



Joanne Conaghan and Yvette Russell: *Sexual History Evidence and the Rape Trial*

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“Sexual history evidence is a power unto itself, and that power derives from, and continues to call upon, a patriarchal legacy which still resides in law, and is quintessentially expressed in the performance of the rape trial.” (160).

The technical form of evidential rules often belies the power of those rules to uphold a sexist status quo. The so-called ‘rape shield’ is a case in point. Now an established feature of common law legal systems, it prohibits questioning of a rape complainant about her sexual experiences other than the incident charged. The issue of the admissibility of this evidence brings together questions of power, sexuality, epistemology and the meaning of a fair trial, and connects them with wider questions of justice for sexual violence. Historically, sexual history evidence was regularly invoked by defence counsel to either support a claim that the complainant had consented to sex with the accused, or to tarnish her character and therefore her credibility. The prevailing wisdom among many legal scholars, practitioners and senior judges is that sexual history evidence is only rarely admitted, and when that happens, it is only because the evidence is truly relevant and essential for justice to be done.¹ In *Sexual History Evidence and the Rape Trial*, Joanne Conaghan and Yvette Russell set out to challenge this wisdom by restating the terms on which we understand sexual history evidence. This ambitious book takes the reader on an intellectual journey through legal history, philosophy, psychoanalysis and culture to offer fresh insights into sexual history evidence and its impact on the twenty-first century rape trial.

¹ In *R v A (No 2)* [2001] UKHL 25, Lord Steyn described the idea that sexual history evidence is relevant in some rape trials as “a matter of common sense” [31].

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Following an introduction that unpacks the case of *R v Evans* (2016) which prompted much public and scholarly debate in England and Wales, the argument proceeds over three connected parts.

Chapters two and three are for anyone who has ever wondered *why* a rape complainant's credibility is treated with unique suspicion; for those who query the phrase '*it's his word against hers*' when offered as a common sense justification for the abysmal rates of prosecution and conviction for rape. Chapter two is a fascinating tour of the history of rape law on the books and in action: from a crime perpetrated against a male property holder; to legal protection of women's chastity and virtue; to the idea of rape as a violation of a person's sexual autonomy. Chapter three illuminates the legal, social and cultural conditions under which sexual history evidence became understood as relevant to the determination of guilt. The analysis helps us understand the core question of whether propensity reasoning is appropriate. One of the implications is that previous sexual encounters with the accused only became thought to be relevant because of the emphasis on women's chastity generally in the Victorian age. The power of Conaghan and Russell's analysis is its demonstration that evidence lawyers must account for the fact that reasoning from propensity carries a range of assumptions about the complainant's attitude to sex, and to the defendant, that are imbued with culturally-mediated gendered and misogynistic beliefs about women and their (our) status as individuals with bodily and sexual autonomy.

Chapters four and five focus on law. Chapter four analyses the contemporary framework governing the use of sexual history evidence. The comparative critical analysis of legislation and case law across common law jurisdictions yields fascinating insights into how rape shield laws work to trouble patriarchal assumptions about women and female sexuality. Chapter five interrogates the scholarly evidence for claims that sexual history evidence is only rarely a feature of rape trials, and explores various methodological approaches to investigating such claims. This discussion will be of interest to anyone designing a study on rape trials or indeed anyone contemplating a socio-legal project.

It is in the final third of the book that the analysis really comes into its own, expanding our intellectual horizons through engagements with feminist philosophy and psychoanalysis. Chapter six tackles the 'holy grail' of relevance head on. Working from feminist epistemology, the authors show how claims of relevance are based on generalised assumptions about women's sexual behaviour that are often highly contestable. For this reader, chapter six's interrogation of propensity reasoning as applied to previous sexual history between the parties was especially interesting. This is the most contentious aspect of rape shields, especially since the decision in *R v A (No 2)* that a fair trial necessitates allowing such evidence in rare cases (see above). The discussion convincingly shows that the admission of this evidence risks employing a faulty logic linked to the judge's life experience. The authors highlight the importance of any alleged similarities between an 'unusual' previous experience and the one at hand being very carefully scrutinised, given the lack of reliable statistics about the in/frequency of particular behaviours. However, I was left wondering if there was more to say about such cases, especially in hard cases like where the unusual characteristic of the sexual encounter charged is in fact helpful to the prosecution's case. Sex in an alleyway off a busy city street might be understood as

supporting a claim of sexual violation, but if there is evidence that the couple had previously had consensual sexual intercourse in an alley should this be considered relevant, and if so, to what? Might it be relevant to a defence of belief in consent? Should a judge try to guess how a jury might interpret the fact that the alleged rape took place in an alley? Perhaps the burden and standard of proof are adequate protection for the defendant? Perhaps the power of such evidence to mobilise unfair, discriminatory reasoning about the complainant (such as that she has previously had sex outside and is therefore unstable and untrustworthy) might well outweigh any possible relevance. Indeed, the authors' observation that once sexual history evidence is admitted it "assumes a significance and a potency far in excess of the circumscribed conditions set for its admission" (160) underscores the power of such evidence to work in ways that are contrary to justice.

Chapter seven draws on feminist philosophy and psychoanalysis, to show how sexual history evidence influences the types of stories lawyers are able to tell the jury about the defendant and complainant. For victimologists, this analysis offers a rich new perspective on the ways in which the figure of the (non)ideal victim (Christie 1986) is constructed with and through law and legal argument. The authors argue that this evidence "functions to redirect the court's attention away from the defendant while simultaneously activating a particular understanding of feminine subjectivity which helps to undercut a linear story of violation a prosecutor might be trying to tell" (183). The chapter problematises subjectivity in the rape trial, examining the relationship between agency, rationality and subjectivity and the role of sexual history evidence in mediating this relationship. Sexual history evidence's power is shown to be bound up in feminine sexual subjectivity—in which women's sexuality is uncontrollable, and therefore a threat to male domination.²

The book concludes by exploring what is to be done about sexual history evidence. The authors find promise in independent legal representation for complainants on applications to admit evidence of their sexual behaviour, something the Law Commission has recently proposed (Law Commission 2025). Striking a hopeful note, they invite readers to think through what anti-rape politics and strategy might mean for them, and offer some interesting suggestions on what that might look like (197–8).

Finally, their reflections on law as tactics (Spade 2011: 40) and feminist accountability are generative for scholars concerned about becoming implicated in a carceral politics that upholds the structures of inequality that are themselves conditions of sexual violence.

Sexual History Evidence and the Rape Trial is a critically important intervention in evidence law scholarship, and in feminist work on the law's response to sexual violence. It has sparked deep reflection for me on my understanding of sexual history evidence. The book will appeal to scholars and students of law and criminal justice, legal practitioners, and activists as they grapple with what truly is at stake when sexual history evidence is admitted in a criminal trial. It will inspire students and scholars for many years to come.

²This denotes a mode of being that encompasses sexuality, but also "designates the contours of our being and becoming as singular subjects, as well as the interaction of the body's morphology with its environment" (162).

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