

## Cornell Law Library Scholarship@Cornell Law: A Digital Repository

---

Cornell Law Faculty Publications

Faculty Scholarship

---

4-1-1994

# Assuming Facts Not In Evidence: A Response to Russell M. Coombs, Reforming New Jersey Evidence Law on Fresh Complaint of Rape

Sherry F. Colb

*Cornell Law School*, [sfc44@cornell.edu](mailto:sfc44@cornell.edu)

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Criminal Procedure Commons](#), and the [Evidence Commons](#)

---

### Recommended Citation

Colb, Sherry F., "Assuming Facts Not In Evidence: A Response to Russell M. Coombs, Reforming New Jersey Evidence Law on Fresh Complaint of Rape" (1994). *Cornell Law Faculty Publications*. Paper 616.  
<http://scholarship.law.cornell.edu/facpub/616>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## ASSUMING FACTS NOT IN EVIDENCE

### A Response to Russell M. Coombs, *Reforming New Jersey Evidence Law on Fresh Complaint of Rape*

Sherry F. Colb\*

Professor Coombs, in an articulate and thoughtful article, urges that when a witness at a criminal trial testifies that she was raped by the defendant, evidence that she was silent about the rape immediately after it allegedly occurred is probative of the truth or falsity of her accusation. Professor Coombs claims that such evidence is “often logically relevant” to the alleged victim’s veracity and to the substantive question of rape, because, respectively, “her period of silence about the incident may be inconsistent with her testimony at trial that it was a sexual assault,” and because “her period of silence may tend to show that there was no sexual assault.”<sup>1</sup> Professor Coombs proposes several legal reforms on the basis of this factual claim.<sup>2</sup> I will not here dispute the propriety of his specific reform proposals, given the factual premise that delay evidence is relevant. I will instead focus my discussion on disputing Professor Coombs’s central factual premise that delay evidence<sup>3</sup> is often useful information in an assessment of whether or not a complainant has indeed been raped.

Professor Coombs’s vision of the relevance of delay evidence closely parallels the traditional “prior inconsistent statement” doctrine.<sup>4</sup>

---

\* Assistant Professor of Law, Rutgers School of Law—Camden; A.B., Columbia College; J.D., Harvard Law School. The author expresses appreciation for the helpful comments and suggestions of Carl T. Bogus, Michael C. Dorf, Martha A. Fineman, Ann E. Freedman, James S. Liebman, Nancy J. Moore, and H. Richard Uviller. She also gratefully acknowledges the research assistance of M. Kim Alexander and Stuart D. Rudoler.

1. Russell M. Coombs, *Reforming New Jersey Evidence Law on Fresh Complaint of Rape*, 25 RUTGERS L.J. 699, 711 (1994).

2. *Id.* at 701.

3. I will use the phrase “delay evidence” to refer to evidence that a rape complainant did not speak to another about the attack immediately after it allegedly took place.

4. New Jersey law provides that a statement is admissible if “previously made by a person who is a witness at a hearing, provided it would have been admissible if made by

Indeed, Professor Coombs draws the analogy himself.<sup>5</sup> Therefore, to understand the nature of Professor Coombs's factual contentions, it is important first to examine the process by which prior inconsistent statements discredit and substantively disprove the testimony of a witness.

The introduction of a testifying witness's prior inconsistent statement supports two inferences. The first inference is that the witness is not credible. The second is that the out-of-court statement is true and the current testimony is false. The prior inconsistent statement, in other words, is probative of the witness's credibility as well as the affirmative truth of his earlier statement. Consider the following example: a witness testifies that on some stated occasion, the light at a given intersection was green. On cross-examination, the opponent's attorney brings out the witness's prior statement that the light was actually red. The opponent's attorney can argue that "this witness can't make up his mind and therefore should not be believed" (the credibility inference), or that "this witness said the light was red shortly after the accident and that statement should be taken as affirmative evidence that the light was indeed red" (the affirmative truth inference).

Professor Coombs's arguments amount to a claim that the failure of a complaining rape victim to have told someone about the rape immediately after it allegedly occurred tends to discredit her subsequent testimony and affirmatively demonstrate that no rape occurred, in the same fashion as the prior inconsistent statement about the color of the light does in the above example.<sup>6</sup> Professor Coombs's underlying assumption is that silence is behavior that tends to reveal the belief of

---

him while testifying and the statement [i]s inconsistent with his testimony at the hearing." N.J. R. EVID. 63(1)(a).

5. Coombs, *supra* note 1, at 723-24.

6. Because the initial failure to complain is not intended as an assertion, of course, the delay evidence does not pose the hearsay problems that accompany prior statements. As Professor Coombs points out:

In virtually every case of delayed reporting [of rape], the circumstances create a strong inference that the alleged victim did not intend her silence to assert anything about the incident. . . . A more apt conclusion is that she intended not to communicate any information, for the time being. In such a case, her silence was not a statement, so it is not hearsay.

Coombs, *supra* note 1, at 734.

the silent that no rape has just occurred.<sup>7</sup> This is how the behavior is purported to contradict any later statement that a rape did occur.

Professor Coombs would surely not contend that silence always has the relevance of a prior inconsistent statement. For example, in the above case of the light at the intersection, the witness's failure to say that the light was green immediately upon seeing it would not appear inconsistent with his later assertion in court that the light was green. It would sound strange for the opponent's attorney to cross-examine the witness by saying, "Isn't it true that you were silent upon seeing the light?" The reason this sounds peculiar is that at any intersection with a functioning traffic light, the light observed by the witness will either be red, yellow, or green. Silence is no more likely to mean "the light is red" than it is to mean "the light is green." Silence, therefore, is not necessarily informative in the way that a prior inconsistent statement is.

In light of the fact that silence is often uninformative, we see that Professor Coombs is making a very particular claim about silence immediately following an alleged sexual assault. He thinks that unlike silence at an intersection, this silence usually tells us something useful about what the silent person believes. Specifically, it tells us that she believes she has not just been raped. In other words, Professor Coombs suggests that unlike at the intersection, we would *expect* an immediate complaint from someone who has just been raped.<sup>8</sup> Therefore, if an individual does not complain that she has just been raped, her silence provides evidence that she does not believe she has been raped, and that therefore she has not been raped.<sup>9</sup>

---

7. Professor Coombs concedes that the prior inconsistent statement is more probative than silence. He argues, however, that the distinction is only one of degree. Coombs, *supra* note 1, at 724.

8. In explaining why a juror might find delay evidence discrediting of a rape complainant, Professor Coombs asserts that "[j]urors evaluate credibility and draw inferences mainly on the basis of their opinions of what people *would* do in given situations." Coombs, *supra* note 1, at 741 n.164.

9. We see this assumption reflected in Professor Coombs's explanation of the meaning of delay in a hypothetical case in which we already know that an assault has occurred. In such a case, where, presumably, only the severity of the assault is at issue, "delay evidence would appear incriminating because it might show, for example, that the rape was so aggravated that the victim was too traumatized to speak or too fearful that the defendant would retaliate if she accused him." Coombs, *supra* note 1, at 711 n.68. According to Professor Coombs, then, silence is such an unusual or unexpected response to rape that if an actual rape victim were silent, this would suggest an assault of uncharacteristic brutality, rather than a typical sexual assault, in which a victim would presumably have complained. Unlike the aggravated rape victim, the typical rape victim

If Professor Coombs is correct in his assumption that silence ordinarily reflects a belief that no rape has occurred, then a failure to complain immediately tells us two things. First, her failure to report the rape immediately tells us that the complainant is not credible: she initially acts as though she were not raped (by being silent) and then later acts as though she were raped (by asserting on the witness stand that she was raped). This vacillation leads the fact-finder to doubt the value of this witness's testimony. Second, the alleged victim's failure to complain immediately tells us that the complainant was not raped: a person who was raped would have complained right away, and this alleged victim did not. Therefore, she was not raped. Once again, the premise is the following: silence is, to a greater or lesser extent, inconsistent with a rape having just occurred. The fact of initial silence tends to remove our witness from the category of people who have been raped and to place her into the category of false accusers.

Under New Jersey law, "[r]elevant evidence" means evidence having any tendency in reason to prove any material fact."<sup>10</sup> According to the New Jersey Supreme Court, "[i]n determining relevance, the inquiry should focus upon whether the proffer 'renders the desired inference more probable than it would be without the evidence.'"<sup>11</sup> Probability, then, is the touchstone of relevance. Probability, in turn, depends upon the existence of empirical facts in the world. Therefore, Professor Coombs must do more than assume that silence after an alleged rape is inconsistent with a rape having just occurred; he must appeal to empirical facts about what rape victims actually do.

Professor Coombs refuses to consider such facts. He claims that "[p]olicymakers should rely on logic, common sense, and lay knowledge of human behavior, unless and until scientific research clearly contradicts these more subjective sources of knowledge."<sup>12</sup> Though this formula may sound unobjectionable, it requires a serious consideration of the scientific or empirical research contradicting one's beliefs. Professor Coombs, however, does not engage in any such

---

is not, under this approach, so traumatized and fearful that she would remain silent after an attack. If Professor Coombs is incorrect in his assumptions about typical rape victims, including his belief that they tend to complain immediately, then the silence of a known rape victim would not tell us very much at all about the severity of a particular attack. It would not, in other words, be "incriminating," as he claims.

10. N.J. R. EVID. 1(2).

11. *State v. Davis*, 96 N.J. 611, 619, 477 A.2d 308, 312 (1984) (quoting *State v. Deatore*, 70 N.J. 100, 116, 358 A.2d 163, 172 (1976)).

12. Coombs, *supra* note 1, at 720.

serious consideration but instead demonstrates an antipathy to facts. This antipathy is apparent in his repeated invocation of the phrase "logical relevancy."<sup>13</sup> He appears to believe that relevance is a matter of pure logic, prior to experience, much in the way that Descartes believed he could prove the existence of God by pure introspection. Accordingly, Professor Coombs nowhere claims to have encountered or studied the behavior of rape victims and thereby to have discovered that such victims tend to complain immediately. He instead derives his intuitions about how to distinguish true rape victims from false ones exclusively by resort to his "logic," his "common sense," and his untested beliefs about human behavior.

In response to other commentators' resort to factual data about rape victims, Professor Coombs erects a straw man argument. He criticizes one commentator because her "analysis . . . assumes defendants' guilt by limiting her analysis of the relevancy of such defense evidence [of delay] to the behavior of actual rape victims."<sup>14</sup> He adds that "[m]any scientific materials on sexual abuse are also of limited value as a basis for policymaking about the admissibility of evidence of guilt or even of credibility, because they too are based only on studies of persons assumed to be truly reporting a sexual assault."<sup>15</sup> Professor Coombs implies here that observations about actual rape victims are not pertinent to evaluating evidence at a rape trial unless one is assuming that the alleged victim was actually raped. Since the purpose of the trial is to determine whether or not she was raped, the argument goes, the scientific materials on sexual abuse have no bearing on the relevance of delay evidence.

The flaw in this argument is that considering the behavior of actual rape victims does not presume the guilt of the defendant. It would be unjust and illegal to assume that the defendant is guilty; the defendant is, on the contrary, presumed innocent until proven guilty. In order, however, to interpret the complaining witness's silence as relevant to the defendant's guilt, one must have a hypothesis about how an actual victim would have behaved. In simple terms, if all rape victims complained immediately, the fact of silence would conclusively prove the defendant's innocence. If no rape victims complained immediately,

---

13. *See, e.g., id.* at 711, 712, 713, 714.

14. *Id.* at 712 n.70.

15. *Id.*

the fact of silence would prove nothing.<sup>16</sup> Therefore, when Professor Coombs says that delay tends to be inconsistent with a rape having occurred, he is saying that true victims would tend to complain immediately. Ideally, one's hypothesis about what rape victims typically do after having been raped has some grounding in reality. Professor Coombs's hypothesis, however, proves surprisingly resistant to reality.

During the hearing of the New Jersey Supreme Court's subcommittee on Criminal Practice and Rules of Evidence, one member of the subcommittee asked Professor Coombs whether defense evidence would be irrelevant if a study proved that false accusations of rape are made as promptly on average as true accusations of rape. Professor Coombs responds in his article that "it is artificial to pose a question of relevancy so abstractly."<sup>17</sup> Perhaps it is, but this is Professor Coombs's chosen level of abstraction. Though he argues in this part of his article that "[t]he relevancy of this evidence does not depend on whether false rape accusations are made as promptly as true ones, but on a much more complex, contextual question, framed only in the context of a particular case,"<sup>18</sup> he claims elsewhere that "[t]he fairest, most reliable, and most democratic way to resolve a dispute over . . . the reasons for any delay, is to admit all the evidence, allow argument on the competing inferences, and let a jury decide what really happened."<sup>19</sup> Since only relevant evidence may be admitted for a jury's consideration, Professor Coombs implies here that delay evidence is virtually always relevant. He adds that although the strength of the two types of delay inferences—that the witness is lying and that she was not raped—may depend on the particularized circumstances of a given case,

---

16. For illustration, consider the following example. A prosecutor wishes to introduce into evidence testimony that the defendant, accused of child molestation, watches *The Flintstones*. The defense objects on relevance grounds. To determine whether the evidence is relevant, the judge will form a hypothesis about what actual molesters do. Do they or do they not watch *The Flintstones* more than other adults? To consider the behavior of actual molesters is not tantamount to assuming the guilt of the defendant in this example. Instead, it forms the basis of the following inquiry: does defendant's propensity for watching *The Flintstones* make him resemble molesters more than he otherwise would? Similarly, if a judge attempting to calculate the relevance of delay evidence considers her observations about what actual victims do, this consideration does not assume that an alleged victim is an actual victim. On the contrary, it represents an effort to find out whether the delay of a particular witness in reporting rape distinguishes her from actual rape victims and thereby renders her less likely to be what she claims to be.

17. Coombs, *supra* note 1, at 721.

18. *Id.*

19. *Id.* at 731-32.

“[t]hese factors *seldom* justify finding a lack of logical relevancy.”<sup>20</sup> The latter claim means that if we abstract away all other facts of a particular rape trial, Professor Coombs believes that silence following an alleged rape almost always provides relevant evidence that there was no rape. Relevant evidence here means evidence that helps the fact-finder take the witness out of the category of people who have actually been raped (and behave like people who have actually been raped) and place her into the category of people who have fabricated a rape story (and behave like people who have fabricated a rape story). If a hypothetical study showing that fabricated victims complain as quickly as real victims would not disabuse Professor Coombs of his relevance claims, it is difficult to imagine that any facts would.

It pays to pause here and examine why Professor Coombs might believe, as a matter of logic and common sense, that silence tends to be inconsistent with a rape having just occurred. When something upsetting happens to a person, we expect that the natural human response is to complain. Human beings are social creatures who understand their experiences largely by sharing them with others. While unimportant events (such as seeing a green light) generally go unreported, we might have an intuition that traumatic events, particularly those that violate the criminal law, would be likely to impel a complaint to a friend or to the police. As Professor Coombs explains in a footnote:

[I]t is reasonable to expect any victim of crime, especially violent crime, to inform not only family or friends but also law enforcement authorities, a doctor, and perhaps others. . . . It is not sexist to apply this expectation

---

20. *Id.* at 713 (emphasis added). Indeed, Professor Coombs has difficulty even imagining a case in which delay by an adult victim would not be relevant. The example he provides of such a case illustrates just how uncommon a legitimate refusal to admit evidence of delay would be, under his approach:

The adult complainant first spoke of the alleged rape after twenty-four hours. During that period she was distraught and avoided all contact with persons in whom she ordinarily confided. When she did speak of the alleged crime, the complaint was consistent with her trial testimony, and was not the result of coercive or unduly suggestive questions.

*Id.* at 722. Even under these facts, Professor Coombs is only willing to concede that “*perhaps* a judge could correctly rule that no reasonable juror could infer that the alleged victim’s day of silence cast any doubt on her testimony or on the charge that she was raped.” *Id.* (emphasis added).



to rape as to other crimes, or to apply it to female victims of crime as to male ones.<sup>21</sup>

This expectation is indeed neither malevolent nor sexist. However, it does underestimate the countervailing forces that operate on a rape victim—in contrast to victims of other crimes—to suppress the otherwise common inclination to talk about one's pain.

In an April 1992 study entitled *Rape in America*, the Crime Victims Research and Treatment Center of the Medical University of South Carolina interviewed a nationally representative sample of 4008 women about sexual assault.<sup>22</sup> The following statistics emerged from this study: 71% of sexual assault victims were concerned about their families knowing they had been sexually assaulted; 69% were concerned about people thinking the assault was their fault or that they were responsible; and 68% were concerned about people outside their families knowing they had been assaulted.<sup>23</sup> We begin to see from these data that extending our expectations about the behavior of crime victims generally to victims of sexual assault is not necessarily warranted.<sup>24</sup>

---

21. *Id.* at 740 n.164.

22. NATIONAL VICTIM CENTER & CRIME VICTIMS RESEARCH AND TREATMENT CENTER, *RAPE IN AMERICA: A REPORT TO THE NATION* (1992) [hereinafter *RAPE IN AMERICA*]. Sexual assault was determined by the following questions:

[1.] Has a man or boy ever made you have sex by using force or threatening to harm you or someone close to you? Just so there is no mistake, by sex we mean putting a penis in your vagina.

[2.] Has anyone ever made you have oral sex by force or threat of harm? Just so there is no mistake, by oral sex, we mean that a man or boy put his penis in your mouth or someone penetrated your vagina or anus with his mouth or tongue.

[3.] Has anyone ever made you have anal sex by force or threat of harm?

[4.] Has anyone ever put a finger or object in your vagina or anus against your will by using force or threat?

*Id.* at 15.

23. In this portion of the study, sexual assault victims "were asked about the extent to which they were concerned about issues specific to their personal rape experiences." *Id.* at 4. The percentages represent the number of victims who responded that they were "at least somewhat or extremely concerned" about these issues incidental to their assaults. *Id.*

24. The difference between rape and other crimes was brought home to me quite dramatically on a day which, ironically, coincided with my work on this response to Professor Coombs. During a seminar I taught during the Spring 1994 semester, a student asked whether she could make an announcement before distributing her paper to the other students in the class. After receiving my permission, the student asked that the readers not share the information in her paper with anyone outside the seminar. She had never told anyone, she continued, including her parents, about the events described in the paper. The

Additional data provide more specific facts illustrating that Professor Coombs's otherwise understandable intuitions about the behavior of rape victims are empirically false. The *Rape in America* report disclosed that only 16% of sexual assault victims ever report the assault to the police.<sup>25</sup> The Senate Judiciary Committee found an even lower reporting rate of 7%, compared with a reporting rate of 53% for robberies.<sup>26</sup>

Moreover, data from other sources show that "rape is rarely reported to anyone, and women who do report the crime often wait days, weeks, months, or even years before confiding in a family member, a friend or a rape crisis counselor, much less going to the police."<sup>27</sup> Of those few who actually go to the police, a full quarter do not go within twenty-four hours.<sup>28</sup>

Finally, it is worth noting that the United States Supreme Court has recognized and based part of a decision on a finding that one category of rape victims, those who are married to their attackers, rarely discuss the

---

paper was on the subject of acquaintance rape, and the student had decided to write in the introductory paragraphs about her own experience of being raped several years earlier. I asked the student whether she would mind my relating these events in my response to Professor Coombs, and she said she would not, on condition of anonymity. It would certainly strain credulity to claim that a robbery victim might have similarly waited years to reveal to anyone that a robbery had taken place and that, upon revealing the information, would ask that listeners please keep the revelation a secret.

This anecdote, of course, does not itself prove that delay evidence is irrelevant. It does, however, provide an illustration of what is otherwise discussed in the text.

25. RAPE IN AMERICA, *supra* note 22, at 6 (citing the findings of The National Women's Study).

26. Lynn H. Schafran, *Women in the Criminal Justice System: Writing and Reading about Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1014 (1993) (citing MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., 1ST SESS., VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 28 (Comm. Print 1991)). This contrast is particularly significant in addressing Professor Coombs's analogy between delay evidence in robbery cases and in rape cases. Coombs, *supra* note 1, at 714-16.

27. Schafran, *supra* note 26, at 1013 (emphasis omitted). In support of this assertion, Professor Schafran provides the following useful citations:

ELAINE HILBERMAN, *THE RAPE VICTIM* 33-40 (1976) (discussing many reactions to rape, one of which is shock, accounting for many rape victims who do not immediately report crime); Jean Wolfe & Virginia Baker, *Characteristics of Imprisoned Rapists and Circumstances of the Rape*, in RAPE AND SEXUAL ASSAULT 265 (acknowledging rape as most underreported crime). See generally Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 935-36 (1975) (indicating that victims of crime do not report it because of belief that nothing would be done).

*Id.* at 1013 n.139.

28. RAPE IN AMERICA, *supra* note 22, at 5.

attack with others, rarely file a police report, and may remain psychologically unable to discuss or report the assault for several years after the incident.<sup>29</sup>

What does this all mean for the witness who testifies that she was raped, but who does not complain immediately? It means that she resembles the vast majority of true rape victims. Therefore, an argument to the jury that she is demonstrably different from actual rape victims—by virtue of her delay—would be misleading. If jurors share Professor Coombs's common sense intuitions about rape, then we can expect they will indeed be misled by delay evidence. To say this is not to deny that "jurors today are well-educated,"<sup>30</sup> but simply to acknowledge what ignorance of the facts can do to even the brightest and most educated people. Because a true rape victim is typically unwilling to talk about her experience, the fact-finder's inference that "if she were raped, she would have complained" is misguided and therefore inappropriately prejudicial to the prosecution.<sup>31</sup>

---

29. *Planned Parenthood v. Casey*, 505 U.S. \_\_\_, 112 S. Ct. 2791, 2827 (1992).

30. Coombs, *supra* note 1, at 731.

31. Though delay evidence is not, without more, relevant to either credibility or the substantive question of rape, there will sometimes be cases in which the timing of a rape complaint will be relevant. For example, this would be so in a case in which the defense independently establishes a plausible motive for the alleged victim to lie, and the timing of the alleged victim's first complaint coincides with that motive. The plot of *To Kill A Mockingbird* provides an illustration. In this novel, there was evidence that the alleged victim's father had beaten his daughter for "tempting" the defendant, a black man, and that the daughter only then brought a charge of rape against the defendant. See HARPER LEE, *TO KILL A MOCKINGBIRD* 189, 197-200 (1960). The daughter's initial silence would not have been relevant in and of itself, since rape victims are typically silent after being raped. See *supra* notes 22-29 and accompanying text. However, the fact that her first complaint took place after her father apparently blackmailed her into complaining is probative of the witness's credibility.

To see that the coincidence of motive-to-lie, on the one hand, and timing, on the other, is relevant independent of any "delay" in reporting, consider the following two hypothetical cases. Case 1: On December 9, John Doe has a fight with his daughter's friend, Defendant. That night, Mr. Doe threatens to beat his daughter unless she accuses her friend of rape. On the morning of December 10, the daughter goes to the police and complains that she was raped by Defendant 10 minutes earlier. There is here no "delay" between the alleged rape and the complaint. Nonetheless, the complaint followed a motive to lie, and this coincidence is relevant. Now consider Case 2: The daughter goes to the police on December 10 and complains that she was raped by Defendant on December 5. On December 19, the father fights with Defendant and then, unaware of his daughter's complaint, threatens his daughter on that same day. In this case, there is a five-day delay between the alleged rape and the complaint, but it is irrelevant, because both the alleged rape and the complaint precede the motive to fabricate a claim.

Though the empirical irrelevance of delay should be enough to exclude the evidence,<sup>32</sup> there are policy reasons to do so as well. At this time, most rape victims do not go to the police within twenty-four hours. Just as they do not want to report to police officers, they are reluctant to talk to friends and family. We know from psychologists that the reasons for this, though varied, stem in part from the stigma attaching to victims that makes rape a virtually unique crime.<sup>33</sup> If this initial silence can be used to discredit a later complaint, then we send the following message to the typical rape victim (who has not complained yet): any forthcoming complaint will be discredited by your initial silence, and the jury will be asked to infer that you are lying and that no rape occurred.

Admitting a defendant's proffered delay evidence would discourage rape victims who have failed to report the crime within twenty-four hours, the overwhelming majority, from ever reporting. Admitting such evidence would thus reinforce the current state of underreporting: nationally, 95% of rape victims who do not go to the police within twenty-four hours do not go at all.<sup>34</sup> One potential consequence of tolerating this overwhelming failure to report is rampant recidivism. In a study of unincarcerated sex offenders, 126 admitted offenders had

---

32. In other words, delay evidence should generally be inadmissible under New Jersey Rule of Evidence 1(2) because it fails the threshold requirement of relevancy without further reference to a special "fresh complaint" doctrine of "legal relevancy." Though evidence that an alleged victim did not complain immediately is irrelevant and therefore ought to be excluded from evidence, it does not necessarily follow that evidence that an alleged victim *did* complain immediately is also irrelevant and inadmissible. First, while an alleged victim's silence is ambiguous and is not likely to mean that she was not raped, a statement to the effect that she was raped is not similarly ambiguous. *See infra* note 36 (discussing in greater detail the difference between silence and statements in evidence law). A potential obstacle to admitting such a statement is the hearsay rule. One could argue, however, that such evidence qualifies as an excited utterance, if the complaint is indeed prompt. Moreover, admission of the evidence may be defended as providing a rebuttal to the unjustified inference that the alleged victim delayed and was therefore lying. This argument, of course, raises the problem of admitting irrelevant evidence to rebut unfounded inferences that are premised upon unsupported assumptions. I will not consider in greater detail the strengths and weaknesses of these arguments but wish only to note here that there are principled grounds for distinguishing between evidence of "fresh complaint," on the one hand, and evidence of "the lack of fresh complaint," on the other.

33. *See* Schafran, *supra* note 26, at 1015.

34. *See* RAPE IN AMERICA, *supra* note 22, at 6. If 16% of victims report to the police, and 4% report after 24 hours, this means that of those who do not report within 24 hours—88% of victims—.84/.88, or 95%, will never report.

committed a total of 907 rapes involving 882 different victims. The average number of different victims per rapist was seven.<sup>35</sup>

In light of all the facts refuting the relevance of delay evidence and demonstrating the potential for increased underreporting, it is incumbent upon a responsible policymaker proposing the admissibility of delay evidence to support his claim with something more than a citation of "common sense."<sup>36</sup> Some of Professor Coombs's common-sense intuitions do not withstand the empirical information we have about rape victims. To ignore this empirical information, as he wishes to do, is misguided as to the facts and, consequently, as to the law as well.

---

35. *Id.*

36. Professor Coombs defends his resort to common sense in place of empirical data by noting that "we also lack data proving that rape victims make fewer inconsistent statements [than false accusers]." Coombs, *supra* note 1, at 723. Since prior inconsistent statements are deemed probative without resort to data, so then should delay evidence, the argument goes.

A major flaw in the analogy between statements and silence concerns the difference between their respective roles in our system of justice. An essential premise of that system is the existence of a positive correlation between what people say, on the one hand, and the truth, on the other. Even physical evidence is authenticated by live witness testimony. To credit such testimony, it is necessary to believe that statements are relevant to their truth value. Indeed, our willingness to allow people to be convicted of crimes based on testimony reveals an overwhelming faith in the proposition that if an individual said "X," that fact makes it more likely that X is true than if an individual did not say "X." The vacillation of an individual, in saying "X" and then "not-X," reduces the probative value of each statement for the same reason that either statement had probative value in the first place: each statement, in a system that depends on statements to discern the truth, reduces the likelihood that its opposite is true. Since X and not-X cannot both be true, the witness who has uttered them both is not a consistently accurate speaker.

The probative value of silence is subject to much greater doubt. Our legal system is not premised on a correlation between silence and truth (or falsity). Therefore, the relevance, if any, of silence, depends very much on the type of case in question. As we saw in the example of the traffic light, silence is obviously irrelevant in many types of cases. This simply cannot be said of statements.

Moreover, there is no controversy surrounding the relevance of prior inconsistent statements. If there were such a controversy, then common sense would be an inadequate justification for admissibility there as well. In contrast to intuitions about prior inconsistent statements, Professor Coombs's intuition that delay evidence is relevant is highly controversial. *See supra* notes 22-29 and accompanying text.

Of course, if prior inconsistent statements in some contexts were so typical among those who testify truthfully at trial as to be completely uninformative, then such statements would appropriately be excluded as irrelevant, common sense intuitions notwithstanding. However, in spite of the fact that some true rape victims might give false or inconsistent statements, *see* Coombs, *supra* note 1, at 723, I know of no claim that former statements by rape complainants are entirely untrustworthy or irrelevant, in the way that silence upon seeing a traffic light is.

Professor Coombs would thus elevate the adage “justice delayed is justice denied” to a novel role in evidence jurisprudence.<sup>37</sup>

---

37. *Cf. Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting) (arguing that the majority’s decision “elevates the adage ‘misery loves company’ to a novel role in Fourth Amendment jurisprudence”).