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The Ultimate Violation

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THE ULTIMATE VIOLATION. By *Judith Rowland*. New York: Doubleday & Company, Inc. 1985. Pp. xiii, 353. $17.95.

As an assistant deputy with the San Diego District Attorney's Office, Judith Rowland pioneered a new approach to the prosecution of rape cases. By offering expert testimony which focused upon the perceptions, prevention strategies, and coping behaviors of rape victims, Rowland sought to dispel the myths and misconceptions which so often prevented convictions in cases where the defendant claimed consent. *The Ultimate Violation* is Rowland's chronicle of the history of four rape cases on which she worked between 1978 and 1980.

The book is a brisk narrative account of Rowland's experiences in the district attorney's office. "In an effort to reach the broadest possible audience — potential jurors, law enforcement personnel, the nation's prosecutors and judges, even mental health professionals, and, certainly, future and past victims" (p. vii) — Rowland uses a simple prose style, much as if she were addressing a jury. Relying to a large extent on office interviews and trial testimony (interposed with her commentary), Rowland artfully describes her clients, their cases, and their lives.

To convict a defendant of rape in California, Rowland had to prove that the victim had resisted the attack.[1] This requirement led to a horrifying paradox: while resistance is most easily proved by the physical scars of the victim and the attacker, most literature on rape avoidance and survival counseled women against the use of physical force (pp. 24-25). As one victim told Rowland: "[E]verything I did right to save my life, those things, you know, in the articles and films, all of that is exactly wrong in terms of proving I am telling the truth" (p. 19). Faced with this dilemma, Rowland sought to present direct evidence to enhance victim credibility, including expert testimony regarding rape prevention strategies and the coping behavior of victims.

Initially, Rowland presented this testimony based upon its relevance to the preliminary question of resistance. She hoped this evidence would aid the jury "in reaching their decision about whether [the victim] resisted or why she had chosen not to" (p. 25). Since the district attorney's office would provide no money for an academic expert, Rowland chose an officer with the sex crimes unit of the San Diego police force. The officer testified in three cases, two of which seemed "untriable" to other deputies in her office and one of which

1. P. 25. While the California courts held that the victim need only resist with as much effort and for as long as *she* perceived it to be of any use, Rowland claims that "history had taught us that the victim must really resist for as long as the *jurors* felt she should." P. 25 (emphasis in the original). The California legislature abandoned the resistance requirement for rapes prosecuted after January 1, 1981. CAL. PENAL CODE § 261(2) (West Supp. 1987).

had previously resulted in a hung jury. The officer's testimony addressed the behavior of rape victims in order to educate the jurors and to clear up common misconceptions which make prosecution so difficult. First, she explained that most rapes occurred between casual acquaintances rather than strangers. Second, she described the prevention and self-defense guidelines taught to women: those techniques suggested for avoiding, recognizing, and defending against a sexual assault. Finally, she assessed and defended the reasonableness of each victim's response to being attacked, emphasizing that these women faced situations in which they feared for their lives.

Rowland won convictions in each of the three cases in which the expert testified; however, she was not successful on appeal. The reviewing courts found this "educational" testimony irrelevant. One court noted:

> How these interesting observations and experiences of the officer would tend to prove or disprove there was forcible rape of Terri R. is not clear. The rape of Terri is not to be determined by statistics or by a popular survey of what victims in other rape scenes do or do not do. [p. 211]

Nevertheless, two of the appellate courts affirmed the convictions,[2] finding the erroneous admission of expert testimony harmless since it had "no 'probative value' " and did not " 'disturb the jury's evaluation process' " (p. 210). Interviews with the jurors in these cases clearly showed the contrary (pp. 115-16, 130, 204).

Undaunted, Rowland developed an alternative theory. Acknowledging the "tricks" of advocacy, she confesses that she had previously "use[d] resistance as an excuse to get in expert testimony while its real purpose was a psychological one to challenge defense credibility in the jurors' minds" (pp. 218-19). Taking a more direct approach, she decided to offer the testimony to support victim credibility and help the jury distinguish between a reasonable and unreasonable mistake as to consent (pp. 218-19).[3] In her final, and seemingly "untriable," case with the district attorney's office, Rowland presented the testimony of Dr. Joshua Golden, a professor of psychology at the UCLA School of Medicine. Dr. Golden, well-versed in the field of rape victimization, described the standard behavior patterns of rape victims and the disorder known as "rape trauma syndrome."[4] He also informed the jury

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2. Sadly, as was the trend in California, these rapists were sentenced to serve short *jail* terms. Pp. 116, 204. Since January 1, 1980, all rape convictions in California require a *prison* sentence. P. 205.

3. Aside from the appellate decisions, the California legislature rendered the resistance theory obsolete. As of January 1, 1981, resistance was deleted from the definition of rape. *See* note 1 *supra*. The new law made consent, or lack of consent, the only issue for the jury to determine concerning victim behavior. CAL. PENAL CODE § 261(2) (West Supp. 1987). Previous decisions held that, to be convicted, the defendant had to be at least negligent with regard to consent, thus paving the way to a reasonable mistake as to consent defense. People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975).

4. Rape, like other potentially life-threatening events, often produces behavioral, somatic,

that, after interviewing the victim, he was certain she suffered from this syndrome. The trial ended in a hung jury, with only two members voting not guilty.

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Although *The Ultimate Violation* provides a fascinating behind-the-scenes look into the prosecution of four rape cases, it is subject to criticism on a few fronts. Due in part to Rowland's attempt to reach such a large audience, the work may not fully satisfy the legal scholar. The book is long on opinion and short on analysis. Rowland expresses confidence that her legal theories and technique are "right" (pp. 26, 208-11); unfortunately, she provides little information with which the reader might evaluate her arguments.[5] She is certain that expert testimony was properly admissible, but never sets out the provisions of the California Evidence Code which she relied upon to "carry off this coup."[6] The reader is left wanting to know more, but with little guidance where to turn.

Furthermore, Rowland's self-aggrandizing stance throws into question the accuracy of these histories. She bills herself as the ultimate prosecutor — a woman who can write a crucial trial memo in fifteen minutes (p. 34), determine the reliability of a rape claim in ten minutes (p. 140), and ascertain the deepest prejudices of any juror (pp. 52, 350-51). More practically, one wonders how she can quote accurately from meetings and interviews which occurred five years prior to the writing of this book.

These problems, however, do not detract greatly from what is, for the most part, an absorbing (and empassioned) analysis of the law of

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and psychological reactions on the part of the victim. The pattern of typical responses to this event is termed "rape trauma syndrome." In its initial phase, the victim may become emotionally unbalanced and feel guilty, wondering what she had done to deserve the attack. After that disorganization phase, the victim will consciously deny the event occurred and may avoid all circumstances reminiscent of the rape, particularly sexual experiences and the geographic area in which the rape occurred. Pp. 336-42. *See generally* Burgess & Holmstrom, *Rape Trauma Syndrome,* 131 AM. J. PSYCHIATRY 981 (1974).

5. Rowland provides almost no legal support for the arguments she does make. She mentions only a few cases in the entire book (referring to one as "the *Morgan* case") and then she gives no case citations. Pp. 214, 217, 352. Similarly, she relies on, and quotes from, a few scholarly articles and research studies, but provides little or no bibliographic information. Pp. 27, 213, 283. Rowland's analysis relies heavily on Bienen, *Rape III — National Developments in Rape Reform Legislation,* 6 WOMEN'S RTS. L. REP. 170 (1980); Burgess & Holmstrom, *supra* note 4; A. GROTH & H. BIRNBAUM, MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER (1979).

6. P. 21. For thorough analyses of the admissibility of expert testimony on rape trauma syndrome to rebut defendant's consent defense, compare Ross, *The Overlooked Expert in Rape Prosecution,* 14 U. TOL. L. REV. 707, 723 (1983) (arguing that a "qualified psychologist, psychiatrist, or other competent expert should be allowed to testify to a diagnosis of rape trauma syndrome when the symptomatology is present"), with Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings,* 70 VA. L. REV. 1657, 1705 (1984) (concluding that the "reliability problems with the rape victim literature and the difficulty of inferring the defendant's mens rea from the alleged victim's emotional state" weigh against admissibility). *See generally* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 COLUM. L. REV. 1 (1977).

rape. At its core, *The Ultimate Violation* is an insightful feminist critique of the legal profession and the criminal justice system; a system that is dominated by men, and one in which rights, responsibilities, duties, and privileges are defined to meet the needs of men (p. xi). Throughout the book, Rowland argues that her gender permits her to evaluate, understand, and respond to life experiences from a new vantage point — a "woman's perspective" (pp. xi, 4, 28, 304). This assertion, reminiscent of other feminist arguments grounded upon the work of Nancy Chodorow and Carol Gilligan,[7] is particularly compelling in an area where women have a special status as victims.

Traditionally, the law has protected men from rape convictions through the use of cautionary instructions, corroborative requirements, proof of resistance to establish nonconsent, and the introduction of past sexual history of victims.[8] Professor Susan Estrich notes: "In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims."[9] This bias had contributed to the much-documented abuse of rape victims by defense attorneys.[10] In addition, prosecutors may perpetuate similar, although more subtle, abuses. Rowland's supervisor once suggested that she dismiss a case because the victim lived and slept with a male roommate in Ocean Beach (a "bohemian" neighborhood), had herpes, and kept her door unlocked (p. 6). Contrary to her associates, Rowland rarely dismissed a case if the victim was " 'flaky,' 'loose,' [or] 'dingy' " (p. 3). Her sensitivity to the plight of rape victims is praiseworthy. Her interviews and trial examinations, delicately handled but remarkably thorough, deserve careful reading.

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7. N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). For an excellent overview of these arguments, see Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 580-91 (1986). *See also* Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

8. Estrich, *Rape*, 95 YALE L.J. 1087, 1090-91 (1986).

9. *Id.* at 1091. Professor Estrich, in words similar to those of Rowland's victims, begins her article by describing her experience as a rape victim. She then goes on to provide an illuminating examination of the law of rape. She argues:

> [In cases where less than extreme] force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, . . . where the woman says no but does not fight, . . . the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman. In concluding that such acts . . . are not criminal, and worse, that the woman must bear any guilt, the law has reflected, legitimized, and enforced a view of sex and women which celebrates male aggressiveness and punishes female passivity.

Id. at 1092.

10. *See generally* S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975); J. & H. SCHWENDINGER, RAPE AND INEQUALITY (1983); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973).

Such sensitivity is crucial because, in striking contrast to other crimes, rape cases focus the court's attention upon the appropriateness of the *victim's* behavior. As a "victim's advocate" (p. 84), Rowland used expert testimony as a tool to educate jurors and to shift the boundaries between consensual and nonconsensual sex. Paying tribute to her success, one trial judge, when ruling on the admissibility of the expert's testimony, noted:

> I do not think what I have heard in this courtroom today can be viewed as generally known by the public. . . . This information is important, and relevant for jurors to understand. It puts a whole new perspective on the behavior of women in these situations. [p. 49]

It is startling and disheartening that the California appellate courts found the expert testimony both irrelevant and non-prejudicial.[11]

Although rejected by the courts, new legal theories, such as Rowland's, may serve an important educational function. These arguments, and the debate they engender, force us to re-evaluate our laws and our prejudices. Another area in which a feminist critique has been instructive, but unpalatable to the courts, is that of pornography. In April 1984, Indianapolis enacted an ordinance, principally drafted by Catherine MacKinnon and Andrea Dworkin, which defined pornography as "the graphic sexually explicit subordination of women. . . ."[12] This ordinance empowered women to bring a civil rights action against the makers and sellers of pornography.[13] The Seventh Circuit, in an opinon written by Judge Easterbrook, struck down the statute on first amendment grounds;[14] nevertheless, this initiative set off an intense debate about pornography, gender discrimination, and the first amendment.[15] As one commentator noted, it "involved the courts in

11. Pp. 209-10. Since Rowland left the district attorney's office, the highest courts in four states have addressed the issue of expert testimony to prove rape trauma syndrome. These courts have split on the issue of admissibility. *Compare* State v. Marks, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982) (expert testimony admissible), *with* State v. Taylor, 663 S.W.2d 235, 236-42 (Mo. 1984) (expert testimony inadmissible), *and* State v. Saldana, 324 N.W.2d 227, 230-31 (Minn. 1982) (expert testimony inadmissible). For an intermediate position, see People v. Bledsoe, 36 Cal. 3d 236, 246-49, 681 P.2d 291, 298-99, 203 Cal. Rptr. 450, 457-58 (1984) (expert testimony inadmissible to prove rape, but admissible to rebut inferences a jury might draw with respect to alleged victim's behavior following the rape). Rowland misreads *Bledsoe* as a total ban of expert testimony on rape trauma syndrome. Pp. 352-53.

12. INDIANAPOLIS, IND., CODE § 16-3(q) (1984).

13. INDIANAPOLIS, IND., CODE § 16-17(b)(1984).

14. American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *affd.*, 106 S. Ct. 1172 (1986).

15. For a defense of this approach to pornography, see MacKinnon, *Pornography, Civil Rights, and Speech,* 20 HARV. C.R.-C.L. L. REV. 1 (1985). *See also,* Clark, *Liberalism and Pornography,* in PORNOGRAPHY AND CENSORSHIP 45, 52-57 (D. Copp & S. Wendell eds. 1983); A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981). For criticisms of this approach, see, *e.g.,* Brief for Amici Curiae prepared by Feminist Anti-Censorship Task Force, American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *affd.*, 106 S. Ct. 1172 (1986). *See generally, Symposium — Pornography,* 21 U. MICH. J.L. REF. 1 (1987) (forthcoming).

exactly the sort of public discourse which is vital to society."[16] As an author, Rowland hopes to continue a "process of education and enlightenment for men and women everywhere on a subject so long cloaked in myth and misunderstanding" (p. vii). On this score, *The Ultimate Violation* should be applauded; it compels the reader to reevaluate the biases and implications of our rape laws and the treatment of sexual assault victims.

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16. Scales, *supra* note 7, at 1373 n.2.