

RAPE: ADDING INSULT TO INJURY

"If I could get my client off by appealing to the jury's sexism I probably would."¹

INTRODUCTION

Rape survivors are typically victimized in two significant ways: first, they are brutally victimized by their attackers; second, they are further victimized by the legal system's often insidious treatment of rape as a "special crime." The Vermont Supreme Court's recent decision in *State v. Gonyaw*² will effectively add further insult to many rape victims' injuries. In addition, the rule set forth in *Gonyaw* substantially dilutes recent legislative efforts to afford greater protection to rape victims and illustrates the need for more legislative reform.³

In *Gonyaw* the court created a "test" for when evidence of a rape victim's past sexual conduct with the defendant would be more probative than private as mandated by section 3255(a)(3) of title 13.⁴ The rule establishes that evidence of the victim's past sexual history with the defendant is clearly material to the issue of consent if the "acts have been reasonably contemporaneous with the alleged rape, and the relationship between parties supports a reasonable belief that there was consent to renewed sexual activity."⁵

In order to place the *Gonyaw* rule in its historical perspective, this note will first evaluate the decision and discuss its likely impact on subsequent rape cases. Second, this note will discuss *Gonyaw* in light of the intent of Vermont's current rape shield laws and the recent criminalization of marital rape in Vermont.⁶

1. T. BENEKE, *MEN ON RAPE* 105 (1982).

2. No. 84-118, slip op. (Vt. Dec. 6, 1985).

3. 1977 reform legislation in Vermont included a provision explicitly stating that all evidence of the victim's past sexual conduct is inadmissible unless it pertains to past sexual conduct with the defendant or third persons, as a means of showing the source of semen, pregnancy, or disease. VT. STAT. ANN. tit. 13, § 3255(a)(3)(A)-(C) (Supp. 1985). A 1985 legislative amendment deleted the marital rape exemption from the sexual assault statute that criminalized marital rape in Vermont. VT. STAT. ANN. tit. 13, § 3252 (Supp. 1985).

4. VT. STAT. ANN. tit. 13, § 3255(a)(1). See also *infra* notes 26-30 and accompanying text.

5. *Gonyaw*, slip op. at 5.

6. VT. STAT. ANN. tit. 13, § 3255 (Supp. 1985).

Finally, this note will conclude that the judicial and legislative conflict arising from the use of past-sexual-conduct evidence both mandates further legislative reform and requires the Vermont Supreme Court to overrule *Gonyaw* at the first opportunity.

I. THE *Gonyaw* RULE

Consent is the conventional defense in rape cases.⁷ The defendant typically claims that the victim consented to the sexual act and seeks to admit any evidence of the victim's sexual history to indicate consent. While most states have wholly rejected introducing as evidence the victim's past sexual conduct with third persons,⁸ Vermont and other jurisdictions continue to allow, in certain circumstances, past sexual conduct between the victim and defendant to be entered into evidence.⁹

In *Gonyaw*, the Vermont Supreme Court examined the state's rape shield laws. The defendant appealed his sexual assault¹⁰ conviction, based on the trial court's ruling that *all* evidence of the complainant's past sexual conduct with the defendant was prohibited.¹¹ The defendant, seeking to substantiate his claim that the victim consented, had attempted to introduce evidence that he had prior consensual sexual relations with the victim.¹² The evidence

7. See generally, Howard, *Rape: A Prosecutor's View*, 24 N.H.B.J. 119 (1983); 18 *LOV. L.A.L. REV.* 895 (1985).

8. 18 *U. RICH. L. REV.* 433, 434 n.7 (1984).

9. See *infra* notes 32-35 and accompanying text.

10. *VT. STAT. ANN.* tit. 13, § 3252(1)(A) (1974 and Supp. 1985).

11. *Gonyaw*, slip op. at 2. The defendant contended that this prohibition of evidence violated his statutory rights under the rape shield law and deprived him of his confrontational and compulsory rights under the sixth and fourteenth amendments to the United States Constitution, and chapter I, article 10 of the Vermont Constitution. *Id.*

12. *Id.* at 1. Section 3255(a)(3)(b) reads:

(a) In a prosecution for a crime defined in this chapter:

(3) Evidence of prior sexual conduct of the complaining witness shall not be admitted; provided, however, where it bears on the credibility of the complaining witness or it is material to a fact at issue and its probative value outweighs its private character, the court may admit:

(A) Evidence of the complaining witness' past sexual conduct with the defendant;

(B) Evidence of specific instances of the complaining witness' sexual conduct showing the source of origin of semen, pregnancy or disease;

(C) Evidence of specific instances of the complaining witness' past false allegations of violations of this chapter.

(b) In a prosecution for a crime defined in this chapter, if a defendant proposes to offer evidence described in subsection (a)(3) of this section, the de-

showed that the defendant and victim had lived together and had been sexually intimate from 1977 until 1980.¹³ From 1980 until 1982, uncontroverted evidence showed that the defendant and victim continued their sexual relations, although they no longer cohabited.¹⁴ Finally, the defendant claimed that he had sexual relations with the victim four days prior to the alleged sexual assault.¹⁵ The victim denied this last allegation, insisting that she did not have sexual relations with the defendant after June, 1982.¹⁶ The defendant also offered evidence that the victim often initially refused to have intercourse, but would then consent.¹⁷ The trial judge ruled that all evidence of complainant's past sexual conduct with the defendant be prohibited.¹⁸

The supreme court reversed, holding that the defendant was prejudiced by the trial court's prohibition of the evidence.¹⁹ The court further denounced the trial judge for failing to engage in the necessary inquiry of determining the probative versus private nature of the evidence, which is mandated by statute.²⁰ This inaction, according to the court, constituted an abuse of discretion.²¹ The supreme court then engaged in its own review of the evidence and determined, without explanation, that "under the circumstances here presented [the evidence's] . . . probative value outweighed its private character."²² The supreme court's reasoning is particularly faulty in that their own statutory analysis never discussed the private nature of the evidence. The shallowness of the *Gonyaw* court's analysis is especially shocking because it directly criticized the trial court for its lack of statutory analysis.²³

defendant shall prior to the introduction of such evidence file written notice of intent to introduce that evidence, and the court shall order an in camera hearing to determine its admissibility. All objections to materiality, credibility and probative value shall be stated on the record by the prosecutor at the in camera hearing, and the court shall rule on the objections forthwith, and prior to the taking of any other evidence.

13. *Gonyaw*, slip op. at 2.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 5.

20. VT. STAT. ANN. tit. 13, § 3255(a)(3) (Supp. 1985). The supreme court determined that the trial judge did not exercise discretion.

21. *Gonyaw*, slip op. at 3.

22. *Id.* at 5.

23. *Id.*

The court emphasized that the jury might have arrived at a different result if it had been allowed to hear contradicted evidence of consensual acts after the couple's separation.²⁴ The court further emphasized that the jury might have reached a different result if they had been allowed to hear the defendant's contradicted allegation that he had had consensual intercourse with the victim four days before the rape.²⁵ The court reasoned that the evidence of consensual activity over a period of years, coupled with an alleged consensual act reasonably contemporaneous with the alleged rape, was clearly material to the issue of consent.²⁶

Unfortunately, the tenor of the *Gonyaw* decision returns to anachronistic maxims that women are the property of the men they have intercourse with, and that a woman cannot say no if she previously had said yes.²⁷ In effect, intercourse on past occasions

24. *Id.*

25. *Id.*

26. *Id.* at 5 (emphasis added). Other courts have adopted similar rationales. See, e.g., *Testerman v. State*, 61 Md. App. 257, 264, 486 A.2d 233, 236 (1985); *Commonwealth v. Grieco*, 388 Mass. 484, 489, 436 N.E.2d 167, 170 (1982).

27. A form that a Montana legislator circulated to his colleagues as a joke during a marital rape law campaign demonstrates popular sexist views of consent to rape:

Due to a situation in Oregon in which a man is on trial for raping his wife, the following "Consent Form" is being furnished as a public service for Montana's males.

It's recommended that no sexual contact be made by Montana's males with their wives until this form has been filled out and signed.

Remember, tonight she may be willing but tomorrow YOU MAY BE CHARGED WITH RAPE.

AGREEMENT

I, _____, do hereby on this _____ day of _____

(check one) _____ Beg
 _____ Request
 _____ Agree
 _____ Grudgingly Agree
 (please pull down
 my nightgown
 when you're through)

to have sexual relations with my husband between the hours of _____ and _____

 (signed)

Legally, this form is but a one time agreement of course. Any sexual contact other than on the above date and at the above time shall require a new agreement.

Additional copies of this form can be obtained from State Senator Pat Regan.

Detach form on dotted line.

D. RUSSELL, RAPE IN MARRIAGE 22-24 (1982).

implies the right to sexual intercourse on all occasions. However, the court reached this conclusion without offering any convincing argument or authoritative evidence that prior sexual conduct may produce reasonable support for renewed sexual activity.

The major flaw in the court's position is that it failed to discuss the nexus between consent to the prior acts and consent to the disputed act. The purpose of the probative versus private test is to determine the extent to which consent on previous occasions bears on the issue of consent to the disputed act. Rather than discussing the two-step analysis clearly set forth by statute, the court simply assumed that the probative value of this particular evidence outweighed the private character. Yet the *Gonyaw* decision is devoid of any reference to the private nature of the victim's past-sexual-relations evidence. Rather, the court opines the broad generalization that several years of consensual activity, along with an alleged reasonably contemporaneous act, is *clearly material* to the issue of consent. Rather than reflecting a cogent decision-making process based on the weighing of the relevant facts and circumstances, this type of conclusion is infused with sexism. The supreme court did not engage in the proper statutory analysis.

The *Gonyaw* court apparently assumes that the victim's privacy rights are not very weighty and that previous consent given is probative to consent given to the disputed act. Yet the *Gonyaw* court is once again silent about how probative this evidence really is. A strong argument can be made that the probative value in this particular case was not that great because other, more probative evidence was available. For instance, events during the day of the alleged rape revealed that the victim and defendant were voluntarily together the entire day on a joint business venture.²⁸ While the defendant repeatedly threatened the victim, testimony indicated that the victim could have called the police or escaped from the defendant at several opportunities. The victim further testified that she obeyed the defendant's orders to go upstairs in her own home and lie on the bed. She then testified to submitting to several acts of sexual intercourse.²⁹ After the defendant left at 5:30 a.m., the victim testified that she showered, changed the bedding, and went to work. She did not report the rape to police until two

28. See *The Chronicle* (Newport, Vermont), Jan. 25, 1984, at 10, col. 1.

29. *Id.*

days later. This evidence, clearly probative and admissible, was considered by the jury. In comparison, evidence that the victim had previously engaged in sexual activity with the defendant has very little bearing or relevancy to whether she consented on that particular day.³⁰

The *Gonyaw* decision creates a substantial obstruction for prosecution in marital rape cases and in other situations in which the victim has consented in the past. Moreover, this rule departs from the legislature's express intent in enacting the rape victim shield provisions and criminalizing marital rape.

II. RAPE SHIELD LAWS

Rape laws in most states now include some form of rape shield provision.³¹ Vermont is no exception.³² These evidentiary provisions either prohibit or limit evidence concerning the past sexual conduct of the victim. Before enactment of these laws, the victim was usually subjected to grueling cross-examination pertaining to past sexual history. For many victims, this practice often made the trial almost as degrading as the rape itself. The purpose behind rape shield laws was to protect the victim from these often brutal inquiries and thus lessen the degradation to the victim at trial.

Vermont's rape shield law excludes all reputation and opinion testimony regarding a rape victim's sexual conduct.³³ However, it allows evidence of the victim's prior sexual acts in specified circumstances.³⁴ These circumstances include evidence of the complaining witness's past sexual conduct with the defendant;³⁵ evidence of specific instances of sexual conduct showing the source of semen, pregnancy, or disease;³⁶ and specific past false allegations of sexual assault.³⁷

30. *Id.* The victim further testified that she told the defendant, "If he persisted this would be rape."

31. See, e.g., MD. ANN. CODE art. 27, § 461A (1985); MICH. STAT. ANN. § 28.788(10)(1) (Callaghan 1982); MINN. STAT. ANN. § 609.347 (West 1985).

32. VT. STAT. ANN. tit. 13, § 3255 (Supp. 1985).

33. *Id.* § 3255(a)(1).

34. *Id.* § 3255(a)(3)(A)-(C).

35. *Id.* § 3255(a)(3)(A).

36. *Id.* § 3255(a)(3)(B).

37. *Id.* § 3255(a)(3)(C).

A. Probative Value Versus Private Character

Section 3255 requires that certain procedural steps be followed in order to introduce evidence of the victim's past sexual conduct. First, the defendant must file notice of intent, and then an in camera hearing must be held.³⁸ If the court determines during the in camera proceeding that the evidence is probative enough to outweigh the private character and bears on the credibility of the victim, it may be admitted at trial.³⁹ The legislative intent behind this section, as articulated in *State v. Patnaude*,⁴⁰ was to treat past-conduct evidence in a rape trial uniformly with past-conduct evidence in other criminal trials.⁴¹ In *Patnaude*, the court examined the "private character" test and concluded that it was a specific application of the more "probative than prejudicial" test.⁴² Moreover, the court expressed strong disdain regarding the use and purpose of past-sexual-conduct evidence as it relates to the consent defense in rape trials.⁴³ This disdain is irreconcilable with the actions of the *Gonyaw* court.⁴⁴

In *Patnaude*, the supreme court attacked the "fallacious" reasoning used to provide the necessary causal connection between prior sexual conduct and the rape.⁴⁵ The court's emphatic protest against using past-sexual-conduct evidence is revealed in the following passage:

Consent is not an uncontrollable force, which, once given, can never be withheld. Each decision to consent is a new act, a choice made on circumstances prevailing in the present, not

38. *Id.* § 3255(b).

39. *Id.* § 3255(a)(3).

40. *State v. Patnaude*, 140 Vt. 361, 376-77, 438 A.2d 402, 407 (1981) (quoting from *Hearings on S. Bill 34 Before the Vermont Senate Judiciary Comm.*, (Adj. Sess. 1977)).

41. *Patnaude*, 140 Vt. at 374, 438 A.2d at 407.

42. *Id.* at 377, 438 A.2d at 409.

43. *Id.*

44. The court, in *Gonyaw*, held *Patnaude* inapposite because the proffered testimony concerned the victim's sexual conduct with a third person, whereas in *Gonyaw*, the proffered evidence concerned past sexual conduct with the defendant. *Gonyaw*, slip op. at 3.

45. "[S]uch testimony is competent, not merely for the purpose of impeaching her general character for truth, but to show her part, a corrupted mind, from which her consent to such an act is the natural result of her inclinations." *State v. Johnson*, 28 Vt. 512, 514 (1856).

"The jury would be less ready to conclude that a woman who had once improperly yielded, afterwards properly resisted, than they would if she had been a woman of unquestioned virtue." *State v. Reed*, 39 Vt. 417, 419 (1867) (reaffirmed in *State v. Hollenback*, 67 Vt. 34, 35, 30 A. 696, 697 (1894)).

governed by the past.

The proffered evidence is worse than worthless. Not only does it have no probative value, but it carries with it the great potential for unfair prejudice, confusion of the issues, and bogging the court down in collateral matters which is characteristic of evidence of past sexual conduct.⁴⁶

Although the strong language in *Patnaude* involved past sexual conduct with third persons,⁴⁷ prohibiting this type of evidence should not be wholly abandoned because the victim and defendant have had previous consensual activity.⁴⁸

In *Patnaude*, the two defendants were accused by two women of repeated sexual assaults upon them at a secluded cabin.⁴⁹ A jury found both defendants guilty of sexual assault on both women.⁵⁰ On appeal the defendants claimed that the trial judge's exclusion of past-conduct evidence constituted reversible error.⁵¹ The supreme court wholly rejected this claim and heartily applauded the restrictions of the Vermont shield laws. The *Patnaude* court reasoned that these restrictions purposely screened the rape victim from unnecessary indignities and needless probing into her past sexual history.⁵²

The court's directive in *Patnaude* is that "[e]ach decision to consent is a new act, [based] on [the] circumstances of the present, and not governed by the past."⁵³ However, the *Gonyaw* court weakly attempts to distinguish *Patnaude* by noting that consent for sexual conduct with one person has no tendency to prove consent for sexual conduct *with another*.⁵⁴ Distinguishing *Patnaude* on the basis of past sexual conduct with third persons, other than

46. 140 Vt. at 380, 438 A.2d at 410. The court further stated:

The legislature, in enacting the rape victim shield law, rejected the former view that in rape, unlike all other areas of the law, past acts prove the existence of a corrupt mind which inclines the witness to automatic consent on all occasions. The notion that an unchaste woman cannot be raped has been wholly rejected.

Id. at 373, 438 A.2d at 407.

47. *Id.* at 380, 438 A.2d at 411.

48. *Id.* In addition, the court stated, "Even a prostitute should have a right to choose." 140 Vt. at 373, 438 A.2d at 407. It is difficult to imagine how the choice may be usurped dependent upon whether the victim has previous sexual activity.

49. *Id.* at 366, 438 A.2d at 403.

50. *Id.*

51. *Id.* at 367, 438 A.2d at 403.

52. *Id.* at 373, 438 A.2d at 407.

53. *Id.* at 380, 438 A.2d at 410.

54. *Gonyaw*, slip op. at 3.

the defendant, is a distinction without a difference. Given the strong language of *Patnaude*, the *Gonyaw* decision renders the sound reasoning of *Patnaude* impotent.

Prior to *Gonyaw*, the trial judge, bound by the legislative strictures of section 3255, was required to weigh the probative value of the evidence against its private nature to determine its admissibility. After *Gonyaw*, the discretion of the trial judge at the in camera hearing is significantly limited. The trial judge presented with similar factual circumstances to *Gonyaw* will be bound by the ruling that the probative value of the evidence outweighs its private character. However, with the recent criminalization of marital rape in Vermont,⁵⁵ proffered evidence of prior consensual acts may be more commonplace in marital rape trials. A ruling such as *Gonyaw* presents a dangerous precedent in the context of marital rape trials.

B. Marital Rape: Past Consensual Acts?

As mentioned earlier, when the defendant claims the victim consented, the defense will attempt to admit any and all evidence of the victim's sexual history. If the defendant is accused of marital rape, past-conduct evidence from the couple's sexual history will become of utmost importance to the defendant's consent defense. The *Gonyaw* rule will unfairly disadvantage the spouse alleging rape.

A strong argument can be made that the private character evidence between a victim and a defendant who were previously intimate far outweighs the probative value. Interviews with rape victims contradict the preconceived notion that rape by a husband, friend, or lover is less traumatic than rape by a stranger.⁵⁶ The sexually battered spouse is subjected to cruelties and atrocities that take place in the socially supported institution of marriage. Coming forward to report such crimes presents substantial fears of reprisal, guilt, and disbelief. As a result, many spouses are reluctant to report physical abuse and rape by their husbands. Subjecting victims to degrading cross-examination based upon their past

55. VT. STAT. ANN. tit. 13, § 3252 (Supp. 1985). The 1977 revised sexual assault statute barred prosecution of spousal rape in Vermont. After several years of legislative debate, the current statute allows prosecution of all instances of marital rape, regardless of whether the couple is living together or apart.

56. D. RUSSELL, *THE POLITICS OF RAPE* 87-97 (1975).

sexual activity with a husband, friend, or lover presents even more trauma and degradation for the victim at trial.

Although *Gonyaw* involved an unmarried couple who had once cohabited, the court indicated that consensual sexual activity over a period of years, coupled with a claimed reasonably contemporaneous consensual act with the act complained of, would be clearly material to the issue of consent.⁵⁷ Since prior sexual activity is universally present in marriage, evidence of past sexual conduct in a marital rape situation will fall squarely within the *Gonyaw* rule. Although creative litigation by prosecutors may be able to distinguish *Gonyaw* on a case-by-case basis, a more viable and consistent solution would be through legislative change. The Vermont legislature should either prohibit all evidence of past sexual conduct between the defendant and the victim or amend section 3255 to clarify the probative versus private test. In addition, in light of the fallacious reasoning of the *Gonyaw* court, the court should overrule *Gonyaw* at the first opportunity.

III. JUSTIFYING LEGISLATIVE REFORM

Strong arguments can be made in favor of prohibiting all evidence of the victim's and defendant's previous sexual conduct. First, not only is such evidence inherently unreliable, private, and prejudicial, it distracts the jury from the main question of what actually happened on the particular occasion under review. The jury will focus upon the victim's sexual history with the defendant rather than confining itself solely to the issue of consent on the one occasion.⁵⁸ Moreover, any evidence of the victim's prior sexual behavior will assume disproportionate importance in the trial.

The victim's guilt or innocence should not be in issue during a rape trial. The defense is allowed to bring the victim's character and reputation into question by detailing her sexual history for the jurors, while the defendant's sexual and criminal history are rarely put in issue.⁵⁹ These types of legal procedures may further threaten the rape victim's emotional state.

Prohibiting past-sexual-conduct evidence between the victim

57. *Gonyaw*, slip op. at 5.

58. H. KALVEN & H. ZIESEL, *THE AMERICAN JURY* 249 (1966).

59. C. GOLDSTEIN, *THE DILEMMA OF THE RAPE VICTIM: A DESCRIPTIVE ANALYSIS* 20 (1976).

and defendant would not significantly impair the defendant's right to cross-examine and confront the witness.⁶⁰ Although the right to confront adverse witnesses is fundamental, it is not absolute.⁶¹

The *Patnaude* case also explicated that, according to the Vermont Supreme Court, legally relevant evidence was not automatically admissible without regard to the state's interests.⁶² The *Patnaude* court, in discussing confrontation clause issues, concluded that the defendant's right was not absolute, that it can be outweighed by legitimate state interests.⁶³ Certainly the state's interest in the effective prosecution of sex crimes is just such an interest.

The state's interests in restricting the admissibility of past-sexual-conduct evidence with the defendant include encouraging reluctant rape victims to report the crime and assist in subsequent prosecution. This incentive to testify in court against the assailant would produce more prosecutions and convictions, and thus provide a greater deterrent. This state interest must also be balanced with the victim's interest in privacy and freedom from unfair prejudice at trial and the defendant's right to due process. As long as the sexual assault statute does not infringe on the defendant's constitutional right to confront his accusers and produce evidence on his behalf, the statute is permissible. Merely extending the rape shield law to sexual history relating to the defendant would be constitutionally permissible because the existing rape shield provision was constitutionally upheld in *Patnaude*.⁶⁴

CONCLUSION

Inquiries into sex histories carry an inherent danger of unfairly prejudicing and misleading the jury. Avoiding these dangers is a legitimate interest in the Vermont criminal trial process. A further articulated state interest is that the victim no longer be subject to debilitating and degrading cross-examinations in a forcible rape trial. Prohibiting past-sexual-conduct evidence between the victim and defendant would protect the victim's legitimate expect-

60. U.S. CONST. amend. IV.

61. *Chambers v. Mississippi*, 410 U.S. 284 (1973). The Supreme Court pointed out that other legitimate interests in the trial process must be considered. *Id.* at 295.

62. 140 Vt. at 369, 438 A.2d at 405.

63. *Id.* at 369-80, 438 A.2d at 404-11.

64. *Id.* at 361, 438 A.2d at 402.

tation of privacy without denying the defendant's right to confrontation.

The Vermont legislature and the Vermont Supreme Court have recognized that the rape victim's sexual conduct with those other than the defendant is irrelevant to establish consent. However, the *Gonyaw* court's calm, despite *Patnaude* and the recent legislative victory of criminalizing marital rape, demands outrage. While it is not clear to what extent legislative power can resolve the private versus probative test, Vermont lawmakers must strengthen efforts to ensure a consummate solution to this dangerous precedent.

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