Proving Character and Credibility in Sexual Assault Cases

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REAL RAPE

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In May 1974 a man held an ice pick to my throat and said: "Push over, shut up, or I'll kill you." I did what he said, but I couldn't stop crying. When he was finished, I jumped out of my car as he drove away.

I ended up in the back seat of a Boston police car. I told the two officers I had been raped by a man who came up to the car door as I was getting out in my own parking lot (and trying to balance two bags of groceries and kick the car door open). He took the car, too.

They asked me if he was a crow. That was their first question. A crow, I learned that day, meant to them someone who is black. That was the year the public schools in Boston were integrated.

They asked me if I knew him. That was their second question. They believed me when I said I didn't. Because, as one of them put it, how would a nice (white) girl like me know a crow?

Now they were really listening. They asked me if he took any money. He did; but though I remember virtually every detail of that day and night, I can't remember how much. It doesn't matter. I remember their answer. He did take money; that made it an armed robbery. Much better than a rape. They got right on the radio with that.

We went to the police station first, not the hospital, so I could repeat my story (and then what did he do?) to four more policemen. When we got there, I borrowed a dime to call my father. They all liked that.

By the time we went to the hospital, they were really on my team. I could've been one of their kids. Now there was something they'd better tell me. Did I realize what prosecuting a rape complaint was all about? Did I think I could handle it, I seemed like a nice girl, what a defense lawyer could do ...

Late that night, I sat in the Police Headquarters looking at mug shots. I was the one who had insisted on going back that night. My memory was fresh. I was ready. They had four or five to "really show" me; being "really shown" a mug shot means exactly what defense attorneys are afraid it means. But it wasn't any one of them. After that, they couldn't help me very much. One shot looked familiar until my father realized that the man had been the right age ten years before. It was late. I didn't have a great description of identifying marks or the like: no one had ever told me that if you're raped, you should not shut your eyes and cry for fear that this really is happening, but should keep your eyes open and focus so you can identify him when you survive. After an hour of looking, I left the police station. They told me they'd get back in touch. They didn't.

A clerk called one day to tell me that my car had been found minus all its tires and I should come sign a release and have it towed -- no small matter when you don't have a car to get there and are slightly afraid of your shadow. The women from the rape crisis center called me every day, then every other day, then every week. The police detectives never called at all.

At first, being raped is something you simply don't talk about. Then it occurs to you that people whose houses are broken into or who are mugged in Central Park talk about it all the time. Rape is a much more serious crime. If it isn't my fault, why am I supposed to be ashamed? If I'm not ashamed, if it wasn't "personal," why look askance when I mention it? ...

In many respects I am a very lucky rape victim, if there can be such a thing. Not because the police never found him: looking for him myself every time I crossed the street, as I did for a long time, may be even harder than confronting him in a courtroom. No, I am lucky because everyone agrees that I was "really" raped. When I tell my story, no one doubts my status as a victim. No one suggests that I was "asking for it." No one wonders, at least out loud, if it was really my fault. No one seems to identify with the rapist. His being black, I fear, probably makes my account more believable to some people, as it certainly did with the police. But the most important thing is that he was a stranger; that he approached me not only armed but uninvited; that he was after my money and car, which I surely don't give away lightly, as well as my body. As one person put it: "You really didn't do anything wrong."

Had the man who raped me been found, the chances are relatively good that he would have been arrested and prosecuted and convicted. Stranger rape is prosecuted more frequently, and more successfully, than many violent crimes. And the punishment on conviction tends to be substantial. In some states, until very recently, it could have been death. Not without costs for me, to be sure: under the best circumstances, prosecuting a rape case has unique costs for the victim. And many jurisdictions have made it harder still, by imposing unique obstacles in rape cases, from the requirement that the victim's testimony be corroborated by other evidence to the requirement that she resist her attacker to the inquiry into her sexual past. But although the requirements were theoretically imposed in all cases, victims like me surely fared best. We could count on prosecutors to take our cases more seriously, on juries to be more sympathetic, and on courts to manipulate the doctrinal rules to protect a conviction.

But most rape cases are not as clear-cut as mine, and many that are, like mine, simply are never solved. It is always easier to find the man when the woman knows who he is. But those are the men who are least likely to be arrested, prosecuted, and convicted. Those are the cases least likely to be considered real rapes.

Many women continue to believe that men can force you to have sex against your will and that it isn't rape so long as they you know and don't beat you nearly to death in the process. Many men continue to act as if they have that right. In a very real sense, they do. That is not what the law says: the law says that it is rape to force a woman "not your wife" to engage in intercourse against her will and without her consent. But while husbands have always enjoyed the greatest protection, the protection of being excluded from rape prohibitions, even friends and neighbors have been assured sexual access. What the law seems to say and what it has been in practice are two different things. In fact, the law's abhorrence of the rapist in stranger cases like mine has been matched only by its distrust of the victim who claims to have been raped by a friend or neighbor or acquaintance.

The latter cases are cases of "simple rape." The distinction between the aggravated and simple case is one commonly drawn in assault. It was applied in rape in the mid-1960s by Professors Harry Kalven and Hans Zeisel of the University of Chicago in their landmark study of American juries. Kalven and Zeisel defined an aggravated rape as one with extrinsic violence (guns, knives, or beatings) or multiple assailants or no prior relationship between the victim and the defendant. A simple rape was a case in which none of these aggravating circumstances were present: a case of a single defendant who knew his victim and neither beat her nor threatened her with a weapon. They found that juries were four times as willing to convict in the aggravated rape as in the simple one. And where there was "contributory behavior" on the part of the woman -- where she was hitchhiking, or dating the man, or met him at a party -- juries were willing to go to extremes in their leniency toward the defendant, even in cases where judges considered the evidence sufficient to support a conviction for rape.
Juries have never been alone in refusing to blame the man who commits a "simple rape." Three centuries ago the English Lord Chief Justice Matthew Hale warned that rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent." If it is so difficult for the man to establish his innocence, far better to demand that a woman victim prove hers; under Hale's approach, the one who so "easily" charges rape must first prove her own lack of guilt. That has been the approach of the law. The usual procedural guarantees and the constitutional mandate that the government prove the man's guilt beyond a reasonable doubt have not been considered enough to protect the man accused of rape. The crime has been defined so as to require proof of actual physical resistance by the victim, as well as substantial force by the man. Evidentiary rules have been defined to require corroboration of the victim's account, to penalize women who do not complain promptly, and to ensure the relevance of a woman's prior history of unchastity.

Men have written for decades about women's rape fantasies -- about our supposed desire to be forcibly ravished, to "enjoy" sex without taking responsibility for it, to be passive participants in sexual ecstasy which, when we are spurred in the relationship or caught in the act and forced to explain, we then call "rape." That was Hale's concern. It ignores the burdens and humiliation of prosecuting a rape case. It converts the harmless fantasy of some women that a favorite movie star would not take "no'' for an answer into a dangerous stereotype that all women wish to be ignored and treated like objects by any man we know.

Yet if the female rape fantasy is open to challenge, and I think it is, the law of rape stands as clear proof of the power and force of a male rape fantasy. The male rape fantasy is a nightmare of being caught in the classic, simple rape. A man engages in sex. Perhaps he's a bit aggressive about it. The woman says no but doesn't fight very much. Finally, she gives in. It's happened like this before, with other women, if not with her. But this time is different: she charges rape. There are no witnesses. It's a contest of credibility, and he is the accused "rapist."

It is important to note that the male rape fantasy is not a nightmare about all rapes, and all women, but only about some; the law of rape has focused its greatest distrust not on all victims, but only on some. The formal prohibitions of the statutes do not distinguish between the stranger and the neighbor, between the man who climbs in the car and the one offered a ride home. The requirements of force and resistance and corroboration and fresh complaint have been formally applicable in every case, regardless of the relationship between victim and defendant. In practice, distinctions have always been drawn. It is in the male fantasy cases -- the "simple" cases in which the unarmed man rapes the woman he knows -- that these rules have been articulated and applied most conscientiously to punish the victims and protect male defendants. And it is in those cases that prosecutors, courts, and juries continue to enforce them in practice. ... The rules governing the proof of rape are the perfect complement to the courts' definition of the crime itself. Here as well unique requirements were imposed; and here as well the requirements placed the heaviest burden of proof on cases of simple rape in potentially appropriate situations.

A simple rape might be reversed because the victim did not adequately resist, but it could as easily be reversed on the grounds that her testimony was not corroborated. In many jurisdictions corroboration was technically required in all rape cases. But, as with resistance, the absence of corroborating evidence was most critical where the case turned on questions of attitude (that is, the meaning of "no") or where the woman's story was considered incredible or inculpatory. Limits on a defense counsel's ability to ask questions or present evidence about a woman's sexual past might be upheld in a stranger case, but never in a simple rape. A delay in reporting a simple rape--a delay which empirical evidence, let alone the humiliation of pursuing a rape complaint, suggests is common and understandable--was proof to the common law courts, at least in the cases of simple rape, that the woman should not be believed. As for juries, it was never enough for them to be told that they could convict only on proof that established guilt beyond a reasonable doubt. Courts insisted that they be told, in Hale's own words, to focus their distrust on these women victims.

The reform of these rules has been a primary goal of feminist efforts in recent years, and for good reasons. The rules all too often resulted in the victim's being violated a second time -- by the criminal justice system. Formally, most of these rules have now been repealed. In practice, many of them are still applied, if not quite as often in the opinions of the appellate courts, then in the day-to-day workings of the system.

I am interested in these evidentiary rules not so much as an example of the law of evidence gone awry, but for the light they shed on how the crime of rape has been understood in the courts. Here, as with the definition of the crime itself, the underlying theme is distrust of women; that distrust is always focused on rape complaints in appropriate relationships; and the evidentiary rules, like the resistance requirement, serve to enforce the "no means yes" philosophy of social relations and to assure men broad sexual access in appropriate situations.

The requirement that the victim's testimony be corroborated in order to support a conviction was, in its heyday, formally applied in a significant minority of American jurisdictions. In practice, it continues to be a critical factor in determining the disposition of rape charges even today. The justification for the formal rule was, quite explicitly, that women lie. As the Columbia Law Review explained in the late 1960s: "Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false. ... Since stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough to convict a man of a crime." The writer felt no need to cite a single authority for the long-held, if never-tested, proposition that women frequently lie, voluntarily exposing themselves to the potential humiliation of a rape prosecution.

Rhetorically a number of courts agreed. Without the corroboration rule, "every man is in danger of being prosecuted and convicted on the testimony of a base woman, in whose testimony there is no truth." The corroboration rule is required because of the "psychic complexes'' of "errant young girls and women coming before the court,'' which take the form "of contriving false charges of sexual offences by men."

"If proof of opportunity to commit the crime were alone sufficient to sustain a conviction, no man would be safe." Corroboration is required because "sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."

In practice, the corroboration requirement tended to be applied by these courts more flexibly than their rhetoric suggests. Sometimes they insisted on corroboration of every detail: not only the fact of intercourse, but force, resistance, and the identity of the defendant. Sometimes little or no corroboration was required. The plausibility of the victim's story was determinative. If her testimony was "credible," it might support conviction even if largely or wholly uncorroborated; where it was "inherently incredible, or ... contrary to human experience or to usual human behavior," the corroboration requirement mandated reversal of the conviction.

The corroboration requirement was an almost perfect complement to the resistance requirement, both in principle and in application. One is as hard pressed to find the convictions of men who jump from behind bushes reversed for lack of corroboration as for lack of resistance, even if they leave no bruises. These accounts are rarely considered so "inherently incredible'' as to be reversed for lack of corroboration. Complaints of simple rape are another matter. The "inherently incredible'' standard, clearly rooted in Hale's distrust, made corroboration most important precisely in the cases where resistance was most likely to be demanded....
The evidentiary rules relating to the relevance of a woman's sexual past have been even more controversial than the corroboration requirement. Perhaps the most often quoted justification for the admission of such evidence is that of New York's highest court in 1838: “Will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?” Where there was evidence that the woman was a “common prostitute,” another court emphasized: "It would be absurd, and shock our sense of truth, for any man to affirm that there was not a much greater probability in favor of the proposition that a common prostitute had yielded her assent to sexual intercourse than in the case of the virgin of uncontaminated purity." But it was not necessary that the woman be a prostitute; “no impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one spotless and pure.”

For these courts and many others unchastity was relevant both to the issue of consent and to the woman's credibility as a witness (that is, whether her testimony could be believed). Some courts restricted evidence of the victim's sexual relations with men other than the defendant to testimony of general reputation; witnesses could be asked if the victim had a “bad” reputation for chastity in the community. Others allowed cross-examination, and even direct evidence, relating to “specific immoral and unchaste acts,” so long as not too remote in time. When the woman took the stand to testify, defense counsel could cross-examine her as to the details of any of these past relations with other men. In some states the men themselves might be called as witnesses. As the Nebraska Supreme Court explained it in 1949, evidence of past specific acts must be available, "not only for the purpose of being considered by the jury in deciding the weight and credibility of [the victim's] testimony generally, but for the purpose of inferring the probability of consent and discrediting her testimony relating to force or violence used by the defendant in accomplishing his purpose and her claimed resistance thereto." The court termed this the "modern realist rule," and "the better one." It certainly was the better one for the male defendant.

In a general sense, the belief that a woman's sexual past is relevant to her complaint of rape reflects, as does the resistance requirement, the law's punitive celebration of female chastity and its unwillingness to protect women who lack its version of virtue. Wigmore, the leading commentator on the law of evidence, so distrusted women who complained of rape that he proposed a requirement that the unchaste complainant be subject to a mandatory psychiatric evaluation before her testimony could be presented to a jury. According to him:

> Rape complainants'] psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions... The unchaste... mental... finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straight-forward and convincing.

Even apart from Wigmore's extreme proposal, the risks of painful humiliation for the sexually experienced victim were enormous. And the likelihood of convicting the defendant after the humiliation of the victim was questionable. Sociological studies have found significant correlations between victim chastity and the perceived seriousness of the rape. Holding all other facts constant, the rape of an experienced woman is viewed as a less serious assault. Courts have long been aware of the danger of prejudice based on sexual history, but in a different way: they have never been as willing to allow similar inquiries into a male defendant's sexual history, precisely because of the prejudice which might be occasioned in the mind of the jury.

But, again as with the resistance requirement, distinctions have always been drawn in these cases, based on the type of rape and the type of relationship. Where the defendant is a stranger-in-the-bushes, courts have upheld convictions even if the trial judge exercised his discretion to limit the evidence of a woman's sexual history. But where it is a simple rape by someone the victim knows, let alone someone with whom she has previously been intimate, limits on questioning almost routinely led to reversals of convictions. Past acts of intercourse with this defendant have always been considered relevant evidence of consent. The influential Model Penal Code automatically downgrades the severity of the offense where there is a past relationship of intimacy. Under this approach, the existence of a prior relationship is not only relevant evidence but is itself an issue of fact which must affirmatively be found by the jury.

A defendant who had engaged in a continuing relationship with the victim might assume that his passive partner was consenting to the intercourse apart from their prior relationship. But cases like that are unlikely to result in the filing of charges in the first instance, let alone a discretionary decision by a trial judge to exclude this evidence, let alone a conviction of rape—at least absent extraordinary force.

The more common issue in the appellate cases relates to evidence of a woman's past sexual relations with men other than the defendant. Procedurally these cases take the form of appeals by convicted defendants challenging the trial court's exclusion of such evidence. The question is whether the trial court's decision to exclude requires reversal of the conviction. When the defendant is a stranger, particularly an armed stranger, courts seldom reverse. The stated reason is that consent is not an issue. Thus, the same court that held evidence of a prior relationship between victim and defendant, "regardless of how false," to be admissible, has also held that "where want of consent is not an issue, as where accused denies the act charged, evidence of the female's want of chastity is immaterial and inadmissible."

The most common justification for upholding the exclusion of evidence of a woman's sexual past—that consent is not at issue—does not fully explain the pattern of results. There are some simple rape cases where consent is also not at issue because the defendant, like the stranger in the aggravated case, denies having had intercourse with the victim. But evidence of her sexual history has still been considered so important that its exclusion justifies reversal: for example, by finding it to be relevant to testimony as to the severity of the alleged injury. By the same token, there are cases of aggravated rape where the defendant nonetheless claims consent as a defense and the court still affirms the conviction notwithstanding the exclusion of evidence. In those cases little or no weight is given to the relevance of the evidence of consent; instead, one finds courts emphasizing the brutal nature of the attack or the corroborating proof or the existence of a confession, albeit contested. Of course consent is not the only issue to which sexual history evidence is considered relevant; the woman's (dubious) credibility is always mentioned and often stressed when courts are ordering the admission of such evidence. In the aggravated rape cases where exclusion is upheld, the credibility issue is rarely even mentioned. What explains the cases best is not whether consent is raised as a technical defense, but whether the court sees reason to doubt or suspect the woman. If there is no reason to distrust, there is also no reason to humiliate.

Where there is reason to distrust--where the man is not a stranger and the relationship not inappropriate--the opportunity to humiliate is required as a matter of law.

If a defendant knew of a woman's sexual history, an argument might be made that such knowledge is relevant to determining what he thought at the time of intercourse, whether he believed that she was consenting to his advances. Even in that case one might conclude that the prejudice of the evidence exceeded its very limited probative value. But the admission of evidence of a woman's sexual history was not limited to cases where the defendant himself knew his victim's reputation or history. The defendant lucky enough to find out, albeit later, that his victim was sexually experienced could and would try to hide behind that fact at trial, if she was willing even to proceed to trial. The decision to admit such evidence rested, in the first place, with the trial court. For the appellate courts it represented another opportunity to give explicit meaning to the distinction between the trusted victim of the stranger rape and the suspect victim of simple rape. For many of these courts the requirement of humiliation, like the requirement of resistance, was limited to the latter.
The cautionary instruction is a final example of the institutionalization of the law's distrust of women victims through rules of evidence and procedure. Juries are always told that they must be convinced beyond a reasonable doubt of the defendant's guilt. In rape cases, since the nineteenth century they have also been told, sometimes in Hale's own words, that they must be especially suspicious of the woman victim. In a fairly typical version of the instruction, the jury is told "to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." All women who are forced to have sex therefore have an "emotional involvement" in the event and are not to be totally trusted in their recounting of it. The force of the instruction is, not unintentionally I think, likely to be greatest in those cases where there is some prior "involvement," if not emotion, between the man and the woman.

Each of the rules discussed in this chapter, and particularly the patterns of their application in the appellate courts, can be seen as a response to a man's nightmarish fantasy of being charged with simple rape. The requirement that the woman resist, as strictly applied in the nonstranger cases, provides men the needed notice that sex is unwelcome. The requirement of corroboration, again applied most strictly in the "improbable cases," prevents a simple credibility contest. The requirement of fresh complaint limits the woman's freedom to turn on her former friend or lover or neighbor after she has been spurned or discovers she is pregnant. Even after all of this, the cautionary instruction reminds the jury of the unfair and vulnerable position in which the man finds himself and the suspicion women deserve in such cases.

It is important to understand that this male rape fantasy is not just a nightmare about women. It is also a nightmare about juries, and about the unwillingness or inability of prosecutors and judges to exercise their discretion to dismiss unfounded complaints. For if juries were not distrusted, then they could be expected to recognize the "ambivalent" woman without the corroboration requirement, let alone the resistance requirement; to take into account the absence of a fresh complaint as one factor to be considered in judging her credibility; and certainly to resolve the issues presented without the necessity of a cautionary instruction.

The nightmare is not merely that women are confused and ambivalent to begin with and filled with vengeance and deceit after the fact, but that the passions of the men on the jury (prior to the 1970s it was constitutional to discriminate against women in jury duty) may be so inflamed by the violation of rape that they will rush to judgment. It is "because the crime of rape arouses emotions as do few others," because of "the respect and sympathy naturally felt by any tribunal for a wronged female," and because "public sentiment seems preinclined to believe a man guilty of any illicit sexual offense he may be charged with" that appellate courts and statute writers must perform their watchdog functions.

The male fantasy has never been substantiated by an empirical study. From all we know, the nightmare case is highly unlikely even to be reported to the police, let alone prosecuted; trials which are no more than credibility contests between the victim and the defendant are virtually nonexistent; and juries tend to be biased against the prosecution in rape cases, particularly in simple, non-stranger cases. Convictions in the absence of "aggravating circumstances" are extremely rare.

Far from challenging that bias, common law judges have given it the force of law. By adopting and enforcing the most insulting stereotypes of women victims of simple rapes, they have enshrined distrust of women in the law, legitimated the male fantasy, and ensured that rape trials would indeed be real nightmares--for the women victims.

The rules governing character in sexual assault cases have been substantially clarified and revised in the last few decades. Traditionally, evidence of prior sexual behavior of the victim could be admitted on several grounds. The porosity of the character evidence rules with respect to the prior sexual history of a victim-witness in a sexual assault case allowed defense counsel aggressively to cross-examine prosecuting victim-witnesses on these matters and essentially put them on trial in the manner described by Professor Estrich. This state of affairs tended to discourage many victims of sexual assault from coming forward to report the crime and assist in its prosecution.

In recent years, this sensitive subject matter has been regulated by legislative changes in the Federal Rules of Evidence and by statute and court rules in many states. Rule 412 (originally adopted in 1978) and its numerous state "rape shield law" counterparts severely restricts admissibility of evidence of the prior sexual behavior of a victim of sexual assault or other misconduct. This new rule represents a legislative resolution of some of the issues raised by Professor Estrich, above. Traditionally, evidence of prior sexual assaults by the defendant was subject to exclusion when its only relevance was as evidence of a propensity for sexual misconduct. However, in the mid-1990s, Congress enacted new Rules 413-415 to make evidence of the defendant's prior sexual misconduct expressly admissible in a criminal prosecution or civil action for sexual assault or child molestation.

As you consider the difficult issues raised by this kind of criminal activity and its effective prosecution in the problems and cases which follow, please keep some of the following questions in mind.

How does proof of character in sexual assault cases differ from proof of character under Rules 404-406?

Is there a logical, experiential, or policy justification for treating evidence of the prior conduct of a defendant in a sexual assault case differently from such evidence in other criminal cases? Is evidence rendered admissible by Rules 413-415 subject to exclusion under Rule 403? If so, under what conditions?

When, if ever, should evidence of the prior conduct of a prosecuting witness in a sexual assault case be admitted? Are restrictions on this sort of proof in sexual assault cases based only on considerations of relevance, or do the modern rape-victim shield statutes (such as Rule 412) also create a privilege for the sexual assault victim, similar to other privileges, that operates to exclude possibly relevant evidence? If the rape-victim shield statutes are based on considerations of relevance, whose notion of relevance is incorporated in the statutes -- that of women? men? the average person? reformers? feminists? enlightened" legislators seeking to bar "the information jurors would tend to use to perpetuate stereotyped and prejudiced views about women"?

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