IDEAS

American Law Does Not Take Rape Seriously

Permeating every moment of Harvey Weinstein's trial is the disturbing history of sexual-assault prosecution in America.

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JANE ROSENBURG / REUTERS

When Harvey Weinstein arrives at the Superior Court of New York each day, frail, aged, sometimes hobbling on a walker, he settles into a courtroom crowded with spectators and freighted with a legacy of distrust. On the prosecutor's side sit two women alleging that the Hollywood producer sexually assaulted them; four others who would buttress their claims that he is a sexual predator; and, in spirit if not in fact, dozens of other accusers and legions of people who see in Weinstein the original villain of the #MeToo movement. Across the aisle, supporting Weinstein and his attorneys, are the skeptics of this and other rape prosecutions, those who cite the false allegations against the lacrosse players at Duke and the fraternity brothers at the University of Virginia. And permeating

every moment of the proceedings, every motion and witness testimony, every cross-examination and jury instruction, is the disturbing history of rape prosecution in America.

What's happening in the Manhattan courtroom is a watershed for Weinstein and, perhaps, for victims who almost never see their abusers held accountable. Rape is rarely investigated or prosecuted, making sexual assault the easiest violent crime to get away with. This is changing, but slowly—less like the tsunami of the #MeToo movement and more like a tide rising in centimeters. The trials of Weinstein, and Bill Cosby before him, surely mark progress. But as Tania Tetlow, a former federal prosecutor and the president of Loyola University New Orleans, observes, "It's a sad sort of progress that we now believe victims when the 40th or 50th victim comes forward."

Skepticism about sexual violence seems to be written into Western society, and certainly into Western jurisprudence. Lord Matthew Hale, a 17th-century judge in England, captured the sentiment when he instructed jurors to consider carefully the allegations of the victim before them. A rape charge "is an accusation easily to be made and hard to be prove, and harder to be defended by the party accused," he advised, adding that the woman's testimony should be examined "with caution."

[Read: Harvey Weinstein's sympathy campaign]

If those words seem prehistoric, then consider this guidance from the Model Penal Code, a blueprint for states to look to when writing their criminal codes. The code, a project of the American Law Institute, was published in 1962. It originally suggested that a woman must report an assault within three months, the so-called prompt-outcry rule that makes even the stingiest statute of limitations today look generous by comparison. The authors wrote that a prosecutor must not take the woman's word at face value, but find external corroboration in "an attempt to skew resolution of … disputes in favor of the defendant." They further noted the "dangers of blackmail or psychopathy" by a "vindictive complainant," and recommended that jurors evaluate a woman's testimony "with special care," given "the emotional involvement of the witness." States drew heavily on the code, and that's how it read until 2012—that's right, 2012—when lawyers began to make revisions.

ape laws in most states were written in such a way as to make rape virtually impossible to prosecute," says Jane Manning, a former sex-crimes prosecutor in Queens, New York, and currently the director of the Women's Equal Justice Project, a nonprofit that advocates for survivors of sexual assault. First, she says, until a wave of changes beginning in the 1960s, the "corroboration requirement" meant that a woman's testimony was worthless unless it could be proved by external evidence. If a man robbed and then raped a woman, her testimony could convict him of the robbery but not the assault.

Second, a woman had to show "earnest resistance"—proof that she fought or fled, even if doing so would have put her life at risk. Third, if she dared to proceed to court, her own sexual and personal history were fair game, leading to brutal questions: Were you a virgin? How many partners have you had? Why were you at that bar? These questions theoretically spoke to her "chastity" and credibility. And finally, the law provided no refuge for a woman married to a sexually abusive husband. Rape was part of the marriage contract. From Genesis to 19th-century America, a wife was the man's property. "Raping your wife made no sense at all," Tetlow says. "You had perfect rights to her. But for someone else to rape your wife—that was an incredible affront to the husband's dignity, and a sort of ruination of his property."

In the past five decades, progress has proceeded in fits and starts. All states have effectively eliminated the corroboration requirement. Most have extended the statute of limitations, though in a dozen states, a victim must report the assault within a decade, sometimes less. Not until the '70s did the federal government and states begin to enact rape-shield laws, barring defense attorneys from grilling a woman about her sexual history. By 1993, marital rape was technically outlawed in all 50 states. Yet about a dozen states have loopholes in the law, such that a man cannot be prosecuted for raping his wife if she is, say, drugged or asleep. Minnesota changed its law only last year, after a woman went public with her story: She had found videos of her husband raping her while she was unconscious, drugged; in one video, the camera zooms in to show her face, and the face of her young son lying next to her.

[Read: An epidemic of disbelief]

But if some of the rules have changed, the attitudes that animated those rules live on, a vile inheritance passed down to the current generation. Despite the #MeToo movement, those attitudes continue to shape the events in the courtroom, the jury room, and society.

This makes the *People v. Harvey Weinstein* a tricky proposition for the prosecutors. According to *The New York Times*, more than 90 possible accusers have been whittled down to two. The first is Mimi Haleyi, who alleges that Weinstein forced her to have oral sex at his apartment on July 10, 2006. The other, Jessica Mann, had hoped Weinstein would help her break into acting until, she alleges, the producer forcibly raped her in the spring of 2013. She's considered an "imperfect" witness—a troubling idea to begin with—because evidence has emerged that she continued a relationship with Weinstein for years after the alleged assault.

Prosecutors are also calling on four other women to bolster their case and increase the penalty. They're charging Weinstein with "predatory sexual assault," which carries a life sentence, and to that end, last week they called Annabella Sciorra (best known for her role in *The Sopranos*) to describe how Weinstein allegedly raped her in her Gramercy Park apartment in the winter of 1993–94. Finally, three other victims—Dawn Dunning and Tarale Wulff, both aspiring actresses, and Lauren Young, a model—will testify about alleged assaults in 2004, 2013, and 2005, respectively. The prosecutors hope to show that Weinstein had a modus operandi: inviting women into a hotel room or going to one of theirs, offering to help them with their movie career, asking for a massage, pressuring them for sex, remaining in contact afterward. As for the dozens of other women who claim he harassed or abused them, the incidents happened too long ago or didn't meet the standard of sexual assault—or, perhaps reasonably, the alleged victim did not want her life scrutinized and publicly maligned by the defense.

As they try to prove their case, prosecutors must grapple with the legacy of skepticism toward women's allegations of rape. True, lawmakers and judges may have excised the more odious barriers to proving rape allegations. But the sentiment remains: Today's laws are direct descendants and carry the same disbelief, under a new name. In short, even in 2020, the woman's character and behavior are on trial as much as the man's.

Consider the rule that a woman's testimony is worthless without external evidence. "It's no longer the case that there's a corroboration requirement as a formal matter," notes Deborah Tuerkheimer, an expert on rape law at Northwestern University Pritzker School of Law and a former sex-crimes prosecutor in Manhattan. "But how often do we hear someone say, 'Well, it's just a he said, she said case'?" Of course the state should guard against false allegations that can ruin a man's reputation, Tetlow says. But it's as if "somehow, uniquely of all crimes, rape involves an extraordinary amount of false reporting," and so a woman's word deserves higher scrutiny. Tetlow says studies show that about 5 percent of rape allegations turn out to be false—no higher than any other crime.

[Read: The ongoing horror of #MeToo]

I came across this sentiment time and again when researching my *Atlantic* story on why so few rapes are investigated and prosecuted. Usually, the victim never sees a courtroom. Police tend to pursue only cases involving a "righteous victim"—for example, a woman raped by a stranger with a gun, in an alley, who fought back, who had a clean record, and who had no alcohol in her system. That is a "real rape," worthy of investigation. But 80 percent of the time, the victim knows her assailant. Prosecutors avoid those cases, even if they believe the woman, anticipating that a jury will not. Central to the "he said, she said" conundrum lurks the issue of consent. How do you prove she resisted, without cuts and bruises? How do you prove the encounter wasn't a "party rape," in which a woman drinks too much and has sex, or a matter of "buyer's remorse"—when a woman consents to sex and then regrets it in the light of day?

In part driven by public outcry, Harvey Weinstein's case has, against the odds, reached the courtroom. But even here, the issue of consent, and the credibility of the women in this "he said, she said" case, has shaped the prosecutors' decisions. Early on, for example, they centered their case on Lucia Evans, who alleges that Weinstein forced her to perform oral sex on him at his office in 2004. The district attorney suddenly and publicly dropped her, after a source told investigators that Evans had said the act was consensual—something Evans denies.

When a victim does come forward, she does so at her peril, inside the courtroom and out. Rape-shield laws *theoretically* prevent a defense attorney from exposing a woman's sexual history, Tetlow says. But if the victim's behavior "doesn't look like

the behavior of a nun, she will be attacked." Society—part of it, at least—may have abandoned the chastity standard and accepted that women should be as free to express their sexuality as men. But in effect, the law has not caught up. At least one alleged victim told *The New York Times* that she opted not to come forward, because her lawyer warned her that Weinstein would hire investigators to dig through her past. Weinstein's defense attorney, Donna Rotunno, spelled out the modern-day equivalent of the chastity requirement when she told *ABC News*: "If you don't want to be a victim, don't go to the hotel room." According to Manning, the former sex-crimes prosecutor, the message is clear: "A woman who goes into a man's hotel room is by definition a loose woman, and she deserves whatever happens to her."

One might think that the fame and accomplishment of some of Weinstein's accusers would empower them. But Tetlow says no one is spared. "I don't think that there's any woman in this country, no matter how powerful, who doesn't understand that they can be taken down in a moment."

Which in fact happened. Two decades ago, Weinstein invited the young actress Ashley Judd to his hotel room for a breakfast meeting; would she give him a massage, a shoulder rub, watch him take a shower? After she declined, he spread word around Hollywood to avoid her; she was "a nightmare to work with." He exacted the same revenge on the actress Mira Sorvino around the same time.

Professional concerns aside, getting a conviction for rape is a long shot—and a nightmare. When a woman alleges rape, the defense (and the jury) dissects not only her character and history, but also her behavior during and after the alleged assault. Here's where the descendants of two pillars of rape law come into play: forcible compulsion and earnest resistance. Did he overpower her, and did she kick and scream or run away? For the Manhattan prosecutors to prove the first-degree rape of Jessica Mann or the first-degree criminal sexual conduct (oral sex) perpetrated against Haleyi, they must demonstrate that Weinstein forced the women to comply, or made them fear he would injure them. It's not enough that they allegedly told him to stop. This is a high bar for a crime with no witnesses, reported long after any possible bruises had faded and DNA had disappeared. And New York is not an outlier: About half the states have a forcible-compulsion requirement.

If the force standard seems antiquated, the resistance standard predates, and defies, everything scientists have established about the neurobiology of trauma. Why didn't she fight? Why didn't she run? Why didn't she scratch his eyes out or kick him where it hurts? These are ridiculous questions to rape survivors. You never know how you're going to react in that moment of terror. I interviewed one victim who offered her assailant iced tea, hoping he'd be satisfied with that. Another pretended to enjoy herself so he wouldn't kill her—a choice that, trauma experts say, is rational, not inculpatory. We'd never expect a robbery victim to fight back, Manning says, "but there's still this ancient prejudice in the back of our mind that when it comes to rape, a virtuous victim should put up a fight." Even though Weinstein did not wave a knife or a gun, his accusers said they nonetheless felt terrified for their safety, and their careers.

Here we arrive at the heart of Weinstein's defense: that these were willing partners, as evidenced by their behavior in the days and even years afterward. Already, Weinstein's attorney has suggested that the women were using Weinstein, not the other way around—"that they were doing this to get ahead in the industry," Northwestern's Tuerkheimer says, "and maybe it wasn't something that they wanted because they were wildly attracted to Harvey Weinstein—but this was transactional."

[Read: The facts and fictions of Harvey Weinstein's arrest]

Exhibit A for the defense is a series of emails from Mann, who claims that Weinstein raped her on March 18, 2013. "I hope to see you sooner rather than later," she wrote three weeks after the alleged assault, one of hundreds of warm emails she sent him over the years. The next day she wrote, "I appreciate all you do for me, it shows." Five months later: "Miss you Big Guy." Four years later, she was still writing: "I love you, always do. But hate feeling like a booty call. :)."

"Friendly emails do not mean it's consensual," Tetlow notes. "But they are very tricky to explain to a jury." Still, she says, put yourself in the alleged victim's shoes: Harvey Weinstein may hold the keys to her every career opportunity. "The desire to somehow make nice and hope that you can still get what you have earned in your career is very strong. It's easy to blame women, but I don't know why you would blame them for that versus blaming the man who would put them through such hell."

Veronique Valliere, a forensic psychologist who works with both sexual perpetrators and victims, says that for most victims who know their assailant, reaching out to him, "even if it feels wrong," helps them sort through their confusion. They need some sort of admission from him to set their world back on its axis: "Even just an acknowledgment and apology, like, 'Hey, I was a little drunk last night. I went a little too far. Sorry.'" It's easier for a victim to deny that a friend or mentor or colleague assaulted her than to deal with its fallout. "Because to say I've been raped, I have to say my friend is a rapist," Valliere explains.

Manning argues that you can draw a straight line between the marital-rape exception—that it's okay to rape your spouse—and the pattern of assault and reconciliation common in acquaintance rape. "It is still surprising to many jurors that a woman could continue in a personal or professional relationship after a rape. And the victim is sort of trapped." But she says that to those who work with domestic-abuse survivors, "it's a familiar story."

What happens in the jury room—the narratives that dominate the discussion, and the unvoiced biases in each juror's head—makes the outcome anyone's guess. Valliere knows this all too well. She testified as an expert witness in the first trial of Bill Cosby, in 2017, who was accused of drugging and assaulting a 29-year-old acquaintance. (Dozens of women said Cosby assaulted them, but the prosecution relied on only one victim, Andrea Constand.) Valliere explained to the jury that victims and perpetrators often act counterintuitively: Perpetrators can be charming and kind; victims can seem engaged in the friendship. Cosby talked with Andrea Constand's mother and insinuated himself into the young woman's life; Constand called Cosby 53 times after the assault. Ultimately, facts didn't matter. The jury hung for reasons unrelated to the evidence. One juror spoke with a Pittsburgh TV station and explained, "My personal feeling is, whatever the man did, he has already paid his price—paid, suffered. He's looking bad. I was wondering if he was going to make it through the whole trial."

Philadelphia prosecutors retried Cosby in 2018. The second time, they brought in five other women, who served as witnesses to describe Cosby's signature: his pattern of mentoring, drugging, keeping in touch—a strategy the New York prosecutors have adopted in their case against Weinstein. The second jury convicted Cosby.

Weinstein's defense team seems to be following Cosby's script, Valliere observes. Weinstein looks fragile and old. "He doesn't look dangerous. He doesn't look sexual. He doesn't look like what the victims are going to portray him as—a powerful, confident, arrogant, persistent, and coercive offender who feels entitled to take what he wants. It doesn't surprise me that he came in on the walker."

Valliere adds that many verdicts come down to likability. She remembers that in lunch breaks during his trial, Cosby would step outside the courthouse to greet hundreds of his fans gathering in the plaza. "Hey, hey, hey!" he'd call out. "Hey, hey, hey!" they'd chant back. Cosby was America's Dad, adored by many despite his transgressions. "I think there may be one thing that Weinstein doesn't have that Cosby did," she says. "I don't get the impression that he was ever a particularly likable public figure."

The fact that Weinstein is being tried at all is, again, progress. But society's—and the law's—distrust of women's accounts will die slowly. An unspoken high standard still seems to prevail in these cases: Not only must the state prove the defendant's guilt beyond a reasonable doubt, but it must prove the victim's purity as well. If a man were robbed at an ATM, it wouldn't matter what he was wearing or what time of night he was withdrawing money; the dispositive fact is that a robbery occurred. If two men brawled at a bar and one broke the other's nose, it wouldn't matter whether they came to the bar together; the fact is, an assault occurred. Only when the victim is a woman and the crime is sexual can such personal details derail a prosecution—whether she knew her assailant, how she interacted with him before or after the assault, what her sexual history entailed. Only in sexual-assault cases are these private matters as important as the allegation. Maybe the prosecution of Harvey Weinstein will shift society's view of a woman who says she has been raped. What it won't change is the law itself.

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