Desexualizing Rape: a Dissenting View on the Proposed Rape Amendments

Un point de vue opposé aux modifications proposées à la loi sur le viol.

There's something worse about being raped than just being beaten. It's the final humiliation, the final showing that you're worthless and that you're there to be used by whoever wants you. In general, I think rape is a political act on the part of the man.
— A rape victim speaking out in Diana Russell's *The Politics of Rape*

Historically rape has been a separate criminal offence, qualitatively different and treated more seriously than other forms of assault. Women have not received fair treatment or adequate protection under the prevailing legislation. As a result, there has been active lobbying to amend the rape laws.

The present federal government is about to introduce legislation which will abolish rape as a sexual offence with the stroke of a pen. Although there has been considerable public attention focused on these amendments, there has been virtually no opposition. While no one would question the sincere motivation of those who proposed and pressured for these reforms, it is important to take a second look at the implications.

There are a number of questions that require answers. What are we giving up? Will the proposed changes be substantive? Will they encourage more women to come forward? Will they secure more convictions and act as an effective deterrent? The central question is — can we in fact desexualize rape? Can we or should we?

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The Legal Situation Today

'A male person commits rape when he has sexual intercourse with a female person who is not his wife without her consent,' according to the *Criminal Code*. If the woman consents to intercourse, but her consent is given because of threats or fear of bodily harm, this is still rape, according to the Code definition. The maximum penalty for rape is life; for attempted rape, 10 years.

It must be clear to all but the most sexist observers that the present rape laws are not working. The FBI estimates that only one in 10 rapes is reported. Of those that are reported, fewer still go on for trial. Crown attorneys openly admit that the conviction rate in rape trials is much lower than other criminal offences. While the general conviction rate is 86 per cent, Lorenne Clark and Debra Lewis, the Canadian authors of *Rape: The Price of Coercive Sexuality*, concluded that the Canadian conviction rate for rape is 55 per cent. Their research suggests that the Ontario figure is even lower — a shocking 32 per cent. And finally, despite recent amendments dealing with corroboration and the prior sexual history of the victim, women complainants are still subjected to vicious cross-examination at trial that attempts to prove them unchaste liars, unworthy of protection from the criminal justice system.

Recategorizing Rape

In an attempt to encourage more rape victims to report and to diminish the moral stigma attached to the complainant, proponents for change have made a number of demands. 'It is our belief that rape must be removed from the category of sexual offences and reclassified as an assault,' state Clark and Lewis, two of the most articulate spokeswomen for rape amendment.

The arguments behind the proposed reclassification are quite compelling. Historically rape has been viewed as the worst thing that could happen to women. Virginity and chastity were viewed as women's primary value. It was this male perspective that created a deep-rooted belief that rape was a disgrace to its victim.

Susan Brownmiller, the American author of *Against Our Will: Men, Women and Rape*, urges that a modern perception of rape should view the crime strictly as an injury to the victim's bodily integrity, and not as an injury to the purity or chastity of man's estate. 'When rape is placed where it truly belongs, within the context of modern criminal violence, and not within the purview of ancient masculine codes, the crime retains its unique dimensions, falling midway between robbery and assault.'

Paul Weiler, a leading Canadian legal theorist now teaching at Harvard Law School, agrees with this approach. 'We need a radical form of deescalation by abolishing the crime of rape and treating it in accordance with the range of assault offences,' he says. 'Look at the unfairness of the rape process to the victim. If you want to get away from sexist connotations, desexualize the elements of the transaction, treat it as assault.' He concludes: 'We must desexualize rape in the eyes of the criminal law.'

Clark and Lewis assert that women experience rape as assault. 'To her, the fact that this assault was directed against her sexual organs is — at least at the time — irrelevant,' they state. 'Rape is a violation of every woman's right to sexual autonomy, and wrong because it is an unjustified interference with her physical person, no different in kind from any other form of physical interference.'

By abolishing rape and treating it as assault, Clark and Lewis believe that none of the special rules which currently attach to the offence of rape would continue to be applied. These special rules, they state, are 'rooted in the false assumption that rape is not an assaultive crime but a sexual act done with the wrong woman.'

In fact, Clark and Lewis go so far as to conclude that it is not until women begin to demand that rape be regarded and treated as assault that the problem as we know it can be eliminated. 'So long as we persist in the view that rape is wrong because it is an attack on female sexuality, we can do nothing to effect fundamental change.'

Lowering Rape Penalties

The second focus for reform, quite apart from reclassification, is the drive to decrease penalties. Susan Brownmiller, one of the first to call for this change, stated: 'We must normalize the penalties for such an offence and bring them into line more realistically with the penalties for aggravated assault, the crime to which a sexual assault is most closely related.' She argued that penalties should depend on the severity of the objective physical injury sustained by the victim, and the manner in which the assault was accomplished. For instance, if weapons were used, or if there were two or more rapists, the penalty should be more severe. She favoured a sentence range from six months to 20 years, but where a victim suffered permanent damage, she argued for a stiffer penalty.

In Canada, Clark and Lewis asserted that the severity of punishment should depend on the degree of actual harm inflicted on the victim. Other factors affecting sentence should be the potential risk to the victim created by actual violence used or threatened and potential risk to other members of society.

Although Clark and Lewis urge women to view rape as just another assault, they concede that during a temporary transitional phase, many women will continue to view themselves as having a value based primarily on their sexuality. For these women, who

identify strongly with traditional concepts of women's status in our society, they advocate more severe punishment. 'Rape must be punished according to the degree of damage felt to have been done by the victim,' they state.

In addition to the need to decrease penalties to diminish the stigma associated with the offence, there is also an argument that lower penalties will facilitate more convictions. Given that rape now has a maximum sentence of life, many proponents for reform have assessed that judges and juries are reluctant to convict except in the most outrageous cases. Lesser penalties, it is assumed, will contribute to higher rates of conviction.

The Proposed Rape Amendments

Three successive governments have responded to this pressure for rape reform.

> 'I am very concerned that many incidents of rape go unreported. Too often the attacker benefits from the victim's fear of the stigma associated with rape as a sexual offence, her fear of publicity and her concern that she as much as her attacker will be "on trial" in court.'

On May 1, 1978, the former Liberal Justice Minister Ron Basford made this statement as an explanation for the introduction of Bill C-52. It was Basford's contention that by eliminating 'rape' from the Criminal Code and replacing it with 'indecent assault' or where serious physical harm results, with 'aggravated indecent assault', the stigma and trauma experienced by rape victims would be eliminated thereby encouraging more victims to report incidents involving rape to the police. The penalty for indecent assault would have been increased from a maximum of five years imprisonment to 14 years, and for aggravated indecent assault, the maximum would have been life imprisonment. Bill C-52 was never passed.

In October, 1979, the Progressive Conservative Justice Minister Jacques Flynn issued a public statement that he and his government were in agreement with the basic provisions of Bill C-52 with the addition of a new amendment which would eliminate spousal immunity. Husbands and wives would also have access to the proposed rape amendments. With the defeat of the PC Government on February 18, 1980, this proposal was never introduced in the House of Commons.

The newly elected Liberal government is planning a second attempt to reform the rape law. In the recent Throne Speech, reference was made to the government's concern with violence against women. Newspapers across the country reported that the government, as in Bill C-52, intended to abolish the offence of rape, and in its place introduce a series of sexual assault offences. As well, the Liberal government vowed to acquiesce to the PC suggestion that the spousal immunity for rape should be removed.

However, the status of the most recently proposed amendments has taken a new turn. The offence of rape will still be eliminated. But informed sources in Ottawa advise that instead of the two-tiered 'indecent assault' and 'aggravated indecent assault' offences, a new three-tier categorization will be introduced. The most serious forms of rape will fall within the new offence of 'sexual assault with intent to maim or endanger life.' The penalty for this most serious charge will be life. The second tier will be called 'sexual assault causing bodily harm or armed with a weapon,' with a maximum 14-year penalty. The lowest tier, 'sexual assault', will encompass all other rapes and forms of indecent assault. The maximum penalty for this will be five years. Most rapes will be prosecuted under the two lower tiers. It is expected that these amendments will be introduced in the early stages of the life of this new Parliament.

The Dissent

Having examined the rationale behind the push for reform, we must now turn to the weaknesses and problems inherent in this approach.

The Improbability of Desexualizing Rape

The trauma of rape comes not so much from the physical unpleasantness of the experience as from the fear or terror that often accompanies rape. Rape victims are humiliated and outraged at being used as a mere receptacle. Rape transforms what is for many women an intimate act into a completely impersonal one, used for the expression of hate, conquest or contempt.

Rape victims perceive rape as an act which is qualitatively different from other forms of physical assault. The fear that it engenders can best be likened to the male fear of castration. As one rape victim said, 'For me, the trauma was the total humiliation of not being treated as a person. There's something worse about being raped than just being beaten.'

Freada Klein, one of the leaders of the American anti-rape movement, firmly believes that it would be a mistake to eliminate the word 'rape' from the criminal law. 'I only want rape to disappear if the crime itself goes away. Since our culture generates rape, which is a peculiar overlap of violence and sex, I don't want to see the results of that brushed under the rug.' Klein asserts that rape is fundamentally different from assault. 'The way women are defined in our culture, primarily in terms of their sexuality, gives rape a distinct meaning. It's not the same as assault.'

Klein backs up this analysis by pointing out that in a completely non-sexist society, 'rape would be unthinkable.' She maintains that in such a world men would act out their aggres-

sions against women through other forms of assault. Sexual penetration would be inconceivable as a means of expressing hostility. Klein notes that in our sexist society, women do not rape men. They use other forms of violence. 'This fact alone underlines that rape is the product of striking inequalities between the sexes. To prosecute rape as assault is to ignore that fact,' she says.

The argument for abolishing the concept of rape is that the term 'rape' perpetuates the notion that the most important thing about a woman is that she's a sexual receptacle. But Klein counters that that is reality. 'That's how women are viewed and rape is a crime that comes out of that view of women.' To eliminate the word will not eliminate rape itself.

Focus on the Victim

The initial amendments, in Bill C-52, provided for more severe penalties if the victim could demonstrate that she was severely physically or psychologically damaged by the attack. Alan Gold, a prominent Toronto criminal lawyer, is quick to point out that this reformulation is potentially dangerous to the victim. 'From my perspective, as defence counsel, it would be far worse for a woman victim. It is an invitation to me to cross-examine her on all aspects of her psychological make-up. Once you make psychological damage an issue, you open it up to questions on her psychological health from day one.' Gold concludes that these amendments would allow for an invasion of privacy much more acute than anything under existing law. 'As defence counsel, I'm delighted with the amendments. But to say the amendments will improve the situation for the victim is absolute balderdash.'

It is likely that the first set of amendments — setting out two tiers of rape as 'indecent assault' and 'aggravated indecent assault' — created the more serious tier to protect unliberated women who viewed rape as the ultimate degradation. The theory was that liberated women would view rape just like assault, and that lesser penalties were appropriate. Diana Russell, in *The Politics of Rape*, takes the opposite position. It is her contention that the more liberated women become, the more humiliating and traumatic it is for them if men subject them to the supremely sexist act of rape. More liberated women are likely to resent the political nature of the act and experience it as a new kind of violation, a violation of their will as well as their bodies, rather than of their virtues.' Klein agrees with Russell, and points out that this puts the focus on the reactions of the victim, not the nature of the act. 'The thinking is if you were a liberated woman, this behaviour wouldn't bother you. They're still talking about victims, not offenders or causes.'

Ultimately, as we have seen, Bill C-52 was not passed, and the two-tier system with its focus on the psychological damage of the victim, was not reintroduced. Instead, it appears that the new set of amendments about to be introduced will create a three-tier system of sexual assault, with the focus on the elements of the actual crime, rather than the victim. Although this is a step in the right direction, serious weaknesses remain.

The Issue of Consent

One of the major failings of all these amendments concerns consent. Historically the difficulty of proving lack of consent was the main stumbling block in rape trials. There has always been tremendous skepticism about a woman making sexual complaints unless she has been brutally beaten by a perfect stranger. These amendments, unfortunately, in no way alter the requirement for lack of consent. Just as with rape, for the prosecution to prove that an indecent or sexual assault took place, they must convince the court that the woman unequivocally did not consent. Without signs of force, the defence counsel will still try to establish consent by cross-examining the woman, often with humiliating, traumatizing results. The new amendments are cosmetic on the issue of consent; they do not alter the law substantively.

The Significance of Lowered Penalties

The present maximum penalty for rape is life imprisonment. John Takach, Director of Crown Attorneys for the Province of Ontario, states that in practice the range of sentence in Canada for convicted rapists is four to six years. The proposed amendments will lower the maximum penalty, in some cases, to five years. 'This will have the effect of depreciating the seriousness of the offence,' says Takach. 'If rape, reclassified as indecent assault, can get you anywhere from $50 to five years, where is the deterrent? Where is the stigma of being convicted?'

Alan Gold takes a different stance. 'We should not have penalties that are out of line with what the courts do in practice. If the public perceives that the crime of rape gets you life, but in fact the rapist gets off with four years, there is a credibility gap.'

While Gold's point appears reasonable, it is absurd to view the crime of rape in isolation from other crimes. Unless the penalty structure of the entire Criminal Code is revamped, the lesser penalties for rape will constitute an anomaly. For example, as it now stands, the maximum penalty for sending a letter or making a telephone call threatening to cause injury is 10 years; committing mischief in relation to pub-

lic property could net you 14 years, as could selling defective stores to Her Majesty; and finally, sending a telegram in a false name with intent to defraud has a five-year maximum penalty.

Will the Amendments Produce More Convictions?

The original intent of the proposed amendments was to improve the conviction rate. Takach scoffs at this notion: 'There certainly won't be more convictions. We'll still run into the same issues, the same problems of proof. The amendments do not constitute a step forward; in fact, they are a step backward.' Takach maintains that by changing rape to assault and restructuring the offence, an enormous area is created for defence counsel to explore. 'Increased litigation while lawyers and judges battle out legal problems, arguments, and statutory interpretation, will not improve the situation for rape victims, in my opinion,' he says. 'You shouldn't change legislation unless there's something substantial to be accomplished.'

Takach also believes that the trial process will continue to be traumatic for the victim. 'You still have a specific act to complain about, and you're still going to have to testify about it. Rape is a terrible thing because it's a horrible crime. But it's not terrible in the sense that women should be ashamed about it.' He notes that the difficulty is to separate the two. 'It's a terrible crime that should be vigorously prosecuted and for which appropriate sentences should be handed out. But society must recognize that it's their attitudes that are the problem. What we need is not reclassification or lowered penalties, but a change in attitude that is reflected in the courts.'

Takach openly declares that Crown attorneys welcome any attempts at legislative reform to improve the rape law. 'And if I'm wrong and these amendments do improve the situation, hallelujah! But I just don't see it.'

The Assault Option is Already Available

Under our present system of criminal law, a rapist can already be convicted of the lesser and included offences of indecent assault and assault. This option is rarely used. Crown attorneys only consider assault charges when certain elements of the more serious offence of rape are missing. The victims themselves, when they decide to bring their cases forward to the courts, generally reject the assault option. Freada Klein's experience in counselling rape victims has been that they want a rape conviction. 'They are very angry when the prosecutor plea-bargains down from rape to a lesser offence. Rape was the crime, they maintain, not assault.'

Despite the reluctance to use the assault avenue, it remains a viable option. There is no need to abolish rape entirely, since women who wish to have their rapes viewed as assault can choose that route now. Surely it is more logical to pressure Crown attorneys to prosecute under the existing assault laws where this is requested. It is not necessary to eliminate the crime of rape, especially since there will always be women who will define their attack as rape.

Other Hidden Problems

There is concern that, by reclassifying rape to assault, such statistics as we have will be lost. Even Clark and Lewis admit that the lack of statistics on rape is a grave problem. 'It is our belief that many rapes are statistically and socially invisible, precisely because they can so easily be classified as something else, (i.e., murder, indecent assault, assault causing bodily harm, common assault, etc.)' Once rape is abolished entirely, this problem will be compounded.

The latest round of amendments, while having eliminated the problem of 'psychological harm', have inadvertently created a new dilemma. The third tier, 'sexual assault with intent to maim or endanger life', by its wording, will allow the use of a new defence. Presently, drunkenness is no defence to rape. However, in the proposal, drunkenness will automatically become a defence to these most serious forms of sexual assault, through the legal concept known as 'specific intent'. Takach, picking up on this, noted that defence counsel will love this, as it creates another dimension for their arguments. 'Have you ever heard of a rapist who wasn't drunk?' he adds.

Conclusion

The proposed rape amendments are cosmetic, not substantive. They are riddled with discrepancies and irrational assumptions. Reclassification and lowered penalties do not alter the fundamental problems in the rape law. Rape victims are not given greater protection. Lowered penalties speak loud and clear to society that the crime is no longer as serious as it once was. There is no evidence to suggest we will have a higher rate of conviction. The only breakthrough is the inclusion of marital rape.

If these amendments become law, we will never have the opportunity to re-introduce the concept of rape. The danger is that these cosmetic reforms will be viewed as complete. It is unlikely that the issue will be subjected to this level of scrutiny again in this century. Before we make such a major commitment, we must reconsider. We must re-examine whether these amendments constitute a step forward or a step backward.