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“Always Believe the Victim”?

Automatic credence given to allegations of sexual assault may come back to harm the maker of the allegations.

A few years ago the University of Montana, where I was teaching, stood at the epicenter of a national crisis of campus rape. Even as the U. S. Department of Education directed colleges and universities to lower the level of evidence necessary for conviction in sexual assault cases, the Department of Justice censured the lax investigation and prosecution of such cases at UM in particular, in effect making UM an example to the nation. But not only was UM under the eyes of federal monitors. DOJ made it known that it would also be looking closely into the handling of allegations of rape in the city of Missoula, of which UM is part.

In this charged atmosphere, and with the national press looking on as well, two members of the UM football team—one of them none other than the quarterback and team captain—were charged with sexual intercourse without consent. The respective incidents took place two years apart. In the first case, where the facts were undisputed, a woman was raped while asleep; the perpetrator pleaded guilty and in 2013 was sentenced to thirty years in prison, with twenty suspended. Here I address the second case, in which a woman claimed that quarterback Jordan Johnson raped her after she refused to engage in intercourse following

mutual petting, while he maintained that she never refused and he would have stopped if she had. Johnson was acquitted by a jury, also in 2013. Both sets of events are chronicled in painful detail by Jon Krakauer in *Missoula: Rape and the Justice System in a College Town* (2015), a work fired by the belief that the authorities in Missoula and elsewhere, and the legal system in general, all too often serve the perpetrators instead of the victims of rape. By analogy with the rule change ordered by DOE to make convictions more likely in cases heard in campus tribunals, Krakauer pleads for policies that will aid the prosecution of sexual assault in the courts and guarantee the victims of such crimes the sympathy of the police in particular. Though he acknowledges the rights of the accused and knows that demanding an end to the presumption of innocence in rape cases would provoke outrage, Krakauer clearly leans to the view that the presumption of innocence has done great injury to victims of rape and constitutes, therefore, an outrage in its own right.

It's a measure of Krakauer's antipathy to what was once called the liberal tradition that he repeatedly endorses rules requiring the police not just to handle allegations of sexual assault with due sensitivity, but to believe every allegation as soon as they learn of it. He cites with approval, for example, a new policy of the Missoula police mandating "that investigators believe everybody who comes through their doors complaining of a sexual assault." Can belief be prescribed? Locke and Jefferson thought not. Locke's *Letter Concerning Toleration* (1689), which underwrites the separation of church and state in our nation, constitutes an extended argument against the proposition that a human being can be compelled to believe a religious tenet or indeed anything at all. "Such is the nature of the understanding that it cannot be compelled to the belief of anything by outward force." It was under Locke's influence that

Jefferson began the “Bill for Establishing Religious Freedom” (1779) by stipulating that “the opinions and beliefs of men depend not on their own will, but follow involuntarily the evidence proposed to their minds.” Krakauer turns Jefferson on his head, making belief voluntary and enforceable and demanding that the police credit accusations of rape before investigating the evidence. Not once in his tireless polemic does he concede that any problem, philosophical or otherwise, attaches to the policy of requiring a fellow citizen in an open society to believe something.

As a practical matter, the belief rule endorsed by Krakauer will tend to inhibit any line of inquiry that could indicate doubt of a report of sexual assault. Krakauer emphasizes that the rule must govern the investigation of such an assault until contrary evidence (if any) overcomes it; but unless the story of the “victim” is a complete fabrication (as in the Duke lacrosse case), it’s hard to see how evidence against Jane Roe’s claims can mount up if the investigators believe them as required, or merely refrain from questioning them. However, if the case goes to trial, the ground rules will be less friendly to Jane Roe and the infamous difficulty of getting convictions in rape cases will come into play. At that point each and every one of her claims will be subjected to all the questioning from which they have been carefully shielded, as happened in the second of the two cases occupying most of the Krakauer book: that of the acquitted quarterback. In that instance, the policy of believing the victim from the beginning delivered her ultimately into a courtroom where the claims accepted by investigators were torn to bits, with damage to her that can scarcely be imagined.

Records of the case in question show how weak, and therefore how vulnerable to demolition in the courtroom, evidence accepted by a sympathetic investigator can be. On

March 27, 2012, UM's Dean of Students stated in a letter to the accused quarterback, Jordan Johnson, that he had found by a preponderance of evidence—the standard required by DOE—that Johnson raped the student given the pseudonym Cecilia Washburn by Krakauer. He recommended expulsion, a penalty upheld by UM's President, Royce Engstrom. The only evidence cited by the dean is the following:

1. "Contrary to your repeated assertion, text messages between you and the victim prove you and the victim were more than mere acquaintances."
2. "Your previous conduct in your University residence hall." [Johnson had been disciplined for being drunk and disorderly.]
3. "Your assertion that you and the victim had jointly initiated getting together the night of the rape; a copy of your text message to the victim clearly proves you initiated the meeting."
4. "The complete and immediate cessation of your friendship with the victim following the night of the rape."
5. "Your failure to attempt to retrieve your watch that you forgot at the victim's house, despite your assertion that this watch had been a present to you from your sister."

Despite the dean's robust language, none of this "evidence" establishes that Jordan Johnson raped Cecilia Washburn. Indeed, to someone not already convinced of Johnson's guilt, the entire stack amounts to little if anything. That Johnson and his accuser were more than acquaintances proves precisely nothing, as is also true of the trail of messages showing that the encounter in question was initiated by Johnson. Johnson's offense of being drunk and disorderly at a party a year before has no bearing on the case. The "immediate and complete cessation" of friendship covers a total of eight days, the period from the date of the alleged rape (Feb. 4) to the date of Johnson's receipt of a letter from the dean notifying him that he was charged with rape (Feb. 12), after which we might well expect a total severance of communication. Indeed, Cecilia Washburn obtained a restraining order against Johnson on March 9, after she saw him at a distance. What about the watch? Only if you already believe that Jordan Johnson raped Cecilia Washburn does it become incriminating. "He left an item of sentimental value at the victim's house because he couldn't bring himself to confront the woman he raped. It's a damning confession of guilt." If you don't presume the defendant's guilt, his failure to retrieve a watch certainly doesn't establish it. While the dean accepted the accuser's account without being required to do so by a belief rule, his enumeration of the evidence against Johnson shows how greatly a belief in the truth of an allegation of sexual assault can change the weight and value of the evidence itself.

Under the influence of a presumption of guilt, many details ambiguous in themselves suddenly assume the appearance of incriminating evidence. In an unrelated case, the same Dean of Students included the theft of the victim's jeans as evidence against a student accused and convicted of rape. While the jeans could have been taken as a trophy of a crime, they

could also have been taken as a souvenir of a sexual encounter the male acknowledged to be his first. In the Jordan Johnson case, both the prosecutor and Krakauer himself construe the fact that Cecilia Washburn “had not showered for more than twenty-four hours” at the time of her encounter with Johnson as evidence that she had no intention of a sexual liaison (even though she is reported by a witness to have said to Johnson the night before, “Jordy, I would do you anytime”). Unless governed by a prior belief in the guilt of the accused, the significance of a detail like this is too indeterminate to bear the weight of evidence. As in these instances, the presumption of guilt generally acts as a heat source that inflames the meaning of what would otherwise be equivocal or incidental details.

When we refer to someone who brings an allegation of sexual assault as a *victim* of sexual assault—as in the “always believe the victim” policy—prejudgments that influence the weight and power of the evidence have already taken effect.

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Some years before the Jordan Johnson case, I was instrumental in raising the burden of proof in disciplinary hearings under the UM Student Conduct Code to “clear and convincing evidence,” a standard higher than preponderance but lower than the criminal standard of guilt beyond a reasonable doubt. I reasoned that no student should be disciplined, even possibly expelled from the University, on the strength of evidence that was unclear and unconvincing. UM’s then-Legal Counsel agreed, the change was made, and there the UM Student Conduct Code stood until the Obama administration in 2011 ordered the standard of evidence in all such

documents lowered to expedite the prosecution of sexual assault. When Jordan Johnson appealed his expulsion from UM to the Commissioner of Higher Education, Clayton Christian, in 2012, the Commissioner reverted to the “clear and convincing evidence” standard, voided Johnson’s conviction, and remanded the case to UM, where a new dean of students (the original dean having retired) now determined that “there was not clear and convincing evidence to find that [Johnson] committed sexual misconduct.” (Krakauer filed a lawsuit against Christian over the latter’s refusal to release documents pertaining to the Jordan Johnson case on grounds of privacy.) Both DOJ and DOE then reprimanded UM for failing to use the preponderance standard as required. In a case like that of Jordan Johnson where the facts are disputed and the evidence unclear, it’s plain that much can depend on the evidentiary standard in use.

Mandated specifically to generate more convictions at the campus level for sexual assault, the preponderance standard represents the lowest evidentiary threshold, signifying only that it’s more probable than not that the defendant committed the offense. A dean who took to heart Krakauer’s argument that true allegations of rape vastly outnumber false ones could easily conclude that any allegation of rape that comes before him or her is automatically more likely to be true than not. Maybe it was this sort of thinking that led the original Dean of Students to accept evidence in the Johnson case whose probative value depends entirely on presumption. In my estimation the evidence against Johnson cited by the dean is so flimsy that it fails to meet even the lowest standard. How then can evidence like this hold up in a courtroom where the burden of proof is set at the highest level known to the law—guilt beyond a reasonable doubt?

The dean's tribunal was not a court of law. Non-university investigators who interpret equivocal evidence as highly incriminating (because they interpret it in the light of a compulsory belief in the guilt of the accused) may find themselves leading the victim down a garden path that ends in a court of law. Again, this is just what happened in the Johnson case, where the jury delivered a swift verdict of Not Guilty in direct opposition to the judgments and prejudgments of advocates, sympathetic investigators and Jon Krakauer.

Press reports as well as Krakauer's interview with a juror suggest that the jury couldn't be sure that Cecilia Washburn communicated refusal to Jordan Johnson, as a result of which it acquitted Johnson after only two and a half hours of deliberation. Paradoxically enough, even Krakauer, who views the trial as a travesty of justice, concedes that the evidence put forward by the prosecution was open to reasonable doubt:

Cecilia Washburn was lying, or Jordan Johnson was lying. Or perhaps both of them were misrepresenting key details of their respective accounts. There wasn't enough incontrovertible evidence to prove whose version came closest to the truth, however. . . . Most of the evidence was subject to conflicting interpretations.

Given the less than compelling evidence against the accused, how could the prosecution team have exposed Cecilia Washburn to the distinct risk of a devastating public defeat? I suggest that because they, like the dean and the victim's advocates, *believed* Cecilia Washburn (with all this credence creating an effect of mutual reinforcement), evidence that was obviously "subject

to conflicting interpretations” seemed to them indisputable enough to withstand the fray of the courtroom. It was not.

According to Krakauer, a police investigation of a report of rape should always “begin by believing the victim.” However, once belief is invested, evidence can look a lot stronger than it actually is, as in UM’s adjudication of the Jordan Johnson case. Once belief is invested, a case can even become a sort of metaphysical drama, which is why the question of compelled belief leads back to the 17th century wars of religion, and why Krakauer’s advocacy has the tone of a crusade. In the courtroom, however, no one can claim a right to be believed. No wonder Krakauer gives the distinct impression that he detests the open skepticism to which Cecilia Washburn was subjected in court, and, beyond this, that he detests the adversarial system of justice itself.

For now, we have a system in which the defense and prosecution clash, defendants are to be presumed innocent, and evidence must meet a high standard in order to convict. This being so, a woman who claims to have been sexually assaulted may be ill served by receiving from investigators the automatic credence she will not receive if her case goes to court. Let the story of Cecilia Washburn serve as a cautionary example.