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## People v. Rincon-Pineda: Rape Trials Depart the Seventeenth Century--Farewell to Lord Hale

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**PEOPLE v. RINCON-PINEDA: RAPE TRIALS  
DEPART THE SEVENTEENTH CENTURY—  
FAREWELL TO LORD HALE**

In the recent case of *People v. Rincon-Pineda*<sup>1</sup> the California Supreme Court affirmed the trial judge's refusal to give one of defendant's jury instructions which had previously been held to be mandatory in sexual offense cases.<sup>2</sup> This decision undercut the rationale for the three-hundred-year belief that the defendant in a sexual offense case requires greater protection than other criminal defendants. The rejected instruction provides:

A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent.

Therefore, the law requires that you examine the testimony of the female person named in the information with caution.<sup>3</sup>

This language constitutes the rationale used by courts of other jurisdictions, including Oklahoma, to justify treating sexual offense cases in a manner which not only affords the defendant greater protection than other classes of criminal defendants, but also subjects the complaining witness to a stricter examination than that given to other types of witnesses. This note examines the traditional judicial treatment of sexual offense cases in light of the California Supreme Court's decision in *People v. Rincon-Pineda* to determine if this treatment has any contemporary factual or legal justification.

**A. THE CASE OF RINCON-PINEDA**

Factually, *Rincon-Pineda* involved a victim sleeping alone in her apartment who, fearing for her life, submitted to a dozen acts of sexual assault by the defendant. Upon her positive identification of defendant,

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1. *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975).

2. *People v. Merriam*, 66 Cal. 2d 390, 426 P.2d 161, 58 Cal. Rptr. 1 (1967); *People v. Nye*, 38 Cal. 2d 34, 237 P.2d 1 (1951).

3. CALJIC No. 10.22 (Cal. Jury Instrs., Crim. (3d ed. 1970)), quoted in *People v. Rincon-Pineda*, 14 Cal. 3d at —, 538 P.2d at 252, 123 Cal. Rptr. at 124.

he was arrested and charged with rape,<sup>4</sup> oral copulation<sup>5</sup> and attempted sodomy.<sup>6</sup> The trial judge instructed the jury that it could interpret from the evidence that the victim was a woman of unchaste character.<sup>7</sup> However, believing that California Jury Instruction 10.22 was demeaning to the victim, the judge refused to give it at the second trial. The defendant was convicted<sup>8</sup> and appealed on the sole basis of the trial judge's failure to give instruction 10.22.

In affirming the defendant's conviction the California Supreme Court held it was error for the trial judge to refuse the instruction, but that such error was not prejudicial. Cataloguing the other protections afforded the defendant,<sup>9</sup> the court found that the language of instruction 10.22 was inappropriate in any context, disapproved its further use, and stated that cases to the contrary should no longer be followed.

### *Historical Findings of the Court*

The language of instruction 10.22 originated in the seventeenth century with the writings of Sir Matthew Hale, Lord Chief Justice of the Court of Kings' Bench from 1671 to 1676.<sup>10</sup> His technical discussion of the felony of rape touched upon admission of evidence from infants and in this context he pronounced:

But in both these cases, whether the infant be sworn or not, it is necessary to render their evidence credible, that there should be concurrent evidence to make out the fact, and not to ground a conviction singly upon such an accusation with or without oath of an infant.

For in many cases there may be reason to admit such witnesses to be heard, in cases especially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are the triers of the credit of the

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4. CAL. PENAL CODE § 261 (West 1970).

5. CAL. PENAL CODE § 288a (West 1970).

6. CAL. PENAL CODE §§ 286, 664 (West 1970).

7. CALJIC No. 10.06 (Cal. Jury Instr., Crim. (3d ed. 1970)) *quoted in* People v. Rincon-Pineda, 14 Cal. 3d at —, 538 P.2d at 251-52, 123 Cal. Rptr. at 124.

8. There were two trials of defendant. The second trial differed from the first in that the victim was more specific about the illumination allowing her to recognize defendant, she was represented by counsel and she refused to answer questions about her past sexual conduct. The first trial ended in a hung jury.

9. These protections are judicial comments on the evidence and jury instructions. The court held that credibility instructions applicable to all witnesses were to be given henceforth in all trials where the victim testifies, that instructions on weighing conflicting testimony were to be given henceforth where no corroborating evidence is required, and that a new instruction should be used in every case where testimony conflicts.

10. 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN (1st Amer. ed. 1847) [hereinafter cited as HALE].

witnesses as well as the truth of fact; it is one thing, whether a witness be admissible to be heard, another thing, whether they are to be believed when heard.

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that *it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.*<sup>11</sup>

Hale then recounted two trials which occurred while he sat on the bench. Both cases involved young girls whose accusations of rape proved to be completely fabricated.<sup>12</sup> He concluded the chapter:

I only mention these instances that we may be the more cautious upon trials of offenses of this nature, wherein the court and the jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the accused thereof, by the confident testimony sometimes of malicious and false witnesses.<sup>13</sup>

An evolutionary process transformed these words into instruction 10.22 which was to be given sua sponte by the trial court.<sup>14</sup> Hale's reference was to uncorroborated infant witnesses in rape trials.<sup>15</sup> The California instruction became mandatory in all sex offenses regardless of the age of the prosecutrix or the amount of corroboration.<sup>16</sup>

Contrasting the state of seventeenth century criminal procedure with modern due process the court in *Rincon-Pineda* demonstrated that Hale's caution was reasonable during his time. In the seventeenth century the accused was expected to address the jury<sup>17</sup> without benefit of counsel.<sup>18</sup> He was not presumed innocent, and to convict him it was not necessary to prove his guilt beyond a reasonable doubt.<sup>19</sup> Furthermore, his rights to present witnesses in his defense and to compel their

11. *Id.* at 634 (emphasis added).

12. *Id.* at 634-35.

13. *Id.* at 635.

14. *People v. Nye*, 38 Cal. 2d 34, 237 P.2d 1 (1951).

15. See text accompanying note 11 *supra*.

16. *People v. Merriam*, 66 Cal. 2d 390, 426 P.2d 161, 58 Cal. Rptr. 1 (1967); *People v. Nye*, 38 Cal. 2d 34, 237 P.2d 1 (1951); *People v. Putnam*, 20 Cal. 2d 885, 129 P.2d 367 (1942).

17. 1 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 440 (1883) [hereinafter cited as STEPHEN].

18. 2 J. WIGMORE, *WIGMORE ON EVIDENCE* § 575, at 684 (3d ed. 1940) [hereinafter cited as WIGMORE].

19. See *Coffin v. United States*, 156 U.S. 432, 454-59 (1895).

attendance at trial were barely nascent.<sup>20</sup> Therefore, the defendant was "often pitiable, even if he ha[d] a good case."<sup>21</sup> However, the court reasoned that today Hale's caution is "superfluous and capricious"<sup>22</sup> since the accused has all the safeguards of constitutional due process. He is entitled to be represented by competent counsel,<sup>23</sup> to present witnesses and compel their attendance at trial,<sup>24</sup> and to be presumed innocent unless proven guilty beyond a reasonable doubt.<sup>25</sup>

Hale himself did not view every allegation of rape a potential fabrication; he pointed out the desirability of leaving the question of witness credibility to the jury.<sup>26</sup> He considered the best test of credibility to be the facts and circumstances surrounding the case.<sup>27</sup> The court found nothing in Hale's writings to suggest that victims of sexual offense are presumptively entitled to less credence than victims of other crimes.<sup>28</sup>

### *Empirical Findings of the Court*

By examining empirical data, the court concluded that the charge of rape is not so easily made and difficult to defend against as to warrant a mandatory cautionary instruction in the nature of jury instruction 10.22.<sup>29</sup> In supporting its conclusion that rape is not a charge easily made, the court cited statistics showing that rape is a grossly underreported crime due to strong deterrents operating on the victim.<sup>30</sup> These deterrents include the emotional trauma of the investigatory process, the fear of subsequent humiliation and publicity, demeaning trial defense tactics, and the police process of deciding whether the rape was "victim-precipitated."<sup>31</sup> Of those rapes reported, police determine an estimated

20. WIGMORE, *supra* note 18, at 685.

21. STEPHEN, *supra* note 17, at 442.

22. 14 Cal. 3d at —, 538 P.2d at 257, 123 Cal. Rptr. at 129.

23. Gideon v. Wainwright, 372 U.S. 335 (1963).

24. U.S. CONST. amend. VI.

25. See *In re Winship*, 397 U.S. 358, 361-64 (1970); *Coffin v. United States*, 156 U.S. 432, 453-56 (1895).

26. HALE, *supra* note 10, at 634.

27. *Id.* at 633.

28. 14 Cal. 3d at —, 538 P.2d at 256, 123 Cal. Rptr. at 128.

29. *Id.* at —, 538 P.2d at 257-60, 123 Cal. Rptr. at 129-32.

30. *Id.* at —, 538 P.2d at 258, 123 Cal. Rptr. at 130. See, e.g., M. AMIR, PATTERNS IN FORCIBLE RAPE 27-28 (1971); FBI UNIFORM CRIME REP. 15 (1973) [hereinafter cited as FBI REPORTS]; Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 921 (1973); Note, *The Rape Corroboration Requirement: Repeal not Reform*, 81 YALE L. J. 1365, 1374-75 (1972).

31. 14 Cal. 3d at —, 538 P.2d at 258, 123 Cal. Rptr. at 130. See, e.g., M. AMIR, PATTERNS IN FORCIBLE RAPE 29 (1971); Amir, *Victim Precipitated Forcible Rape*, 58 J. CRIM. L.C. & P.S. 493 (1967); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 348-51 (1973).

15 percent<sup>32</sup> to 29 percent<sup>33</sup> are unfounded and the investigation terminates.<sup>34</sup> Even after arrest, California reports indicate that the police released 28 percent of the alleged rapists.<sup>35</sup>

Furthermore, the court found that once a rape charge gets to trial it is no more difficult to defend than other charges.<sup>36</sup> FBI crime reports show that of the four violent crimes, forcible rape has the highest rate of acquittal or dismissal and the lowest rate of conviction for the offense charged.<sup>37</sup> California state statistics reflect this trend with the rate of acquittal in rape cases being exceeded only by that of bookmaking cases.<sup>38</sup>

A leading analysis of jury behavior further supports the court's conclusion that it is unlikely the accused will be convicted capriciously by an inflamed jury.<sup>39</sup> Indeed, juries often acquit or find guilty of a lesser offense a rapist who is clearly guilty.<sup>40</sup> The jury redefines the crime in terms of its notions of assumption of risk, especially where the prosecutrix and defendant are not strangers or where there is no evidence of violence to her person.<sup>41</sup> The jury closely scrutinizes the victim and, where it finds contributory behavior on her part, tends to be lenient with the accused even though physical harm to the victim is es-

32. FBI REPORTS, *supra* note 30, at 15.

33. M. AMIR, PATTERNS IN FORCIBLE RAPE 29 (1971).

34. 14 Cal. 3d at —, 538 P.2d at 259, 123 Cal. Rptr. at 131.

35. Testimony of David G. Miller, senior crime studies analyst, Bureau of Crim. Stat., Cal. Dept. of Justice, in Transcript of the Hearing before the Assem. Crim. Justice Com. and the Cal. Commission on the Status of Women (Los Angeles, Oct. 18, 1973) as cited in *Rincon-Pineda*, 14 Cal. 3d at —, 538 P.2d at 259, 123 Cal. Rptr. at 131.

36. 14 Cal. 3d at —, 538 P.2d at 257, 123 Cal. Rptr. at 129.

37. FBI REPORTS, *supra* note 30, at 116. Table 18 is reproduced below.

1973 DISPOSITION OF PERSONS FORMALLY CHARGED BY THE POLICE  
(3,090 CITIES) 4 VIOLENT CRIMES

Offense	No. of Persons Charged	Percent Offense Charged	Percent Guilty Lesser Offense	Percent Acquitted or Dismissed
TOTAL	2,141,347	58.8	4.9	17.9
Murder-				
Manslaughter	3,234	39.7	19.9	29.1
Forcible Rape	4,657	28.5	13.0	36.3
Robbery	23,075	29.6	9.9	25.3
Aggravated Assault	38,756	33.6	13.6	35.9

38. CAL. DEP'T OF JUSTICE, CRIME AND DELINQUENCY IN CAL., 1972, Adult Prosecution reference tables (1973), table 9, at 16, *cited in* *People v. Rincon-Pineda*, 14 Cal. 3d at —, 538 P.2d at 258, 123 Cal. Rptr. at 130.

39. H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966) [hereinafter cited as KALVEN & ZEISEL].

40. *Id.* at 254.

41. *Id.* at 252.

tablished.<sup>42</sup> More expert evidence is presented in these cases than in burglary and drunk driving trials.<sup>43</sup> In none of the cases included in the jury study did the prosecution rely solely upon the testimony of the prosecutrix.<sup>44</sup> The court also found that proof by the state in rape cases is more difficult than in other types of cases.<sup>45</sup> A rape trial is no more likely to turn on a credibility contest between the victim and the accused than is a case of nonsexual assault.<sup>46</sup>

On the basis of these findings, the court disapproved its instruction. Cautioning trial judges not to use Hale's language, the court stated that such language "now performs no just function, since criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges, and those who make such accusations should be deemed no more suspect in credibility than any other class of complainants."<sup>47</sup>

Implicit in the opinion is the court's effort to elevate the victim's status in the eyes of the law. The court noted, for example, that the victim felt that she was the defendant at the trial.<sup>48</sup> Although the court could have considered other areas, such as the attitudes of trial judges toward rape victims<sup>49</sup> and the myths endemic in society regarding the crime of rape,<sup>50</sup> its findings are borne out in a major statistical study<sup>51</sup> as well as a major historical study<sup>52</sup> released since publication of the court's opinion.

## B. THE EFFECT OF RINCON-PINEDA ON APPELLATE REVIEW

Sir Matthew Hale's words have not only been the basis of the mandatory jury instruction used in California and other jurisdictions<sup>53</sup>

42. *Id.* at 249, 251.

43. KALVEN & ZEISEL, *supra* note 39, at 143, *cited in* People v. Rincon-Pineda, 14 Cal. 3d at —, 538 P.2d at 259, 123 Cal. Rptr. at 131.

44. *Id.* table 39, at 141, *interpreted in* People v. Rincon-Pineda, 14 Cal. 3d at —, 538 P.2d at 259, 123 Cal. Rptr. at 131.

45. 14 Cal. 3d at —, 538 P.2d at 259, 123 Cal. Rptr. at 131.

46. KALVEN & ZEISEL, *supra* note 39, tables 40-41, at 142-43, *interpreted in* People v. Rincon-Pineda, 14 Cal. 3d at —, 538 P.2d at 259, 123 Cal. Rptr. at 131.

47. 14 Cal. 3d at —, 538 P.2d at 260, 123 Cal. Rptr. at 132.

48. 14 Cal. 3d at —, 538 P.2d at 252, 123 Cal. Rptr. at 124.

49. Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303 (1974).

50. *See, e.g.*, S. BROWNMILLER, AGAINST OUR WILL, MEN, WOMEN AND RAPE (1975); Comment, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36, 50-51 (1974).

51. *See* Tulsa Daily World, Oct. 27, 1975, § A, at 1, col. 2.

52. *See* S. BROWNMILLER, AGAINST OUR WILL, MEN, WOMEN AND RAPE (1975).

53. *E.g.* State v. Dodson, 67 N.M. 146, 353 P.2d 364 (1960) (refusal of instruction is reversible error); State v. Yates, 239 Ore. 596, 399 P.2d 161 (1965) (instruction may

but they have also been the basis of required corroboration of the prosecutrix' testimony<sup>54</sup> and the rationale behind exceptional appellate scrutiny of rape convictions.<sup>55</sup> In light of the persuasive findings of the California court which undercut the rationale embodied in Hale's words, the inquiry of this note shifts to the question of whether Hale's rationale can justify exceptional appellate scrutiny applied to sexual offense convictions. Oklahoma is used as a representative jurisdiction since it practices this exceptional scrutiny and its low rate of convictions and high rate of acquittals in forcible rape cases mirror that of the nation.<sup>56</sup>

Rape in Oklahoma is a capital offense with a five year minimum sentence.<sup>57</sup> Neither corroboration of the prosecutrix' testimony, violence to the person of the victim, nor emission are statutorily required for a conviction.<sup>58</sup> As a practical matter, however, some of these items are usually present in successful convictions<sup>59</sup> and are lacking in rever-

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be given at the discretion of the court). In *State v. Feddersen*, 230 N.W.2d 510, 515 (Iowa 1975) the court disapproved the instruction, saying it arbitrarily singles out rape victims as a class whose credibility is suspect. "In eliminating the requirement of corroboration of a rape victim's testimony, the legislature rejected this concept as a discredited anachronism. We now do likewise."

54. *E.g.* *Black v. State*, 120 Ga. 433, 47 S.E. 180 (1904). The corroboration requirement has been thoroughly discussed in other articles and will be noted here only as it applies to exceptional appellate scrutiny. *See, e.g.*, Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

55. *E.g.* *People v. Kazmierczyk*, 357 Ill. 592, 192 N.E. 657 (1934); *People v. Mixer*, 8 Ill. App. 3d 531, 290 N.E.2d 705 (1972); *Carmicle v. Commonwealth*, 452 S.W.2d 378 (Ky. Ct. App. 1970); *Ables v. State*, 331 P.2d 954 (Okla. Crim. App. 1958).

56. Oklahoma Bureau of Investigation, Uniform Crime Reports Div., 1974 State Total, Annual Return of Persons Charged. The statistics below are accurate but may not be complete according to Uniform Crime Reports Project Director David Murdock in letter and conversations with author. The letter is on file at the University of Tulsa College of Law Library.

#### 1974 Oklahoma Disposition of 4 Violent Crimes

Offense	Percent		Percent Adults Guilty		Percent Acquitted
	Determined Unfounded	Total No. Charged	As Charged	Less. Offense	
Murder-Manslaughter	28	180	28.9	11.6	26.1
Forcible Rape	37	211	18.5	4.7	33.6
Robbery	5	726	40.6	3.7	26.4
Assault, Felonious	4	1,442	42.1	6.1	29.6

57. OKLA. STAT. tit. 21, § 1115 (1971). (1965 Amendment lowered the previous minimum sentence of 15 years.)

58. OKLA. STAT. tit. 21, § 1111 (1971).

59. *See, e.g.* *Maxey v. State*, 526 P.2d 951 (Okla. Crim. App. 1974) (live sperm present); *Saylor v. State*, 506 P.2d 589 (Okla. Crim. App. 1973) (prosecutrix was corroborated); *Holmes v. State*, 505 P.2d 192 (Okla. Crim. App. 1973) (prosecutrix was corroborated); *Hurd v. State*, 502 P.2d 1276 (Okla. Crim. App. 1972) (sperm present); *Goodson v. State*, 354 P.2d 472 (Okla. Crim. App. 1960) (pregnancy).



sals.<sup>60</sup> All criminal convictions may be appealed.<sup>61</sup> As a general rule, the appellate standard of review is a sufficiency of the evidence test; where evidence is legally sufficient to submit to the jury, although conflicting, the court will not go beyond its scope of review and delve into the facts.<sup>62</sup> The credibility of witnesses and the weight and consideration to be given their testimony are the exclusive province of the jury.<sup>63</sup> Ostensibly, this is true even though the crime has occurred under evanescent circumstances; the testimony of one witness will suffice for conviction.<sup>64</sup> Testimony by noncriminal witnesses, including informers, presents no exceptional credibility problem on appeal.<sup>65</sup>

However, the general rule for appellate scope of review has a well-recognized exception which is applied in appeals from convictions of sexual offenses.<sup>66</sup> This class of convictions is given a

careful examination of the whole record to [the] end that it may justify [the] sentence imposed notwithstanding [the] general rule that, where there is any evidence to support [the] verdict or where evidence is conflicting, [the] appellate court will not examine [the] record to ascertain or determine [the] weight of such evidence, and [the] verdict approved by [the] trial judge will be permitted to stand.<sup>67</sup>

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60. *Louis v. State*, 92 Okla. Crim. 156, 222 P.2d 160 (1950) (no evidence corroborative of infant such as blood and pain from ruptured hymen, prosecutrix was not nervous and upset, prosecutrix reported act to her brother and not to her mother); *Howard v. State*, 79 Okla. Crim. 247, 153 P.2d 831 (1944) (physical condition of prosecutrix did not show force claimed, pajamas not torn, contradiction in prosecutrix' testimony); *DeWitt v. State*, 79 Okla. Crim. 136, 152 P.2d 284 (1944) (insufficient corroboration); *Sowers v. Territory*, 6 Okla. 436, 50 P. 257 (1897) (prosecutrix was not corroborated).

61. OKLA. STAT. tit. 22, § 1051 (1971).

62. *Racy v. State*, 520 P.2d 375 (Okla. Crim. App. 1974) (illegal delivery and distribution of marijuana); *Wiebe v. State*, 473 P.2d 348 (Okla. Crim. App. 1970) (forgery); *Harris v. State*, 448 P.2d 296 (Okla. Crim. App. 1968) (manslaughter); *Townley v. State*, 355 P.2d 420 (Okla. Crim. App. 1959) (assault with a dangerous weapon).

63. *Caudill v. State*, 532 P.2d 63 (Okla. Crim. App. 1975) (defrauding innkeeper); *Jones v. State*, 468 P.2d 805 (Okla. Crim. App. 1970) (burglary).

64. *White v. State*, 518 P.2d 1112 (Okla. Crim. App. 1974) (burglary—only witness was complaining witness); *Quarrels v. State*, 502 P.2d 1293 (Okla. Crim. App. 1972) (robbery—only witness was complaining witness); *Davis v. State*, 490 P.2d 775 (Okla. Crim. App. 1971) (assault with a deadly weapon with intent to kill—only witness was prosecuting witness).

65. *Spriggs v. State*, 511 P.2d 1139 (Okla. Crim. App. 1973) (informer was a known drug user).

66. *Johnson v. State*, 380 P.2d 284 (Okla. Crim. App. 1963) (sodomy); *Stout v. State*, 96 Okla. Crim. 88, 248 P.2d 1059 (1952) (indecent exposure); *Maxwell v. State*, 78 Okla. Crim. 328, 148 P.2d 214 (1944) (rape); *Cape v. State*, 61 Okla. Crim. 173, 66 P.2d 959 (1937) (assault with intent to rape). Each of these cases received close scrutiny of the entire record.

67. *Goodson v. State*, 354 P.2d 472, 474 (Okla. Crim. App. 1960) quoting from

The prosecutrix' testimony must be "clear and convincing, and where it bears upon its face inherent evidence of improbability, is contradictory, inconsistent or unreasonable, it will be held as insufficient . . . ."<sup>68</sup> The Court of Criminal Appeals of Oklahoma has established a policy of scrutinizing the quantity as well as the quality of the evidence in rape appeals, looking to evidentiary weight when it would not do so in other classes of appeals.<sup>69</sup>

The modern trend is to apply this policy selectively. Some recent cases have totally ignored the exception and appear to use the same standard of review for rape convictions as for other appeals.<sup>70</sup> However, *Meeks v. State*<sup>71</sup> demonstrates that the court still considers the exception viable. The *Meeks* court stated clearly that the weight of the evidence was the exclusive province of the jury and that the court would not interfere but still exercised its prerogative to peruse the victim's credibility by attaching significance to the fact that her testimony was corroborated.<sup>72</sup>

In 1909, the Court of Criminal Appeals in *Reeves v. Territory*,<sup>73</sup> declared that the prosecutrix was not an accomplice and that, henceforth, her testimony need not be corroborated. Lack of corroboration was to be considered by the trial court along with other facts and circumstances in advising the jury to acquit or in considering a motion for a new trial. The late Judge Barefoot, in his widely cited opinion, *Weston v. State*,<sup>74</sup> drew not upon *Reeves* but upon an earlier supreme court decision, *Sowers v. Territory*.<sup>75</sup> In *Sowers* the court quoted Hale in justifying an exception to the ordinary rules of appellate procedure in rape cases.<sup>76</sup> The prosecutrix in *Sowers* was seventeen years old and not an infant whose credibility is subject to attack merely on the basis of age. Thus, on the basis of Hale's caution, a questionable exception was incorporated into Oklahoma appellate review of rape

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Louis v. State, 92 Okla. Crim. 156, 157, 222 P.2d 160, 161 (court syllabus par. 4) (1950).

68. Maxwell v. State, 78 Okla. Crim. 328, 334-35, 148 P.2d 214, 217 (1944).

69. Ables v. State, 331 P.2d 954, 961 (Okla. Crim. App. 1958). "Ordinarily, this court is not to judge the weight of the evidence . . . . But, on cases of this character, an exception to the general rule is recognized . . . ."

70. Carpenter v. State, 530 P.2d 1049 (Okla. Crim. App. 1975); Jones v. State, 527 P.2d 169 (Okla. Crim. App. 1974).

71. Meeks v. State, 540 P.2d 584 (Okla. Crim. App. 1975).

72. *Id.* at 587-88. The court noted that the adult prosecutrix was corroborated by a police officer.

73. 2 Okla. Crim. 351, 359-62, 101 P. 1039, 1042 (1909).

74. 77 Okla. Crim. 51, 138 P.2d 553 (1943).

75. 6 Okla. 436, 50 P. 257 (1897).

76. *Id.* at 438-39, 50 P. at 258.

convictions. *Weston* applied the exception in statutory rape.<sup>77</sup> Later cases, relying on both *Sowers* and *Weston*, have applied the exception to adult and infant prosecutrices indiscriminately.<sup>78</sup>

The Oklahoma policy of exceptional appellate scrutiny is founded on fundamental error. Hale's words, relevant in his time, no longer apply in the light of modern criminal due process. In view of the low rate of reporting, arrest, and conviction of forcible rape in Oklahoma, rape is clearly not a charge easily made and difficult to defend. Indeed, Judge Barefoot's analysis in *Weston* that the appellate scrutiny rule had a reason based on the fifteen year minimum and death maximum sentence no longer applies.<sup>79</sup> The accused does not need the protection of exceptional scrutiny to defend himself adequately. He has the safeguards of general credibility instructions,<sup>80</sup> directed verdict, new trial, and appeal. Exceptional scrutiny will continue to be afforded the rare appeal where constitutional questions or racial issues are raised.<sup>81</sup>

The victim in a rape case is placed in a position similar to that of an accomplice.<sup>82</sup> Close scrutiny of her testimony as a routine matter suggests that she is presumptively less credible than other witnesses. Her testimony must often be corroborated in a crime usually committed in secretive circumstances. Victims of other assaults are not similarly treated in court.<sup>83</sup> They are presumed to give truthful testimony unless

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77. OKLA. STAT. tit. 21, § 1114 (1971). "Rape committed by a male over eighteen years of age upon a female under the age of fourteen years . . . is rape in the first degree."

78. *E.g.* *Ables v. State*, 331 P.2d 954 (Okla. Crim. App. 1958) (adult); *Maxwell v. State*, 78 Okla. Crim. 328, 148 P.2d 214 (1944) (infant).

79. The minimum Oklahoma penalty is now five years. See note 57 *supra*. While the death penalty has not been statutorily amended, it may well be constitutionally infirm since the holding in *Furman v. Georgia*, 408 U.S. 238 (1972). It is noteworthy that two of the three petitioners in *Furman* were sentenced to death for rape. The Court reversed their convictions.

80. *Fletcher v. State*, 20 Okla. Crim. 300, 101 P. 599 (1909) (credibility instructions must apply to all witnesses).

81. Exceptions to the usual scope of review have been judicially developed for extraordinary circumstances. The death sentence has traditionally received a review of the entire record, *e.g.* *Hathcox v. State*, 94 Okla. Crim. 110, 230 P.2d 927 (1951). Perjury receives extraordinary evidentiary treatment as well as careful review, *e.g.* *Madden v. State*, 26 Okla. Crim. 251, 223 P. 716 (1924). Appeals alleging constitutional error receive close scrutiny, *e.g.* *Wright v. State*, 285 P.2d 445 (Okla. Crim. App. 1955) (unfair trial); *Johnson v. State*, 84 Okla. Crim. 368, 182 P.2d 777 (1947) (racial discrimination). Each of these exceptions applies to cases involving extreme facts.

82. See, *e.g.*, *Fritts v. State*, 487 P.2d 1188, 1191-92 (Okla. Crim. App. 1971).

83. See, *e.g.*, *Christy v. State*, 496 P.2d 405 (Okla. Crim. App. 1972); *Davis v. State*, 490 P.2d 775 (Okla. Crim. App. 1971); *Townley v. State*, 355 P.2d 420 (Okla. Crim. App. 1959).

bias is shown. Their credibility is a matter of fact for the jury. Appellate courts restrict themselves to a review of questions of law in the usual case.<sup>84</sup> Barring exceptional circumstances where racial prejudice or constitutional questions arise, rape cannot be said to require extraordinary appellate review.

The Oklahoma legislature recently elevated the status of the victim by enacting a prior chastity evidentiary ban.<sup>85</sup> It is incumbent upon the Court of Criminal Appeals of Oklahoma to review its former treatment of the victim, with a view toward similarly elevating her status to that of any other victim.

### C. CONCLUSION

There are several dangers inherent in continuing the practice of close appellate scrutiny. Potential for abuse of discretion always exists when the court relies on a rule without reason. Additionally, scrutiny of a "cold" record without benefit of seeing or hearing the witnesses testify and, in effect, second-guessing the jury on the facts, renders jury verdicts meaningless. Judge Simms, specially concurring in *Householder v. State*,<sup>86</sup> emphasized this danger:

While the right of trial by jury is, without question, primarily for the benefit of an accused, nonetheless, every citizen has a vital interest in the protection of that constitutional right free from undue interference from those members of the judiciary who first reach a conclusion, then attempt to justify that conclusion through serpentine-like rationale.<sup>87</sup>

Judge Simms argued that when the court reads the record it should do so not as advocates but as judges, searching for legal error and, absent legal error, give credence to the jury's verdict.<sup>88</sup> Close appellate scrutiny implies that juries are not capable of rendering unbiased verdicts. As the previously mentioned jury study suggested, if bias exists, it appears to be in favor of the defendant.<sup>89</sup>

A further result of adherence to this policy is the immeasurable but definite influence it has on trial judges, prosecutors and the police. The determination by law enforcement agencies that many rape charges are unfounded cannot be attributed to deliberate falsification by the com-

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84. *E.g.* *Smith v. State*, 51 Okla. Crim. 31, 299 P. 229 (1931).

85. OKLA. STAT. tit. 22, § 750 (Supp. 1975).

86. 501 P.2d 1112 (Okla. Crim. App. 1972).

87. *Id.* at 1127 (Simms, J., specially concurring).

88. *Id.*

89. KALVEN & ZEISEL, *supra* note 39, at 249, 251; *People v. Rincon-Pineda*, 14 Cal. 3d at —, 538 P.2d at 258, 123 Cal. Rptr. at 130.

plainants since numerous deterrents to reporting operate on the victims. It is submitted that police departments are aware of evidentiary requirements and the credibility shadow placed upon victims by judicial scrutiny. Police may be moved to consider as unfounded cases where the victim's word is not corroborated, or where the facts will not permit exceptional scrutiny. Prosecutors and trial judges are acutely aware of what evidence will be held insufficient on appeal. A chilling effect on the entire justice system can occur when the highest court's policy is to question the credibility of rape victims.

It is submitted that no area of rape law, whether it be jury instructions or appellate scrutiny, can be justified by the phrase "rape is a charge easily made and difficult to defend against." These words have no contemporary validity in any context and wherever the law reflects their use, the law must be reconsidered. Rape is not an exceptional crime requiring exceptional judicial measures. The only extraordinary fact is that convictions for rape are excessively low. The courts' treatment of victims may have contributed to the statistics. In the interests of society, the defendants and the prosecuting witnesses in rape cases must be given the same treatment received by defendants and prosecuting witnesses in other criminal offenses.

*Mildred B. Dodson*