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J. Temkin and B. Krahe, Sexual Assault and the Justice Gap: A Question of Attitude

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Introduction

In the last decade, the English legislature has worked tirelessly to seek to improve the conviction rate for sexual offences. The substantive law has been dramatically overhauled by means of the Sexual Offences Act 2003, which created a whole new scheme of offences and provided for a new framework for determining the presence or absence of consent. These changes to the substantive law have been accompanied by a number of changes to the procedural law which limit the admissibility of sexual history evidence¹, forbid a defendant in a sexual assault case from personally cross-examining a complainant² and broaden the circumstances when evidence of recent complaint or of the defendant's previous bad character may be admissible at trial.³ However, despite this wealth of legislative activity, the conviction rate for sexual offences has remained relatively stagnant, standing firm at just under 6%. As a result, despite the best efforts of the legislature, the conviction rate for sexual offences in England and Wales continues to be one of the lowest in Europe.

This failure of law reform to achieve solutions has left many scratching their heads in vexation. There are others, however, who are beginning to look beyond law reform as a means of effecting change. New laws are worth very little if the same attitudes exist among those who are involved in the administration of these laws: the police, the lawyers, the judiciary, as well as the lay population who find their way into the criminal justice process as complainants, defendants and jurors. If all or any of these individuals are labouring under misguided conceptions of what constitutes a 'real' rape (i.e. a stranger pouncing from a dark alley on an unsuspecting victim) or of how a 'real' victim of

sexual violence should behave (i.e. scream, struggle to the utmost and report immediately), then no matter how sophisticated the law is, any allegation that derogates from the stereotype is likely to be approached with a degree of suspicion. Since the majority of real life rape scenarios are significantly different to the notion of 'real' rape which many subscribe to, the continued adherence to rape myths and stereotypes could provide the reason why the best efforts of the law reformers have failed to translate into increased conviction rates for rape.

It is the foregoing theory which Jennifer Temkin and Barbara Krahe seek to explore in *Sexual Assault and the Justice Gap: A Question of Attitude*. The book takes an interdisciplinary approach, comprising both legal and psychological research, in an attempt to challenge the view that the decisions made in rape cases are purely evidence-based. They argue that stereotypes and myths about rape and the victims thereof blight the operation of the law in this area and play a critical role in what they term the 'justice gap' (i.e. the discrepancy between reported rapes and convictions). To this end, the book focuses on two issues. First, the book examines the prevalence in society of adherence to the 'real rape' stereotype and other negative rape myths and how these attitudes may impact upon the operation of the law. Second, ways in which these attitudes may be tackled and counteracted so as to ameliorate the operation of the law in this area are suggested and explored.

Exploring the Myths

The 'Real Rape' Stereotype and How It Operates

Temkin and Krahe argue that when asked to describe a typical rape scenario, many people are likely to conjure the image of a stranger attacking an unsuspecting victim in an outdoor location whereby the attacker uses or threatens to use force and the victim struggles to resist him. This is what they refer to as the 'real rape' stereotype, which is so dubbed because it 'represents a generalisation that is at odds with available factual evidence' (at 31). Statistics repeatedly demonstrate that in reality, women are more likely to be victimised by individuals who are known to them, in social settings such as parties as opposed to dark secluded alleys and that contrary to popular belief women are more likely to be too terrified to offer resistance than to 'struggle to the utmost' in order to offset the efforts of an attacker.

The danger inherent in the 'real rape' stereotype is that cases which deviate from it tend to be disbelieved or dismissed as not amounting to genuine cases. This has the potential to affect decision-making at all levels in the criminal justice process. It may prevent victims from reporting as they do not identify their experience as being a 'real rape' because their attacker was known to them. The stereotype may also affect police decision-making. The authors point to several studies which suggest that the 'real rape' stereotype is endorsed by police (at 39). The stereotype may also affect decisions by the Crown Prosecution Service (CPS) as to whether to prosecute because the more a case deviates from the stereotype, the less likely that it will be successful at trial, thereby discouraging the CPS to proceed with a prosecution. Finally, should the case make it to trial, the stereotype has the propensity to influence juror perceptions of the case and the victim, thereby making it more likely that they will return a 'not guilty' verdict. Numerous studies have revealed that members of the public (from whom jurors are selected) adhere to many negative perceptions

about victims of sexual assault. For example, the oft-quoted survey conducted by Amnesty International in 2005 revealed that 30% of people believed that a woman was partially or totally responsible for being raped if she was drunk and that 26% were of the same opinion where the woman was wearing sexy or revealing clothing.⁴

Temkin and Krahé explain the way in which the ‘real rape’ stereotype operates in order to affect individual’s attitudes towards rape by reference to *attribution theory* (at 42). This theory is based on the idea that individuals seek to attribute experiences and events to their underlying causes in order to achieve a sense of predictability and controllability in their social world. Within attribution theory, two different methods of arriving at the cause of an event have been identified. The first is *data-driven information processing*, whereby individuals try to arrive at a causal judgment by examining the information available to them. In the case of a rape allegation, this would involve looking solely at the facts of the case, e.g. the statements of the defendant and the complainant, the evidence of any witnesses and forensic evidence. Conversely, in the second mode of causal information processing, *schema-driven processing*, individuals seek to reach a conclusion as to the cause of an event by referring to their generalised beliefs and stored knowledge. In the context of an allegation of rape, this would involve making a decision by reference to beliefs or knowledge about rape which are generally accepted within society (e.g. that rape can only ever be perpetrated by a stranger).

Temkin and Krahé note that individuals are likely to be driven by data-driven processing if they have sufficient knowledge about the event at hand and if they are sufficiently motivated to invest cognitive effort in the task. They cite as an example the circumstance where an individual learns that a close friend or relative was raped and they are given a detailed account of events. Where individuals lack sufficient information or where they do not see the task as having personal relevance, however, they are likely to refer to their generalised schemata. These latter circumstances mirror closely the circumstances of decision-making regarding rape allegations. The information available in a rape case is more often than not incomplete, open to interpretation or rigorously contested. Decision-makers such as the police, the CPS and the jury, therefore, may make decisions based not on the facts of the case before them, but rather by reference to generalised attitudes and beliefs about rape.

The benefit of Temkin and Krahé’s interdisciplinary approach is that the psychological research provides an account of how an individual’s cognitive process may be affected by the ‘real rape’ stereotype. This form of explanation is usually lacking from the more traditional socio-legal accounts of the effects of attitudes on criminal justice decision-making and lends an air of scientific authority to the authors’ claims.

Temkin & Krahé’s Research

In addition to providing a comprehensive account of the relevant psychological and legal research which has hitherto been undertaken regarding the prevalence and effects of the ‘real rape’ stereotype, Temkin and Krahé also conducted their own independent empirical research.

Their empirical research comprised a number of studies. The first two studies assessed the attitudes of prospective lawyers, that is through researching the view of undergraduate and vocational law students. Both sets of students were asked to make judgements regarding defendant and complainant responsibility in a series of different sexual assault scenarios. The results revealed an

element of adherence to the 'real rape' stereotype among both groups. In the scenarios where the defendant and complainant were known to one another prior to the attack, both sets of students tended to view the defendant as less blameworthy, more blame was attributed to the complainant and there was less certainty that the incident was rape than in the scenarios which aligned with stereotypical 'real rape'.

Surveying the attitudes of prospective lawyers was seen as important because the prospective lawyers who were surveyed constitute the general pool from which CPS prosecutors, solicitors, barristers and eventually judges involved in rape trials are drawn (p 85). While the attitudes of solicitors and barristers generally may not be thought of as relevant, those of CPS prosecutors and judges certainly have the propensity to prove determinative in the decision-making process surrounding the progress of rape trials. In any event, even if the link between the attitudes of these students and future CPS decision-makers and judges is tenuous, the information gleaned from this research is valuable in that it demonstrates that even those with knowledge of the law on sexual offences may have their decision-making process affected by the 'real rape' stereotype.

Temkin and Krahe also conducted a study involving members of the public eligible for jury service. This study had two aims. The first aim was to examine the responses of members of the public to the same types of scenarios which were presented to the prospective lawyers. Unsurprisingly, the reactions of the general public were largely the same as that of the law students, revealing a certain level of adherence to the 'real rape' stereotype which impacted upon their adjudications of guilt or innocence of the defendants in the scenarios depicted by the researchers.

The second objective of the research involving the public was to evaluate the effectiveness of a campaign run by the Home Office in an attempt to underline the importance for men of obtaining consent to sex. The initiative involved a poster campaign, together with radio and magazine advertisements and the placing of stickers on condom machines and posters in men's toilets. The two posters were the central elements in the campaign. The first depicted the image of a man in a prison cell and carried the caption 'If you don't get a "yes" before sex, who'll be your next sleeping partner?' The second portrayed a woman in her underwear with the slogan, 'Have sex with someone who hasn't said yes to it, and the next place you enter could be prison'.⁵

Research conducted in the wake of this campaign suggested that the campaign was successful in that it was widely noticed and a substantial number of the target audience understood the intended message.⁶ However, Temkin and Krahe argue that the fact that the target audience noticed and understood the message conveyed by the consent campaign was not a sufficient test of the campaign's success and that it is necessary to show that the campaign has actually affected the people's attitudes and behaviour.

In order to gauge the success of the consent campaign from this perspective, Temkin and Krahe sought to measure the immediate effects of the posters on judgments about rape cases. Participants were either shown or not shown one of the two posters which were used in the consent campaign while assessing different rape scenarios so that differences in ratings of defendant liability, complainant blame and recommended sentences could be attributed to the presence or absence of the posters (at 111). Unfortunately, the study was unable to demonstrate the effectiveness of the posters. Whether or not participants were shown the posters while judging the rape scenarios made

practically no difference to the way in which participants perceived the liability of the defendant and it had no effect on the sentences which they recommended if he was found guilty (at 119).

Temkin and Krahe's finding regarding the ineffectiveness of the poster campaign is disappointing but is of immense importance because it illustrates that the mere provision of information is not enough- care must be taken to ensure that the message is conveyed in an accessible manner and that it is readily understood. Temkin and Krahe's research should also prevent the Home Office from resting on its laurels, content in the belief that they have done their bit to eradicate the 'real rape' stereotype as the results illustrate that the Home Office (and other interested groups) have much more work to do and that more careful research is needed when devising future information campaigns in this area.

The final component of the research conducted by Temkin and Krahe was a qualitative interview study with a group of seventeen judges and seven barristers. The group identified a number of problems which had a bearing on the low conviction rate for rape, namely, poor policing; defence counsel's treatment of complainants; incompetent prosecuting counsel and the judge's attitudes towards complainants.

More importantly, however, both judges and barristers displayed an awareness of the impact of stereotypes and myths on juror decision-making. Interviewees noted that jurors were unwilling to convict where the complainant and the defendant are known to each other prior to the attack. They also pointed to unrealistic expectations on the part of jurors as to how 'real' victims should behave, for example, that they should resist the efforts of their attacker to the utmost and report immediately. Jurors were also identified as showing a propensity to blame the complainant for the attack where she was seen as behaving foolishly or inappropriately, for example, by allowing a man she had just met to walk her home or by wearing revealing clothes. This acceptance of the influence of the 'real rape' stereotype among those with practical experience of the trial process supports the empirical research of Temkin and Krahe and significantly bolsters their argument regarding the impact of myths and stereotypes on decision-making regarding rape allegations.

Overall, the independent research conducted for the purposes of this book provides ample evidence of the 'real rape' stereotype in operation and demonstrates the capacity of the stereotype to lead to injustice in the decision-making process of individuals involved in the criminal justice system.

Narrowing the Gap

Having identified myths and stereotypes as the source of the 'justice gap' in rape, Temkin and Krahe dedicate the final section of their book to suggesting ways in which the ill-effects of these myths and stereotypes may be off-set in the short-term and possibly eradicated in the long-term. Their suggestions for improvement encompass law reform, changes to the trial process and changing public attitudes.

As regards law reform, the authors' most notable suggestions include clarifications to the law which would aid adjudications of consent where the complainant is intoxicated at the time the alleged rape occurred and the introduction of legislation permitting the use of expert testimony on rape trauma syndrome or post-traumatic stress disorder in order to explain to jurors that the fact that a

complainant may not have behaved in a way they would expect does not mean that she was not a 'real' victim.

The authors also make recommendations which would improve the operation of the trial process. They suggest that the current training offered to 'rape-ticketed' judges should be improved and that training for barristers involved in sexual offence cases should be extended to defence counsel as well as the prosecution.

Finally, Temkin and Krahe urge that information about sexual violence be provided at an early age by means of school-based interventions to seek to ensure that future generations are less likely to be affected by stereotypes and myths about sexual violence. Drawing on their research into the effectiveness of the Home Office Consent campaign, they also suggest that any similar endeavour in the future should be thoroughly researched and more carefully designed if it is to be successful.

Conclusion

'People should realise that juries acquit, it's not the system, the system doesn't fail women: we as a society fail them.' (at 132)

The foregoing quote from a barrister interviewed by Temkin and Krahe provides a very clear summation of the message of this book. The source of the 'justice gap' in sexual offences is not the system (i.e. the laws and processes which provide the framework within which allegations of rape and other forms of sexual violence are processed) but rather the society within which the system operates. So long as the stereotypes and myths about sexual violence continue to exist in the minds of the general public, no legislative or policy changes in this area are likely to have much of an impact on conviction rates.

What Temkin and Krahe have achieved with this text is the identification of a new frontier in the quest to make the criminal justice system more satisfactory to rape complainants. It is hoped that those in power will take note of this type of research and of some of the recommendations made by the authors and direct some money and effort towards tackling negative societal attitudes towards sexual violence in a bid to eradicate the 'real rape' stereotype for once and for all.

¹ Section 41 of the Youth Justice and Criminal Evidence Act 1999

² Section 34 of the Youth Justice and Criminal Evidence Act 1999

³ Sections 120 and 101 of the Criminal Justice Act, respectively.

⁴ Amnesty International (UK), *Sexual Assault Research Report*, (2005).

⁵ To view the posters, go to <http://www.homeoffice.gov.uk/documents/consent-campaign/>

⁶ Home Office, *Consent Awareness Campaign- Summary of Evaluation*, (Home Office: Unpublished Report, 2006), discussed in Temkin, J & Krahé, B, *Sexual Assault and the Justice Gap: A Question of Attitude*, (Portland: Hart Publishing, 2008), p 110