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The Yale Rape Trial Isn't Over Yet

A criminal court cleared Saifullah Khan of the charge of raping a fellow undergraduate, but he's about to face a campus committee.

By STUART TAYLOR JR.

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The Yale campus.

The March 7 acquittal by a New Haven jury of a suspended Yale student on charges of raping a classmate has been much lamented on campus and in the national media. But a review of the evidence shows that the trial was fair, the defense was ethical, and there was much more than a reasonable doubt about the accuser's claim that she was so drunk as to lack the capacity to consent.

The facts of this he-said, she-said case are that Saifullah Khan, a then-22-year-old Yale senior, and his accuser, also a senior, had Halloween dinner together at the dorm's dining hall on October 31, 2015, and crossed paths later that night—first at a drinking party and then at a Yale Symphony Orchestra concert—ultimately ending up in her room at 1:11 a.m. and having sexual intercourse.

The trial centered on the credibility of the accuser's testimony—which was halting, tearful, and contrary to

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proven facts on some points—and of her claim that she was so drunk that she could barely stand or walk, flitted in and out of consciousness, and awakened in her bed for just long enough to feel Khan on top of her and to try to push him off.

Khan, an Afghan who was recruited to an American prep school (Hotchkiss) and then to Yale because of his academic gifts, testified that the accuser did not seem at all intoxicated to him during the six hours they were in her room, flirted with him at the concert and on the walk back to the dorm, invited him into her room, and initiated both oral sex and, more than two hours later, full intercourse.

Numerous Yale students, journalists, and champions of rape victims' rights have trashed the trial and especially the defense lawyer's cross-examination of the accuser as "every survivor's worst victim-blaming nightmare," in the words of Jess Davidson, interim director of the advocacy group End Rape on Campus.

The article reporting the verdict in the New York Times, which exhibited bias throughout its coverage of the trial, disapproved of Khan's lawyers working "relentlessly to discredit the account of the woman. . . . They asked repeatedly how much she had to drink. . . . They showed off her Halloween costume, a black cat outfit, and asked her why she had not chosen a more modest one, such as 'Cinderella in a long flowing gown.'" Time called its piece "A Yale Student Accused Her Classmate of Rape. His Lawyers Asked What She Was Wearing and How Much She Drank." An online magazine for young women, Refinery29, ran its account of the trial under the headline "Jurors Bought Stale Victim Stereotypes—Just Like the Defense Hoped."

Yet defense lawyers are required to do their best to discredit accusers who are trying to put their clients behind bars—Khan faced a maximum prison sentence of 46 years and deportation back to Afghanistan, where he believes he would have been executed, stoned, or lashed under the country's laws. And wasn't it part of the defense's duty to probe the accuser's claim that she had had so much to drink that she was losing consciousness several hours later? The lead defense lawyer, Norman Pattis, called the reaction "a form of mass hysteria."

His question about the costume that the accuser chose for her Halloween get-together with Khan spurred particular outrage among the accuser's advocates. "A misogynistic tactic that men habitually use to silence women . . . by blaming them for their own assaults," raged Amelia Nierenberg, a Yale Daily News columnist. Out of a variety of costumes from a Yale storage closet, the woman had opted for the sexy cat, pairing a sequined black miniskirt with matching tube top and tail. In pointing this out, Pattis stressed that his purpose was not slut-shaming but spurring skepticism about the accuser's testimony that she was uninterested in Khan sexually and was afraid that he was stalking her and trying to get into her room.

In any event, the jurors appear to have paid little attention to the costume. They were far more interested in the grainy security videos that the prosecution made a focus of its case, claiming that they showed the accuser in such an inebriated state that she was stumbling, with her eyes closed and her left foot dragging behind her (as she testified), and needed Khan to hold her up while walking from the concert to her dorm. She emphasized that she was a dancer and did not normally walk that way.

The jurors had the videos replayed numerous times, and those who have spoken publicly saw nothing of what the prosecution suggested. "We looked at and we looked at and we looked at that video of them walking," one anonymous juror told the New York Times, but "we could not see her leg dragging. We could not see her eyes shut." Juror James Galullo told Alice B. Lloyd of this magazine: "We all agreed that she was walking hand-in-hand, arm-in-arm, smiling." Alternate juror Elise Wiener told Robby Soave of Reason: "She was strolling with him with a big grin."

This did not prevent news outlets, including the New York Times and the Yale Daily News, from repeating the prosecution's characterization of the videos. Both papers could have obtained and posted the footage to let readers judge for themselves. They chose not to do so.

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Hours after the alleged rape, the accuser told a Yale health center nurse that she needed a Plan B morning-after pill due to having had consensual sex with a regular partner. At the trial, she explained that she was "too traumatized" to tell the nurse of the alleged assault.

After meeting later that day and the next day with several friends—including a former boyfriend who took her phone, dialed Yale's sexual-misconduct office, and handed the phone back to her—the initially irresolute accuser filed a complaint against Khan with the sexual-misconduct office and then went to the Yale police department.

The details of the process are unclear, but university officials, the university police, and the accuser decided to ask the New Haven state's attorney's office to prosecute Khan criminally rather than rely on the internal disciplinary process.

It is rare for the kind of sexual-misconduct accusations that are typically filed by university students to be sent on to a public prosecutor. The only plausible explanations here are that Yale officials felt the accusations in this case (unlike in most) to be serious enough to qualify legally as sex crimes or that the accuser herself, as was her right, decided to press criminal charges.

Yale suspended Khan on an emergency basis on November 9, 2015, a week after the accuser reported him. It also threw the Afghan native, who had few connections in the United States, out on the street on very short notice.

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Much of the national coverage of the case has suggested that the verdict was a miscarriage of justice, but that belies any review of the trial evidence, little or none of which would have been uncovered and considered in a Yale disciplinary proceeding.

At a time when the accuser testified she was concerned that Khan was becoming aggressive in pursuing her—and had tried to enter her dorm room uninvited and had responded angrily when she told him to leave—she was also sending playful texts to him sprinkled with smiling and giggling emoticons. She even texted him a Shakespeare poem, "From fairest creatures we desire increase," the first of the so-called "procreation sonnets."

The accuser's claim that after the two had met for Halloween dinner, Khan followed her into her entryway and tried to push his way into her room is almost impossible to reconcile with Yale's electronic dorm card-key system. She swiped into her entryway at 6:47:31 p.m.; he swiped into his just seven seconds later. For her story to be accurate, he would have had to follow her into her entryway, try to push his way into her room while "I was trying to push him back," and then go off to his own entryway and swipe his card-key, all in seven seconds flat.

The timeline of the evening suggests it was unlikely that the accuser could have been completely incapacitated by alcohol at the time of the alleged rape as she claimed. By her own account, she had five drinks containing varying amounts of alcohol at the party. While friends testified that she was somewhat—one said extremely—intoxicated when she left the party for the concert, it appears clear from the testimony that she stopped drinking between 10:50 p.m. and 11:40 p.m. The timeline is complicated by the fact that clocks were turned back at 2 a.m. due to daylight savings time, but it seems the accuser had her last drink at least four-and-a-half hours before the alleged rape, which apparently occurred after a phone call that Khan placed at 1:55 a.m. from the accuser's sofa to his longtime girlfriend in Maryland (a call that lasted 141 minutes).

The two have an open relationship, and the girlfriend testified that she already knew the accuser from a summer physics class at Yale. She and Khan both stated that he handed his phone to the accuser at one point and the two women spoke briefly. "I said, 'Hi,' and she said, 'Hi,'" the girlfriend told the court. She recalled the complainant used the girlfriend's name when saying "Hi" to her. She said this was the extent of their conversation, and that she and Khan then continued talking for another hour and a half. Khan testified that the accuser had already given him oral sex before the phone call and asked him to "come to bed" after it ended.

One friend, Josh Clapper, initially told university police that the accuser "did not seem intoxicated" at the concert, which came after her

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final drink. At trial, his recollection had changed and he, like other friends of the accuser, said she needed support walking.

The apparent passage of those four-and-a-half hours, during which the accuser said she vomited two or three times, casts doubt on her assertions such as "I tried to say 'stop' but I'm not sure if anything came out. I couldn't communicate because I was that inebriated."

The accuser testified "he was pinning my legs and arms so I couldn't move." But Pattis noted that in her 61-page statement to police, she had never suggested that Khan pinned her arms.

After the alleged rape, the accuser awakened with Khan in her bed and told him she was embarrassed and disgusted by her behavior, by his account. After he departed, leaving two condoms that bore his DNA in her room—not the sort of oversight one might expect from a man who feared he might be accused of rape—he sent her a text at 6:14 a.m. She texted back "LOL." Then Khan responded with a winking emoticon and she replied, "Go to sleep and this will stay between us that goes for you too."

Jurors also took notice when a prosecution expert witness had to admit that the DNA found in a swab of the accuser's anus the day after the alleged rape had come from a male other than Khan. This was particularly relevant as the accuser had told police that she had not had sex in six months. The news media completely ignored this crucial fact.

The accuser also claimed that she discovered after Khan left that he had taken her phone and used it to send messages declining her friends' invitations to meet up after the concert. If true, this would be direct evidence that Khan was trying to isolate the accuser. But he denied taking or using her phone. This was a he-said, she-said standoff—and the jury clearly believed that he was the more credible witness.

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What happens now? Saifullah Khan's lawyers have requested that Yale readmit him and allow him to complete his last semester as a cognitive-science major. There is also an online petition circulating that demands "that Yale University continue to follow the guidelines laid out by the Obama administration, and continue to uphold Saifullah Khan's suspension." It had nearly 50,000 signatures as this magazine went to press.

It seems most likely that Yale's University-Wide Committee on Sexual Misconduct (UWC) will employ a secretive campus proceeding to pass judgment on Khan with minimal due process, no speaking role for defense lawyers, no meaningful cross-examination of the accuser, and no transcript of the proceedings.

The UWC defines "sexual misconduct" as "a range of behaviors including sexual assault (which includes rape, groping and any other non-consensual sexual contact), sexual harassment, intimate partner violence, stalking, and any other conduct of a sexual nature that is non-consensual, or has the purpose or effect of threatening or intimidating a person or persons." The policy adds: "Much sexual misconduct includes nonconsensual sexual contact, but this is not a necessary component. For example, threatening speech that is sufficiently severe or pervasive to constitute sexual harassment will constitute sexual misconduct."

Any reasonable penalty would have to take account of the fact that Khan's education has already been derailed for two-and-a-half years by an unwarranted accusation and a criminal proceeding.

It can fairly be said that Khan was insensitive in having sex with a woman he did not know well a few hours after she had downed a lot of alcohol and vomited repeatedly and in placing a 141-minute phone call to his girlfriend in the accuser's presence, in between having oral sex and sexual intercourse with her. But by his account, the accuser was eager to have sex. And Yale's rules do not mention insensitivity or any other violation of its policy less damning than "sexual misconduct," a vaguely defined phrase that surely requires more than insensitivity and in many circles carries a connotation of sexual predation.

Some longtime observers of Yale's process consider it possible—even probable—that despite the verdict of the criminal trial, the UWC will still find Khan responsible for "sexual misconduct" and expel him.

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Indeed, his lawyers have appropriately called the UWC "a political entity draped in the presumption of guilt" that "rushed to judgment in this case" and that has more broadly "embarked upon a secretive Jacobin-style crusade in which complainants were pressured to come forward, procedural due process was ignored, and exculpatory evidence was casually and conveniently displaced."

They have also pointed out that the chief of the Yale Police Department, Ronnell Higgins, recently told the Yale Daily News that his officers "are trained to ask the right questions . . . placing emphasis on a victim advocacy approach." That sounds inconsistent with our legal culture's hallowed presumption of innocence—which is nowhere mentioned in the UWC's procedures. Not one of the sexual-misconduct complaints filed by female Yale students against males since the university's current reporting system started in 2012 has been found to be false.

Asked by email for comment on the verdict and on what Yale might do now, Yale spokesman Tom Conroy responded: "It would not be appropriate for Yale to comment on the verdict in a criminal case, especially one that involved two Yale students. In regard to internal adjudications, Yale's ability to comment on individual cases is limited by federal privacy law and Yale's confidentiality policies. The University believes that confidentiality is critical to the integrity of our processes, and, for that reason, it does not confirm or deny that a specific allegation has come before the University-Wide Committee on Sexual Misconduct."

Defending Yale's overall handling of sexual-misconduct allegations, Conroy said that critics do "not take into account the process that Yale provides, which includes written and specific notice of the charges; the right to an adviser, who may be an attorney; the opportunity to present evidence and suggest witnesses; a written investigative report prepared by an impartial fact-finder; a hearing before a trained panel of members of the Yale community; the opportunity to submit questions through the panel to witnesses and the opposing party; a written panel report; the opportunity to respond in writing to the panel report; a written decision by a decision maker separate from the panel; the right to submit a written appeal to a second decision maker; and a written appeal decision."

Judge José Cabranes, a U.S. circuit judge and Yale's first general counsel, expressed another view in a devastating 2017 article in the Yale Law & Policy Review. While focusing mainly on threats to freedom of expression at Yale, he also assailed the university for its handling of sexual-misconduct accusations. "Today," Cabranes wrote, "as a matter of Yale University law . . . in a sexual-misconduct proceeding, even for an allegation of non-criminal conduct. There is:

- No right to a public hearing, or even to a complete record of the private hearing;
- No right to have counsel speak on one's behalf;
- No right to call friendly witnesses, much less confront and cross-examine adverse witnesses; and
- To top it all off, no assumption of innocence until proven guilty—merely a finding of wrongdoing that rests on a preponderance of the evidence (the lowest standard of proof known to American law)."

Conroy did not mention these aspects of Yale's process. And while touting the "trained panelists" who pass judgment on accused students, he also failed to mention the fact that Yale (like many other universities) has taken great pains to keep secret the materials it uses to train them.

Why so secretive? As KC Johnson and I detailed in these pages last September, the training regimes are designed more to put a thumb on the scales toward guilt than to ensure a fair inquiry. The programs we were able to review were permeated with unsupported assertions about how false complaints are rare and that an accuser who contradicts her own prior accounts or established facts should be seen not as deceptive but as a victim of "trauma."

Cynthia Garrett, a lawyer who is co-president of Families Advocating for Campus Equality, a group supporting students who say they were falsely accused, sat through the whole Khan trial and spent

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much time giving moral support to the defendant. She came away from New Haven, she says, "with the disturbing realization that, as a whole, the Yale community is insular, dogmatic, and intolerant of diverse perspectives. It became apparent from my interactions with at least one Yale Daily News reporter that any who dare expose alternate viewpoints are quickly shamed into silence."

Saifullah Khan himself is far more upbeat. I asked him about the trial, and he wrote, "As dark as this experience has been so far, the foundation of this democratic republic kept my beliefs strong. And as divided as this country may seem online, I have found love and hospitality at every corner of this country." ■