Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*

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Listening to women and believing their stories is central to feminist method.[1]

Feminist method starts with the very radical act of taking women seriously.[2]

This article begins by briefly describing some of the barriers to women's credibility in courtroom settings, drawing on social-psychological research and task force reports on gender bias in the courts.

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1 Patricia A. Cain, *Feminist Jurisprudence,* 4 Berkeley Women's L.J. 191, 195 (1989).

2 Christina A. Littleton, *Feminist Jurisprudence,* 41 Stan. L. Rev. 751, 764 (1989) (reviewing Catharine A. MacKinnon, *Feminism Unmodified* (1987)).

It then focuses on one particular problem facing women who testify about rape—the need for corroboration. While many jurisdictions have by statute abolished requirements of corroboration, or no longer require a warning that it is unsafe to convict without corroboration, trial judges sometimes still give harsh corroboration warnings, with the approval of appellate courts. These instructions are based on the same false beliefs about women's credibility that led in an earlier era to mandatory warnings. The persistence of biased beliefs, in the face of contrary empirical evidence and statutory change, shows that legislative amendment of the proof process must frankly recognize the existence of gender bias and take it into account when planning reform. Otherwise, reforms will fail, and women's evidence will continue to be treated as less credible than men's.

Believing women represents a radical step forward because the world generally, and the law specifically, regard women as less worthy of belief than men for the sole reason that they are women.[3] In her powerful dissent in *Seaboyer,* Justice L'Heureux-Dubé commented that the "preoccupation of law with credibility of the complainants [in rape] cases and the blatant stereotyping of such complainants as untrustworthy are difficult to comprehend."[4] When looked at from a feminist perspective, however, these tendencies are not at all difficult to comprehend. Women who testify to having been raped are insisting on being heard, being taken seriously, and getting the legal system to act on their stories. This is a threatening stand to take in a culture and a legal system that assume and enforce women's subordination.[5]

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[3] Lynn Hecht Schafran, *Gender Bias in the Courts,* 22 Creighton L. Rev. 413, 415–16 (1989). Literature reflects this disability as well. "[W]omen are rarely believed when they testify as victims" and "no account [is] available to us [in traditional stories] of a woman [who is] . . . both good and in control of her story." Carolyn G. Heilbrun, *The Thomas Confirmation Hearings, or How Being a Humanist Prepares You for Right-Wing Politics,* 65 S. Cal. L. Rev. 1569, 1573 (1992).

[4] Seaboyer v. R., [1991] 2 S.C.R. 577, 669 (Can.) (L'Heureux-Dubé, J., dissenting in part).

[5] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State* (pts. 1 & 2), 7 Signs 515 (1982), 8 Signs 635 (1983); *see also* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power,* 40 Buff. L. Rev. 441, 446–90 (1992) (describing some gender-based power disparities and the consequences for women).

The law's lack of belief in women's stories can be seen as a direct manifestation or consequence of the overall problem of male dominance. As both critical theorists and feminist scholars have shown, "the dominant story-teller can make his position seem the natural one."[6] This means that many of men's stories about women—the myths and the stereotypes—have become part of the law's story about women. If these false stories are not challenged, the legal system will continue to serve as a mechanism for perpetuating the subordination of women.

DISBELIEF OF WOMEN'S TESTIMONY IN SEXUAL ASSAULT CASES

In the area of sexual assault, the dominant story in law has been that propounded by Hale more than two and a half centuries ago. Rape is "an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."[7] This commitment to women's lack of credibility when testifying about rape, based on no evidence and indeed in the face of contrary evidence, has consistently been expressed in legal rules, in jury instructions, in appellate opinions, and in law treatises.[8] This dominant legal story appears in many forms,[9] but at its heart lies the assumption that women lie when talking about rape. One commentator has noted that the myth of the lying woman is the most powerful myth in the tradition of rape law.[10]

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6 Carol M. Rose, *Property as Storytelling,* 2 Yale J.L. & Human. 37, 54 (1990).

7 1 Sir Matthew Hale, *The History of the Pleas of the Crown* 634 (1736).

8 Nancy S. Erickson, *Final Report: Sex Bias in the Teaching of Criminal Law,* 42 Rutgers L. Rev. 309, 350 (1990) (noting that none of the U.S. casebooks surveyed provided sufficient material for a law professor wanting to teach sex bias issues in the law of rape); Ngaire Naffine, *Windows on the Legal Mind: The Evocation of Rape in Legal Writings,* 18 Melb. U. L. Rev. 741 (1992).

9 Lynne Henderson, *Rape and Responsibility,* 11 Law & Phil. 127 (1992) (emphasizing society's imposition on women of moral responsibility for male sexual misconduct).

10 Susan Estrich, *Palm Beach Stories,* 11 Law & Phil. 5, 11 (1992).

Before looking at the ways in which the law has implemented this bias against believing women in the particular context of rape trials, it is important to note some of the general barriers that face women who appear in court.

The first element in the lack of belief in women as witnesses has to do with general social expectations about how a credible speaker is supposed to sound: like a man. Studies have identified a number of language features associated with powerlessness. Examples include superlatives, intensifiers ("so" or "such"), fillers ("um" or "you know"), empty adjectives, tag questions with rising intonation (even with an accurate assertion), hedges ("sort of"), and politeness markers.[11] It appears that these features are used more often by women than by men, although class, education, and the particular power relationship between the speakers are also significant factors.[12] Other qualities more likely in women speakers are high pitch and frequent smiling. These, too, are associated with powerlessness (or fear) and hence convey lack of credibility. Similarly, women tend to use numerical specificity less often, whereas men use more numerical specificity but with less accuracy.[13]

Moreover, women are more likely to speak hesitantly even if they are certain, while men are more likely to speak with assurance even if unsure or wrong.[14] Confident speakers may be perceived as more credible, but studies of eyewitnesses have shown that confidence does not necessarily reflect accuracy, and greater confidence can in fact mean less accuracy.[15]

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11 Calvin Morrill & Peter C. Facciola, *The Power of Language in Adjudication and Mediation,* 17 Law & Soc. Inq. 191, 193 (1992); Susan Deller Ross, *Proving Sexual Harassment,* 65 S. Cal. L. Rev. 1451, 1455 (1992) (citing John M. Conley et al., *The Power of Language: Presentational Styles in the Courtroom,* 1978 Duke L.J. 1375, 1380-81, 1386).

12 Cynthia Fuchs Epstein, *Deceptive Distinctions* 215-31 (1988); Morrill & Facciola, *supra* note 11, at 196.

13 Sharon Veach, Linguistics and Women Attorneys in the Courtroom (paper presented at the 11th National Conference on Women and the Law, San Francisco, California, United States, Feb. 28-Mar. 2, 1980).

14 Kit Kinports, *Evidence Engendered,* 1991 U. Ill. L. Rev. 413, 446.

15 Elizabeth F. Loftus, *Eyewitness Testimony* 100-01 (1979).

The cumulative effect of such differences is the perception of women as less believable, even when they are accurate and honest. Indeed, "both women and men perceive women as being less credible than men in all the senses of the term, and the recent years have by no means eliminated these attitudes."[16]

The advantages of a masculine, or powerful, speech style in the legal context may go beyond increased credibility. One recent study suggests that persons, including judges, listening to different accounts of a dispute are more likely to ascribe blame to the party who uses a powerless speech style.[17] In a rape case, where essential elements of proof are the woman's nonconsent and the man's belief as to her consent, this aspect of gender bias in judge or juror may be decisive. A woman witness using a powerless speech style, socially appropriate for her, may thus be wrongly blamed for a "misunderstanding" about consent.

Another way in which bias operates directly against women in the proof process is shown by reports and task forces, in the United States and in Canada, that have examined gender bias in the courts.[18] This literature marshals data that prove remarkably consistent from jurisdiction to jurisdiction[19] and that chronicle many of the ways in which women as witnesses or litigants face credibility issues men do not. Examples include patronizing language ("little lady") or other disre-

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16 New York Task Force on Women in the Courts, *Final Report* 183 n.289 (1986) (quoting Lynn Hecht Schafran, *Eve, Mary, Superwoman: How Stereotypes about Women Influence Judges,* 24 Judges J. 12, 16 (1985)) *[hereinafter N.Y. Report].*

17 Morrill & Facciola, *supra* note 11, at 204.

18 *Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts* (1989) [hereinafter *Mich. Report];* Maryland Special Joint Comm., *Gender Bias in the Courts* (1989) [hereinafter *Md. Report];* Nevada Supreme Court Gender Bias Task Force, *Justice for Women* (1988) [hereinafter *Nev. Report];* New Jersey Supreme Court Task Force on Women in the Courts, *The First Year Report* (1984) [hereinafter *N.J. Report]; Minnesota Supreme Court Task Force for Gender Fairness in the Courts,* 15 Wm. Mitchell L. Rev. 827 (1985) [hereinafter *Minn. Report]; Vermont Task Force Report on Gender Bias in the Legal System,* 15 Vt. L. Rev. 395 (1991) [hereinafter *Vt. Report];* reports for Alberta, Saskatchewan, and British Columbia are described in Joan Brockman, *Bias in the Legal Profession,* 30 Alta. L. Rev. 747 (1992).

19 *Vt. Report, supra* note 18, at 397.

spectful forms of address ("honey"); inappropriate comments on dress, marital status, or parental role; and sexual harassment.[20] Overall, it appears that female litigants and witnesses typically are at a disadvantage because judges and jurors may give the testimony of women less credence simply because they are women.[21] Some reports have concluded that the disparity in credibility and respect accorded men and women is of such magnitude that it denies equal justice[22] and that gender bias directly affects the outcome of legal proceedings.[23]

When women testify about rape in particular, unique barriers to belief emerge. In fact, the common law developed a set of rules specifically to attack the credibility of women testifying in rape cases;[24] these rules related to the expectation of a recent complaint,[25] the relevance of sexual history,[26] the requirement (mainly in the United States) of force or other forms of resistance,[27] and the need for corroboration. The corroboration rules pertaining to women alleging rape contrasted sharply with the usual common law rule that the jury was entitled to convict on the unsupported testimony of one witness.[28] The

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20 *Md. Report, supra* note 18, at xxxiii; *Mich. Report, supra* note 18, at 14; *Minn. Report, supra* note 18, at 839; *Nev. Report, supra* note 18, at 69.

21 *Md. Report, supra* note 18, at xxxv; *Mich. Report, supra* note 18, at 14.

22 *Vt. Report, supra* note 18, at 409.

23 *Md. Report, supra* note 18, at xxxv.

24 Many of these special requirements have now been lessened or abolished in some jurisdictions, though the effect of these changes has been limited. *See* section *infra* entitled "The Persistence of Bias in the Face of Legislative Reform."

25 Susan Estrich, *Real Rape* 5 (1987); Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* 339 (1990); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 Colum. L. Rev. 1, 10 n.72 (1977); Note, *Rape Corroboration Requirements,* 81 Yale L.J. 1365, 1369 (1972) [hereinafter *Yale Note].*

26 Estrich, *supra* note 25, at 4; Berger, *supra* note 25, at 10.

27 Estrich, *supra* note 25, at 3–4; Berger, *supra* note 25, at 7–8.

28 Estrich, *supra* note 25, at 3; Law Comm'n for Eng. & Wales, *Report No. 202, Criminal Law: Corroboration of Evidence in Criminal Trials* 32 (1991) [hereinafter Law Comm'n]; Berger, *supra* note 25, at 9. Note that corroboration of essential facts is

corroboration rules in rape cases ranged from a demand for corroboration of every material fact essential to constitute the crime[29] to a judicial warning that it was unsafe to convict on the basis of a woman's uncorroborated testimony about rape (the usual rule in the United Kingdom and Australia).[30]

The explicit basis of such rules was a belief in the untrustworthiness of women in general and their allegations of rape in particular.[31] The Law Commission, summarizing the law of England and Wales in 1991, stated that the judge must explain to the jury why it was dangerous to convict only on the uncorroborated evidence of the complainant. The reason commonly given related to the putative nature of women and girls.[32] Perhaps the most widely quoted version of this view was that articulated by Lord Justice Salmon:

> [H]uman experience has shown that . . . girls and women [in these courts] do sometimes tell an entirely false story which is

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generally required in Scotland. Iain MacPhail, Corroboration Rules: Sex Cases, Accomplices, and Confessions (paper presented at the Society for the Reform of Criminal Law Conference on "Reform of Evidence Law," Vancouver, British Columbia, Canada, Aug. 3–7, 1992).

29 *Yale Note, supra* note 25, at 1368–70; *see, e.g.*, People v. Radunovic, 234 N.E.2d 212, 214 (N.Y. 1967).

30 Law Comm'n, *supra* note 28, at 31; Andrew Ligertwood, *Australian Evidence* ¶¶ 4.14–4.16 (1988).

31 Longman v. R., 168 C.L.R. 79, 92 (1989) (Austl.) (Deane, J.); Seaboyer v. R., [1991] 2 S.C.R. 577, 653 (Can.) (L'Heureux-Dubé, J., dissenting in part); Estrich, *supra* note 25, at 43; Graycar & Morgan, *supra* note 25, at 339; Law Reform Comm'n of Vict., *Report No. 13, Rape and Allied Offences* ¶ 97 (1988); Jennifer Temkin, *Rape and the Legal Process* 133 (1987); Berger, *supra* note 25, at 10; Christine Boyle, *Sexual Assault and the Feminist Judge,* 1 Can. J. Women & L. 93, 95 (1985); Elizabeth A. Sheehy, *Canadian Judges and the Law of Rape,* 21 Ottawa L. Rev. 741 (1989). Note that other crimes for which corroboration was required were almost always crimes against women or claims by women against men, such as affiliation, P.K. Waight & C.R. Williams, *Cases and Materials on Evidence* 830–31 (2d ed. 1985); and procuration or seduction under a promise of marriage, *Seaboyer,* [1991] 2 S.C.R. at 676 (L'Heureux-Dubé, J., dissenting in part); Law Comm'n, *supra* note 28, at 21–22; Temkin, *supra,* at 133.

32 Law Comm'n, *supra* note 28, at 32.

> very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.[33]

Besides reasons related to the likelihood of falseness in the woman's story, including the alleged ease of making unfounded allegations (and the ease of fabricating corroboration!),[34] judicial explanations for requiring corroboration outlined the difficulty for a man to refute a false charge of rape,[35] the likelihood of jury sympathy for the victim,[36] and more detailed observations about qualities alleged to be significant in female psychology—neurosis, jealousy, spite, fantasy, and shame.[37]

But the law's bias toward women went deeper than merely assuming that they are malicious and mendacious. It also regarded women as particularly adept at concealing these qualities,[38] thus the need to *warn* jurors, based on some notion of the "law's vast experience" or

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[33] Henry v. R., 53 Crim. App. 150, 153 (1968) (Eng.). In the United States as well, many jurisdictions once mandated instructions that embodied Lord Hale's view of the ease of fabricating, and the difficulty of defending, rape charges. Morrison Torrey, *When Will We Be Believed?,* 24 U.C. Davis L. Rev. 1013, 1045 (1991); A. Thomas Morris, Note, *The Empirical, Historical, and Legal Case against the Cautionary Instruction,* 1988 Duke L.J. 154, 154–55.

[34] Australian Law Reform Comm'n, *Report No. 26* (1985) (draft); Australian Law Reform Comm'n, *Report No. 38,* at 168–202 (1987) (final) [hereinafter *Austl. Law Comm'n Report];* Temkin, *supra* note 31, at 134; J.D. Birch, *Corroboration in Criminal Trials: A Review of the Proposals of the Law Commission's Working Paper,* 1990 Crim. L. Rev. 667, 675 n.55; J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U. Pa. L. Rev. 544, 546–47 (1980).

[35] Temkin, *supra* note 31, at 134; Berger, *supra* note 25, at 10; *Yale Note, supra* note 25, at 1382. Because sentences for rape often were very severe, it was said to be particularly important to minimize the risk of wrongful convictions.

[36] *Yale Note, supra* note 25, at 1378.

[37] Temkin, *supra* note 31, at 134; Berger, *supra* note 25, at 10; *Yale Note, supra* note 25, at 1382.

[38] Law Reform Comm'n of Vict., *supra* note 31, at 40; Temkin, *supra* note 31, at 134.

"history."[39]

Some commentators took their distrust of women to fantastic extremes. John Henry Wigmore recommended that no rape case should go forward unless the victim had a psychiatric examination and Glanville Williams advocated the use of lie detectors.[40] Such extreme measures were quite unnecessary: where corroboration requirements were strictly enforced, for instance, in the United States, conviction rates were very low.[41] In New York State in 1972, there were only eighteen rape convictions, a tribute to a corroboration requirement described as the harshest in the United States.[42]

Until the early 1980s, rape was, by definition, a sex-specific crime of men against women. It still is in fact, though the present gender-neutral definitions tend to conceal this.[43] The modern form of the corroboration rule is also usually set out in gender-neutral language, reflecting the new descriptions of the offense.[44] Even so, the special corroboration warning is still expressly based on false beliefs about the untrustworthiness of women.[45] As the Law Commission observed, although the general form of the warning does not distinguish between male and female, "where the complainant is female, the judge may think it helpful to the jury to refer to alleged characteristics of female complainants."[46]

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39 Williams v. R., 26 A. Crim. R. 193, 195 (Vict. Crim. App. 1987) (Murphy, Brooking & Hampel, JJ., quoting the trial court).

40 3A *Wigmore on Evidence* § 924(a) (James Harmon Chadbourn rev. ed., 1970); Glanville Williams, *Corroboration: Sexual Cases,* 1962 Crim. L. Rev. 662, 664.

41 *Yale Note, supra* note 25, at 1370.

42 *N.Y. Report, supra* note 16, at 65 n.102.

43 Graycar & Morgan, *supra* note 25, at 340; Berger, *supra* note 25, at 7 n.43; Boyle, *supra* note 31, at 95; T. Brettel Dawson, *Sexual Assault Law and Past Sexual Conduct of the Primary Witness,* 2 Can. J. Women & L. 310, 326 (1988).

44 Ligertwood, *supra* note 30, at 122.

45 Law Comm'n, *supra* note 28, at 32; Temkin, *supra* note 31, at 135–36; *see also* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts,* 70 Minn. L. Rev. 763 (1986).

46 Law Comm'n, *supra* note 28, at 32.

The various justifications for a gender-based discriminatory rule have been thoroughly discredited by empirical research. There never was, of course, any evidence to support such claims,[47] and there is now substantial contrary evidence.[48]

As an initial matter, there is no more danger of an unfounded charge of rape than of any other crime. Empirical studies have generally shown a rate of false reports for this crime of less than 2 percent (although one report suggests 7 percent, this figure may reflect some of the same biased attitudes that cause police arbitrarily to reject genuine complaints of rape).[49] If anything, the risk of false charges of rape tends to be less than for other crimes. For example, the Portland, Oregon, Police Department has reported that 1.6 percent of rape complaints prove false, compared with 2.6 percent of stolen car complaints.[50] While it is not at all difficult to report a stolen car or a burglary, the obstacles that confront a rape victim when she does come forward and the very low rate of reporting of actual rapes show that it cannot be an easy claim to make.[51]

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47 Longman v. R., 168 C.L.R. 79, 93 (1989) (Austl.) (Deane, J.); *N.Y. Report, supra* note 16, at 65; Birch, *supra* note 34, at 677; Julie Taylor, *Rape and Women's Credibility,* 10 Harv. Women's L.J. 59, 60 (1987); *Yale Note, supra* note 25, at 1384–85.

48 *E.g.,* Graycar & Morgan, *supra* note 25, at 341; Temkin, *supra* note 31, at 134; Sheehy, *supra* note 31, at 757; Kate Warner, *An Obstacle to Reform: "False" Complaints of Rape,* 6 Legal Serv. Bull. 137, 138 (1981); *Yale Note, supra* note 25, at 1378. The U.S. Model Penal Code form of cautionary instruction specifically refers to the "emotional involvement of the witness" as a reason to require the jury to evaluate her testimony "with special care." Model Penal Code § 213.6(5) (1985).

49 Graycar & Morgan, *supra* note 25, at 341; Naffine, *supra* note 8, at 753–53; Sheehy, *supra* note 31, at 758 n.68; Taylor, *supra* note 47, at 88 n.138.

50 Lynn Hecht Schafran, *Writing and Reading about Rape,* 66 St. John's L. Rev. 979, 1012–13 (1993).

51 *Longman,* 168 C.L.R. at 94 (Deane, J.); Temkin, *supra* note 31, at 134; Galvin, *supra* note 45, at 797; Tanford & Bocchino, *supra* note 34, at 547. Law Reform Comm'n of Vict., *supra* note 31, ¶ 97, observed that it is "no longer true that [a charge of rape] is easy to make," a curious remark, since it implies that once it was easier.

In the United States, there is a very significant exception to these generalizations about low conviction rates and lack of jury sympathy for women. When a white woman accused a black man of rape, racism came to the fore. In earlier centuries, and indeed

Nor does it appear to be especially difficult for men to refute a charge of rape (whether the accusation is true or false).[52] Because of low reporting by victims, and unwillingness on the part of police to investigate and prosecute, many men who rape are never confronted with an accusation at all. Even in those cases selected for trial, conviction—whether by a plea of guilty or after a trial—is rare, especially when the assailant was known to the victim and there was no injury beyond the rape itself. In both the United States and Australia, convictions for rape are lower than for other serious crimes, even after implementation of the reforms described in the following section.[53]

The low conviction rate also shows the lack of sympathy on the part of jurors. While this was perhaps especially true when juries were all male,[54] jury suspicion of rape victims continues. Today, attorneys

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not uncommon well into this century, lynchings occurred; in the twentieth century, the death penalty was used in its stead. Between 1930 and 1967, 89 percent of the men executed for rape in the United States were black. Estrich, *supra* note 25, at 107 n.2. This does not necessarily mean that white women had great credibility and were believed, by whites or by blacks; it demonstrates, rather, that racial politics required that white men act on any and all claims that a black man had raped a white woman.

Worst of all is the victimization of black women. In addition to experiencing the negative stereotypes and disbelief confronting all women, black women have suffered negative stereotyping specifically about them, such as their allegedly promiscuous nature. "[T]he experience of rape for black women includes not only a vulnerability to rape and a lack of legal protection radically different from that experienced by white women, but also a unique ambivalence" because of "their own victimization and the victimization of black men." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 Stan. L. Rev. 581, 601 (1990).

[52] U.S. statistics are discussed in Toni M. Massaro, *Experts, Psychology, Credibility, and Rape,* 69 Minn. L. Rev. 395, 404–05 n.52 (1985) (citing a study documenting three convictions out of forty-two jury trials); *Yale Note, supra* note 25, at 1382–84. Canadian statistics are discussed briefly in Sheehy, *supra* note 31, at 751 n.45. Some Australian jurisdictions show somewhat higher conviction rates (43–48 percent) after a filtering process. Law Reform Comm'n of Vict., *Interim Report No. 42,* appendix 7, at 183 (1991) (setting out the legislative and procedural recommendations on sexual assault that were submitted by the Real Rape Law Coalition) [hereinafter *Interim Report No. 42].*

[53] Henderson, *supra* note 9, at 128 (citing Gary LaFree, *Rape and Criminal Justice* (1989)); Naffine, *supra* note 8, at 764–65; Morris, *supra* note 33, at 170–71.

[54] *Yale Note, supra* note 25, at 1379.

perceive jurors as wanting more corroboration in cases of sexual assault than in cases of other serious crimes, and attorneys agree that sexual assault victims are typically accorded less credibility.[55]

The research also establishes that even if any of the generalized accusations about women acting out of spite or jealousy or fantasy or shame are true in a particular case, the jury can spot these motives in rape trials just as easily as in any other criminal trials.[56] As to the generalized claim that women are more likely than men to lie, some judges were beginning to recognize the absurdity of this belief even before the common law rules were amended by statute and resented having to give the warning in all cases.[57]

THE PERSISTENCE OF BIAS IN THE FACE OF LEGISLATIVE REFORM

As feminist legal scholars have begun to have more impact, and the inaccuracy of the law's story of rape has become more widely recognized, the substantive law of rape and many of the procedural rules that denigrate women's credibility when testifying about sexual assault have been reexamined and changed.[58] Unfortunately, a review of recent at-

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55 *Gender Bias Study of the Court System in Massachusetts,* 74 Mass. L. Rev. 50 (1989); *N.Y. Report, supra* note 16, at 75–76; Estrich, *supra* note 10, at 29.

56 Birch, *supra* note 34, at 680.

57 According to Law Comm'n, *supra* note 28, ¶ 4.5, judges asked about the corroboration warning expressed dislike and embarrassment at the standard direction. Judge Jacobs of the Supreme Court of South Australia has been quoted as saying, "I frankly resent having to tell juries that it is unsafe to convict in a case in which it does not appear to be at all unsafe." S. Austl., Parl. Deb. (Hansard), Legislative Council, at 1182 (Oct. 17, 1984) [hereinafter S. Austl. Debates].

58 For a summary of reforms in this area, see Seaboyer v. R., [1991] 2 S.C.R. 577, 674–78 (Can.) (L'Heureux-Dubé, J., dissenting in part); Estrich, *supra* note 25, at 80–91; Graycar & Morgan, *supra* note 25; 2 Gender Bias Comm., Law Soc'y of British Columbia, *Gender Equality in the Justice System* (1992) [hereinafter B.C. Law Soc'y]; Jocelynne Scutt, *Women and the Law* (1990); Temkin, *supra* note 31, at 25–154.

tempts to do away with corroboration rules shows the limited impact of law reform in this area and the tenacity of the legal system's distrust of women. One commentator has suggested that as men have lost the unwarranted protection previously given by the substantive and procedural law of rape, the underlying distrust of women and the myth that women lie about rape have reasserted themselves even more forcefully.[59]

Corroboration warning requirements have been studied by a number of law reform commissions,[60] and some legislative changes have been introduced.[61] The most usual reform is simply abolition of the requirement to warn, without any prohibition on giving the traditional warning, and no further guidance as to when some warning is or is not appropriate. While several U.S. jurisdictions have, by either statute or judicial decision, abolished the requirement to give a cautionary instruction, very few have prohibited such warnings entirely, and more than half the states still permit them.[62]

South Australia's legislation is typical of the movement to abolish corroboration warning requirements;[63] similar reforms have been enacted in New South Wales[64] and Victoria[65] and proposed by the Law Commis-

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59 Estrich, *supra* note 10, at 10, 14.

60 *E.g., Austl. Law Comm'n Report, supra* note 34; Criminal Law and Penal Methods Reform Comm. of S. Austl., *Report No. 3, Court Procedure and Evidence* (1975); Law Comm'n, *supra* note 28; Law Reform Comm'n of Vict., *supra* note 31.

61 *E.g.,* Criminal Code, R.S.C., ch. C-46, § 274 (1985) (Can.); as to the repeal of corroboration and warning requirements in U.S. jurisdictions, see Kinports, *supra* note 14, at 438 n.143 (citing Karla Fischer, Note, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome,* 1989 U. Ill. L. Rev. 691, 696 n.36); *see also* Temkin, *supra* note 31, at 141–43. On the Australian legislation, see *infra* notes 63–65, 67–68.

62 Morris, *supra* note 33, at 155–56.

63 Evidence Act, 1929 (as amended 1976), § 34i(5) (S. Austl.).

64 Crimes (Sexual Assault) Amendment Act, No. 42 of 1981 (as amended 1985 & 1987), § 405C (N.S.W.).

65 Crimes Act, 1958, § 62(3) (Vict.).

sion for England and Wales.[66] Section 34i(5) of the South Australian Evidence Act, 1929, provides:

> In proceedings in which a person is charged with a sexual offence, the judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence.

The Western Australian provision is to like effect, with the additional proviso that the judge shall not give a warning unless satisfied that it is justified in all the circumstances.[67] In the Australian Capital Territory, the judge may comment on the evidence but "shall not" warn that it is unsafe to convict without corroboration.[68] The relevant Canadian provision also directs that the judge shall not instruct that it would be unsafe to convict without corroboration.[69]

How have judges reacted to these reforms? In Australia, the courts have considered the new legislation, and this section examines these decisions. As a general proposition, judges seem to understand that the reason for the changes is that the legislature now regards the previous adverse reflection on the credibility of women as unwarranted (and the corresponding protection of the defendant as unjustified)[70] and that, as a matter of law, women are no longer to be put before juries as a category of persons whose evidence requires corroboration before it can be relied on to convict.[71] Nevertheless, appellate judges continue to allow, and even to require, corroboration warnings to be given when

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66 Law Comm'n, *supra* note 28, ¶ 5.2.

67 Evidence Act, 1906, § 36BE(1) (W. Austl.).

68 Evidence Act, 1971, § 76F(1)(2) (A.C.T.).

69 Cited *supra* note 61.

70 Longman v. R., 168 C.L.R. 79, 85-86 (1989) (Austl.) (Brennan, Dawson & Toohey, JJ.). Note that the Model Penal Code, *supra* note 48, § 213.6(5), contains a corroboration requirement. The reason given is an explicit choice to benefit the defendant, not an effort to discount the testimony of women. *Id.* § 213.6 commentary at 428-29.

71 Murray v. R., 30 A. Crim. R. 315, 321 (N.S.W. Crim. App. 1987).

women testify to being raped.[72] Regardless of the wording of the particular statute, Australian courts treat the new legislation as placing corroboration within the trial court's discretion to warn as an aspect of the general power to comment on evidence.[73]

It is, however, a discretion that a judge is well advised to exercise in favor of giving a warning. The only error a trial court can make when giving a warning is to imply that the law distrusts complainants or regards them as an unreliable class of witnesses or that the warning (or even corroboration itself) is required by law.[74] Because such an error would be favorable to the defendant, it will obviously never be complained of by defense counsel or made a basis for reversal.[75] In contrast, failure to give a warning, if one seems to be indicated on the facts of the case, can result in reversal of a conviction, and will surely be challenged on appeal.

The definite trend of state court decisions, even before the High Court had occasion to address this issue in *Longman,* was to permit trial judges to comment negatively about women's credibility in fairly traditional terms, in the exercise of their discretion to comment on facts, as long as the judge did not imply that the law required corroboration[76] or that complainants in sexual cases constituted an unreliable class of witnesses.[77] General remarks restating many of the myths about rape that discredit women continued to be approved. For example, in *Pahuja,* the Chief Justice of South Australia observed that the trial judge may have a duty to remind the jury of such considerations as sexual appetite or fantasy as possible motives for a false complaint and the ease

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72 *Longman,* 168 C.L.R. at 79; Westerman v. R., 55 A. Crim. R. 353 (N.S.W. Crim. App. 1991); Pahuja v. R., 30 A. Crim. R. 118 (S. Austl. Crim. App. 1987); Williams v. R., 26 A. Crim. R. 193 (Vict. Crim. App. 1987).

73 *See* cases cited *supra* notes 71–72.

74 *Pahuja,* 30 A. Crim. R. at 118; *Williams,* 26 A. Crim. R. at 193.

75 B. v. R., 110 A.L.R. 432, 434 (1992) (Austl.) (Brennan, J.).

76 *Murray,* 30 A. Crim. R. at 315; *Pahuja,* 30 A. Crim. R. at 118; *Williams,* 26 A. Crim. R. at 193.

77 *Williams,* 26 A. Crim. R. at 202.

of accusation of rape.[78] He repeated this observation with approval in a 1993 decision.[79]

In only one case was a conviction upheld where the defendant challenged the trial court's failure to warn as to the woman's testimony on the sexual offenses charged. In *Murray,* the trial court gave a corroboration warning as to the nonsexual offense charged (kidnapping) but did not warn of a need for corroboration as to the sexual offenses (because of the court's interpretation of the legislation abolishing the previous standard on warning about testimony from victims of sexual offenses). On appeal from conviction, the court held that in the circumstances the lack of warning did not make the verdict unsafe. The significant circumstance was that the victim had been violently beaten and abducted from her flat in full view of three eyewitnesses. This much supporting evidence clearly obviated the need for a warning. As a practical matter, however, the impact of this Australian decision upholding a rape conviction without any corroboration warning was undercut by the appellate court's remark that failure to "bring home to the jury the position of the uncorroborated witness will undoubtedly lead to some verdicts being set aside."[80]

The leading case in Australia is a decision of the High Court, *Longman,* which reversed a conviction for failure to warn about the danger of relying on a woman's uncorroborated testimony.[81] The witness, a woman aged thirty-two, testified to several incidents of indecent assault perpetrated on her by her stepfather. The assaults had occurred over a period of several years, beginning when she was about six years old. The case arose in Western Australia, where the requirement of a corroboration warning had been abolished by the Evidence Act, 1906, § 36BE(1)(b), which also specifies that "the judge shall not give a warning . . . unless satisfied that such a warning is justified in the circumstances." The trial court did not give any warning; the defendant

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78 *Pahuja,* 30 A. Crim. R. at 126.

79 R. v. J., No. S3896.1 (S. Austl. Crim. App. Apr. 20, 1993) (Question of Law Reserved on Acquittal).

80 *Murray,* 30 A. Crim. R. at 322.

81 Longman v. R., 168 C.L.R. 79 (1989) (Austl.).

was convicted and fined $2,000 on each of two charges.

The High Court unanimously reversed the conviction for failure to warn. The majority pointed out that the law generally requires a warning whenever necessary "to avoid a perceptible risk of miscarriage of justice" and held that the absence of a warning rendered this conviction unsafe because delay limited the defendant's means of testing the complainant's allegations.[82] The Court also stressed the possibility of sexual fantasy,[83] as well as the possibility of hatred as a motive to lie.[84] This decision was reached in spite of the Court's view that "[t]he evidence of the complainant reads convincingly" and "[i]t is not surprising that the jury accepted her as an honest witness" and that the same could not be said of the defendant, who appeared to lie in court about the recent police interview, as well as about past incidents.[85]

Although *Longman* is an unusual case on its facts and may rest as much on distrust of child witnesses (or of adults testifying about events that occurred in childhood)[86] as of adult women, it will have a significant detrimental impact on the interpretation of other legislation abolishing corroboration warning requirements throughout Australia. This is all the more likely because the statute in issue specifically limits the discretion of the trial judge to give a warning. If the High Court nonetheless concluded that a warning is still required under that statute, then warnings will certainly be seen as required in jurisdictions whose legislation has been interpreted as leaving the matter in the trial judge's discretion. *Longman* also clearly endorses previous state court decisions

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82 *Id.* at 86, 91.

83 *Id.* at 101.

84 *Id.* at 108 (McHugh, J.).

85 *Id.* at 98–99 (Deane, J.).

86 In R. v. Corkin (No. 2), 50 S.A. St. R. 285 (S. Austl. Sup. Ct. 1988), Judge Cox held that the requirement to warn that it is unsafe to convict of sexual assault on the uncorroborated testimony of a child was unaffected by the Evidence Act, 1929 (as amended 1976), § 34i(5) (S. Austl.). Note that in *Pahuja* the witness was fourteen years old, although the supposed unreliability of victims of sexual assault, rather than the disability of age, was the specific ground for the warning given by the trial judge. Pahuja v. R., 30 A. Crim. R. 118 (S. Austl. Crim. App. 1987).

that failed effectively to implement the statutory abolition of corroboration warnings and undoubtedly heightens the expectation that a warning ought to be given.

In the only state court decision since *Longman,* the New South Wales Court of Criminal Appeal reversed a conviction (and did not order a retrial) for failure to warn.[87] Without reference to the New South Wales legislation abolishing the warning requirement, the court stated that the "direction ought only to be given in a case which has special features going beyond the mere fact that the girl's evidence is not corroborated and requiring such a direction."[88] The "special features" here amounted to the trial court's willingness to amend the indictment to reflect a change in the time span during which the victim stated that the assaults had taken place.

The High Court again considered the warning issue very recently in *B. v. R.*[89] This decision is perhaps the most disturbing since it so blatantly relies on the stereotype of a spiteful woman falsely claiming rape—although the "woman" was only ten when the assaults began. The defendant in this case had previously been accused of multiple incidents of indecent assault against his young daughter. He had admitted the offenses, pleaded guilty, and been given a suspended sentence upon posting a bond of $2,000 to guarantee his good behavior for three years. Some months later, the defendant returned to live with his wife and daughter. About four years afterward, when the girl was fourteen, she reported to a school counselor and to the police that her father had renewed his assaults. At trial, the father denied the charge, taking the position that the conduct described by his daughter was simply that which had been the subject of the earlier proceeding. While he acknowledged the earlier incidents, he claimed that the new accusations had been made merely because the girl was unhappy about her father's discipline at home.

The trial judge, apparently unaware that legislation prohibited the traditional corroboration warning, instructed the jury that he was

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87 Westerman v. R., 55 A. Crim. R. 353, 359 (N.S.W. Crim. App. 1991).

88 *Id.* at 359.

89 110 A.L.R. 432 (1992) (Austl.).

"required to warn you that it is unsafe to convict on the uncorroborated sworn evidence" of alleged victims of sexual assaults because "people do sometimes tell an entirely false story which is very easy to fabricate and extremely difficult to refute."[90] The judge nevertheless went on to say that the previously admitted acts of indecency were "very strong corroboration if you accept it and there is no reason why you should not accept it, coming from his own lips," but that the amount of weight to attach to this evidence was for the jury.[91]

On appeal, the High Court held that, although it was appropriate to allow the admitted prior assaults to be treated as corroboration,[92] the instructions taken as a whole were erroneous because they usurped the function of the jury to determine whether the evidence was corroborative. Chief Justice Mason pointed out that the "existence of the prior convictions left the applicant extremely vulnerable to the possibility of irresponsible allegations on the part of an unscrupulous daughter."[93] This view was echoed by Justice Brennan, who cautioned that the "prior acts of indecency had an equivocal character when the central issue was whether the accused . . . had fallen victim to false allegations by a rebellious daughter,"[94] and therefore, in the words of the Chief Justice, "[i]t was essential that the jury be directed that, if they were to convict, they must consider the evidence of the daughter with care."[95] The Court unanimously ordered a new trial.

Thus, despite the clear message of new legislation attempting to restore some measure of credibility to women who report that they have been victims of sexual assault, these recent decisions demonstrate ongoing judicial skepticism toward female complainants.[96]

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90 *Id.* at 436, 443.

91 *Id.* at 435.

92 *Id.* at 433 (Mason, C.J.), 437-38 (Brennan, J.), 439-40 (Deane, J.).

93 *Id.* at 433 (Mason, C.J.).

94 *Id.* at 435 (Brennan, J.).

95 *Id.* at 433 (Mason, C.J.).

96 *E.g.*, B. v. R., 110 A.L.R. 432 (1992) (Austl.); Longman v. R., 168 C.L.R. 79 (1989) (Austl.); Westerman v. R., 55 A. Crim. R. 353 (N.S.W. Crim. App. 1991).

The failure of judges to adhere to the spirit of these legislative changes should come as no surprise, given previous experience with laws attempting to control the use of sexual history of women who accuse men of rape. Courts in Canada, in the United Kingdom, and in some jurisdictions in the United States and Australia have resisted implementing such laws as the legislature intended.[97] In both South Australia and Canada, the legislature has had a second try at preventing this particular form of mistreatment of women as witnesses in courts.[98]

Why has law reform designed to alleviate one of the consequences of women's subordination apparently had so little impact? The short answer is that too many people in the community and on the bench continue to hold prejudices against women and to believe myths and stereotypes about women generally and about rape victims in particular.[99]

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[97] Seaboyer v. R., [1991] 2 S.C.R. 577, 671 (Can.) (L'Heureux-Dubé, J., dissenting in part) (citing Forsythe v. R., [1980] 2 S.C.R. 268, 279 (Can.)); *N.Y. Report, supra* note 16, at 67–70, 75–76; S. Austl. Debates, *supra* note 57, at 1184; Zsuzsanna Adler, *Rape: The Intention of Parliament and the Practice of the Courts,* 45 Mod. L. Rev. 664, 672 (1982); Birch, *supra* note 34, at 681 n.81; Estrich, *supra* note 10, at 21 n.31. A similar problem exists with divorce reform legislation: "[J]udicial attitudes impede the implementation of the law on the books, and help explain the disastrous financial status of many women and children following divorce." Martha Minow, *Consider the Consequences,* 84 Mich. L. Rev. 900, 907 (1986) (reviewing Lenore J. Weitzman, *The Divorce Revolution* (1985)).

[98] In this regard, see S. Austl. Debates, *supra* note 57, at 1184 (leading to amendment of Evidence Act § 34(1) to reduce the trial court's discretion to allow use of sexual history); *Seaboyer,* [1991] 2 S.C.R. at 706 (L'Heureux-Dubé, J., dissenting in part). Indeed, the Canadian Parliament has had a third go at Criminal Code, ch. C-46, in August 1992, adding § 273.1–.2 (dealing with the meaning of consent in rape), amending § 276 (which had been declared unconstitutional in *Seaboyer),* and adding § 276.1–.5 (regarding admissibility of evidence of previous sexual conduct by the complainant).

[99] Recall the Chief Justice's remarks in Pahuja v. R., 30 A. Crim. R. 118 (S. Austl. Crim. App. 1987). *See supra* notes 78–79 and accompanying text. Ironically, Parliament's inability to change human nature was the justification for perpetuating these false and damaging stereotypes. Resistance to reform is also reflected in leading casebooks, Naffine, *supra* note 8; and in other legal scholarship, *e.g.,* Pamela J. Fisher, Comment, *State v. Alvey: Iowa's Victimization of Defendants through the Overextension of Iowa's Rape Shield Law,* 76 Iowa L. Rev. 835 (1991). In this connection, see Massaro, *supra* note 52, at 404–07.

Judges continue to regard women as untruthful,[100] and empirical studies show that "rape myths insidiously infect the minds of jurors, judges, and others who deal with rape and its victims [yet generally] know very little about rape and . . . much of what they believe about it is wrong."[101] Remedial laws are but one aspect of the reform process necessary to achieve legal equality for women. Laws are only as effective as the judges, attorneys, and court administrators who invoke, interpret, and enforce them.[102]

If judges accord female witnesses proper credibility, it is more likely that juries will. Conversely, judicial skepticism toward female complainants will inevitably be communicated to juries, reinforcing inaccurate beliefs jurors already may hold. Moreover, given that it is the belief of the judge as to whether a witness is likely to tell the truth that determines whether and what warning is given,[103] and given the difficulty of obtaining a conviction in the face of a corroboration warning, the judge's attitude is crucial to the outcome of sexual assault trials. Consider in this connection Judge Lee's remarks in *Murray,* the only reported Australian case to uphold a conviction where the defendant challenged the trial judge's decision not to warn:

> The jury chose the sworn testimony of the complainant . . . and in my view nothing . . . suggests that that was not a proper view . . . . [T]he fact that she [age nineteen] was an employee of the appellant, being thirty-eight years of age, would inevitably give rise to the question why she would want to make up a story of unwanted sexual activity unless in fact it were true.[104]

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100 Examples drawn from U.S. cases with regard to force and consent issues are cited in Estrich, *supra* note 25, at 57–79; *see also* Torrey, *supra* note 33, at 1046–49, 1055–57.

101 Massaro, *supra* note 52, at 404.

102 *N.Y. Report, supra* note 16, at 5.

103 Scutt, *supra* note 58, at 481.

104 There were eyewitnesses to part of the assault and abduction that preceded the sexual assault. Murray v. R., 30 A. Crim. R. 315, 322 (N.S.W. Crim. App. 1987).

Another major factor lessening the impact of legislative reforms in this area is the institutional structure of the criminal law and the appellate process. A judge's decision to warn harshly is usually unchallengeable within the legal system. While there is no remedy for the witness whose credibility is impermissibly attacked by improper warnings or improper cross-examination,[105] the defendant can complain after conviction of failure to give a corroboration warning. And failure to warn, if a warning seems appropriate according to the law's peculiar view of human behavior, can lead to reversal. In these circumstances, the defendant is very likely to ask for a warning and, out of caution, the court to warn.

Even where judges appear to obey the letter of legislation abolishing corroboration warnings, and do not expressly mention corroboration, prejudice against women testifying as victims of sexual assault can still be a powerful part of the judge's summation to the jury. More than seven years after the corroboration warning was abolished by statute, Judge Bollen of the South Australia Supreme Court cautioned in his summation: "I must warn you to be especially careful in considering the evidence in a case where sexual allegations are made. . . . It is a very easy allegation to make. It is often very hard to contradict. . . ." He went on

> to illustrate the fact that such allegations have been manufactured in the past and just to say something of the effect that false allegations can have, I will tell you an anecdote. Many years ago now in England, a respectable married businessman, with children, got on a train in London to go to a station outside London. It was quite a trip and some of it was through the countryside. And he sat alone in a compartment. It was one of those that they call "dogboxes"; there's a corridor down the side of the train, with various compartments leading off it. It was a quiet time and he sat in his compartment alone. After

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105 In some jurisdictions, it is possible for the prosecution to appeal from an acquittal, but such appeals are usually limited to a point of law that arose at the trial and cannot result in reversal of acquittal. Even where it is available, this procedure is unlikely to be used to challenge a warning that appears to be so firmly in the judge's discretion.

> a station or two, he was still alone; a woman got in. She seemed to be a respectably dressed woman.
>
> The train then set off to go through a long patch of countryside before the next station. The woman approached the man; sat near him; tore at her dress to expose her chest; knocked her head hard against the wooden side of the train and scratched herself, thus producing bruising and bleeding; and pulled the communication cord.
>
> The train stopped; the guard came running. "He tried to rape me," she said. The guard said he would have to call the police, and did. With the woman making this allegation, the police felt it their duty to charge the respectable businessman. So he was arrested, brought before a magistrate and released on bail. It was a shocking thing for him to have to face. It was too much for him. He took his own life. Soon after that, the same sort of incident happened on the same run, at the same spot, with the same woman. Further investigations showed that she was mentally deranged and it turned out that she had been doing this quite a bit. So you can see how careful we have to be about false allegations of rape.[106]

Not surprisingly, the jury returned a verdict of not guilty on *all* counts, although the defendant had earlier pleaded guilty to common assault as part of the same incident.

RECOMMENDATIONS FOR REDUCING GENDER BIAS IN THE LEGAL SYSTEM

What should be done in order truly to change the legal system and to accord women a real opportunity to be believed?

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[106] R. v. J., No. SCCRM/91/452 (S. Austl. Sup. Ct. Aug. 26, 1992). This instruction was held to be an error of law, but the appellate court strongly affirmed the trial judge's discretion to warn of the dangers of acting on uncorroborated evidence when aspects of "human nature and behaviour" make it appropriate. R. v. J., No. S3896.1 (S. Austl. Crim. App. Apr. 20, 1993) (Question of Law Reserved on Acquittal).

The best method is to move forward on several fronts at once, relying on approaches to improve particular rules and also to address the gender-biased context in which substantive and procedural rules operate. It is important as well to acknowledge the special place of the legal system: it is simply not acceptable for the law to reflect general bias present within the community. The law has a unique responsibility to insure fairness[107] and must act vigorously to remedy bias especially where the legal process itself is infected.

Perhaps the most important reform will be to educate those in the legal system who believe the myths that belittle women and undermine their credibility. The mere abolition of past rules will not in itself reeducate.[108] Nor will the passage of time necessarily bring changes.[109] One report has recommended that judges, prosecutors, police, and law schools seek out accurate empirical information about rape facts in order to dispel myths about this crime. This report concludes that judicial education is a most effective means to reduce gender bias against women in the courts.[110] Both the United States and Canada have considerable successful experience with judicial education programs designed to combat gender bias.[111]

It is also clear that juries need information about the reality of rape and the effects of rape on victims, so that women's testimony can be put into the appropriate context.[112] Expert witnesses can be called to dispel misconceptions the jury may have in evaluating complainants' testimony.[113] It may even be necessary to admit statistical or expert

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107 *Vt. Report, supra* note 18, at 400.

108 Birch, *supra* note 34, at 682.

109 Schafran, *supra* note 3, at 414.

110 *N.Y. Report, supra* note 16, at 18.

111 Norma J. Wikler, *Identifying and Correcting Judicial Gender Bias,* in *Equality and Judicial Neutrality* 12 (Sheilah L. Martin & Kathleen E. Mahoney eds., 1987); Lynn Hecht Schafran, *The Success of the American Program,* in *Equality and Judicial Neutrality, supra,* at 412.

112 Estrich, *supra* note 10, at 29–30.

113 Massaro, *supra* note 52, at 405–06 n.54; Torrey, *supra* note 33, at 1069–71.

evidence showing the falsity of rape myths once actively endorsed by the law and still accepted by many jurors.[114]

Further and better legislation is essential as well. Experience in Australia has shown that mere abolition of the requirement to warn, which leaves discretion with judges, does not necessarily significantly reduce the frequency, or improve the tenor, of the comments judges make about credibility when women testify about sexual assaults.[115] As Justice L'Heureux-Dubé noted in *Seaboyer,* the historical record demonstrates that discretion typically was abused and exercised in a discriminatory fashion by trial judges; moreover, "the tenacity of these discriminatory beliefs and their acceptance at all levels of society clearly demonstrates that discretion in judges is antithetical to the goals of Parliament."[116]

What would better legislation look like? There are many possibilities, including changes to the substantive law and changes to procedural rules (such as tightening rape shield laws). There are also several strategies focusing specifically on controlling what judges say to juries about credibility. The Law Reform Commission of Victoria has recommended a more emphatic version of the existing law as interpreted in *Williams* to the effect that a court shall not give a warning suggesting that complainants in sex cases are an unreliable class of witnesses.[117] A submission to the commission suggested an instruction that, due to the nature of sexual assault, corroborating evidence is often unavailable and no adverse inference should be drawn from that fact.[118] Another

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114 Henderson, *supra* note 9, at 149–51.

115 The Law Commission for England and Wales would disagree with this observation. Law Comm'n, *supra* note 28, at 10–16, raised the concern that even if the warning requirement were abolished, judges would continue to use the traditional formula. Ultimately, the commission concluded from its consultation process that this concern was not well founded, as judges expressed dislike of, and embarrassment at, the standard direction. *See supra* note 57 and accompanying text.

116 Seaboyer v. R., [1991] 2 S.C.R. 577, 707 (Can.) (L'Heureux-Dubé, J., dissenting in part).

117 Law Reform Comm'n of Vict., *supra* note 31, recommend. 19.

118 *Interim Report No. 42, supra* note 52, at 183.

possibility is the Canadian approach, which appears expressly and without exception to prohibit the judge from warning that it would be unsafe to convict without corroboration.[119] To similar effect is a Colorado statute providing that the "jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge [rape] is easy to make but difficult to defend against, nor shall any similar instruction be given."[120]

Yet another approach is to institute a form of guided discretion, where a model direction or legislation enumerates factors that judges must consider, and make express findings on, before giving any warning about treating with suspicion the testimony of a witness describing rape. Such a rule should also identify improper statements that are not to be used in jury instructions. This would provide for some flexibility, while still circumscribing the impact of prejudice and false beliefs about women.

Critics of these recommendations contend, first, that they limit the court's ability to guarantee a fair trial in particular circumstances[121] and, second, that they place the evidence of women as victims of certain crimes in a uniquely (and impliedly unjustified) protected position.[122]

The answer to the first objection is that in all the years of the common law, the courts have not provided a fair hearing to women alleging sexual assault, which is why the legislature must take the

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119 In light of a fairly recent case, the Canadian provision may not be as forceful as it appears. Saulnier v. R., 48 C.C.C.3d 301 (N.S. Ct. App. 1989), involving the testimony of an eleven- year-old girl, appears to hold that the trial judge retains discretion to discuss the weight to be accorded uncorroborated evidence from the complainant; *see also* B.C. Law Soc'y, *supra* note 58, at 7-79 ("In practice, it appears that the courts are continuing to warn juries of the danger of convicting without corroboration in certain cases.").

120 Colo. Rev. Stat. § 18-3-408 (1992).

121 *See* Longman v. R., 168 C.L.R. 79, 86 (1989) (Austl.) (Brennan, Dawson & Toohey, JJ.); *see also* Birch, *supra* note 34, at 681-82 (discussing the proposal of the Law Commission for England and Wales to abolish corroboration requirements).

122 *See Longman,* 168 C.L.R. at 86 (Brennan, Dawson & Toohey, JJ.).

initiative. In speaking of similar Canadian reforms, Justice L'Heureux-Dubé stated in *Seaboyer:*

> Parliament exhibited a marked, and justifiedly so, distrust of the ability of the courts to promote and achieve a nondiscriminatory application of the law in this area. In view of the history of government attempts, the harm done when discretion is posited in trial judges and the demonstrated inability of the judiciary to change its discriminatory ways, Parliament was justified in so choosing.[123]

As to the second argument, opponents of reform tend to assume that women testifying about rape are already on an equal footing with male defendants (or with witnesses generally) and that the proposed reforms would unduly favor women. This is not so. The legal system has always had, and still has, special rules and practices that wrongfully lessen the value of women's evidence, especially in cases of sexual assault. Under such rules, the defendant in a rape case enjoys an unwarranted advantage over persons accused of other crimes. The proposed changes seek only to correct the imbalance that has traditionally distorted rape trials.[124]

Even so, when the entire cultural and legal context of gender bias is taken into account, equality will still not have been achieved. Notwithstanding reform along the lines suggested here, women testifying about rape will continue to be disadvantaged, in direct as well as subtle ways. The hope is that they will be less grossly disadvantaged than before. The full remedy for gender inequality lies in broad social change, so that when women speak, they will be heard and believed.

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123 Seaboyer v. R., [1991] 2 S.C.R. 577, 707 (Can.) (L'Heureux-Dubé, J., dissenting in part).

124 Temkin, *supra* note 31, at 141.