

THE IMPACT OF RAPE LAW REFORM: THE APPLICATION
OF THE SEXUAL OFFENCES (AMENDMENT) ACT 1976

Zsuzsanna Adler

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Department of Social
Policy and Social Science
Bedford College

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ABSTRACT

This thesis considers the implementation of the Sexual Offences (Amendment) Act 1976, which was passed as a response to the inadequacy of rape law and to public outcry following a number of controversial rape cases and their treatment by the legal system. The main intention of Parliament in passing this Act was to ease the burden of the rape victim in court. It proposed that she should generally be granted anonymity, and that certain safeguards should be adopted with regard to admitting evidence of her sexual history. The legislation also contains a statutory definition of rape and a provision granting anonymity to the defendant before conviction. The legislation is essentially discretionary, and its implementation is up to trial judges who are not given clear guidelines on how the law should be applied. This is of crucial significance particularly as far as evidence of sexual history is concerned. The study reviews existing literature on rape, and goes on to outline the history of the law in England and the background of current legislation. It also describes the research methods used in the present study, together with the main hypotheses. It then considers the practical application of the 1976 Act. It deals with the way in which its section relevant to prior sexual history is implemented, and considers the criteria judges use in interpreting the legislation. It goes on to consider ways in which the complainant's credibility may be discredited with reference to aspects of her sexual behaviour which are not covered by the 1976 Act. It then discusses how far the complainant's overall behaviour continues to be a central focus of rape trials, and to what extent it is effectively her behaviour that determines the jury's verdict.

It also considers the impact of the Act on the reporting and disposition of rape offences. Various models of rape law reform and their impact in other jurisdictions are examined. Finally, future rape law reform in this country is discussed, both in the light of the present findings and of recent developments.

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INTRODUCTION

A new law dealing with some aspects of rape offences was introduced in this country in 1976. This was based principally on the recommendations of the Advisory Group on the Law of Rape appointed in the previous year to consider and report on aspects of rape law which were in need of urgent reform (1).

The Advisory Group on the Law of Rape were concerned "with the vital and fundamental rights of an accused person to have a fair trial", but they also intended to "rectify any balance of unfairness to the alleged victim" (2). Those concerns are at least partially reflected in the new Act, which provides for the first time a statutory definition of rape stressing that the crucial element in the offence is lack of consent rather than violence:

"A man commits rape if
a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it". (3)

The Act also gives anonymity to both complainants and defendants in rape trials. The anonymity restriction on the complainant may be lifted by the judge before the trial in some limited circumstances, and on the defendant, if he is convicted of a rape offence at a trial before a Crown Court.

The most important provision of the new Act undoubtedly is the restriction it places on the admissibility of evidence relating to the complainant's previous sexual experience:

"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 the defendant" (4)

Applications for leave to introduce such evidence are to be made to the judge in the absence of the jury and the judge is to give leave

"if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked" (5).

Although the Act received wide support from interested organisations and the general public, the ultimate test of its effectiveness is in its practical application. The aim of this study is to investigate empirically the operation of the Act, particularly with regard to judicial discretion in admitting evidence relating to the complainant's sexual experience and in lifting restrictions on anonymity. The impact of the Act on the trial of rape offences in more general terms will also be assessed, and information on the main features and results of such trials will be presented. Clearly, both the definition and the administration of the law are inextricably bound up with the values and norms of the society within which it operates, and this study will also emphasize the social, as distinct from the legal, definitions of rape which emerge in court.

Part I, divided into three chapters, introduces and describes the background of the study. The Chapter One reviews the existing literature on the phenomenon of rape, and outlines the central ideas and theories relating to the subject. This is intended as a background to the discussion and analysis of current thinking and policy making on rape. It will be argued that, despite radical

changes in rape theories in recent years, the social definition which emerges from the legal process is still profoundly influenced by early psychoanalytical views which label the rapist as a sexual psychopath, and define rape as a violent, impulsive sexual encounter, fundamentally different from what society accepts as normal sexual relations. Equally, despite considerable changes during the course of this century in the social position of women, the social definition of rape still has strong overtones of Victorian morality which requires entirely different norms of sexual behaviour from men and from women. Chapter Two sketches the history of the law of rape in this country, as well as the literature pertaining to it. It points out the peculiar position that rape occupies within the body of the criminal law, and discusses the various special rules which apply to it. The background of the appointment of the Advisory Group on the Law of Rape, its Report and subsequent legislative change will be given particular attention in this context. Chapter Three discusses the background assumptions and main hypotheses of the study. It also describes the research design and procedure and considers the methodology used in the empirical test of the hypotheses. Finally, the chapter presents findings relating to the principal characteristics of the sample including the offences charged, pleas and findings of guilt.

Part II, also in three chapters, presents the substantive findings of the study. Chapter Four considers the admissibility of sexual history evidence before and after the 1976 Act. It discusses the assumptions implicit in pre-1976 case law regarding the relevance and admissibility of such evidence, and goes on to examine

applications under Section 2 of the new Act. Findings are presented that such applications are frequent and usually successful. It is argued that the Act has had little impact in this sense, since its application is governed by judicial discretion. Judges frequently disregard it, or interpret it with reference to earlier case law rather than to the spirit of the 1976 Act. Chapter Five goes on to describe how complainants in rape trials are discredited with regard to their sexual behaviour and reputation in ways not covered by the Act. In particular, their prior relationship with the accused, their behaviour at the time of the alleged offence, and evidence concerning their general lifestyle will be considered here. The chapter concludes that defence counsel use a variety of strategies to discredit the complainant's sexual reputation outside the scope of Section 2, and argues that this is another reflection of the weakness of that legislation. Chapter Six considers whether and how far attacks of this sort on the complainant's sexual or general reputation influence the outcome of the trial. The various hypotheses put forward in Chapter Three are tested and the findings presented that the victim's character and behaviour are important determinants of the outcome of trials.

Part III considers the overall impact of the Sexual Offences (Amendment) Act 1976. Chapter Seven discusses the workings of the anonymity provisions and of the statutory definition of rape which incorporates the controversial Morgan ruling that led to the appointment of the Advisory Group on the Law of Rape. It also considers the impact of law reform on reporting and prosecution, findings of guilt and sentencing. It argues that there is no evidence of change in any of these areas which can be attributed to

the legislation.

Part IV puts the findings of the study in a broader perspective. Chapter Eight looks at rape law reform in other jurisdictions and concludes that discretionary schemes similar to the 1976 legislation have been unsuccessful elsewhere too. Only reforms which firmly limit the scope of judicial discretion have been found to bring about any significant improvement in the lot of rape victims. Finally, Chapter Nine considers what further reforms are needed in this country in the light of findings presented here, and of the Criminal Law Revision Committee's 1984 Report on Sexual Offences. It concludes that while there are limits to what can be achieved by law reform alone, that limit is far from having been reached in this country. Further reforms along the lines described in the last chapter are urgently needed if the commitment to the fair treatment of women reporting rape is to be realised.

FOOTNOTES TO THE INTRODUCTION

(1) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, H.M.S.O., Cmnd. 6352, 1975

(2) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, para.14

(3) Sexual Offences (Amendment) Act 1976, s.1(1)

(4) Sexual Offences (Amendment) Act 1976, s.2(1)

(5) ibid. s.2(2)

PART I. INTRODUCTION AND BACKGROUND OF THE STUDY

CHAPTER ONE. REVIEW OF THE LITERATURE

Until relatively recently, academic literature on rape has been scanty. One commentator observes that

"it is a subject which has received little serious scrutiny and remains shrouded in myths, denied the status of a 'real' problem. The academic community has remained strangely silent about rape. Criminologists, psychologists and sociologists have ignored it or accorded it only cursory recognition of a kind which tends to reinforce rather than challenge the myths, basing their analyses on the folk-knowledge they share with the layman." (1)

The extensive literature on the criminology and sociology of deviant behaviour gives little more than passing notice to rape. Such classics as Sutherland and Cressey's Principles of Criminology (2) hardly mention it, while Cressey and Ward's Delinquency, Crime and Social Process (3) contains only one chapter on sexual aggression against adult females, which includes some reference to rape. A guide to the use of criminological literature published in 1973 (4) contains but two references to rape: one of these is to an article on the psychological classification of rapists (5) and the other concerns the notion of "alcoholised situations" where both rapist and victim are under the influence of alcohol (6).

Tennent has noted that as far as sexual offences in general are concerned,

"some of the most important contributions in the last 20 years have been advances in knowledge of normal sexual practices." (7)

Such studies, however, also fail to throw any light on the phenomenon of rape. For example, Kinsey's only reference to it is

in the context of a discussion of impotence among older men where he concludes that

"not a few older men serve time in penal institutions for attempting to engage in a sexual act which at their age would not interest most of them, and of which many of them are undoubtedly incapable." (8)

Studies which focus on deviant sexual behaviour tend to ignore rape altogether and to concentrate instead on the subjects of homosexuality and prostitution (9). It has been noted that

"volumes on human sexuality, often exhaustive in their coverage of other forms of sexual deviation, rarely mention it. The word "rape" is curiously absent from their indexes, and where present, refers us to a passage on the symbolic significance of rape, the supposed masochistic fantasies of adolescent girls, or defloration rituals in primitive tribes, and not to the act of rape in the context of contemporary society." (10)

Psychology and psychoanalysis

Such early academic literature as exists tends to draw heavily on the disciplines of psychology and psychoanalysis, and views rape as a predominantly explosive act of sexual aggression, and the rapist, as a sexual psychopath. Krafft-Ebing, who is generally regarded as one of the pioneers in the study of sexual disorders, saw rape as a result of "a temporary, powerful excitation of sexual desire induced by alcohol or by some other condition", and thought it highly improbable that "a man morally intact would commit this brutal crime." (11) Indeed, he argued that signs of degeneracy had been found in many men who committed rape and concluded that rape was "very often the act of degenerate male imbeciles" (12).

Krafft-Ebing felt that "voluntary subjection to the opposite sex"

was a physiological phenomenon in women, and consequently regarded masochism as a "pathological growth of specific feminine mental elements" (13), although, somewhat curiously, he did not relate this to rape. Some years later, the notion of inherent female masochism was taken up and expanded by Freud and his followers. Nevertheless, in all his works, Freud failed to consider the phenomenon of rape or to shed any light on the psychology of rapists. His main contribution to the subject was to lay the foundations for subsequent studies on female fantasies of rape which he saw "as a subconscious wish to be sexually overcome" (14).

In his early writings Freud reported that a disproportionately high number of his female hysterical patients had, in their childhood, been "seduced" by adults, particularly their fathers or older children (15). He argued that each of the major neuroses had, as its immediate cause, "one particular disturbance of the economics of the nervous system" and that these pathological changes "have as their common source the subject's sexual life" (16). From the experience of his patients, Freud concluded that a passive sexual experience before puberty was the specific aetiology of hysteria.

Some years later, Freud rejected his early theory. He wrote that he had made a mistake in accepting as true his patients' accounts of childhood seduction by their father, and he reinterpreted these as false memories which were in fact wishful fantasies, pointing to the existence of the Oedipus complex. Freud attributed his initial "mistake" to his lack of experience:

"At that time, I was not yet able to distinguish between my patients' phantasies about their childhood years and

their recollections." (17)

The notion that women fantasize about rape, and indeed are unable to distinguish between reality and fantasy in this respect, developed together with the idea that rape was something that women actually desired. Freud was the first to write in any depth of the "essential character of feminine masochism", which he saw as the "final genital stage", the ultimate in sexual maturity, and closely linked to the "situation characteristic of womanhood, i.e....playing the passive part in coitus or...giving birth" (18).

These views were later expanded by post-Freudians, particularly by Helene Deutsch (19) and Karen Horney (20), both of whom developed Freud's basic theory of feminine masochism. It should be noted here that Horney moved away from Freud's ideas in one important respect, in that she added a cultural dimension to the earlier narrow biological model:

"The problem of feminine masochism cannot be related to factors inherent in the anatomical, physiological, psychic characteristics of woman alone, but must be considered as importantly conditioned by the culture complex or social organisation in which the particular masochistic woman has developed" (21).

While Freud and his immediate followers confined their interest in rape to elaborating theories on women's unconscious rape wish and inherent masochism, a number of criminologists of Freudian orientation began to discuss rape within general works on sexual offences (22). These writers tended to heighten the image of the rapist as "a psychopathic personality (with) pathological personality" (23), viewed him as "powerless before the onslaught of forces within himself" (24), and described his actions as "an explosive expression of pent-up sexual impulse" (25).

The idea that most sexual offences are committed by sexual degenerates and fiends who can be accurately diagnosed as such by any psychiatrist led to the view that such offenders should be confined until they were permanently cured of their condition. In the U.S.A., between 1937 and 1950, some thirteen States passed what have been termed "sexual psychopath laws" which define the sexual psychopath, and establish administrative procedures for his custody, treatment, and release. Although such legislation has attracted heavy criticism (26) its introduction illustrates the weight given to psychological theories on sexual offenders in general, which led to their classification in a separate category, somewhere between the criminal and the mentally ill (27).

Abrahamsen's work represents one of the best examples of Freudian psychology applied to this field of criminology, insofar as it is characterized by the use of an intuitive approach based largely on idiosyncratic case studies (28).

Abrahamsen viewed the sexual offender as

"the most emotionally and mentally disturbed of all criminals, because his problem reaches the roots of his most basic and primitive impulses" (29).

His research covered 102 sexual offenders, including some convicted rapists, and found that they all suffered from mental or emotional disorders ranging from neurotic conditions to character disorders and psychoses. Although all of Abrahamsen's sample of offenders were "sexually deviated", he found that in contrast to popular belief, sex offenders tended to be "undersexed" and "emotionally

fixed at a pregenital level" (30).

Within the scope of their studies on the psychology of the offender, Abrahamsen and his associates investigated the role played by women in the aetiology of sex offences. Together with various other studies (31), they paid particular attention to the relationship of the offender and his mother. They found that many sexual offenders had come from insecure homes, and that their mothers were often stern or sadistic:

"Because sadistic aggressions were frequently common occurrences in their homes, these boys grew up with the idea that women had to be taken by force" (32).

Abrahamsen also apportioned much of the blame to the wives of rapists. On the basis of a psychological study of eight such wives, he found that they showed a "masculine and aggressive orientation", and tended to "compete with men and to negate their femininity" (33). They were the type of women whose sexual attitudes invite aggression, which is then encountered with rejection:

"There can be no doubt that the sexual frustration which the wives caused is one of the factors motivating the rape which might tentatively be described as a displaced attempt to force a seductive but rejecting mother (sic) into submission" (34).

Finally, Abrahamsen joined the ranks of the Freudians in blaming the victims of sexual offences. They may unconsciously tempt the offender, since women often wish to be taken by force. Their seductive inclination takes the form of

"seeking out rather dangerous or unusual spots where they can be picked up, thus exposing themselves more or less unconsciously to sexual attacks" (35).

The 1950s and early 1960s saw a gradual emergence of an awareness among psychoanalytically oriented criminologists that not all rapists were psychopaths and that other, more "normal" types of offenders also existed. One study found that 53 out of a sample of 250 sex offenders did not show any psychiatric abnormalities (36). Another writer reported that almost half of his sample of sex offenders suffered from only relatively mild conditions such as neuroses and character disorders (37). Guttmacher found that "apparently sexually well-adjusted youthful offenders" might commit rape in the course of burglaries, "just as another act of plunder" (38). Using the Rorschach test, Pascal and Herzberg found that a comparison of heterosexual behaviour among rapists and a control group failed to reveal any significant differences (39).

Much of the evidence regarding the non-psychopathic rapist at that time came from a study by Gebhard and others from the Kinsey Institute. On the basis of an extensive study of various types of sex offenders, they concluded that rapists most frequently behave with unnecessary violence:

"It seems that sexual activity alone is insufficient and that in order for it to be maximally gratifying, it must be accompanied by physical violence or by serious threat" (40).

Gebhard and his colleagues classified rapists into seven broad categories and found that the behaviour of most of them included some element of hostility towards women, although only "a few of them may be recognized as clear cases of mental defectives and a few others as unquestionable psychotics" (41). Two groups of rapists identified in Gebhard's typology deserve particular mention, namely the "amoral" and the "double standard" variety.

"Amoral" delinquents appeared to have no specific hostility against women, but tended to view them solely as objects of sexual pleasure: if a woman did not wish to fulfill that role the offender saw the use of force or threat as entirely legitimate. The men classified under the "double standard" heading divided women into "good" women to be treated with respect, and "bad" women not "entitled to consideration if they become obstinate" (42). This group, composed of "rather average males of a lower socio-economic background" tended to feel that with provocation, the use of moderate force or threat was justifiable when applied to "bad" women, whom they judged to be promiscuous (43).

Generally, these seemingly normal rapists did not catch the imagination of writers of a Freudian orientation, partly because they were not perceived as "treatable" in the traditional sense. It was not until the late 1960s, when leadership in the field of criminology passed to sociologists, that the Freudian model of sexual offences became seriously questioned.

Sociological studies

One of the first sociological critiques of psychological theories on sexual offences was published in 1962. Wheeler acknowledged that "the major source of ideas about sex offenders stemmed from clinical reports on a wide variety of sex deviants" (44), and argued that although such case studies may contribute to clinical understanding, they are not to be viewed as fact but rather as hypotheses requiring testing. He also felt that the findings of research carried out under the impetus provided by sexual

psychopath legislation had called into question earlier clinical data and had cast serious doubt on the assertion that all or most sexual offenders are highly disturbed.

He concluded that, on the basis of the evidence available, the typical aggressive sex offender appeared to be less sick than previously assumed, and his background seemed to have "much in common with non-sexual offenders who came from crime-inducing cultural settings" (45). He further argued that it may be useful to view these offences as "part of a broader behaviour system in which force may be used to attain goals" (46).

A further criticism of the psychological approach is based on the assertion that rape is to be viewed as a product of a social situation between at least two actors. Any acknowledgment of the victim's role implies that the explanation of sexual offences "cannot easily be reduced to a search for the childhood emotional disorders of the party who becomes labelled the offender" (47).

The first major sociological study of rape was published by Amir in 1971 and remains to date one of the most comprehensive empirical works on the subject (48). The data it contains give credence to Wheeler's view that the psychiatric model of the sick rapist fails to explain the behaviour of the large majority of rape offenders.

Amir's orientation in this study was "strictly empirical and the method used was that of a phenomenological enquiry" (49). His methodology has attracted heavy criticism over the years and this will be discussed below. His data were based on the files of the

Philadelphia Police Department from 1958 to 1960, relating to 646 cases and 1292 offenders. His emphasis was on the social characteristics of the victim and the offender, on their prior relationship, and on the circumstances of the rape itself. He tried to detect patterns of race, age, marital status, employment, use of alcohol, previous arrest records, and the degree of violence used in rape. The profile of the typical rapist that emerged from his study turned out to be in sharp contrast with the psychological model outlined above.

The median age of offenders in Amir's study was 23, and the 15 to 19 age group was found to be the most likely to commit rape. The vast majority belonged to the lower end of the occupational scale; 26% of white and 16% of black offenders were unemployed, while most of the remainder were unskilled and skilled labourers. The only other important occupational group was made up of white college students who constituted 13% of the sample. Nearly half of the offenders had previous police records, usually for such offences as burglary, robbery, disorderly conduct and assault. Only 9% of those with a police record had previously been arrested for rape.

Amir's study revealed two further important factors which cast serious doubt on the notion that rape is the impulsive act of a mentally sick man. Firstly, nearly 43% of the rapes in the study were committed by two or more men operating together. These findings regarding the frequency of group rape have since been confirmed by other studies and a number of writers have attempted to explain the nature of the phenomenon (50). However, the literature on sexual offences before that time had failed to deal

with the question of group rape altogether.

The second major finding was that 71% of the rapes in Amir's sample (51) were planned. Rape was revealed as an elaborately planned and arranged event, rather than a spontaneous explosion of sudden sexual urges.

According to this study then, the typical Philadelphia rapist was an ordinary youth belonging to the lower end of the occupational scale, his only real distinguishing mark being a tendency to violence. He was found to have no separate identifiable pathology apart from the individual personality disorders that might characterize any violent offender.

On a theoretical level, Amir placed rape within Wolfgang's theory of the subculture of violence (52). This theory holds that within the dominant value system of our culture, there exists a subculture formed of the poor, the lower socio-economic classes, and others whose values run counter to those of the dominant culture. The dominant culture can operate within the laws of civility because it has little need to resort to anything else in achieving its aims. The subculture, however, inarticulate and frustrated by the dominant culture, resorts to violence to the extent that physical aggression becomes a way of life, particularly for young males. Amir saw the rapist as belonging to that subculture. He commented that lower class boys learnt overt aggressive behaviour and attitudes from their families and peers; aggressive behaviour towards women is simply part of the normative system for those who do not view such behaviour as wrong or deviant.

Amir's work has been criticised on several levels. It has been argued that his definition of rape as a typical phenomenon of the lower class black subculture is a reflection of "built-in bias in the statistics" (53), the analysis of which is sometimes "quite careless" (54). It has been noted that his reductionist strategy in analysing rape implies too narrow a conception, which fails explicitly to connect rape with the political economy. Instead, the

"reader is left with the impression that rape merely involves psychic urges, individual prejudices, situational contingencies, misunderstood intentions and provocative female conduct" (55).

Amir is certainly somewhat selective in questioning the psychological approach. The most important area where he accepts, and indeed reinforces this approach, is in his analysis of the role of the rape victim. While his empirical findings and theoretical model establish the essential "normality" of the offender, they also emphasize the pathological and deviant behaviour of the victim of rape. He actually goes so far as to say that "in a way, the victim is always the cause of the crime" (56).

It must be noted that Amir's interest in the role of the victim reflects a general orientation in the criminological literature at the time of his writing. Whereas early criminologists focused mainly on the offender, their interest later shifted from crime as a legal entity to crime as a complex social situation involving the interaction between different actors and reflecting cultural norms and societal expectations. Consequently, interest also developed in the victim as an integral part of the criminal situation:

"Scholars have begun to see the victim not necessarily just as a passive object, as the neuter or innocent point of impact of crime into society, but as eventually playing an active role or possibly contributing to his/her victimization" (57).

The development of the concept of victim precipitation occurred within this context and the notion had been applied before Amir's work to the offence of homicide for example (58).

Amir concluded that 19% of the rape cases in his study were victim precipitated, according to the following definition:

"...rape situations in which the victim actually, or so it was deemed, agreed to sexual relations but retracted before the actual act or did not react strongly enough when the suggestion was made by the offender(s). The term applies also to cases in risky situations marred with sexuality, especially when she uses what could be interpreted as indecency in language and gestures, or constitutes what could be taken as an invitation to sexual relations" (59).

According to other writers too a woman's actions play a primary role in whether or not she is sexually assaulted. It has been argued, for example, that women who wear what could be described as provocative clothing (60) or who go out alone at night (61) are more likely to be raped than women who are more cautious. Hitchhiking has also been described as a classic example of victim precipitation (62).

There is disagreement among those studying victim precipitation in rape as to the extent of the phenomenon. Mulvihill and his colleagues, who define victim precipitation in very similar terms to Amir, found that it was present in only 4.4% of their cases (63). The rate was much higher for other offences of violence, amounting to 22% for homicide, 14.4% for assault and 10.7% for armed robbery. The considerable discrepancies in the empirical

findings of different studies have led a number of writers to question the theoretical basis of the concept of victim precipitation.

Silverman has argued that the concept suffers from "being culture-, time- and place-bound" (64), that it has become confused and "lost much of its utility as an explanatory and empirical tool", and that "its empirical use has been predicated on disparate and often incompatible operational definitions" (65). He cites Amir as a case in point. His definition of victim precipitation cannot be easily replicated in other studies, it is argued, as one does not know whose perceptions of, for instance, "risky situations" are being used. Clearly, different outcomes may result if one uses the offender's, the victim's, the police or the researcher's perceptions. This may partially explain the discrepancies in the findings of Amir and Mulvihill. The main criticism here is that in existing studies, the researcher has tended to identify with the offender and that this has resulted in distorted and biased perceptions. As Silverman commented,

"the measures used in the past have been highly unreliable from a methodological point of view because they are highly dependent on a researcher's interpretation rather than on fixed criteria" (66).

The inadequacy of using the researcher's perceptions in assessing what constitutes victim precipitation is further underlined by a recent study which suggests that violent rapists are far more likely than others to misjudge social situations, and wrongly to believe that women are offering sexual encouragement (67).

Weis and Borges have also criticised Amir's work (68). They assert

that the notion of the rape victim which emerges from the study and in particular his concept of victim precipitation reflects strong bias and is unsupported by the data presented. They argue that Amir's identification with the offender in studying an encounter between several persons leads to inevitable bias in his perspective:

"It is the offender who decides, in his imagination, whether the situation was risky, the woman vulnerable, her reputation bad, or her behaviour otherwise rape precipitating" (69).

They further comment that

"personal bias towards the offender and against the victim so permeates the study that the reader is inclined to entertain the possibility that the data were ordered to fit a preconceived notion" (70).

While recognizing that Amir's data are useful for understanding certain types of rape, they argue that they are of doubtful value as a contribution towards the theoretical understanding of rape, which would require a more rigorous and objective study.

Whereas little had been written on the subject of rape before the late 1960s, there since appears to have been a tremendous upsurge in public concern and academic interest in it all over the world (71), but particularly in the U.S.A. and other common law jurisdictions. Amir's book is only one of a mass of scholarly books and articles published on the topic of rape since that time. Two major bibliographies have been compiled by Chappell, Geis and Fogarty (72) and Feild and Barnett (73), each comprising over three hundred titles.

The proliferation of writings on rape in recent years has been influenced by an apparently increased incidence and public awareness of rape as a social problem, as well as a general concern over violent crime in general. The recorded frequency of rape has increased since around 1964 both in this country and elsewhere. The F.B.I., for example, recorded approximately 55000 rapes and attempted rapes in 1974 (74). It may be argued that such a figure is relatively low in a population of over 200 million, but a comparative perspective reveals that between 1969 and 1974 the number of U.S. rapes increased by 49% which represents a greater increase than that of any other violent crime (75).

In this country, the number of rapes and attempted rapes known to the police doubled between 1964 and 1974, and has steadily increased since (76).

TABLE 1. Number of rapes and attempted rapes known to the police in England and Wales, 1964 to 1982 (77)

<u>YEAR</u>	<u>NUMBER OF RAPES KNOWN TO THE POLICE</u>
1964	517
1965	618
1966	644
1967	702
1968	829
1969	869
1970	884
1971	784
1972	893
1973	998
1974	1052
1975	1040
1976	1094
1977	1015
1978	1243
1979	1170
1980	1225
1981	1068
1982	1336

It should be noted, first, that the current increase in the number of known rapes coincides with a decrease in the total number of known sexual offences, as well as with an increase in the number of offences of violence against the person. Second, the evidence suggests that rape is probably one of the most underreported crimes, primarily because of fear and embarrassment on the part of the victim (78). While American experience cannot be said to apply directly to the English, the literature published there in this respect is worth a brief mention. Society's hostility to the complainant in a rape case, coupled with the trauma and stigma attached to a sexual assault, are thought to lead to considerable reluctance in reporting the offence (79). Studies aimed at determining the extent of underreporting in the U.S.A. have shown that the F.B.I. assumes that about 30% of all rapes are reported to the police (80), while other sources suggest that the figure may be as low as one in ten (81) or even one in twenty (82).

Feminist writings

Berger has noted that the women's movement in the U.S.A. has been a major source of concern over rape:

"Since the law has traditionally defined this crime as an act committed by men against women, it is fitting that the "rediscovery" of rape should coincide with the growth of the women's movement. Prominent feminists and leading feminist publications have authored or printed many of the relevant writings on the subject. Movement women and their sympathizers have organised conferences and speak-outs, primarily aimed at lending psychological support to victims of rape and enhancing feminine consciousness generally. Feminists have been instrumental in establishing and running rape crisis centres, extending to victims such varied aids as escort services, group counselling and referrals to physicians, psychiatrists and lawyers. Women have also played a key

role in lobbying for reforms in the law of rape" (83).

Thus, the definition of rape as a social problem may be seen as a by-product of the feminist movement. From that perspective, it has been argued that

"rape is a direct result of our culture's differential sex role socialization and sexual stratification. For example, the association of dominance with the male sex role and submission with the female sex role is viewed as a significant factor in the persistence of rape as a social problem". (84)

A comparison between the two bibliographies mentioned above (72,73) reveals not only a substantial increase in the number of publications on rape since the early 1970s, but also a shift in their focus. The first bibliography contains forty seven titles under the heading of "Sociology", and the second, one hundred and ten such titles. Emphasis on the offender seems to be on the decrease (1974: 53 titles; 1977: 19 titles) while interest in the victim has increased considerably (1974: 71 titles; 1977: 122 titles). Such changes in the number of publications may not in themselves be of great significance, but the literature also shows clear qualitative changes. The early concern with the offender appears to have been replaced by a desire to protect victims from what is seen as particularly unfair treatment by the legal system. From the legal angle, post-1974 literature has tended to reflect two main concerns: first, the rights of the victim, and second, the modification of laws concerning rape. In both instances, there seems to have been a shift away from concern with the legal rights of the defendant to those of the victim.

Focus on rape victims and on the inadequacies of present institutional response to them have, as we shall see below, been a

predominant feature of recent rape literature. Such institutional response and the treatment of rape victims by the legal system in particular clearly reflect societal attitudes:

"The law concerning proof in rape and the way it functions both influences and is influenced by existing social values. They are indeed a caricature of society's attitude towards women. And so long as the laws remain as they are at present, they will, in part, enforce the continuance of the roles this attitude assumes". (85)

Feminist writers have added a new dimension to the violent element in rape identified by others:

"Hostility against her and possession of her may be simultaneous motivations, and the hatred for her is expressed in the same act that is the attempt to "take" her against her will. In one violent crime, rape is an act against person and property". (86)

They have also pointed out that despite the seriousness of rape in one sense, as reflected for example in the potential severity of the penalties it carries (87), there is still a widespread belief that it is impossible for sexual intercourse to occur without mutual consent (88). Furthermore, it has been argued that society treats with profound suspicion women who allege rape, and that

"the theme of woman as "fabricator" or liar pervades all of our attitudes about rape victims".(89)

This is reflected, for instance, in the rules of corroboration of the complainant's evidence (discussed below in more detail) which one contemporary legal writer justifies as follows:

"...sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed.(90) The distinctive reason for the warning is that experience shows that the complainant's

evidence may be warped by psychological processes which are not evident to the eye of common sense". (91)

At the same time, and rather curiously, the traditional notion of the seriousness of rape is based on the assumption that rape is essentially different from normal sexual acts. As one commentator aptly observed,

"There is an element of double-think here: the belief in rape as something apart from everyday expressions of sexuality exists side by side with the notion that rape is impossible, that it does not happen at all, that the victim is a woman who has changed her mind afterwards. It is simultaneously thought of both as a heinous crime and as a normal sexual encounter mislabelled criminal". (92)

Writers who have analysed the rape victim's situation or contributed to attempts to improve that situation have not, as a rule, offered an overall theoretical perspective on the problem of rape. Nevertheless, an analysis of such writings does reveal a common thread throughout the feminist literature, namely a view of rape as a phenomenon which is inextricably bound up with the social context in which it occurs. This has inevitably involved an assessment of sexual stratification and of the principal elements of male and female sexuality in contemporary society. In trying to place rape in a broader social context, some writers have made extensive reference to anthropological texts which have been used to demonstrate a link between rape and culture and to argue that

"sex and sexuality are not features of society that you can look at in isolation from their social and economic base". (93)

Two studies in particular are frequently mentioned in this context. The first is Mead's work on the Arapesh (94) and the second, LeVine's study of the Gusii (95).

The Arapesh are a small, tightly structured community in New Guinea and their lifestyle is based on peaceful mutual cooperation. Aggression is not seen as a sign of masculinity, and the Arapesh treatment of sexuality stems from their non-competitive, non-aggressive form of social organisation. Among them, rape is virtually unknown:

"Of rape, the Arapesh know nothing beyond the fact that it is the unpleasant custom of the Nugum people to the southeast of them...Nor do the Arapesh have any conception of male nature that might make rape understandable to them". (96)

The Kenyan Gusii, on the other hand, have an entirely different social and economic structure and also differ from the Arapesh in their attitude to sexuality and aggression. They are fragmented into a number of hostile clans which, being exogamous, depend on each other for survival as wives have to be imported. The act of intercourse is seen as an act of subjugation of the female and as such, continues to be an important part of the marital relationship. The high incidence of rape among the Gusii has been linked to that society's attitudes to sexuality:

"Men and women are traditionally aggressive to each other and antagonism is entrenched in their relationship to each other". (97)

Similar observations have been made about contemporary Western society where, it is argued,

"violence and male supremacy have been companions (in the course of civilization)" (98) and
 "male sexuality and violence...seem inseparable" (99).

Consequently, in a society which encourages male aggression and simultaneously associates female sexuality with passivity and

submission, the

"basic elements of rape are involved in all heterosexual relationships". (100)

Jackson has attempted to understand rape in terms of conventional sexual behaviour, using as her theoretical framework Gagnon and Simon's work on "sexual scripts" (101). This conceptualizes sexuality as the outcome of a learning process whereby the individual develops a capacity to interpret and enact sexual scripts. It is argued that the scripts which underlie normal sexual behaviour also provide potential motives for rape, those motives being derived from generally accepted cultural norms. Sexual scripts are linked to cultural notions of masculinity and femininity:

"Sexual relationships are built around sexual inequalities, are scripted for actors whose roles have been pre-defined as subordinate and superordinate, and hence must involve the exercise of power which may be manifested in the sexual act itself, as well as in other aspects of the relationship. Rape, then, is simply an extreme manifestation of our culturally accepted patterns of male-female relationships". (102)

Weis and Borges also developed this theme in arguing that

"the rape situation...is societally structured by the culturally prescribed norms, rights and obligations which define the role expectancies for men and women, and establish the rules by which these roles relate to one another." (103)

It is in the wake of such ideas that the plight of the rape victim became the focus of considerable interest. The expression of that interest in academic and popular literature has undoubtedly played a part in bringing about legislative changes in a number of jurisdictions in the last few years, and as such, deserves some

consideration here.

Focus on the victim

Literature on the victim of rape has centered around physical injuries sustained during the rape, psychological reactions after the rape, as well as institutional response and proposed legislative changes destined to improve the rape victim's present position in the legal system.

It is usually thought that most victims of rape do not suffer serious physical injury. Amir did not consider the physical trauma caused by rape in the victims of his sample, although he did analyse the degree of violence involved in rape events and found that some force had been used in 85.1% of the cases he studied. The degree of force used ranged from "roughness" (28.5%) to "brutal beating" (20.4%) and choking (11.5%). These categories were largely defined with reference to the injuries sustained by the victim: for example, victims of "brutal beating" required hospitalisation for the treatment of such injuries as severe lacerations, fractures and the like.

Another study of 2190 rape victims found that 82 of these sustained severe physical injury as a result of the offence; 24 of them needed hospitalisation and 58 required major treatment in the "emergency room". Hundreds more were treated for minor injuries (104). Massey found that 51 out of 501 rape victims showed external evidence of trauma ranging from small cuts to severe contusions and fractures (105). Similarly, Burgess and Holmstrom found that 86 of

their sample of 146 women had visible bruises resulting from being hit with a weapon or with the assailant's hand or fist during the assault. Gynaecological injury was present in 57 cases (106).

Amir failed to consider the victim's psychological reactions to rape. Since his book, however, a number of studies have been concerned with this issue (107). Such studies generally conceptualize rape as a personal and social crisis, as a result of which "stress reactions" are set up. These represent attempts to "defend or reconstitute the personality from disorganisation" (108).

The first clinical study of rape victims was reported in 1970. The authors found that a similar sequence of events followed the experience of rape among the 13 victims interviewed. The first phase was characterized by signs of acute distress, including shock, disbelief, emotional breakdown and disruption of normal patterns of behaviour. This phase lasted several days and was followed by "outward adjustment" which, according to the authors,

"does not represent a final resolution of the traumatic event and the feelings it has aroused. Instead, it seems to contain a heavy measure of denial or suppression".
(109)

The last phase, during which depression is prominent, is that of integration and resolution. Although this phase often goes unrecognized, it is a crucial one as it is at this time that the victim

"needs to integrate the event with her view of herself and to resolve her feelings about her assailant" (110).

Burgess and Holmstrom interviewed 146 women admitted to hospital

over a one year period with a complaint of a sexual assault. On the basis of their analysis of the 92 adult rape victims in the sample, they were the first to document the existence of a rape trauma syndrome (111). This is described as a two-stage process: there is first an immediate, acute response where the victim's lifestyle is completely disrupted by the rape, followed by a long term process in which she reorganises her life.

The syndrome includes a wide range of physical, emotional and behavioural reactions. Emotional responses, in particular, fall into two major categories, namely "expressed" and "controlled". The "expressed" response during the acute phase is manifested by visible evidence of acute anxiety; on the other hand, the "controlled" victim appears calm and collected, showing little external evidence of distress - a reaction which may reflect shock and disbelief.

The manifestations of response during the second phase are also quite variable, and depend on the victim's personality characteristics, on the available support system, and on the treatment she encounters from others. Burgess and Holmstrom describe a "silent reaction" which can alert the doctor to an earlier unresolved rape, occurring months or even years earlier (112).

Various external factors may contribute to the intensity and complexity of the "normal" reaction that rape victims express. These include cases where the assailant is a relative or someone in a position of trust, or where there exist in the victim

psychological or serious medical problems prior to the rape.

Various age specific issues may also contribute to the trauma, for instance in the case of young, sexually inexperienced victims. In such cases, the rape reaction may include severe depression, possibly with suicide attempts, alcohol or drug abuse, psychosis or significant increase in physical symptomatology.

The documentation of severe psychological trauma in rape victims has led to attempts to outline appropriate treatment models for such victims as well as for their families and partners (113). The immediate emotional state of the victim and the long term consequences of rape were considered to be the aspects of victim response most inadequately dealt with (114), and it was partly as a response to this deficiency that community based rape crisis centres were established all over the U.S.A. and more recently, in this country. These centres are usually staffed by women, some of them victims of rape, and provide assistance and counselling for rape victims. Their other functions include attempts to educate the public on rape related issues and to cooperate with organisations involved in such work (115), and to campaign for law reform as well as for the improvement of institutional response to rape victims (116).

The act of reporting a rape sets in motion a complicated process whereby a number of institutions become involved with the victim. Most studies on institutional response to rape victims have found that such response, far from helping the victim in her recovery, contributes to and magnifies the initial trauma precipitated by the sexual attack.

The most comprehensive work on this subject to date was published in 1978. The authors considered the victim's career through the police, medical and court systems in the U.S.A. and argued that these institutions and groups played an important part in the victimization process. The woman became doubly victimized: first, by the crime, and secondly, by the societal and institutional reactions she encountered (117).

The height of institutional victimization comes with the trial: a number of authors have commented on the "rape of the courts" (118), where the rape victim not only has to relive her experience in the formal setting of a public court, but where her prior sexual life may also become exposed to considerable scrutiny by the defence. Her consent or lack of it is frequently judged not so much on the circumstances of the rape itself, but on her character and reputation:

"The courts and the police, dominated by white males, continue to suspect the rape victim sui generis of provoking or asking for her own assault". (119)

"The sexual reputation of the rape victim is considered a crucial element of the facts upon which the court must decide innocence or guilt". (120)

In effect, the rape victim in a sense has to prove her "innocence" and is as much on trial as the defendant (121). Bohmer and Blumberg argued that the victim's post-rape adjustment cannot be studied without a careful consideration of the effect of the legal system as an external factor in that adjustment. They conducted an ethnographic study of seventeen rape trials in the U.S.A. and tentatively concluded that the

"extent of the trauma suffered by the victim in her contact with the legal system is in large measure due to the attitudes and consequent treatment of the victim by the law enforcement and court personnel with whom she deals". (122)

In another study, forty victims were asked about their reactions to court; all of them found being in court extremely stressful and most of them showed visible signs of stress during the court procedure. For many, this experience was as upsetting as the rape itself and the women saw themselves as victimized, again, by the legal proceedings (123).

While most of the above literature originates in the U.S.A., the ordeal of rape victims in court has been acknowledged in England too. Coote and Gill have argued that where the defence is one of consent, and where there is little or no independent evidence, the defence strategy will normally be to discredit the complainant as this is seen as the most effective way of ensuring an acquittal. In effect, this puts the woman on trial and she has the difficult task of establishing her innocence beyond reasonable doubt in order to prove the man's guilt:

"Because of the nature of the crime, cross-examination of the woman in rape trials tends to take a particularly insidious, personal line". (124)

The Heilbron Report made a similar point:

"although in a criminal case, it is the accused who is on trial, there is a risk that a rape case may become in effect a trial of the alleged victim". ... "whatever the outcome, the very fact of having been involved is liable, at present, to have embarrassing or even damaging consequences for the woman". (125)

It has been argued that the victim of rape occupies a unique role in the legal system in this respect:

"Raped women are subjected to institutionalised sexism that begins with their treatment by the police; continues through a male dominated criminal justice system influenced by pseudo-scientific notions of victim precipitation, and ends with the systematic acquittal of many de facto guilty rapists. The codification of sexism

centers in the legal elements involved in proving guilt and obtaining convictions. In effect, the law's focus on corroboration, consent and character has established a standard of proof in rape cases that is more stringent than 'beyond a reasonable doubt'".(126)

A number of important issues have been raised in recent years with regard to rape laws, particularly in the U.S.A. Arguments for the reform of those laws often derive from feminist rape theories and consequently tend to reflect concern with the rights and protection of the victim. The uniqueness of rape, insofar as it has traditionally been defined as a crime committed by men against women, has been pointed out (127), and it has been argued that the sex-specific definition of the offence may also explain its uniqueness in its legal and procedural aspects (128). Much of the discussion with regard to such legal aspects has focused on the issue of corroboration (129), on consent standards and definitions (130), and on the problems relating to the complainant's character and credibility (131). These issues and their implications for the history and recent development of the law of rape in England and Wales will be considered in the next chapter.

FOOTNOTES TO CHAPTER ONE

- (1) JACKSON, S.: "the social context of rape: sexual scripts and motivation", Women's Studies International Quarterly, vol.1, no.1, 1978, p.27
- (2) SUTHERLAND, E.H. and CRESSEY, D.R.: Principles of criminology, Chicago, Lippincott, 1960
- (3) CRESSEY, D.R. and WARD, D.E. (eds.): Delinquency, crime and social process, New York and London, Harper and Row, 1969
- (4) WRIGHT, M. (ed.): Uses of criminology literature, London, Butterworths, 1973
- (5) COHEN, M.L. et al.: "The Psychology of rapists" Seminars in Psychiatry, Vol.3, No.3, 1971
- (6) AMIR, M.: "Alcohol and forcible rape", British Journal of Addictions, vol.62, Nos.3-4, 1967
- (7) TENNENT, T.G.: "Psychiatric aspects of crime" in WRIGHT, M. (ed.): op.cit., 1973
- (8) KINSEY, A.C. et al.: Sexual behaviour in the human male, Philadelphia and London, W.B.Saunders and Co., 1949, p.238
- (9) GAGNON, J.H. and SIMON, W. (eds.): Sexual deviance, New York and London, Harper and Row, 1967; STORR, A.: Sexual deviation, Harmondsworth, Penguin, 1976; BANCROFT, J.: Deviant sexual behaviour - modification and assessment, Oxford, Clarendon Press, 1974
- (10) JACKSON, S.: op.cit., 1978, p.27
- (11) KRAFFT-EBING, R. VON: Psychopathia sexualis (1886), Translation of the 10th German edition, London, Rebman Ltd., 1899, p.500
- (12) ibid., p.500
- (13) ibid., p.187
- (14) FIGES, E.: Psychology Today, April 1972, p.13
- (15) FREUD, S.: The standard edition of the complete psychological works of Sigmund Freud, London, Hogarth Press, 1961, vol.III
- (16) ibid., vol.III, p.149
- (17) ibid., vol.III, p.168n
- (18) ibid., vol.XIX, p.162
- (19) DEUTSCH, H.: The psychology of women, London, Research Books, 1947

- (20) HORNEY, K.: Feminine psychology, London, RKP, 1967
- (21) ibid., p.232
- (22) GUTTMACHER, M.S.: Sex Offenses, New York, Norton, 1951;
KARPMAN, B.: The sexual offender and his offences, New York, Julian Press, 1954 (Third printing: 1967); ELLIS, A. and BRANCALE, R.: The psychology of sex offenders Springfield, Ill., Charles C. Thomas, 1956
- (23) APFELBERG, B. et al.: "A psychiatric study of 250 sex offenders from the Psychiatric Division, Bellevue Hospital, N.Y.C., and the Department of Psychiatry of the N.Y. University College of Medicine" American Journal of Psychiatry, Vol.100, no.6, 1944, p.762
- (24) ROTH, N.: "Factors in the motivation of sexual offenders", Journal of Criminal Law, Criminology and Police Science, vol.42, no.5, 1952, p.632
- (25) KARPMAN, B.: op.cit., 1954, p.121
- (26) SUTHERLAND, E.H. "The diffusion of sexual psychopath laws", American Journal of Sociology, vol.56, no.2, 1950; SZASZ, T.S. Law, liberty and psychiatry: an inquiry into the social uses of mental health practices, New York, MacMillan, 1963
- (27) TAPPAN, P.W.: The habitual sex offender, Report prepared for the State of New Jersey, 1950. Quoted by WHEELER, S., in "Sex offences: a sociological critique", in WOLFGANG, M.E. et al. (eds.): The sociology of crime and delinquency, New York, John Wiley, 1962
- (28) ABRAHAMSEN, D.: The psychology of crime, New York, Science Editions, John Wiley and Sons, 1960
- (29) ibid., p.151
- (30) ibid., pp.157-158
- (31) For example, COHEN, M.L. et al.: op.cit., 1971
- (32) ABRAHAMSEN, D.: op.cit., 1960, p.160
- (33) PALM, R. and ABRAHAMSEN, D.: "Rorschach study of the wives of sex offenders", Journal of Nervous and Mental Disease, vol.119, no.2, 1954
- (34) ibid.
- (35) ABRAHAMSEN, D.: op.cit., 1960, p.161
- (36) APFELBERG, B. et al.: op.cit., 1944
- (37) ABRAHAMSEN, D.: op.cit., 1960
- (38) GUTTMACHER, M.S.: op.cit., 1951, p.50

- (39) PASCAL, G.R. and HERZBERG, F.I.: "The detection of deviant sexual practice from performance on the Rorschach test" Journal of Projective Techniques, vol.16, no.3, 1952
- (40) GEBHARD, P. et al.: Sex offenders, London, Heinemann, 1967, p.197
- (41) ibid., p.205
- (42) ibid., p.204
- (43) ibid., p.204
- (44) WHEELER, S.: "Sex offenses: a sociological critique" in WOLFGANG, M.E. et al. (eds.): The sociology of crime and delinquency, New York, John Wiley, 1962, p.408
- (45) ibid., p.409
- (46) ibid., p.410
- (47) ibid., p.411
- (48) AMIR, M.: Patterns in forcible rape, Chicago, University of Chicago Press, 1971
- (49) ibid., p.335
- (50) GEIS, G. and CHAPPELL, D.: "Forcible rape by multiple offenders" Abstracts on Criminology and Penology, vol.11, no.4, 1971; WOODS, G.D.: "Some aspects of pack rape in Sydney" Australian and New Zealand Journal of Criminology, vol.2, no.2, 1969; ROBERT, P. et al.: "Young adult delinquents. Group rape." Annales Internationales de Criminologie, vol.9, no.2, 1970; PARROT, C. and GUITTON, R.: "Clinical study on 'plots'. Sex crimes committed in gangs." Rev. Neuropsychiat. Infant., vol.11, nos.7-8, 1963
- (51) The breakdown is as follows: 58% for single rapes, 83% for pair rapes and 90% for group rapes.
- (52) WOLFGANG, M.E. and FERRACUTI, F.: The subculture of violence, London, Tavistock, 1967
- (53) WEIS, K. and BORGES, S.S.: "Rape as a crime without victims and offenders? A methodological critique" in VIANO, E.C. (ed.): Victims and society, Washington D.C., Visage Press, 1976, p.230
- (54) SCHWENDINGER, J.R. and SCHWENDINGER, H.: "A review of rape literature" Crime and Social Justice, vol.6, Fall-Winter 1976, p.79
- (55) ibid., p.79
- (56) AMIR, M.: "Victim precipitated forcible rape" Journal of Criminal Law, Criminology and Police Science, vol.58, No.4, 1967, p.493
- (57) VIANO, E.C. (ed.): Victims and society, Washington D.C.,

Visage Press, 1976

(58) WOLFGANG, M.E.: "Victim precipitated criminal homicide" Journal of Criminal Law, Criminology and Police Science, vol.48, no.1, 1957; HEPBURN, J, and VOSS, H.: "Patterns of criminal homicide: a comparison of Chicago and Philadelphia" Journal of Criminal Law, Criminology and Police Science, vol.59, no.4, 1968

(59) AMIR, M.: op.cit., 1971, p.266

(60) LEE, B.: "Precautions against rape", Sexual Behaviour, 28-30 January, 1972

(61) HAYMAN, C.: "Rape and its consequences" Medical Aspects of Human Sexuality, vol.10, 1971

(62) NELSON, S. and AMIR, M.: "The hitchhiker victim of rape: a research report" in DRAPKIN, I. and VIANO, E.C. (eds.): Victimology: a new focus Vol.5, Lexington, Mass., Lexington Books, 1974

(63) MULVIHILL, D.J. et al.: Crimes of violence. A report to the National Commission on the Causes and Prevention of Violence, Washington D.C., U.S. Government Printing Office, 1969

(64) SILVERMAN, R.A.: "Victim precipitation: an examination of the concept" in DRAPKIN, I. and VIANO, E.C. (eds.): Victimology: a new focus, vol.1, Lexington, Mass., Lexington Books, 1974, p.101

(65) ibid., p.99

(66) ibid., p.104

(67) WILSON, G.: Paper presented to the British Psychological Society's Conference, London, December 1979

(68) WEIS, K., and BORGES, S.S.: op.cit., 1976

(69) ibid., p.242

(70) ibid., p.252

(71) CHAPPELL, D.: "Cross-cultural research on forcible rape" Internat. Journal of Criminology and Penology, vol.4, no.3, 1976; GOUDSMIT, W.: "Sexual offences: the offender, victim and society" Tijdschr. v. Ziekrverpleging, vol.5, pp. 3-11, 1963 (Dutch); HALIMI, G.: Viol- Le Proces d'Aix, Paris, Gallimard, 1978; KOMIYAMA, K. et al.: "Behavioural patterns in forcible rape. I.-Situational analysis of criminals. II.-The interpersonal relationships of offender and victim" Rep.Nat.Inst.Pol.Sci., vol.11, no.1, 1970 (Japanese); LESZCZYNSKI, J.: The offense of rape in Poland, Warsaw, Wydawnictwo Prawnicze, 1973 (Polish); MINSKAYA, v.s.: "victimological research in rape", Voprosy Bor'by a prestupnost'ju, vol.17, pp. 21-31, 1972 (Russian); ROZSA, J. and MUNNICH, I.: "Criminology of rape", Kriminol. kriminalista tanulmanyok, vol.9, pp.51-104, 1972 (Hungarian); SCHIFF, A.F.: "Rape in other countries", Med.Sci.Law., vol.11, no.3, 1971

- (72) CHAPPELL, D., GEIS, G. and FOGARTY, F.: "Forcible rape: a bibliography" Journal of Criminal Law and Criminology, vol.65, no.2, 1974
- (73) FEILD, H.S. and BARNETT, N.J.: "Forcible rape: an updated bibliography" Journal of Criminal Law and Criminology, vol.68, no.1, 1977
- (74) FEDERAL BUREAU OF INVESTIGATION: Uniform Crime Reports for the United States, Washington D.C., U.S. Department of Justice, 1974
- (75) Defined by the F.B.I. as murder, aggravated assault and robbery.
- (76) CRIMINAL STATISTICS FOR ENGLAND AND WALES, London, H.M.S.O., 1964 to 1982
- (77) Figures from 1980 onwards are not strictly comparable to those for previous years because of certain new counting rules introduced in that year.
- (78) FEDERAL BUREAU OF INVESTIGATION: op.cit., 1974
- (79) BRODYAGA, L. et al.: Rape and its victims: a report for citizens, Washington D.C., Health Facilities and Criminal Justice Agencies, Center for Women's Policy Studies, 1975
- (80) ENNIS, P.H.: Field surveys 2: Criminal victimization in the U.S. Report of a national survey, Washington D.C., U.S. Government Printing Office, 1967
- (81) GRIFFIN, S.: "Rape - the all American crime" Ramparts, vol.10, no.3, 1971; HOROS, C.V.: Rape, New Canaan, Conn., Tobey Publishing Co., 1974
- (82) BROWNMILLER, S.: Against our will: men, women and rape, London, Secker and Warburg, 1975
- (83) BERGER, V.: "Man's trial, woman's tribulation: rape cases in the courtroom", Columbia Law Review, vol.77, no.1, 1977, p.3
- (84) ROSE, V.: "Rape as a social problem: a by-product of the feminist movement", Social Problems, vol.25, no.1, 1977, p.87
- (85) BROOKS, N.: "Rape and the laws of evidence", Chitty's Law Journal, vol.23, no.1, 1975, p.10
- (86) BROWNMILLER, S.: op.cit., 1975, p.185
- (87) FINKEL, R.H.: "A survey of capital offenses" in SELLIN, T. (ed.): Capital Punishment, New York, Harper and Row, 1967
- (88) GLASER, D.: Adult crime and social policy, Englewood Cliffs, N.J., Prentice Hall, 1971; MENDELSON, B.: "The origin of the doctrine of victimology" Excerpta Criminologica, vol.3, no.3, 1963
- (89) HILBERMAN, E.: The rape victim, Washington D.C., American

Psychiatric Association, 1976, p.2

(90) WILLIAMS, G.: "Corroboration in sexual cases", Criminal Law Review, 1962, p.662

(91) ibid., p.663

(92) JACKSON, S.: op.cit., 1978, p.29

(93) FINDLAY, B.: "The cultural context of rape", Women Lawyers' Journal, vol.60, no.4, 1974, p.201

(94) MEAD, M.: Sex and temperament in three primitive societies, New York, Dell Publishing Co., 1935; MEAD, M.: The mountain Arapesh, Garden City, N.Y., Natural History Press, 1968-71

(95) LEVINE, R.A.: "Gusii sex offenses: a study in social control", American Anthropologist, vol.61, no.6, 1959

(96) MEAD, M.: op.cit., 1935, p.110

(97) TONER, B.: The facts of rape, London, Arrow, 1977, p.44

(98) KOMISAR, L.: Violence and the masculine mystique, (pamphlet), Pittsburgh, Pa., Know Inc., 1971, p.8

(99) GRIFFIN, S.: op.cit., 1971, p.3

(100) ibid., p.3

(101) GAGNON, J.H. and SIMON, W.: Sexual conduct, London, Hutchinson, 1974

(102) JACKSON, S.: op.cit., 1978, p.37

(103) WEIS, K. and BORGES, S.S.: "Victimology and rape: the case of the legitimate victim", Issues in Criminology, vol.8, no.2, 1973, p.90

(104) HAYMAN, C.R. and LANZA, C.: "Sexual assault on women and girls", Amer.Journal of Obst. Gyn., vol.109, no.3, 1971

(105) MASSEY, J.B. et al.: "Management of sexually assaulted females", Obst. and Gyn., vol.38, no.1, 1971

(106) BURGESS, A.W. and HOLMSTROM, L.L.: Rape: victims of crisis, Bowie, Maryland, R.J. Brady and Co., 1974

(107) For example, NOTMAN, M.T. and NADELSON, C.C.: "The rape victim: psychodynamic considerations", Am. J. Psychiatry, vol.133, no.4, 1976

(108) HILBERMAN, E.: op.cit., 1976, p.33

(109) SUTHERLAND, S. and SCHERL, D.J.: "Patterns of response among victims of rape", Amer. J. Orthopsychiat., vol.40, no.3, 1970, p.507

- (110) ibid., p.508
- (111) BURGESS, A.W. and HOLMSTROM, L.L.: "The rape victim in the emergency ward" Am.J.Nursing, vol.10, pp. 1740-45, 1973; BURGESS, A.W. and HOLMSTROM, L.L.: "Rape trauma syndrome" Am.J.Psychiatry, vol.131, no.9, 1974
- (112) BURGESS, A.W. and HOLMSTROM, L.L.: op.cit., 1974
- (113) SUTHERLAND, S. and SCHERL, D.J.: "Crisis intervention with victims of rape" Social Work, vol.17, no.1, 1972; HARDGROVE, G.: "An interagency service network to meet the needs of rape victims" Social casework, vol.57, no.4, 1976
- (114) GILLEY, J.: "How to help the raped" New Society, vol.28, no.612, 1974
- (115) GAGER, N. and SCHURR, C.: Sexual assault: confronting rape in America New York, Grosset and Dunlap, 1976
- (116) HILBERMAN, E.: op.cit., 1976
- (117) HOLMSTROM, L.L. and BURGESS, A.W.: The victim of rape: institutional reactions, New York, John Wiley and Sons, 1978
- (118) SCHURR, C.: Rape: victim as criminal, (pamphlet), Pittsburgh, Pa., Know Inc., 1971
- (119) GRIFFIN, S.: op.cit., 1971, p.5
- (120) ibid., p.4
- (121) SCHURR, C.: op.cit., 1971
- (122) BOHMER, C. and BLUMBERG, A.: "Twice traumatized: the rape victim and the court" Judicature, vol.58, no.8, 1975, pp.398-399
- (123) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978
- (124) COOTE, A. and GILL, T.: The rape controversy, London, National Council for Civil Liberties, 1975, p.12
- (125) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, H.M.S.O., Cmnd. 6352, 1975, paras. 12-13
- (126) ROBIN, G.D.: "Forcible rape: institutionalised sexism in the criminal justice system" Crime Delinq., vol. 23, no.2, 1977, p.136
- (127) BERGER, V.: op.cit. 1977
- (128) BROOKS, N.: op.cit. 1975
- (129) LUGINBILL, D.H.: "Repeal of the corroboration requirement: will it tip the scales of justice?" Drake Law Review, vol.24, no.3, 1975; GOLDSTEIN, A.B.: "Corroboration in rape cases in New York - a half step forward" Albany Law Review, vol.37, no.2, 1973; GLESS, A.G.: "Nebraska's corroboration rule" Nebraska Law Review, vol.54, no.1, 1975; EISENBERG, R.L.: "Abolishing cautionary instructions in

sex offense cases" Crim.Law Bulletin, vol.12, no.1, 1976

(130) HARRIS, L.R.: "Towards a consent standard in the law of rape" University of Chicago Law Review, vol.43, no.3, 1976; WOOD, P.L.: "The victim in a forcible rape case: a feminist view" Amer.Crim.Law Review, vol.11, no.2, 1973; SCUTT, J.A.: "Fraud and consent in rape: comprehension of the nature and character of the act and its moral implications" Crim. Law Quart., vol.18, no.3, 1976; VALPARAISO UNIVERSITY LAW REVIEW, vol.10, no.1, 1975

(131) HAINES, E.C.: "The character of the rape victim" Chitty's Law Journal, vol.23, no.2, 1975; SROUFE, E.: "Evidence - admissibility of the victim's past sexual behaviour under Washington's rape evidence law - Washington Rev. Code para. 9.79.150. (1976)" Washington Law Review, vol.52, no.4, 1977; HIBEY, R.A.: "The trial of a rape case: an advocate's analysis of corroboration, consent and character" Amer.Law Review, vol.11, no.2, 1973; LEGRAND, C.E.: "Rape and rape laws: sexim in society and law" California Law Review, vol.61, no.3, 1973; JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, vol.64, no.1, 1973

CHAPTER TWO. THE LAW OF RAPEHistory of the law in England

Brownmiller has aptly summarized early English rape law as follows:

"Concepts of rape and punishment in early English law are a wondrous maze of contradictory approaches reflecting the gradual humanization of jurisprudence in general, and in particular, man's eternal confusion, never quite resolved, as to whether the crime was a crime against a woman's body or a crime against his own estate." (1)

There was certainly from the earliest times a sexual element in the offence, in that the very definition of it hinged on the victim's virginity: it is held in Placita Corone (2) that an appeal of rape was invalid if it did not specify that the victim had been a virgin prior to the assault. However, the offence also had a strong property aspect insofar as rape in Saxon law included abduction as well as "violentus concubitus". As Pollock and Maitland wrote,

"if it had wronged the woman, it had wronged her kinsmen also, and they would have felt themselves seriously wronged even if she had given her consent and had, as we should say, eloped". (3)

During this period, the woman could by law redeem the offender from the execution of his sentence by marrying him, provided that the judge and the families involved agreed (4). If there was no reconciliation, the penalties imposed varied with the gravity of the offence, but also with the relative social status of victim and offender. Compensation was often payable by the offender to the man whose wife or servant had been sexually assaulted (5). This too suggests that rape was perceived as a social, rather than sexual offence, the essence of it being the unlawful use of another man's property.

Forcible abduction and marriage did not become offences in their own right until the 15th century (6) and there is evidence that even after Glanvill's time, marriage and abduction remained firmly associated with the offence. As one commentator observed,

"the sexual element, although inherent in the offence, was rapidly losing its significance". (7)

While some writers do not believe that an appeal of rape was frequently the prelude to marriage (8), most of the authorities take the view that the

"woman often married her ravisher, to save her good name, and a titled but penurious young man sometimes carried off an heiress with this in view". (9)

In Saxon law, according to Bracton, the punishment for rape was death:

"If, on meeting a woman, a man throws her upon the ground against her will, he forfeits the King's grace; if he shamelessly disrobes her and places himself upon her, he incurs the loss of all his possessions; and if he lies with her, he incurs the loss of his life and members."
(10)

The punishment became castration and blinding during the reign of William the Conqueror (11) but such a penalty was only applicable where

"there was defloration and the woman would make no peace". (12)

If the woman herself made no appeal, the offender could still be prosecuted by the Crown, but in this instance, a lesser punishment of fine and imprisonment was thought to be sufficient. There is evidence that the fines inflicted in such cases were minimal (13) and although there is little case law on rape offences during this period, it has been noted that appeals of rape were rarely successful during the 13th century (14).

Major changes in the law of rape took place during the reign of

Edward I. In 1275, the first Statute of Westminster gave women forty days to appeal and fixed the punishment of the offender at two years' imprisonment to be followed by a fine. The legal concept of rape had by this time broadened to include, at least in principle, the rape of non virgins. Britton described rape as a felony committed by violence on the body of a woman "whether she be a virgin or not" (15), and Bracton further enlarged the definition of the offence to include, among its potential victims, "married women, widows, nuns, matrons, concubines and even prostitutes".

(16) The rape of married women and virgins became equally punishable under Edward I, and the custom of redemption by marriage was banned. In 1285, the second Statute of Westminster brought back the death penalty for rape, whether prosecuted by appeal of the woman or on indictment. To quote Britton,

"Of such felonies, let enquiry be made; and whoever is attainted thereof, either at the suit of the woman by appeal of felony, or at our suit, shall have the same judgment as for the death of a man, whether the woman have consented after commission of the felony or not, as is contained in our Statutes of Westminster". (17)

It has been argued that the above Statutes intended to protect women from sexual violation

"in a cursory and absent-minded way...but it was the use of rape to force unwilling families to accept disadvantageous marriages that was its main preoccupation". (18)

The policy of banning redemption through marriage was reinforced during the reign of Richard II when the following was enacted:

"...if a woman afterwards assents to the ravisher, both shall lose their inheritance, dower or joint estate after the death of the husband or ancestor, and the next in blood shall enter; and he or the husband shall have an appeal". (19)

Different interpretations have been offered with regard to the legislative changes embodied in the Statutes of Westminster. Some

have argued that despite the small penalty imposed in the first Statute, the gravity of the offence was not compromised. For the first time in statute law, the rape of virgins and non virgins was equally punishable and the policy of Crown prosecution, again for all rapes, was a clear acknowledgment that

"rape was not just a family misfortune and threat to land and property, but an issue of public safety and state concern". (20)

The small penalty that was law for ten years was seen in this light as a way of easing the effect of those major transitions (21). Most historians, however, have argued that the first Statute reduced the status of the offence to a trespass, punishable only by a light penalty, and that the death penalty was brought back in the second Statute because it was felt that the lenient attitude of 1275 encouraged the commission of the crime (22).

As a result of the Statutes of Westminster, various laws were later enacted to deal with forcible abduction and marriage as separate offences from rape. A new felony was created to this effect during the 15th century. This punished any person who, against her will and forcibly, took away any woman

"whether maid, widow or wife, having substance in goods, or lands, or being an heir apparent...to marry or defile her". (23)

It was during the 17th century that many of the principles that govern the contemporary law of rape were set forward by Lord Hale.

As the Advisory Group on the Law of Rape commented in 1975,

"the traditional common law definition, derived from a 17th century writer and still in use, is that rape consists in having unlawful sexual intercourse with a woman without her consent, by force, fear or fraud". (24)

Since Hale's time, various statutes with relevance for particular aspects of rape law have been enacted (25). The death penalty for

rape was abolished in 1841 (26) and a substantial amount of case law has built up around specific aspects of the offence (27).

However, the essential ingredients of the contemporary offence had been firmly established by the 18th century and Hale's influence in this context must be considered in some detail.

It has been noted that Hale's writings have been referred to by "virtually every legal writer who has discussed rape" (28), that he is "still the most quoted authority on the law of rape" (29), and that "the misogynistic bias that has pervaded law and practice concerning...rape" (30) is largely attributable to these. A number of matters illustrate this last point, in particular the question of marital exemption in rape, the corroboration warning in rape trials, and the relevance of the complainant's character and behaviour at the time of the alleged offence.

In contemporary law, a man cannot be convicted as a principal of rape on his wife, although he may be guilty of the rape of a woman who was his wife if there is a separation order in force (31), or a decree nisi (32). The reasoning behind this principle is summarized in Hale's work as follows:

"...the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract". (33)

Hale's view in this matter has been questioned on numerous occasions. Various commentators have found it "archaic" (34) and "patently absurd" (35), and a 19th century judge, Wills J., made the following observations:

"If intercourse under the circumstances now in question constitutes an assault on the part of the man, it must

constitute rape, unless indeed between married persons rape is impossible, a proposition to which I certainly am not prepared to assent and for which there seems to me to be no sufficient authority" (36).

This question arose during the parliamentary debates of the Sexual Offences (Amendment) Bill in 1976, and also more recently in 1983, but no change in the law was made with regard to rape within marriage, - an indication that members of the House of Commons are on the whole still prepared to accept Hale as sufficient authority on this point (37).

Hale's justification of the marital exemption rule undoubtedly implies a view of woman as man's property within the contract of marriage. As Brownmiller put it,

"compulsory sexual intercourse is not a husband's right in marriage, for such a 'right' gives the lie to any concept of equality and human dignity" (38).

Another of Hale's statements provides the basis of the corroboration rule in modern English law:

"(It) must be remembered that (rape) is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent".
(39)

It is clear from the amount of concern with the plight of the rape victim in recent years that Hale's dictum is grossly inaccurate: rape is not an easy charge to allege, and neither is it difficult to rebut. A considerable volume of recent research findings illustrate the enormous difficulties facing a complainant in a rape case, as well as the greater likelihood of acquittal in these as compared to other criminal cases (40). Nevertheless, the cautionary rule remains:

"Though corroboration of the evidence of the prosecutrix is not essential in law, it is, in practice, always looked for and it is the established practice to warn the jury against the danger of acting upon her uncorroborated

testimony" (41)..

In a recent case, the reason why conviction is thought to be dangerous without corroboration was outlined by Lord Justice Salmon as follows:

"...human 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" (42).

It must be noted here that the corroboration warning is given not only in rape cases, but in all cases of sexual offences, irrespective of the complainant's sex. However, a brief look at the relevant criminal statistics (43) indicates that the vast majority of indictable sexual offences are committed by men against women or children. In 1978, for example, almost 99% of the defendants tried at Crown Courts in England and Wales for sexual offences were men, and only 18% of these were tried for offences whose victims may have been men or women. The overwhelming majority (73.4%), however, were tried for offences which, by definition, can only be committed against women or children (44).

Another peculiar feature of the law of rape is the rule relating to recent complaint. In the trial of a rape offence, the prosecution may adduce evidence as to the fact that a complaint was made by the victim on the first opportunity which reasonably offered itself after the offence (45). Evidence of recent complaint is not of a corroborative nature as it does not come from an independent source; however, it may indicate consistency in the behaviour of a complainant and thus tend to negative her consent.

This rule also seems to stem from the idea that there is some

essential difference between the victims of rape and those of other criminal offences. The assumption is that rape is particularly liable to involve false accusations and that alleged victims ought therefore to be put to a more stringent test than those of other crimes. The genuineness of the complaint appears to be judged primarily with reference to the character and behaviour of the woman involved, rather than those of the alleged rapist. Again, to quote Hale, the complainant

"may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact, that concur in that testimony. For instance, if the witness be of good fame, if she presently discovered the offence and made pursuit after the offender, showed circumstances and signs of the injury...if the place, wherein the fact was done was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony when proved by others as well as herself. But on the other side, if she concealed the injury for any considerable time after she had the opportunity to complain, if the place where the fact was supposed to be committed were near to inhabitants or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned". (46)

The fear of false accusations is also reflected in the guidelines given to doctors regarding the medical examination of alleged victims of rape. One of the main sources of corroboration in modern rape trials is medical and forensic evidence regarding the identity of the parties involved, the occurrence of sexual intercourse and most frequently, the physical injuries sustained by the woman as a result of the assault. Physical resistance to the attacker is frequently seen as an essential element of "genuine" rape, while the absence of bodily injury to substantiate such resistance in a woman alleging rape is thought to be a good indication that the

complaint is a false one (47). One distinguished writer in the field of forensic medicine warns that

"a girl out of her first decade is seldom capable of being raped against her will (sic) without mark of forcible restraint or injury". (48)

Although textbooks of legal medicine tend to give some acknowledgment to the possibility of submission through intimidation and fear, their main concern is with the interpretation of signs of injury and with the extent to which injuries are consistent with the woman's account of what happened. An assumption is sometimes made that one must expect a greater degree of resistance in some women than in others:

"in women accustomed to intercourse...it is natural to expect more evidence of resistance for they are less likely to be terrified into inactivity than a virgin would be". (49)

The finding of physical injury alone, however, does not necessarily help to substantiate a complainant's story and the doctor is warned that alternative explanations for any injury must always be looked for:

"...the supposed victim may lacerate the parts and stain the clothes with blood to simulate the condition...Occasionally, irritants such as red pepper are placed within the vagina to produce an inflammation and simulate rape". (50)

Perhaps the most controversial element in the legal treatment of rape before 1976 was the law of evidence relating to the admissibility of evidence regarding the character of the complainant. This situation has been altered, as we shall see below, by the provisions of the Sexual Offences (Amendment) Act 1976.

In the trial of a rape offence, the defence could bring in evidence that the complainant was "a woman of notoriously bad character for want of chastity or common decency" (51) or a prostitute (52). Any sexual behaviour with the defendant on previous occasions was admissible as evidence (53), as was any immoral behaviour with other men (54). Of these types of evidence regarding the complainant's character, the first two (i.e. general bad reputation and previous sexual intercourse with the defendant) were regarded as relevant to consent, while the last one, relating to the complainant's sexual experience with any third party, was seen as affecting her credibility. The law of evidence in this respect reflected the rather strange assumption that women were likely to be untruthful as a direct result of their sexual "immorality".

Cross-examination directed at showing consent did not involve an imputation on the complainant's character within the meaning of the Criminal Evidence Act 1898, so that the defendant was safe from cross-examination as to his previous convictions or character (55). This effectively put rape in a wholly different category to any other criminal offence in that it gave the defence what has been termed "licence for sexual mud-slinging" (56). In the trial of any other criminal offence, attacks on the alleged victim's character would have put the defendant's character at issue. Furthermore, an implicit distinction was created between the complainant and other prosecution witnesses in the trial, insofar as an attack on the character of those other witnesses would have "let in" the character of the accused. The general purpose of introducing evidence as to the complainant's bad reputation was succinctly

summarized by Robin Corbett M.P. in his introduction of the Sexual Offences (Amendment) Bill:

"...a woman could often be subjected to hurtful and irrelevant cross-examination about her previous sexual history, on the seeming assumption that because the woman had had, for example, an abortion, or an illegitimate baby, or was even held to be promiscuous, that somehow excused the rape or, worse, suggested that rape was not possible against such a woman". (57)

The basic assumption that women have a tendency to lie and make false and malicious accusations of rape has been a dominant theme in legal thinking from the earliest times to the present. That attitude, and the correspondingly deep suspicion towards women alleging rape, is reflected in the law of rape which sets the offence in a unique category within the general body of the criminal law in several fundamental respects. The Sexual Offences (Amendment) Act 1976 was generally seen as a move forward and away from old assumptions, as well as a genuine attempt at restoring some balance between the rights of the complainant and defendant in a rape trial. The following section discusses the background and substance of the present law, in order to assess how far the new Act reflects a radical change in social attitudes and legal thinking.

DPP v Morgan and others - the rape controversy

The Report of the Advisory Group on the Law of Rape states that the Group's

"enquiry originated as a result of widespread public concern expressed by the public, the media and in Parliament in regard to the decision of the House of Lords in Director of Public Prosecutions v Morgan and others". (58)

The trial judge in that case, where the issue was essentially one

of consent, directed the jury that the defendants should be acquitted if they honestly believed that the complainant consented, and if such belief was held on reasonable grounds. The men were convicted and subsequently appealed against their conviction on the grounds that the trial judge misdirected the jury and that they were entitled to an acquittal if the jury found that the victim did not consent, provided they, the defendants, honestly believed that she did, whether the grounds for their belief were reasonable or not. The Court of Appeal (Criminal Division) dismissed the appeals; nevertheless, it gave the appellants leave to appeal to the House of Lords, since a point of law of general importance was felt to be involved in the case, namely

"whether in rape the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented if such belief was not based on reasonable grounds". (59)

Although the convictions of the men in the Morgan case were upheld, the majority of the Law Lords who considered the question (60) held that a man should be acquitted of rape if he honestly believed that the woman consented, even if he did not have reasonable grounds for his belief. The rationale for that decision was that the ruling merely extended to the crime of rape a well established principle of criminal law, namely that "actus reus" as well as "mens rea" must be present to constitute a criminal offence. As Mr. Justice Cave observed,

"It is a general principle of our criminal law that there must be as an essential element in a criminal offence some blameworthy condition of the mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge, but as a general rule, there must be something of that kind which is designated by the expression mens rea". (61)

Mens rea is thus seen as some sort of mental nexus between the accused person and the unlawful act he is alleged to have

committed, but it is without doubt a difficult and confused concept. The main point of disagreement among the Law Lords in the case of DPP v Morgan and others had, at its root, divergent interpretations as to what constituted established practice in various areas of the criminal law with regard to criteria used to determine mens rea.

Much literature has been devoted in this context to the cases of DPP v Smith and Hyam v DPP (62). The decisions in these cases turn on whether the prosecution must establish that the defendant himself had the intent to commit the crime in question, or whether it would be sufficient to prove that an average person in a similar position would have had that intent. In the case of Smith, the House of Lords applied the objective test as to what a reasonable man would have foreseen and intended, and the appellant's conviction was upheld. Indeed, Viscount Kilmuir LC argued that the foreseen and intended consequences were to be treated alike and if the defendant should have foreseen the consequences of his actions, then he should be guilty of the offence charged.

Following this decision, s.8 of the Criminal Justice Act 1967 was passed, providing that a jury is not bound by law to infer that the defendant intended a result of his actions merely because that result was a natural and probable consequence of them. This has been interpreted as a subjective test, and was applied in the case of Hyam where the appellant's conviction was quashed. Lord Hailsham held in that case that the consequences of an action which are foreseen as a moral certainty are intended ones, whereas those consequences which are seen as highly probable should not be

treated as intended.

A similar line of reasoning was followed in the case of DPP v Morgan and others by the majority of the Law Lords. This was Lord Hailsham's argument:

"Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a "defence" of honest belief or mistake, or of a defence of honest and reasonable belief and mistake. Either the prosecution proves that the accused had the requisite intent, or it does not...I am content to rest my view of the instant case on the crime of rape by saying that it is my opinion that the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy nilly, not caring whether the victim consents or no. A failure to prove this involves an acquittal because the intent, an essential ingredient, is lacking. It matters not why it is lacking if only it is not there, and in particular it matters not that the intention is lacking only because of a belief not based on reasonable grounds". (63)

Lord Simon of Glaisdale and Lord Edmund Davies, the dissenters, referred to a number of cases where judgments seem to indicate that in some circumstances at least, the objective test was held to be the correct one. Indeed, they pointed out that recent statute law in the area of sexual offences confirmed this view. According to s.6(3) of the Sexual Offences Act 1956 a man is not guilty of unlawful sexual intercourse with a girl under the age of 16 if he is under the age of 24, has not previously been charged with a similar offence, believes her to be of the age of 16 or over and has reasonable cause for the belief. Hence, it was argued, the

"necessary course is to uphold, as being in accordance with established law, the direction given in this case by the learned trial judge as to the necessity for the mistake of fact urged to be based on reasonable grounds". (64)

While the other Law Lords approached the Morgan case from the perspective of the defendant entirely, Lord Simon of Glaisdale took into account the position of the alleged victim too in coming to his decision. He interpreted what in his opinion was established policy as derived from legal concern to strike a fair balance between the victim and the accused:

"A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him". (65)

In any event, the Lords' decision provoked considerable public controversy. Legal opinion was generally in favour of it and confirmed it as nothing more than the welcome application of accepted principles of criminal law to the offence of rape:

"The opposing view was that a man could be convicted of a rape although he honestly believed that the woman was consenting, if he was stupid (unreasonable) in forming that belief. To convict the stupid man would be to convict him of what lawyers call inadvertent negligence...Rape carries a possible sentence of imprisonment for life, and it would be wrong to have a law of negligent rape". (66)

The National Council for Civil Liberties also supported the decision (67) and an article in New Society commented that "as a matter of logic" the ruling was quite right (68).

However, popular opinion and the media in general were fiercely opposed to the Morgan ruling. The Sunday Mirror labelled it a "Rapists' Charter" (69) and this feeling was reflected in numerous articles and readers' letters in most daily newspapers. These expressed the fear of "bogus defences" and of men "getting away" with rape, which was felt to be the inevitable consequence of the ruling:

"The scales of justice have swung heavily in favour of

rapists...Henceforth, every rapist will declare his 'belief' that his victim was willing - and expect his ticket to freedom...because the principle that a man's belief, if he can convince the jury of it, can prevent conviction, is now enshrined unassailably in law. (70)

A reconsideration of the law was urgently called for by a number of individuals and organisations. The National Council of Women of Great Britain, for example, asked for Parliament to

"take immediate steps to reform the intolerable state of this section of the criminal law". (71)

One immediate response to the Lords' ruling was the presentation in Parliament of a Bill containing three major proposals for the reform of rape law. It was introduced by Jack Ashley M.P. The first proposal was aimed at reversing the Law Lords' ruling in the Morgan case, and at replacing the subjective test adopted in the ruling by an objective test. The second proposal was to grant anonymity for victims of rape, except by direction of the court. Thirdly, the Bill sought to ban the disclosure in court of the complainant's sexual experience prior to the alleged rape as this was felt to be irrelevant to her credibility or her consent (72).

Although the Home Secretary initially declined to take emergency action to reverse the Lords' ruling, he eventually agreed, in the face of mounting public pressure, to consider the matter further. He announced that he would be seeking the advice of an independent group which would consider the controversial judgment in a wider context. The Advisory Group on the Law of Rape was appointed in July 1975, under the chairmanship of Mrs. Justice Heilbron, with the following terms of reference:

"To give consideration to the law of rape in the light of recent public concern and to advise the Home Secretary whether early changes in the law are desirable" (73).

In appointing the Group, the Home Secretary appeared to have given

in to public pressure and agitation resulting directly from the Law Lords' decision in the case of Morgan. However, it has been noted that the setting up of the Group was a "very curious intervention" (74), and that the Morgan decision ought not to have been considered in relation to the offence of rape alone. It has also been argued that such an ad hoc approach was inappropriate to law reform, particularly when sexual offences in general were already being considered by the Criminal Law Revision Committee. Rape was felt to be "especially unsuited to instant responses to popular commotions" particularly when the reasons for those commotions were not clearly understood:

"why the application to the offence of rape of the general principles of the law relating to criminal liability...should produce this kind of response is far from clear". (75)

However, the Lords' decision was not as straightforward as the above writer suggests. The mere fact that the Court of Appeal dismissed the appeals yet gave leave to appeal to the House of Lords indicates a feeling that the issues involved here were far from simple. A reading of the House of Lords' judgments reveals that the main issues in the case were open to a good deal of interpretation. In particular, there was disagreement regarding the definition of the "general principles of the law relating to criminal liability" as well as the application of such principles to the offence of rape. The Law Lords' inability to reach a unanimous decision on the matter also underlines the fact that there was at least some degree of doubt, at that stage, as to the correctness of the majority view. The confusion surrounding the matter of criminal intent is further acknowledged and discussed in the Law Commission's 1978 Report on the Mental Element in Crime. (76) It may be that the public outcry which followed the decision

was out of proportion and based on a misunderstanding of the full implications of the ruling. Nevertheless, it would be wrong to view the concern expressed as a totally irrational response to an unquestionably correct decision. It must be acknowledged that the decision carried more than an element of doubt and to that extent, the public controversy which it provoked was, if not wholly justified, at least understandable.

In addition to the doubt inherent in the House of Lords' decision, a number of points may be made concerning the general social climate relating to the offence of rape in 1975. Several factors may have contributed to the sudden newsworthiness of rape and these may also partially explain what has been described as the public's and the media's "thoroughly distorted view of the Morgan ruling" (77).

It has been argued that a distinction could be made between attitudes towards violent crime on the political and personal level, relating to concern over rising crime rates and to personal fear of crime respectively (78). It should be remembered that as far as the "political level" is concerned, the events leading to law reform in 1975 took place against a background of unprecedented increase in the reported number of rapes. The yearly number known to the police more than doubled between 1960 and 1978, and for the first time, exceeded the thousand mark in 1974 (79).

The importance of fear as a factor governing public opinion about rape has been pointed out elsewhere: in analysing the diffusion of sexual psychopath laws in the U.S.A., Sutherland identified a

typical course of events leading to the enactment of such laws (80). The first essential ingredient of legislative reform, he argued, was a state of fear aroused in the community when a few serious sexual crimes have been committed in rapid succession. This is usually accompanied by nationwide publicity and considerable agitation in the community. While the nature of the laws considered in Sutherland's and in this study is clearly quite different, one could argue that public opinion, fuelled in part by a state of fear, had an important influence on Government legislative action. Whatever the general level of fear of rape in the community at any particular point in time, this was substantially increased as a result of the activities between September 1974 and May 1975 of the man who became labelled as the Cambridge rapist. The case received nationwide press publicity and public concern increased as it appeared that the rapes were becoming more violent on each occasion. Some of the victims suffered considerable injuries requiring hospitalisation and even surgical intervention. The local community was in a state of panic:

"Talk of the rapes is everywhere...Rumours fly about wildly...False alarms continue". (81)

By May 1975, the panic and the hunt for the Cambridge rapist had reached such proportions that reports of the latest attack, an unsuccessful attempt and police efforts to catch the man vied for space in the national press with news of the Lords' judgment in the case of Morgan.

The popular view of rape as an extremely serious crime was underlined by the Cambridge events, and the Law Lords' judgment in that light may have been erroneously interpreted as a denial of the gravity of the offence. It was widely believed that the ease of

putting up a bogus defence would have the effect of deterring rape complaints and that increasing numbers of rapists would go undetected and unpunished. A concern with encouraging women to report rape was one of the key issues in the proposals for providing anonymity to victims of rape; this was initially brought up in the House of Commons in 1974, before Jack Ashley's Bill.

Chibnall has argued that one set of rules which governs the press reporting of violence stresses the relevance of the sexual connotation, "which derives its prominence from the imperative of titillation" (82). Thus, rape victims are usually described in the press in terms of their marital status, age, physical appearance and other personal attributes (83). It has also been noted that some papers, particularly after an acquittal, tend to include somewhat gratuitous remarks about the private life of the alleged victim (84).

Thus, the ordeal for women of giving evidence at the trial and of being cross-examined on intimate details of their personal lives was in many cases compounded by full scale publicity. A number of questions were asked in the House of Commons in 1974 regarding the possible provision of anonymity for complainants at rape trials, but these questions only received the answer that judges already had sufficient discretion in this matter without further legislation (85). However, existing practice was regarded as inconsistent by many, and criticised for being dependent on "the judge's view of the deserving character of the woman" (86).

The Rape (Anonymity of Victims) Bill was introduced by F.P. Crowder

M.P. in July 1974. This Bill was intended to encourage victims to come forward and make statements to the police without fear of publicity, and was described by its sponsor as "not a controversial measure" (87). The need for anonymity was presented as a matter of complete unanimity, which one Member of Parliament argued as follows:

"It would be one more advance for a woman's rights, and welcomed by all with any respect for her dignity". (88)

The Bill sought to provide anonymity for victims of "illegal rape", an expression which led the New Law Journal to comment that rape was not

"being treated with the seriousness either the subject or the reform of the law deserves" (89).

It was concerned with the need to protect the genuine complainant, but because of the supposed danger of encouraging false accusations, it did not intend to provide full scale anonymity on all occasions. It would have kept the victim's name unpublished during the proceedings, but would then have vested the judge with authority to direct, on application by the defence, that her name be revealed in cases where she "out of spite and venom...quite unjustly and wrongfully" made a false accusation (90).

Although Crowder's Bill did not go beyond a first reading, the question of anonymity remained a live issue throughout 1974 and 1975. The Bill was re-introduced in early 1975 (91), and its main provisions were also incorporated in Ashley's Bill in June 1975. The matter was also considered by the Heilbron Group, and the Sexual Offences (Amendment) Act 1976 includes an anonymity provision for complainants in rape cases. The details of this will be discussed below.

The Sexual Offences (Amendment) Act 1976

As the Home Secretary intended, the Advisory Group on the Law of Rape under the chairmanship of Mrs. Justice Heilbron considered a number of issues relevant to the law of rape in addition to the Lords' decision in DPP v Morgan and others, and its recommendations covered the definition of the offence, the question of evidence, the anonymity of complainants and the composition of juries. Written and oral evidence was sought from a variety of individuals and organisations from the legal and medical professions, the police, women's groups and the media. Information was also received from other countries and the Group studied the Bills which had been presented in Parliament by Ashley and Crowder respectively. The evidence presented to the Heilbron Group reflected the controversy that had characterized public response to the Morgan ruling, although interestingly, that issue was perhaps least disputed among the matters considered by the Group.

The Group's report was published in December 1975. Although most of its recommendations concerned the conduct of rape trials, the need for a statutory definition of rape was stressed from the outset. It was felt that a comprehensive definition emphasizing lack of consent rather than violence as the essential ingredient of the offence was required, as the absence of a statutory definition had in the past caused some difficulty. Furthermore, the Group argued that although the decision in DPP v Morgan and others was right in principle, it would be desirable to clarify the point by incorporating in a statutory definition some reference to the law

governing intention in rape cases. Thus, the Group recommended that statutory provision should

"(i) declare that (in cases where the question of belief is raised) the issue which the jury have to consider is whether the accused at the time when sexual intercourse took place believed that she was consenting, and (ii) make it clear that, while there is no requirement of law that such a belief must be based on reasonable grounds, the presence or absence of such grounds is a relevant consideration to which the jury should have regard, in conjunction with all other evidence, in considering whether the accused genuinely had such a belief" (92).

Much of the evidence received by the Group tended to criticise the practice and procedure followed in rape trials rather than the substantive law of rape or indeed the decision in the case of Morgan. The Group acknowledged the "prolonged ordeal" (93) and "humiliation and distress" (94) that the complainant is likely to suffer during cross-examination. While emphasizing that every accused person must have a fair trial, the Group argued that some restriction ought to be placed on the kind of cross-examination which

"does not advance the cause of justice but in effect puts the woman on trial" (95).

In considering this, the Group outlined their approach as follows:

"We have reached the conclusion that the previous sexual history of the alleged victim with third parties is of no significance so far as credibility is concerned, and is only rarely likely to be relevant to issues directly before the jury. In contemporary society, sexual relationships outside marriage, both steady and of a more casual character, are fairly widespread, and it seems now to be agreed that a woman's sexual experiences with partners of her own choice are neither indicative of untruthfulness nor of a general willingness to consent. There exists, in our view, a gap between the assumptions underlying the law and those public views and attitudes which exist today which ought to influence today's law" (96).

The Committee felt that matters relating to the relationship of the complainant and the accused would generally be relevant to the

issues in the trial and hence admissible in evidence. However, they strongly argued that the complainant's sexual history with anyone else, including the general question of "bad reputation", ought not to be admissible, subject to one important exception. The trial judge would have the discretion to admit such evidence, according to principles set out in legislation as follows:

"...if the judge is satisfied -
(a) that this evidence relates to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of, or in relation to, events immediately preceding or following the alleged offence; and
(b) that the degree of relevance of that evidence to issues arising in the trial is such that it would be unfair to the accused to exclude it." (97)

If evidence as to the complainant's sexual history is thus introduced, whether with the defendant or third parties, that ought not to put the defendant's character at issue. Otherwise, the Group took the view that the defendant's character should be let in only in certain limited circumstances, following the pattern set out in the Report of the Criminal Law Revision Committee in this respect.

The Group also acknowledged that complainants in rape cases can be greatly distressed by the publicity which they sometimes suffer and that there was widespread support for providing anonymity for complainants in such cases. They rejected the idea of holding rape trials in camera, and argued that any exception to the full reporting of criminal proceedings should be especially justified.

They concluded that

"complainants in rape cases should, in general, be given anonymity in the sense of protection from identification in the press and on radio and television". (98)

The Advisory Group on the Law of Rape rejected the view incorporated in the Crowder Bill that the judge should have

discretion to release the complainant's name where, in his opinion, she has lied or brought a false charge. The publication of the woman's name in such circumstances would be a penal measure, and punishment without a trial would be wrong in principle. Also, it was again stressed that the rape trial ought not to be treated as the trial of the complainant. Their recommendation regarding anonymity was that

"there should, in general, be anonymity for complainants in rape cases with a strong presumption against lifting it, unless there are special circumstances". (99)

Application to lift the restriction should be made to the judge before or not later than at the start of the trial, and the judge's discretion should only operate in favour of the defendant in

"cases where the complainant's identity is necessary for the discovery of potential witnesses, the Judge being satisfied that there are real grounds for supposing that the proper conduct of the defence is likely to be substantially prejudiced by a refusal" (100).

The Group rejected the view that the defendant ought also to be given anonymity in rape cases:

"We think it erroneous to suppose that the equality should be with her (the complainant) - it should be with other accused persons and an acquittal will give him public vindication". (101)

The final set of recommendations concerned the composition of juries. The Group's opinion was that both sexes should be adequately represented in juries trying rape offences, and consequently they wanted to

"ensure that in rape trials, there is a minimum of four women and also four men on a jury, in order to keep the balance of the sexes within reasonable bounds...We suggest that challenges should not be capable of being used so as to frustrate the minimum numbers". (102)

Some of the Group's recommendations were received with reservations. The Medico-Legal Journal questioned the wisdom of proposals aimed at ensuring the representation of both sexes on

juries, and asked whether such juries were

"more likely to be any better at determining guilt or innocence than any jury chosen at random, subject to peremptory challenges?" (103)

The Times criticised the Report for going too far in protecting the woman against publicity. It argued that women making malicious and entirely untruthful allegations should not "escape unscathed, either by the law or by publicity", and suggested that the trial judge have the discretion to reveal the woman's name in cases where her behaviour "amounts to or approaches gross perjury" (104).

Despite such reservations, the Report was on the whole well received. Its recommendations were seen as a major step forward in protecting rape victims:

"(they) should do a great deal to persuade women that it might after all be worthwhile to report rape". (105)

One commentator congratulated the Group

"on producing such a lucid report, ranging over so many issues, in so short a time; on its coolness in the face of popular clamour; and on the persuasive presentation of its proposals". (106)

It was called a "sensible and sensitive report" (107) and although it contained no proposal to reverse the Morgan ruling, some of the popular press even dubbed it a "Charter for rape victims" (108).

The Heilbron Report constitutes the basis of the Sexual Offences (Amendment) Bill, which was drafted by parliamentary draftsmen and had full government support although it was introduced as a Private Member's Bill. Initially, it incorporated all of the Advisory Group's recommendations, with the exception of the one concerning the composition of juries. This was rejected as it was felt that interference with the random selection of juries may extend to the

trial of other offences, and that such a fundamental change in an important aspect of the legal system was not justified.

At the Committee stage, a new clause was introduced regarding anonymity for defendants in rape cases. Because of the potential consequences of a groundless accusation for an innocent man, it was argued that the defendant too should be covered by an anonymity provision, to be lifted in the event of a conviction. A number of Members opposed this clause, because the principle of singling out defendants in rape trials for special treatment was felt to go against the core of the criminal justice system. However, the proposition to grant anonymity to defendants gained support from the majority of the House, particularly from those who saw outright anonymity for complainants as a dangerous measure which would encourage malicious accusations. Taking his lead from Hale, one Q.C. warned that

"there is no branch of law, no class of case, where it is so easy for a woman to make an allegation of this kind and to make it against a professional man. It is men too who require protection of their reputations against baseless allegations of rape, which frequently occur" (109).

The clause regarding anonymity for defendants, which was incorporated in the Act, was thus seen as an attempt at redressing the balance between complainant and accused, and at ensuring that false accusations would not be made too lightly from "acute jealousy or from morbid feelings of having been rejected" (110) by "emotionally and psychologically unbalanced" women (111).

It has been observed elsewhere that debates on matters of crime and penal policy in the Commons tend to have considerable input from members of the legal profession (112). The debates considered here

are no exception, in that they were dominated throughout by lawyers from both sides of the House, who claimed expertise in this field by virtue of their experience in criminal trials in general and rape trials in particular. Indeed, the tone of the debate occasionally suggested open conflict between lawyers and non-lawyers: the Heilbron Group, not predominantly composed of members of the legal profession, was said to have

"transgressed into the criminal law with insufficient experience of what it was seeking to do" (113).

This criticism was made particularly strongly in connection with recommendations to limit the scope of cross-examination, where it was felt that the proposed legislation represented an intrusion into the professional autonomy of lawyers.

Individual opinions were legitimated by reference to professional expertise: while the Heilbron Group felt that a woman's sexual experience was generally irrelevant to her consent or credibility when she made an allegation of rape, there was considerable support in the House for the view that this was at least likely to be relevant to her consent. Frequent reference was made in this context to cases where the woman in question was of "thoroughly ill repute in sexual matters" (114), and one Member observed that

"a woman with a past...is less likely to be the victim of rape than a maiden aunt, an unpromiscuous virgin, or a respectable married woman" (115).

The relevant clause was eventually redrafted, largely as a concession to the legal views outlined here. It was simplified, and did not lay down strict rules for judges to follow in considering applications to admit evidence of this kind, beyond the matter of unfairness to the defendant (116). Thus, the principle put forward in the Heilbron Report was followed insofar as the Act conceded

that a woman's previous sexual experience was generally not a matter for the court to consider in seeking to determine whether or not she has been raped. In practice, however, the decision as to the relevance of such evidence in any particular case was left entirely up to the trial judge.

Although the opposition party criticised the Bill in a number of respects and had considerable misgivings about some of its provisions, it did not oppose it. The crux of the Conservative criticism of it (and this was shared by a number of Labour lawyers in the Commons) was that it tilted the balance too far in favour of the complainant and that it undermined the usual safeguards which apply in law for the protection of the accused.

The Sexual Offences (Amendment) Act 1976 received the Royal Assent on 22nd November, 1976 (See Appendix I). It was described by its sponsors as a victory for the rape victim, and as a measure which would encourage women to come forward and report sexual assaults:

"It will not make it easy for a woman who has suffered this appalling ordeal to report it. What I hope it will do is to make it less difficult to report and, without taking away any right from the defendant, give added protection to the growing numbers of women to whom this vilest of crimes will become a terrifying reality" (117).

A closer examination of the parliamentary debates reveals, however, that the Act was not quite the unmitigated success that the above statement suggests. It seems that for every concession made to the complainant in accordance with the recommendations of the Heilbron Group, there was some counter-measure which favoured the defendant. In the first instance, the Act reinforced the Law Lords' decision in the case of Morgan which had caused such furore, particularly among women. Secondly, although it granted anonymity to

complainants in rape cases, it also extended this to defendants. Interestingly, victims of blackmail are also protected by anonymity but the provision in those cases does not extend to the accused; the logic of granting anonymity to both parties in rape cases is, to say the least, unusual. Finally, as we have seen, the Heilbron Group recommended that evidence regarding the complainant's previous sexual experience should only be admitted in exceptional cases, and that the trial judge be guided by principles set out in legislation in considering whether or not to admit such evidence. In particular, it was recommended that cross-examination of the complainant should be limited to behaviour which was strikingly similar to the complainant's behaviour on the occasion of the alleged offence, and to cases where the relevance of the evidence was such that it would be unfair to the defendant to exclude it. However, in the final event, one is left with a piece of legislation which leaves the grounds for admissibility of such evidence entirely to the discretion of the trial judge. There are no guiding principles laid down in legislation beyond the criterion of fairness to the defendant, which is a somewhat vague concept and involves the exercise of a large degree of discretion. The evidence becomes relevant if the judge deems it to be so, and thus it is likely that judges will differ in their interpretation of that section of the Act.

The Sexual Offences (Amendment) Act 1976 has been described as a

"response to feminist agitation about the absence of adequate concern for rape victims in Britain" (118).

Somewhat more cynically, however, one could also argue that the legislative work involved in the passage of the new law was designed

"to provide a theatrical display of reassurance, a display which is governed more by dramaturgy than bureaucratic rationality" (119).

In other words, the Act can be seen as a mere concession to popular agitation rather than a meaningful change in legal attitudes towards rape victims. A discussion of the significance and impact of this piece of legislation must center around its application in the courts. Some of the initial questions which arise in that context are the following: in what circumstances do judges lift the restriction on the publication of a complainant's name? How frequently are such applications made, and how successful are they? How frequently are applications made by the defence to cross-examine the complainant on her previous sexual experience? What grounds are put forward to justify the need for such cross-examination from the defendant's point of view? How do judges rule on these applications? What types of criteria emerge in determining the relevance of various matters under application? Does evidence of this sort continue to be introduced without an application to the judge, and if so, in what circumstances? How far is the law adhered to? Is the outcome of the trial likely to be affected by the introduction of evidence of sexual character? To what extent, if at all, does the Court of Appeal intervene in the exercise of discretion of trial judges?

This study aims to answer some of the above questions, on the basis of material collected from some fifty trials for rape offences in 1978-79, and to make broader observations on the social definition of rape which emerges in court.

FOOTNOTES TO CHAPTER TWO

- (1) BROWNMILLER, S.: Against our will:men, women and rape, London, Secker and Warburg, 1975, pp.23-24
- (2) PLACITA CORONE, edited by J.M.KAYE, London, Bernard Quaritch Ltd., 1966
- (3) POLLOCK, F. and MAITLAND, F.W.: The history of English law before the time of Edward I, Cambridge, Cambridge University Press, 1898, p.490
- (4) BLACKSTONE, W.: Commentaries on the laws of England, Oxford, Clarendon Press, 1775
- (5) TONER, B.: The facts of rape, London, Arrow, 1977
- (6) 3 Henry VII c.2
- (7) TONER, B. op.cit., 1977, p.90
- (8) For example, POLLOCK, F. and MAITLAND, F.W.: op.cit., 1898
- (9) POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS, ed. by A.K.R. KIRALFY, London, Sweet and Maxwell, 1958, p.370
- (10) BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND, translated by S.E. THORNE, Cambridge, Mass., Harvard University Press, 1968, p.490
- (11) BLACKSTONE, W.: op.cit., 1775
- (12) POLLOCK, F. and MAITLAND, F.W.: op.cit., 1898
- (13) ibid.
- (14) ibid.
- (15) BRITTON ON THE LAWS OF ENGLAND, translated by F.M. NICHOLS, Oxford, Clarendon Press, 1865, vol.1, p.55
- (16) BRACTON, op.cit., 1968, p.415
- (17) BRITTON, op.cit., 1865, vol.1, p.55
- (18) TONER, B.: op.cit., 1977, p.92
- (19) 6 Richard II, c.6
- (20) BROWNMILLER, S.: op.cit., 1975, p.29
- (21) ibid.
- (22) KENNY'S OUTLINES OF CRIMINAL LAW, edited by J.W. CECIL TURNER, Cambridge, Cambridge University Press, 19th ed., 1966; RADZINOWICZ, L.: A history of English criminal law and its administration from 1750; London, Stevens and Sons, 1948-1968

- (23) 3 Henry VII, c.2
- (24) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, HMSO, Cmnd. 6352, 1975, para. 18
- (25) Offences Against the Person Acts 1828 and 1861; Criminal Law Amendment Act 1895; Sexual Offences Act 1956
- (26) 4,5 Victoria c. 56
- (27) On the definition of sexual intercourse in rape, see: R v COX (1832) 5 C&P 297; R v McRUE (1838) 8 C&P 641; R v HUGHES (1841) 9 C&P 752. On the presumption that boys under 14 are incapable of rape: R v ELDERSHAW (1828) 3 C&P 396; R v GROOMBRIDGE (1836) 7 C&P 582; R v PHILIPS (1839) 8 C&P 396; R v JORDAN and COWMEADOW (1839) 9 C&P 118. On rape within marriage: R v CLARENCE (1888) 22 QBD 23; R v CLARKE (1949) 33 Cr.App.R. 216; R v MILLER (1953) 38 Cr.App.R. 1; R v STEELE (1976) 65 Cr.App.R. 22. On the definition of consent: R v CAMPLIN (1845) 1 Den 89; R v PAGE (1846) 2 Cox CC 133; R v CASE (1850) 4 Cox CC 220 CCR; R v JONES (1861) 4 LT 154; R v MAYERS (1872) 12 Cox CC 311; R v FLATTERY (1877) 2 QBD 410 CCR. On recent complaint: R v LILLYMAN (1896) 2 QBD 167; R v OSBORNE (1905) 1 KB 551. On corroboration: R v SMITH (1919) 14 Cr.App.R. 81; R v SALMAN (1924) 17 Cr.App.R. 50; R v SIMMONS (1931) 23 Cr.App.R. 25; R v TRIGG (1963) 47 Cr.App.R. 94. Cases on the admissibility of evidence regarding the complainant's character will be referred to below.
- (28) LEGRAND, E.: "Rape and rape laws: sexism in society and law", California Law Review, vol.61., no.3., p.919, 1973
- (29) TONER, B.: op.cit., 1977, p.95
- (30) GEIS, G.: "Lord Hale, witches and rape" British Journal of Law and Society, vol.5, no.1, 1978, p.26
- (31) R v CLARKE (1949) 33 Cr.App.R. 216
- (32) R v O'BRIEN (1974) 3 All.E.R. 663
- (33) HALE, M.: Historia Placitorum Coronae, London, Nutt and Gosling, 1736, vol.1, p.629
- (34) GORDON, G.: The criminal law of Scotland, Edinburgh, W. Green, 1967, p.831
- (35) CLIVE, E. and WILSON, J.: The law of husband and wife in Scotland, Edinburgh, W. Green, 1974, p.376
- (36) R v CLARENCE (1889) 22 QBD at 33
- (37) H.C.Debates, vol.911, cols.1922-2007, 1976; vol.40, col.185, 1983
- (38) BROWNMILLER, S.: op.cit., 1975, p.381
- (39) HALE, M.: op.cit., 1736, vol.1, p.635

- (40) LEGRAND, E.: op.cit., 1973; ROBIN, G.D.: "Forcible rape: institutionalised sexism in the criminal justice system", Crime Delinq., vol.23, no.2, 1977
- (41) ARCHBOLD ON PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, 39th ed., edited by MITCHELL, S., London, Sweet and Maxwell, 1976, para.2887
- (42) R v HENRY and MANNING (1968) 53 Cr.App.R. at 153
- (43) Criminal statistics for England and Wales, London, H.M.S.O., 1978
- (44) These offences include rape, indecent assault on a female, unlawful sexual intercourse with a girl under 16, gross indecency with a child, etc.
- (45) ARCHBOLD, op.cit., 1976, para.2884
- (46) HALE, M.: op.cit., 1736, vol.1, p.633
- (47) GRADWOHL'S LEGAL MEDICINE, 2nd ed., edited by CAMPS, F., Bristol, J.Wright and Sons, 1968
- (48) SIMPSON, K.: A doctor's guide to court, London, Butterworths, 1962, p.125
- (49) SMITH, S. and FIDDES, F.S.: Forensic medicine, London, Churchill, 1955, p.297
- (50) ibid., p.299
- (51) R v BARKER (1829) 3 C&P 589; R v TISSINGTON (1843) 1 Cox 48; R v GREATBANKS (1959) Crim.L.R. 450
- (52) R v CLARKE (1817) 2 Stark 241; R v CLAY (1851) 5 Cox 146; R v RILEY (1887) 18 QBD 481
- (53) R v COCKROFT (1870) 11 Cox 410
- (54) R v HODGSON (1812) R&R 211 CCR
- (55) R v TURNER (1944) KB 463, 30 Cr.App.R.; SELVEY v DPP (1970) AC 304 HL
- (56) TONER, B.: op.cit., 1977, p.100
- (57) H.C.Debates, vol.905, col.802, 1976
- (58) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 1975, para.1.
- (59) DPP v MORGAN and others (1975) 61 Cr.App.R. 136
- (60) Lord Cross of Chelsea, Lord Hailsham of St. Marylebone, Lord Fraser of Tullybelton
- (61) CHISHOLM v DOULTON (1889 22 QBD 741

- (62) DPP v SMITH (1961) AC 290; HYAM v DPP (1975) AC 55
- (63) DPP v MORGAN and others (1975) 61 Cr.App.R., at p.150
- (64) ibid., at p.166
- (65) ibid., at p.156
- (66) G. WILLIAMS in a letter to The Times, 6th May 1975
- (67) COOTE, A. and GILL, T.: The rape controversy, London, National Council for Civil Liberties, 1975
- (68) Diogenes on law, New Society, Vol.32, no.657, 1975, p.346
- (69) Sunday Mirror, 4th May 1975
- (70) ibid.
- (71) Letter to The Times, 8th May 1975
- (72) H.C.Debates, vol.892, cols.1411-1418, 1975
- (73) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, H.M.S.O. Cmd. 6352, para.2
- (74) Editorial, New Society, vol.32, no.664, 1975
- (75) New Law Journal, vol.125, no.5705, 1975, p.610
- (76) THE LAW COMMISSION: Report on the mental element in crime, Report no. 89, London, H.M.S.O., 1978
- (77) COOTE, A. and GILL, T.: op.cit., 1975, p.26
- (78) DIJK, J.J.M.VAN: "The extent of public information and the nature of public attitudes towards crime" in Public opinion on crime and criminal justice, vol.XVII, Collected Studies in Criminological Research, Council of Europe, European Committee on Crime Problems, Strasbourg, 1979
- (79) Criminal Statistics for England and Wales, London, H.M.S.O., 1960, 1974, 1978
- (80) SUTHERLAND, E.H.: "The diffusion of sexual psychopath laws", American Journal of Sociology, vol.56, no.2, 1950
- (81) "Freedom farewell", New Society, vol.31, no.644, 1975, p.308
- (82) CHIBNALL, S.: Law and order news, London, Tavistock, 1977, p.78
- (83) For example, "Attractive 36-year old housewife" in News of the World, 13th April 1975
- (84) SOOTHILL, K. and JACK, A.: "How rape is reported" in New Society, vol.32, no.663, 1975

- (85) H.C.Debates, vol.875, col.39 (W.A.) 1974; vol.875, col.219 (W.A.) 1974; vol.881, col.471 (W.A.) 1974
- (86) COOTE, A. and GILL, T.: op.cit., 1975, p.28
- (87) H.C.Debates, vol.878, col.498, 1974
- (88) P. ROSE M.P. in The Times, 27th June 1974
- (89) New Law Journal, vol.125, no.5705, 1975, p.610
- (90) H.C.Debates, vol.878, col.498, 1974
- (91) H.C.Debates, vol.892, cols.1411-1418, 1975
- (92) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, H.M.S.O., Cmnd. 6352, 1975, para.83
- (93) ibid., para.88
- (94) ibid., para.89
- (95) ibid., para.91
- (96) ibid., para.131
- (97) ibid., para.137
- (98) ibid., para.152
- (99) ibid., para.163
- (100) ibid., para.165
- (101) ibid., para.177
- (102) ibid., para.188
- (103) Medico-Legal Journal, vol.44, part I, 1976, p.3
- (104) The Times, 11th December 1975
- (105) ibid.
- (106) SMITH, J.C.: "The Heilbron Report", Crim.L.R., 1976, p.106
- (107) MARTIN, A. in New Society, vol.34, no.6522, 1975, p.689
- (108) Daily Mail, 11th December 1975
- (109) H.C.Debates, vol.905, col.845, 1976
- (110) H.C.Debates, vol.905, col.845, 1976
- (111) H.C.Debates, vol.911, col.1930, 1976
- (112) DREWRY, G.: "Parliament and penal policy", ch.3 of BLOM-COOPER, L. (ed.): Progress in penal reform, London, Oxford

University Press, 1974

(113) H.C.Debates, vol.911, col.1993, 1976

(114) H.C.Debates, vol.911, col.2002, 1976

(115) H.C.Debates, vol.911, col.1988, 1976

(116) Sexual Offences (Amendment) Act 1976, s.2(2)

(117) H.C.Debates, vol.905, col.807, 1976

(118) GEIS, G. and GEIS, R.: "Anonymity in rape cases" Justice of the Peace, Vol.141, p.293, May 21st, 1977

(119) ROCK, P.: "Public opinion and criminal legislation" in Public opinion on crime and criminal justice, vol.XVII, Collected studies in criminological research, Council of Europe, European Committee on Crime Problems, Strasbourg, 1979

CHAPTER THREE. RESEARCH METHODS

The principal aims of this research are to examine empirically the implementation of the Sexual Offences (Amendment) Act 1976, its impact on the reporting of rape and, in particular, on the trial of rape offences.

The study analyses the statistical frequency of reported rape and compares conviction rates before and after the Act. It discusses the issue of anonymity, and seeks to establish how frequently and for what reasons that provision is lifted on complainants and defendants. It considers the impact of the relevant section of the Act on the newspaper reporting of rape, as well as practices and procedures adopted in court with regard to anonymity. It also looks at the effect of the Morgan ruling which, as we have seen, was incorporated in the Act.

The study considers the application of Section 2 of the Act, which aims to limit the admissibility at a rape trial of evidence relating to the complainant's previous sexual experience. It seeks to describe how judicial discretion is exercised in this respect, and to point to areas in which the law is not being applied.

Empirical research based on observations of court procedure is in fact the only reliable and valid way of obtaining answers to questions regarding the implementation of an Act of Parliament such as this. Newspaper reporting of rape is superficial and patchy, and as such, it is an unreliable and insufficient source of information. Criminal statistics provide some information on the

number of defendants tried each year, the outcome of trials, sentencing, and so on, but they do not tell us what happens in court and how various decisions are arrived at.

Transcripts of trials are not generally available. While a shorthand note is taken of all the evidence and of the judge's summing up at every trial, this is only transcribed if particular aspects of it are needed for an appeal against conviction. Even then, only extracts relevant to the substance of the appeal are transcribed. Trials ending in acquittals would escape attention altogether. Thus, applications under S.2 of the Sexual Offences (Amendment) Act 1976 would only be transcribed where the trial judge had refused leave to cross-examine on previous sexual experience, and this decision became the grounds of an appeal. This occurred in only one case in the present study; that case was widely reported and will be discussed below (1).

One of the major objectives of the Act had been to rectify the earlier position where the alleged victim of rape was, in effect, as much on trial as the defendant. This study makes certain general observations regarding defence tactics and strategies used in rape trials, with a view to establishing how far the Act has reached that aim. The question of whether legislative reform in general, and this Act in particular, are effective means for improving the treatment of the rape victim in the criminal justice system is also given some consideration.

Background assumptions

The relationship between the legal and social structure has received a good deal of sociological attention. Durkheim claimed that the law reproduced the "principal forms of social solidarity", and perceived it as a means of classifying societies (2). Weber saw the increasing rationality of law as a product of the development of Western capitalism (3). Various conflict theorists have studied legislative developments in an attempt to understand the nature and location of power in society (4). The common feature of most such works is that they tend to postulate a series of more or less complex links between the formulation and implementation of the law and the structure of the society within which it operates (5).

This inquiry considers one aspect of the link between social and legal structure. It aims to examine the way in which certain ideas commonly held in society are reproduced in the functioning of one social institution of that society. More specifically, it aims to investigate the relationship between current social perceptions relating to the phenomenon of rape and the implementation of a specific law, the Sexual Offences (Amendment) Act of 1976. The research describes the operation and broad impact of various aspects of the Act; it also tests a number of hypotheses concerning the processes involved in the trial of rape offences. In particular, it considers the way in which the social definition of rape influences the application of Section 2 of the Act, and the trial of rape offences in general. Before stating the general and specific hypotheses used in this study, a number of background assumptions will be noted and discussed.

We have seen earlier that recent research findings do not support

the traditional view of the rapist as a seriously disturbed sexual psychopath. Rape has consequently been redefined as an act of violence and aggression, reflecting feelings of inferiority or inadequacy, rather than an offence mainly motivated by sexual needs and impulses (6). Rape has been termed a "pseudo-sexual act":

"careful clinical study of offenders reveals that rape is in fact serving primarily non-sexual needs. It is the sexual expression of power and anger". (7)

Despite the considerable weight of evidence on this issue, there remains a widespread belief that rape is the outcome of frustrated sexual needs; such a belief provides the basis for a whole series of misconceptions with regard to both victim and offender.

One of the most persistent myths regarding the victim that is derived from this view is that she provoked the offence. This assumption has the effect of shifting the responsibility from the offender to the victim. As Groth comments, if the assumption is that the assailant

"is sexually aroused and is directing those impulses towards the victim, then it must be that she has deliberately or inadvertently stimulated or aroused this desire in him through her actions, style of dress, or some such feature". (8)

These perceptions encourage the ascription of some kind of deserving status to the victim of rape, and provide the substance of what Sykes and Matza have termed "techniques of neutralization". They argue that there are certain processes involved in creating a "legitimate" victim, in the sense of being a victim deserving of his or her victimization. They discuss a number of techniques whereby juvenile delinquents justify their behaviour, and divide these techniques into five somewhat overlapping categories which include denial of responsibility, denial of injury and denial of

the victim (9). It is important to note that these techniques are based on cultural norms, shared not only by the delinquent in question but also accepted by society in general.

In denying responsibility, the offender asserts that

"delinquent acts are due to forces outside the individual and beyond his control" (10).

While denial of responsibility mitigates the offence with reference to the offender, other techniques of neutralization revolve around the victim. Denial of injury involves a distinction between acts that are wrong in themselves and acts that are illegal but not seen as intrinsically wrong. Sykes and Matza note that

"wrongfulness often hinges on the question of whether or not anyone has been hurt by the offence; and that, of course, is open to a variety of interpretations". (11)

This technique has particular relevance for rape offences: one can argue that as long as these are seen as acts of sexuality rather than aggression and hostility, they will be interpreted as predominantly pleasurable to both parties, rather than as harmful to the victim.

The denial of the victim is closely linked to denial of injury.

Here, the offender may assume responsibility for his deviant actions and their results, but nevertheless, attempt to neutralize any moral indignation attached to such actions

"by an insistence that the injury is not wrong in the light of the circumstances. The injury, it may be claimed, is not really an injury; rather, it is a form of rightful retaliation or punishment... By a subtle alchemy, the delinquent moves himself into the position of avenger and the victim is transformed into a wrong-doer" (12).

This theme has been adopted by a number of commentators. For example, Weis and Borges have observed that when a woman is

"sexually provocative, morally inferior, has a bad reputation or needs to be taught her place... the offender can justify his behaviour via the rationale that she both asked for it and deserved it" (13).

Reynolds illustrates this process from a slightly different perspective by arguing that a victim who fails to demonstrate her good character or her adherence to strict moral standards discredits her claim to victim status and may even get labelled as the deviant:

"When there is evidence that the victim was or gave the appearance of being out of her place, she can be raped and the rapist will be supported by the cultural values, by the institutions that embody these values and by the people shaped by these values" (14).

The question now arises as to how these assumptions underlying the social definition of rape affect the court process in a rape case. As we have noted above, rape law in this country before the Sexual Offences (Amendment) Act 1976 explicitly acknowledged that an alleged rape victim's character was highly relevant to the issues in the trial (15). There is also evidence that judges take the complainant's behaviour into account when sentencing rapists. Recently, Judge Bertrand Richards fined a man convicted of rape. He was reported as justifying this unusually lenient sentence by saying that the victim, who had been hitchhiking, "was guilty of a great deal of contributory negligence". (16)

It has been noted that in rape trials, the conduct of the defence will generally involve some attempt to discredit the alleged victim by attacking her character, her sexual reputation or her behaviour at the time of the offence, on the assumption that rape is a crime of passion which, at least, to some degree, was precipitated by her. (17)

The Sexual Offences (Amendment) Act 1976 sought to limit the scope of defence strategy in this respect by restricting the admissibility of evidence regarding the complainant's previous sexual experience. However, perceptions of the nature of rape influence notions of appropriate behaviour on the part of the "genuine" victim. Such notions have important implications for the implementation of the new Act, and in particular for the way in which judicial discretion is exercised with regard to Section 2(2) of the Act.

Hypotheses and variables

The first and main hypothesis of this study is that the social definition of rape outlined above, and ensuing assumptions relating to the relevance of an alleged victim's sexual experience, have been carried into the operation of the Act.

Except for trials where the defendant's identity is the sole issue, applications under Section 2 are expected to be made frequently. Furthermore, because the Act failed to lay down strict guidelines for the exercise of judges' discretion, applications are expected to be generally successful, unless their explicit purpose is to discredit the complainant and to suggest that the sort of woman she is, by virtue of her sexual experience, is an unlikely if not impossible rape victim.

The specific hypothesis is that the premises upon which applications are based, as well as the criteria implicit in judicial rulings in this respect, will reflect the assumptions

outlined above. The introduction of evidence regarding previous sexual experience is expected to be justified with reference to the social definition of rape, which views it as a crime primarily motivated by sexual needs. When it is said to be committed by a seemingly non-psychopathic man (which was the case for virtually all defendants in the present study) the alleged victim's sexual reputation and behaviour are subjected to close scrutiny in an attempt, wherever possible, to shift a varying degree of responsibility on to her. One effective way of achieving this is to allege that her past sexual behaviour and morality were less than exemplary. It is therefore expected that some attempt will be made to introduce such evidence in a high proportion of the cases studied, and furthermore, that such attempts will be successful in all but a minority of cases.

This hypothesis is tested by an examination of applications under Section 2 of the Act with regard to their frequency, substance, circumstances and results; and by a qualitative analysis of assumptions implicit in the applications regarding the complainant's perceived role in and responsibility for the offence. A similar examination is made of decision making by judges in this respect, and areas where the Act is not strictly adhered to are also considered.

The Act also aimed, in a more general way, at altering the position where the alleged victim was effectively on trial. There are, however, strong indications that she continues to be judged on the seeming assumption that only certain kinds of women can be raped. It appears that a defendant's guilt can only be established if the

alleged victim's innocence and good character are proved.

The stereotype of the "ideal" case involves a view of rape as an explosive sexual encounter between total strangers, the offender being a dangerous and violent psychopath. The ideal victim is either sexually inexperienced, or a respectable woman with a "good" reputation. In either case, she does everything in her power to resist her attacker and may sustain serious injuries as a result of the assault.

This empirical investigation has been devised to test the hypothesis that there is a systematic connection between this stereotype and actual decision making in court. Cases which approximate to the "ideal" would be most likely to result in a conviction for a rape offence. Furthermore, although the outcome of a trial might be conceptualised as a function of a number of factors, including characteristics of the defendant, the judge and the jury, the study hypothesizes that in rape cases they are strongly and consistently related to characteristics of the alleged victim.

This hypothesis is tested by an examination of the relationship between the outcome of rape trials and a number of variables pertaining to general attributes of the complainant, and to particular features of her behaviour at the material time. In considering general attributes and characteristics of the alleged victim, three main variables are looked at. These are her previous relationship with the defendant, her sexual experience, and her general reputation. As far as her behaviour at the time of the

alleged offence is concerned, the variables investigated are her consent to being in the situation, the extent of her injuries and promptness in reporting the rape.

It is not suggested that the list of variables considered in this respect is in any way exhaustive. However, the choice of a limited number of variables is justified insofar as this study may be described as exploratory, seeking to highlight certain problem areas rather than to make definitive statements regarding this aspect of rape trials.

The variables investigated will be defined more specifically in Chapter Six, and this section is confined to the statement of the expected links between the independent and dependent variables.

The victim's prior sexual experience (excluding here any prior relationship with the defendant) is expected to be an important factor in the outcome of the trial. Trials involving complainants presented and perceived as unchaste or promiscuous are likely to result in acquittal, whereas an allegation made by a woman who is seen as having a good reputation is more likely to lead to a conviction.

The general character of the victim is also thought to be of importance in determining the outcome of the trial. It is expected that the likelihood of an acquittal will be greater in cases where an attempt is made to discredit the complainant with reference to her family problems, psychiatric history, drinking pattern, criminal record, etc. If the defence do not attack the complainant

in this way, and she is seen as a "decent" or "respectable" woman, her assailant is more likely to be convicted.

The victim's relationship with the offender has been defined as one aspect of the "social distance" between them (18) and it is expected that social distance in this sense will influence the outcome of the trial. The most favourable position for a conviction is where the victim and the offender were total strangers prior to the attack. Conversely, a degree of prior relationship is likely to correlate with an acquittal. This is particularly true when a prior sexual relationship between the complainant and the defendant is alleged: in such cases, it is expected that the defendant will almost invariably be acquitted.

With regard to the second set of hypotheses, the first variable considered is the complainant's consent to being in the situation where the alleged offence occurred. It is expected that a defendant is likely to be acquitted if the complainant's behaviour can be perceived as precipitating or provoking the rape. If there is evidence that she went willingly with the defendant to the place where the offence was committed, or was in more general terms willing to be in his company, her responsibility for what happened will be deemed considerable and this will increase the defendant's chances of an acquittal. Conversely, if the defence do not put forward as part of their case the complainant's consent to being in the situation where the alleged offence took place, the chances of conviction are expected to increase.

The second variable in this context is related to the injuries

sustained by the complainant as a result of the alleged offence. The "genuine" victim is expected to put up a considerable degree of physical resistance when she is being assaulted and to prove her lack of consent by the injuries she sustained during the struggle. Unless the complainant exhibits relatively serious bodily injuries, there will be a presumption of consent and the defendant will be more likely to be acquitted.

Finally, the true victim must report the offence to the police promptly if she is to be believed. Any delay in reporting will weaken her case and can only be mitigated by evidence of an early complaint of rape made to some third party. It is expected that rape offences reported immediately or within a few hours of their occurrence are more likely to result in a conviction than offences which for some reason are reported at a later stage.

Although there is clearly some interaction in each case between the above factors, their effect on the outcome of the trial is measured individually. The hypotheses are tested by the chi-square test with regard to each variable. This test indicates whether there is a statistical association between the trial characteristics outlined above and the outcome of the trial. The results tend to support the hypotheses insofar as the distributions are all in the expected direction, and in general the associations are not explained by chance factors alone.

In addition to testing the above hypotheses, this study seeks to examine whether rape is seen as an act motivated by sexual instincts and whether only those cases which conform to the

stereotype are classified as "real" rapes by the legal institutions.

Research design and procedure

This study is based on information collected during trials for rape offences at the Central Criminal Court in London between September 1978 and July 1979. The sentences of two defendants had been deferred beyond this time period, and a further defendant's retrial took place in November 1979. Both sentences and retrial were also included in the study. At the start of the observation, the Act had been in force some twenty months. The period of data collection of ten months was chosen to ensure that a minimum sample of fifty trials was obtained.

The Central Criminal Court was established in 1834 for the trial of offences committed in London, Middlesex and certain parts of Essex, Hertford, Kent and Surrey. It became a Crown Court by virtue of the Courts Act 1971, but it retains much of the tradition and ceremonial associated with its former role as the court of the City of London. For example,

"The Lord Mayor of the City and any Alderman of the City shall be entitled to sit as judges of the Central Criminal Court with any judge of the High Court or any Circuit Judge or Recorder" (19).

Two types of judges sitting at the Court have jurisdiction to try rape cases: visiting High Court judges and permanent circuit judges, including the Recorder of London, who is the judge of the Central Criminal Court, and the Common Serjeant. At the time of data collection, rape belonged to the class of offences which was

"to be tried by a High Court judge unless a particular

case is released by or on the authority of a Presiding judge. A Presiding judge is a High Court judge assigned to have special responsibility for a particular circuit".
(20)

More recently, the Lord Chancellor directed that only senior judges also authorized to try murders should preside over rape cases (21). This new direction would have affected only about a quarter of rape cases tried at the Central Criminal Court, had it been implemented before the data collection period. Seventy percent of the trials in this study were tried by senior judges.

Cases included in the sample were generally committed from Magistrates' Courts in the Greater London area, the Central Criminal Court being the only London Crown Court with jurisdiction to try Class 2 offences (now Class 1) which include rape. This does not, however, mean that all London rapes are tried there: a certain number of cases are transferred elsewhere for trial, in particular to St. Albans Crown Court.

When the overall research design had been formulated, the first step was to make contact with the Court. The Central Criminal Court gave the author permission to sit in the body of the court, and arrangements were made for daily contact with the Listing Office of the Court. This is where cases awaiting trial are assigned to the various courts within the Central Criminal Court, and information was collected daily on where such trials would be heard.

The main instrument of data collection consists of two schedules containing predominantly open-ended categories, designed for the "guilty" and "not guilty" pleas respectively. These schedules, completed on the basis of a longhand note taken during the

proceedings, record for each trial information regarding the following main areas:

Background data: dates of the trial, names of defendant(s), judge and counsel; time and place of the alleged offence; outcome of trial; sentence; details of any appeal.

Defendant: age; occupation; marital status; previous convictions; use of alcohol; prior relationship to the complainant; use of violence.

Complainant: age; marital status; injuries sustained; behaviour at the time of the offence; reporting; evidence of general character; evidence of prior sexual experience.

The trial: evidence given; applications under Sections 2(2) and 4(2) of the 1976 Act; issues in the trial; directions to acquit; judge's direction regarding corroboration; composition and length of deliberations of the jury.

A first draft of this research instrument was prepared and tested in court over a period of some three months, between May and July 1978, with a view to ascertaining whether it was suitable for retrieving information on criminal trials. During this time, the schedules underwent considerable changes: for example, they were altered for use on trials involving several defendants and/or complainants.

As both schedules are appended (Appendix II) their content will not be discussed here in any detail. Nevertheless, a number of general points must be made regarding their use and some of the difficulties encountered in their application.

Different schedules were used for "guilty" and "not guilty" pleas respectively in view of the different procedures involved in the two types of trial. When a defendant pleads "guilty" to the offence charged, or to some lesser acceptable offence, the Court proceeds immediately to sentence. The prosecution outlines the circumstances of the offence to the Court and goes on to call evidence of the

defendant's previous character and convictions, if any. Various reports (e.g. medical, social inquiry) may be presented to the Court. This is followed by a plea in mitigation by defence counsel and the judge then passes sentence on the defendant. The whole procedure is generally brief, and does not involve any of the complexities of a contested trial. The information that becomes available during such a trial is limited, and this is reflected in the type and amount of data sought by the schedule. The schedule used for "not guilty" pleas, in contrast, contains a large number of questions aiming to record information on various salient aspects of contested trials, with particular reference to the application of the Sexual Offences (Amendment) Act 1976.

In cases involving several defendants and/or complainants, the relevant parts of the schedule were completed for each individual. It became clear that reliable information was not systematically available for a number of areas which were intended to be investigated. These include marital status and use of alcohol for both defendant and complainant, as well as occupation and employment for the defendant.

Parts of the trial which involved a conflict between the prosecution and the defence presented an additional problem for data collection. One example of such an area is the use of violence. The defendant and the complainant were invariably in conflict over this issue, and this needed to be incorporated in the body of data collected. The problem was solved by recording both sides' version of the events in question. We shall see below how the problem was dealt with in the analysis.

One further point regarding the use of the schedules concerns the final section on appeal against conviction and/or sentence. This was completed after the initial period of data collection had ended, and the information contained therein is based on the records of the Court of Appeal (Criminal Division).

Between September 1978 and July 1979, the author attended and took a detailed note of all the trials included in this study. That note, which covered the circumstances of the trial, the evidence given, legal argument and the judges summing-up and directions, forms the basic data source from which the information recorded in the schedules is derived.

A number of commentators have discussed the issues and problems involved in using participant observation as a method of data collection (22). In this instance, as discussed above, direct court observation was the only way of obtaining information likely to provide answers to the main research questions. The author's role in court was one of "complete observer":

"Here a field worker attempts to observe people in ways which make it unnecessary for them to take him into account, for they do not know that he is observing them or that, in some sense, they are serving as his informants" (23).

In this role, the researcher remains entirely outside the observed interaction and his presence does not in any way alter that interaction. However, one possible problem with this method is that, precisely because the researcher does not interact with his informants, he may fail fully to understand the meaning of the processes involved. In this study, the possible danger of

misunderstanding was countered in two ways. Firstly, by following the trial from the body of the court rather than from the public gallery, it was possible to make informal contact with many of the individuals involved in the various trials, including the complainant, relatives and friends of both the complainant and the defendant, solicitors, barristers, the police, probation officers, representatives of the Rape Crisis Centre, court officials, etc. A considerable amount of background information was obtained in this way. Secondly, a great deal of preparatory reading was undertaken concerning the criminal law and the criminal process so that the author was able to make full sense of the interaction and proceedings observed during the course of the trials.

The processes involved in an undefended trial have been referred to above. Before embarking on a description of the exact procedures adopted during the data collection period, it may be helpful to briefly outline the course of a contested case.

When the defendant pleads "not guilty" to the offence or offences charged, a jury is empanelled to try him. Counsel for the prosecution then opens the case,

"by telling the jury the essential matters alleged against the defendant and how such facts would amount to the offence charged" (24).

The prosecution then call their witnesses and examine them in chief. In a rape trial, the complainant is almost invariably the first witness. The giving of evidence in chief is followed by cross-examination for the defence, which is designed to

"(a)... elicit evidence favourable to the defence case, and (b) to discredit the testimony of the witness" (25).

It is usually just before or during cross-examination of the

complainant that an application is made by the defence under Section 2 of the 1976 Act, in the absence of the jury, to ask her questions relating to her previous sexual experience.

In a rape trial, the complainant's evidence is usually followed by that of a medical witness, regarding the complainant's condition after the alleged offence. Police witnesses then generally give evidence of the circumstances of the defendant's arrest, details of any interviews with him, as well as details of written statements alleged to have been made by him to the police.

There may be other witnesses whose evidence completes the case for the prosecution, and this is of course dependent on the individual circumstances of each trial. Statements of witnesses may also be read out: this occurs when the prosecution seek to adduce evidence which is not disputed by the defence.

At the end of the prosecution case, the defence may make an application, in the absence of the jury, that the judge direct the jury to acquit. It can be argued that

- "a)...the prosecution have failed to produce any evidence to establish some essential ingredient of their offence, or
- b)...the evidence produced is so weak or so discredited by cross-examination that no reasonable jury could convict" (26).

If the application is successful, the defendant is acquitted at this stage. If it is not, or if there is no such application, the trial proceeds to the defence case. In a rape trial, the case for the defence tends to be relatively brief and hinges on the defendant, who can either decline to give evidence or he can give evidence on oath like any other witness (27). If he chooses the

latter course, he is subject to cross-examination by the prosecution. There may be other defence witnesses, to establish, for example, an alibi for the defendant.

When all the evidence has been heard, prosecution and defence counsel in turn address the jury about their respective cases. Finally, the trial judge sums up the case and directs the jury about the relevant law. In a rape trial, his directions include some statement about the burden and standard of proof, the legal definition of rape and the main components of the offence. The judge also warns the jury against the danger of convicting on the uncorroborated evidence of the complainant, and tells them what evidence, if any, is capable of constituting corroboration in the particular trial. After the summing-up, the jury retire to consider their verdict and if it is one of "guilty", the court proceeds to sentence as in an uncontested trial.

In the course of the study, field notes were taken, as near verbatim as possible, of the evidence, legal submissions, judicial directions, verdict and sentencing for each trial. As the judge too takes a longhand note of the evidence, there was little difficulty in keeping up with this in court. All quotations from trials in this thesis are based on these notes, and they accurately represent what was actually said during the trials.

On occasions, several rape trials were being followed simultaneously and consequently certain parts of a number of cases were not attended. However, at least the following stages of each trial were observed:

- indictment and plea;
- prosecution opening of the case;
- the complainant's evidence and cross-examination;
- applications under Section 2(2) of the 1976 Act;
- all other prosecution evidence in chief;
- the defendant's evidence and cross-examination;
- the judge's directions to the jury in summing up;
- verdict and sentencing.

For trials where the defendant pleaded "guilty", such a problem of coverage did not arise and it was possible on all occasions to take a full note of the whole procedure.

At the end of each trial, the information contained in the field notes was transferred onto the prepared schedules. The substance and outcome of applications made under Section 2(2) of the Act were summarized in these schedules, but they were also transcribed verbatim separately in order to facilitate analysis at a later stage.

After the data collection period, the task of classifying and coding the information contained in the schedules was undertaken. The development of an adequate coding system presented some difficulties, mainly because the material related partly to the trial, partly to the defendant(s), and partly to the complainant. Hence, there was no clear unit of analysis upon which all the classification could be based. The final code for both schedules consists of two somewhat overlapping items, using the defendant and the complainant respectively as units of analysis. The codes for "guilty" and "not guilty" pleas are comparable, although the latter are of course considerably more detailed than the former.

When the data had been coded, frequency distributions were obtained for most of the items of information sought in the study. Answers

to some of the questions were not coded, as the information obtained proved to be insufficient or unreliable. A number of cross-tabulations were also derived with a view to testing the hypotheses discussed earlier in this chapter.

Finally, all trials included in the study were followed up in the Court of Appeal (Criminal Division) where the author was granted access to the relevant records. There are a number of reasons why such follow-up was important. Firstly, decisions in the Court of Appeal can drastically alter the outcome of trials in that they may considerably vary the sentence or indeed quash the conviction. Such decisions must clearly be considered if one is to have a complete picture of the criminal process as it relates to the offence of rape. Secondly, in considering the application of the 1976 Act, it is essential to examine whether, and if so, to what extent, the Court of Appeal is willing to interfere with the discretion of trial judges in respect of Section 2(2). Thirdly, the examination of the files of the Court of Appeal provides a reliability check for parts of the data collected on the trials themselves: a comparison could be made between the transcripts contained in those files and the author's notes of the corresponding cases.

In addition to the data obtained with regard to the sample of rape trials included in the study, various source materials were used. Newspaper reports were collected both on the cases in the study and on rape, sexual offences and related topics in general. Criminal statistics were also extensively consulted. A thorough examination was made of reported as well as some unreported case law concerning rape offences both before and after the Sexual Offences (Amendment)

Act 1976.

Sample characteristics

The main sample consists of fifty trials where the indictment against the defendant, or against one defendant at least, contained a count alleging a rape offence; where the defendant thus charged pleaded "not guilty" to the rape offence, as well as to any alternative counts of lesser offences. Additional material was also collected for thirty-one trials where a plea of "guilty" to a rape offence or to some lesser offence was entered, and where such a plea was accepted by the Crown.

For the purposes of this study, a rape offence is defined in accordance with the Sexual Offences (Amendment) Act 1976 as

"rape, attempted rape, aiding, abetting, counselling and procuring rape or attempted rape, and incitement to rape". (28).

In the majority of cases, a single defendant was charged in any one trial; a substantial number of trials, however, involved more than one defendant. The total sample includes 112 defendants, eighty of whom pleaded "not guilty". The distribution of rape cases involving one and several defendants between the groups of "guilty" and "not guilty" pleas is given in Table 1. It is interesting to note that when several men were charged together, they almost invariably pleaded "not guilty" to the charge:

TABLE 1. Distribution of types of rape between "guilty" and "not guilty" pleas

<u>TYPE OF RAPE</u>	<u>"GUILTY" PLEA</u>	<u>"NOT GUILTY" PLEA</u>	<u>TOTAL</u>
Single	30 (97%)	34 (68%)	64 (79%)
Pair	1 (3%)	8 (16%)	9 (11%)
Group	-	8 (16%)*	8 (10%)
Total	31 (100%)	50 (100%)	81 (100%)

[* Four trials with three defendants, two trials with four defendants; one trial each with five and six defendants.]

As far as the number of alleged victims is concerned, nearly all defendants charged with rape offences on more than one woman pleaded "guilty". In the majority of cases, however, defendants were charged with the rape of one woman only:

TABLE 2. Number of complainants per trial for each defendant, "guilty" and "not guilty" pleas

<u>NUMBER OF COMPLAINANTS</u>	<u>"GUILTY" PLEA</u>	<u>"NOT GUILTY" PLEA</u>	<u>TOTAL</u>
One	20 (65%)	44 (88%)	64 (79%)
More than one	11 (35%)*	6 (12%)**	17 (21%)
Total	31 (100%)	50 (100%)	81 (100%)

[* Eight defendants were charged with rape offences against two women, one defendant, with offences against three women, and two defendants, with offences against four women.]

[** In all six cases, defendants were charged with rape offences against two women.]

Most of the defendants in the study were charged with the full offence of rape, but in two trials of the group of "not guilty" pleas, one defendant was charged with a rape offence while his co-defendant(s) was (were) charged with indecent assault only:

TABLE 3. Main offence charged, all defendants

<u>MAIN OFFENCE</u>	<u>"GUILTY" PLEA</u>	<u>"NOT GUILTY" PLEA</u>	<u>TOTAL</u>
Rape	26 (81%)	65 (81%)	91 (81%)
Attempted rape	6 (19%)	6 (8%)	12 (11%)
Aiding, abetting, counselling or procuring rape	-	6 (8%)	6 (5%)
Indecent assault	-	3 (4%)	3 (3%)
Total	32 (100%)	80 (101%)	112 (100%)

The majority of those pleading "guilty" were convicted of the main rape offence charged, while about a third were convicted of a lesser rape offence or of other offences including indecent assault, unlawful sexual intercourse and incest. A retrial was ordered for two defendants who pleaded "not guilty" as the jury at the initial trial was unable to reach a verdict. In analysing the data, the first trial of these defendants is excluded, where relevant, in order to avoid double-counting.

Forty-one defendants were convicted following a contested trial. They were convicted of the main offence charged, with the exception of seven offenders convicted of a lesser rape offence than charged, or of indecent assault. The Court of Appeal (Criminal Division) subsequently quashed three of these convictions. For the purposes of testing the hypotheses of this study, however, conviction and acquittal are both defined with reference to the trial stage and independently of the outcome of any appeal.

Thirty seven defendants were acquitted of rape and all lesser sexual offences. Most of these were found not guilty by the jury,

but a fairly substantial number were acquitted either following a direction by the trial judge, or because at the start of the trial, the prosecution offered no evidence. In one trial, the judge directed the jury to acquit both defendants before the prosecution closed their case, but after the evidence of the complainants had been heard. In another case, the complainant attended court but refused to give evidence and the judge therefore directed the jury to acquit.

Seven defendants were acquitted because the prosecution offered no evidence in support of the charges against the defendants. In the trial of a rape offence, the evidence of the complainant is of paramount importance, and if she is not available, the case against the accused effectively breaks down. In three cases, one of which involved four defendants, the complainant could not be traced or was known to be unwilling to come forward and give evidence at the trial. In one case, the alleged victim was six years old and could not be called as a witness; that case folded following the judge's ruling that certain statements allegedly made by the defendant to the police were not to be admitted as evidence at the trial. The outcome of trials where the defendant pleaded "not guilty" is summarized in Table 4:

TABLE 4. Outcome of trial, "not guilty" pleas

<u>OUTCOME OF TRIAL</u>	<u>NUMBER OF DEFENDANTS</u>	
Convicted as charged	34	(42%)
Convicted of lesser offence	7*	(9%)
<u>Total convicted</u>	<u>41</u>	<u>(51%)</u>
Acquitted by jury	24**	(30%)
Acquitted on judge's direction	5	(6%)
Acquitted because Crown offered no evidence	8	(10%)
<u>Total acquitted</u>	<u>37</u>	<u>(46%)</u>
Retrial ordered	2***	(3%)
TOTAL	80	(100%)

[* One of these defendants was initially charged with indecent assault.]

[** One defendant included here was charged with rape offences against two women. He was acquitted on one count by the jury, and on the other, on the judge's direction.]

[*** The retrials resulted in a conviction for a lesser offence, and an acquittal because the Crown offered no evidence.]

Because of the number and length of trials for rape offences conducted at the Central Criminal Court, it was not possible to include in the sample all the trials that took place there during the data collection period. The completed sample represents a coverage of 85% of the total population of trials for rape offences defined above. The selection of trials for inclusion in the study was entirely random (Table 5). The sample obtained, therefore, offers an adequate coverage of trials for rape offences at the Central Criminal Court in 1978/79, and it is on that basis that the data has been analysed.

TABLE 5. Sample selection

<u>WHETHER INCLUDED</u>	<u>"GUILTY" PLEA</u>	<u>"NOT GUILTY" PLEA</u>	<u>TOTAL</u>
Yes	31 (89%)	50 (83%)	81 (85%)
No	4 (11%)	10 (17%)	14 (15%)
Total:	35 (100%)	60 (100%)	95 (100%)

The findings of the study and the interpretation of those findings constitute the substance of the following chapters.

FOOTNOTES TO CHAPTER THREE

- (1) R v FENLON and OTHERS (1980) 71 Cr.App.R. 307
- (2) DURKHEIM, E.: The division of labour in society, New York, Free Press, 1964, p.68
- (3) WEBER, M.: The protestant ethic and the spirit of capitalism, London, Unwin University Books, 1930, p.25
- (4) See for example CHAMBLISS, W.: Crime and the legal process, New York, McGraw Hill, 1969; QUINNEY, R.: The social reality of crime, Boston, Little, Brown and Co., 1970; TURK, A.: Criminality and legal order, Chicago, Rand McNally, 1969
- (5) FREEMAN, M.D.A.: The legal structure, London, Longman Group Ltd., 1974
- (6) See Chapter 1.
- (7) GROTH, A.N.: Men who rape: the psychology of the offender, New York and London, Plenum Press, 1979, p.2
- (8) ibid., p.2
- (9) SYKES, G.M. and MATZA, D.: "Techniques of neutralization: a theory of delinquency" American Sociological Review, vol.22, 1957
- (10) ibid., p.667
- (11) ibid., p.667
- (12) ibid., p.668
- (13) WEIS, K. and BORGES, S.S.: "Rape as a crime without victims and offenders? A methodological critique" in VIANO, E.(ed.): Victims and society, Washington D.C., Visage Press, 1976, p.232
- (14) REYNOLDS, J.M.: "Rape as social control" Catalyst, Winter 1974, part 8, p.67
- (15) See Chapter 2.
- (16) The Guardian, 6th January 1982
- (17) GROTH, A.N.: op.cit., 1979, p.7
- (18) HOLMSTROM, L.L. and BURGESS, A.W.: The victim of rape: institutional reactions, New York, John Wiley and Sons, 1978, p.245
- (19) Courts Act 1971, s.4(7)
- (20) MORRISH, P. and McCLEAN, I.: The Crown Court, Little London, Chichester, Sussex, Barry Rose Publ., 5th ed., 1973, p.92
- (21) The Times, 15th December 1982
- (22) See for example LOFLAND, J.: Analyzing social settings,

Belmont, Ca., Wadsworth Publ. Co., 1971; BECKER, H.: "Problems of inference and proof in participant observation" American Sociological Review, vol.23, 1958, pp.652-660; FILSTEAD, J.(ed.): Qualitative methodology, Chicago, Markham, 1970; McCALL, G. and SIMONS, J. (eds.): Issues in participant observation, London, Addison-Wesley, 1969

(23) GOLD, R.L.: "Roles in sociological field observations" in DENZIN, N.K. (ed.): Sociological methods: a sourcebook, London, Butterworths, 1970, p.3

(24) BARNARD, D.: The criminal court in action, London, Butterworths, 1974, p.79

(25) ibid., p.80

(26) ibid., p.83

(27) Section 7 of the Criminal Justice Act 1982 abolishes the right of an accused person to make an unsworn statement. If he chooses to give evidence, he must do so on oath and be liable to cross-examination. This would have affected only one defendant in the present sample who made an unsworn statement from the dock.

(28) Sexual Offences (Amendment) Act 1976 s.7(2)

PART II. RAPE TRIALS AFTER 1976: THE OPERATION
OF THE SEXUAL OFFENCES (AMENDMENT) ACT 1976

CHAPTER FOUR. EVIDENCE OF PREVIOUS SEXUAL EXPERIENCE

No systematic study has been made of the type and range of evidence introduced in rape trials before the Sexual Offences (Amendment) Act 1976 with regard to the complainant's previous sexual experience. The Advisory Group on the Law of Rape received evidence that cross-examination relating to such experience, often extremely painful and distressing for the woman, was widespread. The Group made a firm recommendation against the routine introduction of such evidence and, as we have seen above, a modified version of that recommendation was included in the new Act.

The present chapter is concerned with the effect on rape trials of legislative change in this respect. It seeks to assess, in particular, the extent to which the assumptions reflected in earlier case law have been incorporated into the operation of the new Act. Before discussing the application of Section 2, however, the development of relevant case law since the early 19th century will be considered. Cases referring to the complainant's prior relationship with the accused will be dealt with at a later stage.

The development of case law

A reading of the case law indicates that evidence of the complainant's prior sexual experience tended to fall into two major categories, namely that she was of notoriously immoral character, or that she had previously had sexual experience with persons other than the defendant.

General evidence of "notorious bad character", usually a euphemism for an allegation of prostitution, was introduced to suggest that because of her sexual reputation, the woman in question was likely to have consented to sexual intercourse with the defendant. The relevance of this kind of evidence to the issue in the trial has been firmly entrenched in common law since R v Clarke (1817) where the defence called evidence of the complainant's "abandoned character" and "lack of chastity". This case also established the principle that such evidence could only be adduced in general terms:

"In the case of an indictment for rape, evidence that the woman had a bad character previous to the supposed commission of the offence is admissible; but the defendant cannot go into evidence of particular facts."
(1)

The principle that a woman's sexual reputation or character is relevant to establishing consent has since been reaffirmed in a number of cases. In R v Barker (1829), the complainant was asked whether she had been

"...walking in the High Stret, in Oxford, to look out for men" (2);

in R v Tissington (1843), the alleged victim (who, incidentally, was a child under 12) was cross-examined as to

"facts of indecency ... and of solicitation by her previously made to men to have connection with her" (3);

and evidence was admitted in R v Clay (1851) that the complainant had been seen some twenty years before the offence,

"on the streets of Shrewsbury as a reputed prostitute"
(4).

The above cases have been followed in this century (5), and the position until 1976 was as summarized in the report of R v

Greatbanks (1959):

"In a case other than rape, such evidence would clearly not be admissible. In rape cases, however, special rules applied. It was certain that evidence of intercourse with named men could not be admissible in a rape case, but evidence that the woman was a prostitute or, as in this case, that she was a woman of loose character and notorious for want of chastity or decency was, on the authorities, admissible". (6)

The second type of evidence relating to sexual experience involves what has been termed the woman's "private sexual history", excluding allegations of prostitution and the like (7).

The earliest authority on this matter is interesting insofar as it diverges from subsequent case law. In *R v Hodgson* (1812), the defence proposed to ask the complainant whether she had had sexual intercourse with persons other than the accused and, in particular, with a man named during the trial. The prosecution's objection to this line of questioning was successful:

'... the witness was not bound to answer these questions as they tended to incriminate and disgrace herself... he (the judge) thought there was not any exception in the case of rape". (8)

The prosecution also objected to the defence proposal of calling a witness to prove the above allegations against the complainant, on the grounds that the particular facts in question were not connected with the rape charge. The judge allowed the objection.

On the face of it, *R v Hodgson* appears to have established that a woman's private sexual history in this sense was not relevant to her consent or credibility in a rape trial. However, the case is hardly mentioned in later authorities except as a

"rule which may be doubted in the present day". (9)

The decision seems to have been overturned in *R v Robins* (1843)

where it was held not only that the complainant could be cross-examined as to particular acts of sexual intercourse with third parties, but also that witnesses could be called to contradict her evidence. The judge justified this course of action as follows:

"It is not immaterial to the question whether the prosecutrix has had this connection against her consent, to shew that she has permitted other men to have connection with her, which on cross-examination she has denied". (10)

Later case law shows that a compromise between the decisions in Hodgson and Robins was eventually settled on. It was established in R v Cockroft (1870) and reaffirmed in R v Holmes and Furness (1871) (11) that the complainant could indeed be cross-examined as to her private sexual history. However, such evidence

"cannot be regarded as relevant to the issue, but only as going to the credit of the witness. The witness' answer is therefore binding". (12)

This is an important decision which draws a clear distinction, at least in law, between evidence as to "notorious bad character" and to private sexual history. Evidence to show that the complainant was, for example, a prostitute, had been admitted in rape trials because it was felt to affect the issue in the trial:

"... such evidence is relevant to the issue of consent, as showing a person more likely to consent to sexual intercourse". (13)

The introduction of evidence relating to a woman's private sexual history, however, was not justified in terms of its relevance to consent:

"The reason sometimes advanced for pursuing this line of questioning has been that it casts doubt on the credibility of the woman, i.e. that the fact that she has had prior sexual experience, it is said, tends to prove that she is an untruthful or unreliable witness". (14)

Different rules of evidence apply to cross-examination to the issue

(i.e. consent, in this instance) and to credit. The former is designed to elicit statements concerning the facts relevant to the issue which may be defined as

"the point or matter issuing out of the allegations and pleas of the plaintiff and the defendant in a cause, whereupon the parties join and put their cause upon trial". (15)

Cross-examination to credit, on the other hand, consists in asking questions of a witness designed to test his/her credibility and may involve a general attack on his/her character and reputation. In a rape case, the complainant's answer to a question in cross-examination to the issue may be contradicted by further evidence, while her answers in cross-examination to credit are final and cannot be rebutted by other witnesses. (16)

The law of evidence in this respect suggests that there is a clear distinction between cross-examination to the issue and to credit. In practice, however, that distinction in rape trials is an extremely nebulous one in a number of respects:

It is not always immediately apparent whether a particular piece of evidence comes under the heading of "notorious bad character" or of private sexual history. Expressions such as "lack of chastity", "immorality" and "promiscuity", for example, are used in this context whether it is the complainant's lack of consent or general reputation that is being questioned. It becomes difficult to define what constitutes evidence going to the issue and to credit respectively. Smith has argued that contemporary attitudes towards sexual behaviour are no longer in line with the assumptions underlying 19th century case law:

"It is thought that few would wish to defend the

admissibility of evidence of sexual immorality on the ground of its relevance to credibility". (17)

While theoretically, this view may be correct, court procedure suggests that the distinction in practice between relevance to credit and relevance to consent is, at best, blurred and unclear.

The case law briefly reviewed above indicates that between 1812 and 1976, the complainant in a rape trial was frequently exposed to a whole barrage of questions totally unrelated to the charge which aimed to discredit her evidence by suggesting, more or less explicitly, that she was the type of woman who tends to consent freely. If, for example, it was alleged that the complainant had some prior sexual experience, she may ostensibly have been cross-examined to credit but evidence thus introduced was bound to affect the jury's view of her likelihood to consent:

"Here the difficulty is extreme for the jury might be excused if they thought that the prosecutrix's promiscuity had substantially more bearing on whether she consented than on whether she was a liar". (18)

This clearly suggests that there is assumed to be a strong link between a woman's sexual experience and her consent to sexual intercourse on the occasion in question. Her credibility as a rape victim, i.e. as a woman who did not consent, is seen as dependent on prior sexual conduct on her part with persons other than the defendant. The rationale underlying the relevance of such evidence, whether it is presented in terms of general bad reputation or private sexual history, is based on the assumption that any degree of sexual experience in a woman is indicative of an overall willingness to consent. In other words, it is considered more probable that an "unchaste" woman would assent than a "virtuous" one. At one extreme, prostitution provides a good example of this

view. The very fact that a woman is a prostitute tends to destroy her credibility as a rape victim, and this is given some acknowledgment in law insofar as even contemporary judges warn juries, occasionally in somewhat ambiguous terms, not to dismiss such cases out of hand:

"When one ... is considering thoughts about morality and immorality and permissive societies and all the rest of it, it is no excuse, even if that woman was a common prostitute, if she did not consent to intercourse and a man had intercourse with her against her will. Even with that sort of a woman, that is rape just the same". (Case 18)

The Heilbron Group's approach constitutes a radical challenge to the above assumptions. The Group argued that whatever a woman's sexual experience with partners of her choice, it cannot logically be construed as a general willingness to consent to sexual intercourse, or indeed as an indication of untruthfulness on her part. It was therefore recommended that:

"in general, the previous sexual history of the complainant with other men (including general evidence of bad reputation) ought not to be introduced". (19)

It was felt that such evidence should only be admissible with the leave of the trial judge: in exercising his discretion, the judge ought to take into account among other matters whether the relevance of the evidence to the issue in the trial is such that it would be unfair to the defendant to exclude it.

Parliament did not follow the Group's recommendations with regard to laying down guiding principles for judges in exercising their discretion. According to Section 2 of the Sexual Offences (Amendment) Act 1976, an application must be made to the judge in the absence of the jury, to adduce evidence or to cross-examine the complainant about her sexual experience with any person other than

the defendant. With regard to the use of discretion, legislation was set out in very general terms:

"... on such application, the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked." (20)

The Act therefore overruled the precedents established in the 19th century with regard to evidence of prior sexual experience, but left a good deal to the trial judge's discretion. We must therefore consider court procedure itself in order to assess what effect, if any, legislative change has had on the trial of rape offences. The following sections will describe current practice with regard to applications under Section 2 of the Act on the basis of the sample used in this study.

Applications under Section 2.

Applications for leave to introduce evidence relating to the complainant's previous sexual experience were made in eighteen of the forty-five contested trials in the sample, on behalf of a total of twenty-nine defendants (21).

Such applications were most common in trials where two or more defendants were charged jointly, as Table 1. illustrates. The reason for this may be that it becomes imperative to attack the complainant's sexual morality when she is alleged to have consented to intercourse with several men. In these cases, applications were not always made on behalf of all defendants, but the halo effect of the introduction of evidence to discredit the complainant must be noted here. When a judge gives leave for cross-examination as to prior sexual experience to one defendant, his co-defendant(s) in

trial will also gain advantage from the fact that the jury is led to take a particular view of the complainant's character. As one judge remarked in the trial of two defendants,

Judge: One can't help observing that if I allow one, the other will benefit. (Case 66)

TABLE 1. Applications under Section 2 and number of defendants tried together

<u>NUMBER OF DEFENDANTS TRIED TOGETHER</u>	<u>MADE AN APPLICATION</u>	<u>MADE NO APPLICATION</u>	<u>TOTAL</u>
Defendant tried alone	7 (23%)	23 (76%)	30 (100%)
Defendant tried with one or more co-defendants	22 (56%)	17 (43%)	39 (100%)
TOTAL (22)	29 (42%)	40 (58%)	69 (100%)

The link between frequency of applications and issue in the trial deserves some mention here. In all criminal trials, the burden of proof rests with the prosecution and in a rape case, this amounts to establishing a number of matters, one or more of which may be at issue. These matters include the identity of the defendant, the occurrence of sexual intercourse between the defendant and the complainant, the complainant's lack of consent, and the defendant's intent, i.e. knowledge of or recklessness as to her lack of consent. Predictably, the overwhelming majority (83%) of applications were made on behalf of defendants whose case involved the question of consent. For the remainder, the issue was the occurrence of sexual intercourse:

TABLE 2. Applications under Section 2 and main issue at the trial

<u>MAIN ISSUE AT THE TRIAL</u>	<u>DEFENDANT MADE APPLICATION</u>	<u>DEFENDANT MADE NO APPLICATION</u>	<u>TOTAL</u>
Identity	-	3 (100%)	3 (100%)
Occurrence of sexual intercourse	5 (20%)	19 (79%)	24 (100%)
Consent or belief in consent	24 (57%)	18 (42%)	42 (100%)
TOTAL (22)	29 (42%)	40 (48%)	69 (100%)

Another related point is that applications for leave to introduce such evidence, although not universal, are certainly a good deal less exceptional than the Heilbron Group or Parliament intended. In the present sample, nearly 60% of those defendants whose case was based on consent made such applications. Furthermore, 75% of all applications were wholly or partly successful; insofar as leave was given by the judge to cross-examine the complainant on some aspect of her sexual experience.

Applications under Section 2 were based on a variety of grounds, although the difference between the substance and grounds of applications was not always clear. In some cases, application to cross-examine was made without any attempt to argue the relevance of the proposed questions to the case. Judges generally intervened and required an explicit statement of the purpose of such questions, but occasionally, leave to cross-examine was granted despite an open acknowledgment that the matters in question were not relevant to the issue in the case. An example is as follows:

Defence counsel: I want to cross-examine the complainant on her previous sexual experience. In her statement to the police, there is a sentence which reads: "I am not inexperienced in matters sexual". That is all I seek to put to her.

Judge: I suppose that has not much to do with this case; I don't think it's right to stop the question. (Case 49)

Generally, however, applications are a great deal more detailed and appear to fall into three broad categories. Evidence of the complainant's prior sexual history may be argued to be relevant to her credibility; to issues in the trial excluding consent; and to the issue of consent.

Applications for leave to cross-examine alleged victims with regard to their sexual experience on the grounds of relevance to credit were made in six trials in the present study. Two of these arose out of an inconsistency between the complainant's evidence at the trial and her earlier statement to the police, and the remainder were based on previous rape complaints made by the alleged victim.

An example of the first type of application in this category is a case where the complainant's written statement to the police included a reference to the last occasion she had sexual intercourse before the alleged offence. In her evidence in chief at the trial, however, she volunteered the information that she had had no sexual experience before the rape incident. There was medical evidence to support the substance of her statement to the police, and the defence application was directly based on the question of her overall credibility as a witness:

Defence counsel: If she is lying about her prior sexual experience, what else is she lying about? (Case 69)

Cross-examination on this issue was allowed, and it must be pointed out that an application was only made under Section 2 as a matter

of formality, because of the sexual nature of the inconsistency involved in the witness' evidence. A major contradiction such as this between a witness' evidence and his/her written statement to the police, irrespective of its substance, normally leads to cross-examination aimed at discrediting that evidence.

In four trials of the present study, the defence sought to cross-examine the complainant about previous complaints of rape she was alleged to have made. The proposed cross-examination was intended to go to credit in the sense that the defence were prepared to be bound by the complainant's answers.

Inquiry into prior complaints of rape is based on one of the most persistent themes in the history of the offence, namely the fear of the false accusation. The fear may be that the woman in question has a tendency to invent incidents of rape which have no basis in reality or, alternatively, that she has consensual intercourse which she subsequently labels as rape out of malice, embarrassment, spite, jealousy or some such motivation. It is interesting that applications to cross-examine on the former grounds sometimes rely directly on psychoanalytical theory which gave the fear of the false accusation some pseudo-scientific basis in the early 20th century:

Judge: (Referring to an earlier rape complaint by the alleged victim) What evidence is there that that was a false allegation?

Defence counsel: None. But very often, there are people who allege rape for some psychological reason. It may be some sexual fantasy. There is a certain kind of woman who alleges rape, a certain type... There is a type of woman who'll make hysterical, untrue allegations of rape. (Case 56)

In view of the deep suspicion with which the law has always treated

alleged victims of rape, it is not surprising that a woman who has made more than one such complaint is subject to extreme scrutiny. It is often thought that several sexual assaults in the life of one woman are so improbable as to be practically impossible and consequently, that all such allegations stand or fall together:

Judge: You want to tell the jury that three rapes in one year are so unlikely that she is not credible in this instance ...

Defence counsel: I want to tell the jury that they should either believe all or none of her allegations. (Case 31)

It follows from this that applications of this type were always based on the implicit assumption that prior complaints of rape amounted to false allegations. As one judge pertinently pointed out to defence counsel,

Judge: If she had reported it to the police, and there had been a trial and a conviction, you would not be asking to cross-examine on that". (Case 56)

Evidence of previous rape complaints was excluded in two cases largely because the trial judges involved were not willing to endorse the defence assumption that the earlier complaint was a false or unfounded one:

Judge: It could only be relevant to show the complainant's tendency to make up a story. There is no evidence that that story was made up... There is nothing in her statement to give grounds for the defence to suggest that it was untrue. (Case 56)

In two other cases, however, leave was given to introduce evidence of previous complaints. In both cases, the woman was alleged to have made more than one such complaint, and the judge took the view that this was relevant:

Judge: The issue is that of previous similar complaints - it would be unfair not to allow it. (Case 35)

The latter decision seems to follow the guidelines suggested in the Heilbron Report, namely that evidence of prior sexual experience should be admitted if it

"relates to behaviour on the part of the complainant which was strikingly similar to her behaviour on the occasion of, or in relation to events immediately preceding or following the alleged offence". (23)

Nevertheless, one should note that the divergence between judges illustrated here indicates that interpretations of the meaning of Section 2 vary considerably. We shall return to this point later in the chapter.

A few applications for leave to cross-examine on sexual experience were made on the grounds of relevance to the issue of whether sexual intercourse had occurred between the defendant(s) and the complainant at the material time. These arose when the medical and/or forensic evidence introduced by the prosecution suggested that the complainant had had sexual intercourse at the relevant time, but the defence argued that such intercourse had not been with the defendant(s). An application would then be made to cross-examine the complainant about her sexual experience in order to offer an alternative interpretation of the scientific evidence, i.e. to suggest that she had sexual intercourse with someone other than the defendant on the day in question. Such applications were successful in all cases, but judges always stressed that the introduction of evidence arose on a limited point only. Occasionally, defence counsel tried to pursue matters further to attempt to cast doubt on the complainant's sexual reputation. In one case, for example, the judge had given leave for a question to be asked of the complainant about the last occasion when she had intercourse before the alleged rape. The application went on:

Defence counsel: I would like to go further, and do a bit of probing in the normal way.

Judge: No. What do you mean, probing?

Defence counsel: Asking how often she was having sexual intercourse at the time, with whom... (Case 56)

Such a line of cross-examination was not permitted in any of the above cases, but it must be noted that the relevant applications were only made in two trials in the present study. A Court of Appeal judgment seems to endorse that judges are justified in prohibiting cross-examination without adequate instructions:

"...any further questions beyond those which he (defence counsel) was expressly allowed to ask would necessarily have been a roving commission or a fishing expedition, call it what one likes. The learned Judge endeavoured to allow just so much questioning of the girl as would enable the defendants' point to be developed, without the further difficulty and distress which would be caused to her by the roving commission or fishing expedition. It may be that other judges might not have come to the same conclusion as did the learned Judge, but that is not the point... This was a proper exercise of his discretion and accordingly it cannot be faulted." (24)

The vast majority of applications were argued on the grounds of their relevance to the issue of consent, and this is the critical area in terms of assessing whether the new Act has brought about any fundamental change in the trial of rape offences. The findings of the present study suggest that the principles established in 19th century case law are to a large extent being reflected in the implementation of the new Act. The basic assumption that a complainant's prior sexual experience is relevant in establishing consent has not been substantially altered by a procedural change in the law. Applications for leave to introduce such evidence on the grounds of its relevance for consent are not infrequent, and furthermore, they tend to be successful. They will now be considered in some detail.

One measure of the importance of a "good reputation" for an alleged rape victim is the extent to which her prior virginity is used to strengthen the prosecution case. Women with no previous sexual

experience tend to be presented as highly trustworthy with regard to their complaint of rape. The prosecution inevitably introduce this in opening the case; later, the complainant is asked about it; and finally, the doctor is questioned in some detail about the results of his genital examination of the alleged victim. In other words, wherever possible, a complainant's prior virginity is firmly underlined for the jury, and, as we shall see below, this appears to contribute strongly to her credibility as a rape victim.

A further indication of the importance of virginity is the way in which the defence sometimes disputes the prosecution's allegation that the complainant had had no sexual experience. In such cases, the issue takes on tremendous proportions and a good deal of time and effort is devoted by both sides in trying to make their version of the truth prevail or, as far as the defence is concerned, to sow some doubt at least in the minds of the jury. In one case, for example, the doctor's cross-examination went as follows:

Defence counsel: About the condition of the hymen, what does your examination mean?

Doctor: There was a single split in it, which had no connection with this incident.

Defence counsel: Can your examination show that she had not had sexual intercourse before that occasion?

Doctor: Yes, there would be more damage to the hymen.

Defence counsel: Once a woman has become used to sexual intercourse, you can't really tell?

Doctor: I would not say that this young lady was accustomed to frequent sexual intercourse. I would say her hymen was consistent with her being a virgin.

Defence counsel: If I suggest that the lady had sexual intercourse more than ten times about six months before this incident, is that consistent with your findings?

Doctor: I suppose it is possible. But I would have expected something different in the hymen if that had been the case. (Case 25)

In three trials of the present study, the complainants, aged between 14 and 17, had not been virgins prior to the alleged rape incidents, and in all cases, this became the substance of an

application under Section 2 of the Act. It was argued that the jury should not deliberate on the assumption that the complainant had been a virgin:

Defence counsel: The defence is consent, and this is relevant to establish consent: the fact that this was not the complainant's first experience of sexual intercourse. If it were, it would be heavily against the defendant. The matter ought to be before the jury, or, in view of her age, they may draw inaccurate conclusions about her virginity. (Case 66)

Applications to introduce evidence of sexual experience were not limited to cases involving the issue of virginity in young complainants. They were often made, and seemed to be based on the idea that the credibility of the complaint was to a large degree dependent on any sexual experience, in general terms, that the alleged victim may have had. For example:

Defence counsel: The defence is effectively that she invited (the two defendants) in a threesome on the bed. That kind of suggestion has to be balanced against the fact that she has had sexual experience and against the degree or extent of that experience. (Case 67)

Defence counsel: The girl, although a virgin, was not sexually inexperienced. She made suggestions to the defendant which are entirely incompatible with her account of struggles... The suggestion is that she had done that with her boyfriend regularly. (Case 55)

Applications were occasionally made to cross-examine a complainant in a specific area or aspect of her previous sexual experience. In such cases, the defence aim to show not merely that the complainant had some sexual experience, but that her experience was with persons bearing some similarity to the defendant. In one case, for example, two men in their forties were charged with the rape of a teenager. The defence made an application to cross-examine her about her previous sexual experience in the following terms:

Defence counsel: The complainant was living with a man much older than herself. There was also another (older) man sharing their squat. I want to ask her about that. (Case 71)

The implicit suggestion here was that because the complainant was cohabiting with an older man, she was more likely to consent to intercourse with others in that age group, including presumably the defendants.

Elsewhere this line of reasoning was used with regard to the question of race. In this case, the complainant was white, her assailants black, and the defence made the following application:

Defence counsel: I want to show that the complainant was not averse to having sexual intercourse with coloured men. The jury should have no presumption of lack of consent because of the colour of the people involved here. Her sexual experience was almost entirely with coloured men. (Case 52)

Before considering the extent to which judges were persuaded by such arguments to allow evidence of previous sexual experience to be introduced, it is important to point to another area where 19th century assumptions survive to influence, and indeed to form the basis of applications under Section 2. This is where the defendant's state of mind is concerned. (25) The idea here seems to be that the defendant's view or knowledge of the extent or type of previous sexual experience the complainant may have had is relevant in determining his intent at the time of the alleged offence. The assumption is that his knowledge, whether based on the truth or not, of her sexual proclivities in some way mitigates his intentions. In other words, if he thought that because of her sexual past the woman in question was "fair game" that ought to be taken into account by the jury when they consider his guilt. For example:

Defence counsel: Shortly before this incident, the complainant's boyfriend (who was an acquaintance of the defendants') ...invited the defendants to have sexual intercourse with her. He said that the girl was easy and

would sleep with anyone who came along. The defendants' belief in her consent is the issue here. Even though it was a first meeting, they had heard that she was sexually easy and that goes to their state of mind. (Case 71)

All applications of this type were successful. The underlying assumption seems to be that although the complainant may not have consented to sexual intercourse, the defendants were justified in coming to the conclusion that she did in fact consent on the basis of their knowledge, however mistaken, of her sexual experience. This is a further illustration of the principle that a woman's sexual experience, even if it only occurred in the imagination of the defendant, is considered to be relevant in deciding whether or not a rape has occurred.

Judicial decisions

Decisions with regard to applications under Section 2 of the Act must be seen not only against the background of legislation itself, but also of relevant case law which has been published since. As the Act simply gave judges a broad discretion, principles which have evolved for the exercise of that discretion are extremely important and will be considered here first.

At the time of the present study, two cases had been reported with regard to Section 2 of the Act.(26) One of these concerns a somewhat marginal issue, namely the admissibility of evidence regarding alleged conversations between the complainant and the defendant about the complainant's sexual experience. In the case in question (27), these conversations were relevant to the direct issue, namely the events immediately preceding the alleged offence. Nevertheless, they were clearly covered by Section 2(1) of the Act

and their admissibility in evidence was therefore subject to an application. Leave was given for the questions to be asked in that case, but only as far as conversations were concerned and not with regard to the complainant's actual sexual experience. This is a further indication that the alleged victim need not have any sexual experience for this to be deemed relevant to consent, and the defendant's belief in this respect is sufficient to warrant the admission of such evidence.

The main case on the matter, however, is that of R v Lawrence and Another (1977) and this was referred to on a number of occasions during the trials included in this study. The trial judge in that case ruled as follows:

"The important part of the statute which I think needs construction are the words "if and only if he (the judge) is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked". And, in my judgment, before a judge is satisfied or may be said to be satisfied that to refuse to allow a particular question or a series of questions in cross-examination would be unfair to a defendant he must take the view that it is more likely than not that the particular question or line of cross-examination, if allowed, might reasonably lead the jury, properly directed in the summing up, to take a different view of the complainant's evidence from that which they might take if the question or series of questions was or were not allowed." (28)

The first published interpretation of Section 2 seems to diverge from the spirit of the Heilbron recommendation that relevance to the issue should be the main criterion for the admissibility of evidence of this kind. Instead, R.v Lawrence reflects the old common law principle that cross-examination should be allowed insofar as it affects the complainant's credibility or trustworthiness. A further point in this context is that R v Lawrence appears to make a somewhat spurious distinction between

evidence intended to attack the complainant's sexual character and evidence "going to credit properly":

"... the learned judge ruled that cross-examination designed to form a basis for the unspoken comment "well, there you are, members of the jury, that is the sort of girl she is" was not permissible; distinguishing between cross-examination designed to blacken the complainant's sexual character so as to leave such comment and cross-examination as to the trustworthiness of her evidence, the learned judge ruled that only the latter going to credit properly was permissible". (29)

The decision in *R v Lawrence* has certainly been used as an argument to support the admissibility of evidence of prior sexual experience in the trials of this study, and it can be seen as an endorsement of some of the pre-1976 ideas and positions. Indeed, it is probable that any sexual experience in a complainant which is capable of being construed as "inappropriate" will lead the jury to take a different view of her evidence. As the Heilbron Report commented, in a slightly different context:

"They (the jury) may also react critically to any admissions she may make on the assumption that any sexual experience, however unrelated to the charge, shows her to be a person more likely to consent to sexual intercourse, even with a stranger". (30)

Having considered published case law, let us now turn to a discussion of judges' interpretations of Section 2 in the trials of the present study. We must note here the novelty of the Act for a number of judges: although High Court judges generally seemed to have some experience in dealing with applications under Section 2, this was not the case for the majority of circuit judges sitting at the Central Criminal Court. This, coupled with the scarcity of reported cases on the issue, probably accounts for one of the most striking findings of this study, namely the wide variation among judges in handling such applications.

One judge, for example, on his first encounter with Section 2, decided to clear the court and hear the application in camera. In summing up, he explained this to the jury as follows:

Judge: I took that course for this reason: I do not know whether it could happen in this case or not, but sometimes in cases the members of the jury have relatives or friends who come to court with them, for perfectly proper reasons, natural interest in what is going on, and they sit in the public gallery. If they heard what went on in the absence of the jury, they might hear something which the judge has decided the jury should not be told. There is another reason as well, quite apart from that reason. If the judge decides that the complainant should not be asked about her previous sexual experience but it comes out during the hearing in the jury's absence, then it is a little unfair, do you not think, that members of the public who might know this complainant - a neighbour, maybe, who knows about the case and has come along to hear it - should hear all about the complainant's past if it has been private up until that moment. (Case 52)

This is perhaps a fairly minor area in terms of differences among judges, although one might argue that the above is a sensitive and commendable course of action which ought to be adopted by all judges in trying rape cases. However, the wide variation encountered in this study among individual judges is potentially far more significant in three further, although related areas, as follows. First, in their commitment to the Act; second, in the extent to which the Act is enforced; and third, in respect of decisions on applications under Section 2.

Apart from the extent of judges' own experience in dealing with this particular Section, one factor which may well affect their decisions on the relevant applications is their expressed commitment to the Act. Opinions voiced on the subject in court ranged from strong approval to equally strong disapproval, as these extracts illustrate:

Judge: Before the 1976 Act, this was common practice and difficult for a judge to stop. It worked unfairly on the

woman: the woman has the right to choose with whom she has sexual intercourse. It does not show that she consented to sexual intercourse with the defendant. The Act intended to stop this illogical unfairness. (Case 3)

Judge: It is not up to me to comment on Parliament, but most of them have no practical experience of how one arrives at the truth in criminal trials... I think it might be unfair, perhaps even more so in an older woman, to prevent cross-examination on sexual proclivities, but that is what Parliament wants... This wretched Section overturns many of our habits in criminal trials. (Case 66)

Opinions of this kind must clearly influence how a particular judge chooses to exercise his discretion, and we shall see below the extent to which judges in fact vary in their decisions on whether or not to admit evidence of previous sexual experience.

In addition to differences between judges in their commitment to the spirit of the Act, the variability between them is also evident with regard to areas where the law, on occasions, is not being applied.

Two judges in the present sample systematically questioned the complainant about her previous sexual experience without an application from the defence, and without any intervention from the prosecution. One such case, not included in this study, was considered by the Court of Appeal, where the following observations were made:

"The Judge admitted that he had made a mistake as the argument proceeded. I think I should emphasize that a familiar problem facing the judiciary is that Judges who are immensely experienced in one branch of the law find themselves, apart from their duty, from time to time presiding in other cases, in which their experience may be minimal. That evidently was the situation in this case". (31)

While this may understandably occur in some cases, particularly with a new Act of Parliament, there seems to be no justification

for a judge to introduce evidence of previous sexual experience in this way when he is aware of the terms of legislation. In the present study, one judge who made extensive reference to the Act in his summing up explained to the jury that in his opinion, they ought to have information about the complainant's sexual experience. During the trial, after a few questions in cross-examination, he had intervened as follows:

Judge: How old were you at the time of this incident?

Complainant: I was sixteen and a half.

Judge: Had you had sex with anyone before this?

Complainant: Yes.

Judge: With one boy, or more than one boy?

Complainant: More than one.

Judge: At the time, were you going steady with one boy?

Complainant: Yes.

Judge: So whatever may have been your reputation, were you going steady and was all that finished with? (Case 20)

On the basis of the present study, it is not possible to estimate the frequency of this type of judicial intervention in rape trials. This is nevertheless a disturbing finding insofar as it shows that some judges are deliberately flouting the intention of Parliament as embodied in the Act. As *R v Rahimipour* (1979) clearly states, it is not part of judges' discretion in this area to give themselves leave, as it were, to cross-examine the complainant and such questioning amounts to a misuse of judicial power. (32)

A second problem area concerns cases where the defence ask questions of the complainant without making an application to the judge and where such questions relate to some aspect of the complainant's sexual experience. The following are some examples:

Defence counsel: Were you working as a prostitute at the time? (Case 5)

Defence counsel: Had you been living with your boyfriend? (Case 14)

Defence counsel: Had you been to bed with B. before? (Referring to a man named during the trial, other than

the defendant) (Case 78)

Differences among judges are further underlined by the extent to which various judges intervened in improper cross-examination of this kind. In some cases, the judge sent the jury out as soon as the offending question had been asked and tackled defence counsel about it, in fairly strong terms:

Defence counsel: I apologize...

Judge: That is not enough. You know about that Section.

Defence counsel: I'll not suggest that she had any sexual experience. I was seeking to find out where she was living. I didn't realise the implication of what I was saying.

Judge: That's outrageous. This was incredibly negligent. (Case 14)

In other cases, however, neither the judge nor the prosecution intervened in any way and the defence were free to ask a whole series of questions which, on the face of it, appear to be expressly prohibited by the new Act. In one instance, the complainant was questioned by the defence about her prostitution in the following way:

Defence counsel: Would you say yours was a risky business? Say in the Piccadilly area, around midnight? It would be a risky business, finding yourself with a strange man in a room? And if a man looks like an Arab, rich and lives in a hotel, that would be OK? In your profession, stealing is very common, isn't it? You are well trained to do that? Isn't that why you had a knife, to help you steal? (Case 12)

Such questioning occurred relatively frequently in trials of the present study, and must also cause some concern with regard to the effectiveness of the law in this area.

As mentioned above, seventy-five percent of applications under Section 2 in this study were wholly or partly successful; some evidence of the complainant's prior sexual experience was introduced in such trials. In this area, the variation among judges

is particularly noteworthy. We have seen above, for example, that different rulings were made in various trials with regard to the admissibility of evidence concerning previous allegations of rape by the complainant. In this context, it is interesting to consider two factually similar cases where trial judges differed in their ruling with regard to applications under Section 2.

In both cases, the complainant was about 14 years old and according to her statement to the police, had had a very limited degree of sexual experience before the alleged rape. The defence in both cases sought to cross-examine about this, on the grounds that it would be unfair to the defendants if the jury assumed the complainant's virginity:

Defence counsel: This was not the first sexual experience of this girl. In view of the fact that the defence is consent, it is perhaps important to establish that this was not the first time. (Case 66)

The contrast between the two judges' decisions here illustrates widespread differences in the interpretation and application of the Act:

Judge: The test in the judge's discretion is unfairness to the defendant... My ruling is that it would not be unfair to the defendants if such questions are excluded... A sensible summing-up will dissuade the jury from indulging in guesswork. (Case 3)

Judge: I am very troubled by this. It goes against the grain to deny the defence latitude and to give it to the complainant. I'll take a bold course and allow the one question to be asked. (Case 66)

Without clear guidelines regarding the exercise of discretion, it is perhaps not surprising that judges differ considerably in their interpretation of the Act. However, the lack of uniformity in the implementation of the law clearly presents a problem; this is particularly important and serious if, as we shall see below,

evidence of prior sexual experience affects the verdict juries eventually reach.

It should be noted here that judges' decisions in this respect, until very recently at least, were final and the Court of Appeal was reluctant to interfere with judicial discretion. One must bear in mind of course that only those cases where evidence of sexual experience is excluded, and where there is a conviction, will ever be considered by the Court of Appeal - these represent only a small proportion of those cases where applications under Section 2 are made. The question was first considered in *R v Mills* (1978) where an application was made for leave to appeal against conviction on the grounds that the trial judge had been wrong in refusing to admit evidence of the complainant's sexual experience. The appellant's counsel argued that the Court of Appeal should substitute its own discretion for that of the trial judge. The Court, however, firmly declined to take such a course of action:

"It would be impossible, and it would be quite wrong, for this Court in any way to seek to disturb that exercise in discretion, which seems to us to be wholly in accordance with Section 2(1) and (2) of the statute." (33)

More recently, however, and after the data collection for this study had been completed, the Court of Appeal took a different view in *R v Viola* (1982). The Lord Chief Justice ruled as follows:

"...it is wrong to speak of a judge's "discretion" in this context. The judge has to make judgment as to whether he is satisfied or not in the terms of section 2. But once having reached his judgment on the particular facts, he has no discretion. If he comes to the conclusion that he is satisfied it would be unfair to exclude the evidence, then the evidence has to be admitted and the questions have to be allowed". (34)

Of course, discretion remains insofar as the judge has to decide whether the exclusion of evidence would be unfair to the defendant,

and this is where problems arise with the application of this Section. Nevertheless, Viola establishes the principle that the Court of Appeal is in just as good a position to make the relevant decision as was the trial judge, and is therefore capable of overruling a decision made in the Crown Court. This is what happened in *R v Viola*: the Court of Appeal decided that the judge in that case had been wrong, and should have admitted the evidence. The conviction was quashed.

The reasons advanced for refusing to give leave to cross-examine a complainant about her prior sexual experience are interesting insofar as they shed some light on the criteria judges use in exercising their discretionary powers in this matter. The analysis here indicates that there is only one type of case where such evidence is excluded fairly systematically, and that is where the defence propose to probe into a complainant's sexual past despite the fact that the defendant clearly has no factual knowledge of this. In one case, for example, two men were accused of raping a young girl they knew by sight. They knew nothing of her previous sexual experience, but the medical evidence revealed that she had not been a virgin. On that basis, the defence made an application to cross-examine her in very general terms about her sexual background. The judge's reaction was as follows:

Judge: I am not clear about your application. You have no instructions about the complainant's past sexual experience. Thus, you want to embark on a fishing expedition and ask her whether, how, etc. she has had sexual intercourse. Is that right? (Case 67)

One problem is that applications are not always phrased in quite such explicit terms and this poses some difficulty for judges. As one judge candidly remarked,

Judge: I would find this question easier to decide... if it were to be more of a fishing expedition. (Case 66)

Nevertheless, where applications were turned down, the defence always blatantly proposed to discredit the complainant by inquiring into her sexual past in very general terms. It must be pointed out that this relationship only holds one way: a proposal of overt mud-slinging seems necessary for, but does not guarantee the exclusion of such evidence.

In this context, one cannot fail to note that even if, as in the majority of trials in this study, applications are couched in relatively neutral terms and do not seem to imply a direct attack on the complainant's character, the introduction of almost any such evidence is bound to have some effect on the jury's view of the type of person she is. Consider for example the probable consequences of the following:

Judge: I want to make clear why I did that (give leave to cross-examine). It was alleged, as you know, and she admitted it (sic), that although she had been married to a white man for some years, that marriage had not been consummated and had been dissolved. She has since lived at various times with two or three or four, I forget, coloured men, one of whom is the father of her child. I allowed the cross-examination not in order to show that she was promiscuous or a woman of loose or low morals. I did not allow it for that purpose, but it was simply to show, in fairness to these defendants, that it is manifest that (the complainant) was not averse to having sexual relations with coloured men. (Case 52)

Conclusion

The findings of this study indicate that the practical application of Section 2 of the Sexual Offences (Amendment) Act 1976 is unsatisfactory in a number of respects. It largely incorporates assumptions reflected in earlier case law regarding the relevance of a complainant's previous sexual experience to the issue of

consent. Furthermore, the wide variability among judges in their interpretation and application of that Section presents a major problem. These difficulties derive largely from the broad way in which legislation was phrased. Clearly, without explicit guidelines, judges must ultimately rely on personal experience and individual perceptions of what constitutes relevance or unfairness, and these are bound to vary. Moreover, in the absence of any criteria, judges are likely to refer to and be guided by the spirit of old case law in deciding whether a particular piece of evidence is relevant. This probably accounts for the fact that assumptions implicit in those cases are largely reflected in the operation of Section 2.

Flaws in the application of this Section illustrate the difficulty in changing basic attitudes by altering legal procedure. As long as the social definition of rape depends on the view one takes of the complainant's character, the defence will be bound to make some attack on her in order to legitimate their own position. The Sexual Offences (Amendment) Act 1976 does not appear to have modified that definition.

The next chapter will consider the cross-examination of the alleged victim in a wider perspective. It will be shown that her reputation is often attacked not only through evidence of sexual experience, but also through indirect evidence, implication and suggestion, none of which is covered by the provisions of the new legislation.

FOOTNOTES TO CHAPTER FOUR

- (1) R v CLARKE (1817) 2 Stark. at 244
- (2) R v BARKER (1829) 3 C&P 589
- (3) R v TISSINGTON (1843) 1 Cox 48
- (4) R v CLAY and ANOTHER (1851) 5 Cox 146
- (5) See for example R v BASHIR (1969) All.E.R. 692; R v KRAUSZ (1973) 57 Cr.App.R. 466
- (6) R v GREATBANKS (1959) Crim.L.R. 450
- (7) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, HMSO, Cmnd. 6352, 1975, para.101
- (8) R v HODGSON (1812) Russ & Ry 211
- (9) R v HOLMES and FURNESS (1871) L.R.I. CCC 335
- (10) R v ROBINS (1843) 2 M & Rob 513
- (11) R v COCKROFT (1870) 11 Cox 410; R v HOLMES and FURNESS (1871) L.R.I. CCC 335
- (12) R v HOLMES and FURNESS (1871) L.R.I. CCC at 338
- (13) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 1975, para.97
- (14) ibid., para.102
- (15) MOZLEY AND WHITELEY'S LAW DICTIONARY, 9th edition, edited by SAUNDERS, J.B., London, Butterworths, 1977
- (16) ARCHBOLD ON PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, 39th ed., edited by MITCHELL, S., London, Sweet and Maxwell, 1976
- (17) SMITH, J.C.: "The Heilbron Report", Criminal Law Review, 1976, p. 102
- (18) ibid.
- (19) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 1975, para.134
- (20) Sexual Offences (Amendment) Act 1976, Section 2(2)
- (21) In the remaining five trials, the accused were acquitted without a full trial as the prosecution offered no evidence against them.
- (22) Excluding defendants acquitted because the prosecution offered no evidence (N=8) and defendants charged with indecent assault alone (N=3).
- (23) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 1975,

para.137

(24) R v FENLON and OTHERS (1980) 71 Cr.App.R. 307

(25) There appears to be some confusion about whether evidence of previous sexual experience going entirely to the defendant's state of mind comes under the coverage of the Act. In some cases, applications were made and leave given to introduce such evidence while in others, questions were asked without an application.

(26) A number of cases have been considered by the Court of Appeal since these trials took place, and they are as follows: R v HARRIS (1979), Court of Appeal, Criminal Division, Ref.745/B/79; R v LESTER (1980), unreported, C.A.; R v O'SULLIVAN (1981) Court of Appeal, Criminal Division, Ref. 3292/B2/80

(27) R v HINDS and BUTLER (1979) Crim.L.R. p.111

(28) R v LAWRENCE and ANOTHER (1977) Crim.L.R. p.493

(29) ibid.

(30) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 1975, para.107

(31) R v RAHIMIPOUR (1979) Court of Appeal, Criminal Division, Ref. 2916/B/78

(32) ibid.

(33) R v MILLS (1978) 68 Cr.App.R. 154; R v HARRIS (1979) Court of Appeal, Criminal Division, Ref. 745/B/79

(34) R v VIOLA (1982) 1 WLR 1138

CHAPTER FIVE. DISCREDITING THE COMPLAINANT

It takes very little to discredit the alleged rape victim's sexual reputation. My observation of the court process involved in the trial of such offences indicates that, even in the absence of solid evidence and valid grounds for an application under Section 2. of the Sexual Offences (Amendment) Act 1976, there is almost invariably some attempt to attack the complainant with regard to her sexual history or behaviour. Defence strategies in this respect appear to fall into three major, although to some extent overlapping, categories.

The first one aims to show that the complainant is in general terms "worldly" or "experienced". This relies on the same assumptions as the majority of applications under Section 2, namely that any sexual experience in a woman is indicative of overall consent. Attacks of this sort on the complainant tend to be used when the defence have no specific or direct knowledge of her sexual experience and they are therefore generally couched in rather vague terms.

The second strategy consists in attacking the complainant's behaviour at the time of the offence. This is an attempt at showing victim precipitation, and ranges from comments about the woman's clothes and appearance to suggestions of sexually provocative language, gestures, or general behaviour towards the defendant.

The third major strategy is to allege that the complainant had had previous consensual intercourse with the defendant, whether or not

this is agreed by her. Although the legitimacy of this line of questioning was endorsed by the Heilbron Group, it relies on the rather dubious assumption that once a woman agrees to intercourse with a man, the likelihood is that she will continue to consent at any later stage in their relationship, or indeed when the relationship has ended. The rationale here is reminiscent of Hale's famous dictum regarding the permanent nature of consent given on marriage, which has been discussed above.

Furthermore, the complainant's general reputation is frequently put at issue to suggest that she is not a credible witness because of her "bad" character. It may be suggested, for instance, that she has a history of mental illness or a drink problem, and hence that her rape allegation cannot be believed.

The use of these defence strategies in the course of trials included in the present study will be discussed and illustrated below.

General attacks on sexual character

It has been noted that Western society tends to adopt a split view towards women: Holmstrom and Burgess have termed this the "Madonna-Whore complex" (1). Chafetz has argued that

"a basic dualism is ... displayed toward the female, who is simultaneously held to be 'sexually passive, uninterested' (the Virgin Mary image) and 'seductive, flirtatious' (the wicked Eve tempting poor, innocent Adam). This theme runs throughout the history of Western civilization and our mores concerning 'good' and 'bad' females have no parallels for males". (2)

Although such a view bears no resemblance to the sexual practices

of the majority of women today, the double standard remains and provides the basis of what is frequently a highly successful line of defence in rape cases. It has been observed that

"at the institutional level our legal system still epitomises our double standards, imposing greater control over female sexual behaviour than male and, in effect, punishing women and girls for behaviour overlooked in men and boys". (3)

Insofar as a sexually active woman will be seen as a 'bad' woman, and therefore an unlikely rape victim, it becomes important for the defence in the trial to portray her as such. Depending on the nature and circumstances of the case, this may be done in a variety of ways. Where the prosecution allege that the complainant had been a virgin prior to the rape, the defence may challenge this and attempt to present her as sexually experienced:

Complainant: I was a virgin. I had tried to have sexual intercourse but couldn't.

Defence counsel: Did your boyfriend never try to penetrate you?

Complainant: I don't know really ... we didn't go all the way ... nothing really happened. After that, I went to see a doctor and had an internal examination.

Defence counsel: (On the occasion of the alleged rape) you say two people raped you?

Complainant: Yes.

Defence counsel: Was there any bleeding?

Complainant: No.

Defence counsel: There were swabs taken from you and there was no sign of blood from loss of virginity. Do you still say you were a virgin?

Complainant: Yes.

Defence counsel: How is that possible, without any blood? It's impossible. I suggest you are lying, you'd had sex before. (Case 31)

It may also be implied that the complainant's familiarity with sexual terms or expressions is indicative of experience on her part. A fifteen year old victim was cross-examined as follows:

Defence counsel: How did you know Frank (the first defendant) was coming if you've never had sex with him before?

Complainant: I knew from people talking ... mum and the police helped me.

Defence counsel: Did he ejaculate? '

Complainant: (Made no reply)
Defence counsel: Did you feel any wet?
Complainant: No.
Defence counsel: But there was no contraceptive used?
Complainant: Frank didn't.
Defence counsel: You haven't become pregnant?
Complainant: No.
Defence counsel: Had you used any contraceptive?
Complainant: No.
Defence counsel: Did you know Tom (the second defendant) was coming?
Complainant: I knew with Frank because he shouted it out to Tom.
Defence counsel: But you've said that you noticed Frank coming in some other way. It was Tom who shouted out.
Complainant: I don't remember which - one of them did.
 (Case 25)

Another technique is to question the complainant about any contraceptive used, and thereby to suggest promiscuity on her part. In the following example, this is compounded by the implied existence of a boyfriend, although there was no evidence at the trial that he did in fact exist:

Defence counsel: Did you use any contraceptive?
Complainant: I was on the pill.
Defence counsel: Did you say to him (the defendant) that you had a regular boyfriend who was away?
Complainant: Yes.
Defence counsel: And that meanwhile, you went out with someone else?
Complainant: No.
Defence counsel: Wasn't it this second boyfriend who did not turn up that day?
Complainant: No, that was my boyfriend. I later found out that he was away.
Judge: What is the relevance of this?
Defence counsel: My client felt that this woman was used to having casual relations with men. (Case 26).

The presence of vaginal infections may be used to imply sexual experience and promiscuity, even where there is medical evidence that such infections were not transmitted through sexual contact. The existence of some such infection is occasionally suggested by the defence without any independent evidence at all:

Defendant: Yeah, I had sex with her, but not completely. I thought I might catch something off her, it turned me off. (Case 71)

Even in the absence of direct questions in cross-examination about vaginal infections, the defence may capitalise on the fact that these have connotations of being "dirty" and "unclean". One N.S.U. sufferer was cross-examined as follows:

Defence counsel: I suggest you were dressed in a slovenly fashion, with a hole in your dress.

Complainant: No, I was a manageress in a boutique...

Defence counsel: Were you managing to keep yourself clean and tidy at that period of time?

Complainant: Yes.

Defence counsel: The defendant also says that you were slovenly that evening.

Complainant: No.

Defence counsel: When he first saw you at the pub, you looked slovenly to him.

Complainant: No, I had a new dress on. (Case 56)

Later in that case, on the request of another defence counsel, the judge went on to ask the complainant about her habits of personal cleanliness:

Judge: I want to ask you a personal question. There was some semen found inside you, and I want to clarify the question asked from you about sexual intercourse. Have you a bath at home?

Complainant: Yes.

Judge: How often a week do you have a bath?

Complainant: Two to three times.

Judge: This took place on June 28th. How long before did you have a bath?

Complainant: Probably the night before.

Judge: Certainly two to three nights before?

Complainant: I think it was the night before. (Case 56)

Defence counsel may try to show similarities between features of the alleged rape and aspects of the complainant's everyday life in an attempt to normalise the former. The following example is an extract from a trial where three black youths were charged with the rape of two white girls; here, the suggestion of sexual experience is linked to the issue of race:

Defence counsel: Did you often have boys there (at the flat) until 3 a.m.?

Complainant: No.

Defence counsel: Did boys used to come round at night?

Complainant: In the evening, yes.

Defence counsel: Had the boys coming to the flat nearly

always been black?

Complainant: Not all of them, some.

Defence counsel: The question was, apart from the girl, were they nearly all black?

Complainant: No.

Defence counsel: Do you know what a blues party is? Soul music, low lights?

Complainant: Yes. (Case 67)

In some cases suggestions of sexual experience are made almost in passing and there is no attempt to relate this directly to the issues in the trial. For example, one woman was asked about her divorce which preceded the alleged rape by some eight months, in the following terms:

Defence counsel: On what grounds was your husband divorcing you?

Complainant: Desertion. He also tried to put in adultery, but that wasn't true. He also tried to say I was mentally disturbed. (Case 56)

Such apparently casual questions and the replies they elicit nevertheless serve to discredit the complainant and to portray her as sexually "easy". Even when she is not cross-examined in this way, the defendant's evidence may serve the same purpose:

Defendant: She seemed very liberated and attractive. She was thumbing a lift, anyway ... She told me about her own private life, that she was sick of her boyfriend who slept around too much. She told me she was intending to sleep around too. I think she mentioned that later. She said she'd slept with her boyfriend's best friend, to spite him. (Case 63)

On other occasions, there is nothing subtle or casual about attacks on the complainant's sexual reputation. The following example is an extract from the particularly vicious cross-examination of a woman who had been allegedly raped and severely beaten by four men, all of whom were total strangers to her:

Defence counsel: I suggest you started to flirt with other men in the pub, to show how little you cared for your boyfriend.

Complainant: No.

Defence counsel: Were you in the habit of going to pubs by yourself, in the evening?

Complainant: No, it was the first time. I went there in a

temper, to get away from my parents and my boyfriend.
Defence counsel: I suggest you did, and that is why you walked out of the pub with the first young man who came along.

Complainant: No, I didn't.

Defence counsel: Why talk to your boyfriend in the pub about your first husband using a milk bottle inside you?

Complainant: I was hoping he'd get embarrassed and leave. I'd lost control, I was near to tears.

Defence counsel: At that stage, I suggest, other people joined in the conversation and someone said, "who's got a bottle then". You shared the joke, showing what kind of a person you really were, prepared to have sex with strangers.

Complainant: No.

Defence counsel: You were drawing attention to the bottle in a way that you'd enjoyed it, that you wanted it repeated. Isn't that right?

Complainant: No. (Case 58)

Evidence from the various defendants in the trial, partly perhaps because of the impact of repetition, reinforced the image that counsel had tried to create in cross-examination:

First defendant: A girl came in (the pub) and she had a row with her bloke. She was buying drinks. She was putting herself about, just a slag. It was 'hello, darling, you in the red shirt, I fancy you'.

Second defendant: She was drunk when she came in. She got herself a gin. She was joined by her boyfriend, and bought a pint. She was over everybody. She smelt like an old fishpond. She pulled someone to her knee, she was dancing about.

Third defendant: The way she behaved, I thought she was a bit of an old bag. (Case 58)

The above extracts illustrate the suggestions that are made in court to discredit the complainant's sexual reputation. It is, however, difficult to convey in print the hostile and insinuating tone in which the pertinent questions are frequently asked. In one trial, for example, the alleged victim was questioned as follows:

Defence counsel: Do girls in your flat often get raped?

Complainant: No, ...

Defence counsel: Do they rape easily? (Case 67)

Similarly, facial expressions of utter incredulity often accompany questions such as this:

Complainant: I had sex with him because it was done by force - I had no choice.

Judge: How much did you get paid for it? (Case 75)

Complainant behaviour at the time of the offence

In addition to general suggestions regarding the complainant's past sexual reputation, the defence may attempt to discredit her with reference to her behaviour around the time of the alleged offence. The emphasis here is on the alleged victim's role in and responsibility for the rape incident. The purpose is to show that the rape was somehow her fault, or "victim precipitated", a concept which has been discussed above (4). Weis and Borges have argued that the notion of victim precipitation could be seen as a practical application of neutralization techniques, particularly in terms of denying the victim:

"One might argue that the denial of the victim hinges ... upon the issue of his innocent or deserving attributes. Utilizing this technique, a deserving rape victim is defined as a woman who is sexually provocative, morally inferior, has a bad reputation, or needs to be taught "her place"... The actor (offender) can justify his behaviour via the rationale that she both asked for it and deserved it" (5).

As an analytical and theoretical concept used to understand the phenomenon of rape, victim precipitation was a product of the sociological literature of the 1960s and has now largely been discredited (6). Nevertheless, the defence in rape trials continues to rely on the old stereotype that rape occurs as a result of uncontrollable sexual urges aroused by sexually provocative women. In trying to show that the alleged victim was "asking for it", a variety of approaches may be used.

One technique is to comment on the complainant's clothes and appearance. Although society expects women to look attractive, if they happen to become rape victims, this may subsequently be used

against them. The implication is that their appearance is indicative of what must be their sexual behaviour. In his closing speech, one defence counsel described the complainant in these terms:

Defence counsel: A girl wearing hippy sort of clothes, tight jeans and plimsols, walking around alone late at night, getting into a car with three men, having just left the flat of a fourth man... (Case 69)

Another victim was cross-examined as to what she usually wore in bed:

Defence counsel: You wore no clothes in bed?

Complainant: No. I had a quilt on and a sheet. I was sitting up in bed.

Defence counsel: Were your breasts showing?

Complainant: No.

Defence counsel: I suggest that the quilt slipped and your breasts were showing. (Case 28)

It is frequently suggested that the complainant consented to being in the company of the defendant and/or in the situation where the alleged offence occurred. This is then construed as implied consent to sexual intercourse as well. This example is taken from a case where the complainant, who was acquainted with the defendant, accepted a lift home from him. Her cross-examination went as follows:

Defence counsel: You got off the bike before him, or he wouldn't have been able to get off.

Complainant: No, he got off first. He kind of pulled me off.

Defence counsel: Did you resent that?

Complainant: No.

Defence counsel: So he helped you off.

Complainant: Same difference.

Defence counsel: Were you willing to get off?

Complainant: Yes.

At this stage, the judge intervened:

Judge: On the bench, you expected a bit of necking, didn't you?

Complainant: No.

Judge: Why on earth did you think you were sitting on the bench?

Complainant: He said to talk.

Judge: (looking at the jury, incredulous) I see... (Case 20)

It may also be suggested that the complainant actively sought the company of the defendant and was the one to initiate contact with him. This is then used to imply that she was 'asking for' what happened, as the following extract illustrates:

Defence counsel: You told (your friend) to fuck off, because you wanted to stay at the pub.

Complainant: No.

Defence counsel: Having said that, you joined the coloured men (the defendants) and asked one of them what he was doing after the pub.

Complainant: No.

Defence counsel: He told you he was going to a club.

Complainant: No.

Defence counsel: When he told you he was going to a club, you asked if you could go with him because you liked reggae music.

Complainant: No.

Defence counsel: It had been suggested that you should go back to his place to listen to music,

Complainant: No,...

Defence counsel: and you were happy to go there?

Complainant: Not at first. There was nothing said about a club.

Defence counsel for the other defendant at this trial went on to question her as follows:

Defence counsel: I suggest you made it quite clear that you wanted to be with these men, rather than with your friend, even earlier when he was still at the pub. You said he could fuck off, you wanted to have a good time.

Complainant: No, ...

Defence counsel: You wanted some kicks. Why did you agree to go to a party and then want to creep out?

Complainant: No, I meant later on, when I saw no one there - that's when I wanted to creep out. (Case 18)

The defence may imply that the complainant was "out to have a good time" in general terms, and was actively looking for a pick-up, or at least gave the appearance of being available. The following extract is taken from a case where the complainant had spent the evening preceding the alleged rape offence in a disco with a girlfriend:

Defence counsel: You didn't go with your boyfriend, so

you just danced with anybody and everybody?

Complainant: No, just people we knew.

Defence counsel: I suggest you danced many times with the defendant.

Complainant: No. (Case 22)

Occasionally, the complainant is portrayed as not merely sexually available, but as engaging in behaviour which is explicitly sexual and provocative; the obvious implication here being that such behaviour is indicative not just of consent, but of active participation too:

Defence counsel: I suggest that you put a record on and started to dance around on your own. While you were doing that, the defendants sat down and opened three bottles of lager.

Complainant: I put no music on and didn't dance.

Defence counsel: You were offered a lager with a glass - you just took the bottle. You continued dancing and drank it rather quickly.

Complainant: No.

Defence counsel: You went on dancing and went up to one of the defendants and told him to get up and dance.

Complainant: This is all being made up.

Defence counsel: He said he wasn't dancing. You grabbed him by the arm and pulled him to his feet... You said you were a bad woman, and ripped open your blouse. That's when the various buttons fell off.

Complainant: It's all lies.

Defence counsel: (Later) you told one of the defendants that you liked him and asked where the bedroom was.

Complainant: It's all lies.

Defence counsel: I suggest you said you were tired and wanted to relax. (Case 18)

It may be suggested that some consensual intimacy took place between the defendant and the complainant immediately before the alleged offence, which is another way of implying that consent to intercourse can hardly be a realistic issue:

Defence counsel: I suggest you were enjoying yourself (at the party), away from your boyfriend.

Complainant: That's not true.

Defence counsel: You danced with the defendant?

Complainant: I've never seen him before.

Defence counsel: I suggest you flirted with him, holding him tight as you danced. (Case 52)

A defence witness reinforced this picture by describing the complainant's behaviour as follows:

Defence witness: She came in alone, and stood in the hall looking around. I danced with her, a very, very, close dance like young people do today. I danced with her to half a dozen tunes or more. She was close all the time. I thought her attitude very rude ... Later, she danced with another bloke (the defendant) for about two records. She was the same, very close to him. They were talking, I saw them. They seemed familiar. (Case 52)

Occasionally, a somewhat greater degree of consensual intimacy is suggested:

Defence counsel: I suggest you danced many times with the defendant.

Complainant: No.

Defence counsel: And while dancing with him, you allowed him to kiss you?

Complainant: Not that I remember.

Defence counsel: I suggest he danced with you on a number of occasions and you allowed him to kiss you. (Case 22)

Defence counsel invariably engages in rather detailed cross-examination in cases where the complainant agrees that some sexual contact occurred between her and the defendant before the offence, as in the following examples:

Defence counsel: Was there any kissing at the dance?

Complainant: (He) kissed me just once at the dance hall. He was nice anyway.

Defence counsel: And in the minicab?

Complainant: Yes, once.

Defence counsel: And during the drive around in the other defendant's car, any more kissing?

Complainant: Just once, yes. I liked him a lot. (Case 43)

Defence counsel: You were quite happy to go and sit with him on the balcony?

Complainant: Yes.

Defence counsel: There, you talked and kissed, you say?

Complainant: Yes.

Defence counsel: Kissing with some enthusiasm?

Complainant: Yes.

Defence counsel: There are several kinds of kisses - were you French kissing?

Complainant: We might have been.

Defence counsel: And you were quite happy and content for that to happen?

Complainant: Yes. (Case 14)

The clear suggestion here is that if the complainant flirted with the defendant or allowed him to kiss her, for example, she must also have agreed to sexual intercourse with him, or she was, at the

very least, "asking for it" to happen. In other words, her consent to being in a situation containing some element of sexuality is by implication presented as a generalised consent to intercourse.

Previous intercourse with the defendant

This brings us to the last major strategy to discredit the complainant's sexual reputation, namely suggestions of previous episodes of consensual intercourse between her and the defendant. In Amir's study, where a woman's "bad reputation" is seen as a major element in victim precipitation, the category of "bad reputation" covers not only rape victims who were known as "promiscuous", but also those who "had sex relations before with the offender" (7). If a woman has had a sexual relationship with a man who later attacks and rapes her, no matter how brutally, her rape allegation is likely to be viewed as extremely doubtful. As one defendant put it, after being charged with the rape of his ex-girlfriend:

Defendant: You must be fucking mad. How the fuck can I rape a bird if she has two kids of mine? I'm not saying anything, I can't remember anything happening. (Case 68)

The principle of admitting evidence of the past relationship between the complainant and the defendant has long been established. In 1827, it was held that

"on the trial of an indictment for rape, the prisoner might show that the prosecutrix had been previously criminally (sic) connected with himself" (8).

This was later reaffirmed in *Rv Martin and Martin* (9) and *R v Cockroft* (10); the rationale for these decisions being given as follows by Lord Coleridge:

"... But to reject evidence of her having had connection with the particular person charged with the offence is a

wholly different matter, because such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment. This line of examination is one which leads directly to the point in issue. Take the case of a woman who has lived, without marriage, for years with the accused before the alleged assault was committed. Can it be reasonably contended that the proof of that fact, or evidence tending to prove that fact, is not material to the issue, and if material to the issue, that such evidence should not be admitted?" (11).

More recently, the Advisory Group on the Law of Rape also favoured the retention of this long established rule:

"We think that questions and evidence as to the association of the complainant with the accused will, in general, be relevant to the issues involved in a trial for rape, subject always to the power of the judge to control improper questioning". (12)

The frequency of allegations of a prior sexual relationship between the parties involved was relatively high in the course of trials included in the present study: they formed the basis of the defence put forward on behalf of five defendants.

One of the most noteworthy features of this line of defence is that prior consensual sexual contact was denied by half of the complainants involved in such allegations. Consider the discrepancy between the defendant and the complainant in the following case:

Defendant: Next she came over on a Saturday, a week or so before this. I wasn't surprised because she's been pressing me to take her out and I had no intention of doing it, especially while I was with my wife. She came over after 6 p.m. ... I gave her a Martini... She'd brought a photo of herself; she gave it to me but I didn't take it. She put a record on. We had sexual intercourse together. We danced, we became friendly.

Complainant: He used to say hello to me when he came to the garage. I didn't know his first name ... I had been looking for a room for two or three months, and I had mentioned it to a few customers. (On the day of the rape) another employee at the garage gave me a card with a message written on it, saying "if you're still interested in a room, come to the following address and ask for the tenant in room 1". I decided to try this place, and went there about 6 p.m. Somebody came down, and I said I was

looking for the tenant in room 1. I was taken there, and he (the defendant) was there. He introduced himself to me. (Case 76)

What the complainant claims is an earlier unreported rape attempt may also be presented as an incident of consensual intercourse:

Defence counsel: Were you quite happy to accept a lift?

Complainant: Yes, I've known him a number of years.

Defence counsel: You and he had sex before, didn't you?

Complainant: No, but he tried.

Defence counsel: What did you tell the police about this?

Complainant: I said that he had tried to have sex with me, but didn't manage to.

Defence counsel: Your statement says there had been an occasion in a ladies' toilet where he tried to kiss you and have sexual intercourse with you, and you didn't let him. Did you tell the police that the defendant succeeded in raping you before?

Complainant: No, only that he tried.

Defence counsel: I suggest you've had sexual intercourse with him before, in that toilet, with your consent.

Complainant: No. (Case 20)

Where the complainant denies defence allegations of prior sexual involvement with the accused, it is not unusual for witnesses to be called to contradict her. In the following case, a friend of the defendant gave this evidence:

Defence witness: (When I arrived at the flat) the defendant made a sign with his arm which I associated with sex - indicating that he had or was going to have sex with (the complainant). Later, he told us that he and the complainant had had sexual intercourse before and that he'd picked her up to give her a lift. When he told me that, I said I'm very surprised, because she looked a very presentable, clean young lady. I couldn't believe she lived in a squat and hitched a lift. I said something about her looking like a young virgin. The defendant said, don't you believe it. (Case 63)

It has been argued that

"all rape is an exercise in power, but some rapists have an edge that is more than physical. They operate within an institutionalised setting that works to their advantage and in which the victim has little chance to redress her grievance". (13)

The existence of a prior sexual relationship between the complainant and the defendant appears to be one such setting. Where the complainant agrees that there had been sexual involvement in

the past, the defendant is almost invariably acquitted. Cases of this sort afford the defence with an opportunity to present the alleged rape as an overreaction to a domestic dispute which occurred within the framework of an established sexual relationship. It is often suggested that the relationship is closer than the complainant is willing to admit, or in some cases, that it amounts to cohabitation. In any event, she is likely to be cross-examined in considerable detail about practically all aspects of the relationship, however irrelevant they are to the trial:

Defence counsel: How would you describe your relationship with the defendant?

Complainant: I was going out with him, but it wasn't a permanent relationship. Sometimes he didn't use to come round at all... He stayed the night, but not most nights. Just some nights.

Defence counsel: It's important for you that nobody should think that he lived at your flat because of social security payments, isn't it?

Complainant: Yes,...

Defence counsel: I suggest he lived there, that this was his home all the time.

Complainant: No. (Case 72)

Where the relationship between the complainant and the defendant was no longer a sexual one by the time of the alleged rape, the picture of their past relationship is sometimes compounded by suggestions of promiscuity on the part of the woman. This may be couched in rather general terms, as in the following example:

Defendant: I had been living with the complainant for over a year. We'd been having arguments. I left because there were too many men. She has so many men, you couldn't keep count. She'd have anyone. (Case 45)

Alternatively, the defence may go into a detailed account of the complainant's sexual behaviour, as in the following case. It should be noted that a successful application to introduce this evidence had been made in this case under Section 2 of the Sexual Offences (Amendment) Act 1976. It is merely cited here to illustrate the way in which suggestions of promiscuity may be linked with evidence of

a prior sexual relationship with the defendant:

Defendant: There had been previous occasions of sexual intercourse at the flat. We'd gone there with Joe, Peter, Corinne, the complainant and me. I went up to bed with Corinne. I got up and when I came back, the complainant was in bed with Corinne, making advances to her. Corinne got up and went into the lounge. Then I had sexual intercourse with the complainant in the bedroom. Later, Peter went into the bedroom with the complainant. He came out, and Joe went in then. He ended up staying the night. I think Peter slept in that same room. I slept with Corinne. A week after that there was a similar occasion. I never actually saw her have sexual intercourse with anyone, but Peter and Tony spent time alone with her.
(Case 70)

Another strategy in this type of case is to normalise the alleged rape in the light of the nature of the relationship between the complainant and the defendant. The following example speaks for itself; we should note that both parties agreed that their relationship ended some months before the rape incident:

Defence counsel: I suggest that sex with the defendant was, previously, quite a stormy affair.

Complainant: Yes.

Defence counsel: Physical violence was used from time to time, by the defendant to you.

Complainant: Yes.

Defence counsel: You don't mind some roughness, some beating up?

Complainant: Yes - he hadn't beaten me up during sex. He had beaten me before sex on previous occasions. He used to just beat me up too, irrespective of sex. Sometimes, he was gentle.

Defence counsel: No beating stopped you having sex with him later, that was the pattern of life with him?

Complainant: Yes.

Defence counsel: And you didn't mind?

Complainant: They weren't severe beatings. He was very demanding. If I refused sex, he'd threaten. It was only like that towards the latter part of the relationship.

Defence counsel: That night (rape) was no different to others - the beating may have been more severe, but that's all.

Complainant: It was very different. If I didn't want to give in before, he'd beat me for it. Only very occasionally would the beatings end up in sexual intercourse.

Defence counsel: I suggest that on that day, the only abnormality was that there were two women. Otherwise, the violence and the oral sex had both happened before.

Complainant: It was very different.

Defence counsel: Only in the degree of violence.

Complainant: Yes, and all the other bits and pieces.

Defence counsel: There had been other occasions when you had consented...

Complainant: If I had consented in the first place, I'd never have got beaten up. (Case 68)

The defendant in this case was acquitted. He was, however, subsequently sentenced to life imprisonment for the rape of a woman who had not been as severely injured as the above complainant, but who had had no previous sexual contact with him (Case 80).

The existence of a prior sexual relationship serves not only to discredit complaints of rape, but also to provide a wealth of possible motives for false allegations. These are often very convincing to a jury insofar as they make sense in terms of the general folklore of rape and notions of female sexuality and psychology. The suggestion that women claim rape in order to avoid responsibility, for example, is a common one:

Defence counsel: I suggest you wanted to blame somebody for getting you pregnant, so that you could justify your pregnancy to your relatives.

Complainant: No, that's not the reason. (Case 7)

The defence may also claim that the rape complaint was made for financial gain. In one instance, defence counsel opened his case as follows:

Defence counsel: The defendant provided well for this girl and treated the place as his home. He was of course distressed to be locked out, away from his goods and his girl. If the whole case is about that girl exploiting that distress and exaggerating it, so that she can hold on to the possessions that she on social security couldn't afford - that has to be taken into account in considering the rape and common assault counts. (Case 72)

The most commonly attributed motive for rape allegations in such cases is spite. This relies on the poetic notion that "Heav'n has no rage, like love to hatred turn'd, Nor Hell a fury, like a woman scorn'd" (14), a line which was quoted during the parliamentary

debates of the Sexual Offences (Amendment) Bill (15), as well as (usually inaccurately) during the trials included in this study. These are some illustrations of the practical application of this idea:

Defendant: I woke up to being slapped around the face. I just hit out, slapped her back. She kept asking if I loved her, and I said I still loved my wife. There was a row about it. She said she was going to get me for this. (Case 63)

Defendant: It was at her invitation and with her consent that we had sexual intercourse. After, she asked if I still wanted to go back to my wife. I said I couldn't just decide. I said I couldn't just ignore my wife and I could only be friends with her (the complainant). She was upset by that - I told her to be reasonable. Then she went to the loo. I thought she was coming back, but that was the last I saw of her. (Case 76)

In this chapter, I have tried to show that the defence can and do use a number of strategies to discredit sexually the alleged victim of rape, and that this may be done with considerable success outside the scope of Section 2. of the Sexual Offences (Amendment) Act 1976. Indirect evidence and suggestion are brought into play, and the introduction of new legislation has not, and cannot in isolation, influence this aspect of court practice. The importance of information and speculation thus introduced is invariably stressed in defence counsel's closing speech:

Defence counsel: The girls themselves are worth looking at. One of the complainants' hymen was ruptured before this incident. You might find it shocking that she was prepared to bed down in the same room as any man. (Case 49)

What is perhaps more surprising is that the prosecution also tend to acknowledge the relevance of evidence introduced in this way. Indeed, they may go so far as actively to draw the jury's attention to these aspects of the defence case:

Prosecution counsel: You have heard evidence about the sort of girl she is - you have to take that into account as a background of the case. (Case 71)

General character

We have seen that the complainant's chastity and sexual reputation remain crucial issues in rape trials. Her general character, however, also seems to be a salient factor in the course of such trials and attempts are frequently made to discredit her in this way. Anything other than totally "proper" and "respectable" behaviour may be used for this purpose. The following are examples of some such questions:

Defence counsel: Are you living on social security? (Case 72)

Defence counsel: Did you tell the defendant that you were in a poor financial situation? (Case 49)

Defence counsel: Where did you meet the defendant? (eliciting the reply that it was in a probation hostel) (Case 70)

Defence counsel: Did your mother know that you were staying at the party all night? (Case 25)

Defence counsel: Had you lived in squats before? (Case 71)

Defence counsel: Did you know that your boyfriend had had trouble with the police over drugs? (Case 59)

The most common strategies used to discredit the complainant's general character are to bring out information or make suggestions about her alcohol and drug use, her criminal record and her psychiatric history.

The defence may go to great lengths to establish how much the complainant had had to drink, particularly when she denies heavy consumption. One alleged victim, who said that she had half a pint of beer to drink on the day of the offence, had her blood alcohol level checked and the scientific officer in charge of the analysis was cross-examined as follows:

Witness: It's not possible that only half a pint of beer was consumed five hours earlier. That would have dissipated in five hours.

Defence counsel: Would excitement make the alcohol dissipate slower?

Witness: No, I have allowed for that. There had to be more alcohol taken at that time ... I would expect about four and a half measures of spirits, or four or five half pints to have been drunk five hours earlier.

Judge: What about the previous night's drinks? If she had five double Bacardis between midnight and five a.m.?

Witness: That could still produce that amount of blood alcohol after five hours. It might well affect the reading.

Defence counsel: But if she had no drinks after 5.30 a.m. would that still have an effect fourteen hours later?

Witness: It's just possible, yes.

Defence counsel: Up to that level?

Witness: I'd make it a bit less. (Case 25)

Such evidence is often linked to the issue of consent: the presence of alcohol and/or drugs, for example, may be used to imply that the alleged victim consented to sex with the defendant(s):

Defence counsel: (Around that time) were you drinking heavily?

Complainant: Yes. I was under the doctor.

Defence counsel: Is it right that in August you were fined for being drunk and disorderly?

Complainant: Yes.

Defence counsel: Isn't it right that you were very drunk in the car on the way to the party, as you said in your statement?

Complainant: I wasn't feeling drunk.

Defence counsel: Haven't you been in pubs enough to see people when they have had too much to drink? I suggest that everything that happened at the flat was because you had had too much to drink. (Case 56)

Alternatively, it may be suggested that the complainant's alcohol intake and/or drug consumption so affected her memory of the events that her evidence must be considered unreliable. In the following example, the alleged victim was on a course of Librium, but denied taking any on the day of the rape incident. The defence, nevertheless, continued to operate on the assumption that she had mixed alcohol and this drug, and cross-examined the doctor in the case as to the probable effects of this combination:

Witness: Persons taking Librium and alcohol together may appear more drunk than they in fact are. It makes them feel more abandoned and outgoing... They would be unsteady, more likely to bump into things. If Librium had

been taken with alcohol, that could affect the reliability of the girl's account - as much as in someone who is just drunk. (Case 58)

A complainant with a criminal record is a real bonus for the defence. In such cases, she is almost invariably subjected to lengthy cross-examination about her convictions. One young girl with an extremely disturbed childhood spent largely in local authority care was, in cross-examination, taken through each of her numerous encounters with the police in some detail. The suggestion was then made that these provided her with a strong motive to go through with her rape allegation:

Defence counsel: I suggest you thought that if you withdrew your allegations, you'd be in serious trouble.

Complainant: I knew I'd be in trouble.

Defence counsel: Have you been interviewed (by the police) about other offences, like clipping?

Complainant: Yes - that means getting men's money and running off. You make out you'll do business with them.

Defence counsel: You admitted doing this last September for some weeks. Were you earning £100 to £200 pounds a week, doing this?

Complainant: Yes.

Defence counsel: Were you charged?

Complainant: Yes, but it got dropped.

Defence counsel: Did that have anything to do with your giving evidence here?

Complainant: I don't know, I can't remember.

Defence counsel: Were you told why the charges were dropped?

Complainant: I don't know. (Case 35)

In more usual cases, any evidence that the complainant has a criminal record is used to cast doubt on her credibility. As one defence counsel argued,

Defence counsel: I want to put her conviction for shoplifting - this shows her dishonesty, her unreliability. (Case 56)

One of the main rape myths, as we have already discussed, is that women have a marked tendency to make hysterical, unfounded allegations of rape for a variety of somewhat obscure psychological reasons. Where these hidden motives can be linked to an actual

history of psychiatric disorder, this affords confirmation of the complainant's lack of stability, reliability and consequently, credibility. Cross-examination as to her psychiatric history may take the form of what has been termed a "fishing expedition", prompted for example by her spontaneous mentioning of feeling depressed:

Defence counsel: When you met the two girls, do you remember if you told them you'd just come out of hospital?

Complainant: No, I might have said that I worked in a hospital.

Defence counsel: Have you ever been to a mental hospital?

Complainant: No.

Defence counsel: Or received psychiatric treatment?

Complainant: No. (Case 27)

However, where the defence have something more tangible and concrete to hand, such as evidence of suicide attempts, periods of hospitalisation in psychiatric institutions or outpatient psychiatric treatment, no matter how long before the rape incident, these are certain to be explored in great detail during the trial:

Defence counsel: (About two years ago) you were in a hospital for five months, were you not? A mental hospital?

Complainant: Yes. I was there because I cut my wrists.

Defence counsel: In an attempt to kill yourself?

Complainant: I don't know...

Defence counsel: How old were you at the time?

Complainant: Sixteen.

Defence counsel: That wasn't the only time you cut your wrists. There were many other times, were there not?

(Case 35)

That the introduction of this sort of information is intended to discredit the complainant is unquestionable. As if the importance of the unspoken links between psychiatric history, lack of stability and false allegations of rape were not obvious, these are made explicit for the jury in defence speeches:

Defence counsel: Allegations of a sexual nature, members of the jury, are so easy to bring and so hard to refute... We have here a girl of 18. We know from the scars on her wrists that there is some history of

attempted suicide. She might be confusing this (rape) with another incident. (Case 18)

We have seen that the counterdenunciation of the alleged rape victim is a prominent feature of rape trials, particularly insofar as her sexual reputation and general character are concerned. The following chapter considers how far other aspects of her behaviour become the focus of attention in rape trials, and the extent to which her various characteristics and attributes appear to be linked to the outcome of the trial.

FOOTNOTES TO CHAPTER FIVE

- (1) HOLMSTROM, L.L. and BURGESS, A.W.: The victim of rape - institutional reactions, John Wiley and Sons, New York, 1978, p.177
- (2) CHAFETZ, J.S.: Masculine/feminine or human? An overview of the sociology of sex roles, F.E. Peacock, Itasca, Ill., 1974, p.39
- (3) SMART, C. and SMART, B. (eds.): Women, sexuality and social control, R.K.P., London, 1978, p.5
- (4) AMIR, M.: Patterns in forcible rape, University of Chicago Press, Chicago, 1971, p.266
- (5) WEIS, K. and BORGES, S.S.: "Rape as a crime without victims and offenders? A methodological critique." in VIANO, E.(ed.): Victims and Society, Washington D.C. Visage Press, 1976, p.232
- (6) See Chapter 1.
- (7) AMIR, M.: op.cit., 1971, p.117
- (8) R v ASPINALL (1827) Cor. Hullock, B. York Spring Assizes, cited in STARK ON EVIDENCE, 3rd edition (1842) vol.iii., p.952
- (9) R v MARTIN and MARTIN (1834) English Reports 172 /1364
- (10) R v COCKROFT (1870) 11 Cox Cr.C. 410
- (11) R v RILEY (1887) 18 QBD 481
- (12) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, HMSO, Cmnd. 6352, 1975, para.134
- (13) BROWNMILLER, S.: Against our will: men, women and rape, New York, Simon and Schuster, 1975, p.256
- (14) CONGREVE, W.: The mourning bride , III, viii
- (15) H.C.Debates, vol.911, col.1961, 1976

CHAPTER SIX. THE VICTIM ON TRIAL?

Introduction

The development and implementation of law in society, as well as the judicial process in general, are clearly influenced by a vast range of extra-legal considerations (1). The outcome of a criminal trial in particular is dependent on a variety of factors, including the judge's conduct of the proceedings, the lawyers involved, the impression created by the defendant and witnesses on both sides, and the nature and presentation of the evidence. Another major factor is the jury, whose role and impact in this respect have been the subject of much controversy (2) as well as some academic study (3).

Research in this field has been hampered by the secrecy that continues to surround the jury's deliberations. Consequently, the performance of juries has sometimes been evaluated with reference to differences between their decisions and decisions made by judges. However, as Baldwin and McConville point out,

"Evidence that juries reach different conclusions from those that judges or lawyers would have reached fuels the controversy but does not resolve it. Those who argue that legal experts have no monopoly of the truth would perhaps see this as the greatest strength of the jury, whereas others see it as its weakness" (4).

There seems to be general agreement among supporters and opponents of the jury system that the jury brings its own unique values and interpretations to bear on any case. As Kalven and Zeisel note, in their classic study of the American jury:

"The jury, in the guise of resolving doubts about the issues of fact, gives reign to its sense of values. It will not often be doing this consciously; as the equities

of the case press, the jury may, as one judge put it, "hunt for doubts". Its war with the law is thus both modest and subtle. The upshot is that when the jury reaches a different conclusion from the judge on the same evidence, it does so not because it is a sloppy or inaccurate finder of facts, but because it gives recognition to values which fall outside the official rules". (5)

Researchers have also looked at the victim's role in the outcome of the judicial process. Wolfgang, for example, found that in what he defined as victim precipitated homicide, offenders were less likely to be convicted than in cases where this was not an issue (6).

Denno and Cramer considered the possible effects of victim characteristics on judges' sentencing decisions, and concluded that

"victim precipitation and the impression created by the victim appear to be of importance to the judge in the sentencing process". (7)

Most of the work in this area is based on experimental designs, simulated juries and hypothetical cases. A notable exception is Williams' work regarding the effects of victim characteristics on the disposition of violent crimes. That study focuses in particular on the possible effects of the victim's perceived responsibility for the crime, and of the social relationship between the victim and the offender, and concludes that these factors have some influence on various processing decisions:

"Victim characteristics affect the prosecutor's decisions at screening and later in the case. However, the decision of whether the defendant was guilty or not guilty at trial did not appear to be influenced by characteristics of the victim". (8)

With reference to the offence of rape in particular, Kalven and Zeisel have found that the jury goes beyond determining issues of consent:

"it goes on to weigh the woman's conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behaviour on her part". (9)

In a similar vein, other writers have examined the degree to which the defendant or victim were blamed according to the latter's "respectability" (10), and the role of the parties' character on jury decisions (11).

In their study of the institutional processing of rape in the U.S.A., Holmstrom and Burgess hypothesized a relationship between various victim characteristics and the outcome of trials. Although the numbers involved were small, the results strongly suggest the existence of a systematic link between various attributes of the alleged victim, such as general character, sexual reputation, age, race, and so on, and the verdict on the offender (12).

It has been noted in previous chapters that during the course of a rape trial, the alleged victim's sexual and general character are exposed and investigated in far greater detail than they would in any other criminal case. She is effectively on trial herself, and any suggestion that she may not be entirely innocent is used to imply that the defendant is not entirely guilty. Her personal attributes, general "respectability" as well sexual reputation are central foci of rape trials. In this context, her previous relationship with the accused has also been considered. The question now arises as to whether evidence or indeed suggestions of the kind described in earlier chapters have any bearing on decision making in court.

Rape has been viewed as an instrument of social control which operates to maintain the dominant position of men

"by restricting the mobility and freedom of movement of

women, by limiting their casual interaction with the opposite sex, and in particular by maintaining the males' prerogatives in the erotic sphere. When there is evidence that the victim was or gave the appearance of being out of her place, she can be raped and the rapist will be supported by the cultural values".(13)

Consequently, it has been argued, rape is seen as a legitimate punishment for women who do not adhere to traditional role expectations, and the law acts only against those men who do not rape "appropriately" in this sense. The purpose of this chapter is to examine how far these views are supported by procedures and decision making in court.

Firstly, the extent to which the alleged victim is "put on trial" will be considered. Issues relating to her character and sexual proclivities, as well as to particular aspects of her behaviour at the time of the rape incident will be discussed. Secondly, one of the central hypotheses of the study will be tested, namely that there is a systematic link between characteristics of the complainant, both in terms of attributes and behaviour, and the outcome of the trial. To this end, the relationship between verdict and various features of the alleged victim will be examined in some detail. The argument will be extended beyond the issues already considered, such as character and sexual reputation, to any previous relationship she may have had with the accused as well as to specific aspects of her behaviour at the time of the alleged offence. These will include perceived victim precipitation or "contributory negligence"; the degree of active resistance as indicated by physical injuries sustained by the complainant; and promptness in reporting the offence to the police.

Before discussing these links, a general point must be made with

regard to the definition of the above variables. Wherever possible, these were established from the prosecution's case and reinforced by evidence independent of the complainant. For example, her evidence of virginity or of physical injuries was in all cases substantially supported by the evidence of the police surgeon involved in the case. The time of reporting the offence, similarly, was corroborated by police records.

Difficulties sometimes arose, however, with regard to the more controversial variables investigated. For example, in trying to establish what the relationship had been, prior to the rape incident, between the defendant and the alleged victim, one often comes up against conflicting accounts given by the prosecution and the defence respectively. It has been noted earlier that where the defendant alleges a previous consensual episode of sexual intercourse, the complainant may well present the incident thus referred to as a prior unreported rape. Similarly, defence counsel may question the complainant about alleged episodes of mental illness or criminal activities in an attempt to undermine her credibility, but without any concrete evidence to support the suggestions implicit in such questions.

Such seemingly unfounded allegations or suggestions may or may not have an effect on the jury's decision with regard to the guilt of the accused; in any event, they are so widespread as to make valid analysis almost impossible. In an attempt to overcome the difficulties inherent in the definition of these more problematic variables, evidence presented by the prosecution was used in preference to that given by the defence. In other words, we are

dealing not merely with defence comments and suggestions, but with behaviour and attributes which are endorsed by the prosecution as being those of the complainant. This has the advantage of removing the relevant concepts from the strict context of the adversarial system into a wider perspective, and of allowing a more valid assessment of the interaction between the variables investigated here. We should note, however, that this may lead to an underestimation of the effects of complainant characteristics on the outcome of the trial. Seemingly unfounded suggestions by the defence regarding the complainant's mental health, for example, have not been defined as constituting an attack on her character although they may well have an influence on the jury's view of her credibility.

A second general point concerns the statistical analysis used in this chapter. The primary aim of this study was not to apply rigorous statistical tests to the material collected; indeed, the data does not easily lend itself to quantitative analysis. Nevertheless, the results presented here strongly suggest that various characteristics of the alleged victim do correlate with the verdict. All but one of the distributions are in the expected direction, some strikingly so, and the chi-square test has been used to test the statistical significance of the findings. Of the six relationships investigated, four are statistically significant, and another is nearing, although not quite reaching significance. The combined effect of the various factors favourable to conviction is highly significant. It must be remembered that the value of this measure increases with sample size and consequently, the results presented here are all the more impressive because of the

relatively small numbers involved.

Previous sexual experience

One of the hypotheses of this study is that the alleged victim's prior sexual experience whether with the defendant or other persons is an important determinant of the outcome of the trial. This has been investigated by Holmstrom and Burgess in their study of rape in Massachusetts, in which they argued that a good sexual reputation in a rape victim is an important factor in conviction. Their analysis is based on a very small sample but the results, summarized as follows, are nevertheless very interesting:

"In all cases of conviction for rape, the victim was either a virgin or sexually involved with just one partner at the time of the rape" (14).

There were very few cases indeed where the jury knew nothing of the complainant's sexual past before retiring to consider its verdict. The prosecution brought in evidence of virginity in all pertinent cases, and as far as the remainder of the sample is concerned, evidence of previous sexual experience was introduced in some way in respect of 96% of the complainants involved. Overall therefore, it is only for 4% of the alleged victims in this study that no evidence whatever of sexual past was introduced during the course of the trial:

TABLE 1. Evidence of the complainant's sexual experience given at the trial

<u>TYPE OF EVIDENCE INTRODUCED</u>	<u>% COMPLAINANTS</u>	
Evidence of virginity	20	} 96
Evidence of some sexual experience with third parties	59	
Evidence of prior sexual intercourse with the defendant	17	
No evidence at all	4	
TOTAL	100.0	

There is a staggering difference in the conviction rates of those defendants whose victims were virgins, or of whose sexual past the jury knew nothing, and those accused of raping women known to have had prior sexual experience. This highlights the perceived importance of chastity in the "genuine" victim of rape: virginity all but guarantees the conviction of the accused. In this sample, only one out of a total of seventeen defendants was acquitted of the rape of a virgin or a woman whose sexual past was not referred to during the trial:

TABLE 2. Evidence of the complainant's sexual experience and outcome of the trial

<u>EVIDENCE OF SEXUAL EXPERIENCE</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
Virgin or no evidence	16 (41%)	1 (4%)	17 (27%)
Evidence of some sexual experience	23 (59%)	22 (96%)	45 (73%)
TOTAL (15)	39 (100%)	23 (100%)	62 (100%)

[Chi-square=9.77, significant at P=0.01]

It is worth briefly considering the other end of the spectrum of sexual experience and looking at the conviction rates among those men who were accused of raping a woman whose sexual reputation was markedly discredited during the trial. This includes alleged victims who were or had in the past suffered from sexually transmitted diseases, those who had had a reputation in the local community for being sexually available in general terms, those who had been involved in sexual intercourse with a number of persons within a short period of time and those who were alleged to be prostitutes. A total of twenty men in the sample were accused of the rape of such women, and 52% of these were acquitted. It is interesting to point out that nearly all those defendants who were acquitted on the judge's direction, i.e. whose fate was not felt to be safely left with the jury, were accused of raping women alleged to have such sexual histories.

The 52% acquittal rate in this group compares with 4% for defendants accused of raping virgins. The rate is nearer the average for those men whose victims came somewhere in between these two groups in terms of their degree of sexual experience:

TABLE 3. Types of sexual experience evidence and outcome of the trial

<u>TYPE OF SEXUAL EXPERIENCE</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
Virgin or no evidence	16 (41%)	1 (4%)	17 (27%)
General evidence of sexual experience	15 (38%)	10 (43%)	25 (40%)
Evidence of "bad" reputation	8 (21%)	12 (52%)	20 (32%)
TOTAL (15)	39 (100%)	23 (99%)	62 (100%)

[Chi-square=11.684, significant at P=0.01]

General character

The complainant's general respectability is also hypothesized to be an important factor in determining the outcome of the trial. It is expected that a conviction will be more likely in cases where the alleged victim is seen as a "decent" or "respectable" woman. If she is blameworthy in one area, then she will be presented as blameworthy altogether, and she cannot therefore aspire to the status of the innocent, genuine victim that the stereotype favours. Holmstrom and Burgess lend support to this argument. Their findings suggest that

"a victim of good 'general reputation' is also useful for conviction, but this factor does not seem as salient as sexual experience...In the majority of convictions, the victim was of 'respectable character'. In most acquittals, the victim's character was discredited in some way". (16)

The category of 'highly discredited' character in Table 4. refers to cases where a serious attack was made on the complainant's credibility and where, to some extent at least, the basis of that attack was substantiated by evidence from the prosecution. The

following is a typical example:

The complainant was a young woman in her 20s, recently separated from her husband and the mother of a small child. There was a custody dispute between her and her husband, and at the time of the alleged rape, her child was in local authority care. After the separation, she was feeling very depressed and began to drink more than usual, and went to her doctor about this. She was sent for outpatient treatment for her depression and drink problem, and was seeing a psychiatrist once a fortnight for about three months, when she began to feel better. During this time, she also lost her job because she could not cope with it, and persistently turned up late for work. She was questioned closely about all these matters by defence counsel who suggested that she was mentally unstable, clearly disturbed with a grudge against men, and an unfit mother with a serious drinking problem whose evidence could not be relied on. (Case 56)

Table 4. shows that defendants whose alleged victims had been successfully discredited in this way have a higher acquittal rate than others. The difference is statistically significant, and supports the hypothesis that women who are perceived as having a "good" character have a better chance of having their rape complaint believed than others:

TABLE 4. Evidence of the complainant's general character and outcome of the trial

<u>EVIDENCE OF GENERAL CHARACTER</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
Complainant not discredited	31 (76%)	15 (52%)	46 (66%)
Complainant markedly discredited	10 (24%)	14 (48%)	24 (34%)
TOTAL (17)	41 (100%)	29 (100%)	70 (100%)

[Chi-square = 4.3, significant at P=0.05]

Previous relationship with the accused

One important and particularly enduring myth about rape is that it is an offence which generally involves people who were previously not known to each other. A vast number of empirical studies in recent years have shown conclusively that this is not so. In Amir's study, 57% of the offenders were to some degree known to the victim (18). Sanders found that in another American sample, 68% of the cases involved strangers while the remainder were acquaintances, close neighbours, friends or relatives (19). Holmstrom and Burgess's study of rape victims reveals that 39% (40/102) of them knew the offender prior to the assault (20). Closer to home, Wright's study of rape records considered genuine by the police in six English counties finds an even higher proportion of offences committed by men known to the victim:

"Most of the attacks, whether committed by a lone man or a group of men, involved people who knew each other. In about 60 per cent of the assaults, the victim could name her assailant. Two thirds of these cases involved relationships which could be described as 'close'. In the rest, the parties were briefly or superficially acquainted". (21)

Nevertheless, in spite of overwhelming evidence that strangers have no monopoly on rape, the myth that the only genuine rapes are committed by the mad, bad rapist leaping out of a dark alley continues to influence the way in which juries perceive the offence and decide on guilt or innocence.

It should be noted that the process of dismissing as unfounded rapes which do not fit into this category begins long before the trial stage is reached. Wright noted that victims were less likely to even report a rape when the attacker was not a stranger:

"It seems that when the victim knew her attacker, she was especially hesitant in contacting the police. The reasons for this may have been an awareness that the police view such complaints with scepticism, or the fear of reprisals from the rapist or his friends". (22)

The police may also be less willing to accept as genuine complaints of rape allegedly committed by a man known to the woman involved, and these cases may drop out of the system at an early stage. An American study of rapes classified as 'unfounded' by the police found that the prior relationship between the parties involved was an important factor affecting the likelihood of a complaint being dismissed:

"The largest percentage of unfoundings came from cases in which the alleged offender was a date (43%) or an acquaintance (28%) as compared with a friend (19%) or a stranger (18%)." (23)

Holmstrom and Burgess also considered the link between prior victim-offender relationship and outcome of the trial, and found that it did not differentiate cases at the supreme court level. They did note, however, that almost all convictions in their sample were for rapes committed by strangers; but most acquittals were in that category too. They interpreted this as follows:

"What these figures mean is that the bias is so strong against cases of rape committed by a person known to the victim that they drop out early in the system, long before they reach either the plea-bargaining or trial stage". (24)

In the present sample, the majority (66%) of the defendants who pleaded not guilty to a rape charge were previously known to the complainant. It is interesting to note that among those defendants who pleaded guilty, the percentage of stranger rapes was considerably higher at 53%, compared to only 34% among the not guilty pleas. There may be another process at work here, whereby defendants whose offence more closely approximates to the stereotype of the "real" rape are more likely to be selected into

the group who do not contest the charge.

The type of existing relationship varied considerably. In some cases, the parties involved were general acquaintances, who may or may not have known each other's full names. This group included, for example, two adolescents who had been at the same school for some years, and knew each other by sight, and a complainant who worked as a cashier in a garage and whose assailant was a regular customer there. In other instances, the relationship was closer: one young woman complained of being raped by her brother's friend whom she had met at the family home on many occasions. The category also includes former boyfriends/girlfriends, and cases where the complainant and the defendant lived in the same household (e.g. assaults by step-fathers).

Table 5. shows that there is a significant difference between the conviction rates of the two groups. Thus, it seems that in the sample, the existence of a previous relationship between the complainant and the defendant in general terms has a systematic effect on the jury's finding of guilt:

TABLE 5. Previous relationship between defendant and complainant and outcome of the trial

<u>PREVIOUS RELATIONSHIP</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
Persons known	23 (56%)	23 (79%)	46 (66%)
Strangers	18 (44%)	6 (21%)	24 (34%)
Total (17)	41 (100%)	29 (100%)	70 (100%)

[Chi-square = 4.06, significant at P = 0.05]

The link between any previous sexual involvement between defendant and complainant and the outcome of the trial provides another illustration of the importance of a "good" sexual reputation. As Sanders notes, the assumption seems to be that

"the woman's worth, her reputation, is measured by the rape law in terms of her decision to have sex with a man, and if she does so voluntarily on one occasion, her worth is less on another if the man rapes her" (25).

This is supported by the findings of another American study on decision making by simulated juries, which reports that a

"specific relationship category which had a high rate of case dismissal is the group which has some kind of past or present romantic involvement, composed of the relationships of 'ex-spouse', 'cohabiting person' and 'girlfriend or boyfriend'. The rates of attrition for these cases were far above the average for all cases" (26).

The number of cases involving such a relationship, acknowledged by both defendant and complainant, in the present study is very small. (N=5) but nearly all of the defendants in those cases were acquitted:

TABLE 6. Prior sexual involvement between defendant and complainant and outcome of the trial

<u>PRIOR SEXUAL INVOLVEMENT</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
No	40 (98%)	25 (86%)	65 (93%)
Yes	1 (2%)	4 (14%)	5 (7%)
TOTAL	41 (100%)	29 (100%)	70 (100%) (17)

[Chi-square=5.17, significant at P=0.025]

The only conviction was in a somewhat unusual case, where the defendant and the complainant had had sexual intercourse on one occasion several years before the rape but had not seen each other at all in the intervening period, until he broke into her flat,

forcibly disconnected the telephone, threatened her with a knife and left the following day, leaving a note to apologize for what he had done. (Case 73)

"Contributory negligence"

The concept of victim precipitation, at least as far as rape is concerned, originates in Amir's study (27). We have seen above that his definition of it implies a highly prejudicial and biased notion which seems to find its roots in various psychoanalytical theories where the victims of rape are seen as primary motivators of the offence.

It has been noted that as an academically respectable concept and as a valid analytical tool victim precipitation has attracted heavy but justified criticism. However, the popular stereotype of rape continues to define the 'true' victim as the totally innocent prey of a highly disturbed man. If she is seen as contributing to her victimization, she generally finds it more difficult to convince a jury of her allegation of rape. A number of studies have noted that where there is any indication that the victim somehow provoked the offence, the jury is likely to take a more lenient view of the crime, and although this phenomenon holds for other offences too, its implications for rape are particularly noteworthy.

Where the defence is one of consent, it may be sufficient to secure an acquittal to establish that the complainant had consented to being in the situation where the alleged offence occurred. If for example it can be shown that she accompanied him willingly or that

she allowed him into her home, then the jury will be asked to infer consent to intercourse from her consent to being in the situation where the incident took place. As one defence counsel made this point for the jury:

Defence counsel: She went into the car and to the flat willingly - you must consider this in deciding whether sexual intercourse with (him) was without her consent. Consider her getting into the car - is that a risk any ordinary person would take? In the light of her admission of him taking her hand, and her going along anyway, her behaviour was not inconsistent with consent to sexual intercourse. (Case 5)

This followed cross-examination aimed at establishing how the complainant came to be in the company of the defendants. The existence of a prior relationship between them (he was a friend of her sister's and known to her for many years) was in this case underplayed by the defence, and she was questioned at length about her reasons for going to his flat willingly:

Defence counsel: Would you have gone for a drink with the defendant?

Complainant: Yes.

Defence counsel: If the other man got into the car, why didn't you leave?

Complainant: I thought I was safe with the defendant. It didn't cross my mind that something like this would happen.

Defence counsel: But you were prepared to go shopping with them, and to the defendant's flat?

Complainant: Yes. I knew the defendant. I trusted him. (Case 5)

In another case, the accused was charged with attempting to rape a young woman he had met the evening of the alleged incident. It differs from the previous example insofar as there were more overtly sexual elements involved in the situation. Consequently, the defence tried to establish and underline not only her consent to being in the situation, but also consent to what was alluded to as preliminary sexual activities:

Defence counsel: Did you have a conversation about how the defendant was going home?

Complainant: Yes, I understood he was going to Clapham.

Defence counsel: Did you discuss how you were getting home?

Complainant: I think I had a conversation with him about a night bus.

Defence counsel: And was it suggested in the conversation that he walk you to the bus?

Complainant: Yes, we both decided that.

Defence counsel: And you were perfectly happy for him to do that?

Complainant: Yes.

Defence counsel: (On the way to the bus stop) he asked you for a good night kiss, and you were quite happy for him to do that, were you not?

Complainant: Yes.

Defence counsel: What sort of a kiss was it?

Complainant: Just a kiss.

Defence counsel: He had his arms around you, pressed against you and you against him, isn't that right?

Complainant: I think he did have his arm around me, in a sort of embrace. (Case 14)

The assumption seems to be that a woman who gives a man any sort of sexual encouragement and then retracts from intercourse has so much responsibility for the offence herself that this negates the occurrence of it altogether. In this particular case, prosecution counsel overtly condoned and indeed supported the logic of acquitting in his closing speech:

Prosecution counsel: If she really said 'yes' up to the last minute and then changed her mind, you might think that she asked for it. (Case 14)

On occasions, the judge may try to redress the balance by pointing out to the jury the dangers of inferring consent to intercourse from such behaviour, as the following extract illustrates:

Judge: It's true that the girls put themselves in that situation. It would have been wiser to run out, or shout. On the other hand, put yourselves in that situation. Don't say they were silly to be there in the first place - that has nothing to do with it at all. (Case 32)

Disapproval of victims who are seen as taking risks has often been expressed by judges in sentencing. For example, now retired High Court judge, Sir Melford Stevenson, had this to say about hitchhiking victims of rape:

"A girl looking for a lift who gets into a car at night with a man she doesn't know can reasonably be said to be asking for sexual attention". (28)

More recently, another judge caused a major public outcry when he fined a self confessed rapist because of what he termed 'contributory negligence' on the part of the victim (29). But do juries take such matters into account when they try rape offences?

Holmstrom and Burgess considered how far the alleged victim's consent to being in the situation was linked to the verdict, and found some association although not one amounting to statistical significance:

"In the majority of convictions the victim unwillingly accompanied the assailant. In contrast, in most of the acquittals, the victim willingly accompanied the assailant". (30)

In the present study, the complainant's consent to being in the situation does not, in itself, correlate with the verdict. Acquittal and conviction rates are almost identical in the 'consent' and 'no consent' groups (Table 7.), which indicates that this variable does not have any impact on the outcome of the trial. We shall see later, however, that when the overall effect of all factors favourable to conviction is considered, consent to being in the situation in conjunction with other factors, may well tip the scales in favour of the defendant:

TABLE 7. Complainant's consent to being in the situation and outcome of the trial

<u>COMPLAINANT'S CONSENT TO THE SITUATION</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
No consent	17 (41%)	12 (41%)	29 (41%)
Consent	24 (59%)	17 (59%)	41 (59%)
Total (17)	41 (100%)	29 (100%)	70 (100%)

[Not significant]

The complainant's injuries

The edition of Archbold on Pleading, Evidence and Practice in Criminal Cases which was current in 1975 when the Heilbron Group was appointed defined rape as follows:

"It must be proved that the accused had sexual intercourse with the complainant without her consent... The prosecution must prove either that the girl physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist" (31).

In their Report, the Advisory Group on the Law of Rape emphasized the consent element in the offence, and argued that the use of force and violence should not be regarded as an essential ingredient of it:

"It is ... wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it".
(32)

Their recommendation was incorporated in the 1976 Act which defines rape as "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it" (33), and which makes no reference to the need to establish physical resistance in this

context.

Nevertheless, an observation of court procedure clearly shows that violence is still deemed to be necessary for a conviction. If the woman can show that she physically resisted her attacker and sustained injuries in the process, she is much more likely to substantiate her allegation of rape than if she only offered verbal or passive resistance. As defence counsel commented in one such case,

Defence counsel: The rapes one reads about in the press are savage ones, where consent does not arise. That's a straightforward case of rape, where the issues are clear. There has been a tragic misunderstanding here. (Case 14)

The need to look for signs of injury is frequently underlined for the jury who are told that in 'real' rape cases one should always expect to find evidence of physical violence. The following extracts illustrate this point:

Defence counsel: There is no medical evidence, only an old bruise. There is no scientific evidence - in cases such as this, one is accustomed to buttons missing, fingernail scratches, torn clothes. There is nothing like that here. (Case 34).

Judge: Regarding the evidence of the girl, I have come to the conclusion that none of the things happened that one might expect: no scratches, no pain, no injuries, no evidence that she struggled. (Case 7)

There is a great deal of conflicting opinion, incidentally, as to whether or not it is wise for a woman to physically resist her attacker. Lack of resistance will certainly look bad in court, while fighting back may expose the victim to further physical injuries. Holmstrom and Burgess summarize the dilemma with this sobering observation:

"If they do not struggle, they have a very hard time in court. If they do struggle, they run the risk of incurring even worse injuries at the hands of the rapist".(34)

Groth and Cohen confirm the unpredictability of the effect of resistance on the attacker from first hand interviews with convicted rapists, who were asked about their reaction to it:

"One rapist answered, 'When my victim screamed, I ran'; another said, 'When my victim screamed, I cut her throat'". (35)

Whatever the risks to herself, physical resistance is expected of the 'genuine' complainant. In cross-examination, defence counsel usually makes a point of establishing just exactly how active her resistance to the accused had been. The standard strategy is to try and show that she did not put up a very convincing struggle, and that she missed many opportunities of escape. In the absence of any evidence of marked physical injury, the complainant's cross-examination may be centered entirely around this issue:

Defence counsel: I suggest you made a weak attempt at moving his hand and when he persisted, you stopped objecting.

Complainant: No.

Defence counsel: I suggest he didn't do anything to force you - he didn't put his hand over your mouth.

Complainant: Yes he did, and he had his hands behind my back.

Defence counsel: Did you scratch his face?

Complainant: You don't think of that at the time.

Defence counsel: Surely, it's instinctive?

Complainant: I didn't have the strength to do anything.

Defence counsel: Did you try and run away?

Complainant: Yes.

Defence counsel: Did you hit him?

Complainant: No.

Defence counsel: Did you push him away?

Complainant: Yes.

Defence counsel: Kick him?

Complainant: You don't think of things like that, I've already explained.

Defence counsel: Did you do any of those things?

Complainant: I was too scared. (Case 20)

Having sustained injuries in the course of the rape is not necessarily enough to convince a jury of lack of consent. The defence may suggest that the particular woman's injuries are not as serious as they would have been in a "real" rape. In one case where

the complainant had extensive bruising all over her body after being beaten and raped by two men, defence counsel's closing speech went as follows:

Defence counsel: There are not as many or as serious injuries as might be expected from her account. What she does have is consistent with vigorous sexual intercourse with consent, but in rather cramped conditions ... If she had been fighting for her honour as she says she was, there would be some injury to the defendants too. The examination shows that there wasn't - no sign of injury anywhere on them. (Case 52)

There are cases where the alleged victim's injuries are so severe that it is impossible to minimize or understate them with any credibility. It may then be conceded by the defence that she had been "unfortunate" but nevertheless argued that her physical condition after the assault was not inconsistent with consent:

Defence counsel: Some people prefer sex in a violent way - it was not necessarily without her consent. (Case 5)

On occasions the defence go to considerable lengths to sustain this position. In one case, for example, the complainant had a vaginal tear requiring several stitches as a result of the rape, and the police surgeon who examined her gave evidence that such a tearing of the tissues was extremely unlikely to occur unless considerable force was used. The defence was to dispute this view and called another doctor as an expert witness. The following is an extract from his evidence:

Medical witness: There is not a single obstetrician who has practised over five years (sic) who hasn't seen such tears as a result of consensual sexual intercourse in non-virgins. The dangers of inferring lack of consent from genital injuries are commonly taught in forensic medicine textbooks. These tears simply occur through penetration, when there is a disproportion in the size of those involved. (Case 57)

Clearly then, much effort is invested in rape trials in establishing that a complainant without injuries is not to be believed, and that even severe injuries should be interpreted with

caution as they do not necessarily equate with lack of consent. One hypothesis of this study is that the extent of injuries sustained by the alleged victim correlates with the outcome of the trial.

This link was also examined by Holmstrom and Burgess who found that

"in the majority of convictions, the victim sustained moderate to severe general physical damage ... In contrast, in almost all the acquittals, there were minimal or no general physical injuries". (36)

In this study, injuries are defined as physical damage sustained in the course of the rape incident, including gynaecological damage, but excluding the tearing of the hymen alone. "Some" injury consists of isolated bruises and superficial scratches, while "moderate to severe" injury refers to extensive bruising, lacerations, tearing of tissues or fractures.

The conviction rate among men who inflicted moderate or severe physical injuries on their victims is higher than among those who behaved less violently. The difference is near statistical significance but does not quite reach it. Nevertheless, the data clearly suggest that evidence of violence additional to the sexual assault is helpful in securing a conviction. The bruised and battered woman approximates to the stereotype of the "ideal" rape victim more closely than the one whose sexual violation results in less marked physical injuries:

TABLE 8. Complainant's injuries and outcome of the trial

<u>EXTENT OF INJURIES SUSTAINED BY THE COMPLAINANT</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
Moderate to severe(37)	20 (49%)	9 (31%)	29 (41%)
None or minimal(37)	21 (51%)	20 (69%)	41 (59%)
Total (100)(17)	41 (100%)	29 (100%)	70

[Chi-square=2.2, not significant]

Time of reporting

Although there is widespread acceptance of the fact that the vast majority of rapes go unreported because the victim is too embarrassed and ashamed to go to the police, there is also an expectation that the "genuine" victim will be so distressed by the assault that she will report it immediately. These conflicting assumptions exist side by side, but when it comes to the law, the latter takes precedence. It has been noted earlier that one of the unique features of the law relating to rape is that evidence of an "early complaint" is admissible at the trial. This indicates the law's the assumption that if an immediate report is not essential to prove that the offence occurred, it is at least very helpful in showing that the alleged victim's behaviour was consistent with lack of consent:

"The evidence (of fresh complaint) is not to be taken as proof of the facts complained of, but only as a matter to be borne in mind by the jury in considering the consistency, and therefore, the credibility, of the complainant's story" (38).

Studies have been done in the U.S.A. on the social and psychological determinants of reporting behaviour in victims of

rape, and they have found that there are many reasons why women choose not to report, including embarrassment, fear of retaliation and of further ordeals, shame, and a desire to avoid the stigma of being known as a rape victim. (39) Duker studied a group of women who had been victims of rape and looked for differences between the reporters and non-reporters. He found that four main variables distinguished the two groups:

"One of these variables was the strength of fear experienced by the victim immediately after the rapist left. The stronger the fear, the more likely the victim is to report the offence. The other three variables concerned the victim's impressions of police handling of rape cases. The three variables were concern, efficiency, and consideration. The higher the victim's appraisal of police with respect to these three variables, the more likely the victim is to report the offence." (40)

If similar factors apply in this country, recent publicity regarding the alleged victim's treatment at the police station will not have improved women's perceptions of police consideration and is unlikely to have encouraged them to report rapes. (41) A study by the Scottish Home and Health Department indicates that a substantial majority of complainants in rape cases found various aspects of the police investigation stressful. In particular, there were strong criticisms of the lack of consideration and disbelief with which the victims felt they were being treated. The same study reports that 45% of the cases in their sample proceeded no further than the police stage. (42) The Advisory Group on the Law of Rape did not consider fully the police treatment of rape victims, but urged that their interrogation should be conducted in a "tactful and sympathetic" manner (43) and more recently, new guidelines issued by the Home Office on this subject also indicate an official acknowledgment that all is not well with the treatment complainants receive at the police station.(44)

Nevertheless, any delay in reporting is held against the alleged victim at the trial. As one defence counsel put it,

Defence counsel: Afterwards, she doesn't go to the police, or anyone in the street to complain. She doesn't complain to her mother, which would have been normal. Instead, she lies to her. Is her conduct afterwards consistent with that of a person who was raped, or who consented? (Case 3)

If the complainant fails to report the offence for days or weeks, she is most unlikely to be believed. In cross-examination she will be asked to justify the delay, and this may give the defence an opportunity to suggest the "real" reason for what is presented as an unquestionably false complaint:

Defence counsel: Why didn't you go to the police (after the rape)?

Complainant: I was too terrified ... I thought they'd be harsh ... I thought they would be very unsympathetic.

Judge: Why did you go eventually?

Complainant: I felt ashamed of what had happened to me. I also thought that he might rape somebody else, or come back and rape me again.

Defence counsel: At what stage did you go to the police?

Complainant: I went the day I found out about the pregnancy.

Defence counsel: I suggest you went because you wanted to blame somebody for getting you pregnant. So that you could justify your pregnancy to your relatives. (Case 7)

Another strategy is for the defence to set up expectations in the jury as to what happens in a "real" rape, and then to ask them to judge their case with reference to that, and to draw what is presented as the inevitable conclusion about the defendant's guilt:

Defence counsel: Consider the circumstances in which the allegation was made. Rape and indecent assault are extremely serious charges. You'd expect that an allegation of rape would be made at the earliest opportunity - because it is such outrageous conduct, in this case, by someone the complainant knew. If there is any truth in it, why didn't she make a complaint the following morning? She could have gone out and complained straight after the incident. She could have complained to her neighbours. She could have told someone at work, on

Friday, Saturday or Sunday. But it wasn't until Monday that she went to the Magistrates Court (and afterwards, to the police). (Case 45)

When a complaint is made an hour or two after the incident, the alleged victim may still be asked to justify this delay. In the following extract, the complainant said that she went to the police station immediately after the rape, but there was some discrepancy between her timing and that of the police officer who first saw her. Defence counsel commented on this as follows:

Defence counsel: It is more than significant evidence if the complainant makes her complaint as soon as possible. There is something wrong about that in this case: it is not disputed that she arrived at the police station after 5:20 p.m., but she got out of the (defendant's) car at 3:50 p.m. We have no evidence of what happened in between. (Case 5)

The jury in this case were unable to reach a verdict and a retrial was ordered. In the second trial the police produced further evidence which confirmed that the complaint was in fact made at the earlier time of 4 p.m., and the defendant was convicted.

Defence counsel invariably refers to any delay in reporting in cross-examination and comments on it in the closing speech: not making an immediate formal complaint is sometimes referred to as "an extraordinary thing to do" (Case 4), going against "what you'd expect a girl who has been raped to do" (Case 32).

Is there any systematic link between the time of reporting a rape and the verdict? In their study Holmstrom and Burgess found that

"prompt reporting of the rape is important for conviction ... Reporting promptly seems to be necessary for but does not guarantee conviction". (45)

The present study also finds a correlation between these variables. About 40% of the victims reported the offence after some delay,

ranging from one day to around three months. The conviction rate for those accused of the rape of late reporters differed from the rate for those whose victims made an immediate complaint, and the difference is statistically significant:

TABLE 9. Time of reporting the rape and outcome of the trial

<u>TIME OF REPORTING</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
Immediately	30 (73%)	11 (38%)	41 (59%)
Some delay(46)	11 (27%)	18 (62%)	29 (41%)
Total (17)	41 (100%)	29 (100%)	70 (100%)

[Chi-square=8.69, significant at P=0.01]

Combined effect of factors favouring conviction

Of the six variables considered in this chapter, four significantly relate to the outcome of the trial, and two are not statistically significant. All the distributions, however, are in the expected direction. So far, these factors have been considered in isolation from each other and their possible combined effect has not been mentioned. However, while the effect of some variables alone (e.g. consent to being in the situation) does not seem strong enough to have a significant impact on the outcome of the trial, it may be that, coupled with one or more factors (e.g. evidence of promiscuity and no injuries) it is likely to favour the defendant's acquittal.

In order to examine the combined effect of various victim characteristics on the outcome of the trial, the clustering of

factors hypothesized to be favourable for a conviction has been looked at. The 'ideal' rape, most closely approximating to the stereotype, is one where the victim is sexually inexperienced, was not in the defendant's company willingly, physically resisted and got injured, and promptly reported the offence. A further factor which is thought to favour conviction is the presence of more than one defendant. An index of factors constructed on these assumptions strongly relates to the outcome of the trial. Cases with a low number (0-2) of factors favouring conviction were significantly more likely to lead to an acquittal than those with a high number (3-6) of such factors:

TABLE 10. Factors favourable to conviction and outcome of the trial

<u>NUMBER OF FAVOURABLE FACTORS</u>	<u>DEFENDANT CONVICTED</u>	<u>DEFENDANT ACQUITTED</u>	<u>TOTAL</u>
0 to 2 factors	8 (20%)	16 (55%)	24 (34%)
3 to 6 factors	33 (80%)	13 (45%)	46 (66%)
Total (17)	41 (100%)	29 (100%)	70 (100%)

[Chi-square=9.58, significant at P=0.01]

It is also noteworthy that there were no convictions at all in the cases with no favourable factors present (N=6); and no acquittals in the group which had six favourable factors present (N=5). The latter group not only seems to be invariably convicted, but usually heavier than average sentences are also imposed. One example of this type of case is that of an 18 year old vicar's daughter, staying for the weekend in her older sister's London flat. While she was asleep in the middle of the night, a young man broke into the flat and raped her. She put up considerable resistance, and was

hit and choked by her assailant. He exerted such pressure on her throat that she momentarily lost consciousness. As soon as he had left, she ran into the street, visibly distressed, and told a passer by what had happened. The police were called in immediately. During the trial, it emerged that she lived at home with her parents, was still at school and although she had a steady boyfriend, she had been a virgin before the assault. The defendant was convicted.

It is clear that to fully understand the different outcomes of criminal trials, one must look at a whole range of factors and not only those relating to the complainant. Nevertheless, these findings clearly indicate that characteristics of the alleged victim have a considerable impact on whether or not the defendant in a rape trial is convicted, and that the offence of rape continues to be defined largely with reference to the deserving character of the complainant.

FOOTNOTES TO CHAPTER SIX

(1) SMITH, A. and BLUMBERG, A.: "The problem of objectivity in judicial decision making" Social Forces, vol.46, pp.96-105; HAGAN, J.: "Extralegal attributes and criminal sentencing: an assessment of a sociological viewpoint" Law and Society, vol.8, pp.357-383

(2) There is a good summary of the main issues in the jury controversy in BALDWIN, J. and McCONVILLE, M.: Jury trials, Oxford, Clarendon Press, 1979, chapter 1.

(3) See for example BALDWIN, J. and McCONVILLE, M.: op.cit., 1979; KALVEN, H. and ZEISEL, H.: The American jury, Chicago and London, University of Chicago Press, 1971; CORNISH, W.R.: The jury, London, Allen Lane, 1968; McCABE, S. and PURVES, R.: The jury at work, Oxford, Oxford University Penal Research Unit, Blackwell, 1972, and The shadow jury at work, Oxford, Oxford University Penal Research Unit, Blackwell, 1974

(4) BALDWIN, J. and McCONVILLE, M.: op.cit., 1979, p.19

(5) KALVEN, H. and ZEISEL, H.: op.cit., 1971, p.495

(6) WOLFGANG, M.E.: Patterns in criminal homicide, Philadelphia, University of Pennsylvania Press, 1958

(7) DENNO, D. and CRAMER, J.A.: "The effects of victim characteristics on judicial decision making" in McDONALD, W.F. (ed.): Criminal justice and the victim, Beverley Hills, Sage Publications, 1976, p.224

(8) WILLIAMS, K.M.: "The effects of victim characteristics on the disposition of violent crimes" in McDONALD, W.F. (ed.): op.cit., 1976, p.204

(9) KALVEN, H. AND ZEISEL, H.: op.cit., 1971, p.249

(10) JONES, C. and ARONSON, E.: "Attribution of fault to a rape victim as a function of the respectability of the victim", Journal of Personality and Social Psychology, vol.26, no.3, 1974, pp.415-419

(11) LANDY, D. and ARONSON, E.: "The influence of the character of the criminal and his victim on the decisions of simulated jurors", pp. 195-204 in DRAPKIN, I. and VIANO, E. (eds.): Victimology, Lexington, Mass., D.C. Heath, 1974

(12) HOLMSTROM, L.L. and BURGESS, A.W.: The victim of rape - institutional reactions, New York, John Wiley and Sons, 1978

(13) REYNOLDS, J.M.: "Rape as social control" Catalyst, vol.8, Winter issue, 1974, p.66

(14) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978, p.250

(15) Excluding ten defendants acquitted because the prosecution offered no evidence (N=8) or because the jury failed to reach a

verdict at the initial trial (N=2), as well as eight defendants who alleged prior sexual intercourse with the complainant.

- (16) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978, p.250
- (17) Excluding ten defendants acquitted because the prosecution offered no evidence (N=8) or because the jury failed to reach a verdict at the initial trial (N=2).
- (18) AMIR, M.: Patterns in forcible rape, University of Chicago Press, Chicago, 1971, p.234
- (19) SANDERS, W.B.: Rape and woman's identity, Beverley Hills, Sage Publications, 1980, p.61
- (20) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978, p.247
- (21) WRIGHT, R.: "The English rapist", New Society, 17th July 1980, p.124
- (22) ibid., p.124
- (23) Comment:Police discretion and the judgment that a crime has been committed: Rape in Philadelphia, University of Pennsylvania Law Review, 1968, 117, p.291
- (24) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978, p.246
- (25) SANDERS, W.B.: op.cit., 1980, p.26
- (26) LANDY, D. and ARONSON, E.: op.cit., 1974, p.199
- (27) AMIR, M.: op.cit., 1971, p.259-276
- (28) Daily Star, 7th January 1982
- (29) Reported in The Guardian, 6th January, 1982
- (30) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978, p.253
- (31) ARCHBOLD ON PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, 39th edition, Edited By S. Mitchell, Sweet and Maxwell, London, 1976, Para. 2881
- (32) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, HMSO, Cmnd. 6352, 1975, para. 21
- (33) Sexual Offences (Amendment) Act 1976, s.1(1)
- (34) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978, p.175
- (35) GROTH, A.N. and COHEN, M.L.: "Aggressive sexual offenders:diagnosis and treatment" in BURGESS, A.W. and LAZARE, A. (eds.): Community mental health: target populations, Englewood Cliffs, N.J., Prentice Hall, 1976, p.222
- (36) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978, p.251

(37) "None to minimal" is defined as no physical injuries, or isolated bruises and superficial scratches; "Moderate to severe" includes extensive bruising, lacerations, tearing of tissues and fractures.

(38) HALSBURY'S LAWS OF ENGLAND, 4th edition, vol. 11: Criminal law, evidence and procedure, 1976, London, Butterworths, para.441, p.257

(39) WOOD, P.L.: "The victim in a forcible rape case: a feminist view" American Criminal Law Review, vol.11, Fall 1972; WEIS, K. and BORGES, S.S.: "Victimology and rape: the case of the legitimate victim" Issues in Criminology, vol.8, Fall 1973

(40) DUKES, R.L.: "Predicting rape victim reportage" Sociology and Social Research, vol.62, no.1, p.73

(41) "A complaint of rape" BBC TV "Police" Series, January 1982

(42) CHAMBERS, G. and MILLAR, A.: Investigating sexual assault, HMSO, Edinburgh, 1983

(43) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 1975, para. 192

(44) Home Office Circular, Ref. POL/82 1098/51/14 dated 18th March 1983

(45) HOLMSTROM, L.L. and BURGESS, A.W.: op.cit., 1978, p.251

(46) The breakdown is as follows:

<u>Reported within:</u>	<u>Conviction:</u>	<u>Acquittal:</u>
One day	10	11
Two days	-	2
One week	-	1
One month	1	2
More than one month	-	2

PART III. THE EFFECTS OF LAW REFORM

CHAPTER SEVEN. GENERAL IMPACT OF THE 1976 ACT

Introduction

Previous chapters have shown that as far as restrictions on the admissibility of evidence of sexual past are concerned, the 1976 Act has had precious little impact on the trial of rape offences. Applications to question complainants about their sexual history are made systematically when consent is at issue, and they are usually successful. Moreover, defence lawyers appear to be extremely resourceful in finding ways of introducing comments and suggestions which, even in the absence of formal cross-examination as to sexual past, serve to discredit the alleged victim's sexual reputation and, consequently, her credibility as a "genuine" rape victim.

However, as mentioned above, the Sexual Offences (Amendment) Act 1976 also brought about fundamental changes with regard to anonymity for both complainants and defendants involved in rape trials, and gave a statutory definition of the offence of rape which incorporates the decision in DPP v Morgan and others regarding intent or mens rea. The present chapter examines the operation of these innovations, as well as the overall impact of the 1976 Act on the reporting and disposition of rape offences.

Anonymity and the complainant

Section 4(1) of the Sexual Offences (Amendment) Act prohibits the publication and broadcasting of the name, and of any other material

likely to lead to the identification of, a woman as a complainant in a rape case after a person has been accused of the offence. Any proprietor, editor, or publisher of a publication which infringes this rule is liable to a fine of up to £500. A person is "accused" from the moment when a formal complaint is made alleging that he has committed the offence, and remains so through all court appearances and stages of the trial process. The restriction may, however, be lifted in some circumstances:

"If, before the commencement of a trial at which a person is charged with a rape offence, he or another person against whom the complainant may be expected to give evidence at the trial, applies to a judge of the Crown Court for a direction in pursuance of this subsection and satisfies the judge -

- (a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial; and
- (b) that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if the direction is not given,

the judge shall direct that the preceding subsection shall not, by virtue of the accusation alleging the offence aforesaid, apply in relation to the complainant."
(1)

A similar provision exists for persons who have been convicted of a rape offence, and who have given notice of appeal against the conviction: they can also apply for the anonymity restriction on the victim to be lifted and in this instance the Court of Appeal may direct the publication of her name if it is satisfied

- "(a) that the direction is required for the purpose of obtaining evidence in support of the appeal; and
- (b) that the applicant is likely to suffer substantial injustice if the direction is not given". (2)

A final potential loophole is that a Crown Court judge at a rape trial may direct that the anonymity provision does not apply if he is satisfied that its effect

"is to impose a substantial and unreasonable restriction upon the reporting of the proceedings at the trial and

that it is in the public interest to remove or relax that restriction". (3)

It should be noted, however, that he is not empowered to do that simply by virtue of the defendant's acquittal at the trial.

These restrictions on publicity with regard to both parties have attracted heavy criticism. Geis and Geis have claimed that

"By far the most unusual provision of the Sexual Offences (Amendment) Act is its granting of anonymity (with certain exceptions) to both the alleged victim and the accused person". (4)

That anonymity would encourage women to report rape offences, they argue, is,

"at best, a dubious proposition, and certainly so in smaller areas where the name of the rape victim becomes common knowledge." (5)

But their main criticism is that the anonymity provision implicitly endorses the basic assumptions and myths that have made rape such a "special" criminal offence. The need for the complainant's anonymity is based on the idea that there is something essentially different between victims of rape and those of other violent offences. The implication is that there is something shameful and stigmatising about rape, something which is likely to compromise their character and reputation. While they agree that these assumptions "have much basis in fact", they strongly argue that the right way forward is not through the endorsement of these notions through measures like the protection of the complainant's anonymity. As they put it,

"The fight will be better fought by calm insistence that it is no different to be raped than to be victimized by other criminal offences. The incentive for such a campaign could be seriously undermined by the new anonymity provisions which push rape into a shadowy status". (6)

Whilst it is difficult not to sympathize with the ideology embodied

in this view, it fails to take account of the widespread concern that has developed over recent years over what is estimated to be very large numbers of unreported rapes, as well as over the plight of the rape victim who not only has to go through the trauma of giving evidence in a court of law, but also frequently has to suffer the additional ordeal of seeing detailed accounts of the most personal and intimate aspects of her evidence in the local, or indeed the national, press.

A study of the press coverage of rape cases in Britain over two decades before 1976 found that 54% of the reports revealed the name of the victim, and a third also gave her address. Details of the evidence and various discrediting remarks made to her by defence counsel were also reported, although not as frequently as the authors expected. They also noted that, particularly after an acquittal,

"newspapers often add somewhat gratuitous remarks about the victims which will possibly titillate their readers".
(7)

Although the authors found no deterioration in the quality of press reports over the period of study, the tremendous violation of privacy which results from detailed reports has, probably rightly, been argued to be a significant deterrant when it comes to women's willingness to make a complaint of rape.

There are two principal ways of evaluating the effect of granting anonymity to complainants in rape cases: one is to ask how the provision is being applied, i.e. how often successful applications are made to disclose the name of the complainant, how far newspapers respect the law in this respect, whether and how far the

law is enforced, and whether there have been any significant changes in the newspaper reporting of the offence. The second concerns the effect of changes on the reporting behaviour of women who have been raped: has the Act been successful in encouraging more women to come forward and report the offence to the police, or does rape continue to be as underreported as it had previously been? It is, of course, impossible to measure separately the impact of different components of the 1976 Act in this respect. The present section is chiefly concerned with the first set of questions, while the broader impact of the Act on reporting behaviour will be considered below.

Fears that judges would use their powers to lift the anonymity restriction on the complainant when the defendant is acquitted where they believed that she had lied or made a false accusation (8) appear so far to have been unfounded. There have to date been no reports of judges lifting the ban under Section 4(3) on their own initiative, and only one case where the defendant made a successful application before the start of his trial to have the complainant's name published.

That case was unusual in a number of respects. Firstly, the defendant Powell, described in some newspaper reports as an "apparently wealthy company director", was one of only two middle class men charged with rape in this sample. Secondly, he had a number of convictions for obtaining pecuniary advantage, on each occasion by giving prostitutes invalid paying instruments. Thirdly, while awaiting trial on bail for this offence, he committed another rape for which he was subsequently also tried at the Central

Criminal Court. Before his first trial, his counsel invoked Section 4(2) of the 1976 Act for the name of the complainant to be "given as much publicity as possible" (9), so that witnesses may come forward to support the defendant's allegation that she was a prostitute who specialised in offering herself for flagellation.

The undisputed fact that the complainant was a prostitute would have been introduced by the prosecution at the trial, and in the unlikely event that the prosecution made no reference to it, the defence most certainly would have. In none of the cases of this study was evidence of prostitution kept from the jury, and it is most unlikely that such evidence would ever be excluded under the provisions of Section 2. It is doubtful whether evidence of prostitution is relevant to the issue of consent, but Powell certainly did not need to publicise the complainant's name merely to show that she was a prostitute. Nevertheless, he was charged with rape as well as with assault occasioning actual bodily harm, and his attempt to publicise what in court was termed "a special kind of rather attractive side show for clients who preferred it" arose from that lesser charge. Before agreeing to lift the publicity ban, the judge did remark that he had also to have regard to the complainant's feelings, but Powell's counsel replied that the publicity could be argued to potentially boost her trade. It was perhaps rather naive of everyone concerned to genuinely expect witnesses to come forward to give evidence of their specific dealings with the complainant under these circumstances and, not surprisingly, no such witnesses were produced at the trial. The judge's decision in this case was fiercely criticised by women's groups who interpreted it as the thin end of the wedge, but to date

this fear too appears to have been unjustified. Since the 1976 Act, Powell has been the only defendant charged with rape to succeed in publicising the complainant's name.

There have been no legal cases claiming a breach of the law on the anonymity of the victim, and only one complaint to the Press Council about a report which appeared in the East London Advertiser. In that instance, the complainant was not named but the Press Council took the view that the report would have led to the identification of the woman in the area where the paper was published. In upholding the complaint, the Council noted:

"It is accepted by all newspapers that they do not identify victims in cases of this kind. In this instance the description of the victim given in the newspaper would clearly identify her to people in the circles in which she moved and was perhaps more objectionable than identification by name to people who were not known to her." (10)

So, newspaper publishers and broadcasters appear to conform to Section 4 of the 1976 Act. Nevertheless, it may be argued that the Act has not gone far enough and that the privacy of victims may still be threatened by the publication of various details such as their age, nationality, where they work or live, etc. Women may be referred to as Miss X. in these reports, but at times their authentic initials are used. Details such as these, in combination with extracts from the evidence presented at a trial, may identify victims at least in the local community which is precisely where they would most want to avoid publicity. It is unlikely that cases of this sort would be reported to bodies like the Press Council.

Advocates of the 1976 reforms hoped that apart from ensuring the rape victim's anonymity, the new provisions would also alter the

person, Rupert Murdoch - have the widest coverage of rape cases. In 1978, there were 72 reports in the News of the World, and 32 in the Sun. But, remarkably, not one rape case in that year was covered by both newspapers. The possibility of this happening by chance is so remote as to defy calculation... From this kind of evidence, we suspect that the press is increasingly using the soft pornography of rape reports, and reports of other sex crimes, as a mechanism to sell newspapers." (13)

Anonymity and the defendant

Anonymity for persons accused of rape was considered but rejected by the Advisory Group on the Law of Rape. Nevertheless, the clause covering this matter was introduced during the Committee Stage of the Sexual Offences (Amendment) Bill. Some MPs felt that it was "intolerable" for the complainant to be given anonymity while the defendant did not enjoy a similar privilege. The House of Commons rejected the Heilbron Committee's view that comparisons and parallels should not be drawn between complainant and accused, but rather between persons accused of rape and those accused of other offences. The granting of anonymity for the complainant alone was thought to be a dangerous course of action, which would mean that

"someone who brings a completely groundless and, perhaps, malicious accusation of rape can be protected both from the social disapproval of the community and, in most cases,... from other redress at the hands of the unfortunate defendant, while the defendant's name can be stigmatised even if he is fully (sic) acquitted." (14)

It was also argued that rape is not only a "special" offence for the complainant, but that it carries unique elements for the defendant too: the stigma of being unjustly accused of rape was such that

"an acquittal...is not enough finally and thoroughly to clear a man's name and cleanse his character. There will always be those in the community and at work who are taking decisions about career prospects of the man who will say "No smoke without fire", and that can be most damaging to the individual". (15)

These arguments, despite some opposition, were found convincing by the majority of the House of Commons and the Sexual Offences (Amendment) Act 1976 protects the defendant from publicity until

"after he has been convicted of the offence at a trial before the Crown Court". (16)

However, if the accused person himself applies either to a magistrates' court before his trial, or to the Crown Court during his trial, to have this restriction lifted the Court may direct that the anonymity clause should not apply to that person under the following circumstances:

"(a) the judge is satisfied that the effect of the preceding subsection is to impose a substantial and unreasonable restriction on the reporting of proceedings at the trial and that it is in the public interest to remove the restriction in respect of that person; or
(b) that person applies to the judge for a direction in pursuance of this subsection." (17)

An accused person's co-defendant may also apply for the anonymity provision to be lifted under similar circumstances to those which apply to the publication of the complainant's name, namely where witnesses may be needed to come forward and where his defence would be prejudiced if the accused's name is not publicised. (18)

Outside Parliament, extending anonymity to defendants has received strong criticism, as most commentators felt that the Heilbron Group's approach had been right in principle:

"Anonymity for the individual accused of rape, it appears obvious, stems from sympathy with the possible woes of the "respectable" person who is accused of the crime. Surely, Parliament had in mind a situation such as one in which a female of dubious repute accuses a well-positioned male - a Judge, a prominent businessman, or an M.P., for instance - of having sexually assaulted her. Certainly, they were not much concerned with the reputations of all falsely accused persons - otherwise, they would have seen the illogic of protecting the accused rapist from publicity while exposing the improperly accused burglar or robber to equally unwanted attention". (19)

As with the complainant, the anonymity provision for the defendant is "working" insofar as there have been no prosecutions of newspaper publishers or editors to date under Section 6 of the 1976 Act. There has only been one case where the defendant's name has been published on his own initiative after his acquittal had been legitimated, as it were, when another man confessed to the crime he had been initially charged with.

It is extremely rare for judges to allow the accused's identity to be revealed after a rape acquittal, even when the person concerned is convicted of another offence charged in the same indictment. One notable exception was a direction by Mr. Justice Wien that the names of twin brothers acquitted of rape but convicted of unlawful imprisonment and assault charges should be published. He is reported as justifying this as follows:

"The editor would be placed in an impossible situation if he was not free to publish as he thought fit in this case. Although both defendants have been acquitted of rape, I think it is in the public interest that he should feel free to publish, otherwise there will be an undue fetter on the press and there are too many fetters on the press at the moment". (20)

One unanticipated and very unfortunate effect of the anonymity provision for defendants has been that persons acquitted of rape but convicted of other charges arising from the same incident have, almost invariably, remained anonymous. Although few such cases have come to light, concern has been expressed about this phenomenon which is in breach of the fundamental principle that the identity of people who lose their liberty should be revealed. As an editorial in Justice of the Peace commented,

"The Justices' Clerks' Society were surely right in their plea to the Government that no further restrictions should be placed upon the press without a comprehensive

review of the existing law, the anomalies to which it can give rise and an attempt to balance the public interest in truthful and full reporting of criminal proceedings against the possible distress to which it can sometimes give rise". (21)

Findings relating to the present sample suggest that this phenomenon may be of considerable magnitude. Table 1. shows that in the whole sample, almost 20% of the defendants who are acquitted of a rape charge are nevertheless convicted on other charges. This was particularly a feature of the group of defendants who were included in the sub-sample of "guilty" pleas. The charges these men were convicted of include a variety of offences from indecent assault, the most common category, to unlawful sexual intercourse, gross indecency, unlawful imprisonment, buggery and incest as well as the whole gamut of offences involving assault. It is usually a misnomer to call these "lesser" offences: with one exception, all these persons were sentenced to immediate imprisonment, and over half of them received terms of over two years.

TABLE 1. Persons convicted of charges other than rape

<u>DEFENDANT'S PLEA</u>	<u>ACQUITTED OF RAPE, CONVICTED OF OTHER CHARGE</u>	<u>CONVICTED OF RAPE, OR ACQUITTED OF ALL CHARGES</u>	<u>TOTAL</u>
"Guilty"	11 (34%)	21 (66%)	32 (100%)
"Not guilty"	8 (11%)	62 (89%)	70 (100%)(22)
TOTAL	19 (19%)	83 (81%)	102 (100%)

Of the nineteen defendants involved here, only one was identified in the press. He pleaded "not guilty" to rape, but "guilty" to

unlawful sexual intercourse with a girl of 10, and this plea was accepted by the Crown. It was probably no accident that he received the highest sentence in this group (18 years) and that he had a string of convictions for similar offences. In the past, he had been sentenced to seven years' for indecently assaulting a number of girls between the ages of 5 and 14. The offence he was charged with in this instance was committed about a year after he had been released on licence from that sentence. The judge deemed him "a menace to little girls" and although he did not lift the anonymity restriction under Section 6, it was clear from his comments on sentencing that he had a message for the press to convey:

"The only thing I can think of in your favour is that you may have been encouraged by the intemperate benevolence of those who released you on parole, probably the Home Secretary of the day or his advisors". (23)

Under the circumstances, nobody seemed to object to the identification of this particular defendant. However, there is a major issue involved here: it is hard to justify the anonymity of the perpetrators of some very serious offences indeed by virtue of their (sometimes technical) acquittal of a rape charge. This anomaly highlights once again the imperative of reforming rape law in the context of the rest of criminal law, and particularly of not creating a fundamental distinction between offences which, for all intents and purposes, are extremely similar. It cannot be argued with any credibility that the dividing line between attempted rape and indecent assault, for example, in terms of the damage they may inflict in the victim or indeed in terms of the defendant's intent, is a very clear or important one.

Critics of this Section of the Sexual Offences (Amendment) Act 1976, it is submitted, appear to have been vindicated. There was

little justification in the first place for defendants and complainants in rape cases to be treated in the same way with regard to anonymity. As has rightly been observed, there is no logic in arguing that being accused and acquitted of rape is any more damaging or stigmatising to the person involved than being similarly charged with murder or armed robbery. The implications of this anomaly have been compounded by its unforeseen impact on the identification of persons acquitted of rape but convicted of other offences which may be equally, if not more, serious. The Criminal Law Revision Committee's Report on Sexual Offences which was published in April 1984 recognises that anonymity for defendants in rape cases is an anomaly and recommends that the provision be repealed. It is to be hoped that legislative action will follow this proposal in the near future. (24)

Intent and recklessness

The controversy created by the case of DPP v Morgan and others and the issue of intent in rape have been discussed above (25). The Advisory Group on the Law of Rape, whose enquiry originated in the Morgan decision considered the matter in some depth. The Group concluded that the subjectivist stance of the decision was right in principle and moreover, argued that the most important although almost totally overlooked aspect of it lay in its implications for recklessness:

"For the first time it has been stated clearly and unambiguously that recklessness as to whether the woman was consenting or not was sufficient mens rea for conviction. This was a matter of very considerable significance, not only in strengthening the law relating to the crime of rape, but also in having very important wider implications for the criminal law as a whole, particularly in regard to crimes of personal violence".
(26)

In DPP v Smith (1961), the Law Lords held that a person would have the required intent to kill if a reasonable man, rather than the accused himself, realised that the other person's death was the probable consequence of his act (27). The decision was dubbed "the apotheosis of the law's reasonable man" (28), and as such provoked a storm of protest from academics, lawyers and even judges in other jurisdictions. When Lord Hailsham introduced a subjective element into the concept of intent in rape, it was part of a general trend of subjectivist thinking in the area of criminal responsibility: no person accused of a crime was to be convicted unless he himself, rather than a hypothetical reasonable man, was aware of the likely consequences of his actions. The combination of statute law in the shape of the Criminal Justice Act 1967 and the decision in Morgan marked the end of the era of objective criminal liability.

The dictionary meaning of "reckless" is careless, regardless, or heedless of the possible harmful consequences of one's acts. As far as an accused persons' state of mind is concerned, this may cover a whole range of possibilities from failing to give any thought at all to the risk of those harmful consequences, to being aware of their existence but deciding to ignore them. The question of criminal liability in this context is a complex one, particularly when the range of proscribed behaviour is considered. Should recklessness have the same meaning when applied to rape and driving, for example? The Law Commission's Report on the Mental Element in Crime considered this point and recommended that recklessness be given a standard definition for the interpretation of all criminal statutes (29). This was in substance approved by the Court of Appeal in R v Stephenson (1979) where it was

unequivocally laid down that the test used should be a subjective one:

"A person should be regarded as being reckless as to a particular result of his conduct if, but only if,-
 (a) He foresees at the time that the conduct might have that result and,
 (b) on the assumption that any judgment by him of the degree of risk is correct, it is unreasonable for him to take the risk of that result occurring". (30)

The essence of recklessness in subjectivist thinking is then the deliberate taking of an unjustified risk. A defendant who believes, for whatever reason, that no risk of specific harmful consequences exists is not considered reckless or criminally liable.

It was in this context that the Advisory Group on the Law of Rape recommended that a statutory definition of rape be included in any new legislation, to clarify both Morgan and the role of recklessness for the offence. It may be useful at this stage to repeat the definition contained in the Sexual Offences (Amendment) Act 1976:

"For the purposes of section 1. of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if -
 (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it;
 and
 (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it;
 and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly". (31)

The Act goes on to clarify the requirements regarding the accused's belief in consent:

"It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed". (32)

The following section will consider the impact of the new definition on the trial of rape offences, having regard to the Morgan decision thus incorporated in statute law as well as to the concept of recklessness.

The application of Morgan

Where a defendant pleads "not guilty" to a rape charge and claims that the complainant consented to intercourse with him, he may in addition claim that even if she did not consent, he genuinely believed at the time that she did. Whatever the jury's verdict in such a case, there is no way of establishing whether it was based on their finding about consent or about the defendant's belief in it. Thus, the full impact of the new statutory definition of rape with regard to the Morgan decision can only be evaluated in cases where the two issues are not confounded in this way. In such trials, the defendant accepts that the complainant had not consented at the time of the intercourse, but claims that he genuinely believed that she did. There were only two such trials in the present study, and both involved some consideration of the grounds on which the defendant's belief in consent was held. The facts of these cases are worth examining briefly.

In the first case the defendant, who had recently met the complainant, invited her out for a drink. During the course of the evening, he made some preliminary sexual advances to her which she clearly rejected. He seemed, at that stage, quite happy to accept this. Later on, however, as he was driving her home, he took her to a deserted place where, with considerable threats and violence, he

raped and assaulted her. At the trial, he gave evidence, and called his wife to substantiate it, that he was only able to gain sexual satisfaction when his partner appeared to refuse him. He also told the jury that from the moment he stopped the car and the complainant started to protest, giving the unmistakable impression that she was not consenting, he honestly thought that he had been lucky enough to stumble across a girl who played the game his way:

Defendant: I thought she agreed and pretended to be difficult. When I realised that she didn't agree it was too late". (Case 26).

The second case was no less extraordinary. The defendant (ironically, another Morgan) followed the complainant, a total stranger, from a bus stop with the intention of robbing her. He pleaded guilty to robbing her of a small sum of money and some jewellery. Having taken her property, he continued to threaten her with what she thought was a knife but turned out to be a piece of broken glass. The complainant spoke so little English that an interpreter was used at the trial. Her cross-examination started with counsel conveying the defendant's apologies to her for the distress he had caused. He firmly maintained, however, that at the time of the alleged offence he genuinely believed that she agreed to what took place. He told the jury that as he was robbing her, she said she did not have much money and all she could offer was herself. The complainant denied saying this, but in view of the fact that her English was so poor, the suggestion was that the defendant misunderstood her. As he said at his trial,

Defendant: When I was asked by the police whether I realised I had sex with her against her will I said yes. I meant that afterwards I thought it was rape. But at the time, when we were on the common and at the station, I didn't think it was. (Case 57)

The grounds on which the defendants based their belief in the

complainants' consent were undoubtedly somewhat out of the ordinary, and could be argued to be "unreasonable" by objective standards. The juries were clearly instructed that this was a matter which they should take into consideration, and that they should acquit if they thought the defendants genuinely believed that the complainants were willing. In the second case the judge told them to acquit if they felt that the complainant submitted in fear and the defendant failed to realise this. Both defendants were convicted, and neither of them appealed, an indication that defence counsel were satisfied that the judge's summing-up followed Morgan and was as favourable to their clients as possible.

Williams has asserted that the whole issue of mistake is only likely to arise in two specific circumstances, either when the defendant has been told a story by a third party, as in Morgan, or when he is drunk. (33) The two pertinent cases in this study do not fit into those categories, but lend support to the argument that the matter is unlikely to arise very frequently. The findings suggest that the decision in Morgan has not had the effect that many of its opponents feared, namely that every person accused of rape would only have to state his belief, however ridiculous its grounds, that the complainant consented in order to assure his acquittal. That defence, in its "pure" form, does arise from time to time, as Court of Appeal judgments indicate (34), but it has certainly not replaced consent as the chief issue in the majority of rape trials.

In the immediate aftermath of Morgan, the Court of Appeal applied that decision in R v Cogan and Leak (1975). This too was a case

where a husband (Leak) aided and abetted another man (Cogan) to have intercourse with his wife. Cogan appealed against his conviction for rape on the grounds that he believed that his victim was consenting. His conviction was quashed, following Morgan. Leak appealed on the grounds that if Cogan's, the principal offender's, conviction was quashed, his own could not stand. The Court of Appeal decided that this did not follow and upheld Leak's conviction, justifying the somewhat incongruous position as follows:

"The fact that Cogan was innocent of rape because he believed that she was consenting does not affect the position that she was raped ". (35)

Since then, the Criminal Law Revision Committee have recommended that the theoretical difficulties involved in that decision, which they deem to be fundamentally correct, be removed by legislation. (36)

There are indications, however, that Morgan has not transformed the law relating to intent and mistake in this context quite in the manner anticipated. Case law since then gives a somewhat confused and muddled picture of whether Morgan is still good law. The Court of Appeal has on a number of occasions insisted that the accused's belief in consent must be a reasonable one, and there has clearly been some reluctance to follow the Morgan precedent:

"The courts from time to time have shown a propensity to distinguish other offences from the common law concept of rape so as to avoid having to follow the reasoning in R. v Morgan". (37)

In his judgment in Morgan, Lord Hailsham stated that the issue as to belief was a question of great academic importance in the theory of English criminal law. Despite everything that had been said on the subject in 1975, a more recent judgment claims that the

decision in Morgan was clearly

"confined and intended to be confined to the offence of rape". (38)

Some doubt has been expressed as to the correctness of that view, and the principle that an unreasonable mistake is a defence has since been extended to the offence of indecent assault. (39)

The effect of post-Caldwell recklessness

To complicate matters further, a recent House of Lords decision has created havoc with the concept of recklessness. In considering an appeal in *R v Caldwell*, a case of arson under the Criminal Damage Act 1971, Lord Diplock restated the law by holding that a person is reckless

"as to whether or not any property would be destroyed or damaged, if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it". (40)

This statement unquestionably adds an objective element to the hitherto subjective definition of recklessness. The decision has been described as

"as much of a setback for the subjectivist cause as Morgan had been a triumph for it", (41) and as

"the worst of the House's decisions (not a few of which are infelicitous) in the last 20 years". (42)

The main criticism has been that the judgment goes too far and unjustifiably enlarges the scope of the criminal law. It effectively means that there may now be serious criminal liability simply for inadvertence to "obvious" risk in circumstances where the ordinary prudent person would not have been inadvertent and acted otherwise. This comes perilously close to criminal liability

for negligence which, as one legal commentator notes,

"has long been abhorred by eminent writers on the Criminal Law, and from which it had been thought that the Criminal Justice Act 1967, s.8, took us away". (43)

What are the implications of the Caldwell decision for rape? It has been suggested that it has put Morgan in doubt insofar as it seems to herald a return to an objective test:

"Whilst without consent a man stands to be convicted of rape, Morgan had established that an honest, even unreasonable, belief in consent may relieve an accused of criminal liability. Yet this landmark decision of the House of Lords in 1975 has been either confined or placed in doubt. It has been increasingly suggested that where mens rea is concerned its effect, rather than being that of a general principle, is limited to the crime of rape only". (44)

The specific application of post-Caldwell recklessness to rape was considered by the Court of Appeal in *R v Pigg* (1982). Lord Lane, delivering the judgment, made extensive reference to Caldwell, and, accepting it in principle, concluded as follows:

"Of course it is plain that that opinion cannot, so to speak, be lifted bodily and applied to rape. There has to be a modification in certain of the matters which are there dealt with. But, in the end, it seems to us that in the light of that decision, so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk she was not, or, that he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not". (45)

Concern has also been expressed about the application of the Caldwell decision to rape specifically, and about the implications of "objective" recklessness for that offence. Telling has argued that the decision in *R v Pigg* is tantamount to establishing a crime of negligent rape. He claims that while women need to be protected, the fact that

"a conviction for rape ... could follow if the accused never addressed his mind to the possibility that the woman

was not consenting ... gives rise to grave misgivings."
(46)

Discussions focussing on what is seen as an erosion of the accused's rights and as an extension of the offence to include a concept of recklessness containing objective elements conceal the main issue in this context, which concerns the appropriate basis for liability for rape. This hinges partly on the question of whether mens rea is best defined uniformly throughout the criminal law, and whether to claim an unreasonable mistake in rape in particular (whatever the position is for other offences) should protect a person from criminal responsibility. As Temkin argued,

"whether or not a man who honestly but wrongly and unreasonably believes in a woman's consent should be criminally liable raises a moral problem which is obscured by arguments which focus on the definition of the crime or the frequency with which such a defence is likely to be raised." (47)

The extraordinary cases which involved the use of a Morgan defence found in this study are clearly not the ones that present any real difficulty. The central question is whether the following types of beliefs should constitute a sufficient answer to a rape charge:

"(1) I know that the complainant is a 'slut'. I know for a fact that she regularly sleeps with my friends Tom, Dick and Harry to say nothing of numerous others. Of course, I did not believe her when she said 'no'.

(2) I met the complainant at a dance. She was wearing a mini-skirt and a transparent blouse with a plunging neckline. She drank a lot throughout the evening. She accepted a lift home from me. I took it for granted that she was out to have a good time. I did not believe her when she said 'no'.

Alternatively, the defendant might be a man who believes that most women really want to have sexual intercourse and their 'no' is but a sham or who has had sexual intercourse with the same woman in the past and therefore places no credence on her refusal". (48)

Such claims and beliefs are all too frequently heard at rape trials, although not usually as independent of consent: the

defendant's belief in the complainant's consent is unchanged at the trial despite anything she may have said, and his belief is almost a side issue to the main one of consent. The jury's prejudices in this regard often seem to match those of the defendant and it is likely that, in the present climate at least, they too will disbelieve that anyone wearing so-called provocative clothing could have said 'no' and meant it. Should culpability for rape turn on such beliefs?

It has been cogently and persuasively argued that it should not.

Temkin has suggested that

"the overriding objective which ... the law of rape should seek to pursue is the protection of sexual choice, that is to say, the protection of a woman's right to choose whether, when and with whom to have sexual intercourse". (49)

It is clear that no law can aim to do this if it permits a defence of mistake, either based on what someone else has told accused about the complainant, or his own prejudices which lead him to ignore her refusal in the circumstances referred to above, or on failing to entertain the possibility that she might not be consenting. If the law is to get away from its double-standard of sexual morality for men and women, which is clearly reflected in Morgan, and truly protect sexual choice for women, then logically, unreasonable mistake cannot be a defence to the charge.

It has been suggested that mens rea for each offence should depend on the nature of the conduct proscribed: whereas it may be unjust to require that a mistake be reasonable for certain offences, this is perfectly appropriate for rape (50). As Temkin has put it, with compelling simplicity:

"This is because it is possible for a man to ascertain whether a woman is consenting or not with minimal effort. She is there next to him. He has only to ask. Since to have sexual intercourse without her consent is to do her great harm, it is not unjust for the law to require that he inquire carefully into consent and, it may be added, process that information carefully as well". (51)

The legal decisions in DPP v Morgan , R v Caldwell and subsequently R v Pigg have been controversial for a variety of reasons.

Statutory intervention has been called for to reverse the effect of Caldwell (52), which by and large is seen as representing a step backward in the development of rational modern law. It is to be hoped, however, that any future consideration of the issue of mens rea will take into account the premise that requirements which are appropriate for one crime may not be so for others. For a just law of rape, it is essential to do away with the concept of unreasonable mistake as a defence and to require the defendant to address himself to the question of consent.

Impact on reporting and disposition

Having analysed the working of different elements of the Sexual Offences (Amendment) Act 1976, it now remains to consider its overall impact on the reporting and disposition of rape offences as reflected in official crime statistics. The problems in adopting this approach are only too clear. Published crime statistics do not reflect the "true" incidence of the offence and only provide information about the very few cases which reach the trial stage. It is accepted that the link between a measure designed to encourage women to report rape more readily and actual reporting behaviour cannot be evaluated in any reliable way by an examination of official statistics. A change in the yearly number of rapes

recorded by the police may be a reflection of a number of factors. It may mean an increase in the number of rapes that occur while the proportion of those that are reported remains constant. It could also reflect changes in police procedure and practice in this area. Alternatively, it could be that higher recorded numbers are an indication of the greater willingness of women to come forward when they have been raped, whatever the true incidence of rape in the community. This might be associated with provisions of the 1976 Act, particularly the virtual guarantee of anonymity and the potentially decreased likelihood of distressing cross-examination.

Similarly, changes in acquittal and conviction rates could be explained in a variety of ways. It may be that there has been a genuine change in attitudes and that, because of the amount of publicity the offence has been accorded in recent years, juries are becoming more sensitive to the problem of rape and perhaps view it with less scepticism than previously. They may also realise that a "guilty" verdict does not mean life imprisonment, and this could affect their decision. It could also be that an increased proportion of accused persons are pleading guilty, so that while the acquittal rate among "not guilty" pleas remains the same, the overall conviction rate is higher. Another possibility is that because evidence of the complainant's previous sexual experience may be withheld or not given in the detail that was previously the norm, juries are less likely to be persuaded by evidence which only serves to reinforce strongly held prejudices. We have seen in previous chapters that there is in fact a clear association between the jury's knowledge of the complainant's sexual experience and the verdict.

Thus, any change in the recorded number of rapes or in the disposition of rape offences reflected in published criminal statistics can be interpreted in a wide variety of ways. Changes which coincide with the passage of the 1976 Act can certainly not be attributed to new legislation without a good deal of caution. It is therefore with serious reservations that official statistics are being used as the basis of an assessment of the overall impact of the Act. Notwithstanding these reservations, if the Act has had any effect at all on the reporting and trial of rape offences, whatever the mechanics of such an effect, one would expect this to be reflected in official statistics. With this in mind, published statistics regarding rapes recorded by the police, and the outcome of court proceedings have been examined for a period of three years before and after the Act, in order to detect any trend pointing to a change. (53)

The Home Office recognizes that criminal statistics do not show the total amount of crime committed in England and Wales, as

"some offences go unrecognised or undiscovered while others for a variety of reasons are not reported to the police", and "offences recorded by the police therefore form only a proportion - and for some offences possibly a small proportion of the total crimes committed". (54)

Rape undoubtedly belongs to that latter category of crimes.

American studies indicate that between one in ten and one in twenty-five women report rape and sexual assault to the police (55), and there is much anecdotal evidence in this country too that rape is one of the most underreported serious crimes. The London Rape Crisis Centre reports that only 25% of the women they have been contacted by made a complaint to the police, and that this

percentage has remained constant since they started operating in 1976 (56).

A complaint to the police does not automatically figure in official statistics: crimes are only recorded if the police decide that there is prima facie evidence that the law has been broken. There is no way of knowing how many rape complaints in this category do not receive a crime report at all, but the processing of recorded incidents is revealing. A recent study in Scotland analysed the outcome of 196 reported incidents of sexual assault on the basis of police records and of the procurator fiscal's case papers. 22.4% of the complaints were eventually classified as "no crime"; 24% were unsolved; and no proceedings were taken in 15.8% of the cases. (57) The "no crime" rate found in that study for sexual assault is very much higher than that found by studies on crime in general (58). For the purposes of the Scottish research, the term "no crime" was used to describe the practice of

"amending initial crime reports to ensure that those which do not turn out to be criminal incidents after investigation are excluded, and do not appear in the records of official statistics concerning the number of crimes made known to the police". (59)

Statistics relating to the number of offences known to the police in England and Wales show a slow but steady increase with minor fluctuations of around 5% from year to year over the 1974-1979 period (60). The only exception to this trend was 1978, when a peak number of 1243 rapes were recorded - this represents an increase of 22% on the previous year. In the light of what happened in subsequent years, however, this increase cannot be conclusively attributed to the 1976 Act if we assume that any effect of this sort would be a lasting one. The number dropped by 6% in 1979, but

was still at a higher level than in any earlier year.

Unfortunately, a change in counting rules means that figures from 1980 onwards are not strictly comparable to previous years.

The clear-up rate (61) for rape offences was 77% in 1973. Although figures are not available for some crucial years after this (1974, 1975, 1976), published statistics seem to indicate that it has actually dropped over this period. In 1977, the next year for which figures are available, it was down to 70% and has remained around that ever since.

TABLE 2. Rape offences cleared up as proportion of offences known to the police, 1973-1979 (62)

<u>YEAR</u>	<u>% OFFENCES CLEARED UP</u>
1973	77%
1974	n.a.
1975	n.a.
1976	n.a.
1977	70%
1978	69%
1979	70%

The clear-up rate for rape offences has been consistently lower than for other serious offences: in 1979, for example, the only indictable offence with a lower rate was indecent assault against a female, at 62%. The average for sexual offences was 75%, while assault reached 88% and homicide, 93%. Thus, the clear-up rate of rape offences has not been affected by the 1976 Act, although there is some indication that it may have been decreasing since before 1976.

The proportion of persons committed for trial from Magistrates' Courts to Crown Courts has been steady around 90% of those who

appear before Magistrates' Courts:

TABLE 3. Persons committed for trial at Crown Courts, 1974-1979
(62)

<u>YEAR</u>	<u>PERSONS DEALT WITH AT MAGISTRATES' COURTS</u>	<u>PERSONS COMMITTED FOR TRIAL AT CROWN COURTS</u>	<u>TOTAL</u>
1974	51 (9%)	489 (91%)	540 (100%)
1975	51 (9%)	495 (91%)	546 (100%)
1976	54 (10%)	475 (90%)	529 (100%)
1977	29 (6%)	430 (94%)	459 (100%)
1978	55 (9%)	537 (91%)	592 (100%)
1979	61 (9%)	596 (91%)	657 (100%)

There has, however, been a significant change in the way in which persons are dealt with by Magistrates' Courts. The percentage of cases not proceeded with, withdrawn or dismissed has increased from 51% in 1974 to 89% in 1979. Conversely, the proportion of persons found guilty by Magistrates' Courts has fallen dramatically: the conviction rate was at its peak of 49% (63) in 1974, but started to decrease in 1977, to reach an all-time low of 11% in 1979:

TABLE 4. Outcome of cases dealt with by Magistrates' Courts, 1974-1979 (62)

<u>YEAR</u>	<u>NOT PROCEEDED WITH*</u>	<u>FOUND GUILTY</u>	<u>TOTAL</u>
1974	26 (51%)	25 (49%)	51 (100%)
1975	36 (71%)	15 (29%)	51 (100%)
1976	30 (56%)	24 (44%)	54 (100%)
1977	22 (76%)	7 (24%)	29 (100%)
1978	46 (84%)	9 (16%)	55 (100%)
1979	54 (89%)	7 (11%)	61 (100%)

[* Includes proceedings discontinued, persons discharged under s.7 of Magistrates' Courts Act 1952, and charges withdrawn or dismissed].

Although the downward trend for convictions may have begun before 1977, it has been most marked and consistent since that date. It is difficult to interpret this as an effect of the 1976 Act, and is

taken merely to indicate that the downward trend in Magistrates' Courts' convictions present before 1976 has not been reversed or even stabilised by the provisions of that Act.

The number of persons actually tried for rape offences at Crown Courts falls far behind the number reported to the police as having allegedly committed the offence. As there is usually a long delay in the trial of offences committed to Crown Courts, the number of persons tried each year has been looked at as a percentage of rape offences recorded in the previous year. This proportion has been fairly steady around 40% throughout the study period:

TABLE 5. Persons tried as a proportion of offences recorded in the previous year, 1974-1979 (62)

<u>YEAR:</u>	<u>PERCENTAGE TRIED:</u>
1974	41%
1975	39%
1976	41%
1977	38%
1978	39%
1979	40%

The conviction rate for rape has been consistently lower than that for other serious offences. However, the 1976 Act cannot be said to have influenced this in any significant way. The rate went from 77% in 1974 to its lowest of 71% in 1976 and has since gone back to near its pre-1976 level.

TABLE 6. Outcome of trials at Crown Courts, 1974-1979 (62)

<u>YEAR</u>	<u>PERSONS FOR TRIAL</u>	<u>NO TRIAL</u>	<u>PERSONS ACQUITTED</u>	<u>PERSONS CONVICTED</u>
1974	412	3	91 (22%)	318 (77%)
1975	409	1	87 (21%)	321 (78%)
1976	429	-	123 (29%)	306 (71%)
1977	421	2	113 (27%)	306 (73%)
1978	396	-	86 (22%)	310 (78%)
1979	491	3	117 (24%)	371 (76%)

There is no evidence to suggest that the 1976 Act has had anything to do with these yearly fluctuations: the observed differences are not marked, and the start of the fluctuations did not coincide with the passing of the Act.

It is not clear how far the low conviction rate for rape offences is a reflection of the fact persons accused of rape are far less likely to plead "guilty" than those accused of other serious offences. Figures relating to the relative proportion of "guilty" and "not guilty" pleas have only been published for 1976, but the figures are revealing. Of the indictable offences, rape had the highest "not guilty" plea rate at 60%. The corresponding figure was 34% for homicide, 28% for all sexual offences, and 12% for burglary. (64)

Sentencing practice was not expected to be influenced by the 1976 Act. The proportion of persons convicted sentenced to immediate imprisonment has steadily increased since well before 1976, and has gone on doing so since: it went from 71% in 1974 to 79% in 1979:

TABLE 7. Persons sentenced to immediate imprisonment as a percentage of those convicted, 1974-1979 (62)

<u>YEAR</u>	<u>PERCENTAGE IMPRISONED</u>
1974	71%
1975	73%
1976	77%
1977	77%
1978	75%
1979	79%

The average length of imprisonment has been very steady over the years: the largest group, around a third of those imprisoned each year, receive sentences of 2-3 years, while between 2 and 3% are sentenced to life imprisonment. It is interesting to note that the yearly number of those receiving life sentences has to date always been in single figures:

TABLE 8. Length of sentence, 1974-1979 (62)

<u>SENTENCE:</u>	<u>YEAR:</u>					
	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
<u>6 mo + under</u>	2 1%	4 2%	4 2%	5 2%	8 3%	4 1%
<u>Over 6 mo, under 1 yr</u>	7 3%	4 2%	8 3%	7 3%	5 2%	5 2%
<u>Over 1 yr, up to 2 yrs</u>	28 12%	35 15%	27 11%	17 7%	27 11%	41 4%
<u>Over 2 yrs, up to 3 yrs</u>	75 33%	58 24%	73 31%	71 30%	71 30%	83 28%
<u>Over 3 yrs, up to 4 yrs</u>	49 22%	43 18%	41 17%	53 22%	45 19%	49 16%
<u>Over 4 yrs, up to 5 yrs</u>	28 12%	50 21%	38 16%	47 20%	39 16%	51 17%
<u>Over 5 yrs, up to 7 yrs</u>	17 8%	34 14%	34 14%	23 10%	26 11%	34 11%
<u>Over 7 yrs, up to 10 yrs</u>	9 4%	6 2%	8 3%	7 3%	8 3%	18 6%
<u>Over 10 yrs , excl. life</u>	2 1%	2 1%	- -	2 1%	4 2%	5 2%
<u>Life</u>	8 4%	5 2%	5 2%	6 3%	6 3%	7 2%
TOTAL NUMBER:	225	241	238	238	239	297

A recent editorial in the New Law Journal comments that

"Perhaps one of the most disturbing facts about rape is the large number of rapes that go unreported. That more than anything serves as an example of the appalling inability of the criminal justice system to deal with the problem." (65)

Despite high expectations in this regard, the Sexual Offences (Amendment) Act 1976 has had little impact on the reporting, processing and trial of rape offences. Although their anonymity is by and large protected, women have not been encouraged to come forward and report rapes. The dominant flavour of rape trials has

remained unchanged in spite of evidential restrictions. Conviction rates are still considerably lower than for any other serious offence. This is partly due to the inadequate implementation of crucial parts of the 1976 Act, and partly to the fact that the new legislation was not sufficiently radical and comprehensive to bring about significant change.

Rape law reforms have been implemented in a number of other jurisdictions, in particular in the USA, Canada and Australia. Some of these reforms have been limited in scope and are similar to the 1976 Act, while others went beyond procedural reform and brought about fundamental changes in the substantive law of rape. The following chapters will consider law reform and its impact in other jurisdictions, and the scope for future law reform in this country in the light of experience elsewhere and of the Criminal Law Revision Committee's recent Report on Sexual Offences.

FOOTNOTES TO CHAPTER SEVEN

- (1) Sexual Offences (Amendment) Act 1976, S.4(2)
- (2) Sexual Offences (Amendment) Act 1976, S.4(4)
- (3) Sexual Offences (Amendment) Act 1976, S.4(3)
- (4) GEIS, G. and GEIS, R.: "Anonymity in rape cases", Justice of the Peace, Vol.141, p.293, May 21, 1977
- (5) ibid., (1977), p.293
- (6) ibid., (1977), p.293
- (7) SOOTHILL, K. and JACK, A.: "How rape is reported" New Society, Vol.32, No.663, 19th June 1975, p.704
- (8) H.C. Debates, Vol.919, Cols.1686-1678, 1976
- (9) The Times, 7th February, 1978
- (10) Personal communication with the Press Council, 1983
- (11) HAY, A., SOOTHILL, K. and WALBY, S.: "Seducing the country by rape reports" New Society, 31st July, 1980, p.214
- (12) RAPE COUNSELLING AND RESEARCH PROJECT: Third Report, London, October 1982, p.16
- (13) HAY, A., SOOTHILL, K., and WALBY, S.: op.cit., (1980) p.215
- (14) H.C. Debates, Vol.911, Col.1927, 1976
- (15) H.C. Debates, Vol.911, Col.1926, 1976
- (16) Sexual Offences (Amendment) Act 1976, S.6(1)
- (17) Sexual Offences (Amendment) Act 1976, S.6(2)
- (18) Sexual Offences (Amendment) Act 1976, S.6(3)
- (19) GEIS, G, and GEIS, R.: op.cit., (1977), p.293
- (20) Western Daily Press, March 1st, 1980
- (21) Justice of the Peace, January 26th, 1980, p.47
- (22) Excluding ten defendants, acquitted because the prosecution offered no evidence (N=8) or retried because the jury failed to reach a verdict at the initial trial (N=2)
- (23) Daily Telegraph, March 3rd, 1979
- (24) CRIMINAL LAW REVISION COMMITTEE: Fifteenth Report: Sexual Offences, London, HMSO, 1984, para. 2.93
- (25) See Chapter 2.

- (26) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, HMSO, Cmnd. 6352, Para.77, 1975
- (27) DPP v SMITH (1961) A.C.290
- (28) BLOM-COOPER, L. and DREWRY, G.: Final appeal: a study of the House of Lords in its judicial capacity, Oxford, Clarendon Press, 1972, p.276. This also contains a detailed discussion of the case of DPP v Smith
- (29) THE LAW COMMISSION: Report on the mental element in crime, Report No. 89, London, HMSO, 1978
- (30) R v Stephenson (1979) 2 All.E.R. at 1201
- (31) Sexual Offences (Amendment) Act 1976, S.1(1)
- (32) Sexual Offences (Amendment) Act 1976, S.1(2)
- (33) WILLIAMS, G.: Textbook of Criminal Law, Stevens and Sons, London, 1978, p.103-104
- (34) For example, R v Stapleton (1975) This case is unreported, but is discussed in TONER, B.: The facts of Rape London, Arrow Books, 1982; R v Clark (1975)(unreported); R v Cogan and Leak (1975) 3 WLR 316
- (35) R v Cogan and Leak (1975) 3 WLR 316
- (36) CRIMINAL LAW REVISION COMMITTEE; op.cit., 1984, para. 2.44
- (37) R v Kimber (1983) 1 WLR at 1122
- (38) R v Pheekoo (1981) 1 WLR 1117
- (39) R v Kimber (1983) 1 WLR at 1122
- (40) R v Caldwell (1981) 1 All.E.R. 961
- (41) TEMKIN, J.: "The limits of reckless rape" Criminal Law Review 1983, p.6
- (42) ALLDRIDGE, P.: "Five pillars of wisdom - or salt? Lawrence and Caldwell in the House of Lords" Justice of the Peace, Vol.145, April 18th, 1981, p.231
- (43) ALLDRIDGE, P.: op.cit., (1981), p.229
- (44) TELLING, D.: "Rape - consent and belief" Journal of Criminal Law, Vol.47, 1983, p.139
- (45) R v Pigg (1982) 1 WLR at 772
- (46) TELLING, D.: op.cit., (1983), p.136
- (47) TEMKIN, J.: op.cit., (1983), p.14

- (48) ibid., p.15
- (49) TEMKIN, J.: "Towards a modern law of rape" Modern Law Review, Vol.45, 1982, p.401
- (50) PICKARD, T.: "Culpable mistakes and rape: relating mens rea to the crime" 30 University of Toronto Law Journal, 75, 1980
- (51) TEMKIN, J.: op.cit., (1983) p.15
- (52) See for example ALLDRIDGE, P.: op.cit., (1981) and TELLING, D.: op.cit., (1983)
- (53) The Sexual Offences (Amendment) Act 1976 came into force at the end of December 1976, so that any changes which may be associated with its provisions would have been recorded in Criminal Statistics for 1977 and subsequent years.
- (54) Criminal Statistics for England and Wales, HMSO, London, 1979
- (55) CLARK, L., and LEWIS, D.: Rape: the price of coercive sexuality, Toronto, Toronto Women's Press, 1977
- (56) RAPE COUNSELLING AND RESEARCH PROJECT: op.cit., (1982)
- (57) CHAMBERS, G. and MILLAR, A.: Investigating sexual assault, Edinburgh, HMSO, 1983, p. 10
- (58) BOTTOMLEY, K. and COLEMAN, C.: Understanding crime rates, London, Gower, 1981
- (59) CHAMBERS, G. and MILLAR, A.: op.cit., (1983) p. 38
- (60) See Chapter 1, Table 1.
- (61) The "clear-up rate" is defined as follows: "An offence recorded by the police is said to be cleared up if a person has been arrested, summoned or cautioned for the offence; if it is ascertained that the offence was committed by a child under the age of criminal responsibility; if the offence is taken into consideration by the court in sentencing an offender found guilty on another charge; or if, for various technical reasons, a person known or thought to be guilty of the offence cannot be prosecuted or cautioned". Criminal Statistics for England and Wales, London, HMSO, 1979, p.57
- (62) Source: Criminal Statistics for England and Wales, London, HMSO, 1973 to 1979
- (63) This is as a percentage of cases dealt with by Magistrates' Courts and not committed to a Crown Court for trial.
- (64) Criminal Statistics for England and Wales, London, HMSO, 1976, p.45
- (65) Editorial, New Law Journal, Vol. 132, No.6077, Nov. 4th, 1982, p.1017

PART IV. DISCUSSION AND CONCLUSIONS

CHAPTER EIGHT. LAW REFORM IN OTHER JURISDICTIONS

Over the last ten years or so, numerous legal and academic commentators in the U.S.A., Canada and Australia have drawn attention to the inadequacies of the legal system in its dealings with rape. (1) Most of the criticism has been directed at the admissibility of evidence of the alleged victim's sexual behaviour prior to the rape with persons other than the accused. It has invariably been argued that this is irrelevant to credit, rarely relevant to the issue, highly prejudicial for the prosecution's case and humiliating for the woman concerned. In many cases, the expression of such concern has been followed by the setting up of various groups and commissions to give the problem detailed consideration (2), and subsequently by legislative reform. The purpose of this chapter is to consider the types of legislative reform passed in the last decade in the U.S.A. and Australia (3), as well as their effectiveness in bringing about the intended changes.

Rape laws in the U.S.A.

The trend towards legal reform in the U.S.A. began in the early 1970s. Legislative change there has been attributed to the efforts of the anti-rape movement, and described as one of its major achievements (4). Almost every state has now modified its rape laws in recognition of their prior inadequacy, and with a view to encouraging more victims to report the offence (5). Laws vary greatly from state to state, both in their substance and complexity, but one of the central provisions everywhere is to

limit the defence attorney's ability to enquire into the victim's past sexual conduct during the trial.

In a number of states, "rape shield" laws have been passed in the context of wider reforms. The Michigan Sexual Conduct Law (1975), often referred to as a model for legislative change in other states, has probably been most widely publicised (6). Having identified specific law reform aims in this area, Michigan legislation attempts to deal comprehensively with sexual assaults on the basis of a number of guiding principles.

It was felt that rape law should reflect a community consensus that the offence should be criminalised and result in deprivation of liberty and, furthermore, that the law should aim to establish a scheme which ensures, as far as possible, the certainty of conviction for offenders:

"Working within the present system, it is clear that the certainty of punishment is the key - the most significant deterrent". (7)

The new law also aimed to protect the victim of crime from further victimization by the legal process itself. As the statute's principal drafter commented,

"There is little a criminal statute can do to protect a victim who reports a crime from harrassment by the accused (if he is out on bail) or his friends, from suspicion and ostracism by the victim's family and friends, from curiosity seekers and muck-rakers. But a statute can protect a victim from harassment and invasion of privacy at the trial." (8)

The main provisions of Michigan reform aimed at achieving this third goal were the redefinition of the resistance standard and changes in the rules of evidence as to the admissibility of sexual history. (9)

In addition to this, the Michigan legislation brought in a number of other, sometimes controversial, reforms. It made sexual assault law sex-neutral, in other words, allowing for men and women both to be offenders and victims. It also defined degrees of sexual assault, thereby doing away with the previously confusing overlap between offences such as rape, gross indecency, etc. It no longer requires that the use of physical force be proved in order to secure a conviction. Michigan legislation withdraws the immunity of husbands from rape prosecution where the couple are living apart or where one of them has filed for divorce. Finally, it does away with the need for corroboration which was previously required in rape cases.

Under its old law, Michigan was in the same position as most other jurisdictions at that date with regard to admitting evidence of the complainant's prior sexual activities with persons other than the defendant: the judge had unfettered discretion in whether and how far to allow this.

The reform removes that discretion and substitutes a statutory prohibition which, the law's supporters argue,

"does not unduly prejudice the defendant, does not interfere with the defendant's rights, but merely assures that highly inflammatory and arguably irrelevant matters will not be injected. The reform does take away from defendants in rape cases an opportunity not available to defendants in any other case to escape punishment by the strategem of smearing the victim's reputation and making her previous personal life the key and deciding issue in the case. But the reform does not deny to rape defendants any opportunity now accorded persons charged with other crimes". (10)

The emphasis is thus in making rape law provisions similar to those

of other criminal law, rather than singling out rape for special treatment. This is what the relevant section of the new law provides:

"(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease". (11)

In other words, the statute expressly prohibits evidence of sexual past with two very specific exceptions which are subject to the judge's decision in each case. The constitutionality of this change in the law has been challenged in the Michigan Court of Appeals, and no final statement has as yet been made of the implications of such decisions. Critics have expressed concern that the new laws infringe on the Fourteenth Amendment and the Sixth Amendment rights of confrontation and cross-examination (12). One defendant at least has contended that his right to confront adverse witnesses was denied when evidence of the complainant's sexual activity with third persons was excluded (13). So far, the majority of judges faced with making the decision for the Michigan Court of Appeals seem to have upheld the constitutionality of the reform. However, as Nordby notes,

"opposing considerations are still surfacing and being mulled over by appellate judges, some of whom are surely postponing final judgment until they are presented with more varied fact situations... In sum, the law is still in flux. In camera determination, with more flexibility may be required. But courts are clearly committed to preserving the legislative policy except in extreme circumstances" (14).

The Michigan reforms have been subject to a major evaluation study carried out by the University of Chicago, with a grant from the US National Center for the Prevention and Control of Rape (15). The aims of the research were

- (a) to describe procedures used to handle sexual assault cases in the criminal justice system in Michigan; and
- (b) to examine the impact of Michigan's Criminal Sexual Conduct Statute.

A major component of this research was the analysis of statistical crime data, but in addition to this there were intensive interviews with those responsible for the implementation of the new law. The researchers wanted to identify changes in the report, arrest and conviction rates which could be attributed to the new law, as well as changes in the amount of discretion exercised by those in the criminal justice system, changes in the victim's experience, and in the types of individuals protected by the law. Structured interviews were carried out with a fairly large number of judges, prosecutors, defence attorneys, police officers and rape crisis centre staff with experience of sexual assault cases before and after the new law.

As far as statistical analyses of crime figures go, there was no significant difference in rape reports before and after law reform. There has been instead a continuing trend of increase over time, which respondents in the study attributed to social change rather than to the specific effects of law reform, or indeed to an absolute increase in violent crimes. The majority felt that a change in public attitudes towards rape was one of the most

important influences on reporting trends. A significant finding was that arrests since law reform have been increasing at a faster rate than reports. Paradoxically, interviews with police and prosecutors reveal that there is still more doubt about victim credibility and false complaints for sexual assaults than there is for other violent crimes.

An increase in conviction rates also seems related to the new law. There has been a significant increase in convictions as charged and, correspondingly, a reduction in convictions for lesser offences after law reform. Respondents (who may or may not be correct about their perceptions relating to the role of legal change in influencing such outcomes of the criminal process) largely attributed increased convictions to the provision of the new law which prohibits sexual history evidence. Others, however, felt that these changes were due to other innovations, such as the increased clarity of the law and the degrees of sexual assault introduced by the new legislation.

The investigators were also interested in evaluating victims' experiences with the law before and after reform. Somewhat curiously, however, they sought their answers to this question in interviews with the various professional groups mentioned above, rather than with the victims themselves. The response was highly positive. As Nordby reported,

"According to 77% of our respondents, the victim's experience in the criminal justice system is less traumatic under the new law. Forty-three percent of these cited the prohibition on evidence related to past sexual history as the most important factor; 19 percent felt that a change in attitudes towards women and the crime of rape contributed most importantly to the improvement; and 13 percent said that crisis centre support was crucial in

helping to make the experience less onerous. Only three percent of all respondents stated that the victim's experience had actually deteriorated under the new law". (16)

One area that this research has not addressed is the implementation of the new law in the courtroom, even though some feeling emerges from interviews that all is not well on this front. Respondents report that many aspects of criminal justice processing are left untouched by the law:

"Despite specific prohibitions on sexual history evidence written into the law, respondents report judges often rule this evidence admissible. They rarely take advantage of the provision of the law to hold in camera hearings to rule on the admissibility of this evidence." Furthermore,

"Although respondents report the law has limited the extent to which judge's discretion can control the outcome of a trial, a majority report that judges can still influence the outcome (through their demeanor or through rulings on admissibility of evidence)" (17).

In spite of these limitations, there are strong indications that the Michigan law has brought about substantial improvements. As Nordby commented,

"The law works, but possibly not as well as it could - or should". (18)

Much of its success is attributed to sexual history evidence restrictions which are more stringent than in most other jurisdictions and leave very little to the judge's discretion. However, it should be noted that the impact of law reform may, at least in part, be explained by one of the other major innovations embodied in the Criminal Sexual Conduct Statute.

In other states, law reform has been less comprehensive and rather more similar to the English legislation of 1976. It has sometimes taken place in the context of one or two of the changes brought about in Michigan, but more often, law makers have concentrated on

the issue of restricting the admissibility of sexual history evidence alone.

The diversity of provisions enacted in this respect in the various states of the U.S.A. is somewhat bewildering. Some distinguish between the admissibility of sexual history evidence to impeach the complainant's credibility and to go to the issue at the trial. Different types of evidence are covered by different statutes, some referring to specific sexual acts and others, to evidence of reputation. One provision that most of them have in common is that, occasionally with minor restrictions, they allow evidence of the complainant's sexual experience with the accused. Another class of evidence which is almost invariably allowed is that introduced to prove the source of forensic evidence, or pregnancy, and similar matters, which may arise when the defendant denies having had intercourse with the complainant. Some states impose time limits, usually of one year, and bar any evidence of sexual character before that time. As one commentator observed, some of these variations

"present practical or even constitutional problems. Unhappily, many reform efforts, well-meant but ill-conceived, pose more dilemmas than they resolve".
(19)

The most important differences in law reform efforts between the various states undoubtedly arise from the procedures adopted for the exclusion of sexual history evidence, which range from virtually total prohibition to unfettered judicial discretion. We have seen how strictly exclusionary Michigan's legislation is. Another example of that end of the spectrum is Louisiana, where the use of all evidence of the woman's prior sexual conduct or reputation for chastity is banned,

"except for incidents arising out of the victim's relationship with the accused". (20)

At the other extreme is Texas whose provisions are not dissimilar to those of the Sexual Offences (Amendment) Act 1976, and where sexual history evidence of any variety whatsoever is admitted if and to the extent that the judge believes its probative value to exceed its prejudice. (21)

Another popular version of the discretionary approach is that adopted by New York, among others; this first states a general rule of exclusion, then lists specific exemptions and ends with a catch-all provision allowing in any evidence

"determined by the court...to be relevant and admissible in the interests of justice". (22)

In fact, the majority of the new statutes adopt this type of formula which ensures that discretion remains firmly with the judiciary. This may partly be due to the fact that when faced with the task of forecasting every possible case where the admission of sexual history evidence might be just and appropriate, legislators have tended to take the easier option by deciding on discretion as the best course. If the law does no more than advise the judge to balance relevance against prejudice in making these decisions, there can certainly be no suggestion that the defendant's rights are being eroded. But, as Berger rightly observes,

"there is a difference between the law in action and the law on the books. That is, although legislatures may enact statutes that make certain provisions, it does not necessarily follow that those specifications will be precisely followed by law enforcement agencies, the prosecutor's staff, or judges". (23)

It is somewhat surprising that the impact of the wide range of reforms introduced in the U.S.A. in recent years has not been more systematically monitored. As Deming and Eppy have argued,

"The expectations of reformers can be developed into a series of testable hypotheses. First, the more restricted the admissibility of evidence on prior sexual conduct, the less likely are criminal justice agents to question the credibility or non-consent of the victim. Second, the formal sanctions of the law with respect to offenders will be more effective: a larger percentage of cases will involve guilty pleas; and a larger percentage of cases will result in conviction, and conviction on rape charges. Third, the certainty of punishment will increase, but the severity of sentences will depend on the penalty structure of the new laws".(24)

Apart from Michigan, California is the only state where a large scale evaluation study has been carried out following law reform. The Robbins Rape Evidence Law there expressly preserves the defendant's right to attack the complainant's credibility. It is, however, stringent in excluding proof of sexual behaviour to show consent. It falls somewhere in the middle of what have been termed "defendant oriented" and "victim oriented" reforms. At the same time, California repealed the mandatory cautionary instruction to the jury, the equivalent of our corroboration warning.

The new law adds a section to the Evidence Code which limits the conditions under which a victim's prior sexual history can be admitted in court to question her credibility as a witness. The defence must offer written proof of the relevance of prior sexual behaviour in a hearing out of the presence of the jury, and the court then determines what evidence may be admitted, the nature of the questions allowed, and other similar matters. The law is more restrictive with regard to such evidence when it is brought in to show consent: opinion evidence, and evidence of specific instances of sexual conduct are not admissible to prove consent, with the exception of previous sexual relations with the defendant. The jury is in effect no longer permitted to infer consent from prior sexual conduct with persons other than the defendant.

The processing of rape cases before and after reform throughout the criminal justice system was compared, as well as the processing of rape and other criminal cases over the same period to identify changes which were not attributable to rape law reform. The authors were looking for statistically significant changes in the processing of cases after law reform, in terms of increased reporting, percentage proceeding to superior court trial, percentage plea-bargaining, percentage found guilty of the offence originally charged, penalties imposed and other such variables.

Their reasons for looking at the impact of law reform from this perspective were based on their expectations regarding the far-reaching potential effects of changes in the law of evidence:

"Although these changes relate to evidence of the victim's consent and credibility in a rape trial, we hypothesize and test for ramifications of these changes throughout the criminal justice system. The number of arrests which result in court cases is inversely proportional to the costs involved in prosecution. For the victim, the psychological costs of prosecuting a rape case should be reduced after legal change; therefore, a larger percentage of victims are expected to prosecute. As the victim's prior sexual conduct becomes less relevant for court proceedings, the formal sanctions of the law with respect to offenders will become more effective. It is expected that the disposition of rape cases will occur at a later point in the criminal justice system, that the charges at disposition will be more serious, and that sentences will be more severe". (25)

Rather disappointingly, no statistically significant changes were found in rape case processing after the evidence law reform.

However, when both evidence law reform and the change in the cautionary instructions were in force, the researchers' hypotheses that a higher proportion of offenders would plead guilty at the Superior Court level, and that sentences would be higher, were confirmed. A number of other hypotheses were not supported by the

findings. A further complication was that changes in rape case processing varied between the four counties included in the study and all in all, the results were inconclusive.

In assessing directions for future research, the investigators make the crucial point that legal changes and the implementation of those changes by the criminal justice agencies should be clearly distinguished from one another. Even if this merely involved structured and unstructured interviews with relevant criminal justice personnel, as these researchers recommend, this would undoubtedly contribute to a better understanding of the interaction of law and its operationalization.

This particular piece of evaluative research, based as it is on complex statistical analyses of criminal justice data, may be criticised on two fronts: firstly, it fails to investigate the use of discretion by the courts, and consequently to shed any light on how the law is being implemented by judges and various other professionals at a lower level of case processing. Secondly, it seeks to analyse the impact of law reform by relying on a series of somewhat tenuous links which may or may not be empirically justified. The whole research is based on the assumption that the law is being adequately implemented. Evidence from other sources, as we shall see below, shows that discretionary legislation of the sort that exists in California is unlikely to be implemented in the impartial and uniform way that the spirit of the law assumes.

Several researchers concluded that there is little difference between conviction rates for rape in states with "traditional" rape

legislation, and states where substantial reforms have been enacted (26). But perhaps the biggest empirical blow to the effectiveness of discretionary legislation comes from a study by Borgida and White. They conducted a large scale jury simulation experiment in order to examine the impact of legal reform on inferential processes made by the jury, under "common law", "moderate reform" and "radical reform" legislatures:

"As predicted, only the Radical Reform Rule, when applied to an Improbable Consent fact pattern [i.e. where various features of the facts of the case are unlikely to suggest victim consent or contributory behaviour to jurors] seems to restrict the inference of victim consent, enhance victim credibility, and increase the likelihood of conviction. A particularly distressing aspect of this pattern ..is that the impact of prior sexual history evidence with Moderate Reform and Common Law Rules in an otherwise Improbable Consent case is apparently detrimental to the prosecution's case." (27)

Thus, the effect of American reforms, with the possible exception of Michigan, is unclear. Their impact has rarely been monitored, and where it has, evaluation has been based on crime statistics rather than on court proceedings and judicial decision-making. Because many of the new statutes dealing with sexual history evidence were passed at the same time as other related legal reforms, it is also difficult to distinguish the effect of their different components. Nevertheless, there is now increasing agreement that discretionary legislation has not had the hoped for effect in bringing about major changes in the criminal justice system's dealings with rape. Even the supporters of discretionary provisions concede that courts may be far too ready to assume that any past sexual activity by a woman makes her more likely to consent to any sexual activity. There is clearly a genuine problem involved in charting a course between inflexible legislative rules and totally unfettered judicial discretion, and it may be that

reforms such as those implemented in Michigan, at least on paper, go too far. However, as Berger notes,

"Lack of empathy and understanding manifested by judges presents the strongest counterargument against making the conservative, largely male judiciary primarily responsible for reform. Moreover, shield laws not only serve to insulate victims against irrational or biased rulings; they also aim to increase uniformity and hence predictability in practice. For these reasons one may favour specific provisions that leave little to the courts' predilections". (28)

Australian reforms

Most of the Australian states introduced very similar legislation to the Sexual Offences (Amendment) Act 1976 around the same time. By and large, the Australian statutes differ from the American ones insofar as, with the exception of New South Wales which will be discussed below, reforms of any significance were only introduced with respect to the rules of evidence about the complainant's prior sexual experience.

The reports of the various commissions which looked into this area in a number of states differed markedly from the Heilbron Committee's recommendations here. The Victorian report, for example, expressed a great deal of concern with false allegations of rape and the imperative need to protect defendants from these. (29) It was also felt, in sharp contrast to Heilbron, that sexual experience with third parties was indeed relevant to a woman's credibility. The Commissioners put forward the somewhat archaic argument that where a person's behaviour goes against conventional norms, which they felt included abstention from extra-marital sexual intercourse, one is right to automatically question their credibility as they may be just as inclined to disregard other

conventional norms such as telling the truth in a court of law. One wonders why they did not recommend that witnesses in all criminal cases should be questioned about their previous sexual experience on those grounds. The Tasmanian report also found that Heilbron went too far, and largely accepted the proposals of the Victorian Commission. They strongly favoured a scheme where "the discretion of the judge would not be unduly fettered". (30) As Temkin observed,

"Thus, the discretionary schemes proposed in Victoria, Tasmania and New South Wales may be said to have been born out of a combination of suspicion, hostility and indifference towards women who complain of rape. The Heilbron committee, by contrast, which was unequivocal in its sympathy for the rape victim, favoured legislation which would have left the judges with very limited scope to admit sexual history evidence. The legislation which was to emerge from sources so disparate proved, however, to be remarkably similar". (31)

Legislation in various states is far from consistent, and its actual terms vary considerably. This in itself has been criticised by O'Connor who noted that while before reform, the common law applied throughout Australia,

"there are now, in law, three different definitions of rape in Australia - the common law, the South Australian and the Victorian variations. The New South Wales Report proposes another variant. It is clearly arguable that reform of the substantive law is necessary but without some centralisation the result has been duplication of activity and a confused national picture." (32)

The types of offences to which the legislation applies vary from state to state, as do the proceedings to which the legislation applies. Evidence relating to the complainant's prior sexual history with the accused remains unaffected by the new provisions. Evidence of prior sexual conduct is controlled in very different ways, although all but New South Wales adopt an essentially discretionary approach. Tasmania and South Australia exclude such evidence if it is only relevant to credibility but otherwise leave

the question to the judge, who may rule it in if he finds it,

"in all the circumstances of the case, justified". (33)

The other four states exclude evidence of sexual reputation but not evidence relevant to credit. The Victorian legislation, for example, excludes without exception cross-examination or evidence about "the general reputation of the complainant with respect to chastity". (34) Sexual experience with men other than the defendant may be admitted if the court "is satisfied that the evidence has substantial relevance to facts in issue", or if it is a proper matter for cross-examination as to credit. Queensland requires that admission be "desirable in the interests of justice". (35) The criterion of admissibility in Western Australia, as in Victoria, is "substantial relevance" to the main issue or to credit, but the qualified prohibition is wide ranging and includes evidence of the complainant's reputation, disposition or indulgences in sexual matters. (36) New South Wales has totally prohibited the admission of sexual conduct evidence subject to a number of exceptions which relate to surrounding circumstances, a prior relationship with the accused, the issue of identity, a specific motive for false complaint (to explain pregnancy or sexual disease) and the rebuttal of prosecution evidence. (37) The following sections will discuss in more detail the various Australian provisions as well as their interpretation and impact in recent years.

South Australia

The shortcomings of the discretionary approach to sexual history legislation are clearly illustrated by the implementation of the Evidence Act Amendment Act of South Australia which was passed in

1976. To begin with, this was far from being a particularly radical piece of legislation, and has been criticised for being muddled and confusing (38). It provides that in rape proceedings, evidence of

"(a) sexual experiences of the alleged victim of the offence prior to the date on which the offence is alleged to have been committed; or
 (b) the sexual morality of the alleged victim of the offence,
 shall not be adduced (whether by examination in chief, cross-examination or re-examination) except by leave of the judge.

Leave to adduce evidence under this section shall not be granted except where the judge is satisfied that -
 (a) an allegation has been, or is to be, made by or on behalf of the prosecution or the defence, to which the evidence in question is directly relevant; and
 (b) the introduction of the evidence is, in all the circumstances of the case, justified". (39)

The South Australian provision has been extensively analysed by the courts, and the results of this analysis have been summarized by Aronson, Raeburn and Weinberg (40) who found that there is a great deal of judicial mistrust of the section, sometimes to the point of hostility. (41) While the provision represents no more than a very limited restriction on indiscriminate cross-examination, one judge commented on it as follows:

"The section in its present form presents the rather disturbing prospect of an innocent man being in danger of being convicted because he is unable to practice the right given to him at common law to cross-examine the party who seeks to have him convicted of what is a very serious crime" (42)

In practice, it appears that the trial judge can seek an assurance from defence counsel that he has reliable evidence of the truth of the imputation he wishes to make against the complainant. However, it is also noted that the spirit of the section can easily be flouted by counsel simply alleging the complainant's immorality, and then submitting evidence cogently relevant to the allegation. There seems to be a consensus that the section would have been

better drafted if it had referred to evidence relevant to the issue, rather than to counsel's allegations. (43)

The scope of evidence which may be held admissible in South Australia is enormous. In R v Gun, ex parte Stephenson, the Chief Justice spoke of the "numerous situations in which evidence of sexual experiences or sexual morality may be relevant to one of the factual issues in the case" (44) and provided the following examples:

(1) Where the defendant alleges belief in consent on grounds which include his knowledge or belief of the complainant's previous sexual behaviour. Technically, this refers to his state of mind, not her behaviour.

(2) Where the defendant alleges that the complainant is accusing him of rape because he refused to give her money: "It is relevant to inquire whether she was in the habit of obtaining or asking for money in return for intercourse". There is no indication that supporting evidence would be required before leave to put such a question is given.

(3) Where the defence is consent, previous sexual experiences between the complainant and the accused will almost always be relevant.

(4) Where the complainant is "experienced or sophisticated", and the defence is consent, it may be relevant to enquire into her past sexual experience as a test of the truth of her account of the

details of the alleged crime. The reaction of such a woman in a sexual situation may be expected to differ from that of an unsophisticated and inexperienced girl.

5) Where medical evidence implies previous intercourse on the part of the complainant it is relevant to test this "since if she puts forward a false claim to virginity that will reflect adversely on her credibility".

The Chief Justice also stated that

"While in many cases it may be possible to restrict evidence about previous sexual experiences to a particular topic or a particular person or occasion it will, in my view, generally be found that it is impossible to restrict the questioning in this way and that once the gate is opened the whole field is liable to survey". (45)

Thus, the effect of restricting legislation has been very disappointing; as one observer writes,

"Informal conversations with South Australian women who had hailed these new provisions as a great breakthrough and were monitoring the outcome in particular cases indicate that in their opinion, the only thing that has changed is that the cases are now longer because the defence must formally seek leave for what he previously did automatically and leave is being granted... The legislation to date has had no practical effect at all". (46)

A similar remark was made by the Director of the New South Wales Criminal Law Review Division:

"The provision of a "general discretion" in South Australian legislation of 1976 has not satisfactorily changed the pre-existing law and practice in relation to 'prior sexual behaviour'." (47)

O'Grady and Powell comment that "The old rule returns - if it ever went anywhere else" (48), and Temkin argues that the "old rule" may actually be expanded under the new legislation:

"...cross-examination which might once have been admitted

as going to credit may now be admitted as relevant to the issue. Defending counsel is thereby given carte blanche to investigate the complainant's sexual past in order to show that so experienced a woman is unlikely to have found herself trapped in the situation she describes. We are back to the myth that sexually experienced women do not get raped or that a woman with experience is more likely to have consented, There can be few loopholes of judicial discretion to rival this one". (49)

The South Australian and Tasmanian reforms follow the same "loophole" approach, where an exclusionary rule is adopted with a catch-all at the conclusion, allowing the admission of just about any evidence determined by the court to be "directly relevant" and "justified". (50) Scutt argues that

"such laws go, in effect, no further than current rules of evidence and may in fact be more harmful to the rights of the victim than of help" (51)

Victoria and Queensland

Victoria and Queensland follow an expanded "loophole" approach, with certain kinds of evidence, such as general reputation with respect to chastity, being totally excluded. (52) Evidence of the complainant's sexual experience with the defendant or with third parties is only admissible by leave of the judge. Applications, as elsewhere, are made in the absence of the jury but there is an added provision that the defendant may also request the absence of the complainant.

Evidence relating to the complainant's sexual activities, except with the accused, is not regarded as

"having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition"; neither is it

"a proper matter for cross-examination as to credit in the absence of special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant." (53)

The "loophole" is that the court may give leave to cross-examine provided

"it is satisfied that the evidence has substantial relevance to facts in issue or is proper matter for cross-examination as to credit" (54),

and it considers it is desirable "in the interests of justice" to do so.

The Queensland section is virtually identical, but has an added provision which specifies what evidence may be regarded as being substantially relevant:

"Without prejudice to the substantial relevance of other evidence, evidence of an act or event that is substantially contemporaneous with any offence with which the defendant is charged in an examination of witnesses or a trial or that is part of a sequence of acts or events that explains the circumstances in which such an offence was committed shall be regarded as having substantial relevance to the facts in issue." (55)

In Victoria, evidence of the victim's sexual past can also be brought in to help the court determine an appropriate sentence where the accused has pleaded guilty or been convicted of a rape offence. This may not be as distressing to the complainant as direct cross-examination, but certainly reflects a deeply held belief that the seriousness of the offence is to be evaluated in relation to the victim's prior sexual activities. The unspoken and totally unsupported assumption is that rape is more damaging to a virgin than to a woman with sexual experience. (56)

The impact of Victorian legislation has not been systematically evaluated, but some raw data about the frequency and success of formal applications is available. Applications were made by 13 accused persons during the periods January to December 1978 and

July to December 1979 for leave to cross-examine the complainant in trials for rape offences (rape, assault with intent to rape and attempted rape) about her prior sexual history with persons other than the accused. Leave was granted to nine accused persons, which represents approximately 70% of the applicants. (57)

Thus, discretionary legislation in Victoria has also failed to achieve any significant change in the conduct of rape trials, and sexual history evidence is still held to be relevant in the majority of cases, not only to the issue and to credit, but also to sentencing.

Western Australia

Western Australian amendments to the Evidence Act became law in May 1977. (58) They restrict evidence of any sexual experience of the complainant with persons other than the defendant, her "disposition" in sexual matters, and her sexual reputation with the exception of any matter connected with the facts of the case. Again, a "loophole" approach is adopted, prohibiting such evidence in principle, but allowing the judge a discretion to admit it if he is satisfied that it has

"substantial relevance to the facts in issue or the credit of the complainant" (59)

Assertions that piecemeal reforms such as these have not improved the complainant's negative experiences involved in giving evidence and pursuing a rape complaint through the legal system are supported by the findings of an empirical study examining rape trials before and after the above mentioned law reforms.

Newby studied transcripts from all rape trials heard in the Supreme Court of Western Australia from January 1974 to December 1979 in order to determine what type of evidence was admitted into court in cases prior to the Evidence Act amendments, and whether evidence was held inadmissible following the amendments. Out of a total of 165 rape cases in that period, 113 involved pleas of "not guilty" and proceeded to trial. A preliminary report based on data collected from transcripts of 38 of these trials (21 before the amendment, and 17 afterwards) reveals that the operation of the Western Australian reforms is not dissimilar to that of the Sexual Offences (Amendment) Act 1976. (60)

In each of the cases after amendment where the defence considered it necessary to introduce such evidence, permission was granted where requested, in some cases without any requirement on defence counsel to show "substantial relevance". Newby gives the example of a case where defence counsel got permission to introduce evidence that the 16 year old complainant was not a virgin, apparently to "counteract the effect of her youthful and innocent appearance". (61)

Elsewhere, evidence was introduced through the "back door" in terms of conversations the victim was alleged to have had with the defendant about her sexual experiences.

The failure of reform has been attributed to the "loophole" provision where, if application is made for leave to circumvent the prohibition, it is almost always granted. Newby also asserts, however, that restricted evidence within the Western Australian definition is not used as frequently as might be supposed. But another reason why reforms have not improved the lot of

complainants in the courtroom is that their negative experiences also derive from other kinds of evidence used by the defence which are not caught by reforms.

Newby identifies four major strands of attack commonly used by defence counsel to undermine the complainant's evidence. These are continual questioning about the details of the rape, the relationship between the accused and the victim prior to the rape, her general character or reputation, and her sexual experience and reputation. Only one of these is covered, and inadequately at that, by the reforms.

On the basis of her study and her examination of typical defence strategies in rape trials, Newby concludes that

"the problems for rape victims in court are far too complex to be amenable to simple solutions in the form of procedural "tinkering" with the laws of evidence". (62)

New South Wales

New South Wales has attempted to go beyond "procedural tinkering" and passed comprehensive rape legislation including, rather as Michigan, radical changes in the definition of the offence and severe restrictions on cross-examination about previous sexual behaviour at all court proceedings. (63)

There are new categories of sexual assault offences, each with its own maximum penalty. The law covers not only vaginal penetration, but also penetration with objects, anal penetration as well as oral-genital contact. Boys under 14 can now be charged with rape. Both men and women can be victims and offenders. Husbands can be

charged with raping their wives. According to the New South Wales Attorney-General,

"under the new law it will be much less of an ordeal for the victim to give evidence than under the old law". (64)

New South Wales has rejected the fundamental approach of reliance on the trial judge which is the hallmark of the other states' approaches. Rather than leaving it to the judge to decide whether evidence is "substantially relevant", albeit with some specific rules, it has adopted a more strictly exclusionary approach. It lists specific types of evidence which may be admitted by the courts, and prohibits reference to any other evidence. Evidence relating to the sexual reputation of the complainant, for example, is always inadmissible. (65)

Despite these restrictions, the New South Wales law is not as narrow in its scope as the Michigan legislation. Evidence may be admitted through the following "gates":

1. Where it relates to sexual experience, or lack of it, of the complainant around the time of the alleged offence, and to events which form part of the circumstances in which the alleged offence was committed;
2. Where it is evidence relating to an existing or recent relationship between the accused and the complainant;
3. Where the accused person denies having had sexual intercourse with the complainant, and it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by him;

4. Where it is evidence relevant to whether at the time of the alleged offence, the complainant had a disease which, at any relevant time, was absent in the accused person, or vice versa;

5. Where it is evidence relevant to whether the allegation that the offence was committed by the accused was first made following a discovery of the pregnancy or disease in the complainant. (66)

Evidence thus specified may be admitted only if

"its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission". (67)

As in England and elsewhere, the judge is to consider the admissibility of evidence in the absence of the jury, but of course has very specific rules to follow in deciding on the admissibility of particular pieces of evidence. The word discretion is conspicuously absent from the relevant section. There is also a further safeguard:

"Where a Court or Justice has decided that evidence is admissible under subsection (3), the Court or Justice shall, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision." (68)

The Crimes (Sexual Assault) Amendment Act was passed in 1981, and since its inception, its impact on the Supreme Court of New South Wales has been monitored by the Bureau of Crime Statistics and Research of the New South Wales Government. As the principal investigator in charge of that monitoring has observed,

"Ways can be found around the most stringent prohibitions and barristers in my country are demonstrating how adept they are in finding such ways". (69)

Nevertheless, early results of this ongoing study suggest that the

legislation has had a considerable impact on conviction rates, largely because defendants are now far more likely to plead guilty than previously. (70) Nothing has yet been published on the impact on the evidentiary restrictions, or indeed on the broader workings of the Act, but there is widespread optimism that the comprehensive law reforms in New South Wales will fare better than the limited discretionary reforms introduced elsewhere. For example, it has been observed that

"by adopting a general exclusionary rule subject to certain inclusionary exceptions this approach achieves a fairly high degree of certainty, and will probably ensure increased protection of a complainant's rights in a sexual offence trial." (71)

Conclusion

There is now overwhelming evidence to indicate that discretionary controls on the introduction of sexual history evidence are inadequate and unsatisfactory. Correspondingly, a number of jurisdictions seem to be moving towards provisions which leave little to the discretion of the judiciary. We have seen above the approaches adopted in Michigan and New South Wales in particular. In recent months, major changes have been made to the Criminal Code of Canada which take away much of the judge's discretion. The new law prohibits evidence of any sexual activity of the complainant with anyone other than the accused unless

- (a) it rebuts evidence previously adduced by the prosecution;
- (b) it is evidence of specific instances sexual activity which tends to establish the identity of the person who had sexual contact with her on the occasion of the alleged offence;
- (c) it is evidence of sexual activity that took place on the same occasion as the alleged offence, and where it relates to the accused's belief in her consent. (72)

Nearer to home, the recent report on evidence of the Scottish Law

Commission goes some way towards setting down firm guidelines regarding the admissibility of sexual history evidence. The Scottish recommendations clearly seek to move away from the absolute discretion which characterizes the English legislation, but stop short of the kind of radical reforms that have been introduced in New South Wales for example. The Commissioners outlined their approach as follows:

"...although we subscribe to the principles of clarifying the law and of giving suitable protection to complainers, we do not think that this can be achieved, consistently with the interests of justice, simply by providing for a total prohibition of certain classes of evidence. At the same time, we do not consider that the interests of justice can best be served by leaving with the judges a wholly unfettered discretion in such matters." (73)

The proposals contained in this report are novel in two respects: firstly, all restrictions refer to any sexual behaviour between the complainant and the accused as well as the complainant and other persons; and secondly, they cover not only rape but also a variety of such related offences as indecent assault.

The Report recommends that as a general rule, the court should not admit questioning or evidence which shows that a complainant has at any time been of bad character, associated with prostitutes or engaged in prostitution, or engaged in sexual behaviour with any person so long as this does not form part of the subject-matter of the charge. There are exceptions to this general rule, if the evidence is required to rebut or explain evidence adduced by someone other than the defendant, where it refers to sexual behavior which took place on the same occasion as the sexual behaviour forming the subject-matter of the charge, and when it is relevant to the peculiarly Scottish defence of incrimination.

However, these apparently stringent prohibitions also have a "loophole" provision, in the familiar format that all such evidence may also be admitted where "it would be contrary to the interests of justice" to exclude it. While the Scottish Commission only succeeds to a limited extent in moving away from discretion, it clearly acknowledges that legislation in the English mould is an unsatisfactory approach to this problem.

One of the most frequently voiced objections to the introduction of total prohibition, even with a clear listing of exceptions, seems to be the difficulty involved in drafting legislation to cater for all the possible situations which might arise in a rape trial and to anticipate all eventualities where various aspects of the complainant's sexual experience might be relevant to the case. This point is made by the Scottish Law Commissioners as follows:

"The precise circumstances of each case in which a sexual offence is charged will differ, and it is impossible to predict with any certainty the kinds of circumstances which may arise in future cases. Moreover, items of evidence which in one case may be objectionable or irrelevant may be highly relevant in the circumstances of another". (74)

This problem has now been considered in great detail in England and elsewhere and there are numerous reports and papers dealing with this very issue in some depth in various common law jurisdictions. There is also a fair amount of case law on these issues in these jurisdictions, as well as some evaluative research on the application of the relevant legislation. It is submitted that there is now sufficient knowledge and experience available to draft legislation which, while minimising the role of discretion, could also deal adequately with the contingencies of rape cases that are likely to arise.

Legislation alone, however strict, can only have a limited effect and is unlikely to solve all the problems involved in the social construction of rape that is manifest in and out of court. The process whereby the complainant's character is under attack in rape trials is both complicated and subtle. As Newby notes,

"In attempting to reinterpret events in favour of the defendant, counsel plays upon widely held sexual stereotypes and attitudes about appropriate female behaviour, to present the witness in a detrimental light. This is done through employment of a combination of the various strategies outlined, of which reference to the kinds of evidence precluded by special evidence laws, form only a small component". (75)

Nevertheless, it is crucial to get that small component right. In some jurisdictions at least, the lesson has been learnt. In New South Wales and Canada, the discretionary approaches originally adopted have been replaced by provisions which set firm limits on the admission of this kind of evidence. It is essential here too to ensure that legislation which was passed in 1976 works as the Heilbron Group and Parliament intended and it is most unlikely to do this if section 2 remains entirely discretionary. As Temkin has argued,

"In England too, it is submitted, the time has come for a re-examination of section 2 and a reappraisal of the alternatives to discretionary legislation. The Criminal Law Revision Committee is currently considering the law relating to sexual offences. It is to be hoped that it will now be persuaded to take this matter on board." (76)

The next chapter will consider other ways in which rape law in England could be reformulated, in the light of the Criminal Law Revision Committee's Report on Sexual Offences.

FOOTNOTES TO CHAPTER EIGHT

(1) SCUTT, A.J.: "Admissibility of sexual history evidence and allegations in rape cases", Australian Law Journal, Vol.53, 1979; BERGER, V.: "Man's trial, woman's tribulation: rape cases in the courtroom", Columbia Law Review, Vol.77, 1977; WOOD, P.L.: "The victim in a forcible rape case: a feminist view", American Criminal Law Review, Vol.11, No.2, 1972; LEGRAND, C.E.: "Rape and rape laws: sexism in society and law", California Law Review, Vol.61, 1973

(2) LAW REFORM COMMISSION OF VICTORIA: Rape prosecutions (Court procedures and rules of evidence), Report no.5, Government Printer, Melbourne, 1976; TASMANIAN LAW REFORM COMMISSION: Report on reducing the harassment and embarrassment of victims in rape cases, Government Printer, Hobart, 1976; NEW SOUTH WALES DEPARTMENT OF THE ATTORNEY GENERAL AND OF JUSTICE, CRIMINAL LAW REVIEW DIVISION: Report on rape and various other sexual offences, 1977

(3) The situation in Canada and New Zealand will not be discussed in any detail in this chapter. For the current situation there, see Canadian Criminal Code, s.246.6-246.7, and the Evidence Act Amendment Act (N.Z.) 1977

(4) RANDALL, S.C. and ROSE, V.M.: "Barriers to becoming a 'successful' rape victim", in BOWKER, L.H. (ed.): Women and crime in America, MacMillan, New York, 1981, p.337

(5) For a detailed examination of current U.S. statutes, see ARABIAN, A.: "The cautionary instruction in sex cases: a lingering insult", Southwestern University Law Review, Vol.10, No.3, 1978; BIENEN, L.: "Rape II: the rape laws of fifty states", Women's Rights Law Reporter, Vol.3, No.3-4, 1977; NATIONAL LEGAL DATA CENTER: Rape legislation: a digest of its history and current status, Seattle, Washington, Battelle Law and Justice Study Center, 1975

(6) MARSH, J.C. and CAPLAN, N.: Law reform in the prevention and treatment of rape. Final report, Rockville, Md., National Center for the Prevention and Control of Rape, 1980; COBB, K.A. and SCHAUER, N.R.: "Michigan's Criminal Sexual Assault Law", in LIPSITT, P.D. and SALES, B.D. (eds.): New directions in psycholegal research, Van Nostrand Reinhold Co., New York, 1980; MARSH, J.C., GEIST, A. and CAPLAN, N.: Rape and the limit of law reform, Auburn House Publishing Co., 1982; NORDBY, V.B.: "Reforming rape laws - the Michigan experience", in SCUTT, J.A. (ed.): Rape law reform, Australian Institute of Criminology, Canberra, 1980

(7) NORDBY, V.B.: op.cit. 1980, p.6

(8) ibid., p.7

(9) ibid., p.7

(10) ibid., p.17

(11) M.C.L.A. 750.520a and following

- (12) GEIS, G. and GEIS, R.: "Rape reform: an appreciative-critical review", Bulletin of the American Academy of Psychiatry and Law, Vol.6, No.3, 1978; HERMAN, L.: "What's wrong with the rape reform laws?", The Civil Liberties Review, Vol.3, 1976-77
- (13) People v Thompson, 76 Mich. App. 705 (1977)
- (14) NORDBY, V.B.: op.cit., 1980, pp.17 and 21
- (15) Grant Number R01MH29532, entitled Law reform in the prevention and treatment of rape, N.I.M.H., National Center for the Prevention and Control of Rape, Rockville, Md.
- (16) NORDBY, V.B.; op.cit., 1980, p.28
- (17) MARSH, J.C. et al.: "Criminal sexual conduct in Michigan: the law reform solution", Unpublished paper, 1979, p.4
- (18) NORDBY, V.B.: op.cit., 1980, p. 28
- (19) BERGER, V.: op.cit., 1977, p.39
- (20) Louisiana Rev. Stat. Ann., Para. 609.347, 1977
- (21) Texas Penal Code Ann. tit.5, Para. 21.13(a), 1976-77
- (22) New York Crim. Proc. Law, Para. 60.42(5), 1976-77
- (23) RANDALL, S.C. and ROSE, V.M.: op.cit., 1981, p.338
- (24) DEMING, M.B. and EPPY, A.: "The sociology of rape", Sociology and Social Research, Vol.65, No.4, 1981, p.372
- (25) DEMING, M.B.: "Rape case processing: evaluation of legal reform", Progress report to the National Center for the Prevention and Control of Rape, Rockville, Md., 1980, p.8
- (26) CHAPPELL, D. and SINGER, S.: "Rape in New York City: a study of material in the police files and its meaning", in Geis, G. and GEIS, R. (eds.): Forcible rape, New York, Columbia University Press, 1977; REICH, J. and CHAPPELL, D.: "The prosecutorial response to Michigan's criminal sexual conduct law: business as usual", Unpublished manuscript, 1976; BEN HORIN, D.: "Is rape a sex crime?", The Nation, August 1975
- (27) BORGIDA, E. and WHITE, P.: "Social perception of rape victims - the impact of legal reform", Law and Human Behaviour, Vol.2, No.4, 1978, p.349
- (28) BERGER, V.: op.cit., 1977, p.71
- (29) LAW REFORM COMMISSION OF VICTORIA: op.cit., 1976
- (30) TASMANIAN LAW REFORM COMMISSION: op.cit., 1976
- (31) TEMKIN, J.: "Regulating sexual history evidence - the limits of discretionary legislation", I.C.L.Q., forthcoming October 1984

- (32) O'CONNOR, D.: "Rape law reform - the Australian experience" (Part 2), Criminal Law Journal, Vol. 2, 1978, p.128
- (33) Evidence Act Amendment Act 1976, (No. 84) of South Australia, s.34i
- (34) Rape Offences (Proceedings) Act 1976, (No. 8950) of Victoria
- (35) Criminal Law (Sexual Offences) Act 1978, of Queensland
- (36) Evidence Act Amendment Act 1976, (No. 145) of Western Australia
- (37) Crimes (Sexual Assault) Amendment Act 1981, of New South Wales
- (38) McNAMARA, P.: "Cross-examination of the complainant in a trial for rape", Criminal Law Journal, Vol.5, 1981
- (39) Evidence Act Amendment Act 1976, (No.84) of South Australia, 34i
- (40) Referred to in the AUSTRALIAN LAW REFORM COMMISSION's Research Paper II, Character and conduct
- (41) R v Gun (1977) 17 S.A.S.R. 165
- (42) TEMKIN, J.: op.cit., 1984
- (43) R v Gun (1977) 17 S.A.S.R. 165
- (44) ibid.
- (45) ibid.
- (46) O'CONNOR, D.: op.cit. 1978, p.126-7
- (47) WOODS, G.D.: Sexual assault law reforms in New South Wales - a commentary on the Crimes (Sexual Assault) Amendment Act 1981 and Cognate Act, Dept. of Attorney-General and of Justice, 1981, p.31
- (48) O'GRADY, R. and POWELL, B.: "Rape victims in court - the South Australian experience" in SCUTT, J.A. (ed.): op.cit. ., 1980, p.132
- (49) TEMKIN, J.: op.cit., 1984
- (50) Evidence Act Amendment Act 1976, (No.84) of South Australia; Evidence Act 1976, of Tasmania
- (51) SCUTT, J.A.: op.cit., 1979, p.826
- (52) Rape Offences (Proceedings) Act 1976 (No.8950) of Victoria; Criminal Law (Sexual Offences) Act 1978, of Queensland
- (53) Rape Offences (Proceedings) Act 1976 (No.8950) of Victoria
- (54) ibid.

- (55) Criminal Law (Sexual Offences) Act 1978, of Queensland
- (56) SCUTT, J.A. (ed.): op.cit., 1980, p.117
- (57) ibid.
- (58) Evidence Act Amendment Act 1976 (No.145), of Western Australia
- (59) ibid., s.36B
- (60) NEWBY, L.: "Rape victims in court: the Western Australian example" in SCUTT, J.A. (ed.): op.cit., 1980, p.116
- (61) ibid., p.118
- (62) ibid., p.121
- (63) Crimes (Sexual Assault) Amendment Act 1981 of New South Wales
- (64) "Sexual assault - Changes to rape law in New South Wales", Leaflet issued by the New South Wales Women's Advisory Council, Sydney, 1981, p.6
- (65) Crimes (Sexual Assault) Amendment Act 1981 of New South Wales, s. 409B(2)
- (66) ibid., s.409B (3)-(8)
- (67) ibid.
- (68) ibid., s.409B (7)
- (69) Personal communication, 11th July 1983
- (70) ibid.
- (71) Australian Law Reform Commission: op.cit., p.176
- (72) Canadian Criminal Code, 1983, s.246.8
- (73) SCOTTISH LAW COMMISSION: Evidence - Report on evidence in cases of rape and other sexual offences, Paper No.78, Edinburgh, HMSO, 1983, para.5.2
- (74) ibid.
- (75) NEWBY, L.: op.cit., 1980, p.121
- (76) TEMKIN, J.: op.cit., 1984

CHAPTER NINE. THE LIMITS OF LAW REFORM

It is widely assumed that the Sexual Offences (Amendment) Act has done all that is practicable to deal with the most fundamental problems involved in the legal treatment of rape. Professor Honore, for example, writes that the Act is

"an important reform, which makes it clear that a woman is free to have sex outside marriage with Tom and Dick while refusing it to Harry and that her sex with Tom and Dick is no evidence that she consented to Harry's advances" (1).

More recently, Elliott commented that

"The English Act and Court of Appeal do as much as can be done with a truly insoluble problem" (2).

However, we have seen that the provisions of the 1976 Act fail adequately and uniformly to restrict evidence of the complainant's sexual history in a rape trial. The practical application of that Act clearly flouts the intention of Parliament, and even more so, the spirit of the Heilbron Report. The extension of the anonymity provision to defendants has created a serious anomaly which is still being questioned and, as argued in previous chapters, should be done away with. Lastly, the decision in Morgan, which was said to be uncontroversial from a strictly legal point of view, has also remained a live issue. In the light of subsequent comment and case law, that too should be reconsidered. It can no longer be assumed either that the 1976 provisions are non-problematic in themselves, or that they have been implemented properly.

This chapter considers the implications of the findings of this study for the law of rape in the future, as well as for broader reforms which may be necessary if the offence of rape is to be cleansed of its present strongly anti-female bias.

Changes since 1976 and the Criminal Law Revision Committee's Report

Since the 1976 Act was passed there have been a number of public outcries on rape. There was the Glasgow rape case, where the authorities refused to prosecute and which led to the resignation of Mr. Nicholas Fairbairn as Solicitor General of Scotland. The victim brought a private prosecution against a number of youths who viciously attacked and raped her, two of whom were eventually sentenced to seven years' imprisonment (3). Early in 1982, a television documentary showed the brutal interrogation by three police officers of a complainant which led her to withdraw her allegation of rape (4). But rape returned to serious public attention chiefly as a result of particularly inept judicial handling of a number of well reported cases.

In 1982, Judge Richards fined a man convicted of rape because he thought that his hitchhiker victim was also to blame. The judge deemed the case to be a tragedy for the defendant, a father of two who had no previous record of sexual offences. He explained:

"I am not saying that a girl hitching home late at night should not be protected by the law, but she was guilty of a great deal of contributory negligence" (5).

These comments received hearty support from Sir Melford Stevenson, a retired High Court judge (6), who went on record as saying that

"It is the height of imprudence for any girl to hitch-hike at night. That is so plain, it isn't really worth stating. She is in the true sense asking for it" (7).

Everyone will agree that it is foolish for anybody, irrespective of sex, to expose themselves unnecessarily to the risk of muggings and assaults of any kind. But the arguments used here go far beyond the

statement of this precautionary view. They suggest that imprudent behaviour on the part of the victim, and the victim of rape is singled out in this respect, excuses or at least strongly mitigates the behaviour of the assailant. In fact, the concept of "contributory negligence" has no validity in the law of rape and although a handful of offenders each year receive a non-custodial sentence, a fine is not in line with the general level of sentencing.

The case led the Lord Chief Justice, Lord Lane, to set out guidelines for sentencing in rape cases and to state that, other than in wholly exceptional circumstances, a conviction always calls for an immediate custodial sentence. Claims that a case was "wholly exceptional" should be rejected if any of eleven "aggravating circumstances" were present. These include the use of weapons; the infliction of serious injury; excessive violence; threats; perversions forced on victims; if the victim was very young or very old; if the rapist occupied a position of trust in relation to his victim; intrusion into the victim's home; kidnapping; if a group of men were engaged in the rape; and the number of rapes committed by the rapist, either on different women or on the same woman (8).

At the end of the same year, Judge Price imposed a 12 month prison sentence, with eight months suspended, on a man convicted of raping a six-year old girl. Taking into account two months in prison on remand and time off for good behaviour, the man only served 25 days after his conviction.

The Prime Minister took the unusual step of aligning herself in the

Commons with those who regarded this sentence as "totally incomprehensible". Within days, it was announced that rape would in future only be tried by the most senior judges. As Professor Michael Zander noted,

"Mrs. Thatcher was yesterday getting political credit for the new directive that only the most senior judges qualified to take murder cases will in future be able to take rape cases. But it seems that the initiative for the change came not from her but from the Lord Chancellor who was heartily fed up with the way he repeatedly found himself dealing with bizarre decisions of maverick circuit judges in these sensitive cases." (9)

This research suggests that promoting rape to the category of murder for these purposes is unlikely to have much impact on rape trials. The majority of rape cases were already being tried by the most senior judges before this directive. There is no evidence that these judges as a group are necessarily more sensitive to the plight of the rape victim than others. Indeed, they are more likely to be older and possibly more out of touch with the reality of contemporary attitudes than their junior colleagues. They are also unlikely to impose heavier sentences. This study and sporadic media reports show that though there are occasionally considerable differences in sentencing, these reflect individual idiosyncrasies and personal bias of the judge rather than his status in the judicial hierarchy.

While occasional cases picked up by the media serve to highlight the worst defects of the current system, piecemeal reforms made as concessions to public outrage will only create further anomalies. However, comprehensive reform of the law of rape has been delayed for years to await the report of the Criminal Law Revision

Committee (CLRC) on Sexual Offences, even where relatively uncontroversial matters are concerned. For example, there is an "irrebuttable presumption" in English law that a boy under 14 is incapable of having sexual intercourse, and thus he cannot be convicted of rape or of any offence involving intercourse (10). He can be convicted of aiding and abetting, but no more, even if he is the principal perpetrator of the full offence. It has long been thought that this provision was unjust and should be repealed. The issue was raised during debates of the Sexual Offences (Amendment) Bill in 1976, when Parliament thought it best to refer the matter to the CLRC, despite the following rather sobering observation from a member of the House of Lords:

"It does not seem to me that it requires the deliberations of a Committee, however distinguished, to establish that fact" (11).

The CLRC was asked, in consultation with the Policy Advisory Committee on Sexual Offences, to review the law relating to and penalties for sexual offences in July 1975. It was in the same month that the Heilbron Group was appointed to give urgent consideration to those aspects of rape law which were deemed to be in need of early reform. On the face of it, the CLRC appear to have accepted the model of law reform introduced by the Law Commission after its establishment in 1966. The Commission's procedure is to publish a working paper which expounds the existing law that has been selected for reform, examines the criticisms that have been directed at it, and sets out the field of choice of reforms. Then follows the widest possible consultation with interested parties which

"may take a long time but it can, and usually does, mean a swift passage through Parliament of a non controversial Bill" (12).

Lord Scarman is probably justified in his claim that this technique

"represents a major advance in legislative method. It is perhaps the greatest contribution to the public life of the nation made by the Commission" (13).

The CLRC appear to have followed this blue-print for law reform insofar as they published a Working Paper in 1980 (14) and invited comment on the provisional recommendations it contained. However, there the similarity between the workings of the two bodies ends. The final report published in 1984 (15) strongly suggests that the CLRC has learnt little from the Law Commission with regard to rational procedures of law reform. While in some areas, the final Report reflects the consultation that has taken place, it is also evident that full weight has not been given to the views of the interest groups involved. In particular, representations by women's groups are dismissed in a perfunctory manner, and the CLRC do not seem to be prepared to take seriously views with which they disagree. The substance of the Working Paper and of the final Report will now be considered in some detail.

The future of Section 2

It may be useful at this stage to recall the Heilbron Group's approach to the issue of evidence relating to the complainant's sexual history. It was forcefully and cogently argued in their report that

"...in contemporary society sexual relationships outside marriage, both steady and of a more casual character, are fairly widespread, and it seems now to be agreed that a woman's sexual experiences with partners of her own choice are neither indicative of untruthfulness nor of a general willingness to consent. There exists, in our view, a gap between the assumptions underlying the law and those public views and attitudes which exist today which ought to influence today's law" (16).

There are still some who argue that the Heilbron Group was unduly stringent in its proposals to restrict evidence of the complainant's sexual history. In a recent article Elliott seems to agree that Section 2 does not follow Heilbron, but also puts forward the argument that the drafting and application of the 1976 Act are preferable to Heilbron's proposals. He goes on to say this:

"It is impossible to deny that prior sexual activity with third parties often has a strong relevance to the issues in rape trials. Granted, it has no relevance in certain types of case, e.g. a sudden assault by a complete stranger or rape by a violent burglar. But many typical cases involve a complainant who was, of her own free will, alone with the man involved. The fact of intercourse or even identity of her partner may be, and consent often is, a live question on which her sexual history may shed much light" (17).

It is acknowledged that there are cases where previous sexual history may be relevant to the issues, and that a total ban on all such evidence would work unfairly against the defendant. One obvious example is where the defendant denies the occurrence of sexual intercourse, yet there is evidence of semen or, at a later stage, pregnancy in the complainant. The defendant must in such cases be allowed to cross-examine her to establish the source of the semen or pregnancy. There is nothing in Section 2 that prevents the introduction of evidence in such a case, and indeed the American states which have far more stringent prohibitions about sexual history evidence invariably make an exception for this category of case.

However, Elliott goes on to give a series of hypothetical cases where, according to him, the complainant's sexual experience would be highly relevant to consent without the evidence in question amounting to showing promiscuity or even "striking similarity" in the Heilbron mould. He gives, among others, the following example:

"...D, a senior boy pupil, was kept behind after school by the schoolteacher C, and on their being interrupted by the school caretaker, C screamed and cried "Rape". D must be allowed to prove that she had before had consensual relations with another pupil after school" (18).

Such evidence may be relevant to credit in certain circumstances.

If, for instance, the complainant were to claim in her evidence that she would never consent to intercourse with a pupil by virtue of her position as a schoolteacher, then the question of previous intercourse with a pupil would indeed be relevant to her credibility. We have seen in Chapter 4. that where credibility happens to involve sexual history in this sense, applications under S.2 are almost a formality and, rightly, the evidence is always admitted.

However, what Elliott is arguing in the above example is that this evidence is relevant to the issue of consent. It is submitted that this is precisely the kind of evidence that Heilbron and Parliament intended to restrict. One of the main problems with Elliott's approach is that he does not justify his belief that the complainant's past sexual history will "shed much light" on the issues in the trial. Instead of making his assumptions explicit, he simply postulates that "surely her sexual history is relevant" in a whole series of cases, relying on some dubious notion that if a woman has engaged in consensual sexual activity with someone, perhaps in slightly similar circumstances to the alleged rape incident, this has substantial bearing on whether she consented to the defendant. In fact, it is difficult to see why her consent to sexual intercourse with others should be deemed to have any relevance to the likelihood of her consent to the defendant in question: after all, the identity of the partner is a crucial

element in sexual intercourse and consent.

In any event, Parliament accepted several years ago now that in principle the Heilbron approach was right and made a commitment to its implementation by passing the Sexual Offences (Amendment) Act 1976. The important thing now is to ensure that the spirit of that legislation is adhered to in practice. There is evidence from a variety of sources that Section 2 is not operating as intended.

Cohen examined the application and interpretation of Section 2 after the case of Lawrence, with regard to two main questions. Firstly, he considered when evidence of prostitution or of promiscuity could be admissible in rape trials, and secondly, what would be the nature of the burden on the defendant who wished to introduce such evidence. He concluded that if the criterion is, as stated in Lawrence, that the jury would be likely to take a different view of the complainant's evidence by virtue of the introduction of such facts or allegations, then, strictly, this should always be admissible:

"The relevant question according to Lawrence and Mills is 'when would evidence of prostitution be more likely than not to lead a jury to take a different view of the complainant's evidence?' The answer, it is submitted, is 'always'. If this is the case then the law before the Act has not been altered by S.2, even though, arguably, Heilbron intended it to be altered" (19).

Anecdotal evidence too suggests that all is not well with the implementation of this part of the law. The chairman of the Criminal Bar Association was recently reported as saying that in his experience,

"judges now always allowed that cross-examination to take place - always is too strong a word, but very frequently" (20).

It must be remembered, however, that the worst misuses of judicial discretion are unlikely to come to public notice because, partly as a result of the introduction of evidence of sexual experience, these cases are more likely than not to result in an acquittal. In any event, the different criteria used by judges in deciding whether to admit such evidence and the ensuing uneven implementation of the Act mean that women are still frequently exposed to detailed and humiliating questioning about their previous sexual experience.

Following the publication of the early results of the present study, the Attorney General acknowledged that the 1976 Act, although designed to protect women from unnecessary cross-examination about their sexual past, was not always properly observed in court. He took rather an optimistic view though of judges' willingness to start operating more in line with the letter of the law as a result of public concern:

"The judges are just like any other human beings. Some will be seeing this programme, they read the newspapers, they react to the climate of public opinion just like anyone else. I would suspect that a lot of them, when they are faced with the problem, are going to look at it in a new light in the future" (21).

My empirical study of 50 trials for rape at the Old Bailey in 1978-79 establishes that there are striking differences among trial judges in their interpretation and application of the law; in particular, in their willingness to exercise their discretion to exclude evidence of the complainant's sexual biography. I have shown that the majority of applications to introduce evidence of a complainant's sexual experience are successful. Most women who complain of rape are still subjected to distressing questioning about their intimate lives. Inevitably, the portrayal of the

alleged victim as experienced or promiscuous tends to correlate with the defendant's acquittal. Differences among judges result in large part from the absence of legislative guidelines. One means of changing what now happens would be to assist judges by laying down guiding principles. A clear indication of the circumstances in which a woman's sexual experience with A or B may be relevant to establish whether she was raped by C would undoubtedly help to remedy the worst problems which have arisen in applying the 1976 Act.

There had been some hint that the case of *R v Viola* (22) might provide an opportunity for the Court of Appeal to establish some guidelines of this sort. The date of the hearing was fixed with remarkable speed, within less than three months of conviction, and an *amicus curiae* had also been appointed.

The *amicus* commented that the 1976 Act was operating well, and in all six previous appeals, the Court of Appeal and trial judges seemingly used the same test in deciding what evidence could rightly be excluded. The Act, he said, had not worked unfairly against the defendant. The *amicus* was right to insist that fairness to the defendant is one essential criterion for judging the success of legislative reform but wrong, in this case, to regard it as the only criterion. There is more than a touch of irony in the conclusion that a law which was specifically designed to protect the complainant works well because it is not unfair to the defendant. Acquittals, of course, do not come to the attention of the Court of Appeal, but if more women are to be persuaded that it is worth reporting rape, then the impact of the law on them must

also be given serious consideration.

Viola establishes that it is judgment rather than discretion that is involved in the application of Section 2:

"...it was perhaps wrong to speak of a judge's 'discretion' in the case. He had to make a 'judgment' whether he was satisfied or not in the terms of Section 2". (23)

This is correct to the extent that once the judge has decided that the proposed evidence has relevance to the case, he has no option but to allow it in as any other course of action would be unfair to the defendant. But Viola begs the main question, which is how judges are to arrive at a sensible decision as to relevance. As we have seen earlier, the Court of Appeal felt it "improper and unwise" to lay down strict criteria for judges to adhere to in applying Section 2. It did not explore or deal with the grey area between what is becoming increasingly obvious in this debate, namely that the distinction between the legal categories of credit and issue, where the issue is consent, is largely spurious as far as rape is concerned. As the situation stands now, judges will have to continue to rely on their own individual notions of the nature of rape and of appropriate female behaviour in interpreting this part of the law.

The role of the judge in a rape trial is crucial. He brings to it his beliefs, experience and knowledge about sex, with all its emotional and often unsettling implications. He cannot free himself from the influences and attitudes which family life, or its lack, have given him in childhood and as an adult. Like the rest of us, most judges remain creatures of their time and circumstances, their social opinions largely shaped by education, class and occupation.

Their view of the proper sexual roles of men and women, and the social status and situation of women reflect, by acceptance or sometimes by rejection, the values of the generation to which they belong. Such are the components of judges' decisions whether to grant leave to a defendant's counsel to cross-examine about a complainant's sexual experience in many cases of rape under the present law. No doubt, judicial technique and professional experience can help to suppress the merely personal judgment but, nevertheless, the findings of this empirical study show the inescapable significance of what Mr. Justice Holmes called the "instinctive preferences and inarticulate convictions" of judges in this branch of the law (24). There are large differences among them in their practice in respect of Section 2 of the Sexual Offences (Amendment) Act 1976, and this has important consequences for the protection that the law affords to complainants and the willingness of juries to acquit defendants.

There is nothing novel in the English experience. The same problem has been encountered in a number of other jurisdictions, some of which, as we have seen, have moved away from discretionary schemes. The results of this study indicate that the whole issue should be reconsidered here too, and that serious thought should be given to replacing Section 2 with stronger legislation (25). The publication in 1984 of the long-awaited CLRC Report on Sexual Offences is intended to form the basis of legislative reform in this area, and press reports indicate that the Home Secretary is expected to act on it. Any changes in the law which result from the Report are likely to be the last for the foreseeable future and the document is therefore important.

The approach of the CRLC's Fifteenth Report on Sexual Offences to the working of the present law of rape is instructive. The Committee notes that television programmes and articles in the press and legal journals suggest that some people, in particular some women's organisations, think that complainants are inadequately protected because many judges too readily grant leave to cross-examine about sexual experience. At the time when the Report was written, the only empirical data about the working of the jurisdiction was part of the material reported in this thesis which had been published in an article in the *Modern Law Review* (26). This evidence is dismissed in the Report in four sentences:

"Critics do not seem to appreciate that a complainant's previous sexual experience may be relevant to the issue of consent... The frequency with which leave is granted is no indication of the strength of the applications. Experienced advocates do not make applications unless they are reasonably sure that they will be granted. It is bad forensic practice to make applications which are likely to be refused." (27)

The first sentence is inaccurate; the other three are irrelevant to the conclusion reached from the findings of this study upon the consequences of the present unfettered discretion of trial judges.

The current law, effectively, is that evidence of sexual history is relevant if the judge thinks that it is relevant. The CLRC assume that there is general consensus about the concept of relevance. However, the operation of the law as well as common sense indicate that this is a misconception. The present state of affairs is bound to lead to uneven implementation and has important implications for the legal process.

Nevertheless, the Policy Advisory Committee and the Criminal Law

Revision Committee decided to "discover what the practice of the courts actually was". (28) To this end, they

"invited the Recorder of London to discuss this problem of giving leave to cross-examine with the circuit judges who sit regularly at the Central Criminal Court, because it had been suggested in the Press and in a television programme that leave to cross-examine had been given too freely at that court. The Policy Advisory Committee asked the Chairman of the Criminal Bar Association, who is now one of our members, to make enquiries amongst members of the Bar practising both in London and on the circuits as to the way section 2 was applied". (29)

These investigations

"did not disclose any grounds for concern that either the letter or the spirit of section 2 of the 1976 Act was being disregarded. This is what we would have expected.."
(30)

This conclusion was inherent in the type of inquiry made by the Committees, and the reader is bound to assume that it was adopted in order to produce the result desired by the CLRC. What, one must ask, would the CLRC think of the confident finding that there was nothing to worry about by a Committee which sought to discover if public houses were habitually staying open after closing time by addressing inquiries as to whether the law was being properly observed to the Chairman of the Licensed Victuallers' Association and to the brewers' Trade Association?

It has been impossible to secure uniformity in the exercise of the wide discretion inherent in Section 2, and the present study as well as other observations show that the law is being applied arbitrarily and unequally. There is now overwhelming evidence from this and other jurisdictions that broad discretionary schemes are, by definition, almost bound to fail. Elsewhere, legislation in the S.2 mould has now been tightened up while here the CLRC proposes to rely on judges to follow the rules in future, "even if they have

not done so in the past" (31). But the crux of the problem is that there are no clear rules, and judges must in the end fall back on their own beliefs and values in making these decisions. It is unlikely that the will of Parliament will prevail when trial judges have totally unfettered discretion in such a controversial area, and when members of the CLRC, themselves largely senior members of the legal profession, assume that practitioners are the only reliable judges of how the law is working. If legislative reform is to have any bite in this area, strong guidelines in accord with contemporary thinking and behaviour must replace the rag-bag of "human experience in the courts" that currently governs the interpretation of the 1976 Act.

Definition of the offence

The CLRC examined the possibilities of redefining rape from a number of perspectives. They looked at sexual intercourse obtained by fraud and fear; at the creation of two degrees of rape with separate penalty structures; at the mental element in rape; and at the possibility of extending rape to cover other forms of non-consensual sexual activity. The Committee's recommendations for these areas will now be considered in turn.

1. Sexual intercourse by fraud

Section 3 of the Sexual Offences Act 1956 creates a special offence of sexual intercourse procured by fraud. The courts and Parliament have intervened over the years in a number of cases to interpret the notion of absence of consent in such a way as to extend the law

of rape to what would otherwise have been cases of intercourse procured by fraud.

For example, a man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape (32). There is also some case law to establish that, if a woman submits to intercourse because of ignorance or mistake as to the nature of the act and this is induced by the fraud of the defendant, she does not consent and his behaviour amounts to rape. An example of this is the case of Flattery, where the victim allowed intercourse in the belief induced by the defendant that he was performing a surgical operation. (33)

The CLRC notes that criticism of this situation centres around the question of why one form of fraud should provide a defence to rape and another not. For example there seems to be no good reason to argue that impersonating a husband is rape, but impersonating a lover is not. Thus, the CLRC start from the assumption that the law in this area should either be extended or narrowed.

In the Working Paper, the majority of the CLRC argue that no satisfactory line can be drawn between one sort of deception and another:

"Most of us are of the opinion that the distinctions drawn in the cases cannot bear the weight they have been made to carry..." (34).

Accordingly, they then proposed removing fraud altogether from the law of rape. This recommendation was for the notion of absence of consent to be given a more limited interpretation, and for the offence of rape not to apply when the woman has consented to the

defendant putting his penis into her vagina. Mistake as to identity or the purpose of the act, they argued, should be irrelevant.

Critics have put forward persuasive arguments for the law to remain as it is. Temkin, for example, disputes the difficulty in drawing the line between one sort of fraud and another and points to parallels in other areas of the law:

"It is submitted that the distinction which prevails in the law of rape between frauds as to identity and the nature of the act and other types of fraud is a perfectly tenable one. Moreover... it has its counterpart in, for example, the law of contract and the law relating to the nullity of marriage" (35).

Another reason why the majority of the Committee in the Working Paper preferred a narrower definition of rape was the perceived damage suffered by victims of fraudulently obtained intercourse which they assumed to be less severe than in cases where fraud was not involved:

"We consider that the distress which the victim of such frauds or threats may suffer is, though a serious matter, not really comparable with the fear and shock that often accompanies "true" (sic) rape" (36).

This assertion, for which the Working Paper produced no justification, is surprising in view of the pertinent case law. The girl who is deceived into intercourse by the defendant's pretence that the act is a surgical operation or a way of improving her singing ability is bound to be young, naive and inexperienced, and no less likely to suffer great psychological damage, become pregnant or catch VD as one who is raped without this element of fraudulence.

However, in the final Report, the CLRC reject the Working Paper's approach and recognise that there is no true consent in the fraud cases; the victim would not have consented to sexual intercourse if

she had known the defendant's true purpose or his true identity. Agreement to the act of penetration alone does not constitute consent; the identity of the person, after all, is of crucial importance in sexual intercourse. The CLRC further propose that sexual intercourse obtained by impersonating anybody, as well as fraud as to the nature of the act should constitute rape. They recommend that the dividing line between rape and fraudulent intercourse should be clearly drawn by legislation, but without narrowing the current definition of rape (37).

2. Intercourse obtained by fear

This question was not considered in the Working Paper, but in the final Report, the CLRC do make a majority recommendation.

Where consent is obtained by inducing fear, this is not expressly defined as rape in the 1976 Act. Juries, it is thought, may not consider that a woman has been raped when she gives in to sexual intercourse through fear and this may lead to considerable injustice. The recommendation is to work out some statutory provision to make a man liable for rape if he obtains consent by implied or explicit threats of force against the woman or another person, eg. her child, provided that those threats are capable of being carried out immediately (38). It may be difficult to find the right formula to express this in legislation. However, the proposal to give statutory recognition to the fact that intercourse obtained by threats rather than physical violence is still rape is welcome and may help to dispel existing prejudice against victims who have no physical injuries.

3. Degrees of rape

One objection to the present law of rape which is sometimes voiced is that juries may be reluctant to convict men known to be of previous good character because of the severe penalties the offence may attract. This is said to be particularly true when juries feel that the alleged victim was partly responsible, and

"willingly allowed herself to get into a situation of a kind in which a sensible woman would have appreciated the possibility that sexual intercourse might be expected" (39).

There is no evidence that the maximum sentence deters juries from convicting. Indeed, thanks to extensive media coverage in recent years of the range of likely sentences for rape, most people are probably well aware by now that life sentences are only given to a handful of offenders each year. Nevertheless, the CLRC's Working Paper considered a possible remedy to this situation in the creation of two degrees of rape, one of which would only carry a maximum penalty of about three years' imprisonment:

"The first category should apply to rapists who inflict violence on their victims or who are strangers to them and use threats of violence to induce submission. All other cases of rape should go into the second category" (40).

Such a reform would result in the creation of a "lesser" category of rape, and effectively in narrowing the current definition of the offence. That the distinction between degrees of rape exists in the public mind is unquestionable. Sir Michael Havers has referred to "minor" rapes, having in mind a case

"where a man persisted (sic) with a woman who had perhaps gone off him after a long relationship (41).

The law should not endorse the myth that only violent, brutal rapes

committed by men who are unknown to the victim constitute "real" rape and that other non-consensual intercourse is a lesser offence. Instead, it should work to eradicate this myth and to recognise fully the gravity of such behaviour, whoever its perpetrator and whatever his relationship to the victim. The creation of two degrees of rape would undoubtedly be a step backward and the rejection of this measure by "almost all commentators" (42) as well as by the CLRC in their final Report must therefore be welcome.

4. Intent in rape

The old Morgan decision, somewhat confused by recent decisions on recklessness and the meaning of that concept in rape, was also considered in the CLRC's final Report. They recommend that the mental element in rape should cover the man who knew that the woman was not consenting, as well as the man who either was aware that she might not be consenting or did not believe that she was consenting (43). The concept of recklessness may or may not be retained. This recommendation does not do justice to the complexities surrounding this issue. For example, it has been suggested that the definition of the mental element should vary between offences. Thus, the requirement for an objective or subjective test should depend on the sort of behaviour that is involved. After all, when it comes to sexual intercourse, it is not unduly complicated for a man to find out whether a woman is consenting or not. The law should protect a woman's right to say no, rather than give support to the blatantly sexist notion expressed by Mr. Nicholas Fairbairn among others that

"a woman frequently refuses or delays consent because she wants to be seduced" (44).

Similarly, nothing stops a man from saying that he believed that the alleged victim was consenting because, although she protested, he knew that she had had intercourse with others in the past and on that basis, he had formed an idea of her general willingness to consent. By effectively retaining the Morgan decision, the CLRC fails to come to grips with the issues involved here and it is to be hoped that any attempt at legislation will be broader in its approach.

5. Extending the definition of rape

For the purpose of rape law, sexual intercourse is defined as penetration of the vagina by the penis. However, cases which have the non-consent element essential for rape but do not involve such penetration also come before the courts. These may involve oral-genital contact, penetration of the anus or penetration by various objects. Currently such offences amount to buggery or indecent assault. The range of acts covered by the category of indecent assault is enormous, from the

"most gross such as forcible oral intercourse to the relatively minor such as bottom-pinching" (45).

There are occasions where the trauma and injury inflicted in such assaults is just as severe than those inflicted in vaginal intercourse. In one case of indecent assault, the police surgeon's evidence was that the victim's genital injuries

"caused extreme pain which he had only seen in cases of recent childbirth" (46).

It may well be that the only factor that distinguishes rape from indecent assault is the object of penetration. There is no logic in keeping as totally separate the treatment by the law of offences

which are all on a continuum of sexual violence committed by men against women. The CLRC considered whether the definition of rape should be extended to cover non-consensual oral intercourse, anal intercourse (whether on a man or woman) and any form of vaginal penetration. In their Working Paper, they declined to follow this course and recommended, with some apparent hesitation, that the present definition of rape should continue:

"At this stage we confirm that we provisionally favour confining rape to non-consensual sexual intercourse with a woman and we invite comment on that decision" (47).

This proposal is based on two main grounds. Firstly, the CLRC endorse the Heilbron Group's view that

"The concept of rape as a distinct form of criminal misconduct is well established in popular thought and corresponds to a distinctive form of wrongdoing" (48). The first argument has been challenged by a number of commentators.

Temkin, for example, has pointed out that

"if the views of the public are of any significance at all in this context, then it must be its views of what the law ought to be rather than what it is. Furthermore, the committee does not in fact know how the public perceives the ambit of the law of rape, nor did it attempt to find out" (49).

Card also noted that, contrary to Heilbron's view, the concept of rape is now popularly understood to include behaviour other than that covered by the legal definition. He cites as an illustration that

"terms such as "oral rape" and "homosexual rape" are frequently encountered in the press" (50).

Further support for his view comes from the recent case of Rai (51) who received a partly suspended sentence for the rape of a girl of six. When the transcript of the case became available, it turned out that the judge in fact sentenced Rai for indecent assault because he did not technically achieve penetration. The niceties of this legal distinction were probably lost on the general public and

indeed on the press, which continued to be outraged by the leniency of the sentence despite this new piece of information. One may well speculate that many people would be surprised to learn just how limited the legal definition of rape is.

Secondly, the CLRC argue that the risk of pregnancy is a further characteristic of rape, and that this too sets it apart from other forms of non-consensual sexual activity. However, although the risk of pregnancy is much reduced, it cannot be excluded in anal intercourse. Furthermore, the prevention of unwanted pregnancy does not seem a major reason for criminalising rape. As Temkin put it,

"The fact that pre-pubertal, menopausal, sterilised and infertile women as well as those who practice contraception are all covered by the law of rape suggests that this distinction is not of overriding significance" (52).

An important feature of rape law reform in the USA and some Australian states has been the broadening of the legal definition of rape so that it is not limited to sexual intercourse but covers a range of coercive sexual acts. The trend has been towards such reform after experimenting with minor procedural alterations in rules of evidence, not unlike Section 2 of the 1976 Act in England. A number of commentators would like to see a similar trend in this country. The NCCL, for example, believe that rape law should be widened to include other forms of sexual penetration and serious sexual assault (53). Card has also argued that the CLRC were wrong not to propose the merging of various types of non-consensual sexual penetration into a single offence:

"It is submitted that if the CLRC's view is accepted, a golden opportunity will have been missed not only to simplify the law but also to make it accord with popular opinion" (54).

There are two major problems which could lead to injustice under

the present situation. Firstly, the maximum penalty is much too low for the gravity of some of the offences which come into the category of indecent assault. Currently, the maximum penalty for indecent assault on a female is 2 years, and 5 years if the victim is under 13 years of age, whilst the maximum penalty for indecent assault against males is 10 years.

The CLRC's final Report proposes to do away with this distinction and to increase the maximum penalty for indecent assault to make it "adequate to deal with the worst cases" (55). In principle, this is a step in the right direction. However, in practice it falls short of what is required. The maximum penalty which the CLRC recommend is ten years, which implies that indecent assault can never be as severe an offence as rape. There is clearly no significant difference between one sort of non-consensual sexual penetration and another, and no logic in fixing the maximum penalty at life for one, and at ten years for the other.

The second important injustice which arises from the current distinction between the legal categories of rape, indecent assault and buggery is that the various provisions which apply to protect alleged victims of rape under the Sexual Offences (Amendment) Act 1976 do not apply to these related offences. There is no equivalent to Section 2 to safeguard them from cross-examination as to their sexual experience to show that they were likely to consent to the incident which constitutes the subject matter of the charge. This means that a complainant in a case of buggery or indecent assault can be freely questioned about her previous sexual experience, without defence counsel having to show the relevance of his

cross-examination to the case. In a case included in the present study, a man was charged with several counts of buggery and indecent assault, as well as with one count of rape on the same woman. Defence counsel began by questioning her as to her past experience of buggery, and eventually made an application under Section 2 in respect of the rape charge. In giving him leave for further cross-examination, the judge wryly remarked that

"it was only the existence of the rape count which posed the difficulty" (Case 35)

The CLRC's final Report aims to remedy this situation and to bring in line the law relating to rape and indecent assault. They recommend that Section 2 of the Sexual Offences (Amendment) Act 1976 should be extended to cover cases of indecent assault. Notwithstanding the criticisms made of the operation of Section 2, this again is a welcome and logical recommendation.

The same argument goes for extending the anonymity provision accorded to rape victims in the 1976 Act to victims of indecent assault and buggery. It is no less distressing for a victim of non-consensual sexual penetration than for a victim of rape to have personal details published in the local press. Interestingly, the only area where rape and indecent assault have so far been treated on a par is in relation to the question of intent. The decision in *DPP v Morgan* was recently applied in an offence of indecent assault on the following grounds:

"In analysing the issue in this way we have followed what was said by the majority in *Reg. v Morgan*...If, as we adjudge, the prohibited act in indecent assault is the use of personal violence to a woman without her consent, then the guilty state of mind is the intent to do it without her consent. Then, as in rape at common law, the inexorable logic, to which Lord Hailsham referred in *Reg. v Morgan*, takes over and there is no room either for a "defence" of honest belief or mistake, or of a "defence"

of honest and reasonable belief or mistake" (56).

Whether acts of non-consensual oral intercourse or vaginal penetration by various objects are included within the legal category of rape is probably not the main issue. What is of crucial importance, however, is that the gravity of these behaviours should be fully recognised by the law, and that the protection extended to alleged victims of rape is also extended to victims of other forms of non-consensual sexual acts.

Marital rape

As we have noted above, the law of rape has many features which are not shared by the criminal law as it relates to other offences. One of its greatest anomalies is probably the exclusion of married women from its protection against rape by their husbands. The rationale for providing husbands with immunity from the charge of raping their wives is said to date from Hale's famous dictum that by the marriage contract,

"the wife hath given up herself in this kind unto her husband, which she cannot retract" (57).

In fact, since Hale the courts have recognised that a wife can retract her consent in cases where there is some legally endorsed step towards separation or divorce. A husband can be convicted of rape if there is a decree nisi (58), an injunction or an undertaking not to molest his wife (59) or a separation order (60). When a married couple are living apart without a court order, the law does not protect the woman from rape by her husband, although it has been established that the husband has no right to use force in obtaining intercourse. If he is violent, he may be liable for an offence of wounding or assault, but not for rape (61). Another

anomaly of the current position is that if a woman who is cohabiting without marriage is forced to have sexual intercourse by the man involved, his behaviour will come within the scope of the law of rape.

There is some evidence that where a man is convicted of raping his ex-wife the courts do not always view the offence very seriously, and that the harm and injury inflicted in such situations are not fully recognised. In a recent case, for example, a man was sentenced to three years' imprisonment for raping his wife after their separation. On appeal, the sentence was considered "excessive" and reduced to 18 months because, according to the Court of Appeal,

"the victim suffered no physical or psychological harm as a result of the rape, although it was an unpleasant and unwelcome experience" (62).

There is no empirical evidence in this country as to the psychological harm caused by rape, but it has been forcefully argued elsewhere that there is no reason to assume that a woman suffers

"less pain, humiliation or fear from forcible sexual penetration by her husband, a boyfriend or a stranger" (63).

Despite some sporadic criticism, the archaic law remains. There has been no serious challenge to it, even though some of the most recent causes celebres in this area were rape offences significantly initiated and effectively committed by husbands against their wives (64). It has also been pointed out that the marriage "contract" is unlike any other in legal terms. Weitzman commented that

"its provisions are unwritten, its penalties unspecified, and the terms of the contract are typically unknown to the 'contracting' parties" (65).

Thus, as Mitra argues,

"It seems to be totally unreasonable to infer from such vague promises that a wife intends to make her body accessible at all times. By marrying, she indicates no more than that she will usually consent to intercourse and it is fanciful in the extreme for the law to imply that by her vow she has deprived herself of the right to decline the act at any given time". (66)

During the debates of the Sexual Offences (Amendment) Bill in 1976 a clause was introduced to extend the criminal law to cover marital rape. This had a less than welcoming reception in the House of Commons. Among others, Mr. Rees-Davis commented that

"It would be going far beyond the bounds of anything hitherto imagined to allow this serious crime to come into the matrimonial bed" (67).

Fears were also expressed that such a provision would encourage married women frivolously and maliciously to complain of rape after a mere domestic disagreement:

"There are some women who are so unscrupulous that if they were given the encouragement of a statutory provision... they might well be prepared to commit perjury and bring their husbands into a criminal court for the sole purpose of breaking up the marriage" (68).

Finally, it was argued that successful prosecution for such offences would be very rare because of the difficulty of proof, and uncertainty about whether wives would ultimately be prepared to give evidence against their husbands:

"...complaints of rape by a wife against her husband could lead to a great many complaints which, while not frivolous, are not maintained to the point of trial" (69).

The clause was talked out in 1976, but another attempt was made to extend rape law to cover married couples in 1983. As seems to be the fate of amendments to rape law, this was through a Private Member's Bill, which did not proceed because of the early election.

The CLRC also considered whether or not marital rape ought to

become an offence. In their Working Paper, they were split over this issue, but a majority favoured radical reform following the advice of the Policy Advisory Committee, which did not believe that an extension of the law to all married couples would lead to any substantial number of

"improperly motivated threats to bring charges of rape against husbands" (70).

The concession to the opponents of reform was the proposal that no marital rape prosecution should be brought without the consent of the Director of Public Prosecutions. This would give the DPP discretion in an area where, as the CLRC recognises, there are no guidelines apart from the question of whether there is evidence to warrant prosecution, and whether "the public interest points to prosecution" (71). Thus, despite a move in the right direction, even the majority of the CLRC did not propose to give married women quite the same rights as others and this is clearly acknowledged in their Working Paper:

"...If wives were to be treated in relation to rape in the same way as other women, that might lead to prosecutions which some would think were not desirable in the interest of the family or the public" (72).

In the CLRC's final Report, the discussion of marital rape starts with a statement that there is wide divergence of opinion both in the CLRC and outside on the question of whether rape law should apply between spouses. The CLRC are agreed that the offence should apply when the parties are effectively separated, whether with or without legal endorsement. However, they are divided on whether to also extend it to couples who are living together. By a majority, they recommend that only married couples who are not cohabiting should be covered, although they acknowledge that there may be considerable difficulties in defining cohabitation. If it proves

impossible to find an adequate working definition, the majority would prefer to leave the law as it is rather than to extend it to all married couples (73).

The CLRC's final report sets out the arguments on both sides.

First, opponents of radical reform feel that forced intercourse within marriage is not the "grave and unique" offence that rape is outside marriage. It involves people who have had regular consensual intercourse in the past, which is believed to mitigate the gravity of the sexual aspect of the offence:

"Where the husband goes so far as to cause injury, there are available a number of offences against the person with which he may be charged, but the gravamen of the husband's conduct is the injury he has caused not the sexual intercourse he has forced" (74).

Those in favour of reform feel that a woman is entitled to decide whether or not to have intercourse on any particular occasion, and that her right to choose within marriage should be protected by the law. This would also be a development in the removal of discrimination against women:

"If an extension of the law of rape to all married couples brought about a re-assessment of the sexual rights and duties in marriage, the law would ... have performed a valuable educative function" (75).

A second argument put forward against extending the law is that because imprisonment would be unlikely in cases involving husbands and wives, unless there were severe injuries, this might lead to all rape cases being regarded less seriously (76). Related to this is the argument that investigating the offence would be particularly difficult unless there was corroborating evidence, for example in the form of physical injury (77). Those in favour of reform say that the above arguments could also apply to offences other than rape where they are committed within marriage, but have

never been held to do so (78).

Problems of proof are considerable in any rape complaint, particularly where the issue is consent and where there is some relationship, however distant, between the defendant and the complainant before the alleged offence. In the present study there was not a single conviction without some corroborative evidence. Forensic evidence of sexual intercourse is generally of no probative value where the defence is consent. Recent complaint or evidence of distress, save in exceptional circumstances, do not amount to corroboration. Without injury or admissions by the accused, and preferably both, a conviction in any rape case is extremely unlikely. Those in favour of reform assert that

"...it is wrong that the law should turn a blind eye to criminal acts merely because they are difficult to prove" (79).

Thirdly, it is argued that the creation of an offence of marital rape would be detrimental to the institution of marriage. Once a wife had made a complaint, she would be unable to withdraw it. Police intervention would drive the couple even further apart, and lessen their chances of reconciliation which in turn would have detrimental consequences for the children (80). This position assumes that reconciliation is always desirable, which is questionable. It is hard to see whose interests would be served by the perpetuation of marriages where one partner continually and severely abuses the other.

It is interesting that the CLRC takes a somewhat different line when it considers the effect on the family of prosecutions for incest. There, they

"recognise that the institution of criminal proceedings, and the punishment of those involved, may cause added distress to and even harm the very persons whom the law is seeking to protect". (81) "A sentence of imprisonment, for instance, which will commonly be visited upon a father guilty of incest with a young daughter, may serve to break up the family in a damaging and distressing manner". (82)

This, however, is not used to suggest that father-daughter incest should no longer be a criminal offence. The protection of the victims is given priority, rightly, over considerations of the "sanctity" of the family. The CLRC's minority on this issue state,

"The intervention of the police when the violence takes the form of forcible sexual intercourse may sometimes be in the wife's best interests and those of any children of the marriage." (83)

Lastly, the majority fear that an offence of marital rape would be open to abuse by unscrupulous women:

"an allegation of the serious and emotive offence of rape might be used by a wife as a bargaining counter in negotiations for maintenance or custody, or as a basis of a charge of unreasonable behaviour in a divorce petition" (84).

The response of the minority is to point out that at present, wives might use allegations of buggery as a bargaining counter in matrimonial proceedings, but such accusations against husbands are rarely made (85).

It is unlikely that a change in the law to cover all married couples would precipitate vast numbers of complaints by wives against husbands. Certainly this has not been the experience of other jurisdictions where the marital immunity from rape prosecution has, to varying degrees, been repealed. And, as Williams comments,

"The primary purpose of the criminal law should not be to secure the maximum number of convictions, rather it is to educate people as to standards of behaviour which society expects of them" (86).

The immediate practical impact of such law reform may be minimal, but the archaic principle that husbands are immune from liability for rape should be repealed. The law in this area, as Temkin argues,

"is of crucial symbolic significance. For the law must be seen to uphold the principles of freedom of choice to sexual intercourse and equality between husbands and wives" (87).

Corroboration

Another element in the law of rape which many regard as antiquated and blatantly sexist is the practice of warning juries of the danger of convicting on the complainant's evidence alone:

"In cases of rape and other sexual offences, the jury may convict upon the uncorroborated evidence of the alleged victim, but the trial judge must warn the jury that it is dangerous to do so. In such cases it is the duty of the trial judge to convey the warning in plain terms, and the warning must be given whether the issue is one of consent, identification or anything else" (88).

This rule is said to date from Hale's assertion that rape is

"an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent" (89).

Although it is still widely believed that rape is an offence particularly prone to false complaints (90), there is no evidence to substantiate this. Despite serious challenge, the law continues to require judges to warn juries against the dangers of convicting on the complainant's uncorroborated evidence. "Human experience in the courts" and "long judicial experience" are said to conform with Hale's view and to justify continuation of this practice. However, as a recent NCCL publication comments,

"Those who believe that rape victims lie might look at the report of the New York City Rape Analysis Squad which found that only two per cent of rape charges reported were false and that these figures were not out of step

with false charges made for other serious crimes" (91). The recent Scottish study of police handling of sexual assault cases does not set out to estimate the percentage of false complaints, but seeks police officers' views on the matter. The authors conclude that

"despite a certain amount of rhetoric from police officers about the frequency of false complaining, individual officers were unable to document many individual cases which fitted into the category of false complaints" (92).

As far as speculation goes, it would be equally easy to think of reasons why women and young girls, as well as men and young boys, might make false complaints of other criminal offences, either for financial gain or as a result of interpersonal relationships and tensions. None of this has been reflected in a corroboration requirement in other areas of the criminal law.

The CLRC's final Report does not discuss the question of corroboration. Presumably, it was felt to have been adequately dealt with in the past. While the Working Paper recognises that it may be "offensive" for a rape victim to hear the judge directing the jury as to corroboration, it remains firm in the position it had adopted by a majority in its 1972 Report on Evidence that special caution is needed in sexual cases because, it is said,

"women and girls... sometimes allege that they have been raped in order to explain away evidence leading to the inference that they have recently had sexual intercourse." (93)

The proposal in the Working Paper was to leave things more or less as they are. The principle that a corroboration warning is essential is endorsed but slightly toned down insofar as juries would in future be warned of "special need for caution" rather than of the "danger" of convicting. The precise form of the warning was

a matter for the judge to decide "according to the circumstances" (94).

There are already more than adequate safeguards to counter the effect of possible false complaints in the criminal law in general (e.g. cross-examination of the victim, defence speech to the jury) and in rape in particular where the barriers to successful prosecution are known to be enormous from deterrents early on in the system (police questioning, medical examination) and right through to the trial stage where cross-examination is far wider in scope than in other trials. There is no logic in arguing that, in such circumstances, the corroboration warning is needed as a safeguard against false complaints.

It is not always appreciated that judges often make comments in the guise of a corroboration warning to the jury which are nothing less than a fundamental insult to women. The following extracts are taken from trials in this study to provide some illustrations:

"Experience has shown that it is very dangerous to convict a man of an offence of this nature on the unsupported evidence of a woman. These offences are very easy to allege - some people may have strange motives and reasons for alleging them, the imagination can play tricks. It is dangerous to convict on the evidence of the complainant alone. For this reason, it has become a healthy practice in law to warn juries about that". (Case 5)

"It is easy to make an allegation of rape: only the girl and the man are present - how on earth is the man to disprove it? Women do make false accusations out of fantasy or spite. That's why doctors always have a nurse present. Juries are warned that they shouldn't convict if they're not aware of this. They should look for corroboration, for example, doctor's evidence of injury or admissions to the police". (Case 7)

"The experience of these courts is that sometimes women make up such charges - I ask you to accept that. It is dangerous to convict in a sexual case on the word of a

woman." (Case 4)

"In sex cases, whatever the sex of the complainant, it is dangerous to convict on the girl's (sic) evidence unless there is corroboration of it against the defendant".
(Case 8)

These extracts show how the corroboration warning can serve to reinforce for the jury the stereotype of the malicious, vindictive, and sometimes unbalanced rape victim which pervades the legal system. As the New South Wales Attorney General commented in introducing sexual assault law reforms there,

"It is stressed that the present practice (of corroboration warning) is regarded as being grossly offensive to women, and discriminatory." "Under Section 405C the judge will not be compelled to utilize the traditional formula of denigration which identifies women as especially untrustworthy". (95)

The elimination of the corroboration rule has been a major feature of rape law reforms in Australia and the USA. One function of the law should be to challenge assumptions about culturally acceptable behaviour towards women, and thus to contribute to more enlightened attitudes towards the offence. It is regrettable that the CLRC's final report missed the opportunity to recommend long overdue change in this area. As with marital rape, the effect of repealing the corroboration requirement may have little practical impact. Nevertheless, a matter of principle is at stake. If the law is to be widely respected by women, it is essential that it should get rid of its inherited view of the rape victim as a neurotic female, particularly prone to lying and to sexual hysteria. One crucial step would be to drop the practice of a judicial warning about the danger of accepting the complainant's uncorroborated evidence that gives a ritual public reinforcement of this image at every rape trial.

Conclusion

When the CLRC produced its final Report in 1984, the media showed some optimism that its recommendations would be followed by legislative reform. Unfortunately, however, even if the political climate were favourable to change, the proposals contained in the CLRC's Report are insufficient to bring rape law into line with contemporary needs, attitudes and behaviour. There is a marked contrast between the tone and approach of the CLRC and of the Advisory Group on the Law of Rape towards the plight of the rape victim. One wonders to what extent this is explained by the composition of the two committees. Only two of the seventeen members of the CLRC, drawn mainly from the legal profession, were women. It is puzzling that a committee which considered sexual offences, an area which affects women so profoundly, was composed almost exclusively of men. The membership of the Advisory Group on the Law of Rape, on the other hand, was more evenly divided between the sexes and was also chaired by a woman High Court judge, Mrs. Justice Heilbron. It also produced a more sympathetic, balanced and sensitive report than the CLRC.

There is considerable ambiguity in society and in the legal system towards the plight of the rape victim. On the one hand, recent years have seen a growing awareness that rape victims are getting a rough deal from the various institutions they come into contact with when they report the offence. Measures like the Sexual Offences (Amendment) Act 1976 have gone some way towards attempting to remedy this situation. On the other hand, there is convincing evidence that legislative reform has not gone far enough. Not only

is the scope of the Act very limited, but each of its provisions designed to help the alleged victim is matched with a provision to favour the defendant. Furthermore, the essentially discretionary nature of the legislation, a male judiciary and a conservative criminal bar have meant that its practical impact has been minimal. During the debates of the Bill, one M.P. opposed to it expressed his hope that the judges would

"have sufficient ingenuity to whittle it down." (96)

The findings of the present study suggest that his hopes were not misplaced.

If we are to have a rape law that meets the essential need of being fair to the defendant but also affords adequate protection for the complainant, which is essential if our society is not to decriminalise the offence by continuing to discourage the reporting of rape, some vital changes are urgently required. The first priority must be to ensure that the Sexual Offences (Amendment) Act 1976 works as intended by Parliament, and this involves the strengthening of Section 2. Anonymity for defendants, which was introduced to pacify those who felt that anonymity for complainants alone would give rise to an upsurge in malicious accusations, and which has had certain unforeseen and unfortunate consequences, should be repealed as the CLRC's Fifteenth Report recommends (97). The Morgan decision which, in the light of subsequent case law, has turned out to be more controversial than was first presumed, should also be reconsidered with regard to its application to rape.

In addition to strengthening the 1976 Act, a number of other reforms are urgently needed. The gravity of other forms of

non-consensual sexual penetration and contact must be recognised by the law, whether through the creation of an extended category of rape, or simply through an increase of maximum penalties for such offences. As has been argued, victims of indecent assault should also be entitled to the same protection vis a vis their sexual history and anonymity as victims of rape. Husbands should be brought within the compass of rape law, and it is high time to get rid of the anachronistic assumption that on marriage women relinquish their right to refuse sexual intercourse. Finally, the corroboration requirement which serves to perpetuate the myth that women are particularly untrustworthy witnesses and prone to lying on oath should be repealed. It is also important that future reforms leave as little as possible to judicial discretion.

Further research in this area is also of crucial importance. Both the Advisory Group on the Law of Rape and, more recently, the CLRC, have clearly been greatly hampered in their work by the fact that so little reliable information exists in this country about the nature of the offence, its effect on victims, the motivations of offenders, and the role of societal institutions in compounding its impact on victims. Both bodies have had to rely almost exclusively on assumptions and empirical data predominantly from the USA regarding various aspects of the problem. Unhappily, the Fifteenth Report of the CLRC in 1984 gives little confidence that it would use empirical data if it had them, or that it would be capable of distinguishing reliable from unreliable data.

A recent Law Commission Report on divorce and maintenance recommends that provision be made for the

"continuous monitoring of the operation of any amending legislation dealing with the financial consequences of divorce". (98)

A similar case could well be made out for setting up machinery for the systematic monitoring of the law relating to rape, partly to identify potential areas for future reform, and partly to ensure that the operation of current legislation is in line with the intentions of Parliament.

Finally, it must be remembered that law reform, however comprehensive and well implemented, is only part of the solution. There are clearly limits to how much can be achieved by procedural change. In an adversarial system some attack on the chief prosecution witness's evidence is standard strategy, and any defence lawyer will capitalise on information which, however prejudicial from the complainant's point of view, is in favour of his client. As Wood has argued from American experience,

"Temporary measures, such as crisis centres or legislative reforms, may be able to alleviate current atrocities, but until the time when the rape victim is no longer looked upon with suspicion and distrust, most rapists are likely to commit the crime with impunity. The bias against the rape victim... can only be dispelled if people become aware of the quandry in which she has been placed by a society which tends to adopt a male perspective. Exposing the defects in the present system is the first step in curing them". (99)

The present position of the rape complainant is partly the result of legal definitions of rape, and of an essential and proper concern to afford maximum protection for accused persons in an adversarial system. But the legal system is an integral part of society, and subject to the same values. Thus, the experience of rape victims in court is also a product of current social attitudes towards sexuality and the "proper" nature of male and female relationships.

The ambivalence towards the rape victim which has characterised both the substance and the application of the Sexual Offences (Amendment) Act 1976 has to be resolved without further delay if this area of the criminal law is to recover credibility. It is imperative to get away from the attitudes embodied in the current legal process, attitudes which are not only insulting and degrading to women, but which also hamper the administration of justice in the broadest sense of the term.

FOOTNOTES TO CHAPTER NINE

- (1) HONORE, T.: Sex law, Duckworth, London, 1978, p.64
- (2) ELLIOTT, D.W.: "Rape complainants' sexual experience with third parties" Criminal Law Review 1984, p. 14
- (3) See for example The Sunday Times, 24th January 1982
- (4) "A complaint of rape" BBC TV "Police" Series, January 1982
- (5) Daily Mirror, 6th January 1982
- (6) Mr. Justice Melford Stevenson's last case before retiring was a rape, included in this study (Case 42)
- (7) Daily Telegraph, 7th January 1982
- (8) The Guardian, 16th January 1982
- (9) The Guardian, 16th December 1982
- (10) R v GROOMBRIDGE (1836) 7 C & P 582, R v ELDERSHAW (1828) 3 C & P 396; R v JORDAN AND COWMEADOW (1839) 9 C & P 118; R v WAITE (1892) 2 QB 600, 61 LJMC 187
- (11) HL Debates, Vol. 376, Col. 1530, 4th November 1976
- (12) LORD SCARMAN: The Jawaharlal Neru Memorial Lectures, Lecture III, p.4
- (13) ibid.
- (14) CRIMINAL LAW REVISION COMMITTEE: Working Paper on Sexual Offences, HMSO, London, 1980
- (15) CRIMINAL LAW REVISION COMMITTEE: Fifteenth Report on Sexual Offences, London, HMSO, Cmnd. 9213, 1984
- (16) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, HMSO, Cmnd. 6352, para. 131
- (17) ELLIOTT, D.W.: op.cit., 1984, p. 7
- (18) ibid.
- (19) COHEN, M.D.: "Evidence of the complainant's previous sexual conduct in a rape trial" New Law Journal, 17th July 1980, p. 622
- (20) London Weekend Television's "Weekend World" Programme, 14th February 1982
- (21) The Times, 15th February 1982
- (22) R v VIOLA (1982)75 Cr.App.R. 125
- (23) ibid.

(24) Quoted in HART, H.L.A.: Essays in jurisprudence and philosophy, Oxford, Clarendon Press, 1983, p.130

(25) It is beyond the scope of this thesis to propose a model for legislative reform but these have been offered in other jurisdictions. See for example SCUTT, J.A.: "Admissibility of sexual history evidence and allegations in rape cases", Australian Law Journal, vol. 53, 1979; BERGER, V.: "Man's trial, woman's tribulation:rape cases in the courtroom", Columbia Law Review, Vol. 77, 1977; McNAMARA, P.: "Cross-examination of the complainant in a trial for rape", Criminal Law Journal, Vol. 5, 1981

(26) ADLER, Z.: "Rape - the intention of Parliament and the practice of the courts" 45 Modern Law Review 1982, p.664

(27) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.87

(28) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.88

(29) ibid.

(30) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.89

(31) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.90

(32) Sexual Offences Act 1956, s. 1(2)

(33) R v FLATTERY (1877) 2 QBD 410. Other examples are R v CASE (1850) 4 Cox CC 220 CCR and R v WILLIAMS (1923) 1 KB 340

(34) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 24

(35) TEMKIN, J.: "Towards a modern law of rape" 45 Modern Law Review, 1982, p.404

(36) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 24

(37) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.25

(38) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.29

(39) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 47

(40) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 50

(41) The Times, 15th February 1982

(42) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.50

(43) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.41

(44) The Times, 12th May 1982

(45) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 45

(46) R v HOLDSWORTH (1977) Unreported, CA

(47) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 46

- (48) REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, HMSO, Cmnd. 6352, 1975, Para. 80
- (49) TEMKIN, J.: op.cit., 1982, p. 411
- (50) CARD, R.: "The Criminal Law Revision Committee's Working Paper on Sexual Offences" Criminal Law Review, 1981, p. 373
- (51) R v RAI (1982) Leeds Crown Court
- (52) TEMKIN, J.: op.cit., 1982, p. 412
- (53) BENN, M., COOTE, A. and GILL, T.: "The rape controversy" NCCL, London, 1983, p. 26
- (54) CARD, R.: op.cit., 1981, p. 373
- (55) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 4.5
- (56) R v KIMBER (1983) 1 WLR at 1122
- (57) HALE, M.: Historia Placitorum Coronae London, Nutt and Gosling, 1736, vol. 1, p. 629
- (58) R v O'BRIEN (1974) 3 All.E.R. 663
- (59) R v STEELE (1977) 65 Cr.App.R. 22
- (60) R v CLARKE (1949) 2 All.E.R. 448
- (61) R v MILLER (1954) 2 Q.B.D. 282
- (62) R v LARGER (1981) C.L.R. 578
- (63) LEGRAND, C.E.: "Rape and rape laws: sexism in society and law" California Law Review, vol. 61, 1973, p. 926
- (64) DPP v MORGAN AND OTHERS (1975) 2 WLR 913; R v COGAN AND LEAK (1975) 3 WLR 316
- (65) WEITZMAN, L.: "Legal regulations and marriage: tradition and change" 62 California Law Review 1170
- (66) MITRA, C.: "...For she has no right or power to refuse her consent" Criminal Law Review, 1979, p. 561
- (67) HC Debates, Vol. 911, Col. 1968, 21st May 1976
- (68) ibid., Col. 1970
- (69) ibid., Col. 1953
- (70) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 32
- (71) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 42
- (72) ibid.

- (73) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.56
- (74) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.64
- (75) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.72
- (76) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.66
- (77) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.68
- (78) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.71
- (79) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.76
- (80) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.66
- (81) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 126
- (82) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 128
- (83) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.73
- (84) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.69
- (85) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.74
- (86) WILLIAMS, J.: "Marital rape - time for reform" New Law Journal, Vol. 134, No. 6137, 1984, p. 27
- (87) TEMKIN, J.: op.cit., 1982, p. 419
- (88) Halsbury's Laws of England, Vol. 11: Criminal Law, Evidence and Procedure, Butterworths, London, 1976, para. 458
- (89) HALE, M.: op.cit., 1736, vol.1, p. 635
- (90) See for example the House of Commons Debates of the Sexual Offences (Amendment) Bill 1976
- (91) PATTULLO, P.: op.cit., 1983, p. 18
- (92) CHAMBERS, G. and MILLAR, A.: Investigating sexual assault, HMSO, Edinburgh, 1983, p. 86
- (93) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1980, Para. 49
- (94) ibid.
- (95) WOODS, G.D.: Sexual assault law reforms in New South Wales - a commentary on the Crimes (Sexual Assault) Amendment Act 1981 and Cognate Act, Dept. of Attorney-General and Justice, 1981, p. 28
- (96) HC Debates, Vol. 917, Col. 886, 15th October 1976
- (97) CRIMINAL LAW REVISION COMMITTEE: op.cit., 1984, Para. 2.92
- (98) THE LAW COMMISSION: The financial consequences of divorce

Law.Com. No.112, HMSO, London, 1981, para. 11

(99) WOOD, P.L.: "The victim in a forcible rape case: a feminist view" American Criminal Law Review, Vol. II, No. 2, 1973, p. 354

APPENDICES

APPENDIX I.THE SEXUAL OFFENCES (AMENDMENT) ACT 1976

1976 CHAPTER 82

An Act to amend the law relating to rape [22nd November, 1976]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1.-(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if-

- (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
- (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it: and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.

2.-(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, 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 the defendant.

(2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

(3) In subsection (1) of this section "complainant" means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.

(4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

3.-(1) Where a magistrates' court inquires into a rape offence as examining justices, then, except with the consent of the court, evidence shall not be adduced and a question shall not be asked at the inquiry which, if the inquiry were a trial at which a person is

charged as mentioned in subsection (1) of the preceding section and each of the accused at the inquiry were charged at the trial with the offences of which he is accused at the inquiry, could not be adduced or asked without leave in pursuance of that section.

(2) On an application for consent in pursuance of the preceding subsection for any evidence or question the court shall-

(a) refuse the consent unless the court is satisfied that leave in respect of the evidence or question would be likely to be given at a relevant trial; and

(b) give consent if the court is so satisfied.

(3) Where a person charged with a rape offence is tried for that offence either by court-martial or summarily before a magistrates' court in pursuance of section 6(1) of the Children and Young Persons Act 1969 (which provides for the summary trial in certain cases of persons under the age of 17 who are charged with indictable offences) the preceding section shall have effect in relation to the trial as if-

(a) the words "in the absence of the jury" in subsection (2) were omitted; and

(b) for any reference to the judge there were substituted-

(i) in the case of a trial by court-martial for which a judge advocate is appointed, a reference to the judge advocate, and

(ii) in any other case, a reference to the court.

4.- (1) Subject to subsection (7)(a) of this section, after a person is accused of a rape offence no matter likely to lead members of the public to identify a woman as the complainant in relation to that accusation shall either be published in England and Wales in a written publication available to the public or be broadcast in England and Wales except as authorised by a direction given in pursuance of this section.

(2) If, before the commencement of a trial at which a person is charged with a rape offence, he or another person against whom the complainant may be expected to give evidence at the trial applies to a judge of the Crown Court for a direction in pursuance of this subsection and satisfies the judge-

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial; and

(b) that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if the direction is not given,

the judge shall direct that the preceding subsection shall not, by virtue of the accusation alleging the offence aforesaid, apply in relation to the complainant.

(3) If at a trial before the Crown Court at which a person is charged with a rape offence the judge is satisfied that the effect of subsection (1) of this section is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction, he shall direct that that subsection shall not apply

to such matter relating to the complainant as is specified in the direction; but a direction shall not be given in pursuance of this subsection by reason only of an acquittal of a defendant at the trial.

(4) If a person who has been convicted of an offence and given notice of appeal to the Court of Appeal against the conviction, or notice of an application for leave so to appeal, applies to the Court of Appeal for a direction in pursuance of this subsection and satisfies the Court-

(a) that the direction is required for the purpose of obtaining evidence in support of the appeal; and

(b) that the applicant is likely to suffer substantial injustice if the direction is not given,

the Court shall direct that subsection (1) of this section shall not, by virtue of an accusation which alleges a rape offence and is specified in the direction, apply in relation to a complainant so specified.

(5) If any matter is published or broadcast in contravention of subsection (1) of this section, the following persons, namely-

(a) in the case of a publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical;

(b) in the case of any other publication, the person who publishes it, and

(c) in the case of a broadcast, any body corporate which transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of an editor of a newspaper,

shall be guilty of an offence and liable on summary conviction to a fine not exceeding £500.

(6) For the purposes of this section a person is accused of a rape offence if-

(a) an information is laid alleging that he has committed a rape offence; or

(b) he appears before a court charged with a rape offence; or

(c) a court before which he is appearing commits him for trial on a new charge alleging a rape offence; or

(d) a bill of indictment charging him with a rape offence is preferred before a court in which he may lawfully be indicted for the offence,

and references in this section and section 7(5) of this Act to an accusation alleging a rape offence shall be construed accordingly; and in this section-

"a broadcast" means a broadcast by wireless telegraphy of sound or visual images intended for general reception, and cognate expressions shall be construed accordingly;

"complainant", in relation to a person accused of a rape offence or an accusation alleging a rape offence, means the woman against

whom the offence is alleged to have been committed; and
 "written publication" includes a film, a sound track and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings.

(7) Nothing in this section-

(a) prohibits the publication or broadcasting, in consequence of an accusation alleging a rape offence, of matter consisting only of a report of legal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with that offence; or

(b) affects any prohibition or restriction imposed by virtue of any other enactment upon a publication or broadcast;

and a direction in pursuance of this section does not affect the operation of subsection (1) of this section at any time before the direction is given.

5.-(1) In relation to a person charged with a rape offence in pursuance of any provision of the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955, the preceding section shall have effect with the following modifications, namely-

(a) any reference to a trial or a trial before the Crown Court shall be construed as a reference to a trial by court-martial;

(b) in subsection (1) after the word "Wales" in both places there shall be inserted the words "or Northern Ireland";

(c) for any reference in subsection (2) to a judge of the Crown Court there shall be substituted a reference to the officer who is authorised to convene or has convened a court-martial for the trial of the offence (or, if after convening it he has ceased to hold the appointment by virtue of which he convened it, the officer holding that appointment) and for any reference in subsection (3) to such a judge there shall be substituted a reference to the court;

(d) for any reference in subsection (4) to the Court of Appeal there shall be substituted a reference to the Courts-Martial Appeal Court; and

(e) in subsection (6) for paragraphs (a) to (d) there shall be substituted the words "he is charged with a rape offence in pursuance of any provision of the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955".

(2) If after the commencement of a trial at which a person is charged with a rape offence a new trial of the person for that offence is ordered, the commencement of any previous trial at which he was charged with that offence shall be disregarded for the purposes of subsection (2) of the preceding section.

(3) In relation to a conviction of an offence tried summarily as mentioned in section 3(3) of this Act, for references to the Court of Appeal in subsection (4) of the preceding section there shall be substituted references to the Crown Court and the reference to notice of an application for leave to appeal shall be omitted.

(4) When an offence under subsection (5) of the preceding section which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be

attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and be liable to be proceeded against and punished accordingly.

Where the affairs of a body corporate are managed by its members the preceding provisions of this subsection shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(5) Proceedings for an offence under subsection (5) of the preceding section (including such an offence which is alleged to have been committed by virtue of the preceding subsection) shall not be instituted except by or with the consent of the Attorney General or, if the offence is alleged to have been committed in Northern Ireland, of the Attorney General for Northern Ireland; and where a person is charged with such an offence it shall be a defence to prove that at the time of the alleged offence he was not aware, and neither suspected nor had reason to suspect, that the publication or broadcast in question was of such matter as is mentioned in subsection (1) of that section.

(6) In section 31(1) of the Criminal Appeal Act 1968 (which provides that certain powers of the Court of Appeal may be exercised by a single judge) after the word "1973" there shall be inserted the words "and the power to give directions under section 4(4) of the Sexual Offences (Amendment) Act 1976"; and in section 36(1) of the Courts-Martial (Appeals) Act 1968 (which provides that certain powers of the Courts-Martial Appeal Court may be exercised by a single judge) after paragraph (g) there shall be inserted the words "and the power to give directions under section 4(4) of the Sexual Offences (Amendment) Act 1976 as adapted by section 5(1)(d) of that Act".

6.-(1) After a person is accused of a rape offence no matter likely to lead members of the public to identify him as the person against whom the accusation is made shall either be published in England and Wales in a written publication available to the public or be broadcast in England and Wales except-

(a) as authorised by a direction given in pursuance of this section or by section 4(7)(a) of this Act as applied by subsection (6) of this section; or

(b) after he has been convicted of the offence at a trial before the Crown Court.

(2) If a person accused of a rape offence applies to a magistrates' court, before the commencement of his trial for that offence, for a direction in pursuance of this subsection, the court shall direct that the preceding subsection shall not apply to him in consequence of the accusation; and if at a trial before the Crown Court at which a person is charged with a rape offence in respect of which he has not obtained such a direction-

(a) the judge is satisfied that the effect of the preceding subsection is to impose a substantial and unreasonable restriction

on the reporting of proceedings at the trial and that it is in the public interest to remove the restriction in respect of that person; or

(b) that person applies to the judge for a direction in pursuance of this subsection,

the judge shall direct that the preceding subsection shall not apply to that person in consequence of the accusation alleging that offence.

(3) If, before the commencement of a trial at which a person is charged with a rape offence, another person who is to be charged with a rape offence at the trial applies to a judge of the Crown Court for a direction in pursuance of this subsection and satisfies the judge—

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial; and

(b) that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if the direction is not given,

the judge shall direct that subsection (1) of this section shall not, by virtue of the accusation alleging the offence with which the first-mentioned person is charged, apply to him.

(4) In relation to a person charged with a rape offence in pursuance of any provision of the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955, the preceding provisions of this section shall have effect with the following modifications, namely—

(a) any reference to a trial or a trial before the Crown Court shall be construed as a reference to a trial by court-martial;

(b) after the word "Wales" in both places there shall be inserted the words "or Northern Ireland";

(c) in subsection (2) for any reference to a judge of the Crown Court there shall be substituted a reference to the court-martial; and

(d) in subsection (2) for any reference to a magistrates' court and in subsection (3) for any reference to a judge of the Crown Court there shall be substituted a reference to the officer who is authorised to convene or has convened a court-martial for the trial of the offence or, if after convening it he has ceased to hold the appointment by virtue of which he convened it, the officer holding that appointment.

(5) An order in pursuance of section 49 of the Children and Young Persons Act 1933 (which among other things imposes restrictions on reports of certain court proceedings concerning juveniles but authorises the court and the Secretary of State to make orders lifting the restrictions for the purpose of avoiding injustice to a juvenile) may include a direction that subsection (1) of this section shall not apply to a person in respect of whom the order is made.

(6) Subsections (5) to (7) of section 4 of this Act shall have

effect for the purposes of this section as if for references to that section there were substituted references to this section; and-

(a) in relation to a person charged as mentioned in subsection (4) of this section, section 4(6) of this Act, as applied by this subsection, shall have effect as if for paragraphs (a) to (d) there were substituted the words "he is charged with a rape offence in pursuance of any provision of the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955";

(b) in section 5(2) of this Act the reference to the purposes of section 4(2) of this Act shall be construed as including a reference to the purposes of subsections (2) and (3) of this section; and

(c) in relation to a person charged by virtue of this subsection with such an offence as is mentioned in subsection (5) of section 5 of this Act, that subsection shall have effect as if for the reference to section 4(1) of this Act there were substituted a reference to subsection (1) of this section.

7.-(1) This Act may be cited as the Sexual Offences (Amendment) Act 1976, and this Act and the Sexual Offences Acts 1956 and 1967 may be cited together as the Sexual Offences Acts 1956 to 1976.

(2) In this Act-

"a rape offence" means any of the following, namely rape, attempted rape, aiding, abetting, counselling and procuring rape or attempted rape, and incitement to rape; and

references to sexual intercourse shall be construed in accordance with section 44 of the Sexual Offences Act 1956 so far as it relates to natural intercourse (under which such intercourse is deemed complete on proof of penetration only);

and section 46 of that Act (which relates to the meaning of "man" and "woman" in that Act) shall have effect as if the reference to that Act included a reference to this Act.

(3) In relation to such a trial as is mentioned in subsection (2) of section 1 of this Act which is a trial by court-martial or a summary trial by a magistratres' court, references to the jury in that subsection shall be construed as references to the court.

(4) This Act shall come into force on the expiration of the period of one month beginning with the date on which it is passed, except that sections 5(1)(b) and 6(4)(b) shall come into force on such a day as the Secretary of State may appoint by order made by statutory instrument.

(5) Sections 2 and 3 of this Act shall not have effect in relation to a trial or inquiry which begins before the expiration of that period and sections 4 and 6 of this Act shall not have effect in relation to an accusation alleging a rape offence which is made before the expiration of that period.

(6) This Act, except so far as it relates to courts-martial and the Courts-Martial Appeal Court, shall not extend to Scotland and this Act, except so far as it relates to courts-martial and the Courts-Martial Appeal Court (including such a publication or broadcast in Northern Ireland as is mentioned in section 4(1) as

adapted by section 5(1)(b) and section 6(1) as adapted by section 6(4)(b), shall not extend to Northern Ireland.

APPENDIX II.

SCHEDULE FOR "GUILTY" PLEAS

A. IDENTIFICATION OF THE CASE

R v.

1. Number

2. Was there more than one defendant?

Yes / No

If yes, how many?

3. Dates of trial

4. Judge

5. Prosecution counsel

a. Sex: Male / Female

b. Whether Q.C.: Yes / No

c. Whether Treasury Counsel: Yes / No

B. THE DEFENDANT (One section to be completed for each defendant at the trial)

1. Name (D/No....)

2. Defence counsel

a. Sex: Male / Female

b. Whether Q.C.: Yes / No

3. Indictment and pleas

Charges:

Pleas:

a

b
c
d
e
f
g
h
i
j

4. Verdict (on charges other than rape)

Charges:	Acquittal:	Conviction:	Other: (Specify)
----------	------------	-------------	---------------------

a
b
c
d
e
f
g
h
i
j

5. Sentence (all offences) (To be recorded separately, where relevant)

6. Previous convictions

Did the defendant have any previous convictions?

Yes / No

If yes, give details:

Charge: Year: Sentence:

a

b

c

d

e

f

g

h

7. Age at the time of the offence

8. Relationship to victim

9. Occupation

Usual occupation:

Was he unemployed at the time of the offence?

Yes / No

10. Marital status

11. Did the defendant make any threats of violence in committing the offence? (verbal threats, gestures, etc.)

Yes / No

If yes, give details:

12. Did the defendant have a weapon on him at the time of the offence?

Yes / No

If yes, give details:

13. Did the defendant use any physical violence in committing the offence?

Yes / No

If yes, give details:

14. Had the defendant been taking any drugs other than alcohol?

Yes / No / Not known

If yes, give details:

Was there any suggestion that his behaviour was influenced by this?

Yes / No

If yes, give details:

15. Had the defendant been drinking alcohol before committing the offence?

Yes / No / Not known

If yes, give details:

Was there any suggestion that his behaviour was influenced by this?

Yes / No

If yes, give details:

16. Was he, in his own submission, a heavy drinker/alcoholic/drug addict?

Yes / No

If yes, give details:

Had he been receiving any treatment at the time of the offence?

Yes / No

If yes, give details:

If not,

Was treatment a condition of his sentence?

C. THE VICTIM (One section to be completed for each victim involved in the trial)

1. Age at the time of the offence

2. Occupation

3. Marital status

4. Was there evidence of the victim's virginity?

Yes / No

If yes, give details:

5. Police

Did the victim report the offence to the police?

Yes / No

If no, who did? (Give details)

How soon after the offence was it reported?

6. What was her behaviour during the attack?

7. Did she suffer any physical injuries?

Yes / No

If yes, give details:

D. THE RAPE OFFENCE

1. What was (were) the rape offence(s)?

2. Brief description

3. Date

4. Time

5. Location

In which borough did it occur?

Where precisely did it occur?

E. MITIGATION (Record main points)

F. SUMMARY AND COMMENTS

G. APPEAL (Record details of any appeal against sentence)

SCHEDULE FOR "NOT GUILTY" PLEASA. IDENTIFICATION OF THE CASE

R v.

1. Number2. Was there more than one defendant?

Yes / No

If yes, how many?3. Dates of trialNumber of days:4. Judge5. Prosecution counsel

a. Sex: Male / Female

b. Whether Q.C.: Yes / No

c. Whether Treasury Counsel: Yes / No

B. THE DEFENDANT (One section to be completed for each defendant at the trial)1. Name (D/No....)Does the anonymity restriction apply? (Give details)2. Indictment and pleas

Charges:

Pleas:

- a
- b
- c
- d
- e
- f
- g
- h
- i
- j

3. Verdict on rape charges (Give details)

Charges:	Acquittal:	Conviction as charged:	Conviction lesser offence:	Other: (Specify)
----------	------------	---------------------------	----------------------------------	---------------------

- a
- b
- c
- d
- e
- f
- g
- h
- i
- j

4. Verdict on other charges (Give details)

Charges:	Acquittal:	Conviction as charged:	Conviction lesser offence:	Other (specify):
a				
b				
c				
d				
e				
f				
g				
h				
i				
j				

5. Sentence (all offences) (To be recorded separately, where relevant)

6. Previous convictions

Was information on previous convictions available?

Yes / No

If yes, how did it become available?

Did the defendant have any previous convictions?

Yes / No / Not known

If yes, give details:

Charge:	Year:	Sentence:
a		
b		

c

d

e

f

g

h

7. Age at the time of the offence

8. Relationship to complainant

9. Occupation

Usual occupation:

Was he unemployed at the time of the offence?

Yes / No

10. Marital status

11. Did the defendant make any threats of violence in committing the offence? (verbal threats, gestures, etc.)

Yes / No

If yes, give details:

12. Did the defendant have a weapon on him at the time of the offence?

Yes / No

If yes, give details:

13. Did the defendant use any physical violence in committing the offence?

Yes / No

If yes, give details:

14. Had the defendant been taking any drugs other than alcohol?

Yes / No / Not known

If yes, give details:

Was there any suggestion that his behaviour was influenced by this?

Yes / No

If yes, give details:

15. Had the defendant been drinking alcohol before committing the offence?

Yes / No / Not known

If yes, give details:

Was there any suggestion that his behaviour was influenced by this?

Yes / No

If yes, give details:

16. Was he, in his own submission, a heavy drinker/alcoholic/drug addict?

Yes / No

If yes, give details:

Had he been receiving any treatment or help for this at the time of the offence?

Yes / No

If yes, give details:

If not,

Was treatment a condition of his sentence?

17. Defence counsel

a. Sex: Male / Female

b. Whether Q.C.: Yes / No

18. Police

What evidence was given by the police regarding initial interview(s) with the defendant? (Record in detail)

If a statement under caution was made, what evidence was given about that?

How far was the defendant's evidence at the trial consistent with his admissions and/or statement to the police? (Give details of any "attacks" on the police in this connection)

C. THE COMPLAINANT (One section to be completed for each complainant involved in the trial)

(C/No.....)

1. Was the anonymity restriction lifted on the complainant?

Yes / No

If yes, give details:

2. Age at the time of the offence

3. Occupation

4. Marital status

5. Was there evidence of the complainant's virginity?

Yes / No

If yes, give details:

6. Police

Did the complainant report the offence to the police?

Yes / No .

If no, who did? (Give details)

How soon after the offence was it reported?

7. Did she suffer any physical injuries?

Yes / No

If yes, give details:

8. Had she been drinking alcohol/using drugs before the alleged offence was committed?

Yes / No / Not known

If yes, give details:

Was there any suggestion that this influenced her behaviour?

Yes / No

If yes, give details:

9. How long was she in the witness box?

For the prosecution:

In cross-examination:

10. Demeanour in witness box (Describe briefly)

D. THE RAPE OFFENCE

1. What was (were) the rape offence(s) charged?

2. Brief description

3. Date

4. Time

5. Location

In which borough did it occur?

Where precisely did it occur?

E. ISSUES IN THE TRIAL

Medical evidence

1. Was the occurrence of sexual intercourse or attempted intercourse at issue?

Yes / No

If yes, give details:

2. What evidence was given regarding the occurrence of sexual intercourse or attempted intercourse? (Record details)

3. When was the complainant first examined by a doctor?

4. What evidence of victim injury was there? (Give details)

5. Did the medical evidence for the prosecution indicate that injuries should have been apparent if the complainant's story were true?

Yes / No

If yes, give details:

6. Did the defence indicate that the victim's injuries were not consistent with her version of events? (Give details)

7. Was any medical evidence given to clarify the identity of parties involved?

Yes / No

If yes, give details:

8. Was any aspect of the prosecution medical evidence disputed by the defence?

Yes / No

If yes, give details:

Identity

9. Was the identity of the defendant(s) at issue?

Yes / No

If yes, give details:

Consent

10. Was consent at issue?

Yes / No

If yes, complete the rest of this section

11. What was the complainant's behaviour at the time of the alleged offence

(a) according to her?

If submission: Was lack of resistance interpreted as implied consent by the defendant?

Yes / No

If yes, give details:

(b) according to the defendant(s)?

12. Why was such behaviour interpreted as consent?

13. Did the defence try to set some absolute standard of consent?

Yes / No

If yes, give details:

Sexual history of the complainant

14. Was there any suggestion or evidence that the complainant has previously had consensual intercourse with the defendant, or any relationship short of sexual intercourse?

Yes / No

If yes, give details:

Was this agreed by the complainant?

Yes / No

If no, give her version of the facts:

15. Was an application made to cross-examine the complainant about her previous sexual experience with any man other than the defendant?

Yes / No

If yes, What were the grounds of the application?

What was the judge's ruling?

What reasons, if any, did the judge give for his ruling?

16. Was evidence of the complainant's previous sexual history introduced during the trial?

Yes / No

If yes, via which route? (i.e. medical evidence, application under s.2., etc.)

What were the main points of the evidence?

How far was this agreed by the complainant?

Complainant's character

17. Was there any suggestion that the complainant provoked the incident?

Yes / No

If yes, give details (particularly of grounds on which such a suggestion was made):

18. Did the defence make any indirect references to the reputation or character of the complainant with the purpose of undermining her credibility?

Yes / No

If yes, give details:

Intent

19. Was the defendant's intent at issue?

Yes / No

If yes: What aspects of the complainant's behaviour were interpreted as consent by the defendant?

G. DIRECTIONS AND VERDICT

1. What evidence, in the judge's summing up, was capable of

constituting corroboration? Give details:

2. What was said about the danger of convicting on the complainant's evidence alone? (Record as near verbatim as possible):

3. How did the judge deal with reasonable/unreasonable mistake in believing in consent, where applicable?

4. Judge's attitude to complainant (as compared to other witnesses)
(Describe briefly):

The jury

5. Sex composition of the jury

No. of men:

No. of women:

6. Were the jury directed to acquit?

Yes / No

If yes, give details:

7. Were the jury aware, before retiring, of any previous convictions of the defendant(s)?

Yes / No

If yes, give details:

8. Deliberations

How long were the jury out before returning a verdict?

Were they directed on a majority verdict?

Yes / No

If yes, Did they return a majority verdict?

Yes / No / Not known

If yes, give details:

H. MITIGATION (Record main points)

I. SUMMARY AND COMMENTS

J. APPEAL (Record details of any appeal against conviction and/or sentence)

APPENDIX III.ADDITIONAL RESULTS

	<u>Guilty pleas:</u>	<u>Not guilty pleas:</u>
<u>Number of defendants per trial</u>		
One	30 (97%)	34 (68%)
Two	1 (3%)	8 (16%)
Three	-	4 (8%)
Four	-	2 (4%)
Five	-	1 (2%)
Six	-	1 (2%)
Total trials:	31 (100%)	50 (100%)
<u>Number of complainants per trial</u>		
One	20 (65%)	44 (88%)
Two	8 (26%)	6 (12%)
Three	1 (3%)	-
Four	2 (6%)	-
Total trials:	31 (100%)	50 (100%)
<u>Judge</u>		
High Court judge	14 (45%)	13 (26%)
Circuit judge	11 (36%)	28 (56%)
Recorder of London	6 (19%)	9 (18%)
Total trials:	31 (100%)	50 (100%)
<u>Length of trial</u>		
1 to 4 days	31 (100%)	28 (56%)
5 to 8 days	-	15 (30%)
9 to 12 days	-	4 (8%)
13 to 16 days	-	2 (4%)
17 days and over	-	1 (2%)
Total trials:	31 (100%)	50 (100%)
<u>Main rape offences charged</u>		
Rape	26 (81%)	65 (81%)
Attempted rape	6 (19%)	6 (8%)
Aiding and abetting rape	-	6 (8%)
Indecent assault	-	3 (4%)
Total defendants:	32 (100%)	80 (101%)

Guilty pleas:Not guilty pleas:Other offences charged

No other offences charged	9 (28%)	41 (51%)
Additional sexual offence	13 (41%)	19 (24%)
Property offence	12 (38%)	12 (15%)
Offence of violence against the person	9 (28%)	23 (29%)
Other offence	5 (16%)	5 (6%)
Total defendants:	[32*]	[80*]

*These categories are not mutually exclusive, and some defendants were charged with more than one group of offences in addition to rape.

Plea to rape charge,
"guilty" plea group

-Guilty of rape as charged	17 (53%)
-Not guilty of rape,	
a. guilty of attempt	1 (3%)
b. guilty of unlawful sexual intercourse	4 (13%)
c. guilty of indecent assault	5 (16%)
d. guilty of other offences	2 (6%)
-Guilty of attempted rape as charged	3 (9%)
Total defendants:	32 (100%)

Verdict on rape charge,
"not guilty" pleas

Convicted of rape as charged	30 (38%)
Convicted of attempt as charged	3 (4%)
Convicted of aiding and abetting as charged	1 (1%)
Convicted of lesser offence	7 (9%)
Acquitted by jury	24 (30%)
Acquitted on judge's direction	5 (6%)
Acquitted because prosecution offered no evidence	8 (10%)
Retrial ordered	2 (2%)
Total defendants:	80 (100%)

Guilty pleas: Not guilty pleas:

Main offence sentenced for
(convictions only)

Rape	15 (47%)	30 (73%)
More than one count of rape	2 (6%)	-
Attempted rape	4 (12%)	3 (7%)
Aiding and abetting rape	-	2 (5%)
Indecent assault	4 (12%)	6 (15%)
Other sexual offences	7 (22%)	-
Total defendants:	32 (99%)	41 (100%)

Sentence

Probation	2 (6%)	-
Borstal	1 (3%)	4 (10%)
Suspended sentence	1 (3%)	-
Immediate imprisonment,		
up to and incl. 1 year	2 (6%)	2 (5%)
up to and incl. 2 years	4 (13%)	4 (10%)
up to and incl. 3 years	4 (13%)	13 (32%)
up to and incl. 4 years	5 (15%)	6 (14%)
up to and incl. 5 years	2 (6%)	6 (14%)
up to and incl. 10 years	4 (13%)	6 (14%)
over 10 years, excl. life	3 (9%)	-
Life	4 (13%)	-
Total defendants:	32 (100%)	41 (99%)

Defendants' previous
convictions

None	5 (16%)	26 (32%)
Rape offences	4 (12%)	10 (12%)
Other sexual offences	6 (19%)	6 (7%)
Offences against property	15 (47%)	44 (55%)
Offences of violence against		
the person	8 (25%)	32 (40%)
Other offences	12 (38%)	22 (27%)
Total defendants:	[32*]	[80*]

* These categories are not mutually exclusive, and some defendants had more than one type of previous conviction.

Guilty pleas: Not guilty pleas:

Defendants' age at the time
of the offence

Under 17	3 (9%)	8 (10%)
17 and under 21	6 (19%)	13 (16%)
21 and under 25	4 (13%)	19 (24%)
25 and under 30	8 (25%)	12 (15%)
30 and under 35	2 (6%)	11 (14%)
35 and under 40	5 (16%)	10 (13%)
40 and under 50	3 (9%)	5 (6%)
50 and over	1 (3%)	2 (3%)
Total defendants:	32 (100%)	80 (101%)

Complainants' age at the
time of the offence

Under 10	1 (2%)	2 (3%)
10 and under 16	12 (26%)	6 (11%)
16 and under 20	3 (7%)	19 (34%)
20 and under 25	12 (26%)	19 (34%)
25 and under 30	7 (15%)	5 (9%)
30 and under 35	5 (11%)	1 (2%)
35 and under 40	1 (2%)	-
40 and under 50	-	2 (3%)
50 and over	3 (7%)	1 (2%)
Not known	2 (4%)	1 (2%)
Total complainants:	46 (100%)	56 (100%)

Defendants' marital status

Single	20 (63%)	41 (51%)
Married or cohabiting	10 (31%)	21 (26%)
Separated or divorced	1 (3%)	15 (19%)
Not known	1 (3%)	3 (4%)
Total defendants:	32 (100%)	80 (100%)

Guilty pleas: Not guilty pleas:

Complainants' marital status

Single	31 (67%)	37 (66%)
Married or cohabiting	9 (19%)	6 (11%)
Separated or divorced	1 (2%)	12 (21%)
Widowed	1 (2%)	-
Not known	4 (9%)	1 (2%)
Total complainants:	46 (99%)	56 (100%)

Complainants' injuries

None	30 (65%)	19 (34%)
Minimal	1 (2%)	21 (37%)
Moderate	10 (22%)	10 (18%)
Severe	4 (9%)	3 (5%)
Not known	1 (2%)	3 (5%)
Total complainants:	46 (100%)	56 (99%)

Where offence was
committed - police area

SW London	5 (16%)	8 (16%)
SE London	5 (16%)	10 (20%)
Central London and West End	4 (13%)	5 (10%)
NW London	2 (6%)	7 (14%)
N and E London	3 (10%)	13 (26%)
Outside London	5 (16%)	4 (8%)
Not known	7 (23%)	3 (6%)
Total trials:	31 (100%)	50 (100%)

Where offence was
committed - location

Defendant's premises	4 (13%)	18 (36%)
Complainant's premises	10 (32%)	11 (22%)
Home shared by defendant and complainant	4 (13%)	4 (8%)
Car/van	2 (6%)	3 (6%)
Public place - outdoors	8 (26%)	9 (18%)
Public place - indoors	3 (10%)	4 (8%)
Not known	-	1 (2%)
Total trials:	31 (100)	50 (100%)

Guilty pleas: Not guilty pleas:

Who reported the offence

Complainant	22 (48%)	19 (34%)
Parent	12 (26%)	7 (12%)
Relative/friend/neighbour	3 (7%)	13 (23%)
Passer-by	5 (11%)	15 (27%)
Not known	4 (9%)	2 (4%)
Total complainants:	46 (101%)	56 (100%)

Number of women on the jury

1-2		3 (6%)
3-4		13 (26%)
5-6		23 (46%)
7-8		7 (14%)
9-10		-
11-12		-
No jury sworn		4 (8%)
Total trials:		50 (100%)

Length of jury deliberations

Under 1 hour		8 (16%)
1 to 2 hours		8 (16%)
2 to 3 hours		8 (16%)
3 to 4 hours		6 (12%)
4 to 5 hours		4 (8%)
More than 5 hours		5 (10%)
Not decided by jury		7 (14%)
Not known		4 (8%)
Total trials:		50 (100%)

APPENDIX IV.BIBLIOGRAPHY

A

ABRAHAMSEN, D.: The psychology of crime, New York, Science Editions, John Wiley and Sons, 1960

ALLDRIDGE, P.: "Five pillars of wisdom - or salt? Lawrence and Caldwell in the House of Lords" Justice of the Peace, Vol.145, April 18th, 1981

AMIR, M.: Patterns in forcible rape, Chicago, University of Chicago Press, 1971

AMIR, M.: "Alcohol and forcible rape", British Journal of Addictions, vol.62, Nos.3-4, 1967

AMIR, M.: "Victim precipitated forcible rape" Journal of Criminal Law, Criminology and Police Science, vol.58, No.4, 1967

APFELBERG, B. et al.: "A psychiatric study of 250 sex offenders from the Psychiatric Division, Bellevue Hospital, N.Y.C., and the Department of Psychiatry of the N.Y. University College of Medicine" American Journal of Psychiatry, Vol.100, no.1, 1944

ARABIAN, A.: "The cautionary instruction in sex cases: a lingering insult", Southwestern University Law Review, Vol.10, No.3, 1978

ARCHBOLD ON PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, 39th ed., edited by MITCHELL, S., London, Sweet and Maxwell, 1976

B

BALDWIN, J. AND McCONVILLE, M.: Negotiated justice, London, Martin Robertson, 1977

BALDWIN, J. and McCONVILLE, M.: Jury trials, Oxford, Clarendon Press, 1979

BANCROFT, J.: Deviant sexual behaviour - modification and assessment, Oxford, Clarendon Press, 1974

BARNARD, D.: The criminal court in action, London, Butterworths, 1974

BECKER, H.: "Problems of inference and proof in participant observation" American Sociological Review, vol.23, 1958

BENN, M., COOTE, A. and GILL, T.: The rape controversy NCCL, London, 1983

BERGER, V.: "Man's trial, woman's tribulation: rape cases in the courtroom", Columbia Law Review, vol.77, no.1, 1977

- BIENEN, L.: "Rape II: the rape laws of fifty states", Women's Rights Law Reporter , Vol.3, No.3-4, 1977
- BLACKSTONE, W.: Commentaries on the laws of England, Oxford, Clarendon Press, 1775
- BLOM-COOPER, L. and DREWRY, G.: Final appeal: a study of the House of Lords in its judicial capacity, Oxford, Clarendon Press, 1972
- BLOM-COOPER, L. and DREWRY, G.: Law and morality London, Duckworth, 1975
- BOHMER, C.: "Judicial attitudes towards rape victims", Judicature vol. 57, no.7, 1974
- BOHMER, C. and BLUMBERG, A.: "Twice traumatized: the rape victim and the court" Judicature, vol.58, no.8, 1975
- BORGIDA, E. and WHITE, P.: "Social perception of rape victims - the impact of legal reform", Law and Human Behaviour , Vol.2, No.4, 1978
- BOTTOMLEY, K. and COLEMAN, C.: Understanding crime rates, London, Gower, 1981
- BOWKER, L.H. (ed.): Women and crime in America , MacMillan, New York, 1981
- BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND, translated by S.E. THORNE, Cambridge, Mass., Harvard University Press, 1968
- BRITTON ON THE LAWS OF ENGLAND, translated by F.M. NICHOLS, Oxford, Clarendon Press, 1865
- BRODYAGA, L. et al.: Rape and its victims: a report for citizens, Washington D.C., Health Facilities and Criminal Justice Agencies, Center for Women's Policy Studies, 1975
- BROOKS, N.: "Rape and the laws of evidence", Chitty's Law Journal, vol.23, no.1, 1975
- BROWNMILLER, S.: Against our will: men, women and rape, London, Secker and Warburg, 1975
- BURGESS, A.W. and HOLMSTROM, L.L.: "The rape victim in the emergency ward" Am.J.Nursing, vol.10, 1973
- BURGESS, A.W. and HOLMSTROM, L.L.: "Rape trauma syndrome" Am.J.Psychiatry, vol.131, no.9, 1974
- BURGESS, A.W. and HOLMSTROM, L.L.: Rape - crisis and recovery , Bowie, Maryland, R.J. Brady Co., 1979
- BURGESS, A.W. and LAZARE, A. (eds.): Community mental health: target populations, Englewood Cliffs, N.J., Prentice Hall, 1976
- BUSH, J.P.: Rape in Australia ,Melbourne, Sun Books, 1977

C

CARD, R.: "The Criminal Law Revision Committee's Working Paper on Sexual Offences", Criminal Law Review, 1981

CHAFETZ, J.S.: Masculine/feminine or human? An overview of the sociology of sex roles, F.E. Peacock, Itasca, Ill., 1974, p.39

CHAMBERS, G. AND MILLAR, A.: Investigating sexual assault, Edinburgh, HMSO, 1983

CHAMBLISS, W.: Crime and the legal process, New York, McGraw Hill, 1969

CHAPPELL, D.: "Cross-cultural research on forcible rape" Internat. Journal of Criminology and Penology, vol.4, no.3, 1976

CHAPPELL, D., GEIS, G. and FOGARTY, F.: "Forcible rape: a bibliography"

COHEN, M.L. et al.: "The Psychology of rapists" Seminars in Psychiatry, Vol.3, No.3, 1971

CHIBNALL, S.: Law and order news, London, Tavistock, 1977

CLARK, L. and LEWIS, D.: Rape: the price of coercive sexuality, Toronto, Toronto Women's Press, 1977

CLIVE, E. and WILSON, J.: The law of husband and wife in Scotland, Edinburgh, W. Green, 1974

COHEN, M.D.: "Evidence of the complainant's previous sexual conduct in a rape trial" New Law Journal, 17th July 1980

CONNELL, N. and WILSON, C. (Eds.): Rape: the first sourcebook for women, New York, New American Library, 1974

CORNISH, W.R.: The jury, London, Allen Lane, 1968

CORNISH, W.R. and SEALY, A.P.: "Juries and the rules of evidence" 1973 Crim.L.R. 208

CRESSEY, D.R. and WARD, D.E. (eds.): Delinquency, crime and social process, New York and London, Harper and Row, 1969

CRIMINAL LAW REVIEW Editorial: "The axioms of change", 1982

CRIMINAL LAW REVISION COMMITTEE: Evidence (General) HMSO, London, Cmnd,4991, 1972

CRIMINAL LAW REVISION COMMITTEE: Working Paper on Sexual Offences HMSO, London, 1980

CRIMINAL LAW REVISION COMMITTEE: Fifteenth Report on Sexual Offences, London, HMSO, 1984

CRIMINAL STATISTICS FOR ENGLAND AND WALES, London, H.M.S.O., 1964

to 1983

CROSS, R.: Evidence , London, Butterworth, 1967

D

DAVIDSON, T.: Conjugal crime ,New York, Ballantine Books, 1978

DEMING, M.B. and EPPY, A.: "The sociology of rape", Sociology and Social Research , Vol.65, No.4, 1981

DENZIN, N.K. (ed.): Sociological methods: a sourcebook, London, Butterworths, 1970

DEUTSCH, H.: The psychology of women, London, Research Books, 1947

DEVLIN, P.: Trial by jury ,London, Methuen University Paperback, 1966

DIJK, J.J.M.VAN: "The extent of public information and the nature of public attitudes towards crime" in Public opinion on crime and criminal justice, vol.XVII, Collected Studies in Criminological Research, Council of Europe, European Committee on Crime Problems, Strasbourg, 1979

Domestic Violence and Matrimonial Proceedings Act 1976

DRAPKIN. I. and VIANO, E. (eds.): Victimology, Lexington, Mass., D.C. Heath, 1974

DREWRY, G.: "Parliament and penal policy", ch.3 of BLOM-COOPER, L. (ed.): Progress in penal reform, London, Oxford University Press, 1974

DUKES, R.L.: "Predicting rape victim reportage" Sociology and Social Research, vol.62, no.1

DURKHEIM, E.: The division of labour in society, New York, Free Press, 1964

E

EDWARDS, S.: Female sexuality and the law Martin Robertson, London, 1981

EDWARDS, S.: "Sex crimes in the 19th century" New Society , 13 September 1979

EDWARDS, S.: "Rape: a consideration of "contributory negligence", the mandatory sentence, and police procedures" Justice of the Peace, 20 February 1982

EISENBERG, R.L.: "Abolishing cautionary instructions in sex offense cases" Crim.Law Bulletin, vol.12, no.1, 1976

ELLIOTT, D.W.: "Rape complainants' sexual experience with third

parties" Criminal Law Review 1984

ELLIS, A. and BRANCALE, R.: The psychology of sex offenders
Springfield, Ill., Charles C. Thomas, 1956

ENNIS, P.H.: Field surveys 2: Criminal victimization in the U.S.
Report of a national survey, Washington D.C., U.S. Government
Printing Office, 1967

EYSENCK, H.J. and NIAS, D.K.B.: Sex, violence and the media
, London, Maurice Temple Smith, 1978

F

FEDERAL BUREAU OF INVESTIGATION: Uniform Crime Reports for the
United States, Washington D.C., U.S. Department of Justice, 1974

FEILD, H.S. and BARNETT, N.J.: "Forcible rape: an updated
bibliography" Journal of Criminal Law and Criminology, vol.68,
no.1, 1977

FIGES, E.: Psychology Today, April 1972

FILSTEAD, J.(ed.): Qualitative methodology, Chicago, Markham, 1970

FINDLAY, B.: "The cultural context of rape", Women Lawyers'
Journal, vol.60, no.4, 1974

FINKEL, R.H.: "A survey of capital offenses" in SELLIN, T. (ed.):
Capital Punishment, New York, Harper and Row, 1967

FREEMAN, M.D.A.: "But if you can't rape your wife, whom can you
rape?" Family Law Quarterly, 1, 1981

FREEMAN, M.D.A.: The legal structure, London, Longman Group Ltd.,
1974

FREUD, S.: The standard edition of the complete psychological works
of Sigmund Freud, London, Hogarth Press, 1961

FRIEDMAN, L.M.: Law and society - an introduction, Prentice Hall,
Englewood Cliffs, N.J., 1977

G

GAGER, N. and SCHURR, C.: Sexual assault: confronting rape in
America New York, Grosset and Dunlap, 1976

GAGNON, J.H. and SIMON, W. (eds.): Sexual deviance, New York and
London, Harper and Row, 1967

GAGNON, J.H. and SIMON, W.: Sexual conduct, London, Hutchinson,
1974

GEBHARD, P. et al.: Sex offenders, London, Heinemann, 1967

- GEIS, G.: "Lord Hale, witches and rape" British Journal of Law and Society, vol.5, no.1, 1978
- GEIS, G. and CHAPPELL, D.: "Forcible rape by multiple offenders" Abstracts on Criminology and Penology, vol.11, no.4, 1971
- GEIS, G. and GEIS, R. (eds.): Forcible rape, New York, Columbia University Press, 1977
- GEIS, G. and GEIS, R.: "Rape reform: an appreciative-critical review", Bulletin of the American Academy of Psychiatry and Law, Vol.6, No.3, 1978
- GILLEY, J.: "How to help the raped" New Society, vol.28, no.612, 1974
- GLASER, D.: Adult crime and social policy, Englewood Cliffs, N.J., Prentice Hall, 1971
- GLESS, A.G.: "Nebraska's corroboration rule" Nebraska Law Review, vol.54, no.1, 1975
- GOLDSTEIN, A.B.: "Corroboration in rape cases in New York - a half step forward" Albany Law Review, vol.37, no.2, 1973
- GORDON, G.: The criminal law of Scotland, Edinburgh, W. Green, 1967
- GRADWOHL'S LEGAL MEDICINE, 2nd ed., edited by CAMPS, F., Bristol, J.Wright and Sons, 1968
- GRIFFIN, S.: "Rape - the all American crime" Ramparts, vol.10, no.3, 1971
- GROTH, A.N.: Men who rape: the psychology of the offender, New York and London, Plenum Press, 1979
- GUTTMACHER, M.S.: Sex Offenses, New York, Norton, 1951
- *H*
- HAINES, E.C.: "The character of the rape victim" Chitty's Law Journal, vol.23, no.2, 1975
- HALE, M.: Historia Placitorum Coronae, London, Nutt and Gosling, 1736, vol.1
- HALIMI, G.: Viol- Le Proces d'Aix, Paris, Gallimard, 1978
- HALSBURY'S LAWS OF ENGLAND, 4th edition, vol. 11: Criminal law, evidence and procedure, 1976, London, Butterworths
- HARDGROVE, G.: "An interagency service network to meet the needs of rape victims" Social casework, vol.57, no.4, 1976
- HARRIS, L.R.: "Towards a consent standard in the law of rape" University of Chicago Law Review, vol.43, no.3, 1976

HART, H.L.A.: Law, liberty and morality Oxford University Press, 1963

HART, H.L.A.: Essays in jurisprudence and philosophy, Oxford, Clarendon Press, 1984

HAY, A., SOOTHILL, K. and WALBY, S.: "Seducing the country by rape reports" New Society, 31st July, 1980

HAYMAN, C.: "Rape and its consequences" Medical Aspects of Human Sexuality, vol.10, 1971

HAYMAN, C. and LANZA, C.: "Sexual assault on women and girls", Amer. Journal of Obst. Gyn., vol.109, no.3, 1971

HEPBURN, J, and VOSS, H.: "Patterns of criminal homicide: a comparison of Chicago and Philadelphia" Journal of Criminal Law, Criminology and Police Science, vol.59, no.4, 1968

HIBEY, R.A.: "The trial of a rape case: an advocate's analysis of corroboration, consent and character" Amer.Law Review, vol.11, no.2, 1973

HILBERMAN, E.: The rape victim, Washington D.C., American Psychiatric Association, 1976

HOLMSTROM, L.L. and BURGESS, A.W.: The victim of rape: institutional reactions, New York, John Wiley and Sons, 1978

HONORE, T.: Sex Law, Duckworth, London, 1978

HORNEY, K.: Feminine psychology, London, RKP, 1967

HOROS, C.V.: Rape, New Canaan, Conn., Tobey Publishing Co., 1974

J

JACKSON, S.: "The social context of rape: sexual scripts and motivation", Women's Studies International Quarterly, vol.1, no.1, 1978

JANOFF-BULMAN, R.: "Characterological versus behavioral self-blame: inquiries into depression and rape" Journal of Personality and Social Psychology, Vol.37, No. 10, 1980

JONES, C. and ARONSON, E.: "Attribution of fault to a rape victim as a function of the respectability of the victim", Journal of Personality and Social Psychology, vol.26, no.3, 1974

JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, vol.64, no.1, 1973

K

KALVEN, H. and ZEISEL, H.: The American jury, Chicago and London, University of Chicago Press, 1971

KARPMAN, B.: The sexual offender and his offences, New York, Julian Press, 1954

KATZ, S. and MAZUR, M.A.: Understanding the rape victim, New York and Oxford, John Wiley, 1979

KENNY'S OUTLINES OF CRIMINAL LAW, edited by J.W. CECIL TURNER, Cambridge, Cambridge University Press, 19th ed., 1966

KINSEY, A.C. et al.: Sexual behaviour in the human male, Philadelphia and London, W.B.Saunders and Co., 1949

KJERVIK, D.K. and MARTINSON, I.M.: Women in stress: a nursing perspective, New York, Appleton Century Crofts, 1979

KOMISAR, L.: Violence and the masculine mystique, (pamphlet), Pittsburgh, Pa., Know Inc., 1971

KRAFFT-EBING, R. VON: Psychopathia sexualis (1886), Translation of the 10th German edition, London, Rebman Ltd., 1899

L

LAW COMMISSION: Report on the mental element in crime, Law.Com. No. 89, London, HMSO, 1978

LAW COMMISSION: The financial consequences of divorce Law.Com. No.112, HMSO, London, 1981

LEE, B.: "Precautions against rape", Sexual Behaviour, 28-30 January 1972

LEGRAND, C.E.: "Rape and rape laws: sexism in society and law" California Law Review, vol.61, no.3, 1973

LEVINE, R.A.: "Gusii sex offenses: a study in social control", American Anthropologist, vol.61, no.6, 1959

LEVINE, S. and KOENIG, J.: Why men rape, London, W.H. Allen, 1982

LIPSITT, P.D. and SALES, B.D. (eds.): New directions in psycholegal research, Van Nostrand Reinhold Co., New York, 1980

LOFLAND, J.: Analyzing social settings, Belmont, Ca., Wadsworth Publ. Co., 1971

LUGINBILL, D.H.: "Repeal of the corroboration requirement: will it tip the scales of justice?" Drake Law Review, vol.24, no.3, 1975

M

MACKAY, R.D.: "Some developments in the law of rape" Justice of the Peace, 14 August 1982

MARSH, J.C., GEIST, A. and CAPLAN, N.: Rape and the limit of law reform, Auburn House Publishing Co., 1982

- MASSEY, J.B. et al.: "Management of sexually assaulted females", Obst. and Gyn., vol.38, no.1, 1971
- McCABE, S. and PURVES, R.: The jury at work, Oxford, Oxford University Penal Research Unit, Blackwell, 1972, and The shadow jury at work, Oxford, Oxford University Penal Research Unit, Blackwell, 1974
- McCALL, G. and SIMONS, J. (eds.): Issues in participant observation, London, Addison-Wesley, 1969
- McDONALD, W.F. (ed.): Criminal justice and the victim, Beverley Hills, Sage Publications, 1976
- McNAMARA, P.: "Cross-examination of the complainant in a trial for rape", Criminal Law Journal , Vol.5, 1981
- MEAD, M.: The mountain Arapesh, 3 vols., Garden City, N.Y., Natural History Press, 1968-71
- MEAD, M.: Sex and temperament in three primitive societies, New York, Dell Publishing Co., 1935
- MEDEA, A. and THOMPSON, K.: Against rape ,New York, Farrar, Strauss and Giroux, 1974
- MENDELSON, B.: "The origin of the doctrine of victimology" Excerpta Criminologica, vol.3, no.3, 1963
- MITRA, C.: "...For she has no right or power to refuse her consent" Criminal Law Review, 1979
- MORRISH, P. and McCLEAN, I.: The Crown Court, Little London, Chichester, Sussex, Barry Rose Publ., 5th ed., 1973
- MUKHERJEE, S.K. and SCUTT, J.A. (eds.): Women and crime ,Sydney, Allen and Unwin, 1981
- MULVIHILL, D.J. et al.: Crimes of violence. A report to the National Commission on the Causes and Prevention of Violence ,Washington D.C., U.S. Government Printing Office, 1969
- *N*
- NATIONAL LEGAL DATA CENTER: Rape legislation: a digest of its history and current status , Seattle, Washington, Battelle Law and Justice Study Center, 1975
- NOTMAN, M.T. and NADELSON, C.C.: "The rape victim: psychodynamic considerations", Am. J. Psychiatry, vol.133, no.4, 1976
- *O*
- O'CONNOR, D.: "Rape law reform - the Australian experience" (Part 2), Criminal Law Journal , Vol. 2, 1978

P

PALM, R. and ABRAHAMSEN, D.: "Rorschach study of the wives of sex offenders", Journal of Nervous and Mental Disease, vol.119, no.2, 1954

PARROT, C. and GUITTON, R.: "Clinical study on 'plots'. Sex crimes committed in gangs." Rev. Neuropsychiat. Infant., vol.11, nos.7-8, 1963

PASCAL, G.R. and HERZBERG, F.I.: "The detection of deviant sexual practice from performance on the Rorschach test" Journal of Projective Techniques, vol.16, no.3, 1952

PATTULLO, P.: Judging women London, NCCL, 1983

PICKARD, T.: "Culpable mistakes and rape: relating mens rea to the crime" 30 University of Toronto Law Journal, 75, 1980

PLACITA CORONE, edited by J.M.KAYE, London, Bernard Quaritch Ltd., 1966

POLAK, A.L.: "Can a husband be found guilty of raping his wife?" Justice of the Peace, 14 April 1979

POLLOCK, F. and MAITLAND, F.W.: The history of English law before the time of Edward I, Cambridge, Cambridge University Press, 1898

POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS, ed. by A.K.R. KIRALFY, London, Sweet and Maxwell, 1958

Q

QUINNEY, R.: The social reality of crime, Boston, Little, Brown and Co., 1970

R

RADZINOWICZ, L.: A history of English criminal law and its administration from 1750, London, Stevens and Sons, 1948-1968

RAPE COUNSELLING AND RESEARCH PROJECT: Third Report, London, October 1982

REEVES SANDAY, P.: "The social context of rape" New Society, 30th September 1982

REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, London, H.M.S.O., Cmnd. 6352, 1975

REYNOLDS. J.M.: "Rape as social control" Catalyst, Winter 1974, part 8

ROBERT, P. et al.: "Young adult delinquents. Group rape." Annales

Internationales de Criminologie, vol.9, no.2, 1970

ROBIN, G.D.: "Forcible rape: institutionalised sexism in the criminal justice system" Crime Delinq., vol. 23, no.2, 1977

ROSE, V.: "Rape as a social problem: a by-product of the feminist movement", Social Problems, vol.25, no.1, 1977

ROTH, N.: "Factors in the motivation of sexual offenders", Journal of Criminal Law, Criminology and Police Science, vol.42, no.5, 1952

ROZSA, J. and MUNNICH, I.: "Criminology of rape", Kriminol. kriminalista tanulmanyok, vol.9, pp.51-104, 1972 (Hungarian)

RUSSELL, D.E.H.: Rape in marriage, New York, MacMillan, 1982

S

SACHS, A. and WILSON, J. HOFF: Sexism and the law Oxford, Martin Robertson, 1978

SANDERS, W.B.: Rape and woman's identity, Beverley Hills, Sage Publications, 1980

SCHIFF, A.F.: "Rape in other countries", Med.Sci.Law., vol.11, no.3, 1971

SCHURR, C.: Rape: victim as criminal, (pamphlet), Pittsburgh, Pa., Know Inc., 1971

SCHWENDINGER, J.R. and SCHWENDINGER, H.: "Rape myths in legal, theoretical and everyday practice", Crime and Social Justice. A Journal of radical criminology, 1, Spring/Summer 1974

SCHWENDINGER, J.R. and SCHWENDINGER, H.: "A review of rape literature" Crime and Social Justice, Vol.6, Fall-Winter 1976

SCOTTISH LAW COMMISSION: Evidence - Report on evidence in cases of rape and other sexual offences, Paper No.78, Edinburgh, HMSO, 1983

SCUTT, A.J.: "Admissibility of sexual history evidence and allegations in rape cases", Australian Law Journal, Vol.53, 1979

SCUTT, J.A. (ed.): Rape law reform, Australian Institute of Criminology, Canberra, 1980

SCUTT, J.A.: "Fraud and consent in rape: comprehension of the nature and character of the act and its moral implications" Crim. Law Quart., vol.18, no.3, 1976

Sexual Offences Act 1956

Sexual Offences (Amendment) Act 1976

SILVERMAN, R.A.: "Victim precipitation: an examination of the concept" in DRAPKIN, I. and VIANO, E.C. (eds.): Victimology: a new focus, vol.1, Lexington, Mass., Lexington Books, 1974

- SIMPSON, K.: A doctor's guide to court, London, Butterworths, 1962
- SMART, C.: Women, crime and criminology, R.K.P., London, 1976
- SMART, C. and SMART, B. (eds.): Women, sexuality and social control, R.K.P., London, 1978
- SMITH, J.C.: "The Heilbron Report", Crim.L.R., 1976
- SMITH, J.C. and HOGAN, B.: Criminal law: cases and materials, London, Butterworth, 1973
- SMITH, S. and FIDDES, F.S.: Forensic medicine, London, Churchill, 1955
- SOOTHILL, K. and JACK, A.: "How rape is reported" New Society, Vol.32, No.663, 19th June 1975
- SOOTHILL, K.L., WAY, C. AND GIBBENS, T.C.N.: "Rape acquittals" Modern Law Review, vol. 43, 159
- SOOTHILL, K.L., GIBBENS, T.C.N. and JACK, A.: "Rape: a 22 year cohort study" Medicine, Science and the Law 16, no.1, 1976
- SROUFE, E.: "Evidence - admissibility of the victim's past sexual behaviour under Washington's rape evidence law - Washington Rev. Code para. 9.79.150. (1976)" Washington Law Review, vol.52, no.4, 1977
- STORR, A.: Sexual deviation, Harmondsworth, Penguin, 1976
- SUTHERLAND, E.H. "The diffusion of sexual psychopath laws", American Journal of Sociology, vol.56, no.2, 1950
- SUTHERLAND, E.H. and CRESSEY, D.R.: Principles of criminology, Chicago, Lippincott, 1960
- SUTHERLAND, S. and SCHERL, D.J.: "Patterns of response among victims of rape", Amer. J. Orthopsychiat., vol.40, no.3, 1970
- SUTHERLAND, S. and SCHERL, D.J.: "Crisis intervention with victims of rape" Social Work, vol.17, no.1, 1972
- SYKES, G.M. and MATZA, D.: "Techniques of neutralization: a theory of delinquency" American Sociological Review, vol.22, 1957
- SZASZ, T.S. Law, liberty and psychiatry: an inquiry into the social uses of mental health practices, New York, MacMillan, 1963
- *T*
- TELLING, D.: "Rape - consent and belief" Journal of Criminal Law, Vol.47, 1983
- TEMKIN, J.: "Regulating sexual history evidence - the limits of discretionary legislation", I.C.L.Q., forthcoming October 1984

TEMKIN, J.: "The limits of reckless rape" Criminal Law Review 1983

TEMKIN, J.: "Towards a modern law of rape" Modern Law Review,
Vol.45, 1982

TONER, B.: The facts of rape, London, Arrow, 1977

TURK, A.: Criminality and legal order, Chicago, Rand McNally, 1969

U

UNIVERSITY OF PENNSYLVANIA LAW REVIEW :Comment:Police discretion
and the judgment that a crime has been committed: Rape in
Philadelphia, 1968, 117

V

VALPARAISO UNIVERSITY LAW REVIEW, vol.10, no.1, 1975

VIANO, E.C. (ed.): Victims and society, Washington D.C., Visage
Press, 1976

W

WEBER, M.: The protestant ethic and the spirit of capitalism,
London, Uniwin University Books, 1930

WEIS, K. and BORGES, S.S.: "Victimology and rape: the case of the
legitimate victim", Issues in Criminology, vol.8, no.2, 1973

WEIS, K. and BORGES, S.S.: "Rape as a crime without victims and
offenders? A methodological critique" in VIANO, E.(ed.): Victims
and society, Washington D.C., Visage Press, 1976

WEITZMAN, L.: "Legal regulations and marriage: tradition and
change" 62 California Law Review 1170

WILLIAMS, J.: "Marital rape - time for reform" New Law Journal Vol.
134, No. 6137, 1984

WILLIAMS, G.: "Corroboration in sexual cases", Criminal Law Review,
1962

WILLIAMS, G.: Textbook of Criminal Law, London, Stevens and Sons,
1978

WILSON, G.: Paper presented to the British Psychological Society's
Conference, London, December 1979

WOLFGANG, M.E.: Patterns in criminal homicide, Philadelphia,
University of Pennsylvania Press, 1958

WOLFGANG, M.E.: "Victim precipitated criminal homicide" Journal of
Criminal Law, Criminology and Police Science, vol.48, no.1, 1957

WOLFGANG, M.E. and FERRACUTI, F.: The subculture of violence, London, Tavistock, 1967

WOLFGANG, M.E. et al. (eds.): The sociology of crime and delinquency, New York, John Wiley, 1962

WOOD, P.L.: "The victim in a forcible rape case: a feminist view" Amer.Crim.Law Review, vol.11, no.2, 1972

WOODS, G.D.: "Some aspects of pack rape in Sydney" Australian and New Zealand Journal of Criminology, vol.2, no.2, 1969

WOODS, G.D.: Sexual assault law reforms in New South Wales - a commentary on the Crimes (Sexual Assault) Amendment Act 1981 and Cognate Act, Dept. of Attorney-General and Justice, 1981

WRIGHT, M. (ed.): Uses of criminology literature, London, Butterworths, 1973

WRIGHT, R.: "The English rapist", New Society, 17th July 1980

APPENDIX V.LIST OF CASES

A

Albert v Lavin (1982) A.C. 456
R v Allen (1982) Ipswich Crown Court
R v Aspinall (1827) Cor. Hullock, B. York Spring Assizes, cited in
 STARK ON EVIDENCE, 3rd edition (1842) vol.iii., p.952

B

R v Barker (1829) 3 C&P 589
R v Bashir (1982) Crim.L.R. 687
R v Bashir and Manzur (1969) 3 All.E.R. 692

C

R v Caldwell (1981) 1 All.E.R. 961
R v Camplin (1845) 1 Den 89
R v Case (1850) 4 Cox CC 220 CCR
Chisholm v Doulton (1889) 22 QBD 741
R v Clarence (1888) 22 QBD 23
R v Clark (1975) Unreported, CA
R v Clarke (1817) 2 Stark. 241
R v Clarke (1949) 33 Cr.App.R. 216
R v Clay and another (1851) 5 Cox 146
R v Cockroft (1870) 11 Cox 410
R v Cogan and Leak (1975) 3 WLR 316
R v Cox (1832) 5 C&P 297

E

R v Eldershaw (1828) 3 C&P 396
Elliott v C (1983) 1 WLR 939

F

R v Fenlon and others (1980) 71 Cr.App.R. 307, C.A.
R v Flattery (1877) 2 QBD 410 CCR

G

R v Greatbanks (1959) Crim.L.R. 450
R v Groombridge (1836) 7 C&P 582

H

R v Harris (1979) Court of Appeal, Criminal Division, Ref. 745/B/79
R v Henry and Manning (1968) 53 Cr.App.R.
R v Hinds and Butler (1979) Crim.L.R. 111
R v Hodgson (1812) Russ & Ry 211
R v Holdsworth (1977) Unreported, CA
R v Holmes and Furness (1871) L.R.I. CCC 334
R v Hughes (1841) 9 C&P 752
Hyam v DPP (1975) AC 55

J

R v Jones (1861) 4 LT 154
 R v Jordan and Cowmeadow (1839) 9 C&P 118

K

R v Kimber (1983) 1 WLR 1122
 R v Krausz (1973) 57 Cr.App.R. 466, C.A.

L

R v Larger (1981) Crim.L.R. 577
 R v Lawrence (1982) AC 510
 R v Lawrence and another (1977) Crim.L.R. 492
 R v Lester (1980) Unreported, C.A.
 R v Lillyman (1896) 2 QBD 167

M

R v Madigan (1982) Crim.L.R. 692
 R v Martin and Martin (1834) English Reports 172, 1364
 R v Mayers (1872) 12 Cox CC 311
 R v McRue (1838) 8 C&P 641
 R v Miller (1953) 38 Cr.App.R. 1
 R v Mills (1978) 68 Cr.App.R. 327, C.A.
 DPP v Morgan and others (1975) 61 Cr.App.R. 136

O

R v O'Brien (1974) 3 All.E.R. 663
 R v Osborne (1905) 1 KB 551
 R v O'Sullivan and others (1981) Unreported, C.A.

P

R v Page (1846) 2 Cox CC 133
 R v Pheekoo (1981) 1 WLR 1117
 R v Philips (1839) 8 C&P 396
 R v Pigg (1982) 74 Cr.App.R. 352, C.A.

R

R v Rahimipour (1979) Court of Appeal, Criminal Division, Ref.
 2916/B/78
 R v Rai (1982) Leeds Crown Court
 R v Riley (1887) 18 QBD 481
 R v Robins (1843) 2 M & Rob 513

S

R v Salman (1924) 17 Cr.App.R. 50
Selvey v DPP (1970) AC 304 HL
 R v Simmons (1931) 23 Cr.App.R. 25
 R v Smith (1919) 14 Cr.App.R. 81
 DPP v Smith (1961) A.C.290
 R v Stapleton (1976) Unreported, CA

R v Steele (1977) 65 Cr.App.R. 22
R v Stephenson (1979) 2 All.E.R.

T

R v Tissington (1843) 1 Cox 48
R v Trigg (1963) 47 Cr.App.R. 94
R v Turner (1944) KB 463, 30 Cr.App.R.

V

R v Viola (1982) 1 WLR 1138

W

R v Waite (1892) 2 QB 600, 61 LJMC 187
R v Williams (1923) 1 KB 340
R v Williams (1893) 1 QB 320
R v Woods (1981) Unreported, C.A.