Feminism and Rape Law Reform*

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There has been an abundance of papers in recent years detailing the problems of rape: the question of what to do with rapists, the problem of dealing with the rising rape rate, the issues around the treatment of rape victims, and the history of rape laws as sexist legislation designed to protect not women, but men's property and perogatives.[1-5]

While there has been a renewed interest among psychiatrists in studying rapist behavior, there has been significantly more involvement by the legal community. Virtually all of the states and the federal government have either studied the possibility of changing their statutes on rape, or have actually made some changes in the 1970s.

In many cases, the impetus for this renewed interest has come from the women's movement, or the concerns it has generated. Activists have found in rape a cause to which women of many political stripes might rally, and have found receptive legislators for their arguments that the legal system has in the past been heavily biased against female victims of this crime.

The central theme of this paper is that rape reformers, including many feminists, have too often taken the partial route of demanding concern for the woman victim, while taking positions that require the retention of sexist legislation. Indeed, the paths chosen by some reformers, even some feminists, are not only antagonistic to an ultimate goal of equality under the law, but in fact set back this goal. This paper is an exploratory effort to identify some of these issues.

The Problem

The two problems most frequently addressed by rape reformists are that not enough rapists are convicted and that the criminal justice system is openly hostile to rape victims.

On the issue of too few convictions, writers have put the blame in many places, from the high percentage of unreported incidents due to victims' fear, distaste, disgust, hopelessness, or other factors,[6] to the unknown number of women who are themselves unaware of the difference between an insistent male and a legal rape.[7] Indeed, Klemmack and Klemmack found that when given true narrative descriptions of legal rapes, as few as 21% of a sample of

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citizens actually believed a rape had been committed based on the descriptions.[8]

Other problems include archaic laws requiring corroboration of penetration and proof of residence, rules of evidence that allow the victim's entire private life to be attacked publicly, and more. Most of these laws sprang from the male belief that many or most women are prone to false accusations of rape[9] even to the point where a rape victim is sometimes called a "prosecutrix." Yet there is no evidence in the literature beyond a few ancient anecdotal examples (usually dealing with very young girls) to support the contention that women are any more likely to fabricate rape accusations than other potential victims are to fabricate reports of other crimes.[6,10,11]

Ever since Dean John Henry Wigmore entombed in his monumental opus on evidence[12] his own "almost obsessive concern with female sexual derangements,"[2] the American legal profession has taken as an article of faith the proposition that rape-fantasizing or scheming shrews falsifying police reports make up a significant amount of the reported crime.[13-14] Under the American precept that convicting an innocent man is far worse than letting a guilty one go unpunished, it is logical for a state that believes in the natural inclination of women to lie to build a system that requires a rape victim to undergo a virtual ordeal by fire to prove her veracity.[15]

These practices lead to a vicious cycle of statistics. Police refuse to investigate the rape complaint of any woman they do not believe to be a proper victim; ideally, a plausible victim is one who displays severe bruises or cuts, is fairly incoherent, has ripped clothing stained with blood, and perhaps brings a witness or two in tow.[16] After refusing to take seriously complaints by women who don't approach that standard, naive observers cite the fact that the police throw out, say, 18% of all complaints, as evidence that 18% of complaints are fabrications by women.[17]

The steps that have been suggested in order to convict rapists and to improve the treatment of victims encompass a wide range of actions, including ending corroboration requirements, increasing convictions, and setting up rape crisis centers and special police and hospital units to deal with rape.

The Impact on Women

It is the central argument here that these well-intended strategies will have little, if any, impact on the relationship between women and the criminal law. If this is where reformist energy is to be spent, the potential for meaningful change is minimal.

Unfortunately, the present authors have no magic solutions to offer that would end the problem of rape. However, some discussion of promising directions in which to proceed might be useful.

Two of the major reforms suggested in rape reform literature are the end of corroboration requirements and the end of the admissibility of the victim's previous sexual history. Of course, for some authors these goals are put forth mainly to make the task of the prosecuting witness less distasteful. It certainly should do that, and should in addition reduce the reluctance of other rape victims to come forward and report their victimizations. (There

are early indications that this has occurred with the recent reform in Michigan, to be discussed below.)[18] To the extent that these reforms are not meant to be symbolic, but rather are meant to be effective in the overall crime control problem, however, they are doomed to failure.

One commentator has recently suggested, "The criminal sanction cannot possibly deter in the case of rape because it often happens that rapes are not reported, not fully prosecuted, and even when fully reported and prosecuted frequently convictions are not obtained."[10] The modest increase in the conviction rate (or average sentence) for the total rapist community would probably have little effect on the total problem.[19]

A better justification for these reformist efforts is the symbolic value of the reforms, which can focus public attention on the issues. Legislation need not be restricted to that which either reflects a value system or is a prospective, concrete guide to desired behavior. Those who follow a Poundian social engineering approach to law could argue for laws that lead institutions and individuals toward more socially acceptable behavior.[20] The symbolic value of such changes can be powerful educational tools in demystifying sexual assaults.[21]

Unfortunately, the majority of the time and effort devoted to rape reform is squandered on proposals that are useless or that substantially damage the position of women in society. In recent American history, many of our legislative responses to social ills have been to legislate progressively draconian measures to stomp out offending behavior, so it is no surprise that similar proposals abound here. For example, the recent penal code revision in Indiana increased the penalties for all first-felony rapists by an estimated 114%.[22] Other states have acted similarly.

The current maximum penalty for simple rape is already higher in America than the penalty for premeditated murder in most of the civilized world. In 30 states, life imprisonment is possible, and maximums of 30 to 50 years are common in other states.[10] Only a prohibition by the U.S. Supreme Court has kept the death penalty out in many states. Despite the fact that the severity of the penalty is not as likely to deter as is the certainty of punishment, a great many people seem to think the solution is to increase the severity of punishment.[23]

More likely than an increase in convictions, additional severity of the law (such as castration, high minimum sentences, etc.) will probably lead to more juries refusing to convict for fear of imposing atavistic penalties on the defendant. It was the severe penalties imposed for forcible rape that led in the first place to the creation of an extraordinary protection of the defendant and its concomitant mistreatment of the complaining witness.[10] It is unreasonable to ask the state to simultaneously increase the penalty and the possibility of innocent men being convicted. This problem is exacerbated by the fact that juries in rape cases often find themselves sympathetic to the defendant's situation.[24]

Most damaging of all to the feminist movement, however, are those proposals given out to women who wish to avoid being raped "which perpetuate sex role stereotypes and generally denigrate women." For example, one self-proclaimed "feminist protest work" by a "public relations director of National Organization for Women" and her husband is entitled,

Rape: How to Avoid It, and What To Do About It If You Can't. In one short chapter, it recommends that women be always suspicious; never give out information of any sort; never go anywhere alone and preferably go in groups of four or eight; keep a large, ferocious dog; "be aware of the possibility of danger at all times" and particularly never daydream while walking in the street; wear conservative clothing; don't carry packages; never drive with less than a quarter-full tank of gasoline; never stop to help strangers, even in a serious accident; never have car windows open in any weather; and beware of all babysitting jobs. Most of this information is quoted from rape crisis centers or police departments. The authors conclude: "We call it a thoroughly understandable but unrealistic conviction on the part of many women that they are as free as any man to go anywhere and with anyone they please."[25]

Perhaps, but as Susan Brownmiller has pointed out, "to impose a special burden of caution on women is no solution at all . . . While the risk to one potential victim might be diminished (and I even doubt this, since I have known of nuns who were raped within convent walls), not only does the number of potential rapists on the loose remain constant, but the ultimate effect of rape upon the woman's mental and emotional health has been accomplished *even without the act.*"[1]

Rapists and Psychiatry

It is impossible, of course, to summarize in a few words a history of psychological and psychiatric evaluation of rape and rapist behavior. Several excellent summaries do exist elsewhere.[26-30] It is, however, possible to question both the validity and the utility of much of the research to date.

The validity argument is stated by Albin: "Theory and research about rape provides a striking example of the impact of male-dominated psychology on our view of women. In few other contexts have women been as maligned, as degraded, and yet as ignored as in discussions of rape by mental health professionals."[27] Recent feminist books on rape, while certainly polemic and biased, do suggest that studying rape as a crime of power can be a corrective to previous efforts which went looking for sexual aberrations in rapists and found them.[30,31]

Be that as it may, there are other serious problems in dealing with the psychopathology of rape. One problem with reading the professional literature is that "it is confusing . . . because the data sometimes appear inconsistent and usually lack generalizability."[29] Further, much of the work with rapists has taken place in the context of prisons and treatment facilities. Given that there is a very low conviction rate for rapists, what can this tell us about those convicted rapists who become the object of studies?[30] Is there, perhaps, a legal bias which makes it easier to convict those who exhibit obvious signs of psychological disturbance? We already know that rape is more likely to be reported and therefore prosecuted in a stranger situation than in a case where the actor is known to the victim.[32] Can we then assume that the small numbers of convicted rapists are in any way representative of the rapist population?[26]

Aside from these and other questions about validity, there is the question about the utility of psychiatric findings on rapists to the legal issues

involved. The role of the psychiatrist as a clinician concerned with treatment can be separated out from the legal concerns of prosecution. In a recent report, the Group for the Advancement of Psychiatry argued that sex psychopath laws which provide for special treatment of sex offenders, including rapists, have been a failure and warrant repealing. "A variety of psychiatric disturbances can give rise to symptomatic expressions that may violate a sex law, even though most disturbed individuals exist without experiencing such behaviors," they argue. [33] Unsaid, but underlying that presumption is that a variety of psychiatric disturbances can give rise to symptomatic expressions that may violate *any law.* Why have we decided to pay special attention only to sex crimes as warranting extraordinary treatment? Certainly there are rapists who have serious disturbances. Certainly, however, there are also assaultists who have serious problems.[34] No doubt, there are welfare cheats, burglars, thieves, and customs smugglers who also have serious psychiatric disturbances.

If the psychiatric problem is such as to relieve the individual from criminal responsibility for his act, then there are already procedures in most jurisdictions to find the individual legally insane. If, however, the disturbance is less severe, then the issue is one of determining the proper postconviction treatment program for the rapist, as it is with all other offenders.

Of course, proper postconviction treatment facilities are usually non-existent. However, "seeing that an offender actually receives the treatment he requires is a judicial and legislative responsibility, as well as a duty of the general public. It is the ambivalence of these groups, along with the pretense of treatment, which perpetuates the existing situations,"[33] the Group for the Advancement of Psychiatry argues.

The argument here is that as in other areas, the very existence of a rape statute outside of general assault law fosters the myth that there is something special about rape that requires special attention by psychiatrists. Assuming that many or most rapists are not more seriously disturbed than offenders of other laws, a proper step to demystify the crime of rape would be to prosecute it in the same manner as other crimes. If a treatment program is indicated, there is no barrier in criminal law to providing it postconviction, either in rape or in any other felony crime.

An Alternative Approach

We maintain that there is no reason to separate the state's concern for protecting women's sexual integrity from the law's concern for protecting the general physical integrity of all its citizens. This is not to say that the state cannot make such a distinction. Indeed, although many provisions of state laws would have to be changed, it is the opinion of most scholars that the adoption of the Equal Rights Amendment to the United States Constitution would not overturn the basic rape laws. It is within the legislative powers to choose to give one special part of the body, the vagina, special protection from physical attack.[35]

The basis of differentiation is the argument that the vagina can be seen as qualitatively different from male genitalia. By the same token, laws that include rectal or oral penetration in the definition of rape are either invalid

under the ERA, or must be extended to include male victims. Inasmuch as some authors recognize vaginal rape as qualitatively unique only because of a possibility of impregnation, an unlikely event statistically, an argument could actually be made against any sex-based law even under an ERA.[10]

At any rate, there are two clear routes out of this dilemma. First, as in Michigan, a neuter sexual assault law can be adopted[36] that attempts to cover sexual assaults on either gender. By placing sexual assaults in a degree-matrix, based on "the lethality and amount of coercion used, the infliction of personal injury, and the age and incapacitation of the victim,"[18] the Michigan law attempts to "above all distinguish between sexual union and coercive genital contact."[18]

In constructing a neuter sexual assault law, the Michigan code (which is often described as a "model" rape law) also eliminated corroboration and the admissibility of past sexual behavior, and shifts the burden of proof regarding the question of the victim's possible "consent" to the defense. Clearly an improvement over the previous law, the Michigan code attempts to resolve the two traditional rape reform issues: increased convictions and better treatment of victims.

The second approach, the proposal endorsed here, is to eliminate sexual assault laws altogether, and to subsume the content of these laws into already existing law.[5,37,38] Under this second proposal, the sexual nature of the assault might not even be mentioned, except as it is relevant to a description of the offense or to document aggravating or mitigating characteristics in sentencing.

If rape law were simply brought over bag and baggage into assault law, we would have succeeded only in changing some page numbers. It is essential to this proposition that the assault law be expanded only far enough to bring under its fold assaults that have a sexual basis.

While much of this proposed law's force is symbolic, it retains powerful practical benefits as well. One of the most immediate effects of this change is to make irrelevant some of the major current battles over rape laws. Corroboration, for example, is almost never required under assault law, although it is certainly very helpful to the prosecution's case in a "my word against yours" situation. Similarly, previous sexual activity by the victim is irrelevant, although there may be reason to allow the introduction of some evidence under narrow and carefully controlled circumstances.

The symbolic side of this reform deals with the widespread belief that women "ask for it" either individually or as a group. Beginning with the works of Deutsch,[39] Freud,[40] and Menninger,[41] and continuing with modern criminologists such as Amir,[32] writers have argued that some sort of rape wish is present in virtually all females. In discussing Amir's pioneering work, Weis and Borges[42] noted "the following two assumptions to be guiding principles in Amir's work: first, the possible universality of the female's wish to be raped; secondly, only certain females with pathological characteristics are likely to become victims . . . the woman who without reservations or qualifications simply does not want to be raped is not mentioned in this book."

Curiously, we do not censure the robbery victim for walking around with $50 in his pocket, or the burglary victim for keeping all of those nice things in his house, or the car theft victim for driving around town showing off his

flashy new machine, just asking for someone to covet it. When the mugging victim is questioned, it is unlikely that he'll be asked, "How often in the past have you given money voluntarily to drug addicts?" Many questions that seem legitimate to a society imbued with myths about rape sound silly when asked in the context of assault.

By focusing the law on the behavior of the defendant, attention is diverted from issues such as the consent of the victim, or the extent of the victim's resistance. The operative factor here is the use or the threat of force: *Did the defendant* use or threaten force, not *did the victim* resist to the utmost, is the enquiry. Assault law can also differentiate penalties on the basis of the vulnerability of the victim.

Of course, all of these aims might be achieved while keeping rape laws separate from assault law (as the Michigan code may have done). But separate rape laws (even those called "sexual assault") should be eliminated. The state, through its assault laws, proclaims the right of its citizens to the physical integrity of their bodies. A sexual assault, like any other assault, is a violation of this physical integrity. Holding, as most states do, that one set of laws applies when a woman is assaulted in the leg, the back, or the head, but a totally different set of laws applies when she is assaulted in the vagina, is to perpetuate most of the sexist reasons for the development of rape law in the first place: the "property interests" of the male father/husband/state in chaste and faithful females. Creating a technically neuter sexual assault law which would infrequently be used on behalf of men would not disturb the essentially sexist nature of all rape law.

Rather than focusing on the sexual nature of the crime, as do current rape and sexual assault laws, our proposal mandates a focus on the assault itself. In that focus, asking for the previous sexual history of a victim of rape is not unlike asking the victim of a stabbing about any history of self-mutilation. Asking a stabbing victim whether he "enjoyed it" seems foolish. The fact that many people may unconsciously want to be punished is not an accepted defense to the crime of assault. Nor is the behavior of the victim (getting rowdy or insultive) normally a defense to assault charges. Most particularly, the appearance of the victim (black leather jacket, studded belt, slicked hair, practiced leer) is never a defense to assault charges (*e.g.*, "he was asking for trouble").

There are other practical benefits. Under the assault laws, a married woman may charge her husband, while forcible rape is legal within the bounds of marriage,[43] usually even when the couple is legally separated or has filed for divorce.[44] For example, when Indiana recently rewrote its entire Penal Code, it left "marriage" as a total defense to forcible rape charges. In each state, however, a woman may charge her husband with assault, although experience has shown that obtaining a conviction in such a case is extremely difficult.[45,46] Yet, both as a protection in the most aggravated cases and also as an educational symbolic tool to assert the equal rights of wives, this aspect of the reform is important.

Perhaps the most important of all, however, is that rape is an emotionally charged word. Kalven and Zeisel found that it was common in forcible rape cases for juries to use their own ideas about the blameworthiness of the victim, looking carefully at the previous sexual history to see if she can be

blamed in any way. In their often quoted study, they found that in simple rape cases where the defendant was not a total stranger to the victim (*e.g.*, picked her up in a bar, but rather than taking her home raped her in a local park) the jury voted to acquit 60% of the time under circumstances where the trial judge reported that he would have convicted if it were a bench trial.[47] In an attempt to "eliminate some of the traditional social reactions which have placed such a strain on our legal system,"[48] the name has been changed in several states: to sexual battery in Florida and sexual assault in Michigan, for example.

Under the assault law, enquiry focuses on the force used by the defendant, and on the harm to the victim and to society from that use of force.[5] The proposed reform is aimed not just at sexual assault, but at systematic social and cultural oppression of women. As a strategy, it recognizes that "people's view of rape [is] something more than simply an act of sex; their perceptions of rape tend to be intimately tied to their views of women."[24]

Rape laws support sexual differentiation of women from men and thereby support the cultural value of women as sexually more vulnerable and in need of special protection by the state. Instead, "rapes" should be treated as physical assaults. The sexual aspects of the assault are relevant only to the amount of injury sustained by the victim.

Certain technical issues would need to be clarified before this proposal could be adopted. For example, graded or stepped offenses would need to be designated, perhaps taking account of the special mental anguish which many claim accompanies sexual assault. The use of threatened force rather than actual force would also have to be taken into account. One possible solution would be to develop a stepped or graded system as in most assault laws, but to upgrade the offense one step if penetration (oral, rectal, or vaginal) can be proved.

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