

# Teaching Rape Law

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From the beginning, for me, there was never any question whether I would teach rape as part of my criminal law course. How could I not?

I got my first lessons in the law of rape the summer before I started law school, in the back seat of a Boston police car. The law, the cops explained to me, was very tough on victims, even nice girls who weren't asking for it. They couldn't really advise me whether I should try to pursue the man who raped me or not. Was there anything I'd ever done that I wouldn't want discussed in court? You know these lawyers, said one to the other.

I was flabbergasted. The very notion that I should be afraid of the law! In my ignorance, I believed in the law. I knew that prosecuting a rape case might be difficult, but I believed that in the end, the law punished wrongdoers and protected victims. He should be afraid, not me. I was going to be a lawyer, I told the police. Take me to the station, and let's find the bastard. They took me to the station, but they never found him. Neither of us had our day in court.

When I got to law school that fall, I expected to learn something about rape. It was 1974. Feminists had started talking about rape.<sup>1</sup> It was the only crime whose victims were mostly female, and the only one, as far as I knew, where cops routinely warned victims about what would happen to *them* if the wrongdoer were caught. I wanted to know why. How could it be that "the law," which I thought was the enemy of discrimination, was actually part of the problem?

I didn't find any answers in law school. We spent what seemed an eternity on homicide—a crime that fortunately had touched no one in my class—but no time at all on rape. The topic did arise very peripherally in a civil procedure class, dealing, I think, with privileges. One or two of the men in class held forth at length and with great vigor: they could not understand why rape victims should be entitled to any special protection against vigorous cross-examination into their lives and their pasts. Plainly, these young men had never sat in the

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1. See, e.g., ANDREA MEDEA & KATHLEEN THOMPSON, *AGAINST RAPE* (1974); *NEW YORK RADICAL FEMINISTS, RAPE: A FIRST SOURCEBOOK FOR WOMEN* (Noreen Connell & Cassandra Wilson eds., 1974); Susan Griffin, *Rape: The All-American Crime*, *RAMPARTS*, Sept. 1971, at 26. The next year brought even more. See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); DIANA E. H. RUSSELL, *THE POLITICS OF RAPE* (1975).

back of a police car, trying to figure out how they would feel if every mistake from their past were invoked in a courtroom. In my opinion, the professor was letting them get away with murder, or rape anyway. I raised my hand, something that I never did in law school, but the professor didn't call on me or any of the women. He didn't challenge the men. If there were two sides to the issue, he hardly seemed to realize it. Apparently, he was content that all aspects were being addressed without a single woman speaking. He was wrong.

Seven years later, in 1981, I came back to teach at Harvard. I used the same casebook I had used as a student, the same one Professor Tomkovicz uses.<sup>2</sup> The only rape case in that book was the tall tale of the English sailors who argued that they should not be punished for believing, however foolishly, that the wife of one of their buddies enjoyed having sex while they were holding her down and she was screaming. To my amazement, the court held that a stupid man,<sup>3</sup> who can be guilty of killing,<sup>4</sup> or of adulterating the food supply,<sup>5</sup> could not be found guilty of raping.<sup>6</sup>

So I xeroxed some materials of my own. I found better cases than the drunken sailors, with more sympathetic defendants making more believable claims.<sup>7</sup> I knew that sexism infected the law of rape, although it was hardly as one-sided as much of the early feminist writing suggested. It was true that lawyers and judges, armed with the stereotype of the spiteful, vengeful, lying woman, had fashioned special rules designed to make rape prosecutions more difficult.<sup>8</sup> But it was also true that black men charged with raping white women

2. The text is SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* (5th ed. 1989). See James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 *YALE L.J.* 481 (1992). In those days, the casebook was SANFORD H. KADISH & MONRAD G. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* (3rd ed. 1975).

3. Nouns and pronouns throughout this Essay reflect the fact that most of those who rape are men and most of those who are raped are women.

4. The Model Penal Code, for example, provides for negligence liability for homicide, MODEL PENAL CODE § 210.1 (A.L.I. 1980) (stating that "a person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being") but not for rape. The justification for negligence liability is that it provides an additional motive for individuals "to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct." *Id.* § 2.02 cmt. 4. I have always thought that this justification applied equally to rape. See SUSAN ESTRICH, *REAL RAPE* 97-98 (1987).

5. *United States v. Park*, 421 U.S. 658 (1974) (affirming conviction of grocery chain president who received repeated warnings about rodent infestation, but unreasonably assumed subordinates were attending to the problem).

6. *Regina v. Morgan*, 1976 App. Cas. 182 (appeal from C.A.). While the court held that a rape defendant's belief in a woman's consent need not be "reasonable," it affirmed the defendants' convictions on other grounds.

7. For example, I teach a case in which three men were convicted of raping a woman who had left a party with them and smoked marijuana with them before each man, in turn, had sex with her. She testified to having said no, but did not physically resist the men. Numerous appeals followed the initial convictions. See, e.g., *Commonwealth v. Sherry*, 437 N.E.2d 224 (Mass. 1982); *Commonwealth v. Lefkowitz*, 481 N.E.2d 227 (Mass. App. Ct. 1985). The case is also described in Art Jahnke, *The Jury Said Rape*, *BOSTON MAG.*, Oct. 1981, at 131.

8. The Model Penal Code provisions on rape, for example, adopted in 1962 and praised as "fresh" and "balanced" as recently as 1980, MODEL PENAL CODE, § 213.1 commentary at 306, 303, include requirements unique to rape: a complaint within three months; corroboration of the victim's testimony; and a cautionary

had for decades found the protections of due process illusory: racism trumped sexism when the defendant was a black stranger and the victim a white woman.<sup>9</sup> I thought it was important to discuss these things in a class on criminal law, and not just in the sex discrimination classes taken by a few handfuls of people already interested in the subject. But that was only a starting point. I also wanted to focus on the lines between criminal and noncriminal conduct, and on the question of what mens rea is necessary to constitute a crime. Defining mens rea, in turn, requires addressing the question of what "reasonable" means when we talk about sex, and how men's and women's perspectives on what is reasonable may differ. The classes were, I think, among my best, not because they were explosive (my classes on search and seizure were much more explosive, with black and white students disagreeing rather sharply on how much discretion the police need, and whether they can be trusted to use it fairly), but because I cared so much, and so did so many of my students.

For me, the big issue was whether to tell my students I'd been raped. If you are a young woman teaching 150 students in the first semester of the first year, even now, but particularly a decade ago, you spend a lot of time thinking about how to present yourself in the classroom; how to retain the degree of distance and control necessary to make you and the students comfortable. Besides, there are crazy people out there, as I've learned painfully over the years: a few years after I started teaching, I told the truth about being raped to another first-year section, and after a story appeared in the student newspaper I started getting anonymous calls from a man claiming to be my student and threatening to rape me again. Talk about creating distance between professor and student.

But that first year, I didn't know about all the crazies. I thought that telling my students might help the ones who were also victims. Here I was and if I wasn't ashamed, why should they be? That wasn't my prime motivation, though—I'm a teacher, not a rape counselor. The truth was that I couldn't honestly teach two days on rape without telling my students why I was the only professor at Harvard who thought it was more important than an extra day on the theories of punishment, or more insanity, or covering some federal crimes—topics my colleagues added to the basic course where I added rape.

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instruction to evaluate the victim's testimony 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." *Id.* § 213.6(4)-(5). The Code also grades the severity of the offense based on whether "the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties." *Id.* § 213.1(1). I find the Model Penal Code to be a very valuable teaching tool in almost every area except rape; its provisions on rape are of interest to me as a case study of what has been wrong with the law, and of the fallibility of even the most prestigious legal institute.

9. Between 1930 and 1972, 89% of the men executed for rape in this country were black. Marvin Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in *EXECUTIONS IN AMERICA* 109, 113 (William J. Bowers ed., 1974). Although the death penalty for rape has been held unconstitutional by the Supreme Court, *Coker v. Georgia*, 433 U.S. 584 (1977), one study has found strong evidence that black men convicted of raping white women continue to receive disproportionately harsh penalties for rape. Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 *AM. SOC. REV.* 842 (1980). See generally Jennifer Wiggins, *Rape, Racism, and the Law*, 6 *HARV. WOMEN'S L.J.* 103 (1983).

We all know that we bring ourselves to our teaching. If there is anyone left who thinks himself or herself totally objective, distanced, and singularly intellectual, I'll leave it to others to do the demystifying. Still, there are questions of degree. The biases I bring to the teaching of rape sit at the surface, the hard edges of survival. It is not just that I think rape is important; I also think about it from a certain perspective. You survive rape, but you never leave it behind.

That's no excuse to stack the deck, and I don't think I do. I do my politics, albeit with limited success, outside the classroom, not in it. Besides, I have too much respect for the intelligence of my students to think that a day with me, or even a semester, will really alter their fundamental views. Sometimes students change their minds, but they do that on their own. I just try to make them think.

If I err, it is in the direction of making it harder to accept the simplistic solutions some feminists have put on the table. I don't believe all heterosexual sex is rape.<sup>10</sup> I don't believe mens rea should be irrelevant.<sup>11</sup> What I have been fighting for, over these years, is not to give rape special treatment because it happened to me and to so many others, but rather to stop treating it specially; to get rid of both the rules and the prejudices that have narrowed the scope of the crime far more than the words of the statutes, and have uniquely increased the burdens and obstacles to prosecution.<sup>12</sup>

Certainly, there are plenty of easy cases out there, cases where guilt is clear and where no victim in the class would be offended by the discussion,<sup>13</sup> but I don't teach those cases. Easy cases don't make people think, and besides, in the criminal law, the rules should be structured to protect the innocent (few) and not the guilty (many).

So I don't spend much time on strangers who jump from the bushes and rape women at knife point. That is a terrible crime, but from the vantage point of the law, even in the bad old sexist days, the hardest thing about such cases

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10. For the position that all sex is rape, see, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 646-55 (1983).

11. Many American courts, unlike the English House of Lords in *Regina v. Morgan*, see *supra* text accompanying note 6, have omitted mens rea altogether from their definitions of rape. See, e.g., *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984) ("The legislature, by carefully defining the sex offenses in the criminal code, and by making no reference to a culpable state of mind for rape, clearly indicated that rape compelled by force or threat of force requires no culpable state of mind."); *Commonwealth v. Williams*, 439 A.2d 765, 769 (Pa. Super. Ct. 1982) ("If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by our legislature. . . . We refuse to create such a defense."); *Commonwealth v. Grant*, 464 N.E.2d 33 (Mass. 1984) (holding that intent that intercourse be without consent was not an element of rape).

12. See ESTRICH, *supra* note 4; Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Susan Estrich, *Palm Beach Stories*, LAW & PHIL. (forthcoming 1993).

13. It is in precisely such "easy" cases that even those courts that tended to require corroboration of every element of the crime have easily waived the requirement. See, e.g., *People v. Masse*, 156 N.E.2d 452 (N.Y. 1959) (holding that state law requirement that victim's testimony be supported by "other evidence" of both rape and identity of rapist was met by medical evidence of intercourse and by evidence of defendant's opportunity to commit crime); *People v. Deitsch*, 142 N.E. 670 (N.Y. 1923) (holding that evidence of defendant's presence outside child rape victim's home shortly before rape occurred was sufficient to corroborate child's identification of defendant, but reversing conviction on other grounds).

was finding the man. The rules have long been manipulated in these stranger cases to alleviate the burden on the victim: Who needs corroboration at the point of a knife; who cares about her sexual past when the man jumped from the bushes?<sup>14</sup> In truth, it probably wouldn't have been quite as hard on me as I feared if the man who raped me had been caught, but who knows for sure? The big issue in cases like mine tends to be the accuracy of the woman's identification; if there is a danger, it's that the jury will be too willing to credit the woman's testimony.

I also don't spend much time on acquaintance rape cases where the "friend" burns the woman's chest with a cigarette, and lacerates her vagina with his keys.<sup>15</sup> Such cases don't require us to delve into what "consent" really means, whose perspective on consent should govern, or how to define "force." It's easy, in these cases, to turn down a defendant's request to delve into a victim's sexual past: while most rape shield laws include an exception for patterns of similar conduct by the complainant, I've never seen a case involving a woman with a "pattern" of enjoying cigarette burns and vaginal lacerations.<sup>16</sup>

Hard cases make better classes. I like to teach cases where there are no guns or knives, no lacerated vaginas or burnt breasts. I teach cases about men and women who met in bars<sup>17</sup> or used to date<sup>18</sup> or were platonic college friends.<sup>19</sup> I teach cases about people like us, an unusual experience for most of my criminal law students, who get through the course, as do I, by distancing themselves from both the victims and the defendants in the day's grueling narrative. I teach these cases not to shock, but because they are, academically, at the cutting edge of the law. In putting materials together, and teaching from them, I am looking for the limits and the lines: When does sex become rape; according to whom;

14. *Compare, e.g., Franklin v. United States*, 330 F.2d 205 (D.C. Cir. 1964) (reversing conviction of one alleged assailant in gang rape case, on grounds that victim's identification of him was not corroborated) with *Walker v. United States*, 223 F.2d 613, 617 (D.C. Cir. 1955) (holding that "circumstantial evidence which supports the prosecutrix' story" meets the requirement of corroboration). See generally ESTRICH, *supra* note 4, at 43-44.

15. See, e.g., *Young v. State*, 562 So. 2d 370, 372 (Fla. Dist. Ct. App. 1990).

16. According to the *Young* court:

Unlike the victim's prior sexual encounters, in which there was no evidence of force, torn clothing, or physical injuries, the encounter with Young involved violence. He allegedly raped the victim during their first encounter, held her down, ripped her outer garments and both layers of her undergarments, burned her on the chest and thigh with a cigarette, bit into her left breast, inserted a car key into her vagina, and bruised her entire body. Even if the victim is found to have consented to the "same activity" with Young that she had engaged in with the other men in the group, there is no evidence that she consented to violence or physical abuse in any encounter. Consequently, no pattern exists to justify the admission of the excluded testimony.

*Id.* at 372.

17. *State v. Rusk*, 424 A.2d 720 (Md. 1981) (reversing rape conviction on grounds that defendant's behavior, including a "light choke," did not induce fear sufficient to overcome a normal woman's will to resist).

18. *State v. Alston*, 312 S.E.2d 470 (N.C. 1984) (reversing rape conviction on grounds that sexual intercourse, although against complainant's will, was not achieved by force or threat of force, in case where defendant and complainant had prior violent but consensual relationship).

19. *Commonwealth v. Stockhammer*, 570 N.E.2d 992 (Mass. 1991) (reversing rape conviction on grounds that defendant was denied access to complainant's psychiatric records).

what counts as force; whose definition of consent governs; how much do we really need to know about the accuser and the accused in order to decide who to believe?

I know there's some pressure in classrooms these days to be politically correct—not to sound as unsympathetic as the young men I remember from my law school days. Still, it's my job to create an atmosphere where both sides of the argument are heard. We do a lot of role-playing on rape days. I have always believed that you need to understand the other side's approach as well as they do before you can formulate your own. So I expect the feminists to articulate the defendant's strongest arguments, and those most skeptical of the feminist position to be able prosecutors. I know it's difficult, but that's not an excuse. I spend more time in rape classes arguing the defense perspective than the prosecution's; and if I can do it, so can my students, however passionately they might ultimately disagree.

The year after I first taught rape, I convinced one of my male colleagues—the man who'd taught me criminal law—to teach it as well. He took my materials, substituted his name for mine on the cover sheet, and xeroxed them. A few days before the class, he was visited by a delegation of women students. They had come to complain about the materials. They found the cases too one-sided, they said; why teach such questionable cases, when so many women are clearcut victims? The students were worried about how my male colleague would teach the class, and about its impact on the women in the room who were victims. They had no idea the materials were mine.

The professor stood his ground on the materials, and I don't think he's had much trouble since. His agenda is not really that different from mine, and if he starts with more sympathy than I have for the plight of the men, he tries as hard to be open to the victim's perspective as I do to the defendant's. That is all one can demand, in fairness, of either of us. Most of his students understand that, and appreciate it.

Of course some students, the ones who are victims or perhaps the ones who have been accused, may still find these classes painful. But no one would ever suggest that we should skip homicide in those years when we have students who have been touched by it, or skip insanity because some of our students have fought mental illness, or never mention drunk driving because we're all probably too familiar with that. Why should rape be different? Besides, I think the majority would find it even more painful to learn nothing about rape in law school.

That's not to say all the problems are over. A former colleague of mine told me that only last year he was visited by a similar delegation of students, concerned less about the materials than about how his presentation of them affected some of the women in the class who were victims. I don't know all the details; maybe the women felt stifled in the class discussion; maybe the

professor could have been more sensitive with no loss in pedagogy. But maybe not.

I know many students, and even a few professors, who believe that the women are always right and the men are always wrong; that if she didn't consent fully and voluntarily, it is rape, no matter what she said or did, or what he did or did not realize. Everything about his past should be admitted, and nothing about hers. And that's what they want to hear in class.

This kind of orthodoxy is not only bad educationally but, in the case of rape, it also misses the point. Society is not so orthodox in its views. There is a debate going on in courthouses and prosecutors' offices, and around coffee machines and dinner tables, about whether Mike Tyson was guilty or not, and whether William Kennedy Smith ever should have been prosecuted; about when women should be believed, and what counts as consent. There's a debate going on in America as to what is reasonable when it comes to sex. Turn on the radio and you will hear it. To silence that debate in the classroom is to remove the classroom from reality, and to make ourselves irrelevant. It may be hard for some students, but ultimately the only way to change things—and that's usually the goal of those who find the discussions most difficult—is to confront the issues squarely, not to pretend that they don't exist. Besides, the purpose of education, in my classes anyway, is to prepare our students to participate in the controversies that animate the law, not to provide them with a shelter from reality.

Indeed, given both the importance and the intellectual content of rape law, for me the central question is not why a professor should teach rape, but why he or she would not. I think the only reason *not* to teach rape is the fear that it is so political, so difficult, and so close to the lives of our students that it can't be turned into just another intellectual exercise. To which I say, what a wonderful challenge for a teacher, and for a student.

In my experience, passion makes classes better, not worse. Precisely because so many of us can relate so easily, the struggle for answers takes on greater urgency than the arid intellectual exercise *mens rea* in homicide often seems to be. The pressures on the teacher are surely greater when there is passion in the room: explosiveness is fine, but no one wants a class to actually explode on her. Sharp disagreement and debate is what we strive for, but if it degenerates, and good will is lost, the atmosphere for learning can be destroyed. It is the teacher's job to make sure that the lines are not crossed, that both sides are heard from, that no one is ridiculed, that civility is maintained. I always tell my students that the way to disagree is to make a better argument, and if you really disagree, to make a much better argument. I remind them of that on the days we study rape. Passion means more work for the teacher, but that is what we're paid for, and if the pressures are greater on those days, so are the rewards.

My rape classes are my best not because I'm so smart, but because the subject is so alive. I fear that I say the same things year after year about

voluntary acts and homicide and attempt and complicity. I fear that I hear the same things from students. The notes in the book hardly change. Not so with rape. The questions are harder, the problems are bigger, and everyone's answers keep changing. I'd rather skip *Dudley & Stephens*<sup>20</sup> than skip rape, and I think every one of my students, whether they agree with me on anything else or not, would agree with that.

Most casebooks these days have sections on rape.<sup>21</sup> Most criminal law teachers, I think, use them, and teach the subject, for a day or a week. I hope those who do not now teach rape law will be convinced by Professor Tomkovicz's thoughtful essay in this volume that it is unlikely to be half so difficult or painful as they might fear.

And to those who still are not persuaded, consider this: I can think of no subject of substantive criminal law in greater ferment, no area where the concepts that are at the core of the "general course" come alive so vividly, and none that demonstrates some of the dilemmas of criminalization and just punishment so clearly as the law of rape. The line between what is criminal and what is noncriminal has been shifting, and not painlessly, for the last five years, even though the words of the statutes have not changed at all.<sup>22</sup> Could there be a better case study of the complexities of defining what is reasonable? One that more keenly tests students' understanding of mens rea? Or that more successfully shows mistake of fact as something other than a series of improbable hypotheticals? Consider the possibilities: He met her in a bar, got her to take him home, showed her around, pushed her down on the beach or the bed. Is that how a reasonable man behaves? If he's wrong, is his mistake reasonable? Should he be guilty for being stupid? What if he didn't care what she thought: is that recklessness or just plain churlishness? Is it enough that she said no, and then took her stockings off, and performed oral sex? Is that how a reasonable woman behaves? Do you really take your victim as you find her?

I have found that as our understanding of the law of rape changes, the questions are also changing. When I first started teaching rape, the hard questions were whether and when "no means yes," whether nonconsent meant more than saying no, and whether force required more than a push onto the bed and a heavy caress. In those days, it was possible to argue that both the man and the woman

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20. *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884) (holding that cannibalism by stranded sailors was murder).

21. See, e.g., KADISH & SCHULHOFER, *supra* note 2, at 365-414; JOHN KAPLAN & ROBERT WEISBERG, *CRIMINAL LAW* 1039-71 (1986); ANDRE A. MOENSSENS ET AL., *CASES AND COMMENTS ON CRIMINAL LAW* 600-78 (1992).

22. Most rape statutes were reformed in the 1970's and 1980's, but studies done in the 1980's found that these reforms had little impact on the kinds of cases prosecuted or on conviction rates. See, e.g., Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543 (1980); Kenneth Polk, *Rape Reform and Criminal Justice Processing*, 31 CRIME & DELINQ. 191 (1985). The changes we are seeing now—the fact that cases like *Stockhammer*, 570 N.E.2d 992, and the Tyson case are being prosecuted—seems to me to owe less to decades-old reform than to recent changes in public attitudes.

in a typical acquaintance rape case were telling the truth: that she said no and did not consent, and that he thought he was engaging in consensual intercourse. The question was not just who to believe, but what standard to apply—male or female, objective or subjective—and how to define it. Is the reasonable man the average man, or the man most reasonable women would like to date? And who is the reasonable woman?

Today, the old questions seem a little easier, but there is a new set that is, in many respects, even more difficult. In the William Kennedy Smith trial, for example, the defense lawyers took pains to point out that they were not arguing that no means yes, or that necking constitutes presumptive consent, or even that going to a man's house in the middle of the night entitles him to make any assumptions. Rather, they argued that the complainant said yes.<sup>23</sup>

The Smith defense strategy, I think, reflects an accurate assumption that judges and juries these days are less inclined to accept male conduct that only a few years ago was tolerated as understandably macho. I don't find as many students in my classes these days who believe that a man has the right to ignore the fact that a woman is saying no. And I don't think the reason for this change is that feminists have defined what is "politically correct" in the classroom; I think instead that most of my students, male and female, actually believe that a man should listen to a woman's words, and take her at her word.

This shift in our thinking about the elements of culpability leaves credibility as the only defense game in town. After all, rapes rarely take place in front of witnesses. If no doesn't mean yes, if bruises aren't necessary, and if no unusual force is required, then in many cases there's not going to be much physical evidence to rely on. She gives her version and he gives his. If you are the defense attorney, your job is to convince the jury not to believe what she says—which means that the only way to defend may be to destroy the credibility of the victim.

The key question in many acquaintance rape cases today thus becomes not what counts as rape but rather what we need to know about the victim, and the defendant, in order to decide who is telling the truth. I still teach *State v. Rusk*,<sup>24</sup> the Maryland case in which the intermediate court and the high court split, in different directions, on the questions of whose perspective governs in defining force and consent, and how a reasonable woman behaves when she encounters an aggressive man. But I also teach *Commonwealth v. Stockhammer*,<sup>25</sup> a case involving college classmates and friends in which the

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23. Smith's chief lawyer, Roy Black, made this point when we appeared together on *A Closer Look* (NBC television broadcast, Dec. 12, 1991). See David Margolick, *Smith Lawyers Assail Accuser's Memory*, N.Y. TIMES, Dec. 6, 1991, at A16. See generally Marcia Chambers, *New Tactic: Prosecuting the Victims*, NAT'L L.J., May 6, 1991, at 13.

24. 406 A.2d 624 (Md. Ct. Spec. App. 1979), *rev'd*, 424 A.2d 720 (Md. 1981).

25. 570 N.E.2d 992 (Mass. 1991).

conviction was reversed not on substantive grounds, but rather because the defendant had been denied direct access to the victim's psychiatric records.

It isn't easy to destroy the credibility of an adult woman. She's probably not lying to protect her reputation of virginity. She's less likely than women fifty years ago to be embarrassed that she's ever had sex. So why would a grown woman lie? To put it in the most vulgar terms, and perhaps that is appropriate, most defense attorneys faced with credibility cases set about to prove, or at least to suggest, that the woman is either "a nut or a slut," or both. The question for the students, and for the courts, is when and where to accept that defense; how to balance the defendant's right to present a meaningful inquiry into the victim's credibility (particularly since we've eliminated most of his other defenses) with the victim's right not to be put on trial herself.

It is one thing to exclude evidence of a woman's sexual past or of psychiatric treatment when she has been beaten and burned; it is easy to argue there that admitting such evidence does almost nothing except to deter legitimate prosecutions and to victimize the victim. But it is surely a harder case when there have been no weapons and no bruises, and when the man's liberty depends on convincing a jury not to believe a woman who appears at least superficially credible.<sup>26</sup>

Many of the traditional rules of rape liability were premised on the notion that women lie; Wigmore went so far as to view rape complainants as fundamentally deranged.<sup>27</sup> I don't buy that for a moment nor, I expect, do most of my students. Yet even if only one of a hundred men, or one of a thousand, is falsely accused, the question is still how we can protect that man's right to disprove his guilt. Assume for a moment, I tell my students, that it was you, or your brother, or your boyfriend or your son, who was accused of rape by a casual date with a history of psychiatric problems, or by a woman he met in a bar who had a history of one-night stands. Would you exclude that evidence? What else can the man do to avoid a felony conviction and a ruined life? Where do you draw the line? But if you don't exclude the evidence, will some women as a result become unrapable, at least as a matter of law? That is, will women

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26. In the William Kennedy Smith case, for example, the defense, prior to trial, sought the names and addresses of all mental health professionals who had treated the complainant, along with her complete medical and psychiatric records. In their papers, the defense argued that the woman had a "long-standing psychological disorder" that led her falsely to accuse Mr. Smith, that because of "lingering trauma as a result of having been sexually abused when she was 8 years of age," she had made this false charge, and that she was suffering "the emotional impact of at least two abortions and one miscarriage." She was also alleged to be a man-hater. Timothy Clifford, *Smith Lawyers Press Mental Issue*, NEWSDAY, Aug. 2, 1991, at 17; Mary Jordan, *Smith Lawyer: Accuser Has "Psychological Disorder"*, WASH. POST, Aug. 10, 1991, at A1. The defense requests were denied, *Judge Sticks with Smith Rape Trial*, CHI. TRIB., Aug. 28, 1991, § 1, at 11, and Smith's ultimate acquittal obviously eliminated the occasion for further review.

27. 3A JOHN H. WIGMORE, EVIDENCE § 924a, at 736 (Chadbourn rev. ed. 1970) ("[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 . . . mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.").

who have histories of mental instability or of “promiscuity” ever be able to convince juries who know those histories that they really were raped?<sup>28</sup>

Similar issues arise with respect to the man’s credibility. The first question many people asked when Anita Hill charged that Clarence Thomas had harassed her was whether there were other women who had been similarly mistreated.<sup>29</sup> The first significant ruling in the Smith case, indeed the decisive ruling, was the judge’s pretrial decision to exclude the testimony of three other women who claimed that they had been sexually abused by the defendant.<sup>30</sup> If the testimony of only one woman cannot be believed—unless she is a Sunday school teacher, camera in hand, as Desiree Washington was, and the defendant is a black man who has made a host of inconsistent statements, as Mike Tyson did<sup>31</sup>—is it fair to exclude the testimony of the other women? And if the testimony is not excluded, do we risk convicting a defendant for being a bad man, indeed being a rapist, rather than committing the particular act charged?

One answer is to say that we need symmetry: exclude all the evidence about both of them. That’s the approach the judge followed in the William Kennedy Smith case. On the surface, it is neat and appealing. The only problem is that it’s a false symmetry that is being enforced.<sup>32</sup> After all, evidence that a man has abused other women is much more probative of rape than evidence that a woman has had consensual sex with other men is probative of consent. Most women have had sexual experiences, and unless those experiences fall into some kind of unusual pattern, the mere fact that a woman has had lovers tells us almost nothing about whether she consented on the particular occasion that she is charging as rape. But won’t we all look at a defendant differently if three other women have also come forward to say they were abused? The danger with such evidence is not that it proves so little, but that it may prove too much. Symmetry won’t get you out of this hole, at least not in my classroom.

Thus even if most students can agree these days that no means no, and that force can be established if you push a woman down, there’s very little agreement about what we need to know about her or him before deciding whether she in fact said yes or no, and whether he actually pushed her down or just lay down with her. The consensus on what counts as rape is more apparent than real. These days, society’s continued ambivalence towards acquaintance rape is increasingly

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28. To be sure, the discussion of these issues raises evidentiary rules in a course on substantive criminal law. But I think it’s important for students to see that changes in substantive standards may have evidentiary consequences.

29. The United States Senate was interested in the answer to this question, too, and considered hearing testimony from another woman who claimed similar treatment by Thomas. Richard L. Berke, *Thomas Accuser Tells Hearing of Obscene Talk and Advances; Judge Complains of ‘Lynching,’* N.Y. TIMES, Oct. 12, 1991, at 1, 9.

30. David Margolick, *Why Jury in Smith Case Never Heard From 3 Other Women*, N.Y. TIMES, Dec. 13, 1992, at B14.

31. E. R. Shipp, *Tyson Found Guilty on 3 Counts As Indianapolis Rape Trial Ends*, N.Y. TIMES, Feb. 11, 1992, at A1; *Tyson’s Accuser Is Identified*, N.Y. TIMES, Feb. 14, 1992, at B19.

32. See Estrich, *Palm Beach Stories*, *supra* note 12.

being expressed in evidentiary rules and standards of credibility<sup>33</sup> rather than in the definitions of force and consent. The questions have shifted; answering them is no easier.

Teaching rape is certainly a challenge for the professor and the students, but it's the best kind of challenge: a subject that is academically and personally alive, where the debate doesn't have to be fashioned just for a class session, forced upon students rolling their eyes and wondering why it matters. Rape is a subject where almost all of us can bring our own experiences to bear, but teaching rape is no encounter session, at least in my class. These are difficult intellectual questions, requiring reasoned arguments; I try to settle for nothing less, from myself and my students. Maybe it's easier to teach the hard issues involved in rape cases, and to demand intellectual rigor from those arguing on both sides, if you're a woman and a victim to boot. Certainly in eleven years no one has attacked my sensitivity to the feelings of victims. But I think we do ourselves, our students, and our enterprise a grave disservice if we allow the forces of conformity on either the left or the right to chill us in doing our jobs, or frighten us from even trying. Our job is to teach what is significant in our fields. In criminal law, rape is significant, and worth our attention.

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33. A related problem arises, I think, in the consistency that juries may require of acquaintance rape victims before crediting their accounts. It is entirely fair for a defense attorney to seek to exploit inconsistencies in the complainant's testimony; it is not fair, however, for juries to hold women victims of acquaintance rape to higher standards of consistency than other victims of other crimes. And anecdotally, at least, there is reason for concern. *See, e.g.,* E.R. Shipp, *Bearing Witness to the Unbearable*, N.Y. TIMES, July 28, 1991, § 4, at 1 (discussing the highly publicized acquittal of four St. John's University students tried for sexual assault, and the jury's focus on inconsistencies in the woman's testimony about the exact sequence of events).