

# Bringing Rapes to Court



## **Part I**

In 1786, fifteen-year-old Barbara Witmer suffered a horrific assault. A group of men kidnapped her from her Pennsylvania home at gunpoint, and one of these men repeatedly raped Barbara before her family and friends managed to rescue her. Her rescuers quickly brought Barbara to a local justice of the peace to press charges against the attackers, but she had difficulty telling the magistrates about her ordeal. One justice of the peace asked her "8 or 10 times to begin" her testimony. When she said nothing, the justice decided that Barbara was "confused" about what had happened, so he gave up and went to bed. Another magistrate, however, seemed to understand that Barbara might be too traumatized to tell her story. Rather than immediately categorizing Barbara as a confused and therefore unreliable witness, he saw her as "very bashful" about what had happened to her. This justice "spoke very mildly & told her no one could hurt her for telling the Truth." After waiting through ten or fifteen more minutes of Barbara's silence, the magistrate called in her mother and uncle to provide support, and Barbara hesitatingly told her story. Eventually, six men were convicted in the attack. The man who had raped Barbara received a death sentence.

Because the rape of Barbara Witmer was an obvious and brutal assault, it made a relatively easy case for legal prosecution. More than a dozen witnesses testified that Barbara had screamed for help as the men carried her away at gunpoint, that she had seemed terrified, and that she had immediately run to her rescuers when they found her being held captive in a nearby house. Together, these witnesses removed one of the biggest barriers to the successful prosecution of rape cases in early America: the question of whether the woman had consented to the man accused of raping her. Given that the penalty for rape was a death sentence in colonial America and up to twenty-one years in prison

in the early republic, courts required a woman to be exceptionally convincing in her accusation of forced sexual assault. Researchers in women's and legal history over the past few decades have discovered a fair amount about the courtroom prosecution of rape and other sexual crimes in early America. Especially by the eighteenth century, courts seemed loathe to prosecute many rape cases, and women often had great difficulty proving to an all-male jury that they had been raped. But how did such an intimate crime—with its horrifying blend of sex and violence—ultimately become part of a public courtroom proceeding?

Barbara Witmer's experience reminds us that obstacles to successfully prosecuting rape lay as much out of the courtroom as in it. The case against Barbara's attackers was clear cut, she had supportive family members who encouraged prosecution, but Barbara still had great difficulty telling her story to legal officials. Stories like Barbara's invite us to investigate exactly how assaulted women made their way to the criminal justice system. My examination of more than nine hundred incidents of sexual coercion across British America between 1700 and 1820 shows several consistent patterns in the ways that women, families, and communities transformed private sexual assaults into public prosecutions. Layers of unwritten cultural practices shaped women's roads to legal recourse. While bringing an incident of rape to legal officials was undoubtedly challenging for all victims, ironically, the cases that might be most successfully prosecuted were often the most difficult for victims to bring to court.

After a sexual attack, a woman would rarely pick herself up and run to the nearest justice of the peace to file a legal complaint: bringing an official complaint was less often a victim's immediate reflex than the end point of a series of decisions to share her misfortune with family and community. Unlike the assailants in Barbara Witmer's case, most men committed sexual attacks without witnesses, so a victim had to independently make the difficult decision to tell someone what had happened to her. And a woman who had been sexually assaulted might have a variety of reasons to keep the attack secret. An early American double standard that held women responsible for engaging in any sexual behavior outside marriage probably encouraged women to blame themselves for not avoiding attack. Or, like Barbara, they may have been afraid of retribution from their attackers, or embarrassed at the thought of telling intimate sexual details to male court officials or jury members.

The reactions of the first people a woman told about an attack greatly influenced whether she would bring her claim to legal officials. If they did not believe her story they might encourage her to keep her secret. Even when neighbors and kin believed a woman's account, they might still think it best to avoid public legal recourse, fearing public reaction, the effect on the victim's reputation, or the legal system itself. When family members or friends did pursue judicial redress, a husband, father, master, or other male household head would generally accompany the woman to court. Because women depended on this kind of male support, daughters raped by their fathers, or servants raped

by their masters, might find legal recourse especially difficult to attain. Thus, multiple factors—a woman's relation to her attacker, the reaction of those around her, and her own ability to tell others about intimate details of a sexual assault—influenced whether rapes ever came to the attention of early American courts. This extended pre-legal process not only meant that many sexual assaults might never come to the attention of a criminal justice system, it meant that the very cases most likely to result in conviction (such as fathers' abuse of their daughters) were often the least likely to wind up before a jury. Exploring how rapes came to court helps us to examine the surprisingly circuitous relationship between acts of sexual coercion and the prosecution of rape in early America.

## **Part II**

Unlike the attack against Barbara Witmer, most sexual assaults did not occur in front of witnesses. Accordingly, victims had to make an initial decision to tell about their suffering, and they often only did so with significant prodding from family or close friends. In 1804, Kentuckian 'Franky' Tomlinson told no one about her uncle's sexual assault on her for at least a week, perhaps because she was afraid to let her parents know what her father's brother had done to her. After her mother wondered why the uncle skulked near their house "in the weeds or in secret places more than she thought necessary," Franky broke down and confessed that the uncle "had ruined her forever." Franky used the opening provided by her mother's comment about the uncle's odd actions to admit that he had attacked her. Perhaps her mother raised the issue of the uncle's strange behavior because she suspected, even subconsciously, that something was wrong: Franky's mother would later recall that her daughter "even in her sleep would cry out [for her uncle] to let her alone."

Like Franky, many single women told their stories only after others began to suspect some problem. Several men sexually assaulted Mary Anderson in New York City in 1754. She did not mention the incident to anyone until one of her attackers asked if she had gone to a justice of the peace yet to complain. Overhearing the conversation, Mary's mother demanded to know what had happened and took Mary to file a complaint. In an 1812 Philadelphia case, Deborah Williams testified that "I don't know that I shd have said any thing" about being raped if her master had not questioned why she looked so disheveled. Questions from astute family and household members could be the first step in encouraging a woman to bring charges against a man who had sexually assaulted her. Victims without interested, aware, or sympathetic family members might suffer in silence, and their cases might never reach court.

And there was often good reason for such silence. Young girls who were sexually assaulted might hesitate to tell anyone about the attack because they often believed their attackers' threats of great harm should they do so. In nineteenth-century Philadelphia, John Kinless told four-year-old Mary McElroy that he would "give her to the sweep" if she told anyone that he had raped her, and Mary said nothing for nearly a month. Five-year-old Sally Briggs was

covered in blood after a sexual attack in Virginia in 1808, but would not tell her mother anything until her mother could assure her that "there was no danger of his killing her." After an assault in New York in 1810, six-year-old Sally Carver kept silent because her attacker had "told her not to tell and if she did tell he would buy two cow skins and two horse whips and would Twist them up together and would whip her—also that he would borrow a knife . . . and would cut her ears off and her head." While older women might recognize that community involvement and legal prosecution could protect them from retribution, young girls were especially susceptible to believing that the men who had already hurt them so much could make good on such horrific threats. Ironically, cases involving child victims were often the most successfully prosecuted because few jurors would question whether the young girl had chosen to have sexual relations with her attacker. But because fear of their assailants prevented many young girls from telling anyone that they had been raped, such cases might be significantly underrepresented in early American courts.

Similarly, even though incestuous sexual assaults were some of the most fiercely prosecuted rapes, daughters who endured ongoing sexual abuse from their fathers had particular difficulties sharing their suffering with others. In early-eighteenth-century New England, Hannah Hood could not see how to complain against her stepfather. She recounted, "i knew not what to do. I went to one house and to another and to a third thinking to declare my grife to them, but when I came thear, thear being strangers to me, I had not the power to speake, but sat downe and cry." A century later, New Englander Phoebe Bailey also could not admit that her father had been sexually abusing her for years. Her mother "often saw her with cheeks bedewed with tears, on account of his new and astonishing behaviour," but recounted that "such were [Phoebe's] fears of him, that she did not dare to talk with me, or any other person upon her situation." Despite their obvious suffering, these young women could not find a voice to complain against the man who was meant to be their protector, and such sexual abuse often went on for years without discovery. These family dynamics might sound somewhat similar to modern incestuous sexual abuse. However, while daughters in both the eighteenth and twenty-first centuries might hesitate to accuse their fathers of rape, daughters in the eighteenth century were at a further disadvantage: their fathers provided a necessary link to the all-male legal system, and without the support of a male head of household, the victims could not easily pursue legal redress.

Daughters of abusive fathers had additional incentives to keep the secret of sexual assault within the household. As household heads, fathers had not only the social power to scare their daughters into submission, but the legal right to punish disobedient daughters. Household heads also generally had the ability to make their own voices heard over the claims of their dependent children. In Connecticut in 1725, Sarah Perkins testified that her father "threatends he would have her hand cut off for being a dissobedient child and to disinherit her" because she would not agree to have sexual relations with him. A century later, Betsy Wheeler's father told her to keep his attack a secret or he would

"kill me in the most cruel way he could think of." Indeed, Betsy did not complain of his assaults until after her mother had ordered him out of their house. Only when she had enlisted her mother as an ally and her father was no longer an immediate threat could Betsy speak about his attacks. Such fears of a father's retribution were not unfounded. In 1800 in New York City, Maria Cottle may have avoided the judicial system because she believed her father's threat that "he would kill her if he should be hung for [his rapes of her]." Instead Maria ran away. But when her father caught her, he "whipped her severely . . . and kept her chained for about a week." When an attacker was a seemingly all-powerful father figure, his retribution might be worse than anything a victim might gain from sharing her story of sexual abuse.

Daughters of abusive fathers also had to consider whether even successful judicial redress would necessarily improve their lives. While Maria ultimately successfully prosecuted her father for repeated sexual assaults, his conviction meant that she, now homeless, was put in the almshouse. Given the possibilities of physical retaliation, homelessness, or poverty, keeping sexual assaults a secret sometimes made sense. Women needed to carefully weigh these kinds of serious repercussions against the possible gains that could come from public knowledge of sexual abuse.

Even when victims managed to tell neighbors or family members about their ordeal, others' knowledge of the assault did not necessarily insure swift legal action. Family and friends might still think that the risks of prosecution outweighed its potential benefits. Some did not want to bring charges that might take the life of the rapist, some might fear that the jury would not believe the victim's story, and some worried that a public trial would cause embarrassment or dishonor to the victim and her family.

Accordingly, family and neighbors sometimes betrayed a willfulness *not* to know what had happened to an assaulted woman. After Rachel Davis's master repeatedly sexually assaulted her in early-nineteenth-century Pennsylvania, Rachel told her sister what had happened. But when the sister tried to enlist a female neighbor's help, the neighbor refused, saying "that I wanted to hear no more." Sometimes family members could not bear to learn that a loved one had suffered the horror of rape. A man from a nearby plantation raped Lucinda Jeffries in early-nineteenth-century Virginia. When her stepfather found her by the side of the road, he seemed unwilling to learn the full extent of the assault. He told Lucinda that "he hoped [the attacker] had not effected his purpose," and Lucinda "made no reply for some time." Perhaps her stepfather realized that his own need to minimize the damage done to Lucinda inadvertently made her unwilling to admit what had happened. When he changed his approach and "told her to tell him the truth," Lucinda acknowledged that she had been raped. Other family members might mix a need to deny an assault with disbelief that someone they knew could commit a rape. When Christiana Waggoner told her husband that a neighbor had raped her in Revolutionary-era Pennsylvania, her husband's immediate response was that "he did not think [the neighbor] would do such a Thing."

A general reluctance to think that a friend could commit a horrific sexual attack, a neighbor's desire not to get involved, or an aversion to putting words to one's worst fears might all contribute to a community's silence about a sexual assault. Moreover, rape was a difficult crime to prosecute successfully in early America: in the nearly two hundred known rape prosecutions against white men from 1700 to 1820, fewer than one-third resulted in a guilty verdict. Far more charges were dismissed, settled out of court, or led to convictions for only lesser crimes. Since court days were public events, most community members would have known the difficulties that a rape victim faced and factored that knowledge into their decision to encourage or discourage legal redress for a sexual attack.

Family members might also try to seek redress outside the legal system, redress that could range from private settlements to their own version of justice. One victim explained that her husband had planned to "make Some arrangement with [her attacker]—therefore she did not Lodge her Comp[lain]t" with a justice of the peace. Some attackers tried to avoid legal prosecution by making their own amends. After James Dunn tried to force Sylvia Patterson to have sex with him in early-nineteenth-century New York, he tried to avoid punishment by offering a watch as a down payment on a future monetary settlement.



Fig. 1. This cover illustration from a published sexual assault trial shows James Dunn trying to protect himself from prosecution by offering his fleeing victim a watch as part of an out-of-court settlement. Collection of the New-York Historical Society.

Some family members took more direct (and more illegal) action to derail a court prosecution: The family of Franky Tomlinson decided to hide Franky until her uncle could be acquitted of raping her, promising to "send back for her" when the trial ended. The Tomlinsons knew that without Franky's testimony, the prosecutor could not prove a rape charge. This case highlights the difficult position of a rape victim who accused a family member, well-liked neighbor, or respected community member. Even when family and friends believed her story, they might not want the attacker to suffer the full wrath of the criminal justice system.

Because male household heads typically accompanied female victims to court, fatherless families faced additional obstacles to judicial redress. Mothers who were household heads seemed particularly hesitant to usher their assaulted daughters through the judicial process. Mary Anderson's mother eventually took Mary to complain before a magistrate, but told him that if the men who had attacked her daughter would only give assurances not to bother Mary, she would prefer to drop all charges. In Boston in 1817 another mother baldly refused to go with her daughter to file a complaint about a sexual assault, explaining that "I am a poor woman and did not wish the trouble." Especially for lower class women without husbands, the legal system could be a site of intimidation rather than salvation. Neither assault victims nor the women to whom they turned with their stories necessarily thought the legal system provided an easy or satisfying resolution.

But however difficult their circumstances, at least assaulted white women had the option to turn to an early American court. Even unequivocal social support, however, would not lead to legal prosecution for one group of early American women: enslaved women had virtually no judicial recourse for sexual assaults. Legally, enslaved women could bring a claim of rape against a white or black man to the attention of an early American court. However, early American statutes often would not allow enslaved women to testify against white assailants, and a rape case could rarely be prosecuted without a victim's testimony. Accordingly, such prosecutions were exceptionally rare. Indeed, we know of no white man convicted for raping an enslaved woman in all of early American history.

The scant evidence that survives suggests that, like their white counterparts, enslaved women who were raped would first turn to family and community members about their mistreatment. Unlike their free and white counterparts, however, enslaved women did not usually have kin or neighbors who could serve as liaisons to the legal system. Without legally recognized fathers or husbands, slaves could not rely on a patriarchal figure to represent them at early American courts. And slaves might suffer greatly if they told others about a white man's—let alone a master's—sexual misdeeds. Former slave Lewis Clarke recalled that his master repeatedly sexually assaulted his sister. When Lewis's sister complained to other slaves about their owner's behavior, the "master was so mad . . . that he sold her right off to Louisiana." In her famous narrative of her time in slavery, Harriet Jacobs recalled that other slaves knew of her master's sexually abusive acts, but that "they were aware that to speak of them was an offence that never went unpunished." The oppressive realities of slavery denied most African American women the possibilities of social or legal assistance in cases of sexual abuse. Denied patriarchal protection by virtue of their bondage, enslaved women represented the most extreme example of the difficulties all early American women faced in transforming a sexual attack into a rape prosecution. While many victims who had a hard time bringing their attacker to court might at least face a relatively sympathetic court system, enslaved women suffered from the worst of both worlds: community support could not render much assistance, and institutional redress was permanently denied to

them.

### Part III

When Barbara Witmer eventually testified against her assailants in court, their lawyer questioned why she had initially refused to tell her story to the first justice of the peace. She answered, "I was frightened . . . I had not the Courage to speak before him." Women who were sexually assaulted in early America certainly needed courage to bring their complaint to a public forum for judicial redress. But the criminal prosecution of a sexual attack required more than individual courage. The decision to prosecute a sexual assault was a personal, legal, and, perhaps most importantly, social decision.

The legal prosecution of rape involved more than what went on in front of lawyers, judges, and jurors. Of crucial importance were the extensive negotiations that preceded any direct involvement of the judicial system. Despite the numerous obstacles, many women persevered and got their day in court. But untold numbers of other sexual assault victims never completed the long road to the courtroom door. By tracing the entire process from sexual coercion to prosecution, it's possible to realize how much of early American women's sexual abuse might remain hidden—not just from their families, communities and legal system—but also hidden forever from the historian's view. Given that some of the most easily prosecutable cases were often the most difficult for victims to bring to early American courts, we should not assume that rape was simply an underreported crime. Rape appears to have been (and very well may still be today) underreported in very specific and systematic ways.

**Further reading:** Quotations in this article comes from manuscripts at the Connecticut State Library (Hartford), Kentucky Library and Archives (Frankfort), New York Municipal Archives and New York Hall of Records (New York), Historical Society of Pennsylvania (Philadelphia), Library of Virginia (Richmond), as well as from a variety of published and reprinted sources. For more on rape in early America, see Cornelia Hughes Dayton, *Women Before the Bar: Gender, Law, and Society in Connecticut, 1699-1789* (Chapel Hill, 1995), 231-84; and Marybeth Hamilton Arnold, "'Life of a Citizen in the Hands of a Woman': Sexual Assault in New York City, 1790-1820," in *Passion and Power: Sexuality in History*, edited by Kathy Peiss and Christina Simmons with Robert A. Padgug (Philadelphia, 1989). On servants' and slaves' reactions to masters' sexual abuse, see Sharon Block, "Lines of Color, Sex, and Service: Comparative Sexual Coercion in Early America," *Sex, Love, Race: Crossing Boundaries in North American History*, edited by Martha Hodes (New York, 1999), 141-63.

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