ABSTRACT. The paper is an application of the “principle of just deserts” (that is, retribution) to the setting of statutory penalties. The conclusion is that there should be no separate penalty for rape but that rape should be punished under the ordinary battery statutes. The argument has four parts. First, there is a description of the place of rape in a typical statutory scheme. Second, there is a consideration of possible justifications for giving rape the status it has in such a typical scheme. All justifications appear to fail for one reason or another. Third, rape is analyzed as battery and the analysis is justified. This analysis includes an explanation of why it would be unjust to punish rape more severely than ordinary batteries. Last, there is a catalogue of some practical advantages to treating rape as battery (for example, simplifying proof of the crime). The paper takes the principle of just deserts (in the form I have elsewhere defended it) for granted, but does add substantially to the understanding of how to apply it.

In 1978, California raised the penalty for rape from “three, four, or five years imprisonment” to “three, six, or eight years.” Because California sharply restricts judicial discretion in sentencing, that change meant that a conviction for rape without mitigating or aggravating circumstances would require a sentence of six years imprisonment rather than four. If we call a crime without mitigating or aggravating circumstances “simple,” then the change amounted to a declaration that simple rape was about as serious a

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crime as simple aggravated arson rather than simple assault with a deadly weapon.²

One might suppose that feminists applauded the change. They have, after all, for years talked about how rape supports the oppression of women, how fear of rape darkens everything a woman does, how actual rape can shatter its victim. But, in fact, some California feminists opposed the change. They feared stiffer penalties would mean fewer convictions, less deterrence, and more rapists looking for victims. They may have had good reason to fear such consequences. Even so, they found themselves with an awkward argument. They had to argue that, while rape is a very serious crime, it should not be punished that way in California. Ideally (they had to say), the penalty should be very severe, but such severity is impractical in a society as sexist as our own. Better a light punishment than none at all.³ The feminists' opponents, in contrast, had only to argue that, because the penalty should fit the crime and rape is a very serious crime, rape deserves a very severe penalty. The feminists lost the argument. The importance they assigned rape in theory helped to defeat their efforts to protect women in practice.

Those feminists were, I think, right in their conclusion. The penalty for rape should be relatively low. They were wrong only in their premise. Rape is not a very serious crime. Rape should be treated as a variety of ordinary (simple or aggravated) battery

² Annotated California Codes (St. Paul, Minn.: West Publishing Co., 1983) — hereafter referred to as Cal. Penal Code — secs. 264 (Rape) and 451 (Arson). The penalty for arson that causes great bodily harm is five, seven, or nine years; for arson of an inhabited structure (even if no injuries in fact ensue), two, five, or seven years. The penalty for simple rape thus falls between these two forms of aggravated arson. By contrast, the penalty for assault with caustic chemicals is two, three, or four years (Cal. Penal Code sec. 244); for mayhem, two, four, or six years (sec. 213); and for spouse abuse, two, three, or four years (sec. 273.5).