables other than the change being studied that might be important influences, but if the number of study sites and instances can be kept high some of the methodological problems become manageable. Another useful approach can involve examination of the way in which state law reforms are implemented in the jurisdiction's different counties and the results of what almost always will be the different intrastate strategies and styles in regard to the new legal provision.

A list of the rape issues needing closer examination is extensive. A few samples are: What effect do changes in corroboration requirements make in the selection of cases for prosecution? Do female prosecutors (and/or defense attorneys) have different conviction and acquittal rates than their male counterparts, all other things being equal? Does publicity damage the victim beyond the impact of the offense itself and how deep and long-lasting is such damage? What are the consequences for a male charged with rape who is acquitted? What are the implications for the criminal justice system of changes in the definition of rape, the excision of far-ranging cross-examination of the victim, the removal of corroboration requirements, and the elimination of the cautionary instruction? And what would happen if rape were redefined as only another form of assault? If rape law reforms are to be entrenched and expanded, answers to these and similar questions could prove to be extremely valuable.

Psychiatric Issues

Jury studies represent an area of work that ought to attract much more

psychiatric attention than it has done to date. Jury deliberations are a form of group process, in which members of a jury interact with each other in standard behavioral ways, attempting to manipulate and maneuver toward a conclusion congruent with their own personalities and goals. Particularly appealing for jury investigation is an approach recently developed by a British legal studies group at Oxford University in which unoccupied members of selected jury panels are paid to sit in on a real trial and then to reach their own verdict, as if they actually had been the panel involved. These "shadow juries," as the British call them, provide a verisimilitude notably lacking in American studies.[31]

In rape, an interesting issue concerns the variant responses of female and male jurors to the victim, as those responses are translated into a verdict for or against the defendant. The folklore assumption is that women tend to be tougher on members of their own sex who are pressing rape complaints.[32] A survey in Adelaide of actual jury verdicts, however, indicated no significant difference in rape cases in terms of the sex composition of the panel.[33] Though far from an adequately controlled study, the Australian inquiry calls into question the folklore beliefs.

The amalgam of violence and sex in rape is another matter that poses intriguing issues for psychiatric review. Feminists emphasize that rape is a crime of violence. Their aim is first, to put the offense into scientific and semantic territory from which it has unreasonably been excluded, and second, to lobby for a redefinition of rape as more serious behavior than it sometimes is seen as being. Nonetheless, the sexual ingredients of rape distinguish it strikingly from crimes such as assault, particularly since the rate for crimes of violence may vary markedly from the rape rate in some jurisdictions, the one being high, the other low, or *vice versa.* The different forcible rape rates in different cultures challenges a general explanation.[34] Among the Gusii, the rate is extraordinarily high;[35] among the Arapesh, there is no rape.[36] In the United States, Boston has a low rape rate, at least as the offense is reported and tabulated in police statistics, while Los Angeles usually reports the highest rate in the United States, a result that might be interpreted as a paradoxical commentary on a positive correlation between the degree of sexual permissiveness and the ensuant amount of rape.[37] How else might we explain the statistics for a city such as Stockholm, where the rape rate of 25.0 per 100,000 persons matches figures for the highest areas in the United States, although the rate for other crimes of violence – such as murder and assault – is below that for any similarly-sized American city?[38] Obviously, something besides a subculture of violence[39] is contributing to the high Swedish rape rate. An interesting research approach might be to test the responses of rapists in different countries to a variety of measures, particularly one tapping their attitudes toward women and sexuality, and then to test a random sample of the male population on the same dimensions. It could be hypothesized that the rapists will be very similar in their responses, while the general populations will differ in a way that corresponds to the level of rape in the countries in which they live.

Much more work is required on the dynamics of Rape Crisis Centers.

There is some suggestion that the Centers fall along a continuum in regard to the general attitude they convey to rape victims about men. On one end are those that reaffirm any belief that the victim has developed about the general hostility of males toward women; on the other are those that attempt to portray the rape as the act of a single individual who has behaved differently from most of his gender mates.[40] In Britain, the Centers, which almost uniformly are accorded the highest praise in the United States, have come in for strong attack by both the police and members of the medical profession. The British Academy of Forensic Science, in its submission to the national Advisory Group on the Law of Rape,[41] took the following stand:

> The Academy views with very strong disapproval the suggestion of community rape centers, staffed by well-meaning but untrained personnel, where the person could go for comfort and advice before reporting the offense to the police. Such a "third party" involvement would only delay the reporting of the offense and would tend to impede subsequent investigation. Mere conversation with a third party between the offense and the commencement of investigation could well alter or modify certain vital portions of the victim's account of the circumstances of the offense.[42]

Another issue that might be scrutinized by medical practitioners concerns the physical examination of rape victims, a matter of some controversy in the United States. In Britain, such examinations routinely are conducted by police surgeons, specific doctors who are under contract to the constabularies.[43] A pair of Canadian writers recently indicated that rape victims reported that they had received much better treatment from police surgeons in those Canadian provinces that use the British system, compared to places, such as Toronto, that employ the American process of referring rape victims to the emergency rooms of local hospitals.[44] The untangling of the diverse threads of rape crisis center work and evaluation of such work is a pressing research task. Nor has the general idea of rape counseling itself been examined carefully. It is possible that it is more healthy for a victim to deal personally with her trauma than to have the sequelae of the episode – or at least the attention directed to them – prolonged by nuances that may be conveyed by concerned counselors.

Finally, group rape, a phenomenon said to be increasing dramatically, represents another behavioral entity particularly susceptible to analysis along psychiatric dimensions.[45]

It is notable that male fiction writers who portray rape (and, with rare exceptions, it is only male writers who do so), almost invariably depict scenes of group rape. Presumably they regard such episodes as epitomizing the degradation and humiliation of women, for their material tends to be highly sympathetic to the victims. Note, for instance, Hemingway's handling of the rape of Maria by Spanish loyalist soldiers in *For Whom the Bell Tolls;* Selby's account of a group rape in *Last Exit to Brooklyn;* and Algren's story of the gang rape of a Chicago girl in *Never Come Morning.* Steinbeck's vivid account in *East of Eden* of the rape by Chinese railroad

workers of the mother of Lee, a servant in the story teller's house, is a more complicated piece: the rapists discover the woman masquerading as a man; then "the half-mad men . . . went all mad." Lee is born while his mother dies from the sexual assault. Overwhelmed by guilt, the coolies thereafter devote themselves to the child. "No child ever had such care as I. The whole camp became my mother. It is a beauty – a dreadful kind of beauty."[46]

Discussion

The feminist surge into the analysis and reform of laws and processes involved in the criminal offense of forcible rape, epitomized by Susan Brownmiller's hard-hitting (and, at times, wildly flailing) treatise, *Against Our Will,*[47] raises a number of challenging issues for lawyers and psychiatrists. In the legal realm, hoary, centuries-old doctrines suddenly were exposed as illogical, fictively-based, and "sexist". In psychiatry, attention to single exotic cases and promulgation of "victim-blaming" doctrines were found to prevail. The rape victim was said to be seductive, a liar, a blackmailer, a secret rape fantasizer. The pointing feminist finger ranged along shelves of legal and psychiatric writing on rape and located little of redeeming virtue.

The reflexive defense to the feminist allegations is to suggest that the movement in regard to rape might perhaps have been necessary to get things moving, but that it was possibly overzealous. The greater truth by far is that much of the feminist critique is strikingly on target. Few self-respecting lawyers and psychiatrists today would endorse most of the mythology that passed for the lode of scientific information regarding rape a decade or so ago.

The issues that are raised by this situation are disconcerting: How could we have been so wrong for so long? What other inanities (the word is strong but, alas, appropriate) are we now sending forth in regard to other matters that so far remain unchallenged? And, what harm are we causing, and what can we do to reduce such harm? These are disturbing matters.

In regard to the crime of rape, the feminist critique has pushed us, blessedly, well beyond a point of no return. But there are crags and jagged edges on the mountain of reform, and it has been the purpose of this paper to raise a few questions, pose a few dilemmas, and challenge a few matters that have, in their turn, now become part of entrenched wisdom.

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