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The Privacy Rights of Rape Victims in the Media and the Law, Panel Discussion

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PANEL DISCUSSION

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SIR Matthew Hale, who was Lord Chief Justice of the King's Bench in England, once wrote an opinion in a rape case which has been paraphrased in courtrooms and in living rooms almost ever since. According to Justice Hale, rape is an accusation that is so easy for a woman to make and so difficult for a man to defend against that it must be examined with more caution than any other crime.[1]

Unfortunately, Justice Hale wrote that opinion in 1671. And yet, the extra caution that Justice Hale required to support the testimony of a rape victim became in the laws of this country something that was known as the corroboration requirement.[2] The corroboration requirement remained a part of our laws for three centuries and was eliminated only recently from our legal system.

I cannot help but frame this issue in a somewhat personal perspective. I graduated from law school in 1972 and joined the Manhattan District Attorney's office that year. At that time, there were no sex crimes prosecutors or sex crimes prosecution units anywhere in the country. In fact, in 1971, although more than 2000 rapes were reported to the New York City police, only eighteen men were convicted of crimes of sexual assault in that year.

The reason for such a small number of convictions was due to the corroboration requirement. This requirement was still in effect when I joined the Manhattan District Attorney's office. The corroboration requirement mandated that the rape victim prove three elements of her case by independent evidence. First, the victims had to provide independent evidence identifying their attacker. Victims often experienced difficulty proving this element because unlike many crimes, like muggings and bank robberies, that occur in broad daylight and are witnessed by a number of people, sexual assaults, on the other hand, rarely occur in such surroundings. Second, there had to be independent evidence that the defendant used force during the attack. A weapon recovered at the crime scene or an injury to the victim could suffice. This evidence was used to prove that the victim had been assaulted. And third, there had to be evidence of the sexual nature of the attack, usually in the form of seminal fluid. This left open the problem that if the sexual act had not

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1. *See* Louis A. Trosch, Jr., Note, State v. Strickland: *Evening the Odds in Rape Trials! North Carolina Allows Expert Testimony on Post Traumatic Stress Disorder to Disprove Victim Consent*, 69 N.C. L. Rev. 1624, 1624 n.2 (1991) (quoting 1 M. Hale, History of the Pleas of the Crown 634 (1847)).

2. *See* People v. Linzy, 286 N.E.2d 440, 441-42 (N.Y. 1972).

been completed, there was no way to prove that the crime was of a sexual nature.

The existence of the corroboration requirement made it virtually impossible for the state to prosecute rapists. Whether past legislation governing crimes of sexual violence was drafted in reaction to the prevailing public attitudes existing at the time about the crime, or whether these public attitudes were formed and reinforced by the laws and the legal mandates, it is clear that rape and other sexual assaults were treated differently from any other category of crime within the criminal justice system.

Correspondingly, victims of sexual assault also have been treated differently for centuries. When I started in 1972 at the Manhattan District Attorney's office, a woman who was robbed at gunpoint by an assailant caught three weeks later without a weapon and identified in a lineup was considered legally competent to testify to the armed robbery because of the corroborating circumstances. Yet, if the same man at the same time had raped her and there was no corroboration of those elements, she could not testify about the sexual assault.

Rape has been the only category of crime requiring corroboration. It was not eliminated as a requirement in New York State until 1974.[3] Consider, however, that one could convict someone of murder on circumstantial evidence alone.

Also consider that victims of sexual assault have always been treated differently. It is the only crime that is generally viewed as victim-precipitated, occurring because the victim in some way allowed the crime to occur. Rape victims have always been stigmatized for their behavior, and for their participation or victimization in this type of crime.

I believe that we as a society have made progress in our response to rape victims. Our progress, however, has been extraordinarily slow and has occurred in only some segments of society. Moreover, this progress has occurred only in regard to certain kinds of victims of sexual assault cases. Professor Benedict accurately outlines in her book eight factors that frequently cause the public and the press to blame rape victims.[4] It is still quite commonplace for the community to look with suspicion on victims who are known to their assailants, commonly referred to as "date rape" cases, or to victims who are attacked in particular occasions at particular times of day and night, or to victims who do not offer resistance to their offenders.

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3. *See* People v. Salas, 358 N.Y.S.2d 322, 324 (N.Y. Crim. Ct. 1974)

4. *See* Helen Benedict, Virgin or Vamp: How the Press Covers Sex Crimes 19 (1992). These factors are (1) whether the victim knows the assailant; (2) whether a weapon was used in the attack; (3) whether the victim and assailant are of the same race; (4) whether the victim and assailant are of the same social class; (5) whether the victim and assailant are of the same ethnic group; (6) whether the victim is young; (7) whether the victim is attractive; and (8) whether the victim lived her life consistent with traditional notions of the female at home with family or children. *See id.*

Until we can respond to more survivors with more dignity, I believe one small measure of respect we can and must offer to rape victims is their privacy. Those who choose to report the crime should not be named by the media. As Mr. Gartner stated, it seems clear that every broadcaster and every publication has the absolute right to publish the victim's name. Therefore, in my opinion, it is a matter of decency to ask that those names be withheld.

I agree with Geneva Overholser, the editor of the *Des Moines Register*, who encourages women who have been raped to identify themselves and put their faces to these crimes that have been hidden away for so long.[5] Each victim, however, must come to terms with her own experience in her own way. It should be the right of each victim to decide if and when she will become identifiable to the public beyond the courtroom, if she even chooses to go that far. For some women, it is an important step in their recovery to be publicly identified as a rape victim. For others, however, it will never be acceptable to take this step.

Before hearing Mr. Gartner's remarks today, I was aware of four media justifications for printing the names of rape victims. Professor Benedict refers to these in greater detail in her book.[6] One justification, derived from remarks made by Mr. Gartner around the time of the victim naming in the Palm Beach rape, is that the media is not in the business of keeping secrets.[7] Obviously, this idea was a relatively recent change of policy for the media who, for a long time, abided by a gentleman's agreement not to name rape victims.

A second justification is that names lend victims credibility.[8] I find this argument implausible. I do not understand how a story would obtain more credibility when people who do not know the victim, and who live outside the community where the victim lives, hear or read the victim's name. There are occasionally humorous moments in this business. We have a courthouse reporter who has been with one of our local tabloids for forty years and who just celebrated his fortieth anniversary. At every press conference after a press release in our office, this reporter raises his hand and says, "please describe the victim," a question that has been facetiously translated as "what color was the victim's hair"? The resulting newspaper accounts of these crimes frequently refer to the raven-haired woman who was attacked, or to the blonde who was coming out of her office building late at night. Interestingly, there is no other category of crime in which the physical description of the victim plays

5. *See* Catharine Reeve, *Taking Back Her Life: Public Disclosure Helps One Victim of Rape Become a Survivor*, Chi. Trib., Feb. 23, 1992, at CN 3. According to Overholser, "[o]ver the long haul, society would be better served if rape victims were treated the same way as adult victims of other crimes. . . . We are participating in the stigma of rape by treating this crime differently." James Warren, *Naming Rape Victims: A Debate for Media*, Chi. Trib., Apr. 18, 1991, at C5.

6. *See* Benedict, *supra* note 4, at 252-54.

7. *See id.* at 252-53.

8. *See id.* at 253.

any part in the case. Therefore, I do not understand how naming the victim in rape cases gives the story more credibility.

A third justification, advanced by Alan Dershowitz, is that naming the accused but not the accuser unfairly prejudices the accused.[9] Although I agree with this argument in principle, I do not think that naming the accuser rectifies this inequity. Mr. Gartner said that there was never a debate at NBC News about naming the accused in the Palm Beach rape. I feel, however, that it was outrageous for the media to name the accused before he had even been formally charged with the commission of a crime. Accordingly, I do not think that naming the victim is an appropriate answer to this problem.

The fourth justification is that naming the victim is a way of destigmatizing the victim.[10] I think that it would be wonderful to live in such an accepting society. But I also think that until we reach that point, it is each individual victim's right to decide when, and by whom, she should be identified.

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9. *See id.*
10. *See id.* at 253-54.