

# The Identification of Rape in the Gender Perspective

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**Abstract**—Rape is a common and frequently occurring crime that is a serious violation of women's physical and mental health, due to the privacy of sexual intercourse, rape cases are often difficult to prove. In judicial practice, most rape cases are usually judged based on statements between the parties. In recent years, rape cases of zero confessions have occurred frequently, which has made it more difficult for the judiciary to detect and identify rape cases. Many cases of rape have caused the suspects or defendants to go unpunished because of lack of evidence, which is not conducive to the protection of female rights. There are certain misunderstandings in the determination of whether or not to violate the will of women in rape in our country's legislation and judicial practice, they often use men's values to look at the behavior of women, don't understand the behavior of many women, don't fully consider the inner thoughts and wishes of women, and have certain injustices against the victimized woman in rape cases.

**Keywords**—rape, naught confession, gender perspective, protection of female rights

## I. CHANGES IN RAPE CASES AND DIFFICULTIES IN REVIEWING EVIDENCE

### A. Special Changes in Rape Cases

With the development of the society, people's ideological concepts have also undergone great changes. Compared with ancient and traditional rape crimes, there are many new changes in the crime of rape. This article adopts the method of empirical analysis and uses the "rape, criminal, and Zhejiang Province" on the Chinese Judgment Online as the key word. It collected a total of 256 criminal judgments for first-instance rape from 2012 to

2016 in Zhejiang Province, including 4 withdrawal cases, one case was terminated, and the remaining 251 judgments were used to analyze the new changes in rape.

First, rape cases have a high proportion of acquaintances, through the analysis of the relationship between the parties to the judgment, it can be seen from the Table I that the current rape case compared with before, many of the parties are acquaintances, neighbors with neighbors, classmates and friends, colleagues and bosses, relationships with stepfathers, and even close relatives such as brothers and sisters, biological fathers and daughters.

TABLE I. THE RELATIONSHIP BETWEEN THE PARTIES TO THE CASE OF RAPE

Party relationship	Acquaintance	Stranger	Unknown
Number of cases	151	52	48
Proportion	60.2%	20.7%	19.10%

Second, violent criminal means tends to fade. it can be seen from the Table II, compared with traditional methods of rape and crime, violent methods in rape cases today tend to fade. This is mainly due to the fact that most of the rape cases are acquaintances, and the victim's precautionary mentality will not be heavy and the vigilance is not high. In addition, part of the reason is the victim in a drunken or drugged unconscious state, and many of the victim is mentally retarded women or young girls, no defense capability, so the suspect without the use of violent means. [1]

TABLE II. CRIMINAL MEASURES FOR RAPE CASES

Criminal means	Violence, body suppression	Other means	Verbal threat	Holding weapon	Remedy	Shoot a nude photo threat
Number of cases	140	82	18	7	3	8
Proportion	55.8%	32.7%	7.2%	2.8%	1.2%	3%

TABLE III. AGE AND MENTAL STATUS OF VICTIMS

Victim's age and mental condition	Teenage girls	Mentally retarded female	Underage females (not including teenage girls)	Normal adult female
Number of cases	32	14	21	184
Proportion	12.7%	6%	8.4%	73%

Thirdly, the proportion of women and teenage girls with mental retardation as victims is relatively high. it can be seen

from the Table III, compared with the normal people the mentally retarded female and teenage girls lack self-protection

awareness, especially sexual awareness of self-protection. Many criminal suspects often choose teenage girls or mentally retarded female as criminal targets. Because teenage girls and mentally retarded women often do not have sexual defense capabilities, criminal suspects are very likely to succeed.

### *B. Difficulties in the Review of Evidence in Rape Cases*

Due to the “hiddenness” of rape sites, the identification process of rape crimes is also much more complicated than that of ordinary cases. Most rape cases occur in isolated environments such as hotel rooms, housing bedrooms, dormitories, and toilets., there are often only suspects and victims in this environment, which lead to very little evidence of the direct proof to the rape. It often forms a situation in which the victim’s confession and the defendant justify the evidence “one to one.” The process of identification is very difficult, and is mainly reflected in the following Several aspects:

First, the subjective will of victims in rape cases is difficult to determine. Due to the particularity of the rape case, the statements of both parties play a crucial role, since most cases occur between acquaintances, especially between the lovers or the whoring relationship, for the victim voluntarily or being forced to have sex, Judicial investigators find it difficult to identify. At the same time, the victim’s statement is sometimes unstable or even inconsistent. It may be mainly because of the threat from the suspect’s side; the lure of interest related to monetary compensation; and the pressure from the society and the family, which causes the case’s foundation facts is difficult to identify.

The second is that physical evidence is rarely available and difficult to fix. There are very few physical evidence in the rape cases. In daily life, the rape case victims will not report the case immediately for some reasons. Some liquids and danders that the suspects remained will disappear, or they will not be fixed due to the victim’s cleaning. This has led to inconvenience for the identification of forensic doctors.

Third, the particularity of the evidence in the rape case makes it easy to identify deviations. The special place of occurrence of rape cases leads to the basis for final decision is often based on the suspect’s confession, the victim’s statement and the relevant evidence provided by the victim. The subjective, unstable and repetitive nature of the verbal evidence leads to evidence in the rape case. It is more difficult to grasp the identification.

## **II. NAUGHT CONFESSION RAPE CASE PRACTICAL EVIDENCE IDENTIFICATION RULES**

In the judicial practice in recent years, the number of naught confession rape cases has increased, which has increased the difficulty of censorship and identification of rape cases. As a result, many rape cases have caused criminal suspects or defendants to go unpunished because of insufficient evidence. “naught confession” means that the suspect only pleaded not guilty or kept silent during questioning. The “naught confession” rape cases in judicial practice can be divided into two types: One is not to recognize that has occurred the sexual relationship and the other is that both parties are willing to have sexual relations. Due to the physical evidence of the direct proof to the rape is very little, the situation of naught confession of a criminal

suspect will form a situation of “one to one” in verbal evidence between the victim and the suspect. It is very unfavorable for the judicial organs to handle the case and find out the truth. Article 53 of the Criminal Procedure Law stipulates: “The judgment of all cases must be relied on evidence. Emphasis on investigation, and do not rely on confession. Only the defendant confessed that there is no other evidence and the defendant cannot be found guilty and punished, no defendant confessed, the evidence is true and sufficient, and the defendant can be found guilty and sentenced. The confession of the suspect is very important, but it can be finalized without its confession. The “naught confession” situation will increase the difficulty for the judicial organs to identify the case, but it does not necessarily lead to the case being unrecognizable, this provision of the Criminal Procedure Law provides a legal basis for the conviction of a “zero confession” case.

Regarding the trial and determination of the naught confession rape case, the Supreme People’s Court issued “a trial opinion on how to review and admit one-on-one evidence in criminal cases,” in the “Criminal Judgment Method” in March this year ,which stipulated that naught confession rape cases need to be assistant considered include: the defendant's items left behind in the crime scene; the relationship between the defendant and the victim; whether it is a relationship between husband and wife, lovers, or job restriction; The means, time, methods and consequences of rape, such as whether there are signs of bundling, beating, gagging or biting; the time, manner and motivation of the victim’s report; whether the victim’s statement is consistent or contradiction, such as the relationship between the victim and the defendant, the incident time, place, surrounding environment, mandatory means, self-resistance, posture and whether other details of the statement is stable, whether consistent with common sense, whether there is a conflict. In judicial practice, courts often follow the Supreme People’s Court’s trial guidance point in the trial of rape cases. Since the court is the final referee, it plays a decisive role in the judgment of the case, therefore, when the procuratorate and the defense lawyer handle specific cases, they will also handle the case in accordance with the Supreme People’s Court’s point of view of the trial and conduct a review of the victim’s relevant behavior.

Through the investigation of the practice department Procuratorate, when it deals with naught confession rape cases, it proves the ability to demonstrate evidence first and then based on whether or not “violation of women’s will”, establish a review path of “direct evidence, indirect evidence, and other peripheral evidence”. First of all, the investigators will verify the authenticity of the victim’s statement to determine the basic facts of the case, and mainly specify the following aspects: First, the victim’s report time. In judicial practice, it is generally believed that the victim of a rape case will have the strongly hate willingness of the suspect and want to the suspect be jailed after being raped. Therefore, the case will be reported immediately after occurs; otherwise, if the victim reports the case long after the incident, unless they can make a reasonable explanation, it will be doubted the motive of the report. Second, the victim’s report motivation. In practice, some victims will use the illegal purpose of extortion, false accusation and so on to report the rape case. The investigating agency will consider the victim’s motive,

the relationship between the victim and the suspect, and the victim's character and sexual history to judge the authenticity of victim statements. Third, review the stability of the victim's statement. That is whether the victim's multiple statements are repeated, whether it is consistent before and after, and whether the content is contradictory.

Next, review the suspect's confession and defense, although the "naught confession" case suspects do not recognize the crime facts, and very few people will remain silent, they will often justify the innocence and Some basic facts related to the case can be obtained from the defense of the suspects. Moreover, since the direct evidence of the rape case is very little and the naught confession case increases the difficulty of its identification, the conviction of many cases will be based on indirect evidence combined with direct evidence and it must be confirmed between the indirect evidence and direct evidence and the indirect evidence confirms each other to form a complete evidence chain. Finally, excluding the possibility of other reasonable doubts in the case, our country's "Criminal Procedure Law" stipulates that "the facts of the case must be clear, and the evidence must be true and sufficient" requires that the facts based on the conviction exclude reasonable doubts, and there is no possibility of other situations.

### III. DISADVANTAGES OF PRACTICAL EVIDENCE IDENTIFICATION RULES

In the process of handling a rape case, the judicial practice department will inevitably examine the following factors: whether the victimized woman reported the suspect to the judicial organ in time after the incident, and if she does not report it in time, and cannot give a reasonable explanation, the victim's accusation may be untrue; whether the victim's emotional reaction at the time of the report is fearful, angry, anxious, nervous, etc; if not, the victim is most likely not forced to have sex; whether the victimized woman has resistance, if the woman do not try their best to resist, it means that the victim may not exclude sexual relations or half yield and half deny; by investigating the sexual history of the victimized woman to confirm the usual sex life style of the victimized woman, and then judge that the case is rape or adultery or normal sexual needs; review the motives of the victimized women to confirm whether it is because of the dispute over the financing of the whoring, or want to extort the intention to frame the suspect for other reasons report the case, or due to a time of quarrel between the lovers to report the case.

In the case of rape, due to the gender differences between men and women, there are many different and even opposite opinions about the understanding and awareness of the "rape concept":

First, the understanding of "forced" is different. Men think that if the victimized woman is unwilling to have sexual relations, she should try her best to resist it, instead of blurred attitude, half yield and half deny, or saying that she does not but have no rebellious behavior, women think that if they are unwilling, they would indicate that they do not wish to have sexual relations. Second, different understandings of report motives. Many men don't think that women are not voluntarily have sexual relations to report crimes, sometimes because the dispute over the money of whoring or adultery between

acquaintances felt sorry for their husband to report a crime. Women think that they are overcoming the fear that the public's arguments and disparate attitudes to reported the case. Third, different views on whether women have sexual history. Men think that the women who have a sexual history they sex life is more casual. Women do not think that having a history means that this sexual relationship is voluntary there is no inevitable relationship between the two. Fourth, the understanding of the rape victim's reaction is different. Men believe that if women are forced to have sexual relations, they must show fear, anger, anxiety, tension and so on after being raped, this shows that they are not willing to have sexual relations. However, according to the rape trauma syndrome that foreign countries do research on psychological investigation of the rape victimized woman shows that many women deliberately disguise their emotions after being raped and do not have these performances.

In practice, this method of interpreting women's relevant performance after sexual assault is not only reflected in the trial guidance view of the Supreme People's Court on rape cases, but also the practice of reviewing rape cases by the procuratorate. It also has a profound influence on some legal research experts and defense lawyers. A vice president of a university law school, a well-known law professor, and lawyer, in a rape case handled by him, the above-mentioned misrepresentation of women's censorship methods is reflected in his defenses.

Case Description: Bao and the victim Wang are colleagues in the hospital. One day Bao invited Wang and his friends to drink together. After drinking, he drove a car to Wang to go home. He forced a sexual relationship with Wang on the way. During the review and prosecution, the procuratorate considered Bao's behavior to constitute rape. The professor wrote in his defense words: First, after Wang and Bao had a sexual relationship, her performance was very calm, not like being raped, instead she sat in the Bao's car for a while, and then let Bao sent her home and the behavior of the victim Wang after being raped was very doubtful. Second, Wang did not report the case promptly after the incident, her motive for reporting crimes was a serious suspicion of having adultery with others and feel sorry for her husband. In the end, although Wang and Bao both drink, they have no sense of drunkenness when they have sex, and the two have an ambiguous relationship during the drinking process. Wang thinks that she does not voluntarily have sex, however, there are many contradictions in her statements about the sexual behavior with Bao, and it is difficult to distinguish whether her confession is true or not.

Judging from the professor's defense words, it is also defended from some aspects stipulated by the Supreme People's Court's point of view of trial guidance, that is, from the victim's performance after being raped, the time of the victim's report time, the motivation of the victim's report, and the victim's statement stability and other aspects to defend. However, these factors are not actually the correct judgment of whether women are raped. They are actually using the male eye to measure the behavior of the victimized woman after she has been raped, which greatly damage the rights of women. This also often leads to the very low prosecution rate and conviction rate of rape in judicial practice. In the case, Bao was finally found guilty.

#### IV. HOW TO FORMULATE A STANDARD OF EVIDENCE VERIFICATION FOR MEN AND WOMEN

All along, the crimes of rape in the world belong to low reporting rate, low prosecution rate and low conviction rate this has aroused the attention of various countries. A survey conducted by the U.S. Department of Justice in 1981 and the criminal investigations in 1983 estimated that the number of women who actually suffered sexual assault was far greater than the number of people who were later tried by the judicial authorities to initiate investigations. Most women did not report to the judicial authorities after being raped. There are many reasons why the victimized woman does not report the crime. Some people think that the report was useless and they were not able to get help from the judiciary. Others were unable to face their loved ones because of excessive stress. Most people are mainly based on their concerns about their own situation and reputation and their inability to receive proper treatment and support from the judicial authorities.[2] Through the stipulations of the rape cases in the United States before, it can be found that the reasons why most women choose to not report crimes after they have been sexually assaulted are also understandable. In the United States, there were evidences that discriminated against women who had been raped in litigation: First, the “best effort to resist” rule, the rape victim must prove that she had done her best to resist the defendant by sexual assault; Second, the “reinforcement” rule, the victim must provide evidence of other reinforcements in addition to their confession in order to convict the defendant; Third, the “allowing the inquiry of the victim's sexual history” rule, The rape case allows the judicial authorities to investigate the sexual history of the victimized woman to form indirect evidence to support the truthfulness of her statement. Fourth, the “report to the case in timely” stipulates that the victim must report the case promptly after the crime of rape, otherwise, the report may not be accepted afterwards.[3]

In the 1960s, the feminist movement began to rise and the protection of women's sexual rights was received attention. Feminists raised concerns about raped women, driven by its movement, countries in the world have successively revised the provisions of the law, especially the relevant provisions on rape cases and the rules for the identification of evidence, recognized and respected gender differences between men and women, and continued to make substantive equality between men and women nearly. However, in the 21st century, in our country's determination of rape crimes, men often still use the judgment criteria of male sexual behavior to measure women's behavior. There are many provisions that misinterpret women and are not conducive to the protection of women's legitimate rights. Therefore, it is very importance that we establish standards for the identification of evidence of rape crimes that are consistent with gender differences between men and women. Just as feminist jurisprudence advocates “protecting the substantive equality of men and women, respecting the gender differences in gender,” the law makers should also recognize the gender differences between men and women in the legislation and thus cause men and women to show differences in the face of things. That is to include gender awareness in the law, while paying attention to the psychological experience and needs of men and women, assessing the impact of gender differences on men and

women, and adopting special protection measures for vulnerable parties in legislation.[4]

##### A. *Changing the Standards Resisted by the Rape Victims*

The core of the determination of rape is the occurrence of sexual behavior “Is it against the will of women?”. However, the will of the victimized woman is a subjective aspect. Judicial practice is often difficult to prove that it needs to rely on the victim's external behavior and related performance to judge. Therefore, When women are raped, they should try their best to resist the defendant in order to prove that they are forced to have sexual relations and they are not voluntary. Foreign countries have successively revised the standards that victims have resisted. In the early 20th century, the United States demanded that female victims do their best to resist in rape cases and adopt the criterion of “maximizing resistance”. However, in the 1950s, this rule was finally cancelled and replaced with the standard of “reasonable resistance”. That is, according to the specific circumstances of the rape case indicates the woman's resistance whether she is unwilling to have sex. Afterwards, the United States developed a “serious revolt” standard. The rebellion of the victimized woman in the rape case is a situation in which expresses her true rejection of sexual activity. At present, the determination of the rape case in the United States is not based on the content of whether the victimized woman has resisted or not, that is, “the resistance is not a criterion”. New Jersey, the United States, took a step forward on the road to protecting women's rights and interests, adopting the “affirmative consent criteria” based on the principle of whether or not the victim consented to the judgment. In the event of sexual activity, the victimized woman does not have the affirmative consent, then the other person's behavior constitutes a crime.[5]

From the changes in the development of foreign feminist movements and people's awareness of the law of rape protection, the “non-victim's consent” standard will become an essential feature of rape.[6] At present, our country's criminal law does not explicitly specify the criteria for resisting rape of the victimized woman. Generally, the measure of the behavior of the victimized woman is “reluctant to resist, not knowing to resist, and does not dare to resist. Judging from the provisions of our country, it is more in line with the United States' “reasonable resistance” standard. Although the resistance of the victimized woman can prove that the defendant had forced her to do so, it could not rely on this to arrive at the contrary conclusion that if the victim does not have apparent resistance, she is willing to have sexual relations. In many rape cases at present, the parties are acquaintances, the means of violence are very slight. Sometimes even use the verbal threats instead of using violence. The victim out of fear and shame, has not shouted loudly when she is being violated. According to the resistance criteria of female victims identified the rape cases in our country, it is sometimes not reflect their true thoughts when they are raped, it is not conducive to the protection of their legitimate rights and interests. Therefore, it is necessary to revise the current resistance standards in rape cases in China.

##### B. *Expert Evidence Stipulating Rape Trauma Syndrome*

Research on rape trauma syndrome shows that the emotions of the victimized woman are divided into two phases: the acute phase and the reorganization phase. In the acute phase, different

victims show different emotions. Some victimized women have obvious fears and resentment, anxious and stressful emotions, while some women who are victimized will show apathy, sluggishness, slowness, and other reactions to hide their emotions. These two types of female victims emotions have half the probability. In the reorganization process, about two to three weeks after they are raped, victims will feel embarrassed, blame themselves, and even suffer suicide or schizophrenia. The symptoms of rape trauma syndrome can also indicate that some victimized women do not show any emotional reaction such as fear, anger, anxiety or nervousness after being raped. Therefore, it is not entirely possible to determine whether or not a victim has been raped by the emotional expression of the victim after being raped.[7]

Specifically, when the defendant and his defender claimed that the victim was not raped, because they didn't respond to the fear, indignation, anxiety, and nervousness after raped, In order to prevent the victim's performance from giving wrong guidance to the judge's decision, the victim should be allowed to apply for the court to appoint or hire an expert to explain the performance of a person who has been raped and is different from the ordinary person. The judge should combine the expert evidence and other information comprehensively judged when making a referee. The expert evidence of rape trauma syndrome is only an explanation of the emotional response of the victimized woman after she has been raped. It explains to the judge the special emotional reaction of the victimized woman. When using the evidence, the defendant's legitimate interests must also be protected.

### C. *Changing the Concept of Judicial Investigators in China*

In the legislation of rape crimes in our country, the determination of rape cases is biased towards the values and standards of men, without taking into account the feelings of the victimized women, and causing a certain degree of prejudice against women's behavior. And in the judicial practice of rape cases, judicial investigators often use male judgment criteria to measure women's behavior. There are also some false prejudices about women's behavior when collecting evidence and identifying evidence. Therefore, it is very important to change the concept of judicial investigators.

For the present status of the current rape cases in China, the concept of judicial investigator can be changed from the following two aspects: First, professional training for investigators in rape cases can be strengthened, the nature and characteristics of rape, the reasons why victims are not reported, the performance of victims after being raped, the spirit of rapists, the history of laws and attitudes relating to rape, and the prejudice of rape, the use of expert witnesses of rape trauma syndrome, and the status quo and reasons for rape victims not to testify are regularly trained as judicial investigators. Second, absorbing female judicial investigators to participate in case handling, since the legislation itself evaluates the behavior of women from the values of men, In addition, in judicial practice, there are many male judicial investigator which is measured and evaluated the behavior of raped female victims from the perspective of men inevitably. As a result, some female behaviors are not understood and even mistaken for voluntary sexual behavior. Absorption of female judicial investigator is

beneficial to thinking from a female perspective and understanding the victim's feelings personally. Since rape is a crime involving personal privacy, the victimized woman is often physically and psychologically harmed, and female judicial investigator are able to make the victim's psychology get some comfort.

### D. *Balancing the Rights of Victims and Defendants*

Due to gender differences between men and women, the experience of women victims in rape cases may not be felt by men. Only women can deeply understand the law unreasonable led to many cases of rape can not convict which bring their inner pain. Since the 1960s and 1970s, the feminist movement has made tremendous contributions to the protection of women's rights. The influence of feminist ideology in various countries has begun to revise the legislation on rape and women's legal rights have also been universal recognized and respected.

While prosecuting rape crimes to protect the rights of female victims, they must also protect the legitimate rights and interests of the criminal suspects and defendants, so as to achieve a balance between the protection of the rights of the criminal suspects and defendants, rather than just protecting the rights of the victims. For example, in the United States, the rape shield clause was first established to protect the privacy rights of the victimized woman and restrict the defendant's use of the victim's sexual conduct evidence in the allegation. Later, it was criticized because the provision may infringe the defendant's right to query. As a result, the United States made exceptions to the application of the "rape shield clause." Therefore, our country should learn from foreign legislative experience, pay attention to the different physical and psychological characteristics of men and women, psychological needs and inner feelings in the legislation on rape cases, so as to formulate evidence verification rules that meet the gender differences between men and women and balance protection of the legal rights of victims and defendants in criminal lawsuits.

## V. CONCLUSIONS

This paper starts with the special changes of rape cases and the gender differences between men and women. It analyzes the rules of the evidence identification of rape cases in the judicial practice and its shortcomings, and then proposes how to formulate the criteria for judging the evidence according to men and women, in order to better conviction of rape case, and protect the legitimate rights and interests of women.

## REFERENCES

- [1] Qiangming Zhang, Lujun Yang, Yiming Li, "Analysis of Current Evidence in Rape Crimes," *Journal of Shanghai Public Security College*, no. 1, p. 75, 2010.
- [2] Yang He, *The Structure and Application of Rape Crime*, Beijing: Legal Press, p. 170, 2014.
- [3] Jiehui Yang, "The Protection of Rape Victims in Criminal Procedure in the United States and Its Enlightenment," *Journal of Ningbo University (Liberal Arts Edition)*, no.6, p. 104, 2011.
- [4] Jiehui Yang, "Feminist Criminal Litigation: A Preliminary Analysis Based on Rape Case," *Women's Studies*, no. 1, p. 38, 2014.
- [5] Liping Shen, "On Judicial Application and Legislative Perfection of Our Country's Criminal Law Violating Women's Will," *Suzhou University Master Thesis*, p. 16, 2012.

- [6] Hantao Wei, "The Essential Characteristics of Rape Crime and Legislation Reconsideration," *Global Law Review*, no. 4, p. 121, 2012.
- [7] Jiehui Yang, "The Introduction of Rape Trauma Syndrome Expert Evidence in Criminal Justice in the United States and Its Enlightenment," *Chinese Journal of Criminal Law*, no. 12, p. 119, 2011.