In the last three decades there has been a dramatic expansion in the scholarly literature examining how the legal process deals with rape and sexual assault. As part of this trend scholars from a variety of disciplines have focused increasingly on the legal system's failure to protect women, children and men from sexual violence. Researchers have also provided crucial information on the prevalence and impact of rape and sexual assault. Some of this work has been enormously influential on policy makers and has undoubtedly led to changes in the substantive law and its enforcement. The second edition of Professor Jennifer Temkin's *Rape and the Legal Process* is likely to fall within this category. It is fifteen years since the first edition of this work was published and in that time there have been many changes to the law of rape. The legal definition of rape has been revised, with the recognition of marital rape and the rape of males. There have been changes to patterns of sentencing and protections offered to complainants in rape trials, changes in evidential rules pertaining to the sexual history of complainants, as well as significant improvement in the police response to rape. There are also imminent changes to the law with the current Sexual Offences Bill and the recent revision to the sentencing guidelines in cases of rape. In this significantly expanded edition of *Rape and the Legal Process* Professor Temkin takes stock of these, and many other developments and sets out an agenda for future legal reform.

To those who already know her work it will come as no surprise that the second edition of *Rape and the Legal Process* is an outstanding contribution to the existing literature in this area. It is written in a clear, well-structured style and tackles many of the most difficult problems surrounding the law of rape. Crucially, this work integrates three key approaches to the analysis of rape law: first, it examines the legal definition of rape; secondly, it looks at how that definition is enforced; thirdly, it sets out specific proposals for assisting victims of rape within the legal process. It also marries the substantive law and policy issues with material from the social science literature. So for example, when discussing the use of a defendant's past misconduct in rape trials, Temkin surveys the current law, proposals for change, and developments in other countries, as well as empirical research on how mock jurors use such evidence (pp 225–254). This approach, which is adopted throughout the book, is a distinct strength and avoids some of the weaknesses evident in other scholarly work on rape, including approaches that sacrifice clarity and structure for barely comprehensible theorising and analysis that is only concerned with the substantive law, without reference to wider perspectives or sources of knowledge.

In her opening chapter on rape within the criminal justice system, Temkin places subsequent discussion within a context of law enforcement. She examines a range of issues including the experiences of victims in court, police treatment of rape and issues of sentencing. Temkin includes discussion of two trends. The first of these is that since the early 1980s there has been a substantial increase in the number of rape offences being reported to the police (p 12). This, in part, undoubtedly reflects improvements in the response of criminal justice agencies, in particular the...
police, to the problem of rape. In contrast, the last two decades have seen a marked reduction in the rate of conviction, as a proportion of reports of rape, from 32 per cent in 1979 to 8 per cent in 1999/2000 (p 27). Reform of the substantive law and its enforcement can be justified on many grounds; the falling conviction rate in cases of rape, however, is arguably one of the most crucial and underlies much of the subsequent discussion in Rape and the Legal Process.

In Chapter 2 Temkin examines the definition and redefinition of rape. Central to this chapter is the issue of reform. How can the legal definition of rape be revised to reflect the function of a modern law of rape, that is, the protection of sexual choice? The process of rape law reform in this country is a history of heightened expectations and subsequent disappointment. In addition, many reform proposals have tended to be influenced by outmoded and discredited thinking, while more radical reform measures have often been rejected with little serious consideration. Consequently, Temkin’s analysis of the recommendations of the Home Office ‘Review of Sex Offences’ which form the basis of the current Sexual Offences Bill, should be of particular interest to anyone concerned with the process of rape law reform. This review will examine two areas of the reform agenda: the issue of gender neutrality within rape and the revision of the law of consent.

Most jurisdictions that have engaged in significant reform of rape law have introduced reforms that are influenced by the notion of gender neutrality. This is the idea that the law of rape should protect male and female victims and that rape should be defined so as to include an expansive definition of sexual intercourse that allows for women, as well as men, to be convicted as principal offenders. Temkin notes that the suggestion that rape should become a fully gender neutral offence was rejected by the Review of Sex Offences on the basis that the public understanding of rape was an offence ‘committed by men on women and men’ and that penile penetration carried risks of ‘pregnancy and disease transmission’ (p 61). Temkin points out that the Review made no effort to find out how the public perceive the ambit of rape and that the risk of pregnancy is hardly a convincing justification for limiting rape to penile penetration given that the law already protects women (and men) where there is no possibility of a pregnancy resulting. As an alternative justification for the Review’s recommendation Temkin notes that: ‘[a]s sexual abuse is mainly perpetrated by men, there is an argument that an offence of rape should reflect this’ (p 61) and that a gender specific rape law highlights ‘the reality of male sexual violence by confining the offence to penile penetration’ (p 71). This approach, however, is not without its problems. How might such a standard impact upon other criminal offences which are committed by one gender more often than the other, such as armed robbery or sexual offences against children? In terms of the reality of sexual violence, it is apparent that women do perpetrate acts of non-consensual penetrative sex against men, children and other women. A rape law which recognised female perpetrators would arguably reflect the reality of sexual violence more closely than a law which only recognised male perpetrators.

In her discussion of the law of consent Temkin argues that the aim of rape and related offences should be the ‘protection of sexual choice, that is to say, the protection of the right to choose, whether, when, and with whom to have sexual intercourse so long as that choice does not impinge on the same right of others’ (p 96). It is clearly a central function of the law of consent to identify a clear dividing line between situations where sexual choice is freely exercised and where it is not. Temkin argues that the current law of consent fails to meet basic standards of ‘clarity, certainty, and comprehensibility’ (p 93). Her criticisms centre around
the decision of the Court of Appeal in *Olugboja* [1981] 3 All ER 443 where Dunn LJ stated: ‘[i]t is not necessary for the prosecution to prove what might otherwise appear to have been consent was in reality submission induced by force, fear or fraud, although one or more of these factors will no doubt be present in the majority of cases of rape.’ In so doing, Dunn LJ appeared to recognise that consent might be vitiated by blackmail and moral and economic pressure. Temkin argues that *Olugboja* seeks to ‘abandon a legal standard of non-consent in favour of jury decisions on individual cases’ (p 93). She takes the view that this decision introduced an undesirable level of vagueness in the law of consent by drawing a distinction between consent and submission without providing guidance as to what these words mean (p 93). *Olugboja* is undoubtedly unsatisfactory for the reasons Temkin details. However, this decision also contains an underlying approach to consent that is important. The main strength of *Olugboja* is that by allowing jurors to decide the issue of consent on an individual basis it takes us beyond the historic straightjacket of simply assuming that consent could only be vitiated by force, fear or fraud. Ultimately, if rape law is going to focus upon the protection of individual sexual autonomy then *Olugboja* makes significant progress toward recognising that sexual choice can be denied in a range of circumstances, depending upon individual case facts. This is why *Olugboja* is important, though the lack of clarity in the guidance provided to juries is undoubtedly a very significant problem.

In response to such criticisms of the current law the Review of Sex Offences recommended that the law of consent should set out circumstances where agreement to sex would be viewed as absent, such as when a person submits to intercourse because of threats or where a person has been abducted or unlawfully detained. Temkin argues that such a list would introduce ‘greater clarity and certainty,’ but would bring the law ‘not far from where the common law can reach at the moment’ (p 107). So Temkin considers a range of other strategies in dealing with the problem of consent (pp 176–177). Of particular interest is the idea of ‘shifting the evidentiary burden of establishing consent onto the shoulders of the defence in certain cases, such as where there is evidence of serious injury inflicted by the defendant.’ In such cases the defence would not be able just to make an assertion of consent: it would have to show a ‘real factual basis’ for the claim (p 176). Shifting the evidentiary burden in this way would be a radical reform which raises many concerns, not least from the perspective of the Human Rights Act 1998. It might also be argued that in cases involving serious injury there is no need to reverse the burden of proof, as such cases are more likely to result in conviction than those where evidence of violence is absent. On the other hand, one might question whether, as a matter of legal policy, it is right or necessary to place the full burden of proof on the prosecution in cases where a complainant has suffered serious additional violence in the course of an alleged rape.

Temkin’s discussion of consent also illustrates the precarious nature of reform measures. For example, the state of Michigan introduced radical reform legislation in the 1970s that attempted to remove the consent defence where sexual intercourse was accompanied by a range of other circumstances, such as the use of force or where the victim was incapacitated. The Michigan courts, however, have undermined this approach by allowing for a consent defence (pp 163, 172). Such problems are of central importance to the reform process because repeated studies have indicated that the impact of revisions to the substantive criminal law are often weakened by the attitudes and practices of criminal justice professionals. This is an insight that is readily apparent throughout *Rape and the Legal Process*, 938
yet one that is sometimes absent from other legal commentaries on rape law reform.

The pace of change in the law of rape in more recent times is reflected in the fact that as *Rape and the Legal Process* was being published, the Court of Appeal revised its rape sentencing guidelines in *R v Millberry* [2003] 1 WLR 546. *Millberry* resulted from the recommendations of the Sentencing Advisory Panel on the *Billam* [1986] 1 All ER 985 sentencing guidelines. Temkin was able to give attention to the Panel’s advice, which made a number of significant recommendations, particularly in the context of non-stranger rape, where it was argued that cases of stranger and non-stranger rape should generally be treated as being of equal seriousness. Temkin addresses the point thus: ‘[t]he overall impact of this revised approach to sentencing in rape cases will be to reflect current concerns about the offence and above all its grave consequences for victims irrespective of their relationship with the offender’ (p 53). The Panel’s advice and the response of the Court of Appeal, however, reflect the very mixed fortunes of rape law reform. The Panel, for example, suggested that there should be mitigation in some cases of marital rape where the defendant has suffered ‘provocation’ or ‘stress.’ The Court of Appeal, while generally agreeing with the Panel’s recommendations that stranger and non-stranger rape should be treated as equally serious has, in its new guidelines, entrenched several new mitigating factors applicable to cases of non-stranger rape. This includes the clumsy proposition that in some cases of non-stranger rape, the victim may be less fearful than in cases of stranger rape because the assailant in the latter situation is an ‘unknown quantity.’ The use of such reasoning may appeal to judicial notions of common sense, but it has little supporting evidence within the research literature which emphasises the fear and trauma generated by non-stranger rape, precisely because of the relationship between victim and offender, rather than despite it (see P. Rumney, ‘Progress at a Price: The Construction of Non-Stranger Rape in the *Millberry* Sentencing Guidelines,’ 2003, Volume 66, *Modern Law Review* pp 870–884). Such an approach is a further illustration of Temkin’s argument that the judiciary has in the past failed properly to recognise the harm of non-stranger rape (p 44) and that there is a need for greater training and education of legal professionals (p 356).

*Rape and the Legal Process* benefits from being a generally balanced work which does not disregard the rights of defendants in pursuit of an increased conviction rate. In a number of areas where there is intense conflict between defendants’ rights and the interests of rape complainants, Temkin guides us through the problems, potential solutions and the implications of these measures. For example, she examines the use of the complainant’s sexual history in rape trials (pp 196–225) and the House of Lords decision in *DPP v Morgan* [1976] AC 182 (pp 116–136) in a rigorous manner. In Chapter 5 Temkin examines the vexed issue of victim and defendant anonymity in rape cases and engages in a thorough analysis of legal developments in this area. Of particular contemporary relevance is the issue of defendant anonymity in cases of rape and sexual assault and the argument that in such cases the accused is often subjected to a unique degree of vilification and is therefore entitled to anonymity unless convicted. Temkin’s response centres on an assumption underlying this proposal: ‘[i]mplicit in these complaints is an assumption that allegations of rape are prone to be false, so that men require special protection from them. The absence of any evidence for this assumption and the increasing recognition that the guilty are all too often acquitted in rape cases may partially explain why successive governments have stood commendably firm against this backlash’ (p 308). As this quotation
suggests, one of the central issues to be considered in the debate over defendant anonymity is the extent to which men, and sometimes women, are subjected to false allegations of rape or sexual assault. While the rate of false complaints must be balanced against other factors such as the notion of open justice and the impediments anonymity might create for law enforcement, the discussion of anonymity in rape cases often gives scant attention to the actual rate of false complaints.

In her own analysis of the rate of false complaints, Temkin examines research that suggests the police have in the past overstated the number of false reports. She argues: ‘there is no evidence that fabrication occurs more often in rape cases than in other crimes’ (p 5). In fact there is a considerable body of research evidence that suggests a false reporting rate for rape that is higher than that for other serious offences. There is however, little reliable evidence upon which to conclude that the false reporting rate is higher. This does not necessarily lend support to Temkin’s argument because virtually all the quantitative data, whether it suggests a high or low rate of false reporting, is riddled with methodological inadequacies.

In addition, one commonly cited statistic that suggests a false reporting rate of two per cent has recently been the subject of powerful criticism (E. Greer, ‘The Truth Behind Legal Dominance Feminism’s “Two Percent False Rape Claim” Figure’ (2000) 33 Loyola of Los Angeles Law Review 947). Until we have a more reliable research base to work from, it is difficult to make any authoritative statements on the rarity or otherwise of false rape allegations. Consequently, one must express some caution when considering the issue of false complaints and its influence in the development of legal policy.

There can be little doubt that Rape and the Legal Process is currently the most authoritative text on the law of rape in any common law jurisdiction and is likely to remain so for the foreseeable future. The breadth and depth of the analysis contained in this work provides a comprehensive and unique view of rape law. As such, it will be an invaluable text not only for legal practitioners, academics and students, but also for policy makers, legislators and others concerned with the problem of rape.

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In The Origins of Adversary Criminal Trial, John Langbein considers how English felony trials, which had been lawyer-free before the 1690s, had become lawyer-dominated by the 1780s. The book provides an excellent account of changes to the use of counsel and evidential and procedural practice that occurred in this period.

The first chapter provides an introduction to English criminal trial in the late 17th century, a trial that may seem alien to a reader familiar only with modern Anglo-American criminal procedure. Prosecutions were brought privately, albeit in the name of the Crown. All prosecutions were tried, and the average length of trial in the mid 18th century, including jury deliberation, was probably about half an hour. The accused was denied prior knowledge of the precise charge or the evidence to be presented, and was constrained by pre-trial detention in arranging witnesses. The prosecuting victim rarely employed counsel, and the defendant was

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