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Rape: Law Reform

Rape Law: A Feminist Legal Analysis

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Abstract. Rape law is analyzed from the feminist perspective. Feminism can be credited with making the first serious efforts to empower women in all aspects of life, including the right to be free from sexual assault. Part 1 describes feminist theory concerning rape, Part 2 discusses some of the misogynistic images that have influenced rape law while Part 3 surveys some of the changes that have occurred in the United States, England and Israel concerning rape law. Part 4 analyzes the effects of these changes.

1 Feminist Theory Concerning Rape

In their book, *Rape: the price of coercive sexuality* [1] Lorenne Clark and Debra Lewis suggest that rape has been seen throughout history as an offence by one man against another man's property. Specifically, a woman's status has been seen as the private sexual and reproductive property of one man [2] Thus, in order to end rape, female sexuality cannot be seen as a commodity to fight over and acquire, but rather women must claim the right to sexual and reproductive autonomy. In addition, only when society accepts the reality of the principle that women are socially, legally, economically and sexually and equals of men will rape cease to be a problem [3].

Susan Brownmiller, in her seminal work *Against our will: men, women and rape* [4] traces the history of rape and her thesis is that rape 'is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear' [5]. She, like Clark and Lewis, emphasizes the need to attack all forms of sexism in order to eradicate rape. She describes the activities of the feminist movement: consciousness-raising groups [6], self-defence classes [7], rape crisis centres and rape legislation study groups, all of which encouraged women to speak about what had been unspoken, and thus another area of women's oppression was uncovered [8].

These feminist theorists recognize that rape law reform is only one of many possible changes that must be made in order to convict rapists and minimize the trauma of rape victims. Nothing short of fundamental shifts in attitudes towards women and the attainment of sexual equality will accomplish this goal. The role of the law and the legal system is a limited but important one. In this context are examined some of the legal reforms that have occurred over the last fifteen years, largely inspired by the women's movement.

2 Misogynistic Images which have Influenced Rape Law

There are several misogynistic images which have influenced legal theory and practice in the United States, England and Israel. First, there is the image of woman as liar. Wigmore suggests that no man should be convicted to rape unless the complainant first undergoes a psychiatric examination because 'Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious.... One form taken by these complexes is that of contriving false charges of sexual offenses by men.... The real victim, however, too often in such cases is the innocent man' [9]. In addition, men's image of woman as either 'madonna' or 'whore' has led to the belief that 'good girls' were asking for it [10]. Only recently, 'many jurisdictions have now determined, by statute or by court decision, that evidence of a complainant's prior sexual conduct is not admissible by the defendant in order to prove consent by the complaining witness' [11]. Finally, the image of woman as temptress has engendered the theory of 'victim precipitated forcible rape' [12] which blames the victim. Feminism has attempted to expose the harm and injustice which result from these images by using public education, consciousness-raising and rape law reform.

3 Rape Law Reform in the United States, England and Israel

In the United States there have been two basic kinds of reform: evidentiary and definitional. With respect to rules of evidence, there are several points. First, many states until recently required corroboration in rape cases. Because of the difficulty in obtaining corroboration of each element of the crime (identification, penetration and lack of consent), the stringent corroboration rules made it nearly impossible to convict a rapist. In addition, the reason behind these rules seemed to be an excessive fear of woman as liar. Feminists lobbied against these rules and most states either abandoned all corroboration requirements or modified them [13].

A separate issue is whether and to what extent the elimination of the corroboration rules has effected rape trials. The jury must still be convinced of the defendant's guilt beyond a reasonable doubt and it could be argued that corroboration is necessary, even without a strict rule, in order to convince the jury. However, any rule or belief that seems to equate women, as a group, with liars should be strictly scrutinized.

The second kind of evidentiary reform has to do with cautionary instructions. These instructions, which continue to apply at the discretion of the judge in a few states [1] advise the jury to take special care in evaluating a rape victim's testimony. They are based on the words of Lord Chief Justice Hale, who said in the seventeenth century: 'Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho ever so innocent' [15]. The California standard set of jury instructions for rape until 1973 repeated Hale's statement and went on: 'Therefore the law requires that you examine the testimony of the female person named in the information with caution' [16]. The bottom line here is the sexist assumption that female persons tend to lie [17]. Some jurisdictions have adopted modern versions of these instructions, namely psychiatric examinations and lie detector tests for rape victims. For example, the National Institute for Law Enforcement and Criminal Justice Report 1977 found that 69 per cent of prosecutors sometimes used polygraphs in sexual assault cases [18]. This frequent use of polygraphs is visible evidence that the crimi-

nal justice system approaches rape as a unique crime [19].

The third type of evidentiary reform concerns the victim's prior sexual history. Many states have passed laws to control the admissibility of this evidence (rape victim shield laws), but the victim's past still indirectly affects two issues, consent and credibility. Is there logic behind the proposition that a victim's prior sexual history helps to establish whether she did or did not consent to sexual intercourse? Furthermore, does a tendency to consent to sexual intercourse, established by prior acts, indicate a likelihood that a woman will consent on any other occasion? The answer to these questions is: No, if we accept the premise that women are entitled to sexual autonomy [20]. Some courts also claim that past sexual history helps establish a rape victim's credibility. The underlying belief here is that unchaste women are more prone to lie about everything [21]. This sexist belief has no empirical validity [22].

Rape victim shield laws, which vary from state to state, and also Federal Rule of Evidence 412 [23] restrict the admissibility of evidence concerning past sexual history. These statutes have been criticized as violating the defendants' rights of cross-examination and confrontation of witness, which are guaranteed by the Sixth Amendment of the United States Constitution [21]. In addition, these statutes have been criticized for being poorly drafted [25]. Finally, critics claim that the statistics do not support the argument that admitting sexual history evidence leads to acquittals [26]. Is this change in the rules of evidence merely symbolic? No, because these rape victim shield statutes constitute a crucial step in switching the court's attention from the rape victim to the rapist [27].

The other major type of reform is the redefining of rape as assault. This emphasizes the violent aspect rather than the sexual aspect of the crime. The earliest and most radical reform of this type occurred in Michigan in 1974. This law defined 'criminal sexual conduct' in four degrees, none of which use the word 'rape' [28]. Other states have redefined rape so that the offender and the victim may be of either sex and that sexual penetration can be accomplished vaginally, orally or anally with any natural or artificial object [29].

There are certain advantages and disadvantages to the assault approach. In general, the degree structure, that is, criminal sexual conduct in the first degree, second degree, etc, provides comprehensive definitions of assaultive behaviours and this eliminates the overlap and omission seen in multiple statutes. In addition, it reflects the continuum of violence represented by sexual assault crimes, whether these involve penetration or molestation, by describing these acts as a sequence of violent coercive behaviours [30]. The assault approach also complements the reforms in evidentiary rules by eliminating any remaining corroboration rules and eliminating the admissibility of the victim's past sexual history.

However, there are disadvantages to the 'rape as assault' approach. It may have the effect of trivializing rape by emphasizing the physical and not the psychological harm. The potentially devastating psychological harm of rape consists of the fear of death and feelings of degradation and humiliation during and after the rape [31]. Indeed, it would be difficult to argue that a rape as assault statute could or should consider how much pscyhological harm was caused to the victim [32]. Futhermore, feminists raise the question: Should rape be defined as sexual assault or plain assault? Viewing rape as sexual assault stresses the violent character without denying the sexual

overtones. The choice of the object of aggression is not accidental, and the rapist is inflicting a certain kind of damage. If, on the other hand, rape is viewed as plain assault the target of aggression is not significant. According to this approach there is no reason to separate the state's concern for protecting women's sexual integrity from the state's concern for protecting citizen's general physical integrity [33]. The rape as plain assault approach would also help to switch the emphasis from the actions of the victim to the actions of the offender [34]. Those statutes in the United States that have adopted the assault approach use the 'rape as sexual assault' formulation and it does not seem likely that rape will be considered like any other assault.

There have been some significant developments in the rape law of England. The Sexual Offences Act of 1976 defines rape in section one:

'A man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.' This section was thought to reproduce the decision of the House of Lords in *DPP v Morgan* [35] that the man must not only intend to have intercourse but must also intend to have it without the woman's consent or be indifferent whether or not she consents. The majority also decided that a man cannot intend to have intercourse without the woman's consent if he believed she was consenting even if he had no reasonable grounds for his belief. An interesting question arises: Is there a duty of care to ascertain the facts relevant to his avoiding doing a prohibited act? [36]. Certain feminist writers support the imposition of such an objective duty, as all it means is that he has to ask. However, this would turn rape into a crime of negligence. The Criminal Law Revision Committee in its Fifteenth Report (Sexual Offences) 1984 [37] in section 2.40 rejects the imposition of such an objective duty.

One area of English law that remains immune to reform is that concerning marital rape. A husband cannot be prosecuted for raping his wife. Sir Matthew Hale said, in the seventeenth century 'A husband cannot be guilty of rape upon his wife for by their mutual martrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract' [38]. The Criminal Law Revision Committee in 1984 voted by a narrow majority to maintain this rule. The Committee found it hard to contemplate an offence of rape which includes intercourse between husband and wife and did not consider it so dreadful [39]. 'Should he go further and force her to have sexual intercourse without her consent, this may evidence a failure of the marital relationship. But it is far from being the 'unique' and 'grave' offence described earlier . . . the gravamen of the husband's conduct is the injury he has caused not the sexual intercourse he has forced' [40]. This statement fails to reflect the importance of protecting the personal integrity of a wife or of treating her on an equal footing with other women. It possibly encourages or perpetuates the view that the wife should be dependent upon and submissive to her husband [41].

The English rules of evidence reflect partial reform. Concerning corroboration, in all sexual cases the jury must be warned in plain language that it is dangerous to convict on the testimony of the complainant alone [42]. Concerning the admissibility of the woman's prior sexual history, section 2(1) of the Sexual Offences Act 1976 states that 'except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant

at the trial, about any sexual experience of a complainant with a person other than that defendant'. This is a limited rape victim shield statute in that the woman's past sexual history is admissible, but only with leave of the judge.

Israeli rape law has also undergone limited reform. In 1982 the corroboration rule was repealed. Section 54 (A) of the Evidence Ordinance now states that if the court convicts a defendant on the basis of the complainant's testimony alone, the judges must list their reasons for doing so in the decision. On the one hand, this amendment is a welcome change from the previous strict rule of corroboration. On the other hand, there remains unjustified special treatment afforded to the testimony of a rape victim, in that the court must explain its reasons for relying on the complainant's testimony only.

Israeli courts have taken a progressive stand on the issue of marital rape, and have indeed found no marital rape exclusion, at least for Jewish Israelis. There is a curious situation here because the Israeli definition of rape includes the words 'unlawful intercourse', and 'unlawful' has been interpreted in the case law [3] as being dependent on the law of personal status of the couple, which in Israel is religious law. Jewish law prohibits coercion in sexual relations, thus rape in Jewish law is an offence even between married people. What if the couple were Christian or Moslem Israelis, or intermarried? There has been criticism of this development in Israeli rape law, as it might discriminate between defendants on the basis of religion [44].

This and other problems would be solved if the Draft Bill presented to the Knesset in 1980 by Shulamit Aloni were adopted [45]. Section 346 of this proposal does not include the words 'unlawful' and thus there would be no defence to any husband in Israel that the intercourse was lawful solely because the complainant was his wife. There are other salient features of this proposal. First, the section is renamed 'Sex Crimes', a welcome change from the current title 'Crimes Against Morality'. Second, the definition of rape would be expanded to include anal penetration. Third, the definition is as gender-neutral as possible, given the limitations of the Hebrew language, in which there are no truly gender-neutral pronouns. Fourth, there is a rape victim shield provision that states: 'The court shall not allow questioning concerning the past sexual history of the victim unless the court deems it necessary, for reasons it shall list, to prevent an unfair trial for the defendant'. Unfortunately, this proposal has not reached the First Reading in the Knesset, as the then Minister of Justice, Mr Shmuel Tamir, withdrew it [46].

4 The Results of Rape Law Reform

The law reforms described above represent many societal changes, not least the strength and power of the women's movement. However, the criticism that has been levied against particular aspects of the reforms and against rape law reform in general cannot be ignored. Indeed, studies have been done to test empirically the effectiveness of such reforms in increasing conviction rates for rape. These studies have shown that rape law reform increases conviction rates slightly, at best [47] or even decreases the rates, at worst [48]. Thus, rape law reform has been criticized as being no more than a symbol [49].

A more positive statement concerning rape law reform is that if the law is one source of oppression, then the law itself must be changed [50]. Rape law reform is a neces-

sary condition to secure the conviction of rapists and minimize the trauma of rape victims, but it is far from adequate [51]. Other strategies of cricital importance include victim assistance programmes, distribution of rape evidence collection kits, injunctions preventing the use of polygraphs with rape victims, hot lines, speak-outs and demonstrations [52].

Even if we label rape law reform as a symbol, it is a powerful one, as it symbolizes and reinforces emerging conceptions concerning the status of women and the right of self-determination in sexual conduct [53]. The women's movement over the last fifteen years has taken upon itself the challenge of rape law reform in order to secure the conviction of rapists, to minimize the trauma of rape victims and ultimately to eradicate rape. The goals have certainly not been reached, but the campaign has just begun.

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