

## **A Feminist Critique of the Distinction Between Penile Rape and Rape with an Object**

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### **I: INTRODUCTION**

On 18 June 1993, the Minister of Justice, the Hon Douglas Graham, appeared on Television 3 National News to discuss the Criminal Justice Law Reform Bill 1993. He was interviewed by Bill Ralston, TV3's political correspondent. Ralston pointed out that the effect of cl 73 of the Bill would be to increase the maximum penalty for penile rape (defined as rape in the Crimes Act 1961 ("the Act")) to 20 years, while maintaining the maximum sentence for rape with an object (defined in the Act as unlawful sexual connection) at 14 years.<sup>1</sup> Ralston questioned the justification for this disparity in sentence. The Minister replied that, in his view, the justification was that "[i]t's very hard to become impregnated by a bottle; there is a difference".<sup>2</sup>

Although incorporated into the Act,<sup>3</sup> this distinction was short-lived. Currently, both penile rape and rape with an object share a maximum penalty of 20 years.<sup>4</sup>

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1 Section 128(1) establishes the offence of sexual violation. This is defined to include rape and unlawful sexual connection. Section 128B of the Act stipulates the penalties for sexual violation. At the time of the Hon Douglas Graham's comment the maximum penalty for sexual violation, including rape and unlawful sexual connection, was 14 years. Clause 73 of the Criminal Justice Law Reform Bill 1993 increased the maximum penalty for rape (s 128(1)(a)) to 20 years, while leaving untouched the penalty for unlawful sexual connection (s 128(1)(b)) at 14 years.

2 Quoted in "Row growing over remarks on rape", *New Zealand Herald* 21 June 1993, section 1, 3.

3 Section 2 Crimes Amendment Act 1993 (1993 No 46).

4 Section 2 Crimes Amendment Act 1993 (1993 No 62) repealed s 128B(1) of the Act, and consequently the prior statutory amendment, enacting a maximum penalty for sexual violation of 20 years.

The distinction between penile rape and rape with an object has been the source of worldwide debate. This article examines both the history of rape and the objectives of rape legislation in order to determine the assumptions that underlie this distinction. It then rebuts the specific justifications given for the distinction, and critiques these by way of a feminist analysis of the crime of rape. It concludes that penile rape and rape with an object should be seen as conceptually and practically the same in both their true nature and their impact on women. Consequently, they should be viewed as equally repugnant and receive equivalent sanction.

## II: THE HISTORICAL BASIS OF MODERN RAPE LAW

Many writers on this subject argue that, in the past, the law of rape did not exist for the protection of women, and does not do so today. Modern rape laws are said to be founded on “ancient male concepts of property”.<sup>5</sup> Historically, man’s desire to maintain sole access to a woman’s vagina, codified in the earliest laws of marriage, arose from his need to govern impregnation, progeny, and inheritance rights.<sup>6</sup> The criminal act he viewed as rape was not sexual assault, but “a trespass against his ... right to control vaginal access to all women who belonged to him”.<sup>7</sup> Any man who raped a woman was liable to financially compensate the man who owned her.<sup>8</sup> The accused could also be subject to the death penalty in order to deter the perpetration of further offences.<sup>9</sup>

However, where the penalty for rape was justified by proprietary notions, there was no damage when a woman was regarded as without property value.<sup>10</sup> The rape of a woman without male protection, without property, or who shared her sexual favours with more than one man, was not regarded as a crime and rarely punished.<sup>11</sup> Further, the rape by a man of his wife was not considered rape. A husband could not take what already belonged to him - “the property value in his wife’s chastity”.<sup>12</sup>

Since the 1800s, the rules pertaining to property have become more flexible.<sup>13</sup> As women demanded and gained more economic, social, and physical freedom, and the notion of owning people became repugnant, the perception of rape laws changed. Rape was conceived as a crime against the person.<sup>14</sup> The origin of rape

5 Brownmiller, *Against Our Will: Men, Women & Rape* (1975) 376.

6 Ibid.

7 Ibid.

8 Clark and Lewis, *Rape: The Price of Coercive Sexuality* (1977) 116.

9 West, “Rape in the Criminal Law and the Victim’s Tort Alternative: A Feminist Analysis” (1992) 50 U Toronto Fac L Rev 96, 102.

10 Ibid.

11 Ibid.

12 Clark and Lewis, *supra* at note 8, at 112-124, cited in West, *ibid*.

13 West, *supra* at note 9.

14 Ibid. The Act, however, lists rape under Part VII: Crimes Against Religion, Morality, and Public Welfare.

laws as a protection of property became indistinct, replaced by the explicit focus of protecting women's safety.<sup>15</sup>

However, some argue these sexual property notions underlie modern perspectives on rape.<sup>16</sup> Complainants who were historically regarded as of little property value, are still more likely to have their cases dismissed or to fail to achieve conviction.<sup>17</sup> This illustrates that those responsible for making rape laws have a tendency to define rape incorrectly.<sup>18</sup> Rape occurs as a physical attack, and its punishment should not depend on a woman's social, economic, or family status.<sup>19</sup> Consequently, some commentators believe that rape laws might disadvantage rather than protect women in their implicit reinforcement of historical perceptions regarding social and sexual roles.<sup>20</sup> Many argue that rape laws protect only male interests: they make women more dependent on men and they "help protect the male from any "decrease in the 'value' of his sexual 'possession'," which results from forcible violation".<sup>21</sup>

### III: THE OBJECTIVES OF RAPE LEGISLATION

It is important that efforts to reform existing law and practice be premised on both an awareness of the operation of the existing system, and a clear understanding of the objectives of change.<sup>22</sup> The objectives of those pressing for reform are complex and varied. However, they may be divided into the two broad categories of symbolic and instrumental objectives.<sup>23</sup> These are not mutually exclusive. For example, symbolic changes may indirectly influence how the criminal justice system responds when a rape complaint is made.<sup>24</sup>

#### 1. Symbolic Objectives

The aim of symbolic objectives is to enact reforms that represent a certain attitude toward the offence, victim, and offender, thereby effecting a change in societal attitudes.<sup>25</sup>

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15 Ibid.

16 Clark and Lewis, *supra* at note 8, at 124.

17 Ibid, cited in West, *supra* at note 9, at 102.

18 West, *ibid*.

19 Ibid.

20 LeGrand, "Rape and Rape Laws: Sexism in Society and Law" (1973) 61 Cal L Rev 919.

21 "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard" (1952) 62 Yale LJ 55, 73, cited in LeGrand, *ibid*, 924-925.

22 Young, *Rape Study: A Discussion of Law and Practice* (Vol I 1983) 21.

23 Ibid.

24 Ibid.

25 Ibid.

A predominant objective is to demonstrate that the traditional law and practice of rape are founded on false, and often sexist, premises.<sup>26</sup> More specifically, feminist theory is often concerned to show that the present law does not sufficiently reflect rape as a crime of sexual violence, designed to subjugate and humiliate, rather than as an act of sexual desire.<sup>27</sup> In overseas jurisdictions, many substantive law reforms aim “to give symbolic expression to the fact that the offence is not a sexual aberration but an act of violent assault on women”.<sup>28</sup>

To some extent, the rape-as-violence argument effectively separates rape from sex.<sup>29</sup> It lessens the image of pleasure and reinforces sympathy for the victim’s experience.<sup>30</sup> Proponents of this argument believe that until men and women understand that rape is not a crime of sexual passion, it will be difficult to obtain any rape law reform.<sup>31</sup>

However, there are objections to the rape-as-violence position. Some commentators argue that the violence paradigm removes the focus “from the violence of unwanted intercourse itself”.<sup>32</sup> The stereotype assumes “the characteristics of a brutal beating and the harm of penetration becomes incidental”.<sup>33</sup> These commentators state that by labelling rape “violence”, feminists provide the means whereby many men differentiate their own sexual experience from what rapists do.<sup>34</sup> If there is no evidence of physical injury, some men may be unable to perceive the violence.<sup>35</sup> Further, to the extent that the label “violence” connotes an image of evil and danger, many men may distinguish themselves from the perpetrator of rape.<sup>36</sup> Such an image “simply does not describe most men who rape”.<sup>37</sup>

Despite these objections, the reforms, particularly in respect of procedure and evidence, facilitate women’s insistence on full protection of their rights and autonomy by criminal justice agencies.<sup>38</sup> This includes their right to choose with whom and when they wish to engage in sexual relations.<sup>39</sup> Regardless of their practical achievement, the reforms are symbolic of the increasing acceptance of women’s rights in this context.<sup>40</sup> They convey the notion that offences against women are serious, and must be regarded as such.<sup>41</sup>

26 Ibid.

27 New Zealand University Students’ Association (Inc), *Submission to the Statutes Revision Select Committee on the Rape Law Reform Bill* (1984) 9-10; Young, *Rape Study: Research Reports* (Vol 2 1983) 100-101. Cf MacKinnon, *Toward a Feminist Theory of the State* (1989) 171-183 for a rejection of the rape-as-violence argument. See text *infra* at Part VI, section 6.

28 Young, *supra* at note 22, at 22.

29 Henderson, “Rape and Responsibility” (1992) 11 *Law & Phil* 127, 156.

30 Ibid, 157.

31 Ibid, 156.

32 Ibid, 157.

33 Ibid.

34 Ibid.

35 Ibid.

36 Ibid.

37 Ibid.

38 Young, *supra* at note 22, at 22.

39 Ibid.

40 Ibid.

41 Ibid.

## 2. Instrumental Objectives

Instrumental objectives of law reform aim directly to affect the scope and operation of the law of rape.<sup>42</sup> There are three main goals in this category.

First, substantive legislative reform is concerned with broadening the definition of rape by equating anal and oral intercourse with vaginal intercourse.<sup>43</sup> A corollary to this is extending rape laws to cover not only penile penetration, but violation by other bodily part or object.

Second, the focus of some law reform is on altering "reporting, prosecution and conviction rates".<sup>44</sup> The aim is for more victims to report offences to the police, more prosecutions to be taken to trial, and a greater percentage of convictions in court.<sup>45</sup> This will lead to an enhancement of both certainty of conviction and the deterrent nature of rape laws.<sup>46</sup>

Third, reforms are promoted with the aim of protecting the complainant from "unwarranted victimisation by the legal process itself".<sup>47</sup>

## IV: ASSUMPTIONS UNDERLYING THE PENILE/NON-PENILE DISTINCTION

There appear to be three main justifications for the retention of the penile/non-penile distinction in rape legislation.<sup>48</sup>

First, the meaning of rape is widely understood and accepted and, thus, its ambit should not be broadened.<sup>49</sup> The Heilbron Committee stated:<sup>50</sup>

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.

Second, penile rape carries the risk of pregnancy, which is not present when penetration is effected by an object.<sup>51</sup>

<sup>42</sup> Ibid, 23.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid. Examples of provisions which may achieve this aim can be found in the Evidence Act 1908. See, for example, s 23A (restrictions on the evidence and examination of complainants in cases of sexual violation), s 23AB (abolition of the corroboration requirements in sexual cases), and s 23AC (provision for the explanation of delay in the making of a complaint in sexual cases).

<sup>46</sup> Young, *ibid*.

<sup>47</sup> Ibid. See, for example, the statutory provisions listed *supra* at note 45.

<sup>48</sup> Ibid, 115.

<sup>49</sup> Ibid.

<sup>50</sup> Heilbron Committee, *Report of the Advisory Group on the Law of Rape* (1975) para 80, cited in Temkin, "Towards a Modern Law of Rape" (1982) 45 Mod L Rev 399, 411.

<sup>51</sup> Young, *supra* at note 22, at 115; Humphries, *The Development of the Rape Law Reform Bills of New Zealand During the 1980's*, unpublished thesis, University of Auckland (1991) p96; Criminal Law Revision Committee, *Working Paper on Sexual Offences* (1980) para 45, cited in Temkin, *ibid*.

Third, the act of non-consensual penile penetration is qualitatively different from penetration by other means.<sup>52</sup> A number of reasons have been offered for this qualitative difference. For example:<sup>53</sup>

Changing [rape] so that it can be included in some such crime such as aggravated sexual assault diminishes its gravity, in my view, in the eyes of the ordinary person. It is not just a sexual assault upon a woman but a violent invasion of her person and her integrity. It is also the degrading of something which, at least to a good number of people, represents the ultimate and outward expression of love between two people by treating it as some kind of animal activity which can be taken when the man wishes to take it.

The Christian perspective advances another reason advanced for this qualitative difference, which is founded on the perception that the purpose of sexual intercourse is procreation.<sup>54</sup> The essential argument is that widening the definition of rape to include offences such as unwanted oral or anal sex, and rape with an object, implies that in consensual situations these acts are equal to sexual intercourse within marriage.<sup>55</sup> This is not considered acceptable.<sup>56</sup> As the conception of a new life and motherhood is so important, the law should show reverence in condemning penile rape.<sup>57</sup> It is argued that placing sexual intercourse with “detestable, improper and unfit human conduct” is not consistent with this reverence.<sup>58</sup>

## V: REBUTTAL OF THE ASSUMPTIONS

### 1. Rape Has A Widely Understood and Accepted Meaning

The central proposition to the argument that rape has a widely understood and accepted meaning appears to be that “if the public thinks that a particular law covers certain activities ... then it should for that reason continue to cover only those activities”.<sup>59</sup> However, it is simplistic to suggest that law reform is premised on conformity with the popular usage of words.<sup>60</sup> Law reform designed to affect societal attitudes often demands a movement from previously held beliefs and attitudes.<sup>61</sup>

If the views of the public (the men *and* women of a given jurisdiction) are of significance in the context of law reform, legislators should take into account the

<sup>52</sup> Young, *ibid.*

<sup>53</sup> Opinion of an anonymous High Court judge, cited in Young, *ibid.*, 115-116.

<sup>54</sup> Friel, “Knights of the Southern Cross”, *Submission on the Rape Law Reform Bill (No 2)* JL/85/30W (1984) 1, cited in Humphries, *supra* at note 51, at p96-97.

<sup>55</sup> *Ibid.*, p96.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, p97.

<sup>58</sup> *Ibid.*, p96.

<sup>59</sup> Temkin, *supra* at note 50, at 411.

<sup>60</sup> Young, *supra* at note 22, at 115.

<sup>61</sup> See, for example, the Human Rights Act 1993.

views “of what the law ought to be rather than what it is”.<sup>62</sup> Further, legislators cannot be certain that a large proportion of society believes rape to be confined to the traditional legal definition.<sup>63</sup> Phrases such as “raped with a bottle” and “homosexual rape” are seen in the media and are likely to be understood by the public. In the absence of statistical studies, it is impossible to be sure that the public wants the ambit of the law of rape to be restricted to penile penetration of the vagina.<sup>64</sup>

## 2. The Risk of Pregnancy

Unlike non-penile penetration, pregnancy may result from penetration of the vagina with a penis. However, that the law of rape covers pre-pubescent, menopausal, sterilised, infertile women, and those practising contraception, suggests that the risk of pregnancy does not justify the distinction.<sup>65</sup> Proponents of the risk of pregnancy argument do not seem to have considered what has been, is, or should be the function and purpose of rape laws.

Contemporary rape laws should be, and to some extent may be, designed to protect women’s fundamental rights as human beings: the right to sexual choice, bodily integrity, freedom of movement, dignity, and respect. There is no reason why penile rape and rape with an object, which equally violate these fundamental rights, should not be treated with an equal degree of gravity.

## 3. Penile Penetration of the Vagina is Qualitatively Different from Other Types of Penetration

The qualitative difference argument reflects the traditional “male fetish with one female orifice and one instrument for its violation”.<sup>66</sup> As MacKinnon points out, “[t]he law sees and treats women the way men see and treat women”.<sup>67</sup> Rape laws define their protection of women’s sexuality “in male genital terms”.<sup>68</sup> While women undoubtedly abhor forced penile penetration, they may equally loathe forced penetration with an object. In this light, the legal definition of rape appears more of an attempt to retain exclusive control over a woman’s vagina, than a crime against women’s sexuality or personal integrity.<sup>69</sup>

<sup>62</sup> Temkin, *supra* at note 50, at 411.

<sup>63</sup> Young, *supra* at note 22, at 115.

<sup>64</sup> *Ibid.*

<sup>65</sup> Temkin, *supra* at note 50, at 412.

<sup>66</sup> Box, *Power, Crime and Mystification* (1983) 121, cited in Lacey, Wells and Meure, *Reconstructing Criminal Law: Text and Materials* (1990) 330.

<sup>67</sup> MacKinnon, “Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence” in Hutchinson (ed), *Critical Legal Studies* (1989) 61.

<sup>68</sup> MacKinnon, *supra* at note 27, at 172.

<sup>69</sup> *Ibid.*

The use of the penis as a weapon in rape is qualitatively no different from the use of a bottle or hand. Further, other forms of attack may be worse than traditional rape.<sup>70</sup> Penetration by bottles or pieces of wood may be “more painful, offensive and disfiguring than penetration by a penis”,<sup>71</sup> and may involve a risk of psychological harm greater than that involved in penile penetration.

In the writer’s opinion, there should be no distinction at law between penile rape and rape with an object. All acts of sexual aggression, whether penile or non-penile, should bear the same legal sanction as they are similarly severe violations of women’s personal integrity, dignity, and sexual autonomy.<sup>72</sup>

## VI: A FEMINIST CRITIQUE OF THE PENILE/NON-PENILE DISTINCTION

### 1. Rape as an Expression of Power and Anger

*Argument: The object of rape is not sex, it is humiliation; a rapist does not need to use a penis for that.*

While forcible rape almost always includes the three components of power, anger, and sexuality,<sup>73</sup> offenders and victims experience rape as primarily “the sexual expression of power and anger”.<sup>74</sup> Rape is described as:<sup>75</sup>

[A] pseudosexual act, complex and multidetermined, but addressing issues of hostility (anger) and control (power) more than desire (sexuality).

In an analysis of their 1981 *Questionnaire on Rape*, the Auckland Rape Crisis Centre summarised the attitude of rapists described by the 200 women who replied:<sup>76</sup>

None of the rapists were [sic] passionate or overcome with sexual desire for the women. Half of the rapists were described as calm and matter-of-fact. They were also dominating, insulting, degrading, hostile and angry .... It is clear from the women’s response that the motive for the rape(s) was violence and aggression rather than sexual need.

70 Hesketh, Salas and Horsman, National Council of Women of New Zealand, *Submission on the Rape Law Reform Bill (No 2)* JL/85/42 (1984) 1, cited in Humphries, *supra* at note 51, at p118.

71 *Ibid.*

72 Law Reform Commission of Canada, *Report: Sexual Offences* (1978) 12.

73 Holmstrom and Burgess, “Sexual Behaviour of Assailants During Reported Rapes” (1980) 9 *Archives of Sexual Behaviour* 427, 435, cited in Plummer, “The Social Uses of Sexuality: Symbolic Interaction, Power and Rape” in Hopkins (ed), *Perspectives On Rape and Sexual Assault* (1984) 41.

74 Groth, “The Rapist’s View” in Burgess and Holmstrom, *Rape: Crisis and Recovery* (1979) 23.

75 Groth and Burgess, “Rape: A Pseudosexual Act” (1978) 1 *Int J Womens Stud* 207.

76 Cited in New Zealand University Students’ Association (Inc), *supra* at note 27, at 9.



Therefore, the offence of rape should not be restricted to penile penetration, as non-penile penetration is an identical expression of power and anger.

## 2. Rape as Assault

*Argument: All rape is an unwarranted physical assault on the victim's body, regardless of whether, for example, a penis, a finger, or a bottle is used for penetration.*

[R]ape is actually a form of assault and should therefore perhaps be treated as such under the law .... The concept of sexual assault ... more appropriately characterizes the actual nature of the offence of rape because the primary focus is on the assault or the violation of the integrity of the person rather than the sexual intercourse.<sup>77</sup>

A fundamental freedom in most societies is freedom from unwarranted physical assault and coercion.<sup>78</sup> "This is the most basic form of security and represents the most fundamental justification for the imposition of legal sanctions."<sup>79</sup>

For many women, physical coercion and force are the essence of the crime of rape.<sup>80</sup> In both penile and non-penile rape, a male forces a female to submit to his will and uses her body against her wishes.<sup>81</sup> To the victim, that the assault occurred against her sexual organs may, at least at the time, be of little importance.<sup>82</sup> Rape is an unwarranted physical attack on the person.<sup>83</sup> The victim is entitled to be protected from such an assault regardless of whether it is penile or non-penile.

## 3. Rape as a Violation of Bodily Integrity and Autonomy

*Argument: All rape is a violation of the victim's bodily integrity and autonomy; it is an act performed on her against her will that goes to the very heart of her personhood.*

Regardless of whether an act of rape is penile or non-penile, it represents a fundamental attack on the victim's bodily integrity and sexual autonomy. All rape

<sup>77</sup> Law Reform Commission of Canada, *Criminal Law: Sexual Offences* Working Paper 22 (1978) 15-16.

<sup>78</sup> Clark and Lewis, *supra* at note 8, at 166.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, 167.

<sup>83</sup> *Ibid.*

transgresses a woman's right to sole ownership and control of her own body.<sup>84</sup> The rape victim experiences a denial of her right to do with her body only that to which *she* consents.<sup>85</sup>

Any form of rape depersonalises the victim. To wield an effective power of consent over the body of an individual is the ultimate disrespect, as it denies that there is a person there at all. The offensiveness of this act is exacerbated by the importance of sexual identity to personal identity as a whole. Any act of rape, penile or non-penile, strikes at the very essence of being an autonomous individual.

#### 4. Rape as the Objectification of the Victim

*Argument: The rapist sees his victim not as a person, but as an object. All rape demonstrates this objectification to the victim.*

Rape is a manifestation of how women are mistreated in our society. It is the quintessential example of the social conception of women as objects and entities morally inferior to men.

In any act of rape the rapist dominates not only "the woman's rightful power of consent, but the woman herself, through the manipulation of her body".<sup>86</sup> He does not only divert her resources or use her property, he uses *her* to further his own ends.<sup>87</sup> These ends are diametrically opposed to her interests, her ends including maintenance of bodily integrity and health.<sup>88</sup> The rape demonstrates a perception of the woman as an object which serves a purpose.<sup>89</sup> Furthermore, the woman is seen as "dispensable or replaceable and thus of little value even as an object with a function".<sup>90</sup>

However, for the rape victim, the humiliation caused by this objectification is far from complete.<sup>91</sup> The victim of rape is sensate, one who feels, assimilates and comprehends.<sup>92</sup> The rape reveals to the victim the rapist's perception of her.<sup>93</sup> It conveys to her that she is not seen as a person, but as an object with a sexual function.<sup>94</sup> It gives the victim a picture of herself as a being within someone's control, rather than as one who has control.<sup>95</sup>

<sup>84</sup> Ibid, 166.

<sup>85</sup> Ibid.

<sup>86</sup> Shafer and Frye, "Rape and Respect" in Vetterling-Braggin, Elliston and English (eds), *Feminism and Philosophy* (1981) 341.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

Therefore, rape is an act of sexual objectification. It demonstrates a contempt for the victim's personhood, regardless of whether it is penile or non-penile.

## 5. Rape as Social Control

*Argument: The very concept of rape acts as a mode of control on women, restricting their bodily movement, their participation in activities, and their enjoyment of life.*

All rape is a depersonalising assault on a woman's personal and sexual identity. It is an extreme infringement of a woman's right to sexual freedom. Further, in a feminist analysis, "rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjection, like lynching".<sup>96</sup>

Consequently, what is wrong with rape is not only its specific individual occurrence, but its wider social implication: the fear it instils in all women at all times. Rape threatens not only individual sexual choice, but women's general freedom of movement.<sup>97</sup> Women's lives are influenced by the ongoing fear of rape: some rarely go out at night without men, live by themselves, hitchhike, work late at the office, and they only engage in certain employment.<sup>98</sup>

The fear of rape not only inhibits the freedom of women, it also exaggerates their dependency upon men.<sup>99</sup> Further, to the extent women are forced to turn to men for protection, it provides men with a trump card to play in keeping them in their place.<sup>100</sup> Accordingly, rape becomes a prime method of social control:<sup>101</sup>

[R]ape is a punitive action directed towards females who usurp or appear to usurp the culturally defined prerogatives [sic] of the dominant male role .... [It] operates in our society to maintain the dominant position of males. It does this 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 [sic] in the erotic sphere.

Thus, regardless of the instrument used, rape is an institution that consolidates the dominant position of men. It is part of the patriarchal set of roles and rules that govern coercive social practice.<sup>102</sup> The failure of the State to guarantee the basic

<sup>96</sup> MacKinnon, *supra* at note 27, at 172.

<sup>97</sup> Peterson, "Coercion and Rape: The State As a Male Protection Racket", in Vetterling-Braggin, Elliston and English (eds), *supra* at note 86, at 360.

<sup>98</sup> LeGrand, *supra* at note 20, at 919; Griffin, "Rape: The All-American Crime" in Vetterling-Braggin, Elliston and English (eds), *ibid*, 331.

<sup>99</sup> LeGrand, *ibid*.

<sup>100</sup> Plummer, *supra* at note 73, at 44.

<sup>101</sup> Reynolds, "Rape as Social Control" (1974) 8 Cat 62, 66-67.

<sup>102</sup> Griffin, *supra* at note 98, at 332; Peterson, *supra* at note 97, at 360-362.

political right of freedom of bodily movement to women betrays its underlying character as a “male protection racket”.<sup>103</sup> “What is wrong with rape ... is that it is really not wrong at all.”<sup>104</sup>

## 6. MacKinnon: A Reconception of Rape

*Arguments: The law sees and treats women the way men see and treat women. Men see sex as the penetration of the vagina by the penis. Accordingly, this is the definition of rape as set down by the law.*

*A rape law confined to prohibiting penile penetration of the vagina, when women perceive the act of rape in broader terms, delegitimises women's understanding of, and denies women full protection from, the act of rape. Thus, rape for most women is not forbidden; it is merely regulated.*

### (a) Theory

MacKinnon takes issue with the two traditional feminist conceptions of rape:<sup>105</sup>

- i) that rape is a violent not sexual act, the fear of which threatens all women; and
- ii) that rape, including the violence that so often accompanies it, is the manifestation of male sexuality, “the social imperatives of which define as well as threaten all women”.<sup>106</sup>

The traditional views perceive either violence or sexuality to be the controlling element of the act of rape. MacKinnon sees both of these approaches as inadequate and reconceives rape in a wider context. She believes the better view is that sexuality is “a social sphere of male power of which forced sex is paradigmatic”.<sup>107</sup> She views sexuality as only a part of male dominance and rape as but an illustration of that dominance.<sup>108</sup>

<sup>103</sup> Peterson, *ibid*, 368-369.

<sup>104</sup> *Ibid*, 367.

<sup>105</sup> MacKinnon, *supra* at note 27, at 173.

<sup>106</sup> *Ibid*.

<sup>107</sup> MacKinnon, *supra* at note 67, at 63.

<sup>108</sup> *Ibid*.

Rape is not less sexual for being violent; to the extent that coercion has become integral to male sexuality, rape may be sexual to the degree that, and because, it is violent.

MacKinnon argues that the major difficulty in the traditional feminist and legal conceptions of rape is the differentiation of sexuality and violence.<sup>109</sup> Rape survivors see the intermingling of sexuality and violence in a different manner than the law: "where the legal system has seen the intercourse in rape, victims see the rape in intercourse".<sup>110</sup> Rather than posing the question of what is the violation of rape, it may be better to ask what is the non-violation of intercourse?<sup>111</sup> MacKinnon concludes that the reason why it has been so difficult to come up with a satisfactory definition of the crime of rape, may be due to the premise that rape is distinguishable from intercourse.<sup>112</sup> For many women, these may be indistinct in situations characterised by male dominance.<sup>113</sup> Women have tended to be socially conditioned into passive receptivity and they may perceive no other option than acquiescence to intercourse.<sup>114</sup> Under these conditions, one must query "whether consent is a meaningful concept".<sup>115</sup>

The law distinguishes rape from sex by reference to a "sexually normative level of force".<sup>116</sup> The level of unacceptable force starts just above the level which is seen as normal male sexual behaviour, rather than at the point where the victim perceives that violation has occurred.<sup>117</sup> MacKinnon believes that, if the law is to recognise more instances of women's violation, this norm must be confronted.<sup>118</sup> Calling rape violence rather than sex "evades, at the moment it most seems to confront, the issue of who controls women's sexuality and the dominance/submission dynamic that has defined it".<sup>119</sup> In violent sex, women may have no control over what is happening, but this does not imply women have control when that violence is not present.<sup>120</sup>

The feminist distinction between rape and intercourse lies in the woman's understanding of the act.<sup>121</sup> However, under our present system of law, while the injury of rape may lie in the victim's understanding, the standard by which it is adjudicated criminal lies in the accused's perception of the same event.<sup>122</sup> Thus, "the man's perceptions of the woman's desires often determine whether she is deemed violated".<sup>123</sup>

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<sup>109</sup> MacKinnon, *supra* at note 27, at 174.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Supra* at note 67, at 65.

<sup>115</sup> *Ibid.*, 66.

<sup>116</sup> *Ibid.*, 65.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, 66.

<sup>122</sup> *Ibid.*, 67.

<sup>123</sup> *Ibid.*

MacKinnon argues that rape is not like other crimes of subjective intent.<sup>124</sup> With rape, the difference between assault and non-injury is the woman's understanding of the event.<sup>125</sup> The problem for the law has been to decide whether the man or woman's view should constitute the objective reality of rape.<sup>126</sup> This presupposes that what happened can be objectively determined, as a task "separable from the gender of the participants and the gendered nature of their exchange".<sup>127</sup> Implicit in this is that there is a single reality of what happened. However, inequality often means that reality is divided by different meanings.<sup>128</sup> As MacKinnon states:<sup>129</sup>

[W]omen are ... violated every day by men who have no idea of the meaning of their acts to the women. To them it is sex. Therefore, to the law it is sex.

When there is a challenge to the law's assumption that a final, objective state of affairs exists, the law often concludes that a rape did not occur.<sup>130</sup> As a direct result, most women perceive the law of rape as unenforceable to them.<sup>131</sup> The law manages to delegitimise their very understanding of the act of rape.<sup>132</sup> Accordingly, rape for most women is not prohibited, but merely regulated.<sup>133</sup>

*(b) Criticism : Smart and Henderson*

MacKinnon believes that gender characterises all social relationships. Further, she argues that women are dominated in the gender order, a regime that extends even to totalitarianism.<sup>134</sup> Smart agrees both power and resistance are exercised in the gender order, yet she does not concur that, generally, women are so powerless.<sup>135</sup> Her criticism is that MacKinnon does not distinguish between the law, the State, and society.<sup>136</sup> For MacKinnon, to the extent these illustrate male power, the terms are synonymous.<sup>137</sup> Smart agrees that the law is important in the gender order, which ensures that the law is a powerful tool in the oppression of women.<sup>138</sup>

<sup>124</sup> Supra at note 27, at 180.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> MacKinnon, supra at note 67, at 67.

<sup>128</sup> MacKinnon, supra at note 27, at 180.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid, 183.

<sup>131</sup> Ibid, 179.

<sup>132</sup> Ibid.

<sup>133</sup> MacKinnon, supra at note 67, at 66.

<sup>134</sup> Smart, *Feminism and the Power of Law* (1989) 81.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

However, she does not view law as “the barometer of the social world”.<sup>139</sup> She believes that MacKinnon places too much emphasis on the law by asserting that without its legitimising powers, women’s aims will remain unrecognised.<sup>140</sup> “[I]t becomes the central plank to her political analysis and strategy even against her wishes.”<sup>141</sup> Smart is reluctant to grant the law such authority. She cites the law reform in areas such as rape, equal pay, and domestic violence as examples of the failure of the law to achieve this legitimating function, yet these claims remain socially recognised.<sup>142</sup> Smart also asserts that even if the law succeeds in recognising women’s claims, there is the danger these may be delegitimised by the law in the future.<sup>143</sup>

It is true that the law may not be the sole medium for change in the social world. However, it is submitted that, currently, there is no more important medium. MacKinnon is correct in charging the law with endorsing and entrenching women’s subjugation to men, rather than supplying solutions to women.<sup>144</sup> At every level, the law reproduces sexual experience from the perspective of the male, not the female, and thereby ensures male control over the bodies of women. MacKinnon’s theories are expounded for the benefit of women. If they were adopted by law, the legitimisation of women’s aims would become a considerably more likely prospect.

Henderson takes issue with MacKinnon’s “frequent conflation of heterosexuality and male violence and aggression”.<sup>145</sup> She believes that this denies the possible distinction between sexual aggression and pleasurable, desired intercourse.<sup>146</sup> She also believes that MacKinnon’s insistence on sex-as-violence faces the same difficulty as the rape-as-violence argument: men simply do not see the violence.<sup>147</sup>

However, MacKinnon does not deny the possibility of Henderson’s distinction. She merely argues that, under conditions of male dominance, with its social spheres of sexuality and violence, it is *difficult* to distinguish rape from intercourse.<sup>148</sup>

### *(c) MacKinnon’s work and non-penile rape*

The truth of MacKinnon’s assertion that “[t]he law sees and treats women the

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<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> MacKinnon, *supra* at note 27, at 182.

<sup>145</sup> Henderson, *supra* at note 29, at 159.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> MacKinnon, *supra* at note 67, at 63.

way men see and treat women”,<sup>149</sup> can be seen in the law’s efforts to retain a distinction between penile and non-penile rape. Men can see sex as the penetration of the vagina by the penis.<sup>150</sup> Similarly, the law has traditionally seen rape, defined as an act of unwanted sex, in the same way.<sup>151</sup> That a woman may feel equally injured by non-penile rape is not recognised by the law. In addition to the male definition of rape, MacKinnon asserts that the crime of rape is “adjudicated from the male standpoint”.<sup>152</sup> If a man believes that rape with an object is not real rape, the State may determine that his perception is the single underlying reality.

In MacKinnon’s view, the crime of rape should look at the meaning of the act from the woman’s perception.<sup>153</sup> If women see violation with an object as an act equal to penile rape, the law of rape should recognise that.

Second, *all* forms of rape may represent the convergence of violence and sexuality. As MacKinnon states, “sexuality is violent, so perhaps violence is sexual”.<sup>154</sup> Rape with an object, being an act of “[v]iolence against a woman is sexual on both counts, doubly sexy”.<sup>155</sup> Rape with an object and penile rape are both acts of objectification and as such, the law of rape should not treat them differently.

Finally, it would appear that many rape victims perceive rape as including violation with an object.<sup>156</sup> Accordingly, a rape law confined to prohibiting rape by penile penetration of the vagina delegitimises women’s understanding of, and denies women full protection from, the act of rape. Thus, distinctions between types of rape justify MacKinnon’s assertion that rape for most women is not forbidden, it is merely regulated.<sup>157</sup>

## VII: CONCLUSION

As Brownmiller states, the notion that forcible penile penetration of the vagina is the worst type of sexual assault which deserves the most severe punishment, while all other sexual assaults are lesser offences, “can only be seen as an outdated masculine concept that no longer applies to modern crime”.<sup>158</sup>

Sexual assault is not restricted to forced penile penetration.<sup>159</sup> While the penis may be used most often, it is not the only instrument of power and aggression.<sup>160</sup>

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<sup>149</sup> *Ibid.*, 61.

<sup>150</sup> MacKinnon, *supra* at note 27, at 172.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*, 180.

<sup>153</sup> *Ibid.*, 182.

<sup>154</sup> *Ibid.*, 179.

<sup>155</sup> *Ibid.*

<sup>156</sup> Young, *supra* at note 27, at 103.

<sup>157</sup> *Supra* at note 67, at 66.

<sup>158</sup> *Supra* at note 5, at 378.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*



Sticks, bottles, fingers, and guns are often substituted as the weapon.<sup>161</sup> Who can say that the sexual humiliation suffered through penetration with a bottle is a lesser violation of the person and “a lesser injury to mind, spirit and sense of self”?<sup>162</sup>

Further, feminist analysis postulates that non-consensual penile and non-penile penetration are equivalent for a number of other reasons. Both are acts which men do to reassure themselves of their power and dominance over women. Both include, as a crucial factor in that reassurance, the fear and humiliation of their female victims. Both acts function as a threat to women’s autonomy. They undermine women’s self-esteem and limit their freedom of action. The mere threat of such acts may cause women to become more dependent on men.

The legislative solution in New Zealand has been to enact the umbrella term of “sexual violation” to include rape, comprising penile rape and unlawful sexual connection, which includes rape with an object, and to stipulate identical maximum sentences for each.<sup>163</sup> Although this may be an acceptable compromise to some, others would argue that the term “rape” should be used to cover such acts as unwanted penetration with an object. If women experience it as rape, then, it is argued, it should be considered as rape. Further, as recent legislative activity has shown, when such a distinction exists it is possible for a disparity in maximum sentence to occur.

It is this writer’s opinion that penile and non-penile rape deserve to be treated in law as equally grave offences. The utterances to the contrary by the Hon Douglas Graham are paradigmatic of our patriarchal legal system’s inability to appreciate the true nature of the crime.

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<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> See *supra* at notes 1, 3, and 4 and accompanying text.

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