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Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist

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Lynn Hecht Schafran

Abstract

Rape, by definition and in sentencing, is a crime that is predicated on a male-defined concept of violence. The lack of knowledge about rape trauma produces erroneous assessments or rape and erroneous sentences for rapists. The inability to recognize the damage cause by a "nonviolent" rape trivializes the seriousness of the crime and devalues the individual victim. Judges and attorneys must expand their definitions of violence to include injury to the victim's psyche.

KEYWORDS: nonviolent rape, rape, violence, sentencing, psychological injury, rape definitions

MAIMING THE SOUL: JUDGES, SENTENCING AND THE MYTH OF THE NONVIOLENT RAPIST

*Lynn Hecht Schafran**

I. Introduction

On March 11, 1992 Ernesto Garay appeared in the Manhattan courtroom of New York State Supreme Court Justice Nicholas Figueroa for sentencing.[1] Garay had been convicted by a jury of anally raping and sexually abusing a twenty-three-year-old retarded woman with an I.Q. of 51 and the social functioning of a young child. These counts carried maximum sentences of eight and one-third to twenty-five years and two and one-third to seven years, respectively. Assistant District Attorney Allison Bishop sought maximum sentences on both counts to run consecutively.

Defense attorney Ronald Garnett, himself a former judge of the Bronx Criminal Court, did not object to incarceration or suggest a specific sentence. He did, however, make two arguments in opposition to the prosecutor's demand for maximum time. First, the victim sustained no physical injury and therefore the rape was not violent. Second, because the victim had been sexually assaulted previously by her father and brothers, the impact of the most recent rape was not as severe for her as it would have been for a first-time rape victim. Justice Figueroa concurred readily in both defense arguments.

Prosecutor Bishop expressed shock that the court did not see this rape as a violent crime. She told the judge that the impact on the victim was evident in her nightmares, reported by her guardian, in which the victim screamed out Garay's name. The judge derided these nightmares as "apocryphal."[2]

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This Essay draws on a model judicial education curriculum about rape being developed by the author under a grant from the State Justice Institute. For more information about the curriculum, contact the author at 99 Hudson Street, Suite 1201, New York, N.Y.; (212)925-6635.

1. In New York the Supreme Court is the trial court of general jurisdiction and judges are referred to as "Justice." This Essay discusses the transcript of New York v. Ernesto Garay, No. 669/91 (Sup. Ct. March 11, 1992) [hereinafter *Garay*].

2. *Garay* at 25.

The acrimonious hearing ended with an adjournment and the case reverberated throughout the city, producing press coverage and picketing.[3] Justice Figueroa held a second hearing at which he defied the prosecutor to "find something, anything, violent in the record of this case."[4] After a third and fourth hearing at which the victim and her guardian testified, the judge imposed a sentence of eight and one-third to twenty-four years.[5]

During the first *Garay* hearing Justice Figueroa stated, "[t]here was no violence here. There was an act."[6] He could not grasp that the act of rape is an act of violence, by legal definition and by its impact on the victim. He ignored the New York Court of Appeals' clear statement in its decision striking down the marital rape exemption that "[r]ape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long lasting physical and psychic harm."[7]

How could a former Criminal Court Judge and a well-respected sitting Supreme Court Justice subscribe to the concept of a nonviolent rape and claim that the revictimized victim of rape is less severely traumatized than the first-time victim? These are important questions because the *Garay* is not unique. In 1989, Manhattan Supreme Court Justice Jerome Marks imposed a minimal sentence on a rapist with an appalling record, including murder, on the ground that, "[i]t's not like she was tortured or chopped up."[8] In 1991, Indiana Judge Paula Lopossa imposed a suspended sentence on a prominent businessman convicted of rape, stating that the victim had sustained no physical injuries and "I think it was obvious it was non-consensual sex, but I don't believe it was a violent act as most people think of rape."[9]

Reports from state supreme court task forces on gender bias in the courts throughout the country document that judges' sentencing prac-

3. *See* Emily Sachar, *Was Rapist Violent?* N.Y. NEWSDAY, Mar. 14, 1992, at 10; Hal Davis, *Prosecutors Blast Judge*, N.Y. POST, Mar. 14, 1992, at 10; Salvatore Arena, *Judge Asks Review in Rape Trial Dispute*, N.Y. DAILY NEWS, Apr. 1, 1992, at 19.

4. Emily Sachar, *Was Rapist Violent?* N.Y.NEWSDAY, Mar. 14, 1992, at 10.

5. This means that Garay is not eligible for parole before he serves at least eight years, or six years if he participates in a program such as work release. Interview with Lisa Friehl, Esq., Deputy Chief, Sex Crimes Prosecution Unit, New York County District Attorney's Office (Nov. 2, 1992).

6. *Garay* at 23.

7. People v. Liberta, 474 N.E.2d 567 (N.Y. 1984).

8. Rose Marie Arce, *Women Rap Rape Judge*, N.Y. DAILY NEWS, Feb. 8, 1989, at 12; *What's a Little Rape, Huh?* N.Y. DAILY NEWS, Editorial, Feb. 8, 1989, at 38.

9. Barb Albert, *Criticism of Rape Sentence Grows*, THE INDIAN, Nov. 9, 1991, at 1.

tices frequently ignore victims' psychological injuries and minimize the seriousness of the crime when there is no evidence of physical injury as it is commonly understood, i.e., bashing and slashing. The Massachusetts Supreme Judicial Court Gender Bias Study Commission, for example, urged that the state's sentencing guidelines for rape be upgraded to take account of the psychological consequences of this crime.[10]

At the federal level, the pending Violence Against Women Act[11] seeks to increase the sentence for rape, which is currently punished less severely than robbery. In 1987 the average federal sentence for robbery was 29% greater than that for rape, 12.3 years compared to 9.5 years.[12] The Senate Judiciary Committee observed that the "current penalty structure effectively *discriminates* against simple rape [i.e., rape without additional physical injury] and acquaintance rape, tacitly supporting the 'myth' that rapes occur only when men jump out of bushes wielding knives" and ignoring the severe psychological trauma of "simple rapes" that "are by far the most common rape offenses."[13]

Like the federal rape sentencing structure, the *Garay* case is a paradigm of how a male-defined concept of violence — a concept of violence premised on a school yard fist fight or a barroom brawl — and lack of knowledge about rape trauma produce erroneous assessments of rape and erroneous sentences for rapists. The inability to recognize the damage caused by a "nonviolent" rape trivializes the seriousness of the crime and devalues the individual victim. Judges and attorneys must expand their definitions of violence to include injury to the victim's psyche.

II. The Myth of the Nonviolent Rapist

Ernesto Garay raped the young retarded woman victimized in this case in a bathroom of the building where she lived with her guardian and where Garay worked as a custodian. He was discovered in the act by a carpenter who opened the bathroom door. Garay expressed

10. GENDER BIAS STUDY OF THE MASSACHUSETTS SUPREME JUDICIAL COURT 106 (1989). As currently written the guidelines acknowledge psychological damage only when it is so extreme as to cause temporary or partial disability. Additionally, although the probation department in *Garay* treated the case seriously, judges who minimize the seriousness of rape without overt physical injury encourage others in the system to do likewise.

11. S. 11, 103d Cong., 1st Sess. (1993).

12. DEPARTMENT OF JUSTICE, 1990 SOURCEBOOK, Table 5.27, 5.38.

13. STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., 2D SESS., ANALYSIS OF FEDERAL RAPE SENTENCES 1, 3 (1992).

no remorse, denied the rape, and refused to be interviewed by the probation department during the preparation of its report.

Defense attorney (and former judge) Garnett did not challenge the probation department's conclusion that imprisonment was mandatory. He did object to the following statement from the department's report: "Due to the violent and heinous nature of the instant offense, we recommend that the defendant be sentenced to the maximum period of incarceration."[14] Garnett argued that this was a "biased statement" that misrepresented the facts in the record. He felt that it was unfair to have this language follow his client throughout his incarceration period.

The probation report stated: "The defendant then forced the victim to stand up and spread her . . . hands and legs against the wall while the defendant put his penis in her anus."[15] Garnett argued that Garay had not forced the victim to accompany him to the bathroom where he raped her. Justice Figueroa agreed stating, "[t]here was no dragging . . . [I]f you wanted to use the right word, he practically cajoled her . . ."[16]

Garnett also objected to the probation report's statement that Garay held the victim's hands to the wall and that the carpenter, who opened the door on the rape, "got the defendant away from the victim." Garnett claimed that there was no testimony that Garay pinned the victim's hands and objected to the implication that the carpenter had to grab the defendant and separate him from the victim.

According to Garnett "[t]here was nothing to indicate a violent, brutal attack" because the medical evidence "suggest[ed] no bruises, no scratches, no lesions either on her vagina or on her anus."[17] Justice Figueroa agreed, saying, "[t]here was force under the law, but there wasn't any violence. There wasn't any brutality . . . there was no violence in this case."[18]

What is violence? Is it only what a colleague of mine calls "fist-in-the-face violence?"[19] Or is it also the psychic injury that has caused some victims to call rape "unfinished dying?"[20] Defense attorney

14. *Garay* at 10.

15. *Garay* at 11.

16. *Garay* at 12. Later in the transcript the judge repeated this statement saying, "she testified that the defendant came up to her and said, come on, honey, I'm going to give you some; and she said, no, no, and he said, come on you know you want it." *Garay* at 22.

17. *Garay* at 16.

18. *Garay* at 22-24.

19. My thanks to Danielle Ben-Jehuda for this evocative phrase.

20. STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., 1ST SESS., VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 1990 1 (1992).

Garnett claimed that the probation report was biased because "it suggest[ed] that this was a violent kind of crime committed by my client by seeing this woman, who was mildly retarded, grabbing her for no reason and taking her into a room and brutally sodomizing her."[21] Apparently Garnett thought that a reasonable description of the rape would have read, "This was a nonviolent crime in which the defendant cajoled the victim into accompanying him to the bathroom where he placed her hands on the wall and sodomized her without using any force or causing injury." Such a construction totally misapprehends the harm of rape.

In *Garay*, the judge thought and the defense counsel argued that fist-in-the-face violence is the only kind that counts. If the victim was not dragged into the bathroom, pinned to the wall, wrested away from her assailant or physically maimed, the rape was not violent. It is particularly noteworthy that despite their focus on physical injury, it did not occur to either man that the rape itself must have been physically painful. Victims of vaginal rape have reported being scolded by their rapists for failing to lubricate and have described how painful the dry penetration was.[22] This was an anal assault. Apparently the judge and defense attorney in *Garay* could not extend their narrow concept of physical injury to include the pain of unwanted anal penetration.

In *Garay* the judge and defense counsel took the absence of bruises, scratches and vaginal or anal lesions as proof that this rape was not a violent attack. Their equation of an absence of medical evidence of physical injury with an absence of violence is wholly inaccurate because it denies the injury of the penetration itself and ignores the violence done to the victim's psyche. In April 1992 the National Victim Center and the Crime Victims Research and Treatment Center of the Medical University of South Carolina released the results of a four-year national study titled *Rape in America*.[23] The study found that nearly 80% of rapes were committed by someone related or known to the victim[24] and that 70% of victims reported no physical injuries,

21. *Garay* at 15.

22. In the film "Rape by Any Name," a victim survivor says, "[p]enetration is painful. My rapist kept saying, 'Get wet. Get wet.' " Louisiana Public Broadcasting, 1990.

23. NAT'L VICTIM CENTER AND CRIME VICTIMS RES. AND TREATMENT CENTER, MED. UNIV. OF SOUTH CAROLINA, RAPE IN AMERICA (1992) [hereinafter RAPE IN AMERICA]. Rape was defined as "an event that occurred without the woman's consent, involved the use of force or threat of force, and involved sexual penetration of the victim's vagina, mouth or rectum." *Id.* at 1.

24. RAPE IN AMERICA, *supra* note 23, at 5. Of the nonstranger rapes, 11% were committed by a father/stepfather, 9% by a husband/ex-husband, 16% by other relatives and 29% by nonrelatives.

24% reported only minor physical injuries and just 4% sustained serious physical injuries.[25] Yet fully half of the victims were fearful of death or serious injury during the rape[26] and their psychological injuries were profound. Thirty-one percent of victims developed Rape-Related Post Traumatic Stress Syndrome, 30% experienced a major depression, 33% contemplated suicide and 13% attempted suicide.[27] Rape victims were also thirteen times more likely to have serious alcohol problems and twenty-six times more likely to have major drug abuse problems than nonvictims because they turned to substance abuse to medicate their psychic pain.[28]

It is critical for judges and others to be aware that the severity of victims' responses is not lessened when the victim and rapist know one another. A study of 489 female college student rape victims, among whom seventy were victims of stranger rape and 419 were victims of nonstranger rape, found no difference in the two groups' symptoms of psychological trauma such as depression and anxiety.[29] The same percentage of both groups, 27.8%, had considered suicide to the point of thinking about methods.[30] Indeed, research demonstrates that victims of nonstranger rape often experience even *more* severe and long lasting psychological trauma than the victims of strangers because they experience more self and societal blame for failing to prevent the rape.[31]

The equation of violence with physical injury is one of the most elemental mistakes made in discussions of rape. In 1990 Acting New York State Supreme Court Justice Phylis Skloot Bamberger wrote to *The New York Times* to criticize two articles describing a rape victim as "cut on her arms and hands but not seriously injured."[32] Justice Bamberger wrote, "The suggestion that the rape itself is not a 'serious injury' is beyond comprehension. . . . The physical violence inherent in rape is generally no longer belittled, but the attitude that is ex-

25. *Id.*
26. *Id.*
27. *Id.* at 8.
28. *Id.* at 9.
29. Mary P. Koss, Thomas E. Dinero & Cynthia A. Seible, *Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience?*, 12 PSYCHOL. WOMEN Q. 1 (1988).
30. *Id.*
31. Sally I. Bowie et al., *Blitz Rape and Confidence Rape: Implications for Clinical Intervention*, 64 AM. J. OF PSYCHOTHERAPY 180 (1990). "Blitz rape" refers to "a sudden, surprise attack by an unknown assailant." Confidence rape involves "some nonviolent interaction between the rapist and the victim before the attacker's intention to commit rape emerges." *Id.*
32. Phylis Skloot Bamberger, *Never Underestimate the Injury in Rape*, N.Y. TIMES, Feb. 22, 1990, (Letter to the Editor), at 34.

pressed in your articles is a reflection of an unfortunate view of community attitudes lurking below the surface."[33]

Justice Bamberger also pointed out that New York law does not require the rape-plus approach that *Garay* exemplifies.[34] "New York State law understands the reality and seriousness of the harm [of rape itself]; rape alone is a class B violent felony, which is punishable by a term of eight and one-third to twenty-five years in prison."[35] Under New York State law, if a defendant commits a nonsexual assault along with the rape — i.e., fist-in-the-face violence — he will be indicted for both offenses and face a sentence for the nonsexual assault that can run consecutively or concurrently with the rape sentence.[36] In *Garay*, Justice Figueroa told Assistant District Attorney Bishop that "[t]here are rapes and there are rapes. There are assaults, and there are assaults; and the minute you lose your . . . ability to discriminate, that makes you [a] less effective prosecutor."[37] But when a judge demands a fist-in-the-face assault as well as rape before he or she will consider a rape violent, the judge disregards New York's statutory scheme as well as exhibiting insensitivity to psychological trauma.

That "simple" rape is a violent crime is evidenced by the location of rape on the continuum of crime, as described in a model developed by Dr. Morton Bard.[38] This model is utilized by the Federal Law Enforcement Training Center's Crime Victim and Witness Training Program to assess the level of crisis involved in a crime in order to assist the victim.[39] According to the Bard Model, crisis-producing events are sudden, arbitrary, unpredictable and violate one's sense of self.[40] A large part of the concept of self involves the body and the way one feels about the body. Victims' sense of violation can be measured in

33. *Id.* Women have been making this point to the media repeatedly over the years. In another letter to the editor, for example, a woman responded to a *Washington Post* article on a U.S. Justice Department study claiming that "most victims of violent crime are not physically injured. . . . About 30% of all rape, robbery and assault victims were injured with 15% requiring some medical attention." Marsha Dubrow, *Rape: A Physical Injury*, WASH. POST, Dec. 16, 1983, (Letter to the Editor), at A22. This correspondent wrote, "[a] rape, in and of itself, physically injures a victim. Does a rape victim have to be also beaten, mutilated or worse before being considered physically injured?" *Id.*

34. Bamberger, *supra* note 32, at 34.

35. *Id.*

36. N.Y. PENAL LAW § 70.25 (McKinney 1989).

37. *Garay* at 24.

38. FEDERAL LAW ENFORCEMENT TRAINING CENTER, THE CRIME VICTIM AND WITNESS ASSISTANCE TRAINING PROGRAM § 4, at 5 (1988).

39. *Id.*

40. *Id.* at 5.

terms of the degree to which they feel their sense of "self" has been violated by the criminal act.

Rape victims suffer the penultimate violation. Extensions of the self are violated when the victim's clothing is disarrayed. The external self, the physical body, is handled and injured. And most critical, the site of the inner self, the interior body space, is violated.

> In the crime of rape, the victim is not only deprived of autonomy and control, experiencing manipulation and often injury to the 'envelope' of the self, but also intrusion of inner space, the most sacred and private repository of the self. It does not matter which bodily orifice is breached. Symbolically they are much the same and have, so far as the victim is concerned, the asexual significance that forceful access has been provided to the innermost source of the ego.[41]

A few years ago, when New York model Marla Hansen refused to date her landlord, he retaliated by having two thugs carve up her face.[42] The city was outraged because everyone understood that the victim had been maimed.[43] At the hearings of the New York Task Force on Women in the Courts Linda Fairstein, Chief of the Sex Crimes Unit in the Manhattan District Attorney's Office, testified: "[w]e have learned that the damage inflicted by the sex offender is not measured by the physical injury a woman sustains . . . the survivor's injury is incapable of assessment in physical terms [as] a visible scar might be."[44]

The carving up of a rape victim's soul is an invisible crime, but the victim is no less maimed than the victim of a physical assault. Moreover, while broken bones heal and even scars can often be eliminated with plastic surgery, psychological trauma has no end point. As Dr. Judith Herman, a pioneer in the treatment of sexual abuse, writes in her new book demonstrating the commonalities of the psychological trauma of combat, being taken hostage, torture, child abuse, child sexual abuse, incest, domestic violence and rape:

> Resolution of the trauma is never final; recovery is never complete. The impact of a traumatic event continues to reverberate throughout the survivor's lifecycle. Issues that were sufficiently resolved at one stage of recovery may be reawakened as the survivor reaches

41. *Id.* at 9.

42. *See, e.g.*, Adam Smith, *How Many Times Does a Victim Have to Pay?*, ESQUIRE, Nov. 1987, at 83.

43. *See, e.g.*, Richard Lacayo, *Whose Trial Is It Anyway?*, TIME, May 25, 1987, at 62.

44. REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS, 15 FORDHAM URBAN L.J. 11, 59 (1986).

new milestones in her life.[45]

This reverberation is profoundly evident in the response of the revictimized victim of sexual assault, the second point on which the *Garay* case foundered.

III. The Revictimized Victim

The defense attorney's second argument in *Garay* for mitigation of a maximum sentence was related to victim impact. Garnett asserted that the impact in this case was less severe than might be expected because the victim was used to being sexually assaulted. Here is his colloquy with the judge:

MR. GARNETT:	She was brutalized sexually by her father. She was brutalized sexually by her brothers. I ask your Honor to consider whether to this woman, . . . based on her prior history, this attack is so significantly different than all of the abuses she has suffered in her life before this incident. I'm not asking Your Honor to excuse this, but I'm trying to. . . .
THE COURT:	Not that it's so significantly different but that its impact is less due to her past experience. . . . [T]he impact, I think, on this young woman, given her mental state as it was displayed before This Court, was considerably less than you might say the first one was or the second one, whatever she's been through.[46]

There are situations in which the repetition of a particular experience makes it less strange, less frightening. Repetition is how people conquer fears such as flying in airplanes. But no one ever conquers the fear of sexual assault. It is deeply disturbing that in *Garay* the judge believed and the defense attorney argued that repetition of the intrinsically terrifying act of rape dulled its horror.

According to Dr. Veronica Reed Ryback, Director of the Beth Israel Hospital Rape Crisis Intervention Center in Boston, victims who report to hospital emergency rooms and rape crisis centers with well-trained personnel are quickly asked if they have ever been the victim of a previous sexual assault.[47] This is *not* done, as some

45. JUDITH HERMAN, TRAUMA AND RECOVERY 211 (1992). These milestones are typically marriage, divorce, a birth or death in the family, illness or retirement.

46. *Garay* at 18-19.

47. Interview with Dr. Veronica Reed Ryback, Director of the Beth Israel Hospital Rape Crisis Intervention Center, in Boston, Mass. (Oct. 21, 1992).

suppose, to determine whether the victim has a penchant for alleging rape and is lying. Rather it is because knowledgeable professionals in this field know that the revictimized victim is the most vulnerable and will have the most difficult recovery.[48] It is important to know whether the victim has been previously raped in order to determine the appropriate course of treatment.[49] The *increased* pain that revictimized victims suffer is apparent from the fact that in relating their most recent assault to physicians and crisis counselors, these victims often relate aspects of their prior and current assaults simultaneously because the new rape causes them to re-experience their earlier assaults.[50]

The vulnerability of revictimized victims is not unique to sexual assault cases. According to Professor Barry Burkhart of Auburn University, a national authority on treating child and adult sexual assault victims and offenders, being traumatized by a hostage-taking or a rape creates a fault line in the victim's psychological functioning that never goes away.[51] Any subsequent situation in which the victim is again at the mercy of someone totally indifferent to the victim's well-being strikes at that fault line and causes even greater damage.[52]

According to Dr. Judith Herman:

> People subject to prolonged, repeated trauma develop an insidious, progressive form of post-traumatic stress disorder that invades and erodes the personality. While the victim of a single acute trauma may feel after the event that she is "not herself," the victim of chronic trauma may feel herself to be changed irrevocably, or she may lose the sense that the has any self at all.
>
> The worst fear of any traumatized person is that the moment of horror will recur, and this fear is realized in victims of chronic abuse.[53]

It is important to recognize that the revictimization of a rape survivor is not rare. In fact, research shows that victims raped once have a significant likelihood of being raped again. According to *Rape in America*, at least 12.1 million American women have been victims of rape and 39% of them — an estimated 4.7 million women — have been raped more than once.[54] A study of 702 female students at

48. *Id.*
49. *Id.*
50. *Id.*
51. Interview with Professor Barry Burkhart, Department of Psychology, Auburn University, Auburn, Mass. (Nov. 9, 1992).
52. *Id.*
53. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 86 (1992).
54. RAPE IN AMERICA, *supra* note 23, at 2.

North Carolina University found that women subjected to rape or attempted rape as adolescents were much more likely to be subjected to rape or attempted rape during their first year of college than other women, and that women sexually victimized as children or exposed to family violence were at much higher risk of rape as adolescents.[55] In the *Rape in America* study, 32.3% of the rapes occurred when the victim was between eleven and seventeen, and 29.3% of rapes occurred before the victim was eleven.[56]

Another issue of revictimization highlighted by this case is the singularly high rate of sexual assaults on mentally and developmentally disabled women and girls.[57] The *Garay* prosecutor stated her belief that Garay chose his victim knowing she was retarded because he believed she would not resist, would not report the rape and would not be believed if she did report. The prosecutor argued that Garay's decision to prey on a victim who was effectively a child made this crime "heinous."[58] As this Essay was being written, a jury convicted thirteen male high school seniors of rape for "cajoling" — to use Justice Figueroa's word — a seventeen-year-old girl, whom they knew to

55. *Tie Found Between Risk of Adult Rape and Being Raped as a Child*, N. Y. TIMES, Aug 17, 1992, at A30.

According to the researchers, the reasons for this tie are still unclear. A possible reason is suggested to me by the research of Professor Eugene J. Kanin of Purdue University. Kanin studied seventy-one self-disclosed white, middle-class, college student date rapists. He wrote:

> It is somewhat puzzling to reflect on the apparent ease with which some of these rapes occurred, given the absence of guns, knives and fists. The one thing that became obvious during the interviews was that these men were providing an aura of danger far beyond their intent. . . . [A] substantial number of these rapes occurred because the "right man" (sexually aggressive and determined) did the "right thing" (presented a level of force not usually encountered in dating) to the "right girl" (easily frightened or inebriated). . . .
>
> [M]any of these males held a diluted view of the seriousness of their assaults since these women had succumbed to a presentation of aggression that others had previously successfully repelled, and that others would successfully repel after the rape incident.

Eugene Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, at 101-102.

Perhaps young women subjected to actual or attempted rape as adolescents and those who are sexually victimized or who witnessed family violence as children are the "easily frightened" "right girl[s]" Kanin posits, because the subsequent attacks reinforce their sense of the world as a very dangerous place over which they have little or no control.

56. RAPE IN AMERICA, *supra* note 23, at 4.

57. The National Coordinator for the Canadian Disabled Women's Network recently told a conference that "[m]ost members of our community have been sexually assaulted. . . . The more disabled you are, the more likely you are to be assaulted." *Women with Disabilities*, LEAF LINES, Summer 1992, at 5.

58. A word in the probation report to which the defense attorney particularly objected. *Garay* at 21.

have an I.Q. of 64 and the social functioning of an eight-year-old, into performing fellatio on some of them and being penetrated with a broom handle and a miniature baseball bat while the group watched.[59] The four young men alleged consent.

Thus, the likelihood that a rape victim who reports[60] and goes to trial will be a revictimized victim is substantial. When judges minimize the trauma of these victims' because they have been raped before, it is the cruelest compounding of their multiple assaults.

Justice Figueroa's minimization of the harm to the victim in *Garay* is particularly striking because he knew he was supposed to take into account the psychological impact of the rape on the victim. When defense counsel asserted that the victim's prior sexual brutalization by her father and brothers meant that there was less of an impact on her from Garay's rape, the prosecutor objected. The prosecutor stated that the victim's past problems had nothing to do with the current case and that it would be wrong "for The Court to consider [the alleged acts of abuse by the victim's family] as in some way minimizing this defendant's acts."[61] Justice Figueroa responded, "I have to take [account of] the impact of the crime upon the complainant, on the complainant's mental state, physical state and see really how it impacted her at the time and how it will impact her in the future; whether she will have residual mental trauma as a result of that. This is very important."[62]

That a judge, cognizant of his obligation to factor the victim's mental trauma into his sentence, could nonetheless deny the violence inherent in rape and believe that repeated rape is less rather than more harmful to the victim underscores how essential judicial education is to achieving fair sentences in rape cases. Judicial education also would have helped Justice Figueroa to understand that the victim's lack of emotion in testifying is not an indicator of her mental state, which seems to be a point that confused him. In stating his belief that the victim was less harmed by the *Garay* rape because of her prior victimization, Justice Figueroa spoke of, "the impact . . . on this young woman, given her mental state as it was displayed before

59. Murray Kempton, *Innocence Prevails*, N.Y. NEWSDAY, March 18, 1993 at 13.

60. Extremely few rape victims ever report to police. In the RAPE IN AMERICA study 16% of victims reported to the police. RAPE IN AMERICA, *supra* note 23, at 6. Other studies have found significantly lower percentages. The Senate Judiciary Comm. found a reporting rate of 7% compared to 53% for robberies. STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., 1ST SESS., VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 1990 7 (1991).

61. *Garay* at 20.

62. *Garay* at 20-21.

This Court. . . ."[63] Apparently the victim's flat tone when testifying indicated to the judge that she was unscarred by the attack. In this case there is the added factor that the victim was retarded so that her ability to express herself was limited. But even among victims who are not mentally disabled, there is a sharp contrast in testimonial styles that confuses listeners who have definite expectations about how a "true" rape victim should behave on the witness stand. The "true" victim displays just the right amount of tears. No tears and the assumption is that nothing happened to her. Too many tears or an exhibition of anger and the assumption is that she is hysterical and thus noncredible.

In fact, rape victim witnesses fall into two style categories: controlled and expressive.[64] Judges and juries have particular difficulty with the controlled style witness who exhibits a calm demeanor and does not weep.[65] This does *not* mean that she has not been traumatized. She may have a naturally flat affect. She may feel that she would be further demeaned if she broke down in public. She may have had to tell her story so many times — especially if she lives in a state like Florida that permits defendants to depose complainants — that she can no longer relate it with any spontaneity.[66] Or it may be that a controlled style is the victim's carefully constructed way of continuing to function and she fears that letting her emotions show at all will open the floodgates.

The fact that many victims display a controlled style, which can mislead a judge into thinking that they were minimally harmed underscores the importance of victim impact statements.[67] This is the victim's authentic voice, and it is important for the court to hear it. Victim impact statements empower the victim and help judges to appreciate the invisible trauma of rape. A few years ago New York

63. *Garay* at 18-19.

64. Ann Burgess and Linda Holmstrom, *Rape Trauma Syndrome*, *in* THE RAPE VICTIM 122 (D. Ness ed., 1977).

65. A stunning example of presumptions about how women are supposed to react is a Florida case in which a 13-year-old girl was raped and murdered by a boy who broke into the home where she was babysitting. She had called 911 to report an attempted break in, but because she was "so matter-of-fact and businesslike" and had such a "lucid attitude" the police officer who took the call treated it as an unimportant disturbance. *The Baby Sitter*, N.Y. TIMES, Dec. 4, 1980, at A30.

66. Circuit Judge Helen Stephens Hansel of St. Petersburg, Florida had a rape case in which she had no doubt that the defendant was guilty and believed that the jury acquitted because of the monotone testimony of the 14-year-old victim. Interview with Judge Helen Stephens Hansel (October 8, 1992).

67. Victim impact statements are statements used at sentencing that are made by the victim in her or his own words, either orally or in writing, which communicate to the court the impact of the crime on the victim's life.

Supreme Court Justice Edward Torres, at the request of a rape victim, read her statement aloud to the court. The rapist entered her apartment through a fire escape, raped her, cooked a meal in her kitchen and told her of other women he had raped. There was no fist-in-the-face violence and the rape occurred two years before the sentencing, but the victim wrote, "[m]y life, no matter what the future may hold, will never be the same again. . . . Sometimes I am so scared and tormented, I don't know what to do. Other times I feel like running, running, running - the problem is, where do I run to?" Justice Torres said that the victim's words "evoked a certain sentiment that I thought in my thirty years of criminal justice I had put behind me. They are truly heartrending."[68] The Wisconsin Equal Justice Task Force studied rape sentencing transcripts and described a case in which the judge, after listening to the victim's statement, said to her, "[t]hank you for sharing your pain with me today. I really needed to feel that pain."[69]

IV. Conclusion

Research into how judges approach sentencing reveals that no matter what justification is used for punishment, two factors are consistently predictive of judicial sentencing: the seriousness of the offense and prior criminal record.[70] This combination can be a recipe for disaster in the context of rape sentencing. Because rape always involves an act that is pleasurable in a consensual context, usually involves people who know one another and *rarely* involves weapons, fist-in-the-face violence, or visible injuries, it is often perceived as not serious, as the *Garay* case demonstrates. Moreover, because sex offenders often have no other criminal record, even though they are likely to be unreported recidivists of a high order,[71] judges may consider the rape in question an aberration and the defendant deserving of probation or lenient treatment. This is especially true when the defendant is a successful businessman or college student.[72]

68. Ronald Sullivan, *Rapist is Sentenced to 15 Years*, N.Y.TIMES, May 5, 1988.

69. WISCONSIN EQUAL JUSTICE TASK FORCE, FINAL REPORT 73 (1991).

70. CATHERINE FITZMAURICE AND KEN PEASE, THE PSYCHOLOGY OF JUDICIAL SENTENCING ch. 4 (1988).

71. In a study of 561 nonincarcerated, self-reported sex offenders, the 126 offenders who admitted committing rape had committed a total of 907 rapes on 882 different victims. Gene G. Abel et al., *Self-reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3 (1987).

72. For example, earlier in this Essay I cited a sentence imposed by New York Supreme Court Justice Edward Torres in a 1989 case in which he spoke of the impression made on him by the victim's impact statement, saying it "evoked a certain sentiment that I thought in my 30 years in criminal justice I had put behind me." In 1983 Justice Torres

The concept of a "nonviolent rape" is a myth. Although the vast majority of rapes are "simple rapes" involving nonstranger assailants and no injuries apart from the penetration itself, the *Rape in America* study concluded that rape is so prevalent and so traumatic that it is a major determinant of American women's mental health.[73]

Judges must recognize that all rapes, by definition, are violent, and that the revictimized rape victim is *more* profoundly injured, not less. Only by educating judges, prosecutors and defense attorneys to the invisible impact of rape can we begin to achieve fairness in the urban criminal justice system.

imposed the minimum concurrent sentences of two to six years on convictions for rape and sodomy and one to three years for assault and sexual abuse on a record company executive who raped a date after punching her and threatening her with a razor. The judge noted that the executive's background "seems to be excellent" and that "he's a loving and caring father." Frank Farro and Don Flynn, *Music Exec. Gets 2 Years In Rape Of A Showgirl*, N.Y. DAILY NEWS, Mar. 11, 1983, at 19.

73. RAPE IN AMERICA, *supra* note 23, at 8.