NO REAL HARM DONE: SEXUAL ASSAULT AND THE CRIMINAL JUSTICE SYSTEM

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. . . unlike the victim, everyone, including the accused, is entitled to remain present throughout the hearing . . .

. . . unlike the victim, the accused along with the rest of the crowd is entitled to hear the forensic medical evidence, the description of genitalia, the markings on nipples, the colour and size of bruises on buttocks, the presence or absence of semen on legs or in the mouth, the finding of the internal gynaecological examination . . .

. . . unlike the victim, they can hear about the presence or the absence of loosened pubic hair, of flakes of skin under fingernails, of sexually transmitted diseases . . .

. . . unlike the victim, they are entitled to hear the doctor's impression of the victim's state of mind . . .

. . . unlike the victim, the accused hears the doctor's findings . . .

. . . unlike the accused, the victim is never told. (Kate Gilmore, Public Meeting, Real Rape Law Coalition)
The War Against Women

As long as some men use physical force to subjugate females, all men need not. The knowledge that some men do suffices to threaten all women. Beyond that, it is not necessary to beat up a woman to beat her down. A man can simply refuse to hire women in well-paid jobs, extract as much work or more work from women than men but pay them less, or treat women disrespectfully at work or at home. He can fail to support a child he has sired or demand the woman he lives with wait on him like a servant. He can beat or kill the woman he claims to love; he can rape women, whether mate, acquaintance or stranger; he can rape or sexually molest his daughters, nieces, stepchildren, or the children of a woman he claims to love. The vast majority of men in the world do one or more of the above (French 1992, p. 184).

Violence against women, in all its forms, perpetrated by men is not a 20th century phenomenon; it has been occurring on a systematic basis for centuries. What is a new phenomenon is that violence against women is finally being heard about and placed on political and social agendas. As French writes:

The most important accomplishment of the feminist movement may be the exposure of this secret, the hauling it out of the private darkness where it has flourished and hanging it out in the air for all to see (French 1992, p. 199).

While hard fought gains by women, in both legal and social arenas, in the area of sexual offences are to be celebrated, it is clear that the players in the criminal justice system are still making judgments about whether a woman is a 'deserving' and to be believed victim or a 'non-deserving' and therefore lying victim of sexual assault, based on sexist and discriminatory stereotypes of women.

It appears that the hostile and humiliating treatment meted out by the legal system today hails back to and continues to rely on the words of wisdom of Sir Matthew Hale, a famous British jurist. He stated that:

Rape is an accusation easily to be made and hard to prove and harder to be defended by the party accused tho' never so innocent (circa 17th century).

It appears little has changed within the legal system and its response to the crime of rape. Certain judicial utterances validate this proposition. Judge Sutcliffe stated:

It is well known that women in particular and small boys are liable to be untruthful and invent stories (Sutcliffe J. cited in Smart 1989, p. 35).

Another illustration is:

Human [sic] experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely
difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all (R v. Henry and Manning 1968 53 Cr App R at 153).

In providing a context for the remainder of this paper, it is fundamental to be unequivocally clear about what rape is. Rape is a violation of basic human rights. Rape is about unequal power and use of control. Rape is about hate, humiliation and the degradation of women. It is an act of violence; of penetration that is unequivocally unwanted. Further, it is not an isolated act of aggression by one man against one woman. Rape is part of a continuum of violence perpetrated by men against women. Societal attitudes and structures allow a rape culture to flourish and in doing so ensure that victims/survivors of rape are effectively silenced (Brisbane Rape Crisis Centre 1990, p. 4).

Male violence towards women could not be as epidemic as it is without the cooperation of the entire social system—the press, police, courts, legislatures, academia, welfare agencies, the professions and other institutions. Personal violence against women is an issue of individual acts given firm backing by entrenched institutions. Just as women's problems are circular, so is male oppression: systematic war against women could not succeed without the cooperation of individual men, and individual men's wars on women require the cooperation of the system (French 1992, p. 185).

Licence to Rape

In order to gain some insight into why victims/survivors of sexual assault have a crisis of confidence in the legal system, it is necessary to outline some of the reasons that a licence to rape exists in our community. Rape is a relatively safe crime for perpetrators to commit. In a sexual assault phone-in organised by the Real Rape Law Coalition, of the 267 assaults recorded only 33 per cent were reported to the police and a staggering 6 per cent resulted in a criminal conviction on any charge (Real Rape Law Coalition 1991b). As one victim/survivor succinctly puts it:

Why go through all that when he'll be acquitted anyway? (Law Reform Commission of Victoria 1991, p. 119).

It is safe for perpetrators because they know how difficult it is for a woman to legally prove that she was not consenting. A perfect example of this comes from the sexual assault phone-in. A woman who rang was in her twenties when she was assaulted by a person whom she knew. He threatened to kill her if she told anyone about the assault. He also said to her, 'No-one will believe you anyway. I'll just say you're a slut and asked for it'.

Add to this fear of reprisal, fear of disbelief (not only by the legal system but also family and friends) and the enduring consequences of a sexual assault, it is no wonder that silence is guaranteed. It is this silence that ensures the perpetuation of sexual assault and of the enduring impact on victims/survivors' lives. Given this it is not hard to agree with, Susan Brownmiller's contention that rape is 'a conscious process of intimidation by which all men keep all women in a state of fear' (Brownmiller 1975, p. 114).
It Never, Ever Leaves You

Enduring elements of the assault experienced by the victim/survivor are powerlessness and loss of control. 'I was made to feel powerless' was the most frequent single response when victims/survivors were asked how the assailant had effected the assault. When one considers that in 72 per cent of cases the assailant was known to the victim/survivor, it is hardly surprising that feelings of shock and denial overrode any considerations of resistance or escape (Real Rape Law Coalition 1992, p. 9). Couple this fact with the inappropriate response given to victims/survivors by both the legal system and the community, and it is understandable that a majority of victims/survivors harbour the responsibility for the assault; an unbearable burden wrongfully located that may be rectified by long-term counselling and support.

Taking the blame and the ensuing guilt are not the only enduring repercussions of sexual assault; the impact on victims/survivors' lives are diverse and wide-ranging. An overall legacy of low self-esteem and poor self-confidence are very common, as are feelings of worthlessness, shame and being 'dirty' (Real Rape Law Coalition 1992, p. 10). Anecdotal evidence collected via the phone-in illustrates the diversity of repercussions from sexual assault and emphasise the long-lasting nature of the damage suffered. Accounts included one caller who said that since being raped she can no longer relate to her own son because he is a male; another woman said:

it has affected my career, now I can't get another job here in this town. I have also lost my ability to trust people and to form relationships. I have trouble relating to my family and friends who are divided about whether to believe me. I am very angry.

Another woman raped by four men ten years ago (when she was fifteen) recounted:

It destroyed my life. I've never trusted anyone since. When you're married you are supposed to trust people but I can't. My sex life is a complete shambles, I shower continually because I always feel dirty. I can't sleep, I still have nightmares. They ruined my life so much, why didn't they just kill me?

Treated Like the Criminal

Having already suffered a horrific violation of their very being, a small proportion of victims/survivors of sexual assault then enter the criminal justice system to seek justice. However:

despite formal legal recognition of her need for protection, a woman who is raped, assaulted or battered by a man may find herself victimised again by police, state and medical agencies . . . This refusal to recognise a woman's experience can appear to many as secondary assault (Radford 1987, p. 135).

Many victims/survivors experience the reporting system as intrusive and judgmental. They are required to recount in minute detail and with absolute consistency the entire assault more than once. It is hardly surprising that many women find this experience a damaging and disempowering one. The enduring elements of powerlessness and loss of control experienced by victims/survivors of sexual assault are also prevalent in her role in the
criminal justice system. The legal system dominates the official process of defining what behaviours constitute sexual assault. Further, it is the only formal channel of redress for the victim/survivor and provides the most legitimate and resounding means of validating the woman's experience. However, many victims/survivors find that the legal system offers them no justice, and instead reinscribes the assault.

While it is to be applauded that a new Police Code of Practice for dealing with sexual assault has been introduced in Victoria, one document alone cannot change ingrained perceptions of victims/survivors that police will not believe them. Police inaction on those sexual assaults reported to them holds this perception to be true. The phone-in results show that 60 per cent of reports made to the police did not result in any further action, and in 74 per cent of these cases it was the police who made the decision not to proceed (Real Rape Law Coalition 1991b, p. 23). As a consequence, victims/survivors in these cases expressed strong feelings of anger, hurt, disappointment, and/or a sense of being cheated or let down by the legal system.

A further compounding factor is the unsympathetic and disbelieving attitudes expressed by police to victims/survivors at the time of reporting and the asking of irrelevant and inappropriate questions. One caller recounted being blamed for walking alone at night in the park and being asked if she was a man-hater; another woman recalled how the police had commented to the doctor that she didn't have many bruises and how she was subsequently investigated by the police to construct a picture of her character. The police achieved this by contacting her family, friends and employers without her permission and, as the icing on the cake, released details to the local media. Her case was eventually dropped by the police with the official line that the assailant could not be located.

This police inaction, lack of belief and humiliating treatment of victims/survivors at the time of reporting is totally unacceptable. It appears that police perception is that women reporting rape are just 'crying rape'; that false reports are consistent and constant and make up a substantial component of rape reports (Freckelton 1988, p. 29). Indeed, the Victorian Police Complaints Authority report details how false reports occur:

There are cases in which the woman at the time of intercourse is in two minds, feeling both fear and desire and therefore giving contrary indications to the man, or in which she has a change of mind which is fractionally too late or in which she protests but only to preserve status; and then subsequently, because she feels guilty and remorseful or fears pregnancy, or for both reasons, her mind rejects the idea that she could have consented and, by the mechanism of selective recall which we all possess, she genuinely remembers the event as a rape and reports it as such (Freckelton 1988, p. 27).

In light of this inherent lack of belief, the recent Police Code of Practice, which outlines the wide-ranging repercussions of sexual assault, is to be welcomed with its intent that victims/survivors' interests are paramount. However, unless appropriate implementation of the Code of Practice occurs, through systematic and ongoing training and education for police as well as breaches being treated with the abhorrence they deserve, we will see little change in the police response to victims/survivors of sexual assault.
Raped All Over Again

Going to court is never an easy experience, but it is particularly difficult for sexual assault victims/survivors owing, in part, to the 'intimate' nature of the assault. Many victims/survivors find it is a nightmare trying to cope not only with the repercussion of the assault itself but also with the strain of the legal process. For many, the whole legal process is mystifying and many feel completely unprepared for the court experience (Real Rape Law Coalition 1992, p. 34–5). Debbie, a victim/survivor, describes her experience:

His barrister swung questions at me. I was only supposed to give a yes or no answer. If I paused even in the slightest the barrister would answer the questions for me. The barrister was very smart, he kept insisting that it was one of those boy meets girl affairs when it wasn't like that at all. I couldn't always follow the formal words that were used such as him saying 'my client' instead of using his proper name. Nor did I understand some of the big words that he threw at me. I became increasingly confused. It was just as if he was allowed to tear me apart and lie and get away with it and no-one stopped him. I looked to the prosecutor. She didn't say anything, she just kept her head down taking notes. With all this happening I went even further into a state of shock. I was shaky and nervous and my stomach felt like it was tied in knots. I wasn't really aware of what was going on. It was as if my body was there but my mind was elsewhere. In the end I just agreed with everything that his barrister said (Real Rape Law Coalition 1991a, p. 15).

Victims/survivors are often bitter and angry about the court's insensitive treatment of them and particularly of cross-examination tactics. Responses from the sexual assault phone-in clearly illustrate this. Responses such as:

the court process made me feel raped all over again; and

it took me longer to get over the court experience than the actual rape. I was treated as the criminal.

Furthermore, 38 per cent of victims whose case went to court would not report an assault or go to court again, if given the choice (Real Rape Law Coalition 1991b, p. 45). They would also advise other victims not to go through the legal process. One commentator has observed that:
there is no difference between being raped and giving evidence as a key witness at the trial of your alleged rapist, except that this time it happens in front of a crowd . . . (Kate Gilmore, Real Rape Law Coalition Public Meeting, September 1990).

In particular, the victim/survivor must relate the explicit and detailed minutiae of sexual penetration. Most women, however, are unfamiliar with detailed discussion of the mechanics of 'sexual' behaviour and experience further difficulty in applying the terminology relating to genitalia, oral, anal and vaginal penetration to themselves. There is even greater stress and embarrassment attached when the acts being described are associated with revulsion, humiliation and shame.

In court, the rape trial amounts to a gruelling test of the victim/survivor's credibility, where the honesty and integrity of the parties are pitted in a legal struggle weighted overwhelmingly in favour of the accused. A typical scenario is this. The accused will have instructed his solicitor, met with his counsel, rehearsed his evidence, viewed and interrogated the prosecution's claims. He has the choice to remain silent and not testify in court at all; or he can give unsworn evidence from the body of the court; or he can choose to take the witness stand and undergo cross-examination. It is hardly surprising, then, that very few accused enter the witness stand.

In contrast, the victim/survivor has very few rights in the criminal trial because she is merely a witness for the prosecution. She has no choice but to testify and submit to cross-examination. She cannot instruct legal counsel, and will have had little, if any, preparation for giving evidence. She will have no knowledge of the defence claims or even of other prosecution evidence. She will have waited, perhaps for several days, until the court attendant finally comes to usher her into the courtroom, past the expectant audience. She will see the accused again, and will have to speak with him watching her. She will probably have been told to leave the court as soon as she has given her testimony. She will go home and continue waiting.

**Consent — Just Which Part of 'No' Don't You Understand?**

The following report from an English rape trial illustrates the perverseness of the issue of consent.

The prisoner's defence was that, although the girl had resisted him before he struck her on the head several times with a wheelbrace and that she fought and bit his finger even after he had struck her several times on the head, she consented to the act of intercourse, or if she did not, he reasonably and honestly thought she was consenting.

Consent is the central issue in almost all rape trials. Of the cases that go to court, most commonly sexual penetration is admitted and the issue to be decided is whether it was rape, as the victim claims, or whether it was consensual intercourse, as the accused claims. The prosecution must prove beyond reasonable doubt that the victim was not consenting and that she effectively communicated that fact to the accused in such a way that he could not have honestly believed she was consenting.

Inevitably then, the issue of consent turns a jury's attention from the actions of the accused to those of the victim.

Even though I was the victim, everything in that court procedure worked to place me on trial.
The victim in the rape trial is commonly implied to be a liar, an hysterical or even vicious jilted lover, a woman known by the accused to be of the type who could be expected to consent to his advances or an immature person who acquiesced in or even enjoyed a consensual act but who later feared the consequences of her actions. These scenarios (or variations on the theme) require the defence to show the victim as a person of low intelligence or of low moral fibre whose story should not be believed. As Jacinta, another victim/survivor comments,

They use every tactic they can to portray you to the jury as this uneducated, emotionally disturbed, mentally deranged low life (Real Rape Law Coalition 1991a, p. 13).

Recently, the much publicised Kennedy-Smith trial depicted the victim/survivor within the parameters of the 'scorned woman' scenario. A woman who had extensive sexual experience, who relentlessly pursued him, had sex with him only two hours after meeting, and who, due to his callous behaviour after sexual intercourse, became angry and decided to report the rape. It was Patricia Bowman's reputation and credibility being judged not only in that courtroom but nationally. It was the discrepancies in her story that became the focus; the panty hose in the car, the screaming no-one heard, the un torn and unstained clothing and the fact that, although she said she felt dirty, Patricia Bowman did not take a shower after the alleged rape. To complete the humiliation, there was the talk-show host who had couples re-enacting the rape itself to prove that if it had happened as Patricia Bowman had described, it was anatomically impossible (Taylor 1992, p. 28)

Given this biased focus, it was fortuitous that Mike Tyson's victim was the quintessential girl next door. A freshman at a prestigious Catholic College, versatile sportswoman, volunteer worker with the mentally retarded, a Sunday School teacher and regular church goer. In short, popular, well-educated, intelligent and with a 'toothy engaging smile that is without guile' (Nack 1992, p. 5). The trial outcome was timely and, for many women, a cause for celebration. It belied the popular myth that Tyson's celebrity status would save him from his fall from grace. In many ways the Tyson trial became a microcosm of a wider and very heated national debate about how men treat women, triggered by Thelma and Louise, the Anita Hill and Clarence Thomas case, and the televised broadcast of the entire Kennedy-Smith trial.

Despite their apparent glaring differences, both the women bringing the charges in the Kennedy and Tyson cases quite clearly did have something major in common. Both were subjected to unbelievable violation at the hands of the legal system. Judgments in both cases had little to do with whether a rape was committed and everything to do with whether the accused was a Kennedy or a Tyson. The women were on trial. It was never made simply clear enough that 'no' means 'no' (Sparerib, 'Living in a Rape Culture' 1992, p. 32).

Similarly in Victoria, we have had judgments made based on stereotyped, outmoded and sexist assumptions. A classic case was that of R v. Singh in which the woman was raped by a man known to her in a flat where her children were asleep and in the company of a friend of the assailant. On appeal, the Supreme Court overturned a jury conviction in that case, saying that:
it is a remarkable feature of the case that in spite of her evidence that she was forced to have intercourse there were no signs of force having been used on her body and no evidence of any struggle or resistance or of disarrangement of the furniture in the flat (R v. Singh 1990, unreported judgment of the Victorian Court of Criminal Appeal, p. 8).

The court also placed great emphasis in this case on the fact that the woman did not sustain significant physical injury. They commented that:

when the prosecutrix was medically examined at about 10.30 am no abnormalities or any sign of force having been used, apart from the love bites [i.e. bruises] on the neck, were found (R v. Singh 1990, unreported judgment of the Victorian Court of Criminal Appeal, p. 8).

The effect of this decision is to require conclusive physical evidence of force or some other 'physical' corroboration of the victim's testimony, in order to sustain a rape conviction.

The unenviable choice for women then, is to sustain extensive physical injury in addition to the rape, or to risk disparagement and disbelief by the legal system, family, friends and the wider community. As one victim/survivor, whose case against her assailant resulted in an acquittal after much emphasis was placed on her alleged lack of resistance, says:

The fact you are not torn limb from limb, splattered against a wall, maimed for life implies that you did not fight. The implication that you did not fight is submission. You submitted. And submission implies consent? That is absurd. The act of sex will not kill you if you lay there like a piece of meat. You fight and you could be killed, you could be maimed—but if you don't fight, don't expect the courts to believe you.

However, even when extensive physical injuries, apart from the rape itself, are sustained and even where the rape fits the stranger danger stereotype, one cannot be guaranteed that judges will utilise rational thought when meting out sentences for men who rape. A graphic example of this is the infamous Ealing vicarage rape in England in 1986 in which three men broke into the house armed with knives and two of the men sexually assaulted 21-year-old Jill Saward. The assault included rape, buggery and penetration with a knife handle. The judge sentenced one man to five years for rape and five years for aggravated burglary, and the other for three years for rape and five years for the burglary charge. The judge justified this extraordinarily light sentence on the basis that Jill Saward's trauma was not so great and because she had testified that she had herself forgiven the two men (Sparerib, 'Living in a Rape Culture' 1992, p. 32).

Women may also be disqualified from obtaining legal redress in sexual assault cases owing to their occupation, prior sexual history or lifestyle. The recent decision made by Judge Jones in the case of R v. Hakopian is a perfect example of how sexist attitudes inform the law. Judge Jones followed Supreme Court precedent of R v. Harris, which stated:

the crime when committed against prostitutes . . . is not as heinous as when committed, say, on a happily married woman living in a flat in the absence of her husband when the miscreant breaks in and commits rape on her (R v. Hakopian 1991, County Court, Melbourne, Sentencing Decision, p. 8).
Are we to infer from this that women must be married in order to establish themselves as properly rapeable and then only by someone other than the woman's husband? If a woman does not sustain physical injuries, if she is not in the 'deserving rape victim' mould, and the case not otherwise considered to be a 'real rape', then the culpability of an offender is often seen to be minimal or not warranting sanction by the courts because it is considered that there has been no 'real' harm done.

*R v. Hakopian* again provides a good illustration of this point. When sentencing Hakopian for aggravated rape, aggravated indecent assault and kidnapping, Judge Jones said that:

> As a prostitute, Miss X would have been involved in sexual activities on many occasions with men she had not met before, in a wide range of situations . . .

> On my assessment, the likely psychological effect on the victim of a forced oral intercourse and indecent assault, is much less a factor in this case and lessens the gravity of the offence *R v. Hakopian* 1991, County Court, Melbourne, Sentencing Decision, p. 8).

Overwhelmingly, the stereotype of criminal assault remains the experience of physical attack in a 'public' place by a (male) stranger. Notions of 'force' and 'resistance' are similarly defined according to male standards, as *R v. Singh* demonstrates. Women's experiences of assault—domestic violence as well as sexual assault—are often not recognised within that framework.

Yet the sexual assault phone-in established that the repercussions of assault frequently do not fit within the standard notion of 'injuries' consequent upon a criminal assault. For example, callers described sexually-transmitted diseases, recurrent urinary tract infections, pregnancy, panic attacks and depression as direct consequences of a sexual assault committed against them.

Some 98 per cent of callers to the phone-in described extensive and long-term emotional damage as a consequence of being sexually assaulted and more than one-third of victims suffered physical repercussions in addition.

**Challenging Myths — Law and Education**

Rape laws which do not specifically exclude the application of sexist, discriminatory, and ill-informed attitudes and beliefs in determining outcomes of sexual assault cases tacitly condone rape, condemn women to suffer in silence, and perpetuate and compound this harm consequent on a sexual assault. Law and education play a fundamental role in challenging assumptions and stereotypes surrounding sexual assault.

Over the past twelve months, sexual assault has been placed fairly and squarely on the political agenda by various community and women's groups. It has required tremendous energy and commitment for this to occur. The time is ripe to bring to the community's attention (this includes all players in the legal system) the full dimensions of the problems of sexual assault and its repercussions for victims/survivors.

It must always be remembered that one in every ten women can expect to be raped in their lifetime and, as a result, experience in some degree: lack of motivation, depression, anxiety, fear, loss of confidence and trust, and a sense of hopelessness. Sexual assault dictates that women's primary social use is as sex objects. The extent of sexual assault, and
the consequences for victims/survivors, effectively deny women's right to be self-determining and sexually autonomous and equal members of society.

Clear legislation and appropriate education can indeed go some way in redressing this inequity. To quote Sally Brown, Chief Magistrate of Victoria:

Legislation alone doesn't change culture, but it can be a powerful tool. What I hope the (rape law) reform . . . will do is balance the competing interests of the victim and the accused in a way which reflects the community's growing concern that a victim is often twice victimised. Once by the assault and once by the legal system (Real Rape Law Coalition Public Meeting, 9 September 1990).

It is time the law and the community recognised the nature of and the true repercussions of sexual assault on victims and that both respond appropriately to women who have endured a horrific violation of their very being and ensure that the legal process is accessible and as least traumatic as possible. It is time that victims/survivors are treated with sensitivity and respect by the legal system and the community and, more fundamentally, it is time their voices are heard and their experiences believed. There is no doubt that law does inform community attitudes, and it is vital in the area of sexual offences that it also educates police, judges, juries and makes dramatically and emphatically clear to men what sexual behaviour will be tolerated and what will not. Until this happens, we continue to hear haunting accounts of the consequences of being sexually assaulted.

In conclusion, an extract from a poem by Marge Piercy (1990, p. 5) illustrates the realities of rape that, tragically, millions of women across the globe can identify with.

There is no difference between being raped
And being pushed down a flight of cement stairs
Except that the wounds also bleed inside

There is no difference between being raped
And being run over by a truck
Except that afterwards men asked you if you enjoyed it

There is no difference between being raped
And losing a hand in a moving machine
Except that doctors don't want to get involved
The police wear a knowing smirk
And in a small town you become a veteran whore

There is no difference between being raped
And going head first through a windshield
Except that afterward you are not afraid of cars
But of half the human race.

References

Brisbane Rape Crisis Centre 1990, *Facts On Rape*, Highgate Hill, Brisbane, Qld.


Piercy, M. 1990, extract from poem published in *Facts on Rape*, Brisbane Rape Crisis Centre, Highgate Hill, Brisbane, Qld.


