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1986]

WOMEN AND THE LAW*

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THIS year marks the bicentennial of our Constitution and there is much to celebrate. Great strides have been made in the past two hundred years toward enlarging democracy and securing equal protection. Unfortunately, the promise of full equality remains unfulfilled. Therefore, it seems appropriate to examine a glaring injustice still enshrined in our Constitution and mirrored in some of our laws—the inequality of women.

The Constitution still does not fully grant women equal rights—women are not entitled to the same protection against discrimination as other groups in society. And prospects for adoption of the Equal Rights Amendment before the Constitution's bicentennial are slim. Discrimination in employment remains stubbornly in place; on average, women make only sixty-four cents for every dollar men earn and only six percent of American women earn more than twenty five thousand dollars annually.¹ Few women are found at top levels of corporations, foundations, unions or similar organizations. The situation of women in government is not much better. For example, only twenty-five of the 535 members of Congress are women and only three governors are women.

Women, however, do dominate one level of society—the poor. More than forty-five percent of all families living below the poverty line are headed by single women.² Seventeen percent of American women over sixty-five live in poverty, and almost half of them have median incomes of five thousand dollars or less.³ The

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1. UNITED STATES DEP'T OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 456 (1986).

2. Pear, *Poverty Rate Down Slightly in 1985 to Level of '81*, N.Y. Times, Aug. 27, 1986, at A17, col. 1.

3. *Study Finds Elderly Women More Susceptible to Poverty*, N.Y. Times, Sept. 24, 1984, at A17, col. 1. The study, "Older Women: The Economics of Aging," was an updating of a 1980 report prepared for the Congressional Caucus for Women's Issues. *Id.*

poverty of elderly women is a bitter testament to discrimination in employment, wages and pensions, and to the longstanding failure to make it possible for women to enter the labor force and accommodate their child care responsibilities at the same time.

These inequities reflect societal attitudes about the inferiority of women which are deeply ingrained. Even national leaders make derogatory remarks about women's intelligence. In 1985, for example, the President's chief of staff, Donald Regan, claimed that women don't "understand throw-weights or what is happening in Afghanistan or what is happening in human rights."⁴ The President himself opposes the Equal Rights Amendment and enthusiastically embraces the extreme right, an arch enemy of women's equality.

As a District Attorney, I see daily the ugliest manifestation of this continued lack of equality: the epidemic of violence aimed at women of all ages, classes, races, religions, personalities and backgrounds. This violence draws inspiration and sustenance from prejudice and stereotypes and, despite the progress that has been made in improving the status of women, the extent of violence against women remains enormous.

The crime of rape most accurately reflects the underlying social attitudes about violence against women. For many years, rape was a word rarely mentioned in polite company; it was perceived as something that happened to women who asked for it. According to this view, nice women didn't get raped, and rape was the victim's fault.⁵

Imagine what it must have been like for a woman who was raped only seventeen years ago. By law, her word alone could not convict the rapist.⁶ The assumption was that the women really consented—because women secretly want to be raped—and simply claimed rape to preserve her modesty or to avenge a slight by a boyfriend or lover.⁷ If the prosecution could go forward, and if

4. Mann, *Girl Talk*, Washington Post, Nov. 22, 1985, at C3, col. 4.

5. This view however, has been substantially altered. Phyllis J. Broker, a Boston prosecutor, has noted: "finally everyone understands rape. Victims know they didn't deserve it. Rape doesn't happen only to 'bad women' anymore." Press, McDaniel, Shannon, Kasindorf, Agrest, Hamuth, Sandya, Raine, Anderson & Prout, *Rape and the Law*, NEWSWEEK, May 20, 1985, at 60-61 [hereinafter cited as *Rape and the Law*].

6. The reference here is to the requirement in some states that unless the victim's word is supported by independent corroborating evidence, the case cannot be brought. *Rape and the Law*, *supra* note 5, at 62.

7. In fact, some old rape laws required judges to advise juries that women had been known to lie in sex cases. *Id.*

the victim testified in court, she would be subjected to humiliating cross-examination about her prior sexual activity⁸ on the assumption that if a woman ever said yes to anyone, she would never say no. She could also expect to encounter derision or skepticism from the police, prosecutors and judges. Because of these obstacles, as well as the shame associated with rape and the feelings of self-blame, victims rarely came forward. When they did, prosecutions were extremely difficult.

It was only with the advent of the women's movement in the late 1960's and early 1970's that the public perception of rape began to change. Women who were raped finally began to be recognized as victims, and the laws and criminal justice system started to reflect this new understanding. Thus, in most states, the need to corroborate a woman's testimony was eliminated and limits were placed on the ability to inquire about a victim's sexual past at trial.⁹ Rape statutes themselves, which assumed a woman's complicity to the crime, began to be changed.

Nonetheless, it was only a few short years ago that the New York State legislature finally abolished the sex stereotyped assumptions in its rape statute. Until 1982, in New York State, there was no legal rape unless the woman put up "earnest resistance"¹⁰—even though police often counsel women not to fight back because doing so could endanger their lives. The "earnest resistance" requirement reflected the view that women basically consent to rape, and it placed the burden on them to show they did not. That view was so persistent that when the legislature finally abolished the "earnest resistance" requirement, it imposed in its place a new special burden on women—a legal rape could not take place, no matter how much force was used, unless the woman could prove that she feared immediate death or serious

8. Many defense attorneys admit that "they had shamelessly put the victim on trial" *Id.* A rape victim testifying at trial" to become the focused issue. *Id.*

9. According to rape-law chronicler Leigh Beinen, the old notions embodied in rape law began to fade in 1975 in Michigan and this change spread across 40 other states. The new schemes embodied four basic concepts. First, they "shielded" testifying victims from having their sexual histories raised in court. Second, they redefined rape to be gender neutral; men could be victims of homosexual rape, and the use of an object in place of a penis became sexual assault. Third, corroboration requirements were dropped, along with the demand that a victim prove she had resisted "to the utmost of her ability." Finally, the new laws included a "staircase," or hierarchy, of rape charges, so that a sexual attacker who stopped short of penetration could still be found guilty of a sex offense rather than merely conventional assault. *Rape and the Law, supra* note 5, at 62.

10. N.Y. PENAL LAW 130.00(8) (McKinney 1982).

and longlasting bodily injury. If she had no such specific fear, there was no punishable rape. That statutory burden was finally removed in 1983.¹¹

Despite the statutory reforms, the problem of rape persists. The Federal Bureau of Investigation estimates that a woman is raped every six minutes and that one woman in ten can expect to be raped in her lifetime. Nationwide, complaints of rape have increased steadily while other felony complaints have decreased. Thus, more than eighty thousand rapes were reported in 1984, an increase of six percent over 1983, while overall major felony crimes dropped three percent in the same period.¹²

Recent studies illustrate how widespread and disturbing the problem is. In 1985, a *Ms. Magazine* survey of 1,000 women reported that one in eight had been raped, almost half by their dates.¹³ A 1984 survey of Brown University students found that sixteen percent of women questioned had been raped by men whom they knew or were dating, and eleven percent of the men surveyed admitted having forced a woman to have intercourse.¹⁴ Furthermore, the phenomenon of gang rape at universities is attracting more attention and concern.¹⁵

11. *Id.* 130.00 (McKinney 1986).

12. UNITED STATES DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 6, 13 & 14 (1985).

13. Sweet, *Date Rape*, *MS. MAGAZINE*, October, 1985, at 56, 58. The survey, the *Ms. Magazine* Campus Project on Sexual Assault, reached 7000 women from a nationally representative sample of 35 institutions of higher learning. *Id.* The survey was funded by a grant from the National Center for the Prevention and Control of Rape and was directed by Kent State University psychologist Mary P. Koss. *Id.* Two of the more startling statistics to emerge from the study were that one quarter of today's college women have been victims of rape or attempted rape, and that almost 90% of them knew their assailant. *Id.*

14. *New Recognition of Realities and Prevention of 'Date Rape'*, *N.Y. Times*, Oct. 23, 1985, at C1, col. 1. Date rape victims are even more reluctant than victims of stranger rape to report the crime. *Id.* According to Ellen Doherty, coordinator of the Rape Intervention Program at Roosevelt Hospital in New York, where Columbia University students are sent for counseling, "[m]any times, the assailant and the victim share the same friends. Women are afraid that they will not be believed, that they will alienate the people who are closest to them." *Id.* at C14.

15. *See Gang Rape: A Rising Campus Concern*, *N.Y. Times*, Feb. 17, 1986, at B8, col. 2. The Project on the Status and Education of Women recently released a report entitled "Campus Gang Rape—Party Games," citing over 50 incidents at a wide range of institutions, "public, private, religiously affiliated, Ivy League, large and small." *Id.* Experts theorize that the motive for gang rape stems not from sexual desire but from a desire to humiliate and denigrate the victim. "Males are engaging in ritualistic bonding," said Claire Walsh, director of the Sexual Assault Recovery Service at the University of Florida. *Id.* "Many of the men seem to believe that having intercourse with a woman who is semiconscious, unconscious or severely intoxicated is sex rather than rape, because she

Plainly, the notions that women are sex objects, that women either deserve or really like the violence, humiliation and subjugation of rape, and that men legitimate themselves through sexual aggression and violence have not faded. Given the persistence of these attitudes, it is not surprising that many women are still reluctant to report being raped. In 1985, the United States Department of Justice stated that only half of all rapes are ever reported.¹⁶

Juries, too, are affected by these attitudes. A study released last year found that juries were less likely to view as credible victims women who had prior sexual experience, used birth control or met their assailants in bars.¹⁷ Judges also often hold these offensive views. The New York State Task Force on Women in the Courts reported in 1986 that the stereotypes which degrade women pervade the courtroom and that some judges treat women, including rape victims, unfairly. For example, the Task Force cited a case in which a New York State judge, after accepting a guilty plea from a rapist who broke into a woman's room wearing a stocking mask over his face and brutally raped her, later told the press: "I think it started without consent, but maybe they ended up enjoying themselves."¹⁸

But New York is not the only scene of judicial mistreatment of rape victims. In Wisconsin, not long ago, a judge sentenced the rapist of a sixteen-year-old girl to probation, because rape, he asserted, was a "normal reaction" to provocative clothing. The victim was wearing a bulky sweater and jeans.¹⁹

As troubling as we find the societal attitudes about rape, attitudes about violence against women by husbands and lovers are worse. Today, women in twenty-five states in this country may be legally raped by their husbands. In these states, marital rape is literally not a crime, no matter how brutal the assault. And it was only in the past fifteen years that the other twenty-five states made

is not fighting back," noted Carol Tracy, lawyer and director of the Women's Center at the University of Pennsylvania. *Id.* Successful prosecution of this kind of gang rape is difficult in part because it involves victims who were intoxicated at the time of the crime and who cannot give full account of what happened. *Id.*

16. *Washington Post*, Mar. 25, 1985, at A9, col. 1. The report said that 40% of the estimated 479,000 women raped between 1973 and 1982 did not report the crime and that 49% of the 1.03 million attempted rapes occurring in this period also went unreported. *Id.*

17. Farber, *As He Seeks a 4th Term Morgenthau Confronts First Sustained Criticism*, *N.Y. Times*, June 17, 1985, at B1, col. 1.

18. UNIFIED COURT SYSTEM: OFFICE OF COURT ADMINISTRATION REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS 74 (1986).

19. *Report of the Associated Press*, *Madison, WI*. May 28, 1977.

marital rape a crime.²⁰

There are two basic legal premises underlying the “right” of marital rape. The first is that marriage for the woman entails automatic and total consent to her husband’s sexual demands. A wife has no sexual autonomy or bodily privacy with respect to her husband. Indeed, he is entitled to use violence to enforce his right to have sexual relations with her at will. The second premise is that a woman, once married, is the property of her husband. He cannot commit a crime by abusing his own property. It is incredible that any law in 1986 should embody the view that any person is property. But laws in twenty-five states do.

In New York State, it was legal for a man to rape his wife until quite recently. My office filed an amicus brief which argued that this law was unconstitutional and the state’s highest court, the New York Court of Appeals,²¹ agreed. The law itself, however, remains on the books. The legislature should repeal this law to send a clear message that married women are not property and they have a right to bodily integrity.

The extent of the problem of marital rape is still unknown. Few statistics exist not only because marital rape remains legal in many states, but even where it is a crime, many people do not view it seriously enough to report it. Not surprisingly, women themselves often have attitudes about marital rape that are identical to those of men. Based on a profound lack of self-worth, women may think that they have no right to object to forced sex with their husbands even in states where marital rape is a crime. In addition, women may be deeply ashamed by the humiliation they suffer and, therefore, not report the rape.

Indeed, the deeply violent, cruel nature of marital rape is not widely understood. People tend to see it as a mere bedroom squabble. Typically, though, marital rape involves other violence in addition to the rape. In many cases, it also involves use of the children in the attack—forcing them to witness or participate in the sexual abuse, thereby further degrading the woman. Experts believe, too, that the psychological impact of marital rape is more devastating than that caused by stranger rape, for it involves not merely the physical trauma, violation and degradation found in all rape, but the added factor that the perpetrator has betrayed a relationship founded on the deepest kind of trust.

20. For a discussion of spousal rape, see *Rape and the Law*, *supra* note 5, at 63.

21. Brief for Amicus Curiae, *New York v. Liberto*, 485 N.Y.S.2d 207 (1984).

John Stuart Mill aptly summed up the problem of marital rape 118 years ago. In *The Subjection of Women*, he compared wives with female slaves, noting that the latter could "refuse to her master the last familiarity. Not so the wife. . . ." Mill added that the husband had the right to "enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclination."²² Sadly, the legitimacy of this kind of violence has not changed all that much since then.

Marital rape is not the only form of violence perpetrated on wives. Today, although it is no longer legal for husbands to beat their wives, such domestic violence is still widely accepted and prevalent.

The Federal Bureau of Investigation estimates that, in the United States, one woman is beaten every eighteen seconds. This violence does not consist of love pats: between two thousand and four thousand women die every year as a result of battering. Typically, thirty to forty percent of women killed each year are slain by their partners.²³ In 1984, wife beating resulted in more injuries requiring hospitalization than all rapes, muggings and automobile accidents combined.²⁴

This violence has an ancient derivation. Historically, in addition to sexual domination and control, men were granted territorial rights to physically abuse their wives. For example, the expression "rule of thumb" comes from the shameful tradition embodied in common law that made it legal for a man to beat his wife as long as the stick used was not bigger around than his thumb.²⁵

What are the attitudes underlying the persistence of domestic violence on a vast scale, including marital rape? Many husbands and lovers still believe they have the right to control, and demand obedience from, their wives and lovers and to use force to secure their demands. Many also believe that women need to be shown who's boss, and that "real" men do not hesitate to use force.

Too often the battered woman accepts a violent status quo. As with marital rape, she may hold the same attitudes as her husband. She may blame herself for provoking violence; she may be

22. J. MILL, *The Subjection of Women*, in *THREE ESSAYS* 463 (1975).

23. O'Reilly, *Wife Beating: The Silent Crime*, *TIME*, Sept. 5, 1983, at 23; see also UNITED STATES DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 11 (1985).

24. O'Reilly, *supra* note 23, at 23.

25. W. PROSSER, *HORNBOOK OF THE LAW OF TORTS* 136 (4th ed. 1971); see also Stedman, *Right of Husband to Chastise Wife*, 3 *VA. L. REV.* 241 (1917).

lieve her husband had the right to beat her; she may have seen domestic violence as a child and thought it normal behavior; she may believe that a woman can have no identity separate from her husband and willingly put up with any amount of violence to keep the marriage intact.

External circumstances can also help trap women in violent marriages or relationships. Many women do not earn a living wage, and may stay with a batterer for financial reasons, especially if there are children to support. Others are simply too traumatized and terrified by past violence to believe they could ever be safe if they left. Some women are turned away from battered women's shelters and have no place to go except back to the violent house. More than half of the women in New York State who now want shelter cannot find any—there simply isn't enough room.²⁶ Plainly, the lack of enough shelter space reflects a wide-spread failure in our society to recognize the gravity of the domestic violence problem.

Nonetheless, the effects of battering, as of marital rape, are devastating not only to the victim, but also to her family. Battering creates a vicious cycle of family violence. Studies show that about three-quarters of male abusers were themselves abused as children, and that a majority of boys who witness violence at home grow up to abuse their mates.²⁷ Abusive treatment of women often spurs sons to avenge their mother's pain: sixty-three percent of males eleven to twenty who commit homicide kill their mother's tormentor.

Too often, the criminal justice system has failed to respond adequately because, in part, the social attitudes that legitimize battering are also present in the system. The recent New York State Task Force Report found that judges, court personnel and law enforcement officials are often indifferent to the criminal nature of domestic violence. The report cited many examples of judges asking victims "what did you do to deserve this beating?" or "why don't you just kiss and make up?"²⁸ Such treatment of defendants and victims would be unthinkable if the case involved another violent crime.

But progress has been made. Many police departments now

26. THE NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE, DATA COLLECTION PROJECT (1986).

27. *Relationship Between Child Abuse, Juvenile Delinquency and Adult Criminality: Hearings Before the Subcomm. on Juvenile Justice, 98th Cong., 1st Sess.* 1 (1983).

28. UNIFIED COURT SYSTEM: OFFICE OF COURT ADMINISTRATION REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS 32-36 (1986).

routinely arrest those who beat their wives, and the system has begun to teach batterers that such conduct is unacceptable. There are now approximately forty-five police agencies in large cities whose policy dictates some form of mandatory arrest. Between 1984 and 1985, the percentage of police departments favoring arrest tripled. At the same time, by dealing more sensitively with the victims, the system has started to help them understand that they can extricate themselves from the violence, and to show them how to get help in doing so.

Once a woman's right to reject domestic violence is recognized, an interesting question arises. How can she resist the violence? May she use force, even deadly force? Does she have the right of self-defense?

This is not an abstract issue: over five hundred husbands were killed by their wives last year.²⁹ There appears to be a special horror at a women's use of force; the horror is deeply rooted in early English common law. Then, killing one's husband was not simply murder, it was treason, thus, not merely a crime against a person, but a crime against the order of society. Only two other types of homicide were treasonous, the killing of a master by a servant, and the killing of a cleric by a subordinate.³⁰

Clearly, a woman's right to resist her husband's violence, if any existed at all, was drastically limited by his predominant and broad right to use force against her. And, in any case, it was unlikely that a woman would have protected herself with force given the extraordinary socialization of women against using violence. But what if the force against her was excessive and persistent? What were her rights?

A careful search of legal documents for evidence of a woman's right to use force in self-defense in domestic violence cases turned up nothing before the last decade. It does not appear that any such right was delineated.

That is not surprising. The notion of self-defense arose in medieval English law wholly in a male context and, at its beginning, involved rituals of battle in which helmets, and shields were used. In addition, since the right to defend one's self is a sign of full personhood, and since women were not viewed in that light

29. UNITED STATES DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 9, 11 (1985).

30. Statute of Treasons, 25 E. D. 3, st.5, c.2 (1352); *see* 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 418 n.103 (R. Welsh & Co. ed. 1897); 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 1602; *see also* S. MILSOM, HISTORICAL FOUNDATION OF THE COMMON LAW 370-71 (1969).

until relatively recently, applying the notion of self-defense to women in a marital context would have been contradictory and illogical. The absence of discussion for hundreds of years of a woman's right to self-defense is another reflection of the past invisibility of women in the legal system.

Although one response to domestic violence against women has been an attempt to legitimize the right of women to resist with force, obviously the best solution would be to entirely eliminate the violence on both sides.

That solution, though, is not easily achieved, given the deeply rooted societal views about women. Attitudes that dehumanize and denigrate women persist; laws still reflect those attitudes, particularly in marital rape and practices still embody them. To eliminate this violence completely, the laws must be changed and violence punished. The criminal justice system cannot directly change attitudes, but by taking violence against women seriously, it can begin to change violent behavior.

Because violence against women manifests the broader inequality of women, it is also crucial to address that larger issue. The Equal Rights Amendment must be adopted, and all discriminatory laws and practices must be eliminated. This will not only bring about greater equality, but it will help women achieve a greater sense of self-worth and help men understand that relationships with women have to be based on mutual respect and dignity.

Additionally, other factors that shape attitudes toward women must be understood so they can be changed. For example, we need to examine the way children are raised, to learn how values of male aggressiveness and female passivity are inculcated. We need to understand the role of television and movies in this regard, and in encouraging violence in general. We also need to recognize the way in which the typical depiction of women in advertising and the media reinforces the stereotyping of women as objects.

Until every aspect of our culture that denigrates women is identified and rejected, we will not be able to claim real progress. A few television supergirls clad in revealing outfits, who can leap buildings with a single bound, will not change attitudes. This will not be a just society until Americans confront and root out the deep and shameful attitudes which have condoned and encouraged violence against women and their inequality for too long. I hope each of you will help solve this problem.