

BOOK REVIEW

AGAINST OUR WILL: MEN, WOMEN AND RAPE. By Susan Brownmiller. Simon and Schuster. 1975. Pp. 404. \$10.95. Cloth.

Reviewed by Kathleen F. Brickey.*

Scarcely a decade ago, this reviewer's criminal law professor related to the class the shop worn one-liner, "As the king told his daughters while Atilla the Hun stormed the gates: 'If rape be inevitable, lie back and enjoy it!'" All save three of us laughed. Equally unamusing are casebooks which include—generally without comment—lengthy excerpts from Wigmore which are concluded by the following statement: "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."¹

Such remarks reflect stereotypical generalizations about the nature of the crime of rape and its victims. They are, unfortunately, but a sampling of the notions widely held by lawyers—practitioners, judges and academicians—who have shaped a substantial body of jurisprudence. That is precisely why lawyers should read *Against Our Will: Men, Women and Rape*.

Brownmiller has written more than a feminist tract. Her book is a detailed study of the history of rape and rape laws, of societal attitudes regarding the offender and the victim, and of the inadequacy of individual and institutional responses to the crime.

Mass wartime rape of a people under siege historically has been accepted as a military and political fact of life. In the words of General Patton, "there [will] unquestionably be some raping."² Brownmiller traces the pervasiveness of

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¹ See, e.g., F. INBAU, J. THOMPSON, A. MOENSSENS, *CRIMINAL LAW: CASES AND COMMENTS* 527 (1973).

² S. BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 31 (1975) [hereinafter cited as BROWN MILLER].

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sexual assault as a military reality from the early religious wars through Vietnam. The systematic brutal abuse of women as women is horrifying: Nanking—20,000 rapes committed during the first month of Japanese occupation of China's capital city in 1937; between 200,000 and 400,000 rapes committed during the nine month struggle in Bangladesh. Yet official and reportorial responses were rare. In 1937, *Life* magazine had reported the existence of "[a] few uninvestigated cases of rape" during the Nanking occupation.³ The Nanking International Relief Committee compiled and published extensive data regarding losses suffered in the occupied city, including estimated property loss from fire and looting; loss of labor animals and damage to several types of crops; a statistical analysis of injuries and deaths categorized by age, sex, previous employment and mode of death. What of the rapes? "Among the injured females, 65 percent were between the ages of 15 and 29, although the terms of method of inquiry excluded rape per se."⁴ But for the convening of the International Military Tribunal for the Far East at the conclusion of World War II, the true meaning of the Rape of Nanking would have been lost forever.

The Bangladesh experience was similar in scope and treatment until a Geneva press conference was called by an officer of the World Council of Churches to report the atrocities and to discuss a mission to aid the victims. Their victimization was compounded by their culture, which ostracized them and relegated to them the tasks of bearing the humiliation of their violation, caring for the unwanted offspring of their rapists, and developing the skills to become economically independent in isolation. Infanticide and suicide were solutions for some women.

Not only has the world press chosen to ignore sexual brutality as an accepted part of war, but the encouragement and/or tolerance of this form of violence by the military has largely escaped official notice also. For example, one Japanese company commander was publicly quoted as having

³ *Id.* at 57.

⁴ *Id.* at 58.

ordered soldiers who committed rape either to pay the victims or "kill them in some obscure place" in order to avoid problems.⁵ Moreover, the Winter Soldier Investigation revealed a host of witnesses to gang rapes and sexual brutality by G.I.'s in Vietnam which provoked no official action. As one squad leader explained to Seymour Hersh, "That's an everyday affair. You can nail just about everybody on that—at least once. The guys are human, man."⁶

After examining the prevalence of rape as an everyday occurrence in wars, riots, pogroms and revolutions, Brownmiller focuses her attention on rape as a street crime. Contrary to the commonly accepted notion that rape is usually committed as a result of a sudden, uncontrollable sexual urge, reliable studies indicate that some seventy percent of rapes are planned in advance. Those studies also show a statistically insignificant difference regarding this phenomenon between single-offender rapes and gang rapes.⁷ An equally unpublicized fact relates to the usual modes of commission of the offense. One study of two cities indicated that fifty-five percent of police blotter rapists raped in gangs, while an additional sixteen percent raped in pairs.⁸ Eighty-five percent of the rapes in one study involved the display of a weapon or some form of physical force.⁹

Although there seems to be a paucity of psychological literature giving insight into the rapist's mode of behavior,¹⁰

⁵ *Id.* at 62.

⁶ *Id.* at 104-05.

⁷ *Id.* at 182-83. Seventy-five percent of the single offender rapes were planned in advance. These statistics were derived from Menachim Amir's study of rape in the city of Philadelphia and are published in his work, *PATTERNS IN FORCIBLE RAPE* (1971).

⁸ *Id.* at 188. The two cities were Philadelphia and Toronto. In Philadelphia, group rape accounted for forty-three percent of the reported cases; in Toronto, fifty percent. A Washington, D.C. study also indicated that fifty percent of the rapes were committed in gangs or pairs.

⁹ *Id.* at 184.

¹⁰ Brownmiller was unable to unearth any major volume on the subject of rape which was written by a psychoanalytic authority. Criminologists have tended to associate the rapist's conduct with his relationship with his mother and/or wife. One Rorschach study of the *wives* of eight convicted rapists considered the conduct of the wives, which caused sex frustration in the offenders, as a factor motivating rape. This behavior "unconsciously invited sexual aggression . . . , [and] unknowingly

there is ample anthropological evidence that rape, especially institutionalized gang rape, has played a significant role as a method of social control in some societies.¹¹ The alarming prevalence of gang rape in American culture lends support to Brownmiller's thesis that the act of rape is an act of conquest of men over Woman, an act which by definition defies retaliation in kind. It is an expression of sexual contempt through anonymous mass assault.

Unfortunately, police attitudes toward rape tend to reflect stereotypical male notions regarding the offense and its victims: *e.g.*, it is "one of the most falsely reported crimes" stemming from a wife's subsequent remorse after a night on the town or a prostitute's failure to receive payment from a patron; it is impossible for a man to rape a woman against her will; women who claim to have been raped generally contribute to their own victimization.¹² The existence of these attitudes is borne out by statistics indicating that between fifteen and twenty percent of all reported rapes are determined to be unfounded. When New York City instituted the practice of having policewomen interview complainants, the number of unfounded complaints corresponded with the rate of false reports for other violent crimes—two percent.¹³ Moreover, the National Commission

continued the type of relationship the offender had had with his mother. [Rape] might be tentatively described as a displaced attempt to force a seductive but rejective mother into submission." *Id.* at 179, quoting a study by Dr. David Abrahamson.

This approach was adopted by a medical-psychiatric committee appointed to assist confused police in their search for the Boston Strangler, Albert DeSalvo. This committee constructed an imaginative profile of DeSalvo's mother, which was subject to considerable modification as he began to prey upon younger victims. It appears that the committee's analysis was dead wrong. *Id.* at 203-04.

¹¹ Eminent anthropologists such as Dr. Margaret Mead and Robert F. Murphy have observed this phenomenon. *Id.* at 284 *et seq.* This tribal disciplinary procedure was closely paralleled by Hunter Thompson's description of the use of gang rape by the Hell's Angels "as a form of punishment" inflicted on "a girl who squeals on one of the outlaws or who deserts him." He described the ritual as "a definite ceremony, like the purging of a witch." *Id.* at 299.

¹² *Id.* at 364 *et seq.* Several of these notions apparently are expressed in police patrol manuals. It is interesting to note that despite the common belief that many alleged victims of rape are actually disappointed prostitutes, a Memphis study revealed that only 1.02 percent of all rape victims were prostitutes.

¹³ *Id.* at 387.

on the Causes and Prevention of Crime found that the percentage of discernible victim precipitation in the crime of rape was far below that for other crimes of violence such as homicide, assault and armed robbery.¹⁴

Brownmiller attributes some public misapprehension of the nature of the crime of rape to the mythologizing of the heroic rapist and the glorification of sexual violence. Cultural acceptance of the concept of manhood being defined in terms of aggression toward or protection of women is typified not only by the popularity of real or imagined mass culture figures such as Hell's Angels, Mick Jagger, James Bond, Pancho Villa and the like,¹⁵ but it is also responsible for the casting of women in the role of victims characterized by beautiful passivity. These stereotypes lead to such romanticized notions that Jack the Ripper was a hero immortalized in literature, opera and hard rock; and that rape victims are young, white, middle-class and attractive.¹⁶

In addition to having to combat cultural attitudes and those held by officials charged with the responsibility of enforcing the law, the rape victim faces other obstacles to successful prosecution of her complaint. For example, unlike other crimes of violence, the crime of rape is defined in such a manner as to require the victim to fight back.¹⁷ Moreover,

¹⁴ The study indicated that discernible victim precipitation was present in 22% of homicides, 14.4% of assaults, 10.7% of armed robberies, 6.1% of unarmed robberies, and 4.4% of rapes. Amir's study indicated a much higher percentage of victim precipitation—19%—evidently because of a variance in the definitions of precipitant behavior. *Id.* at 355.

¹⁵ Brownmiller points out, the reviewer believes correctly, that the exaltation of sexual violence occurs only when men victimize women. For example, Gilles de L'Isle, the original Bluebeard, was executed for having raped and murdered scores of small boys. Something was lost in the Mother Goose translation, however, and Bluebeard is immortalized as a "devilish rake who killed seven wives for their 'curiosity'." *Id.* at 292. It is highly unlikely that Dean Allen Corll, convicted of the homosexual murders of young Houston males, will ever become the popular hero that Jack the Ripper did.

¹⁶ In point of fact, nonwhites are victimized disproportionately for all serious violent crimes. The forcible rape rate among nonwhites, according to one study, is 82 per 100,000 population. Among white women, the rate is 22 per 100,000 population. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 39 (1967).

¹⁷ Rape statutes generally require that the force used must overcome "earnest resistance" or the like. See, *e.g.*, KRS 510.010. Some jurisdictions have required the

an isolated adolescent sexual encounter with another youth may be deemed to be relevant to the issue of consent, *i.e.*, a *tendency* to consent, years later when the mature woman claims to have been forcibly raped.¹⁸ Hence, a rape victim's moral history or chaste character frequently becomes a major issue in a rape trial, and jury behavior may reflect disapproval of the victim's reputation rather than condemnation of the defendant's aggressive conduct.¹⁹ Another obstacle to an impartial adjudication of rape cases may be the trial judge's instruction to the jury. "The crime of rape is easy to charge and difficult to disprove. The charge is of such a serious character and nature that the proof offered to establish its commission should have careful consideration."²⁰ Jurisdictions permitting such instructions clearly require a higher degree of credibility on the witness stand than is required for victims of other violent crimes.

Some of these problems can be remedied with relative ease. For example, fair investigation of reported rapes could

victim to resist to the utmost. *See, e.g.*, *Purpero v. State*, 190 Wis. 363, 208 N.W. 475 (1926).

¹⁸ No principle is better settled than that the reputation of the prosecutrix in a case of rape, for virtue or the want of it, is always competent evidence, not to justify the act of rape, if the reputation is good, or to excuse it, if the reputation is bad, but as bearing upon the reasonableness or unreasonableness of her story and the probability of whether she did or did not consent to the act.

Lake v. Commonwealth, 31 Ky. L. Rep. 1232, 104 S.W. 1003, 1006 (1907).

¹⁹ Kalven and Zeisel's study of the American jury indicated that verdicts in rape cases frequently involved a weighing of the conduct of the victim against the consequences of a rape conviction.

It closely, often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior of her part. . . . The jury's stance . . . is not so much that involuntary intercourse under these circumstances is no crime at all, but rather that it does not have the gravity of rape.

BROWN MILLER, *supra* note 1, at 374, quoting H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* 249-51 (1966).

²⁰ The easy to charge difficult to disprove instruction recently was specifically disapproved by the Supreme Court of Iowa. The Court found four vices in the instruction: it constitutes an impermissible comment on the evidence in that it suggests that the rape victim's testimony is more likely to be false than the testimony of other witnesses; it applies a stricter test of credibility to the rape victim; it arbitrarily singles out rape victims as a class whose testimony is suspect; and trial courts may indiscriminately grant or deny the instruction. *State v. Feddersen*, 230 N.W.2d 510 (Iowa 1975).

be assured by placing persons who are cognizant of the dynamics of the offense in charge of interviewing witnesses;²¹ "shield laws" which protect rape victims from public exploitation of their private lives could assure that a higher percentage of rape cases actually are tried;²² elimination of instructions which prejudice the credibility of rape victims could work to assure that juries would decide rape cases on their merits;²³ statutory redefinition of sex offenses could assure prohibition against all forms of sexual assault, and realignment of penalty structures could assure that the gravity of the punishment is reflective of the severity of the offense.²⁴

But there remains a large category of problems for which even partial solutions cannot be identified easily. Foremost among them is attitudinal change and elimination of machismo. Brownmiller posits that pornography and prostitution, which reflect the cultural notions of aggressive male domination over women, and of women as passive sex objects, no longer can be tolerated.²⁵ She strongly believes that institu-

²¹ The New York experience (*see* text accompanying note 13 *supra*) indicates the potential success of this approach. It is interesting to note that while law enforcement personnel tend to determine that an extraordinarily high percentage of rape complaints are "unfounded," they maintain that rape is a vastly underreported crime "due primarily to fear and/or embarrassment on the part of the victim." BROWN MILLER, *supra* note 1, at 175, quoting FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS* 15 (1973). Reform of investigatory and trial practices could improve this situation.

²² *See, e.g.*, CAL. CODE ANN. § 1103 (1974), which limits the admissibility of evidence of sexual conduct of the complaining witness to sexual conduct with the defendant.

²³ *Cf.* note 18 *supra*.

²⁴ *Id.* Kalven and Zeisel's study revealed that juries tend to incorporate civil law concepts of contributory negligence and assumption of risk into the criminal law in order to avoid attaching the opprobrium and prescribing the severe penalty accompanying a rape conviction. "This rewriting of the law to accommodate the defendant when the female victim has taken a risk is on occasion carried to a cruel extreme. There are cases in which the situation is clearly aggravated by extrinsic violence but the jury is still lenient on the defendant." H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* 251 (1966).

²⁵ Brownmiller argues that total eradication of prostitution and pornography is essential to a successful fight against rape. Pointing to military experiences indicating that easy access to prostitutes is no deterrent to the commission of rapes by G.I.'s and to the notion that prostitution institutionalizes the concept that man has a right to gain access to the female body, she expresses horror at the idea of legalized prostitution. Also, noting that the majority report of the President's Com-

tionalized sexual exploitation of women must cease. In her view, there are no satisfactory private solutions. Discouraging the majority of the population from enjoying the basic liberties of publicly appearing without a (male) companion, living alone, hanging out the wash, (*i.e.*, lingerie), etc. is more than unfair. It is also proof that the rape mentality has succeeded; that acceptance of male dominance has served effectively as a mechanism of social control over women.

Against Our Will poses many conclusions and proposals which undoubtedly will anger the liberal²⁶ and horrify the conservative as well.²⁷ It is, however, a thoughtful, if depressing volume, which is deserving of study as a valuable resource.

mission on Obscenity and Pornography recognized that 90% of all pornography is geared to the male heterosexual market, Brownmiller suggests that the availability of such material "promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged." *Id.* at 395.

²⁶ *Cf. id.*

²⁷ For example, she suggests that the crime of rape be redefined to permit forcible intercourse between husband and wife to be prosecuted as rape. Citing Matthew Hale's explanation that "by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract," Brownmiller points out that the law has evolved to protect the interests of the husband rather than those of the wife. *Id.* at 380.

CASE NOTES

ABORTION—Action by nineteen year-old unmarried female against the Arizona Board of Regents to determine the constitutionality of a state statute¹ prohibiting non-therapeutic abortions at the University Hospital. *Roe v. Arizona Board of Regents*, 549 P.2d 150 (Ariz. 1976).

Prior to this hearing by the Supreme Court of Arizona, a temporary restraining order prohibiting enforcement of the statute was issued by the lower court. As a result of the lower court's order, an abortion has since been performed on the plaintiff. Because the Supreme Court of the United States had ruled that a termination of the pregnancy in such instances would not render the issue moot,² the state supreme court heard the plaintiff's case.

The plaintiff attacked the statutory prohibition of non-therapeutic abortions in the University Hospital, a teaching facility, on the grounds that the state was interfering with her constitutionally protected decision to terminate her pregnancy. The majority opinion, however, viewed the issue simply as whether a state could forbid abortions at a teaching hospital without infringing upon the right to choose an abortion. Several cases holding that a state could not bar physicians from using state facilities to perform abortions were cited by the plaintiff in support of her contention.³ The

¹ ARIZ. REV. STAT. ANN. § 15-730 (1974) states:

No abortion shall be performed at any facility under the jurisdiction of the board of regents unless such abortion is necessary to save the life of the woman having the abortion.

² *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973).

³ *Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975), for example, held that staffing obstetric-gynecology clinics in public hospitals exclusively with doctors who morally object to abortions was a denial of equal protection to indigent women. As the doctors could not be forced to perform abortions, no abortions had been provided. *Doe v. Hale Hospital*, 500 F.2d 144 (1st Cir. 1974), held that hospital policy denying non-therapeutic abortions during the first trimester of pregnancy was an undue restriction on the rights of women. In *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974), an action brought by physicians, the court held that a state law which banned non-therapeutic abortions in public hospitals was invalid as overbroad. See also *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974) and *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1st Cir. 1973).

But this is more than a lawbook. Judge Midonick is able in *Children, Parents and the Courts* to capture the pressure and tension under which the juvenile justice system is operated without seeming overly anxiety-ridden. He is able to put his finger on the weaknesses within the early development of this child-system without being overly reproachful. He is able to take this infant system, evaluate it as it now stands and suggest ways it can improve itself in the future without dwelling on past mistakes.

I was delighted that Judge Midonick was able to avoid extremes in his discussion of the fulfillment (or lack thereof) of the "great promise" of the juvenile court. While acknowledging the imperfections of the system, he manages to stay clear of the path of those many who find the system useless, an utter failure. While defending the system (and one can tell that he does firmly believe in the system), he is able to do so without resorting to fanatical loyalty to the system.

Children, Parents and the Courts is not a "must" for anyone. Judges can judge, and lawyers can law, and probation officers can do whatever it is they do without reading this book. However, I highly recommend it to judges, defense lawyers, prosecutors, probation staff, and other interested lay persons. The message is clear and concise, the law is well laid out, the criticisms are well taken, the state of health of the system is diagnosed fairly and impartially, and the conclusions are sound. Judge Midonick's prognosis for this child-system, while somewhat guarded, is generally good.

The book has two weaknesses. First, it is a little heavy on local (New York) law and procedure. Second, it is too short. Judge Midonick writes with an uncommonly smooth style, and I could have read more.

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PATTERNS IN FORCIBLE RAPE. By Menachem Amir. The University of Chicago Press. 1971. Pp. 394. \$15.00 Bound.

Nearly everything you always wanted to know but were afraid to ask about rape—victims, offenders, and methods—probably rests between the covers of Menachem Amir's *Patterns in Forcible Rape*. In the author's words:

The primary purpose of this work has been to explore the nature and disclose the patterns of forcible rapes from among 646 cases that occurred in Philadelphia from 1 January 1958 to 31 December 1958, and from 1 January 1960 to 31 December 1960. The material presented is based on an empirical study of cases found in the files of the morals squad of the Philadelphia police department, where all complaints about rapes are recorded and centrally filed. (p. 334).

Mr. Amir succinctly stated the purposes of his study in the opening pages of his text. After contrasting his work with other writings in criminology, he wrote:

In this study, the main concern will be with information on social characteristics of the individuals involved in the offense and with variables surrounding the commission of the crimes. It will be observed whether there is some significant conjuncture of events prior to or during the crime. Thus, the time, place, and circumstances of the crime are of great importance, as well as the characteristics of both offenders and victims and the relationships between them. (p. 5).

The meticulously narrated data comprising 102 tables in *Patterns in Forcible Rape* do reveal the importance of the time, place, and circumstances in coming to grips with the crime of rape. The well-reasoned statements filling the eighteen chapters which the author divided into five neat major parts elucidate the characteristics of both offenders and victims and the relationships between them.

Mr. Amir studied and analyzed, paralleled and correlated the data involving 646 victims and 1,292 offenders and arrived at a number of significant associations. He found a significant relationship between forcible rape and the race of both the victims and the offenders. Persons in the age group 15-19 years accounted for the highest rates among offenders and among victims. Both offenders and victims generally

were unmarried. Ninety percent of the offenders belonged to the lower part of the occupational scale. "Although the number of forcible rapes tended to increase during the hot summer months, there was no significant association either with the season or with the month of the year." (p. 339). Mr. Amir discovered that forcible rape was associated significantly with the days of the week. Saturday peaked the chart. The high risk hours tended to fall between 8:00 p.m. and 2:00 a.m. A correspondence appeared between the areas in which there was a high rate of crimes against persons and the rates of forcible rape.

Mr. Amir learned that a "bad" reputation of the victim, along with other factors, showed up as a factor in what was termed victim-precipitated forcible rape. The location of the offense associated significantly with the place of the initial meeting of the victim and the offender. A significant association also emerged between the location of the rape in the participant's place and the use of violence in the commission of the offense, as well as the subjection of the victim to practices termed "sexually humiliating."

The phenomenon of multiple rape received special attention in this study. Of the 646 cases of rape studied, 276 of these cases, or 43 percent, involved multiple offenders. A felony in the form of burglary or robbery was committed in addition to the rape in 76, or 4 percent, of the cases studied. These conclusions represent only a few of the postulates derived from Mr. Amir's analysis of these cases.

Marvin E. Wolfgang gave a clue to the value of this book in his "Foreword" when he inscribed the statement: "His [Mr. Amir's] bibliography alone, assiduously collected and digested, makes this work a valuable one." (p. viii). Thirty pages of references grace this book. The list of authors reads like a veritable who's who of forensic psychologists, criminological sociologists, and similar scientists. The bibliography alone plummets this book into the category of outstanding reference works.

Information potentially useful to a wide audience fills the pages of *Patterns in Forcible Rape*. Both defense and

prosecuting attorneys can find guiding dicta here, especially in Chapter 2, "General Perspectives of Forcible Rape," and in Chapter 10, "Modus Operandi." Social and behavioral scientists can obtain useful data and conclusions from this study throughout. Parents, guardians, teachers, and counselors can use this work, especially the last chapter, "Summary and Conclusions," as a basis for delineating meaningful warnings for maturing young ladies. After-lunch speakers at women's clubs ought to be able to extract material from this book for at least a half-dozen talks. Discussions of these data and conclusions, along with similar studies of other crimes, deserve prominence in the programs of the National Crime Prevention Institute and schools with similar objectives.

No journal-type review of *Patterns in Forcible Rape* appears likely to render justice to this monumental work. A completely unbiased, relatively objective, fairly comprehensive abstract of this intensive study seems to lie beyond the confines of a brief description. Mr. Amir exploded some old myths about rape and probably stepped on some toes. No doubt criticism of his contentions will issue from those who feel obligated to protect a few feeble sacred cows. The preceding remarks, therefore, are proffered with a stern sense of caution and humility.

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