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AUTHOR Renner, K. Edward; Yurchesyn, Kathaleen A.
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ABSTRACT

Political efforts by feminists in the 1970s and early 1980s resulted in the redefinition of rape as physical assault in Canada's 1983 rape law in the Criminal Code. This paper argues that treating a woman's sexuality as "property," as did the rape law prior to 1983, was correct. Redefining rape as sexual assault, and measuring the severity of the crime by the level of physical violence, established the legal and social expectation that the woman must be injured to be a "legitimate" victim. While suggesting rape is akin to robbery means that a woman's sexuality is treated as property, the study believed it would achieve reform by shifting ownership from the domain of a male, as was the case under the old law, to the woman herself. Robbery implies the use or threat of force, but unlike assault, does not require harm to the victim as evidence of the robbery. The document examined every case of sexual assault, physical assault, and robbery that appeared before the Halifax Law Courts between 1983 and 1988 to evaluate the proposition that conceptualizing the essence of sexual aggression as "assault" has failed and that "robbery" may be more appropriate. The article provokes discussion about the nature of rape and societal and legal responses to it in law-related education (LRE) settings at secondary, college, or adult education levels. (LH)

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Sexual Robbery: The Missing Concept In The Search For An Appropriate Legal Metaphor for Sexual Aggression

K. Edward Renner
and
Kathaleen A. Yurchesyn

Department of Psychology
Dalhousie University
Halifax, N. S.

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Abstract

Beginning in the late 1970s and continuing into the early years of the next decade, feminists provided compelling evidence that under the existing rape laws a woman's sexuality was treated as "property" belonging to a man. They emphasized that rape was an aggressive invasion of a person's physical integrity and in 1983 rape was redefined in the Criminal Code as a form of assault. The use of physical assault as a metaphor had the effect of shifting the emphasis of the essence of sexual aggression away from a woman's sexuality as property to the coercive nature of the act. A decade later, the evidence suggests this was an ill-conceived change. Redefining rape as a sexual assault, and measuring the severity of the crime by the level of physical violence, has established the legal and social expectations that the woman must be injured to be a "legitimate" victim. This paper advances the proposition that treating a woman's sexuality as property, as did the old rape law, was correct, and that a more appropriate metaphor is robbery. The metaphor of robbery treats a woman's sexuality as property, but achieves reform by shifting ownership from the domain of a male to the woman herself. Robbery implies the use or threat of force, but, unlike assault, does not require harm to the victim as evidence of the robbery. The theoretical proposition that conceptualizing the essence of sexual aggression as "assault" has failed and that "robbery" may be more appropriate was evaluated by examining every case of sexual assault (n=50), physical assault (n=158) and robbery (n=82) that appeared before the Halifax Law Courts between 1983 and 1988. This legal profile of sexual assault was compared to the alternative profile created by examining every case (n=593) of sexual assault reported to the local sexual assault service during the same time period.

Beginning in the late 1970s and continuing into the early years of the next decade, feminists provided compelling evidence that under the existing rape laws a woman's sexuality was treated as "property" belonging to a man (Brownmiller, 1875; Clark & Lewis, 1977). They emphasized that rape was an invasion of a person's physical integrity and sought to have rape redefined as a form of assault (e.g., Advisory Council on the Status of Women, 1976).

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In Canada, this political action proved successful with the introduction of the new sexual assault law in 1983 which replaced the old rape law in the Criminal Code. The new law established a direct parallel with the offense of physical assault, with each crime having three corresponding levels of severity (based on the level of violence): (1) simple assault involving the use or threat of force; (2) assault involving bodily harm, or the threat or use of a weapon; and (3) aggravated assault where the accused wounds, maims or disfigures the victim or puts his or her life in danger (Department of Justice, 1983). It is in this sense that we use the term metaphor in this paper; the existing concept of assault was used as a model for the legal conceptualization of acts of sexual aggression.

The old term "rape" implied the act was primarily sexual in nature and that the only feature which differentiated it from consensual sexual intercourse was the consent of the victim (Tchen, 1983). Thus, a woman's consent and her perceived credibility were the focus of the trial. In contrast, the intent of the new law was to shift the metaphor for rape from a sexual act to an assault against the person. In keeping with this perspective, penetration was no longer necessary to warrant a sexual assault. The redefinition sought to overcome the previous stigma associated with rape by asserting the principle that women have the right to sexual autonomy. Consequently, her past sexual history was no longer held to be a reflection of her credibility or consent, and legal restrictions were placed on the introduction of such evidence (Department of Justice, 1983). These "rape shield" provisions have now been restricted by a 1991 decision by the Supreme Court, marking a shift toward the old "sexual" metaphor as the way of thinking about sexual aggression. The new legislation proposed in 1992 will clarify how consent is to be defined. These two recent events suggest that the conceptualization of sexual aggression is still problematic.

From the time the sexual assault law was first introduced there has been concern (e.g., Boyle, 1984; Strauss, 1983), that the reformulation would not achieve its intended effects. Soon after the new law was enacted, the Department of Justice sponsored an extensive evaluation of its effect. The results have shown that although women have been more willing to reported sexual assault than rape, the legislation has had no discernable effect on the response of the criminal justice system to those reports of sexual aggression (Department of Justice, 1990; Roberts, 1992). In particular, the Justice Department evaluation revealed that the unfounding rate (after preliminary investigation the police conclude that a crime did not occur) remain higher for sexual assault than other offenses against a person and that incidents that would have been classified as serious in 1983 are now being classified at a lower level (Roberts, 1990). These conclusions were based on national statistics.

To empirically evaluate the ways in which the new law has been applied in individual cases, Yurchesyn, Keith & Renner (1991) examined every case of sexual assault which appeared before the Halifax Law Courts between 1983 and 1989. As with the old concept of rape, the woman must still prove that such an assault took place without her consent. However, the evidence now accepted for lack of her consent is bodily injury and behaviour on her part which does not violate social as opposed to legal norms, such as drinking at late hours in strange places. The lack of physical harm is taken as a lack of evidence that there was an assault, and social behaviour which places her at risk is taken as evidence of consent.

Clearly, redefining rape as an assault has not changed in any practical sense the expectations that are placed on women; they are similar under the new assault metaphor to those placed on victims under the old rape law. Thus, our study (Yurchesyn, et. al, 1991) raised for us an important question: To what degree is physical assault an appropriate metaphor for rape, and to what extent is it inappropriate?

Certainly, there are similarities between the crimes. Sexual assault, like physical assault, involves a violation of a person's bodily integrity without consent and both crimes are essentially violent in nature. However, differences also exist. Sexual assault involves an additional sexual intent, unlike physical assault where the force and violence is an end onto itself and the resulting injury is proof of the act. With sexual assault, the force must also be recognized as a means to obtain an end. In this respect, a metaphor with robbery is more appropriate, because the robber uses force or threats of force to take what he wants, thus retraining the element of aggression, but without the additional requirement of physical harm to the victim.

For most women, sexual aggression is much more than the assault itself. Women who have been victims of sexual aggression feel like something of psychological value has been taken from them -- such as freedom of movement or the capacity to trust (e.g., Burgess, 1985). There is a very real sense in which rape and sexual abuse are not simply the application or force or threat of force, but are also robberies of a woman's ownership of her sexuality and of states of mind of great personal worth.

"Robbery" is often used in such a metaphorical way in everyday language. For example, we believe that a person may be "robbed" of experiences, such as their childhood by alcoholic or abusive parents. We can have things taken from us which have no commercial value, but are of great social or psychological worth, like photographs and even memories. Someone can be "robbed" of experiences, not by gun point, but by interpersonal actions and words -- e.g., to say to a mother "he is just an alcoholic, you know," may help to diminish the memory of the person as also a son.

It is the proposition of this paper that reclassifying rape as a form of assault, with physical assault as the metaphor, may have been inappropriate. The new sexual assault law shifted the emphasis of sexual aggression from sexual property under the old rape law to an act of assault. However, if the concept under the old rape law of a woman's sexuality as property was retained, and if the emphasis shifted the ownership of that property from the male to the female, then robbery may well be the more appropriate metaphor.

The purposes of the present paper are two fold. First, to further evaluate our proposition that the present sexual assault metaphor has not had its intended effects, and instead has placed the requirement on the woman to be injured, especially if she can be seen as having used poor social judgement. And second, to propose a metaphor of sexual robbery as a potentially more useful theoretical concept.

While it would be ideal methodologically to cast these two contrasting views as competing hypotheses in a "critical experiment," no such design was obvious for such a complex conceptual issue. Rather, to address these two questions, information on every case of physical assault and robbery was added to the data of the previous study on sexual assault (Yurchesyn, et. al, 1991) to create a comparative legal profile of how these crimes are treated by the criminal justice system. An alternative profile of sexual assault was created by examining every case (n=593) of sexual assault reported to the local sexual assault service on those variables relevant to the issue of proposing "sexual robbery" as a more appropriate metaphor than physical assault in the search for a way to think about sexual aggression.

Method

The details of the major study are available elsewhere (Yurchesyn, et. al, 1991). Briefly, data from the court records was obtained for every case of adult sexual assault (N=50), physical assault (N=158) and robbery (N=82) appearing before the Halifax County and the Nova Scotia Supreme Courts between 1983 and 1988. For each case there were three main sources of information in the file: the trial log sheet; the transcript of the preliminary hearing; and the presentence report (when applicable). The trial log contained dates and specifics about the case (e.g., number of witness, police testimony, number of exhibits, verdict, sentence). The presentencing report contained information about the accused (e.g., previous criminal record, history of substance abuse). The transcript of the preliminary hearing consisted of the testimony of the victim and other witnesses and provided information about the characteristics and circumstances of the offense. Coded information was collected on 37 variables. Variables included in the present analysis were those relevant to the following issues: the relationship between the victim and the offender; the degree of injury, resistance and violence; and the outcome in court. Initially, raters were trained to a standard of 95% overall agreement on twenty cases. Subsequently, all cases were scored by two independent raters; differences were resolved by discussion and mutual agreement.¹

The Service for Sexual Assault Victims (SSAV) in Halifax maintains a record of coded information on each call for service, thereby providing a basis for a statistical summary of basic descriptive facts, such as time of day of the call, age of the victim, type of assault, and similar variables. This data source provided information concerning the relationship between the victim and the perpetrator, the degree of force, presence or absence of injury, and whether or not the assault was reported the police. The present analysis involved 593 known cases of sexual assault of an adult woman contacting SSAV between July 1983 and December 1989. The case information is compiled by the program director in consultation with the case worker; these official records of the agency represents the absolute judgement of the two persons privileged to the confidential case information.²

Results

The court data provides the official record of the crime of sexual assault. From this source it is possible to construct an impression of the nature of the offense from a legal perspective. In

contrast, the case records of the sexual assault service provides an alternative picture of information which has not been subjected to the selective screening process of the legal system.

Court Records Data

Sex of the Offender and Victim. Men were largely the perpetrators of sexual assaults (98%, $N=49$), physical assaults (94%, $N=148$), and robberies (94%, $N=75$). Women were typically the victims of sexually assault (88%), while it was men who were physical assaulted (71%) and robbed (72%), $\chi^2(2, N=265) = 61.63, p < .0001$. In the few cases where a woman was the accused, the victim was most often another woman. In order to have a consistent basis of comparison for sexual assault, the remaining analysis was restricted to those cases ($N=272$) where the accused was male.

Relationship Between the Victim and the Offender. The dynamics of sexual and physical assault were similar in that both these crimes often occurred within a social context (i.e., 67% of sexual assault and 48% of physical assault victims were acquainted with or well known to their assailants). Robbery, in contrast, seldom (20%) involved a such a relationship between the victim and the perpetrator, $\chi^2(4, N=256) = 28.69, p < .0001$.

Given this social context, negative judgments with respect to the victim's responsibility for the crime could easily be made. For example, victims of sexual assault (56%) and physical assault (72%) were more often drinking alcohol at the time of the offense than were victims of robbery (29%), $\chi^2(4, N=195) = 25.56, p < .0001$. As well, by conventional social standards, victims of sexual assault (28%) and physical assault (45%) could be seen to some degree as having an interactive role in the situation leading up to the assault (e.g., initiated the first contact) more often than victims of robbery (7%), $\chi^2(6, N=178) = 36.33, p < .0001$.

Degree of Injury, Resistance and Violence. Virtually all (99%) victims of physical assault were injured. Over half the victims of sexual assault (60%), likewise, suffered physical harm. In contrast, robbery victims (37%) were injured less often, ($\chi^2(2, N=249) = 103.18, p < .0001$). When there was an opportunity to resist, over half the victims of sexual assault (56%) and most victims of physical assault (88%) actively resisted their assailants. Robbery victims (23%), in contrast, seldom resisted $\chi^2(6, N=134) = 49.12, p < .001$. Not surprisingly, victims of sexual assault who resisted were more likely to get hurt, $t(N=40) = .30, p < .03$.

Victims of physical assault (87%) were generally subjected to high levels of violence (i.e., injury requiring hospital attention), in contrast to victims of sexual assault (16%) and robbery (15%), who were subject to lower levels of violence (i.e., use of force or the threat of a weapon or injury) $\chi^2(4, N=244) = 126.06, p < .0001$.

Outcome In Court. The crime of physical assault, relative to sexual assault and robbery, is taken less seriously by the courts: 45% of physical assaults were found not guilty as compared to 24% of sexual assaults and 23% of robberies, $\chi^2(2, N=165) = 8.21, p < .02$. The majority of men convicted of physical assault (81%) were either not incarcerated or received a sentence of

less than one year in jail; in contrast, only 51% of the men convicted of sexual assault and 24% of men convicted of robbery received comparably light sentences, $\chi^2(8, N=205) = 61.89, p < .0001$.

Selectivity of the Sexual Assault Court Cases

There was a large discrepancy between the records of the courts and the experiences of the Service of Sexual Assault Victims (SSAV) over the same time period with respect to the degree of violence. For the SSAV cases, the use of physical restraint alone, without additional force was generally sufficient (91%); few cases involved injury or use of a weapon (6%), or serious harm (3%). The court cases, in contrast, involved a higher degree of violence. Over half (60%) involved injury or use of a weapon and 16% involved serious harm; few sexual assaults (23%) were accomplished with the use of physical restraint alone $\chi^2(2, N=636) = 169.27, p < .0001$. Our findings directly confirm the inference drawn in the evaluation sponsored by the Justice Department that the level of violence was under represented by the actual charges. In our study, a direct comparison between the level of violence found in the court records with the level of charge indicated that 68% of the cases were charged at a lower level, and 4% at a higher level, of violence than actually occurred, with the remaining 28% correctly charged.

 Insert Table 1 Here

Further, based on the SSAV data, victims of sexual assault who were injured or who were strangers to their assailants were more likely to have reported the offense to the police than were victims who were not injured [$\chi^2(2, N=517) = 10.13, p < .005$] or who were sexually assaulted in a social context [$\chi^2(2, N=513) = 34.91, p < .0001$].

Discussion

The Expectations of the Court

Ostensibly, based solely on our court data, sexual and physical assault were very similar crimes. Victims of both of these crimes actively resisted their assailants and were injured. However, the similarities to robbery, in a real sense, were obscured by the selectivity of the population before the court. The most likely explanation for both the high unfounded rate in the national evaluation, and the disproportionately large number of cases at the serious levels in the court sample, is due to the exclusion by the justice system of those cases in which there is no or little evidence of physical harm. This conclusion is strengthened by the fact that virtually all of the large increase in the willingness of victims to report their sexual assault was accounted for by cases classified as Level 1; these cases increased by 100% over the time period of the evaluation by the Justice Department (Roberts, 1990). It is a self-fulfilling prophecy that the cases of sexual assault involving injury are more likely to appear in court. To have established a legal parallel between sexual and physical assault, with increasing levels of physical violence being

the means by which we measure the legitimacy and the severity of the crime, is essentially to have dictated this end.

In reality, most victims of sexual assault are not physically harmed. As a consequence of the choice between being hurt or giving up something of value, victims of sexual assault, like victims of robbery, choose not to be harmed (Brownmiller, 1975). Consequently, they are less often injured than are victims of physical assault. For the legal process to require injury and resistance, through the selectivity imposed by a simple parallel with physical assault, is to ignore the very nature of the crime and to set-up women to have to fulfil unreasonable expectations in order to be taken seriously, i.e., either get hurt or effectively lose credibility for the claim of sexual aggression.

The Paradox of Assault as the Metaphor for Sexual Aggression

With the advantage of hindsight, feminists may have thought better of the metaphorical marriage of rape to physical assault. From all indications physical assault makes for a poor bedfellow. Most physical assaults involve two people who are socially associated with each other in a situation where the victim also can be held to blame or partially responsible (e.g., most often in a bar). The identity of the participants is seldom in doubt and they share a connection (however loosely) through voluntary participation in a common social context. Such altercations, for all intents and purposes, are not now, and never have been, treated as a serious offense (Renner & Sahjpaal, 1986); the exception is a severe beating by a stranger, i.e., when the relationship element is absent.

When a victim of sexual assault acts like a robbery victim (take anything you want, just don't hurt me), she is treated by the legal process like an assault victim of being suspect of partially to blame, i.e. the similarity with assault through a mutual social connection prevails. However, when she looks like an assault victim (with evidence of injury and violence) the physical damage confirms the use of force and the offender is treated by the legal process like a robber, i.e., the penalty will be harsh as it is when property has been taken from a person by force. The net effect of the new law has been to gain for the rape victim all of the disadvantages of the physical assault metaphor, and none of the advantages of the robbery metaphor, unless the victim was prepared to be physically assaulted as well as robbed.

The paradox is compounded because women who are injured or assaulted by a stranger, even though a relative small group in absolute terms, are more likely to come forward to report the assault. This is for good reason; these are the cases that will be treated sympathetically by the criminal justice system. The majority of cases, however, are of simple assault. These women are placed in the difficult situation of having come forward in good faith in increasing numbers under the new law, but without avail, and perhaps to be re-victimised by not having their claims accepted or successfully prosecuted. In a study of victims of sexual assault, Renner, Wackett and Ganderton (1988) found that when victims did not resist they were blamed by parents, mates, friends and the criminal justice system. But, when they did resist to the point of risking or receiving injury, they were told that they need not have done so. Such social and legal

expectations also affect the victim. Victims who did not resist felt more guilt. Resistance to the point of injury was associated with less guilt, but with a more difficult readjustment process, presumably due to the psychological effects of the physical assault. This is a no win situation. A far more reasonable position would be to feel robbed, but without the obligation to also be physically as well as sexually assaulted.

Sexual Robbery: The Missing Concept

To have missed the metaphor of sexual robbery, in favour of sexual assault, in how we think about sexual aggression, is to have adopted a mind set which victimizes women and negates their experience of the crime. At a conceptual level the new sexual assault law was a triumph for women. It removed women's sexuality from the domain of male property and encoded in law the underlying principle of sexual autonomy for women. At a more practical level, however, little has changed for victims of sexual aggression. With the assault metaphor, the social, legal, and to some degree self-expectation remain that unless the victim resists and serious injury occurs, no sexual assault has taken place. Only when these conditions are met, is the case more likely to be selected into the criminal justice process where it then will be treated more similarly to a robbery than to an assault. Otherwise, the robbery is not acknowledged and the lack of physical harm and the non-stranger relationship with the accused renders the victim suspect.

The only similarity with physical assault victims is the relationship of a shared social context, which implicitly acknowledges the "sexual" component of sexual aggression. The alternative we are suggesting is to return to the old view of a woman's sexuality as property, but to shift ownership from the male domain to the woman herself. Under such a redefinition the use or threat of force is implied as it is in a robbery, but there is no requirement to also be hurt. In fact, women who are victims of sexual aggression most often act like bank tellers and convenience store clerks who are robbed; they do not act like people who are physically assaulted.

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Footnotes

1. The analysis of the court records was carried out by Kathy Yurchesyn as her undergraduate psychology honours project at Dalhousie University. Copies of the coding manual used for this research may be obtained from Kathy Yurchesyn, Department of Psychology, University of Waterloo, Waterloo, Ontario, CANADA, N2L 3G1.
2. A copy of the coding manual used for collecting and maintaining descriptive statistics is available from the Service for Sexual Assault Victims, 6450 Young Street, Halifax, N.S., CANADA, B3L 2A2.

Table 1

Selective Over-Representation of the Presence of
Physical Force in Court Cases As Compared
to Cases Served By a Sexual Assault Service

Level of Reported Force	Court Records Data	SSAV Data
Level I: Physical Restraint (Simple Sexual Assault)	23% n = 10	92% n = 543
Level II: Bodily Harm Or Use of a Weapon	60% n = 26	6% n = 34
Level III: Serious Harm (Aggravated Sexual Assault)	16% n = 7	3% n = 16
TOTALS (n)	43	593