Some Questions About SEX & JUSTICE & POWER

Christine Parker

Legal fantasies in 'The First Stone'.

Helen Garner's *The First Stone*[1] can be read as a series of questions about the role of law in issues of sexual harassment. Her account of the Ormond College cases is founded on an intuition that law, especially criminal law, is an inappropriate way of dealing with the 'complex, often shilly-shallying nature of male-female relationships'.[2] Early in the book Garner describes her 'rush of horror' upon hearing:

> ... that a man I had never heard of, the Master of Ormond College, was up before a magistrate on a charge of indecent assault: a student had accused him of having put his hand on her breast while they were dancing.
>
> I still remember the jolt I got from the desolate little item: Has the world come to this? All morning at work I kept thinking about it. I got on the phone to women friends of my age, feminists pushing fifty. They had all noticed the item and been unsettled by it. 'He touched her breast and she went to the *cops*? My God — why didn't she get her mother or her friends to help her sort him out later, if she couldn't deal with it herself at the time?' And then someone said what no doubt we had all been thinking: 'Look — if every bastard who's ever laid a hand on *us* were dragged into court, the judicial system of the state would be clogged for years.' [p.15]

Garner 'dashed off' a letter to the Master saying how sorry she was that feminism had descended to such 'ghastly punitiveness'. In later newspaper reports she learnt that he had also been charged with making an indecent advance to a second student in his locked office during the same party and squeezing her breasts. The letter and the passage quoted above introduce the major themes of the book — Garner's sense that it was inappropriate for the young women to press charges and her feeling that her own reaction was related to her age.

The feminist reaction to *The First Stone* was critical. This paper analyses the differences between how Garner saw the role of law and how her critics saw it. I argue that while there is some validity to her emotional reaction to the invocation of law, her critics identified important ways in which her gut sensibility toward law was confused. Clarifying the role of law in changing the conditions of women's oppression can help us find some answers to Garner's questions about sex and justice and power.

Garner's indecent advance

Garner argued against the use of law in the Ormond case in two ways. Her initial reaction was that the use of law was a disproportionately punitive response to the situation. The criminal process magnifies feelings of ill-will, vindictiveness and vengeance. It brings people 'to loggerheads' (p.23) and destroys relationships rather than repairing them.[3] In this case it lead to disproportionate consequences for the Master: he could have been punished as a criminal and he did lose his job.

A more proportionate reaction might have been to ask the Master for an acknowledgment of what had happened and an apology, and to leave it at that. Garner wonders why the young women and their friends

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resorted to law and why they did not assert themselves early on. Although she struggles against seeing the women as motivated by vengeance, it is the only explanation Garner can imagine for abandoning self-assertion and conciliation in favour of criminal court. She reports the following conversation with the outgoing Women's Officer of the Melbourne University Student Union.

> I asked her why conciliation was such a problem for her. She shifted in her seat; the mood in the room stiffened and became wary.
>
> 'The procedures at the moment', she said, 'are structured so that you get an apology and you get the behaviours to stop — and that's all.'
>
> 'Isn't that already quite a lot?'
>
> She looked at me narrowly. 'I'm against people having to go through conciliation before there can be retribution.'
>
> 'Retribution?' The Old Testament word took my breath away.
>
> 'If you want some form of justice,' she went on, 'for the harasser to be *punished*, you're seen as asking too much. You're being "nasty".' [pp.96-7]

Garner sees herself as motivated by a softer, maternal approach; the approach of mercy which makes space for apologies and builds relationships rather than destroying them.

Garner's second and more vehement reaction against the use of law is that it protects women only at the cost of constructing them as passive, weak, helpless and dependent. She suspects that personal self-empowerment is more valuable than a law that protects women only by deskilling them. In maternal mode again, she argues that young women should be taught to recognise their own power and to see how pathetic the men they think are powerful really are. She wishes she could have taught the Ormond women to stand up for themselves rather than relying on the courts.

Garner emphasises the counter-productive effects of law. The young women did not learn to speak up for themselves. Instead they became victims and ultimately avengers: 'Is it retrospective shame of our passivity under pressure that brings on the desire for revenge?' (p.175). Their failure to assert themselves early on created a problem for the Master; by the time the matter reached court, the stakes were too high for him to acknowledge the possibility of his guilt and to apologise. Resort to law was also painful for the young women, particularly when their testimony was not entirely believed. Thus law was destructive for each individual involved as well as for the relationship. An admission by the Master, an apology and perhaps efforts to make amends could and should have been enough.[4]

For Garner the use of law is not always inappropriate. The net of law was simply cast too wide in this case: 'My young activist ... had a grid labelled *criminal*, and she was determined to lay it down on the broadest field of male behaviour she could get it to encompass' (p.101). *The First Stone* tentatively advanced the idea that this 'punitive' attitude was coming to characterise (young) feminism more generally. In the debate that followed, her advance was seen as an indecent betrayal of what feminism stood for.

A slap in the face

Garner's move toward legal abolitionism was (correctly) interpreted as a general attack on contemporary feminism. Her portrayal of the women and their supporters as cold and vengeful was taken as personal criticism. While Garner had emphasised the destructive effects of law, her feminist critics focused on its constructive use in doing justice. They made several important points about the confusion and naivete of Garner's analysis.

First, they showed that Garner had failed to differentiate adequately between sexual advances which occur in informal social settings and those within institutional hierarchies. As Cassandra Pybus wrote:

> I detect a desperate confusion between the world of everyday interaction — at a party or at the beach — where confused middle aged men ogle and perhaps sometimes grope, the firm flesh of sexually inviting, young women; and an institutionalised hierarchy of power where these confused middle-aged men exercise concrete power over such enticing young women, power invested in them by the state, and, in this case, by the church.[5]

Garner saw the Ormond incident as fitting into the former category: 'nerdish passes at a party'. While the Master's advances may have been that, they also had at least the potential to be much more simply because they occurred at Ormond College. The Master *could* have used his power to take revenge when the passes were rejected or *could* have threatened such revenge to force acceptance. He *did* not, and perhaps *would* not have, but there were no guarantees. As Jennifer Morgan (who appeared anonymously in the book) commented, the Garner interpretation of events cast the story as a debate about puritanism and sexual morality but it was also about equality and inequality.[6]

Second, Garner's critics emphasised that the young women had not run straight to law. Rather they had felt unable to assert themselves at the critical moment, had later tried to resolve matters by reference to college procedures and only then went to criminal law and finally to the Equal Opportunity Commission. Garner herself reported the evidence that this was so, but did not give it the significance it deserved. She quotes a student who had been a mediator in the case early on:

> 'Our thought was, "Can we work this out within the framework of the college?" — because a court's so *final*.
>
> 'It was so traumatic. It was sad that there was no structure — no-one to go to, to tell us what to do. The student equal opportunity board at Ormond was a good idea but it was only at its starting point . . . '
>
> I put to her my question, which with every asking seemed cruder and less applicable: why did they go to the police?
>
> 'You make it sound,' she said rather desperately, 'as if it was all organised — as if we all knew what we were doing. But we didn't. I wasn't there any more — I'd gone overseas — when they decided to go to the courts . . . My role was to keep it out of the courts. I put a lot of effort into it. And I failed. I don't know if it was my fault — but I failed.' [p.78]

But there were also differences between the story Garner told and the story her critics revealed. Jenna Mead saw it this way:

> In Helen's version of events the students reject all possibility of conciliation. This is an astonishing distortion of the facts. As an eye-witness to these events, I saw the students constantly rebuffed and pressured. Those students spent six months from October to March trying to resolve their complaints within Ormond College, confidentially, by every means Ormond Council offered. For their trouble they were denied fairness, impartiality and equality, and treated instead with suspicion, distrust, and contempt.[7]

Finally by focusing on interpersonal relationships and personal agency, Garner ignored the evidence that the Master's actions may have symbolised a more general patriarchal culture in the College. In such a situation individual action is not enough and the tool of law can be helpful in achieving social and cultural change. Jenna Mead was Ormond College equal opportunity officer at the time of the incident. She argued that the young women had only been able to wield power by using the formal legal mechanisms available to them to change their milieu.

> The actions of these two women exposed a practice of discrimination against women at Ormond College that no-one questioned until these two stood up and said 'no' to being ignored. They proved that women have the right to legal remedy. This has been one of the achievements of feminism. For that these young women deserve our thanks.[8]

Elements of the feminist reaction against Garner, however, went beyond these three arguments for the reasoned and constructive use of law. Ironically Garner herself, like the vengeful young women of her imagination, had attacked her target too vociferously and started an argument rather than a conversation. In arguing that mercy should be extended to men who made social blunders, she was too sparing in her mercy for the women who chose to use law. The harshness in Garner's views gave rise to a corresponding unfairness in her critics and she was characterised as anti-feminist. Jenna Mead was a particularly vocal critic. Early on in the debate she reportedly made the following reaction to Garner's views:

> 'Further, [Garner implies] that these two hadn't learnt a very basic rule about being real women and that is, that it's the woman's job to be responsible for the effect her sexuality might have on a man . . . '
>
> Assuming the allegations against Gregory were true, Mead says, the only conclusions you could reach, if you accepted Garner's analysis, were that it was unwomanly and unworldly not to handle having your breasts squeezed and that the women simply overreacted. They went to the police instead of shutting up. They are culpable, therefore, for all that followed, including the decision by police to lay charges, the court case and the media attention.[9]

Garner's point was not that the women should have shut up, but that they should have been empowered to speak up much earlier, to grab and to own the power they did have in the situation. Garner found it necessary to make a speech defending herself against inaccurate criticisms. 'I did *not* say that women are responsible for the way men behave towards them. And I most emphatically did *not* say that women who get raped are asking for it . . .'[10]

The emotional nature of the debate and the fact that it included *some* unfair criticisms entrenched Garner in a position where she could not accept the validity of *any* of the criticisms made against her. She was on the defensive, repeating her argument for the destructiveness of law.

> Being permanently primed for battle, [certain feminists] read like tanks. It's a scorched earth style of reading . . .
>
> Thus, several so-called prominent feminists have used the word 'sentimental' to dismiss the scene in the book where the ex-master's wife speaks, through inconsolable tears, of the devastation these events have brought to her and her family. Less doctrinaire critics have been able to recognise in this scene a terrible example of the human cost of political action which narrows its focus in the purely legal and thus divorces thought from feeling.[11]

Like parties in court, the two sides of the debate on *The First Stone* were at loggerheads. The stakes had been raised too high for either to admit that the other had some validity.

Fantasies about justice and sex

Garner and her critics had two very different images of how justice might have been done in the situation. Garner fantasised a world in which men and women could assert themselves with each other in sexual matters without fear of retribution if they made a mistake. In Garner's fantasy, problems could be worked out using open communication. If not, conciliation at the most informal level possible, perhaps by the intervention of friends, would be the best way to repair relationships.

> Could it have been sorted out to everybody's satisfaction within twenty-four hours? If the students had been cool enough to repeat their statements to Colin Shepherd's face, to ask for an acknowledgment and an apology, might Shepherd . . . have found in himself the sangfroid to do the gentlemanly thing? — to say, 'I certainly don't remember doing what you say I did, and I can't believe I ever would have done such a thing — but we'd all had a bit to drink — I was over the moon because the dinner had gone so well — if I seem to you to have behaved inappropriately, I'm terribly sorry — I hope that you'll accept my sincere apology — and that none of us will ever need to speak of it again'?
>
> This is the pragmatist's fantasy of a way out . . . It assumes fundamental generosity, flexibility, good will, an absence of fear, a willingness to *go the extra mile*. It assumes that . . . a man might not necessarily feel himself backed into a tight corner by such allegations . . . [pp.92-3]

Garner's fantasy was about interpersonal relations between men and women. The fantasy of her critics, and perhaps of the young women, focused on changing the structural realities of power. They wanted more than an acknowledgment and apology from the Master. They wanted a culture in which a man in a position of power would think long and hard before making an advance to an inferior, where women felt empowered to say no to such advances without fearing they would suffer ill-effects and where, if a man did make a mistake, he would acknowledge quickly and without fuss that he had done wrong, and if he did not he would be sanctioned by his superiors or by the law.

In the end the outcome fantasised by Garner's critics was (at least partially) realised after the young women had lost the criminal cases and had gone to the Equal Opportunity Commission. The Master lost his job, the College repented and reformed (by apologising to the students for the appalling way the complaint was handled and promising to implement better procedures), and also paid some compensation (p.68).

Fantasising together

These two fantasies about justice and sex focus on two different outcomes, one interpersonal, the other institutional, each of which is desirable in its own way. Might it be possible in a feat of conciliation to bring the two sides together?

Garner's point was that formal legal means of justice are not satisfactory because ideally people want justice to be a spontaneous matter within interpersonal relationships. She is sceptical of the power of law to change the way such relations occur. Where spontaneous justice within interpersonal relationships is not possible, she advocates a more conciliatory, community-based approach to resolving disputes than law offers.

> I also thought that one reason for the popularity and addictive nature of talk shows, specially the rehashes of trials, is that people in their hearts no longer believe that courts provide justice. These televised bunfights are a grotesque parody of a fantasy I repeatedly had when I covered the child-murderer's trial — a fantasy that there might exist some other forum, outside the harsh rules of evidence which excise context; some better, broader, freer, less rule-bound *gathering of the tribe*; a forum in which everything might be said, everybody listened to: where bursts of laughter and shouts of rage might not be outlawed: where if people agreed to take turns everyone might at last, at last be *heard*. [p.208]

In order to achieve her fantasy of informal justice, Garner argues that young women should assert their displeasure at unwanted advances immediately or soon after. And Garner is right. A young woman should be able to get up and tell a man to get lost if he makes an unsolicited advance — or to accept it if she likes — and there are many social situations in which they could learn to do so. But no woman should be vulnerable to the sexual demands, and resultant abuses of power, of those who are superior to her at work or at university. Garner sees her work as an analysis of heterosexual communication, of eros, but never addresses the fact that a relationship between teacher and student or college Master and resident is always imbued with the power imbalance, no matter how nerdishly pathetic the superior is, or how honourable and trustworthy. It would be nice to be able to treat all advances purely as problems of heterosexual communication, but where such a power relationship is also involved they are more than that.

In such cases women cannot necessarily spontaneously assert their rights because the person making the advance may simply use his power to retaliate or force acceptance. Indeed if a woman finds herself within an institution where domination and harassment of women is culturally acceptable, it is very difficult for her to speak up at all. Options such as conciliation and internal dispute resolution are just as likely to perpetuate the domination and oppression of the social setting in which the incident occurs. This is indeed, it seems, what happened to the young women when they tried to resolve matters within Ormond College. They were (apparently unintentionally) intimidated by the High Court judge who was a member of the council and to whom a complaint was addressed early on, and by the group of three council members appointed to inquire into their complaints.

Law can be useful in counteracting the domination of women within relationships and institutional cultures. Yet, as Garner shows, it can also be incredibly destructive, not only of relationships but also individuals, both victims and offenders. It is not a weapon to be wielded frivolously. Perhaps it would be better to fantasise formal legal and spontaneous private justice as partners, rather than enemies. In this fantasy we could admit that we would like a world in which unwanted advances can always be dealt with informally without destroying relationships. Yet in order to make that possible we recognise that we will need to use law to break down oppressive practices.

Justice can rarely occur spontaneously at the informal, private or interpersonal level if institutional structures and cultures are unjust. A woman is not empowered to speak and have her grievance repaired at an interpersonal or communal level until the culture of the place is changed to be more supportive of her concerns. Law can be a useful tool in levering such change. The very destructiveness of law brings matters to a head and raises the stakes so that a grievance must be taken seriously. Often, as in the Ormond case, a legal case also becomes the subject of media attention so that external pressures for change are felt. Most importantly, law establishes rights and remedies and states the wrongfulness of a discriminatory or oppressive practice. It creates an expectation as to what is just behaviour for the future, but only at the cost of certain relationships and individuals. In this case the Master lost his job and the young women did not stay at the college to enjoy the changes they had helped bring about.

The fact that formal legal justice is used on one occasion means that it may not be necessary next time. Next time the culture of the institution may have been forced to change sufficiently for a young woman to feel she can say 'no' and be supported even if her superior retaliates. Internal procedures may have been put in place so that she knows she can have her grievance dealt with quickly and fairly the next day without having to raise the stakes by going to law. The use of formal legal justice on one occasion can create the conditions in which spontaneous and informal justice are possible on others.

Wherever abuse of power remains possible, redress through the coercive power of law should also be available. Even in a caring relationship between teacher and student where near-perfect interpersonal communication occurred, the reality of institutional power would make it necessary for the subordinate to always have available procedures and coercive mechanisms 'just in case' they became necessary. Indeed the superior's knowledge of the availability of a legal remedy for sexual harassment improves the chances of the inferior being treated justly spontaneously. The shadow of the law helps to balance the domination inherent in the personal relationship because the teacher knows that they can always be pursued for sexual harassment, either within the university or in the courts, if they put a foot wrong.

Conclusion

In my fantasy world, using legal justice creates the incentives and conditions for people to do justice spontaneously and informally in matters of sex and power. The fact that the coercive power of law has been invoked in the past makes it more likely that I will be able to assert myself, ask for an apology and for reparation — and get them — in the future. Garner and her critics each imagined only one side of this fantasy. Like adversaries in court, each participant in the debate chose one side and discredited the other. Eventually this can only weaken the arguments for both fantasies, rather than allowing them to mutually reinforce each other.

Yet, like a well-publicised legal case, the Garner debate did make issues of sexual harassment prominent in both public and private discussion. Women began to discuss how to respond to harassment and to discover some answers. Perhaps some men even thought about how to change their workplaces and universities so that sexual harassment occurred less frequently and was dealt with better. Next time sexual harassment comes up as a public or a private issue, the Garner debate may have clarified where law is useful and where it is not, and we will be closer to a fruitful partnership between legal and spontaneous justice.

References on p.143.

who recently made a sheep clone, Dolly, and requested that they be cloned.

The head of the team, Ian Wilmut, has warned that it is 'absolutely vain to clone yourself ...' and stated that any ethical fears about cloning were 'entirely justified'. Dammit, *Girlie* was going to give Ian a call. What interests *Girlie* about the cloning issue is that the procedure, which can create a new life from a single cell, does not require any biological input from the male of the species. The ramifications for gender relations are enormous!

FROM THE COAL FACE AGAIN

Girlie wonders how much work has to be done before some members of the legal profession's attitudes will ever change. Recent reports from the courts reveal these gems ...

By a defence barrister to a [female] prosecutor in a committal proceeding:

> Let's get this over and done with so that you can go to the beauty parlour or do whatever it is that you girls do ...

From a [female] magistrate to a [female] applicant for crimes compensation for injuries suffered after a gang rape:

> Why are you wearing overalls now? Is it to make yourself look unattractive to the opposite sex?

Girlie is trying hard not to get too depressed!

MAIL FROM OTHER MACHOLANDS

The Philippines

A recent article in *The Earth Times* (13.4.97) discussed the battles being fought by women in the Philippines to improve their status. In 'Women Fight Uphill Battle in Macholand', Daniel Shepard writes that the rule of 'machismo' is still firmly entrenched despite the efforts of feminist Filipinas. He notes that there is still an image of the Filipina being docile and that those interested in achieving change often work through subterfuge and manipulation. There is a lot to be done as, presently, there is no alimony and no divorce law, rape is categorised as a crime against chastity rather than against the person and an attempt to introduce marital rape was defeated. Congresswoman Oreta was interviewed by Shephard and said that when the marital rape bill was mooted in the Congress, some of her male colleagues opined that a woman had a duty to subject herself to her husband's wishes. One Congressman apparently stood up to say that for Muslims one of the commandments is for a woman not to neglect her husband's needs! Wonder where that is written? Interestingly, a bill on sexual harassment was passed.

Afghanistan

A report from Kabul, Afghanistan *(Philadelphia Inquirer 8.5.97)* has made *Girlie* sure she will not be holidaying in that part of the world for a very long time. Taliban religious police have stepped up their patrol of the city to ensure that the strict rules of the Taliban are being met by Kabal residents. Under the Taliban, men must grow beards, women cannot work outside the house and must be covered from head to toe in cloaks called burqas, and girls cannot go to school. All that sounds bad enough but the Taliban also bans the use of paper bags and plastic wrappings!

WARNING TO VICTORIAN READERS

If you are a Victorian reader, Girlie would like to remind you that the system of crimes compensation as you know it is about to be radically changed. The *Victims of Crime Assistance Act 1996* is an ironically named little piece of legislation that comes into force on 1 July 1997. Its main effect is to remove any cash compensation for pain and suffering inflicted by a criminal act and to replace it with an award of assistance for 'reasonable counselling services' actually incurred or likely to be incurred. In s.8(3) there is a provision in 'exceptional circumstances' for an amount to be included to a victim for other expenses incurred or likely to be incurred, to assist the victim's recovery from the act of violence. *Girlie* met with the Attorney-General to express her concern that victims of sexual assault and domestic violence will be adversely affected by the proposed legislation. She was told that the exceptional circumstances clause will 'hopefully' be used by magistrates to help these victims obtain some money to buy a new bed, move house, go on a holiday or do whatever they need to in order to feel a bit better about the trauma they have experienced. *Girlie* hopes so too! In case, the magistrates don't use the exceptional circumstances clause in this way, please tell any potential crimes compensation applicants to get their applications in by 30 June 1997.

Sal Vation

Sal Vation is a Feminist Lawyer.

LEGAL EDUCATION COLUMN

The next issue of the *Alt.LJ* will see the return of the Legal Education Column. Contributions to this column are welcomed. Enquiries as to the suitability of material may in the first place be made to the Column Co-ordinator, Chirs Field on tel 03 9613 8364. Manuscripts should be sent to the Editorial Co-ordinator, *Alternative Law Journal*, c/- Law Faculty, Monash University, Clayton, Victoria 3168.

Parker article continued from p.125.

References

1. Garner, Helen, The First Stone, Picador, Sydney, 1995. Page numbers in brackets in this article refer to this book.
2. Leser, D., 'Generational Gender Quake', Good Weekend, 18 March 1995, pp.30-9, at 34.
3. Garner's arguments are not novel. They are rudimentary forms of more scholarly arguments about the limits of formal legal justice in resolving disputes and restoring relationships. See for example, Auerbach, J., Justice Without Law? Oxford University Press, New York, 1983; Cragg, W., The Practice of Punishment: Towards a Theory of Restorative Justice, Routledge, London, 1992; Merry, S. and Milner, N. (eds), The Possibility of Popular Justice, The University of Michigan Press, Ann Arbor, 1993.
4. See Daly's 1992 analysis of the Clarence Thomas-Anita Hill congressional hearings in which she makes a similar point: Daly, K., 'What would have been justice?', remarks prepared for the plenary on sexual harassment in the Thomas hearings, Law and Society Annual Meeting, 27-31 May 1992.
5. Pybus, C., 'Cassandra Pybus reviews Helen Garner's The First Stone', (May 1995) Australian Book Review 6-8, at 6.
6. Summers, A., 'Sold Out' Sydney Morning Herald, 4 April 1995, pp.13-14, at 13.
7. Mead, J., 'When it comes to sex and power, Garner doesn't get it', The Australian , 21 September 1995, p.114.
8. Mead, J., 'First Stone pushes the panic buttons', Sydney Morning Herald, 21 September 1995, p.15.
9. Leser, above, p.35. Mead's anger was understandable; she claimed she had been split into seven different characters in Garner's account, none of them very sympathetically portrayed: Mead, above, ref.7.
10. Garner, H., 'A story that needed to be told,' The Australian, 9 August 1995, p.11.
11. Garner, above, ref.10.