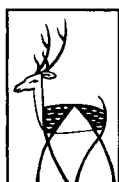
The background of the cover is a watercolor illustration of a city street. In the upper portion, a row of tall, white classical columns stands on a raised platform. Several small figures of people are visible near the columns. Below the columns, a wide street is filled with a diverse group of people. Some are walking, some are carrying umbrellas, and one person is pushing a bicycle. The style is loose and painterly, with a muted color palette of yellows, greys, and blues. The overall scene suggests a busy, everyday urban environment.

Sexual Assault and the Justice Gap: A Question of Attitude

Jennifer Temkin and Barbara Krahé

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October 2007

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Introduction

THE PROBLEM OF rape has emerged from the shadows, encouraged by a climate in which sexual autonomy is increasingly demanded for women as well as for men. In jurisdictions throughout the world and through the medium of international criminal law and human rights law, the desire to deal with sexual coercion and to recognise the rights of victims has been demonstrated. However, legal change has yet to be demonstrably effective. Laws may have been stripped of their most blatantly misogynistic manifestations, but the processing of rape cases through the criminal justice system remains problematic.

In England and Wales, ever since the 1970s, reform of the law concerning sexual offences has continued apace. These reforms of both substantive and evidential law have influenced or have been influenced by those enacted in other jurisdictions in the common law world. Civil law jurisdictions, albeit at a slower pace, have also set about the process of law reform. At the same time, the policies and practice of the police in the investigation of rape and that of the Crown Prosecution Service (CPS) in its prosecution have altered substantially to take account of the victim's interests. In response to these developments, women and more recently men, have become increasingly willing to report sexual victimisation with the result that rape reporting rates have increased exponentially since the 1980s. However, rape conviction rates have remained relatively static. Reports rarely translate into convictions. It is this discrepancy that has been termed the *justice gap*.

Psychological and sociological research has revealed for some time that there is an attitude problem in this area. Perceptions of rape are influenced by stereotypes, bias and gender prejudice. This book will argue that it is this attitude problem which needs to be addressed if the justice gap is to be reduced. The book is necessarily therefore an interdisciplinary enterprise which draws on new psychological and legal research conducted by the authors as well as existing research in both disciplines.

It is often said that the problem in rape cases is simply the lack of evidence, or that it is frequently just one person's word against another. This suggests that the decisions made in rape cases are purely evidence-based. This book seeks to challenge that view. Within the criminal justice system, the decisions made by police, prosecutors, judges and juries are indeed normatively defined as

2 Introduction

data-driven. Decision-makers, whether lay or professional, are expected to assess the evidence in its own right without being affected by their personal feelings or biases or by extraneous information. But the reality of decision-making in sexual assault cases is not adequately explained by a purely normative understanding of the processes involved. A wealth of theorising and research at the interface of psychology and law highlights the influence of psychological processes which operate in a way that is at odds with the normative view (eg Clifford, 2003; Feigenson, 2000). The distinction between two modes of information processing, *data-based* and *schematic* processing, is of particular importance here (eg Kunda, 1999). In data-driven processing, perceivers arrive at a judgment on the basis of a careful examination of the evidence. By contrast, in the schematic mode of information processing, perceivers make sense of the data by referring to a set of abstract ideas and expectations or 'schemata', in this case their general views about rape and rape victims. There is ample evidence of the role of schematic processing in sexual assault cases, reflected in outcomes different from those suggested by the available evidence.

A SOCIAL PSYCHOLOGICAL PERSPECTIVE ON DECISION-MAKING IN RAPE CASES

This book adopts a social psychological perspective on the process of decision-making in sexual assault cases. From this perspective, decisions made in the legal context are seen as potentially susceptible to the same biases and limitations that characterise social information processing in general, such as the tendency to attend to information selectively by concentrating on what is consistent with the perceiver's pre-existing attitudes (McEwan, 2003). Despite safeguards implemented in the legal system to counteract these biases (eg legislation to restrict the use of sexual history evidence that might trigger rape stereotypes), it will be shown that they are hard to eradicate. We argue that judgments about sexual assault are skewed in the direction of low conviction rates partly because of the widely held attitudes about rape which undermine the position of the complainant and benefit the defendant.

The stereotype of the 'real rape' continues to dominate perceptions about what is a genuine rape allegation. It includes socially shared beliefs about the kinds of men who commit rape, the kinds of women who are credible victims, and the way a 'genuine' victim behaves during and after an assault. These beliefs are misguided in a descriptive sense, because only a minority of rape cases match the conditions set out in the stereotype. But the real problem is that they tend to operate as *prescriptive* norms by defining the characteristics that are thought to be necessary in order to qualify as a credible rape allegation. We argue that this discrepancy between what is widely believed to be a 'real rape' and the reality of the circumstances in which women experience sexual violence plays a critical role in the justice gap. To the extent that such generalised stereotypical beliefs

interfere with the data-driven appraisal of the information given in a specific case, biased information processing is likely to result, and it is this which consistently trumps the efforts of legislators to move things on. Stereotypical views operate both at the individual level and at the institutional level of the criminal justice system, both of which are considered in this book. At the individual level, the book reviews existing research and presents new quantitative evidence on the role and impact of rape-related attitudes. At the level of the criminal justice system, it looks at the problems involved in processing rape cases as perceived by a sample of experienced judges and barristers. In addition, it illustrates how law reform which was designed in part to counter the effects of stereotyping has been undermined so that the law in action differs substantially from the law on the statute book.

As well as analysing some of the problems which lead to the justice gap, the book explores ways of narrowing it. Prevailing myths and stereotypes about rape operate towards exonerating perpetrators by shifting blame to victims. Challenging these attitudes and developing strategies for diminishing their influence may improve the position of the complainant in court and ultimately help to reduce the justice gap. The book therefore considers a variety of different methods for improving rape trials. It also looks at the steps which could be taken to educate the public about sexual assault with a view to changing both attitudes and behaviour as well as the quality of jury decision-making.

Sexual assaults are most often committed by a male perpetrator against a female victim so that the roles of complainant and defendant are divided along gender lines. This is in no way to deny the reality and traumatic effects of men's sexual victimisation by other men or by women (Krahé, Scheinberger-Olwig and Bieneck, 2003; Krahé, Schütze, Fritsche and Waizenhöfer, 2000) or indeed the operation of stereotypes in judging sexual violence against men (see Davies and Rogers, 2006, for a review). However, men's sexual violence against women is by far the most prevalent form of sexual aggression, not only in Western Europe but worldwide (see Krug, Dahlberg, Mercy, Zwi and Lozano, 2002: WHO World Report on Violence and Health). Our analysis is addressed specifically to the way in which the criminal justice system deals with male defendants and female complainants in rape cases where the whole range of beliefs and expectations about gender roles is brought to bear on the assessment of the behaviour of the two parties.

PREVIEW OF THE CHAPTERS

In writing this book jointly from the two disciplines of law and psychology, we are keen to ensure that readers from both fields have the information they need. This inevitably means that some of the legal material may be too technical for some readers, while some of the statistical detail from the quantitative studies may be hard going for others. We have tried our best to strike a balance

to meet the needs of our envisaged interdisciplinary audience. Detailed discussion of some of the legal provisions surrounding rape has been confined to Appendix 1 and each chapter contains a brief summary recapitulating the main findings.

The book is divided into three parts. Part 1 (chapters one to three) considers existing research evidence on the justice gap, the role of rape stereotypes and the process of jury decision-making. It also briefly sets out the legal background. Part II (chapters four to seven) presents a series of empirical studies conducted by the authors which investigate the attitude problem underlying the justice gap, combining both quantitative and qualitative methodologies. Part III (chapters eight to ten) discusses avenues for change in terms of law reform, improving rape trials and educational interventions aimed at dispelling misconceptions about rape. The following represents a brief summary of each chapter:

Chapter one illustrates the problem of attrition in rape cases by providing information about the statistical picture in several jurisdictions. It also sets out the legal background by explaining briefly aspects of the law of rape in England and Wales and elsewhere. The legal background is discussed in more detail in Appendix 1.

Chapter two considers the real rape stereotype and how it shapes attitudes towards and assessments of situations involving rape. It looks at the concept of rape myths and reviews evidence about the extent to which these myths are accepted and applied by members of the public as well as professionals who are directly involved in the legal process. It examines factors influencing the attribution of responsibility and blame to victims of rape and seeks to explain the role of schematic and heuristic information processing in sexual assault cases.

Chapter three considers the problems raised by the jury system in sexual assault trials. It presents different models explaining how juries arrive at a verdict, discusses a variety of factors undermining the quality of jury decision-making, such as jurors' susceptibility to cognitive biases and emotional reactions, and examines the functions and effectiveness of expert testimony in rape trials.

Chapter four presents original data from two empirical studies conducted by the authors on the impact of stereotypical beliefs on judgments about hypothetical rape scenarios. The studies examine the extent to which prospective lawyers are susceptible to schematic information processing on the basis of rape stereotypes and some of the processes underlying their judgments about defendants and complainants.

Chapter five presents a third study which demonstrates the impact of rape stereotypes and schematic reasoning about rape cases in a large sample of members of the public representing the population from which jurors are drawn in rape cases. This study also includes an empirical evaluation of a recent media campaign conducted in England and Wales in order to gauge its effectiveness in influencing perceptions about sexual assault.

Chapter six presents the findings from a series of systematic, in-depth interviews with a sample of judges and barristers. It considers their views of the prob-

lems involved in processing rape cases and also their attitudes towards rape and towards the justice gap.

Chapter seven draws on the same sample of judges and barristers to analyse their understanding of and their approach to key areas of the evidential law of rape which have a bearing on rape stereotyping at the trial level, namely corroboration, sexual history and third party disclosure. The chapter sheds light on the law in action and how it contributes to the justice gap.

Chapter eight looks at ways in which the law could be strengthened in order to reduce the impact of stereotypical thinking in rape cases. In particular, it examines the role of expert evidence as an educational tool for jurors and discusses the issue of consent in alcohol-related rape cases.

Chapter nine discusses a range of options for improving rape trials, including the possibility of screening jurors, different ways of assisting the jury, and educating and training lawyers involved in rape cases.

Chapter ten examines strategies for changing public attitudes about rape. These include school-based education programmes, media campaigns and initiatives by men opposed to sexual violence.

The book ends with a brief conclusion summing up its main findings and recommendations for tackling the justice gap.

Part I

The Background

The Justice Gap in Sexual Assault Cases

IN MANY COUNTRIES in the Western world, attempts have been made to improve the lot of victims of sexual offences but increasing conviction rates has proved to be an elusive goal. This book is set against the background of what has been officially accepted in England and Wales as ‘the justice gap’ in sexual cases—the gap between the large number of cases reported to the police and the tiny number which result in conviction (see eg Office for Criminal Justice Reform, 2006). The problem has also been noted across the Western world, with a large proportion of reported rape cases dropping out as they proceed through the criminal justice system (Regan and Kelly, 2003). The present chapter presents evidence for the justice gap by documenting the process of attrition in rape cases. It goes on to summarise the law relating to sexual assault in England and Wales, comparing it briefly with that of other European countries, in order to outline the complicated relationship between law and schematic reasoning and to provide the context for the analyses which are presented in later chapters.

1.1 THE PROBLEM OF ATTRITION

There are certain facts about rape in England and Wales which are indisputable. There is the fact that each year more and more women, and now more and more men, report rape to the police. There is also the fact that few of these reported rapes ever translate into convictions. Moreover, Home Office figures show that the conviction rate in terms of the annual number of convictions as a percentage of the annual number of reported rapes is declining dramatically. In 1977 there was a conviction rate of 32 per cent (Regan and Kelly, 2003: 13). By 2004/05 it had fallen to 5.3 per cent (Home Office, 2005a: Main Volume, Table 3.12; Home Office, 2005b: Table 2.04).¹ This discrepancy between the number of reported cases and the number of those which result in conviction has been aptly

¹ The definition of rape changed with the Sexual Offences Act 2003 which came into effect in May 2004, so that conviction rates thereafter are not strictly comparable with those of preceding years.

described as more of a 'chasm' than a gap (Kelly, Lovett and Regan, 2005). But attrition in rape cases goes far beyond this. For studies show that many reports of rape are rejected by the police so that they never enter the figures for recorded rape. Most importantly of all, most victims never report the matter at all.

Attrition in rape cases has been the subject of a great deal of discussion and a number of high quality studies which confirm the phenomenon (for a summary, see eg Temkin, 2002a: ch 1). Some studies also demonstrate the influence of stereotypes at each stage of the process from the decision to report an offence to the police, the decision taken by the police to record a complaint as rape and to seek to bring charges, the decision of the Crown Prosecution Service (CPS) whether to take the matter to court, and finally the decision of the jury whether to convict or acquit.

Evidence from Victimisation Surveys

It is universally recognised that the number of offences recorded by the police is a small proportion of the number of rapes which actually take place. Gaining an accurate picture of the true scale of sexual assaults is a difficult task, and it requires extrapolation from a limited sample to the population at large. Despite the problems involved in this estimation process, evidence from victimisation surveys and large-scale research studies comes closest to providing a picture of the true incidence and prevalence of sexual offences and is thus part of the background to the justice gap.²

England and Wales

The British Crime Survey (BCS) is a population survey and a key indicator of crime trends. Unlike police recorded crime, it is unaffected by changes in recording practices. The 2001 BCS has provided the most detailed picture so far of the extent and nature of sexual assault in England and Wales (Walby and Allen, 2004). A nationally representative sample of 22,463 women and men aged 16–59 was asked in 2001 via a computerised self-completion questionnaire to answer questions relating to their experience of sexual violence, including whether they had been subject to sexual assault during the preceding year (incidence), since the age of 16 or during their lifetime (prevalence) (Walby and Allen, 2004: v). Some of the main findings are presented in table 1.1.

The figures shown in table 1.1 equate to an estimated 190,000 incidents of serious sexual assault and to an estimated 47,000 female victims of rape or attempted rape (1994 definition) in the year preceding the interviews (Walby

² Incidence refers to the total number of occasions on which sexual offences occurred in a specified time period, usually 12 months; prevalence refers to the proportion of the population that has experienced a sexual offence in a given period or since a particular age.