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Rescue in the Arts

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### **The Need for Evidentiary Reform as a Means of Addressing Abuse**

The way a case is heard and decided depends on the evidence that the court admits. This is in a sense self-evident, as a case can only be decided on the evidence before the court, but it is often overlooked in discussions of ways the laws and legal procedures can be changed to better serve the needs of all people.

For one example of the ways in which evidentiary reform has followed social change, consider the treatment of evidence surrounding sex offense perpetrators and victims. Under the traditional practice, a person alleged to have been a victim of a sex crime was liable to be questioned about matters entirely irrelevant to the factual dispute in the case, such as their prior sexual history. This had two main reasons. On an ostensibly legal level, the idea was that a person's credibility and standing in society was tied to their adherence to social mores, and this was especially the case for women. Therefore, proof that a person behaved in a manner deemed unacceptable was seen as relevant to determining whether they were telling the truth. And second, as a matter of pure trial strategy, bringing up private details was a reliable way of harassing victims and deterring them from coming forward, thus ensuring that sex crimes would remain outside the reach of the justice system. At the same time, repeat sexual offenders made use of strong protections against propensity evidence, enabling them to prevent the jury in any one case from hearing about their other acts of similar sexual misconduct. Now, the order is reversed. Under Federal Rule of Evidence 412, a victim's sexual behavior is

not admissible as evidence, unless a listed exception applies.<sup>1</sup> And if a party seeks to admit such evidence, it must give advance notice and the court must hold a hearing to determine whether the party's substantive legal rights would be affected by not allowing the evidence to be introduced.<sup>2</sup> This may seem like a radical reform, and in a sense it is, but in another, it is merely a reassertion of the principle that only relevant evidence may be admitted.<sup>3</sup> Now, the law recognizes, much like society did as the result of the efforts of survivor advocates and legal scholars, that a person's right to justice does not depend on their gender or conformance with sexual norms.

The second manifestation of this reform is that a defendant's prior sexual misconduct may now be admitted as evidence, in certain cases. This is ground on which the courts ought to tread extremely carefully, to avoid painful miscarriages of justice, but it also recognizes the fact that repeat sex offenders often stick to a "type" of crime. To be clear, this is less like the "calling cards" depicted in popular media and more like either impulsive decisions that follow a pattern or preplanned attacks sticking to a script. But in either case, there is a pattern, and that fact can, at least in some cases, be evidence in and of itself. The fact that the defendant has done similar things is not proof that they have done this particular thing, but it is something to consider. Indeed, recent cases have affirmed this distinction.<sup>4</sup> The victim is shielded from scrutiny, while the defendant's prior acts can be used to establish a pattern. This can be especially important in cases arising from the entertainment industry, in which one perpetrator may have a very high number of victims and make use of one type of script, namely, luring people into a room with the promise of professional advancement, committing a

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<sup>1</sup> Federal Rule of Evidence 412(a), (b).

<sup>2</sup> FRE 412(c).

<sup>3</sup> FRE 402.

<sup>4</sup> *Carroll v. Trump*, \_\_ F.4th \_\_ (2d Cir. 2025).

forcible or unwanted sexual act, and then threatening retaliation should the victim tell anyone. There, the “pattern” behavior consists both of the criminal sexual act itself and the broader acts of drawing the victim in beforehand and then making the threat afterward, a threat they appear eminently likely to be able to carry out.

Even under these important reforms, the aim is not, and ought not to be, to weaken the defendant’s ability to fight charges or to tip the scales in favor of the prosecution. A defendant has the constitutional right to a complete defense and to present relevant evidence, which the laws and rules of evidence recognize.<sup>5</sup> When trial courts go too far in preventing the defendant from introducing potentially exculpatory evidence, the appellate courts can and do reverse convictions.<sup>6</sup> Similarly, appellate courts are zealous (and overly so, according to some advocates) in reversing convictions where the prosecution has attempted to sidestep the ban on propensity evidence.<sup>7</sup>

Separately, it is also important to examine another aspect of victims as evidence. When someone is charged with a crime or believes they are about to be, they often engage in witness and evidence tampering in order to protect themselves from consequences. This conduct is always an abuse of the justice system, but when it involves certain behavior directed at the initial crime victim, it is in effect a form of revictimization of that person. State and federal laws aim to address that, but when they do, they usually veer towards defending the public interest in a fair trial, leaving less attention for protecting the rights of victims. One exception to this is the use of orders of

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<sup>5</sup> *California v. Trombetta*, 467 U.S. 479 (1984); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Holmes v. South Carolina*, 547 U.S. 319 (2006).

<sup>6</sup> See, e.g., *People v. Jovanovic*, 263 A.D.2d 182, 700 N.Y.S.2d 156 (1999) (emails between defendant and complainant in which complainant expressed willingness to engage in sadomasochistic sexual activities).

<sup>7</sup> *People v. Weinstein*, \_\_ N.Y.3d \_\_, \_\_ N.E.3d \_\_ (2024). Harvey Weinstein was retried on the charges for which he had been initially convicted, and was once again convicted. This decision did not affect his separate convictions for sex crimes in a California state court.

protection to ensure that a person cannot contact someone whom they have been found to have committed an offense against, even if the finding is made by a judge based on a legal standard lower than that necessary to convict. In New York, violating such an order, even a temporary one, can be a felony, punishable by prison time and a lifetime criminal record. Federal law provides that someone who is issued such an order in one state and then violates it in another is guilty of a felony, with punishments generally more severe than can be expected in state court.

The law guarantees a victim's right to be present at trial, with certain exceptions.<sup>8</sup> This reflects that a person who has suffered a crime will often want to follow the proceedings, both to better understand the case and to ensure that their own interests are not forgotten. But the law does not always do enough in ensuring that prosecutors take victims into account besides using them as props to obtain a harsh sentence. (It bears mentioning that the interest of a crime victim in seeing their abuser sentenced entails far more than the sentence being harsh; victims require restitution and often use it to pay for counseling and physical therapy. And when victims are positioned in order to obtain a harsh sentence and then forgotten immediately afterwards, their rights are not respected, even though society as a whole may be safer for a dangerous offender being incarcerated for a long period of time.) When a particular victim does not appear sympathetic enough, the prosecution may simply decide that the case is not worth pursuing, which disproportionately affects young women of color in sex cases, who are seen as less innocent and therefore less likely to have been victimized sexually. Of course, laws defining statutory rape make no exception for mature minors or minors of

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<sup>8</sup> FRE 615(a)(4).

any given race, but societal biases are hard to shake, and prosecutors and judges often share them.

The rules of evidence should be amended to permit a party to introduce evidence that they were subject to coercive control, which explains the party's conduct. Note that explaining conduct does not always mean excusing it, whether in a legal or a moral sense; instead, it merely means allowing the court to fully understand the factors underlying someone's behavior. This can also be extended to non-parties, in order to help support theories of liability that involve more than one person, in which one directs the other to act or abstain from acting in a certain way. At the same time, this rule should be carefully circumscribed to avoid a situation where a person's liability can be established by showing that they were under the influence of someone else, unless that influence would also be a complete defense. Otherwise, that would effectively permit a person's status as a victim of abuse to be used as evidence against them, something that is heavily disfavored by the courts.<sup>9</sup>

While more attention is usually given to the facts of a case than how those facts are pleaded and presented in court, the rules of evidence play a key role in the outcome of every trial and the treatment of victims and witnesses therein. As such, they should be closely examined to ensure that they do not reflect outdated stereotypes or perpetuate forms of injustice.

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<sup>9</sup> *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 820 N.E.2d 840 (2004). There, the New York Court of Appeals applied this principle (among other sources) in holding that a parent's status as a victim of domestic violence did not mean that their child was deemed neglected in the eyes of the law, which could result in the victimized parent losing custody of their child.