Sexual History Evidence and the Rape Trial

By Joanne Conaghan and Yvette Russell
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The challenge of if, when and how to introduce a complainant’s previous sexual history as evidence in a rape trial is one that has divided legal theorists and scholars for some decades. Having been characterised by fragmentary reform efforts to date, difficulty arises in striking the appropriate balance between the defendant’s right to a fair trial, the complainants’ right to privacy and the potential diversionary impact of this evidence. Conaghan and Russell’s new book, Sexual History Evidence and the Rape Trial, represents an invaluable contribution to this ongoing debate, synthesising centuries of legal theory, academic research, political scrutiny and philosophical analysis to skilfully contemplate the nature, use, scope and legitimacy of sexual history evidence in the modern rape trial.

1. Summary and evaluation of the book

To begin, the authors helpfully locate the importance of these debates by drawing on recent high-profile and contentious cases, including the highly disputed R v Evans (2016) judgement, which reignited the most recent wave of critiques and discord about the governance of sexual history evidence in England and Wales. It is clear from the outset, however, that this book is not simply limited to discussions of the relative merits or demerits of differing approaches toward the legal regulation of sexual history but is in fact emblematic of much broader theorisations about the status of women within legal histories and an analysis of systemic deficiencies in the criminal justice response to rape. A central theme of the book whereby, cleverly locates the ongoing (mis)use of sexual history evidence as not only an extant legal concern of its own, but equally “quintessentially expressive of wider criminal justice failings when it comes to responding to sexual violence”.

Contextualising the norms and practices governing sexual history evidence, the authors meticulously detail the centuries long evolution of rape law, from outlining the initial classification of rape as a property crime, through to explaining the entrenched significance of female chastity, honour and virtue in an assessment of consent. Scrutinising the emergent focus on complainant credibility, it is thought-provoking, albeit somewhat disheartening, to read the apparent parallels between current challenges faced within the criminal prosecution of rape (namely, low prosecutions, convictions and ongoing focus on complainants’ credibility) and these same challenges facing rape complainants as far back as 13th century. Though socially and culturally much has changed, this historical analysis astutely reveals the influence of sexist and misogynistic practices and attitudes on enmeshed legal principles and assumptions of rape law.

Focusing then on sexual history evidence, the book details incremental developments in regulation whilst situating these against a backdrop of legal tradition and discussion of gendered socio-sexual norms. Yet, what is perhaps most helpful in appreciating the contention
associated with this evidence are the striking similarities drawn between differing jurisdictional responses, all of which can be characterised by repeated and cyclical attempts at reform, typically precipitated by a perceived scandal or injustice. This cross-jurisdictional comparison provides an invaluable resource for anyone seeking to study so-called “rape shield” legislation, providing a comprehensive synthesis of the nature, strengths and limitations of differing regimes.

2. Unique value and contribution of the book

The practical implementation of sexual history provisions holds equal (or greater) significance than the legislation itself. Conaghan and Russel thereby carefully analyse a plethora of academic studies that have examined the use of sexual history evidence at trial and highlight inter alia “troubling techniques” in defence counsel’s reliance on this evidence, “evasion of prescribed procedures” and “humiliating questioning” directed at victims during trial. Drawing on rape myth research, they identify historical underpinnings that posit sexual history evidence as a marker of female chastity, credibility and likelihood of consenting as ongoing and entrenched, both for defence counsel narratives and juror deliberations. Painting somewhat of a sombre (though meticulously grounded) picture, Chapter Five concludes that there remain “real grounds for concern that sexual history evidence is working against rather than in the interests of justice”.

More intricately, the authors also inspected the clear dissonance between legal professionals’ attitudes towards sexual history evidence – seen as an important tool for securing justice and achieving a fair trial – and victim-survivors’/victim support organisations’ stance – perceiving sexual history evidence as a threat to reporting and an unwarranted, violative intrusion into victims’ personal lives. Although this tension has been well established in previous studies, it embodies ongoing disputes about the governance of sexual history evidence and serves as a clear reminder that the balancing of interests in this area is still not resolved. In articulating these challenges, the novelty and astuteness of this book really emerge through a thorough and imaginative analysis of debates about relevance and subjectivity in the governance of sexual history evidence.

Engaging with the fiercely debated question of relevance and the operationalisation of s.41 provisions, the authors cleverly interrogate broad, epistemological quandaries about the socially mediated and contextually bound nature of knowledge. Taking a refreshing look at determinations of relevance, they identify patriarchal foundations of the law and underpinning generalisations about male and female sexual behaviour as central to largely unfounded and inappropriate assumptions within the principles of relevance. Scouring notable precedents from the s.41 framework, they illustrate a concerning focus on complainant credibility, outdated assumptions about female sexual morals and broad interpretation of the gateways approach; warning that “rape myths lurk beneath many of the cases” that set the legal standards of relevance.

Scrutinising this patriarchal legacy, the authors turn to engaging in theorisation about the construction of subjectiveness in rape law and sexual history discourse. Cleverly bringing together much of the book’s previous discussion, the concept of the “sexuate subject” is used to interrogate how “ostensibly neutral legal concepts like relevance are liable to corruption or perversion where sexual violence is concerned”. Reinforcing the clear feminist lens adopted throughout this book, sexual
history evidence is identified as a legal tool used to maintain and advance gendered subjectivities in law, based upon misguided socio-sexual norms intersecting with racialised identities and class assumptions.

Concluding therefore, the authors reflect broadly upon the intersecting complexities of rape law, courageously stepping away from ongoing cyclical and fragmentary policy reform debates and instead positioning entrenched subjectivities, systemic “gaslighting” of complainants and stark inequalities as responsible for the ongoing limitations of rape justice. Though they do give some consideration to potential options for improving current approaches to sexual history evidence, they devote their final reflections to a more radical query about the nature of justice and the possibility that this may be attained outside of the typical criminal justice system.

3. Conclusion
A highly interdisciplinary and thought-provoking read therefore, this book is a critical volume in not only consolidating existing knowledge and debate about the nature and relevance of sexual history evidence in the modern rape trial but also raising important contemplative queries about the suitability and efficacy of our broader criminal justice response to rape.

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