THE CHALLENGES OF ADULT VICTIM SEXUAL ASSAULT CASES

Jury Selection and Decision Making in Adult Victim Sexual Assault Cases

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***A project of Legal Momentum in cooperation with the National Association of Women Judges**

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Jury Selection and Decision Making in Adult Victim Sexual Assault Cases

FACULTY MANUAL

Table of Contents

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Overview

Sexual assault trials with adult victims present a great challenge for judges. Research has shown that jurors in sexual assault cases assess the evidence presented through the lens of commonly held misconceptions and myths about rape, rape victims and rapists. Jurors, as members of our communities, embrace stereotypes about what constitutes "real rape," including expectations about gender roles and "appropriate" behavior by victims before, during and after a reported sexual assault.

This curriculum explores the research on how juries decide sexual assault cases in which the victim is an adult. It looks at research using actual jurors, as well as mock jury studies. It also explores public opinion data about sexual assault. After learning about the current research, the judges are asked to explore and discuss their role in selecting a fair jury, protecting juror's privacy and minimizing jurors' stress and trauma in these difficult cases.

This curriculum contains a three-hour and a two-hour version of the program, which can be adapted to suit the needs of each jurisdiction.

Learning Objectives

- Participants will understand the existing research on how jurors decide sexual assault cases in which the victim is an adult
- Participants will become familiar with current research on opinions and attitudes about sexual assault
- Participants will explore the judge's role in selecting a jury for a sexual assault case in which the victim is an adult, including:
    - The judge's role in selecting fair jurors
    - The judge's role in protecting jurors' privacy
    - The judge's role in minimizing jurors' stress and trauma

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Components of this Module

This curriculum includes the following components:

- A PowerPoint presentation, with suggested commentary for the faculty and extensive references
- *Two sample agendas*
- Three interactive exercises
- A Resources CD which contains relevant articles about jury selection

Suggested Uses for this Module

This module can either be used as a stand-alone program or judicial educators can integrate it into an existing judicial education program.

The following is a list of the types of programs into which this module can be integrated:

- A judicial conference
- A criminal law program
- A program on sexual assault
- A program about violence against women
- A program on jury selection

Planning the Program

Judges and judicial educators wishing to present this *Jury Selection and Decision Making in Sexual Assault Cases* Topic Module or to integrate its subject matter into other judicial education programs should plan as follows:

- Determine the time available for conducting the program. This will determine which version of the program you will use (three-hour or two-hour versions) and which exercises to include.
    - If you decide to use the three-hour version, that includes all three interactive exercises.

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  - However, if you choose to use the two-hour module, you will need to select which of the three exercises you would like to use. You will also need to remove the placeholder slides from the PowerPoint presentation for the exercises you are not planning to use (see Sample Agendas for the slide numbers)

- Adapt the material to local law and practice (see section below)

- Select the presenter/moderator for the program

- Decide whether you will use small groups or a large group discussion for the exercise(s). This will depend on the size of your group. Two of the three exercises can be used in a small or large group, but if the group is larger than 30-40 judges, we recommend that you divide the group into smaller groups for the discussions

  - If you are going to use small groups, you need to decide whether you will choose small group discussion leaders in advance. If so, you need to identify them

  - If you are not going to choose your small group leaders in advance, the exercise directions give you a way to choose group leaders quickly, in order to save time

- Ensure that all faculty members are thoroughly familiar with the parts of the module they will present or the discussions they will lead

Sample Agendas

There are two sample agendas for this module: a three-hour version and a two-hour version. The format includes a lecture portion and an interactive portion. The lecture portion for both programs is the same. The only difference is that the three-hour version incorporates all three interactive exercises. For the two-hour version, the faculty selects one of the three interactive exercises for the participant judges to discuss.

The following page contains sample agendas for each version.

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Three-Hour Program

Amount of Time	Activity
45 minutes	Lecture (Slides 1-34)
15 minutes	"I've Got a Secret" Exercise (small group discussion) (Slide 35)
15 minutes	"I've Got a Secret" Exercise (report back) (Slide 35)
15 minutes	Lecture (Slides 36-47)
15 minutes	Break
10 minutes	Post-Trial Juror Disclosure Hearing Exercise (small group discussion) (Slide 48)
15 minutes	Post-Trial Juror Disclosure Hearing Exercise (report back) (Slide 48)
15 minutes	Lecture (Slides 49-55)
20 minutes	Jury Selection Exercise (small group discussion) (Slide 56)
25 minutes	Jury Selection Exercise (report back) (Slide 56)
5 minutes	Wrap up (Slide 57)

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Two-Hour Program

Amount of Time	Activity
1 hour and 10 minutes	Lecture (Slides 1-56)
20 minutes	Exercise (small group discussion) Choose one of the three exercises provided:** "I've Got a Secret" (Slide 35); Post-Trial Juror Disclosure Hearing (Slide 48); or Jury Selection (Slide 56).
25 minutes	Exercise (report back)
5 minutes	Wrap up (Slide 57)

**NOTE: Remove the placeholder slides for the exercises you will not be using for this program.

Faculty

Presenter/Moderator: This module is designed to be presented by one presenter/moderator, who delivers the lecture portion of the module, introduces the exercise(s), and moderates the report back. The presenter/moderator must be a skilled, experienced judge or judicial educator, who is well-versed in the jury selection process, criminal trials, and the unique challenges presented by a sexual assault case.

Small Group Facilitators: You can either select your small group facilitators ahead of time or choose them at the program.

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With Pre-Selected Small Group Facilitators:

- If you pre-select the small group facilitators, meet with them before the program to review the exercises and discussion questions and be sure the exercises are adapted to your jurisdiction
    - Ask them to appoint the person to their immediate left to be the Reporter who takes notes and gives the Report Back for the group. This saves time
    - Review with them the key elements of leading a small group discussion, such as being sure that everyone speaks and no one person dominates

Without Pre-Selected Small Group Facilitators:

- The person at each table whose last name begins with the letter closest to the letter "A" will serve as the facilitator
- Assign the reporter role to whoever is sitting to the left of the facilitator

Adapting the Module to Your State

- Determine whether there are any relevant state statutes and whether you want to include them in your handouts. For example, some jurisdictions have a statute addressing how judges must handle post-trial issues about jury misconduct.
- Determine whether there is relevant case law in your jurisdiction that addresses the issues raised in this program.
- Be sure the slides and exercises use the terminology of your state. We have used the term "sexual assault" throughout this module to describe the wide range of sexual crimes. In a few instances, we have used the term "rape." You may need to modify the terminology to fit your jurisdiction's statutory scheme.

Participant Materials

Give participants the following items for use during the program:

- Faculty Biographies
- Agenda
- PowerPoint Slides, printed three to a page with room for note-taking
- Exercise(s) you are using
- Annotated Table of Contents for the Resources CD

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- The Resources CD
- Your evaluation instrument

Preparing Participant Materials

The handouts for the Participant's Binder are available on the CD for this module and on the National Judicial Education Program (NJEP)'s website, www.njep.org. To access materials for this module as well as any of NJEP's other resources, click on "Sexual Assault Resources." On the Sexual Assault Resources page, click on the "Resources Available for Download" link which will direct you to the registration and login page for NJEP's materials for in-person education, where you will find this module. Registration is free and will provide you with a username and password that you will need to gain access to this section of the website.

To print handouts from the CD or the NJEP website:

- Click on the link to the handout you want to print. Clicking the link will download the handout to your computer as a PDF
- Open the downloaded PDF files
- Print and copy the handouts

To print PowerPoint slides as handouts for note-taking:

- Navigate to the Print Menu
- From the Print Menu select the "Print What" pull-down menu and choose "Handouts"
- From the "Color/Grayscale" menu select "Pure Black and White"
- From the "Slides per page" pull down menu select "3"

Resources CD

We have included a Resources CD with this Topic Module, as well as an annotated Table of Contents, which describes the materials included. On the CD, you will find pertinent articles about how juries decide sexual assault cases, protecting jurors' privacy and minimizing their stress and trauma. We have taken care to select materials that are relevant for judges and have avoided including academic articles that have no practical application for judges.

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We suggest that you provide a copy of the Resources CD Annotated Table of Contents as part of the material you hand out to the judges. We also recommend that you duplicate the CD and give it to the judges as well.

Prepare the Resources CD as explained below and burn a copy for each participant.

Preparing the Resources CD for Participants via the NJEP website:

- Download the Resources CD from the website
- Create a new folder titled "Jury Selection Resources CD"
- Move the downloaded Resources CD file into the new folder
- Insert a blank CD and when prompted burn the Jury Selection Resources CD folder to the CD

Preparing the Resources CD via the *Jury Selection and Decision Making* Module CD:

- Insert the *Jury Selection and Decision Making* Module CD. Navigate to the Resources CD page and download the Resources CD
- Remove *Jury Selection and Decision Making* Module CD
- Create a new folder titled "*Jury Selection and Decision Making* Resources CD"
- Move the downloaded Resources CD file into the new folder
- Insert a blank CD and when prompted burn the "*Jury Selection and Decision Making* Resources CD" folder to the CD

Resources CD Label

This module includes a folder called "Reproducing the *Jury Selection and Decision Making* CD and Copyright." Within this folder there is a ready-to-print PDF called "CD Label." This label is separate from the label for the Resources CD. It is intended to be affixed to the CD for the IPSA modules. To print, purchase Avery CD label paper at an office supply store or online at http://www.avery.com/avery/en_us/. Put the Avery paper into any regular printer, print the PDF onto it and affix to the CD. This allows you to distribute this CD in the exact format that you received it, with the appropriate label.

Presenting the PowerPoint Presentation

The lecture portion of this curriculum is contained in a PowerPoint presentation, with suggested commentary for the faculty included in the notes section of the slides. Sources

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are included on the slides. The PowerPoint presentation is provided on the CD and the National Judicial Education Program's website, www.njep.org.

To present the PowerPoint, navigate to the View menu or tab and click "View Slideshow." The slide will fill the screen.

- To move to the next slide click your left mouse button, press "Enter" on the keyboard or use the forward arrow key on your keyboard
- To return to a previous slide, press "Backspace" on your key board or use the back arrow on your keyboard
- For more options use the right mouse button or for Mac users press the apple/control key and click your mouse button
- To exit the Slideshow mode press Escape (Esc) on the top left corner of your keyboard

How to Print PowerPoint Slides with Suggested Commentary for the Presenter:

- To print the slides with suggested commentary for guidance during the presentation follow these steps:
  - Navigate to the Print Menu
  - From the Print Menu navigate to the "Print What" pull-down menu and select "Notes Pages"
  - Select the "Color/Grayscale" pull-down menu and choose "Pure Black and White"

Exercises

This topic module includes the following three interactive exercises, with accompanying directions and discussion questions:

- "I've Got a Secret" Exercise and Discussion Questions
- Post-Trial Juror Disclosure Hearing Case Study Exercise and Discussion Questions
- Jury Selection Case Study Exercise and Discussion Questions

"I've Got a Secret": This exercise gives the judges an opportunity to experience how difficult it is to elicit information from potential jurors about their biases or their past experience with sexual assault. For the exercise, participants get in small groups. One judge plays the role of the potential juror with a "secret." The other judges in the group must ask the potential juror questions to elicit the secret. The exercise contains eleven

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"secrets," as well as a short case synopsis that the juror reads to the other judges so they understand the type of case involved.

Setting: This exercise is geared toward small groups and does not work well as a large group discussion.

Recommended Amount of Time: At least 30 minutes. For small groups, allow 15 minutes for discussion and 15 minutes for reporting back.

Post-Trial Juror Disclosure Hearing: This exercise gives the judges an opportunity to apply the material, covered in the lecture, which raises the issue of how to handle post-trial allegations that a juror failed to disclose a pertinent experience or fact during *voir dire*. The case study fact patterns are both based on actual cases. In this exercise, the judges are asked to discuss how they would rule on a motion for a new trial, based on allegations that certain jurors did not truthfully answer questions posed during *voir dire.*

The exercise includes two scenarios, with related discussion questions.

Setting: This exercise can be conducted as a large group discussion or in small groups. If you are using small groups, you should divide the room in half and assign one scenario to the small groups in each half of the room.

Recommended Amount of Time: At least 30 minutes. For small groups, allow 15 minutes for discussion and 15 minutes for reporting back.

Jury Selection: This exercise gives the judges an opportunity to apply the material covered in the lecture portion of this program, including the research on how juries decide sexual assault cases and information about how to protect jurors' privacy. The case study for this exercise, based on two actual marital rape cases, is more detailed and complex. For this exercise, the judges read the detailed case study and then answer the discussion questions posed.

Setting: This exercise can be conducted as a large group discussion or in small groups. If you are using small groups, you may want to divide the room and assign different discussion questions to different groups.

Recommended Amount of Time: At least 45 minutes. For small groups, allow 20 minutes for discussion and 25 minutes for reporting back.

Evaluation

Evaluation is a critical component of any judicial education program. Because jurisdictions have their own standard evaluation instruments and procedures, we have not included a suggested evaluation form here.

Technical Support

The National Judicial Education Program (NJEP) is available to provide technical assistance to judicial educators and judges who are planning programs using these materials. Please contact us if you need technical assistance or have any questions about using this module.

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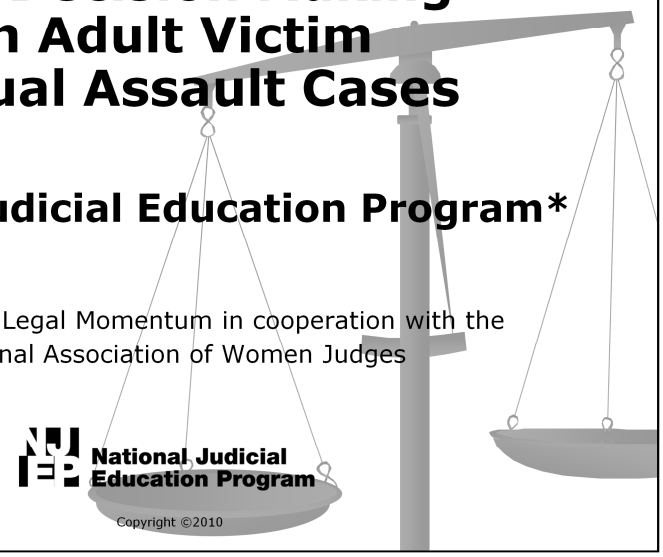

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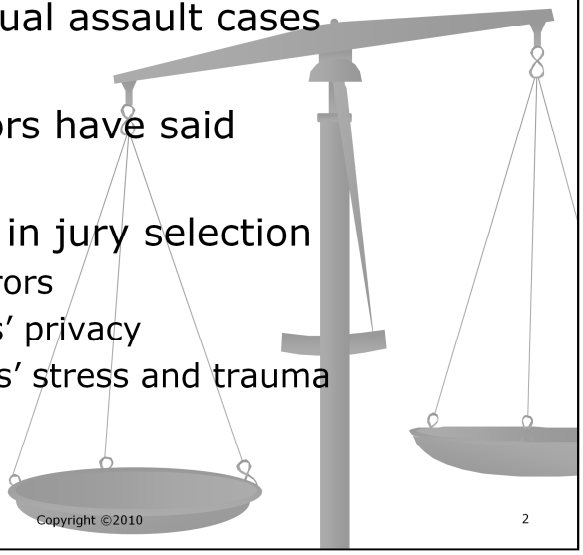
Topics Covered

- What research shows about how juries decide adult sexual assault cases
- What actual jurors have said
- The judge's role in jury selection
  - Selecting fair jurors
  - Protecting jurors' privacy
  - Minimizing jurors' stress and trauma



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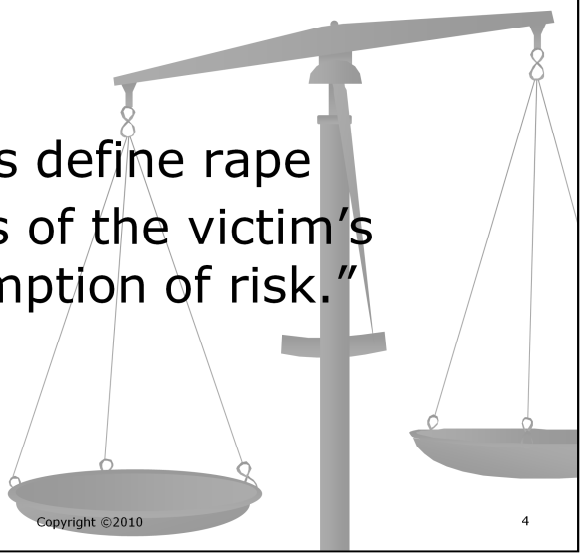
There are many studies that look at how jurors decide sexual assault cases. The earlier researchers mentioned in this presentation studied actual trials or interviewed actual jurors. Although the research was done quite a while ago, more recent research shows similar findings.

Harry Kalven & Hans Zeisel, *The American Jury* (1966)



Jurors define rape in terms of the victim's "assumption of risk."

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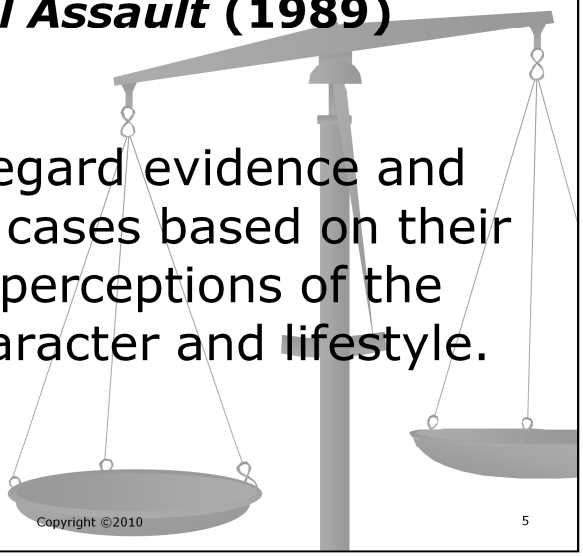
Kalven and Zeisel studied judges' agreement or disagreement with jury verdicts in a large-scale study of 3,576 criminal cases in the 1960s. They found the sharpest disagreement was in the cases they labeled "simple rape", cases in which the parties knew each other, the rapist did not use a weapon, and the victim had no physical injury extrinsic to the rape. In those cases, the juries often acquitted when the judges would have convicted. Kalven & Zeisel found that jurors redefined the crime of rape based on their notions of "assumption of the risk." If the victim went to a bar, went to the defendant's apartment, etc., she assumed the risk of what happened subsequently.

Gary LaFree, Ph.D., *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989)



Jurors disregard evidence and decide rape cases based on their personal perceptions of the victims' character and lifestyle.

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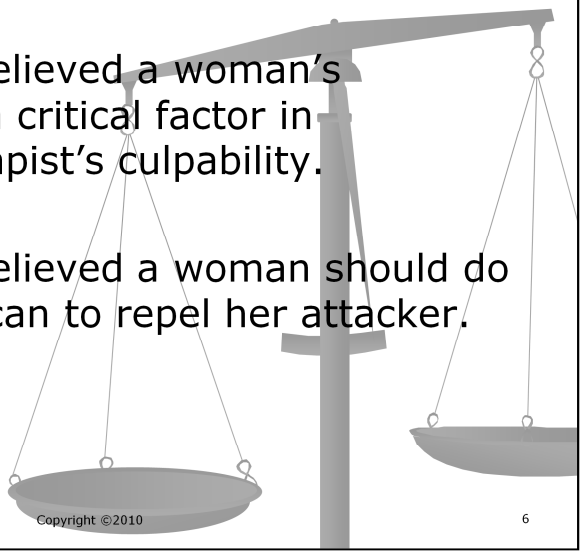
Professor Gary LaFree conducted the next large-scale study of rape cases. He studied these cases in Indianapolis from the initial report of a sexual assault until the final verdict in the case. As part of his study, Dr. LaFree and his researchers conducted 90-minute interviews with 331 men and women who had served as jurors in rape cases. These are some of his findings.

LaFree, *Rape and Criminal Justice*

- 32% of jurors believed a woman's resistance was a critical factor in determining a rapist's culpability.
- 59% of jurors believed a woman should do everything she can to repel her attacker.



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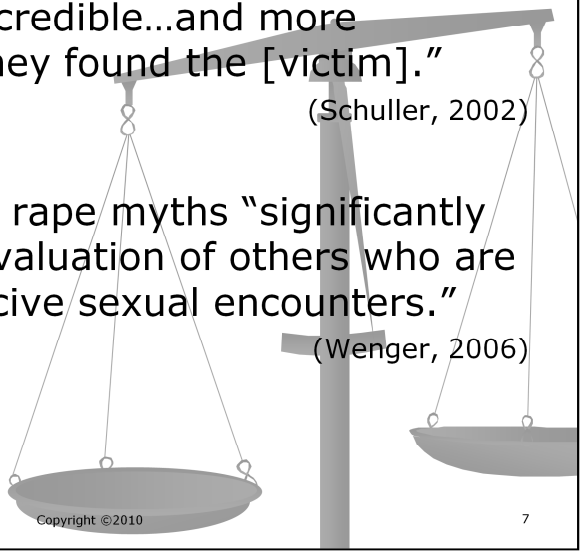
Jurors' Beliefs in Rape Myths

- "The more participants endorsed rape myths, the less credible…and more blameworthy…they found the [victim]."

  (Schuller, 2002)

- Jurors' beliefs in rape myths "significantly predict [their] evaluation of others who are involved in coercive sexual encounters."

  (Wenger, 2006)



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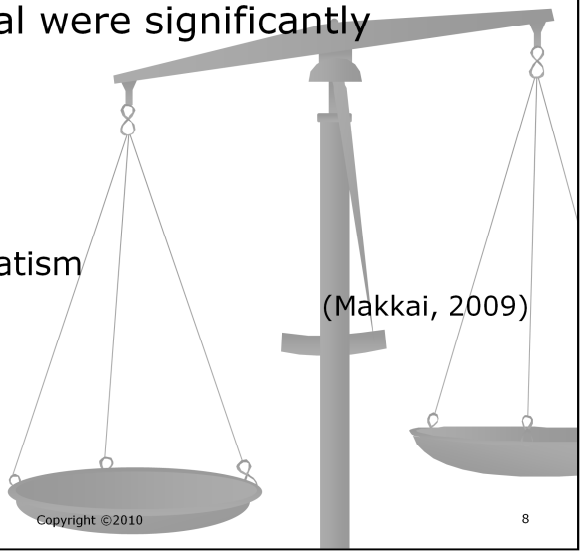
Current studies, most of which are conducted with mock jurors, support the earlier findings of Kalven and Zeisel and LaFree. Many studies, conducted in the US, Western Europe and Australia, demonstrate that potential jurors still have firmly-entrenched beliefs in rape myths and stereotypes and that these beliefs have a profound effect on how they judge sexual assault cases.

Jurors' Beliefs in Rape Myths

Less favorable attitudes toward rape victims in general were significantly associated with:

- Being male
- Lower income
- Political conservatism

(Makkai, 2009)



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This slide discusses findings from two major studies by the Australian Institute of Criminology. The findings, from mock jury studies and public opinion polls, show that "juror judgments in rape trials are influenced more by the attitudes, beliefs and biases about rape which jurors bring with them into the courtroom than by the objective facts presented, and that stereotypical beliefs about rape and victims of it still exist within the community." The researchers found that "pre-existing juror attitudes about sexual assault not only influence their judgments about the credibility of the complainant and the guilt of the accused, but also influence judgments more than the facts of the case presented and the manner in which the testimony is given."

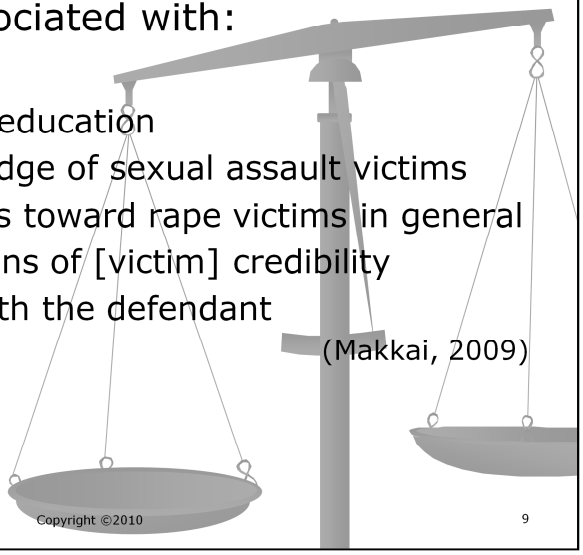
These are some of the factors that make it more likely jurors will acquit.

Jurors' Beliefs in Rape Myths

Stronger personal beliefs in guilt were significantly associated with:

- Higher levels of education
- Personal knowledge of sexual assault victims
- Positive attitudes toward rape victims in general
- Higher perceptions of [victim] credibility
- Low empathy with the defendant

(Makkai, 2009)



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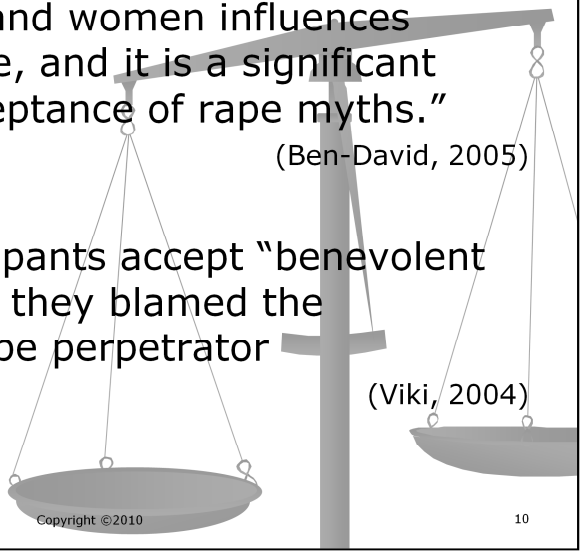
Gender Role Stereotypes

- "Acceptance of traditional gender role norms for men and women influences tolerance of rape, and it is a significant predictor of acceptance of rape myths."

  (Ben-David, 2005)

- The more participants accept "benevolent sexism" the less they blamed the acquaintance rape perpetrator

  (Viki, 2004)



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Assumptions about the roles of men and women in society also strongly predict potential jurors' beliefs in rape myths and stereotypes. These are just two of many studies that demonstrate that jurors with strong beliefs in traditional roles for men and women are also much more likely to believe in rape myths and stereotypes.

"Benevolent sexism" means the individual has positive attitudes toward women, as long as they remain in traditional sex roles.

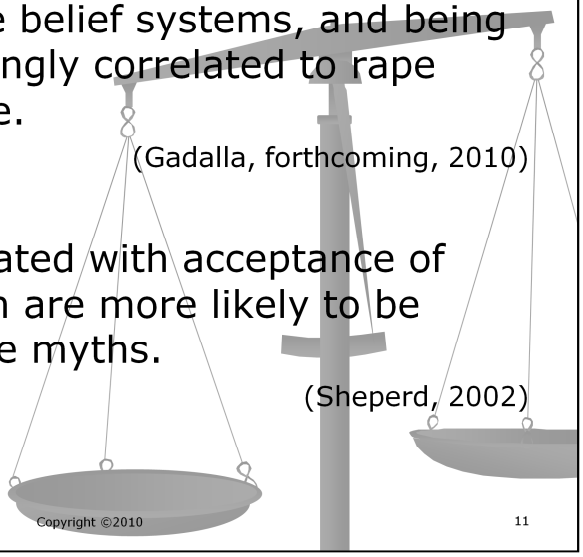
Gender Role Stereotypes

- Hostility toward women, subscribing to other oppressive belief systems, and being male are all strongly correlated to rape myth acceptance.

(Gadalla, forthcoming, 2010)

- Gender is correlated with acceptance of rape myths. Men are more likely to be accepting of rape myths.

(Sheperd, 2002)



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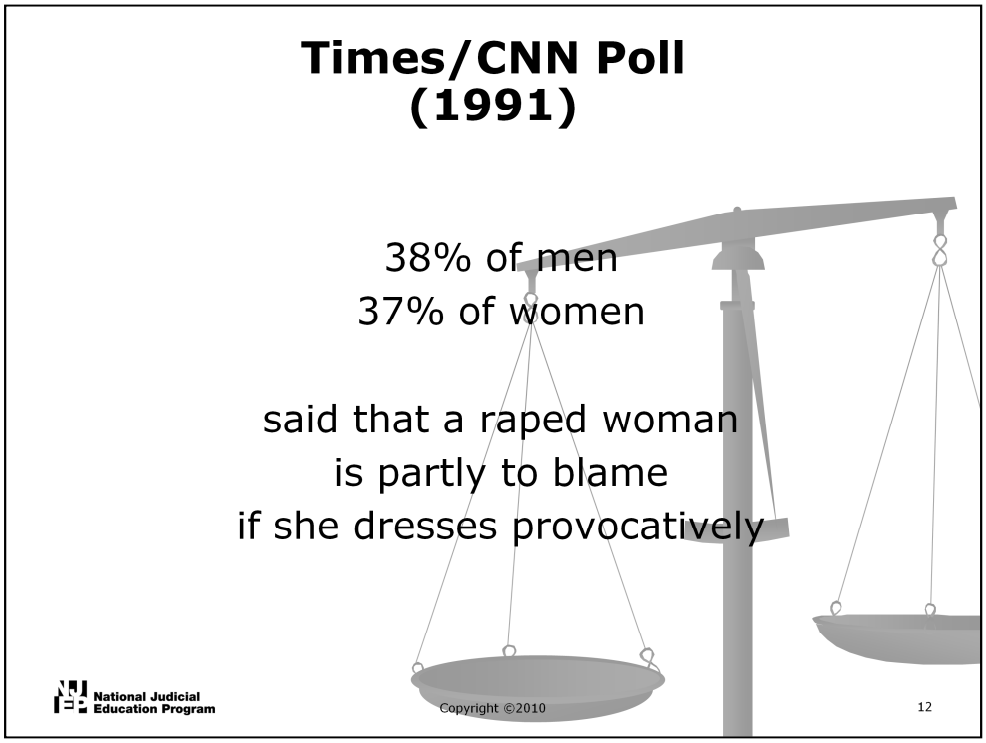
These are just a few more of the myriad of studies that show belief in gender role stereotypes is highly correlated with belief in rape myths.

PREFACE TO NEXT SLIDE

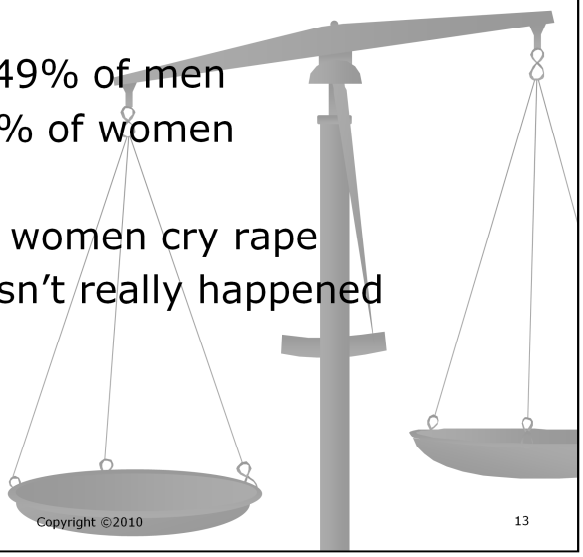
The research findings about the pervasiveness of belief in rape myths are also supported by public opinion polls about rape.



NOTES

Results of a national survey. Even though research shows that men are much more likely to believe in rape myths, a startling percentage of women believe the rape myths as well. In these opinion polls, similar percentages of men and women accept rape myths as true.

Georgia Opinion Poll (1998) (Random sample: ages 18-49)



49% of men
42% of women

believe women cry rape
when it hasn't really happened

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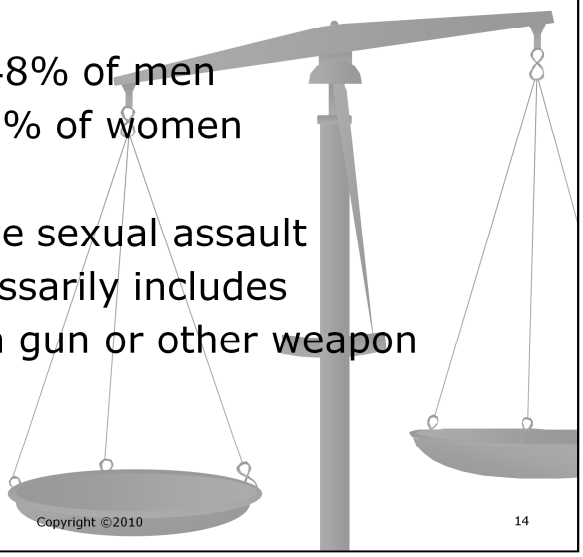
Results of a survey targeted to adults in Georgia.

Georgia Opinion Poll (1998) (Random sample: ages 18-49)



48% of men
48% of women

believe sexual assault
necessarily includes
the use of a gun or other weapon

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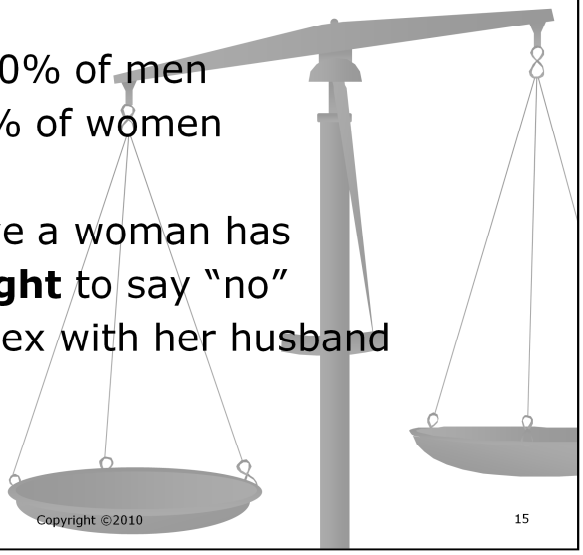
Georgia Opinion Poll (1998) (Random sample: ages 18-49)



20% of men
9% of women

believe a woman has
no right to say "no"
to having sex with her husband

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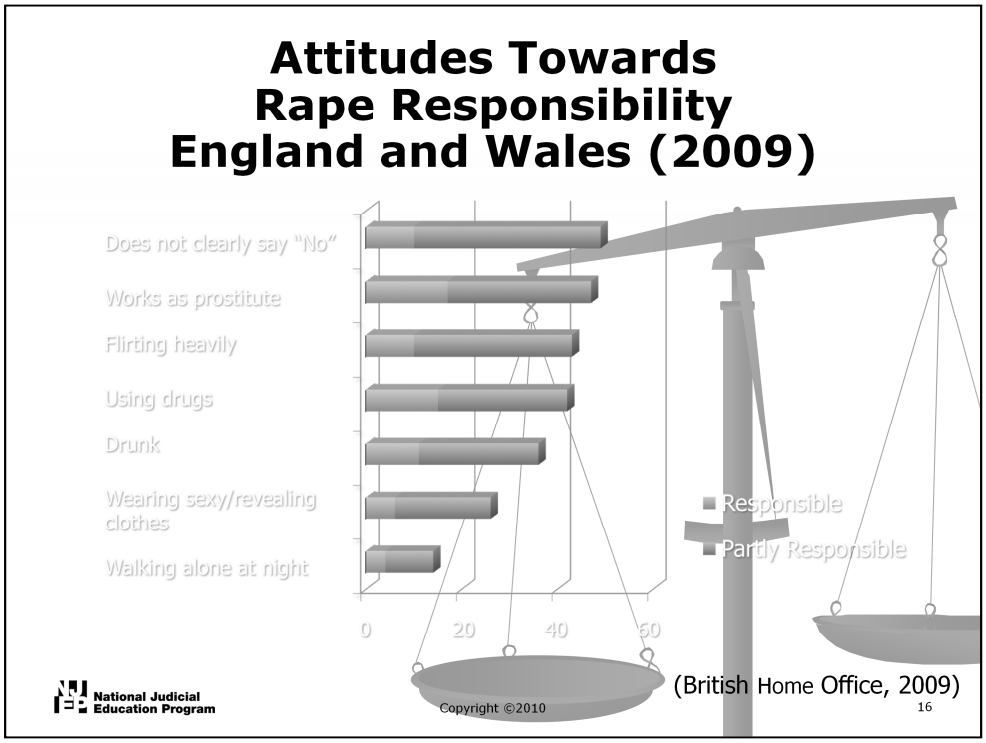
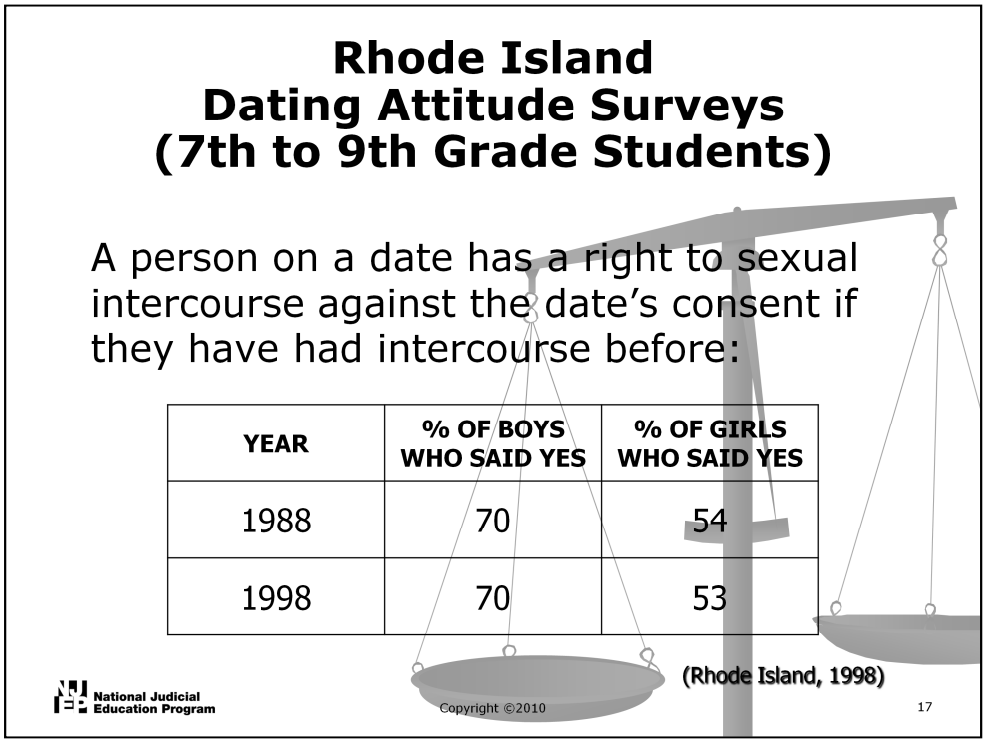


NOTES

The strongly-entrenched beliefs are not only held by residents of the United States. Here is the result of a wide-scale survey of residents of England and Wales.

The blue bar indicates that the respondent felt the victim was responsible for her rape. The red bar indicates the percentage of respondents who felt the victim was partly responsible for her rape.



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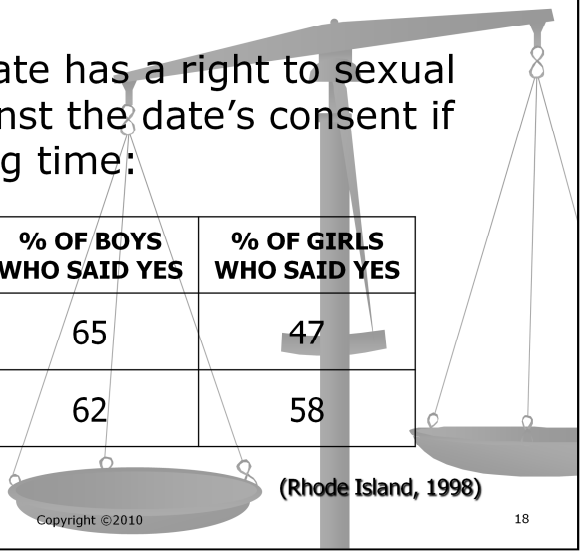
These attitudes are not only held by adults. Here is a summary of the results of two surveys conducted with Rhode Island 7th to 9th grade students. The studies were conducted ten years apart, but the firmly entrenched beliefs in rape myths and stereotypes had not changed in the intervening ten years.

Rhode Island
Dating Attitude Surveys
(7th to 9th Grade Students)

A person on a date has a right to sexual intercourse against the date's consent if they dated a long time:

YEAR	% OF BOYS WHO SAID YES	% OF GIRLS WHO SAID YES
1988	65	47
1998	62	58



(Rhode Island, 1998)

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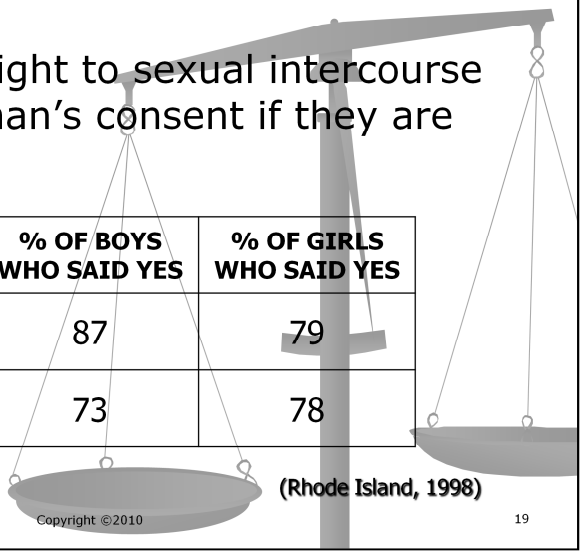
Rhode Island
Dating Attitude Surveys
(7th to 9th Grade Students)

A man has the right to sexual intercourse against the woman's consent if they are married:

YEAR	% OF BOYS WHO SAID YES	% OF GIRLS WHO SAID YES
1988	87	79
1998	73	78



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Other Key Research

- The closer the acquaintance, the greater the minimization of the severity of the rape and the more responsibility attributed to the victim.

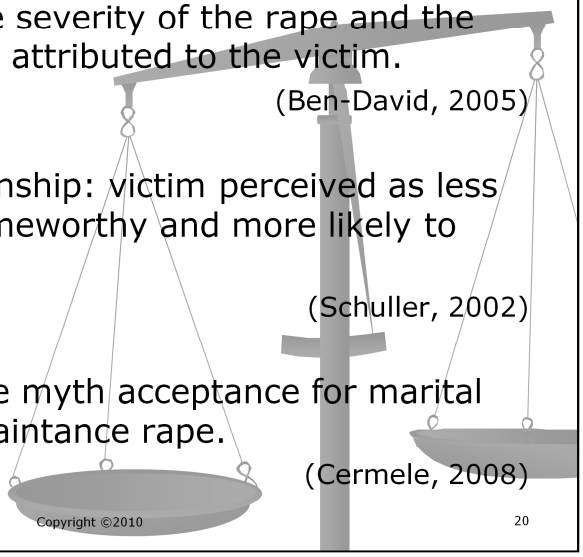
(Ben-David, 2005)

- Prior sexual relationship: victim perceived as less credible, more blameworthy and more likely to have consented.

(Schuller, 2002)

- Higher level of rape myth acceptance for marital rape than for acquaintance rape.

(Cermele, 2008)



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Potential jurors also make big distinctions based on the relationship between the defendant and the victim. The closer the relationship between the victim and the defendant, the greater level of responsibility jurors assign to the victim. They are much less likely to convict if there is evidence of a prior sexual relationship or if the parties are married, despite evidence of force and lack of consent. This is just a summary of the findings in three of many studies that show these same attitudes.

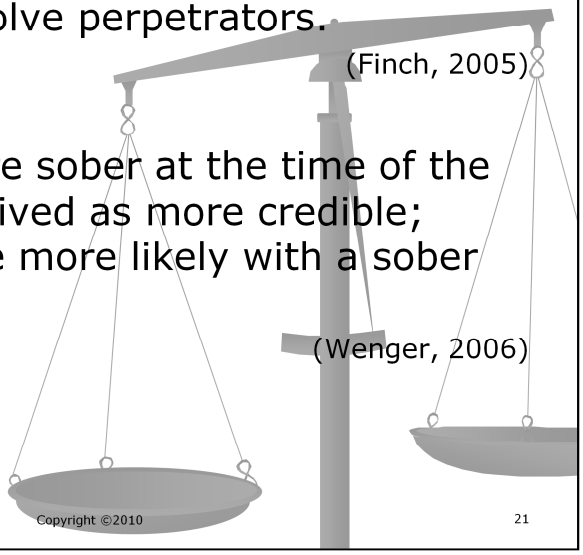
Effect of Alcohol Use

- Mock jurors used intoxication to blame victims and absolve perpetrators.

(Finch, 2005)

- Victims who were sober at the time of the rape were perceived as more credible; convictions were more likely with a sober victim.

(Wenger, 2006)



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There is also a great deal of research on the role of alcohol in sexual assault cases. Researchers have found, for many years, that jurors blame victims who have been drinking, but use a defendant's alcohol consumption to absolve him of responsibility.

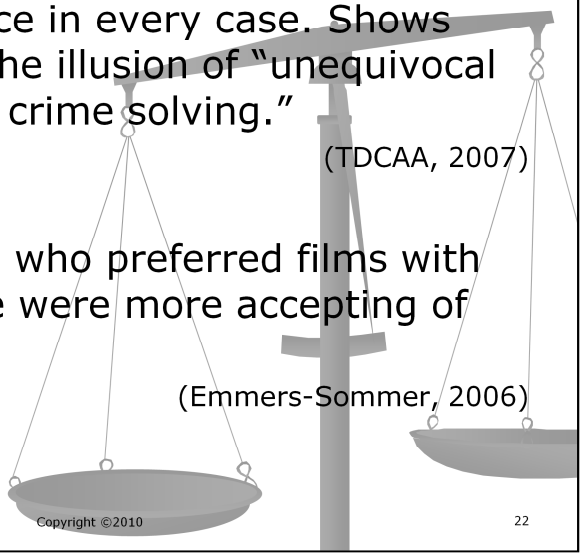
The Effect of Popular Culture

- The "CSI" Effect: Jurors expect to see scientific evidence in every case. Shows like this create the illusion of "unequivocal black-and-white crime solving."

(TDCAA, 2007)

- Men and women who preferred films with sex and violence were more accepting of rape myths.

(Emmers-Sommer, 2006)



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Popular culture has a tremendous impact on how jurors define sexual assault and how they respond to sexual assault cases. Jurors expect DNA evidence in sexual assault cases, even where the defendant has admitted to the sexual contact and the only issue is consent. They also expect scientific or medical evidence in every case. In addition, television shows like "CSI" cause jurors to expect that there is a black-and-white, scientific solution to every case. Several recent studies also demonstrate the pernicious effect of movies, television and music have on potential jurors' beliefs about sexual assault. These are just a few of the recent studies.

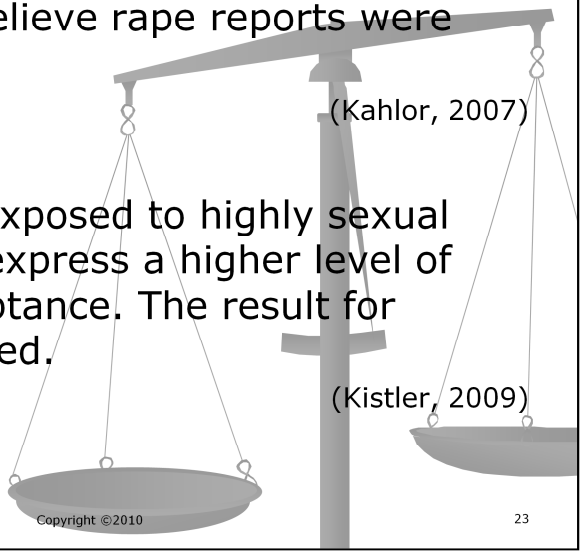
The Effect of Popular Culture

- Women who watch more television were more likely to believe rape reports were false.

(Kahlor, 2007)

- Men who were exposed to highly sexual hip-hop videos express a higher level of rape myth acceptance. The result for women was mixed.

(Kistler, 2009)



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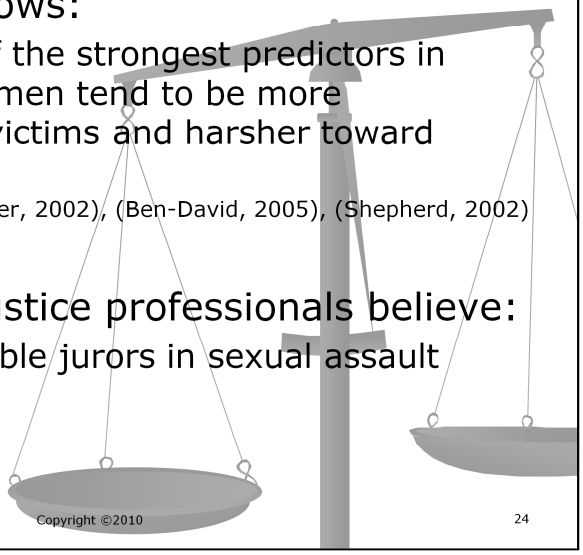
Women Jurors in Sexual Assault Cases

- The research shows:
  - Gender is one of the strongest predictors in mock juries; women tend to be more sympathetic to victims and harsher toward defendants.
    (Wenger, 2006), (Schuller, 2002), (Ben-David, 2005), (Shepherd, 2002)
- Many criminal justice professionals believe:
  - Women are terrible jurors in sexual assault cases.



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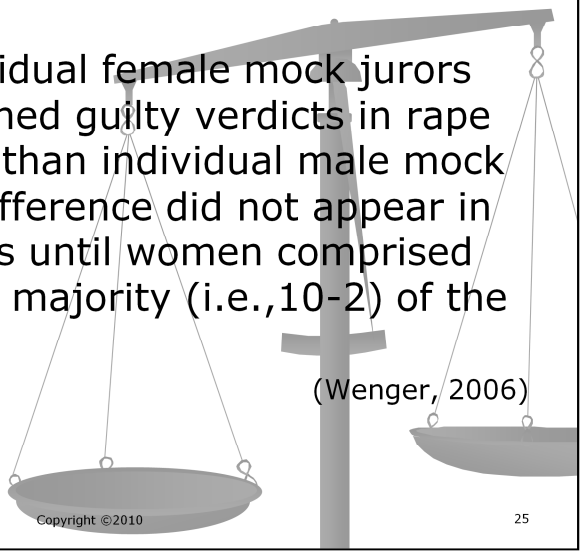
Despite the fact that virtually all of the research shows that women are more sympathetic to rape victims, many criminal justice professionals, especially prosecutors, strongly believe that women are terrible jurors in sexual assault cases.

Women Jurors in Sexual Assault Cases: Possible Explanation

"[A]lthough individual female mock jurors consistently reached guilty verdicts in rape trials more often than individual male mock jurors did, this difference did not appear in deliberating juries until women comprised an overwhelming majority (i.e.,10-2) of the jury."

(Wenger, 2006)



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Perhaps this is the explanation.

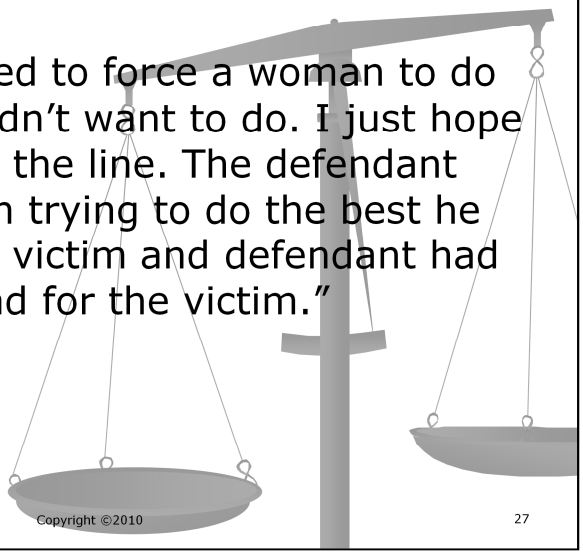
NOTES

PREFACE TO NEXT SLIDE

The National Judicial Education Program (NJEP), which created this curriculum, has worked with judicial educators and judges across the country in educating judges about sexual assault cases. As part of NJEP's two-day program, *Understanding Sexual Violence*, NJEP recommends that jurisdictions bring in a panel of jurors who have deliberated on sexual assault cases in that jurisdiction. The panels include jurors from cases in which there was a conviction and from cases in which the jurors acquitted the defendant. The jurors are carefully questioned by one of the local judges. These panels have been extremely educational for the judges who participate in the programs. The following slides are direct quotes from some of the jurors who have participated in the panel discussions.

New Mexico Juror

"All men have tried to force a woman to do something she didn't want to do. I just hope I haven't crossed the line. The defendant was simply a man trying to do the best he could. I think the victim and defendant had sex and it was bad for the victim."



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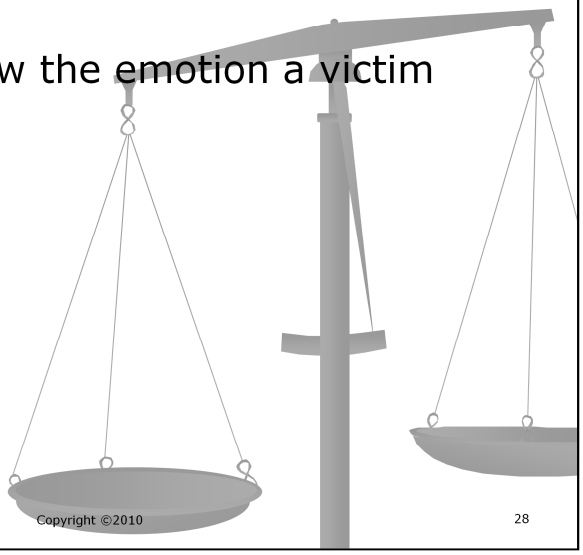
NOTES

Colorado Juror – Comment 1

"She did not show the emotion a victim should show."



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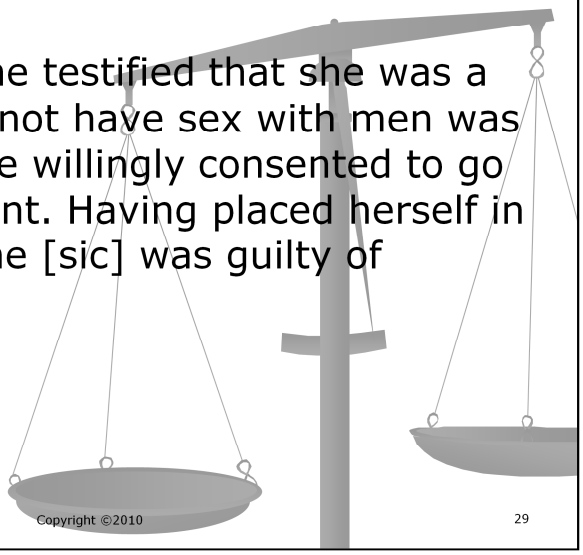
Colorado Juror – Comment 2

"The fact that she testified that she was a lesbian who did not have sex with men was not relevant. She willingly consented to go to their apartment. Having placed herself in this situation, she [sic] was guilty of something."



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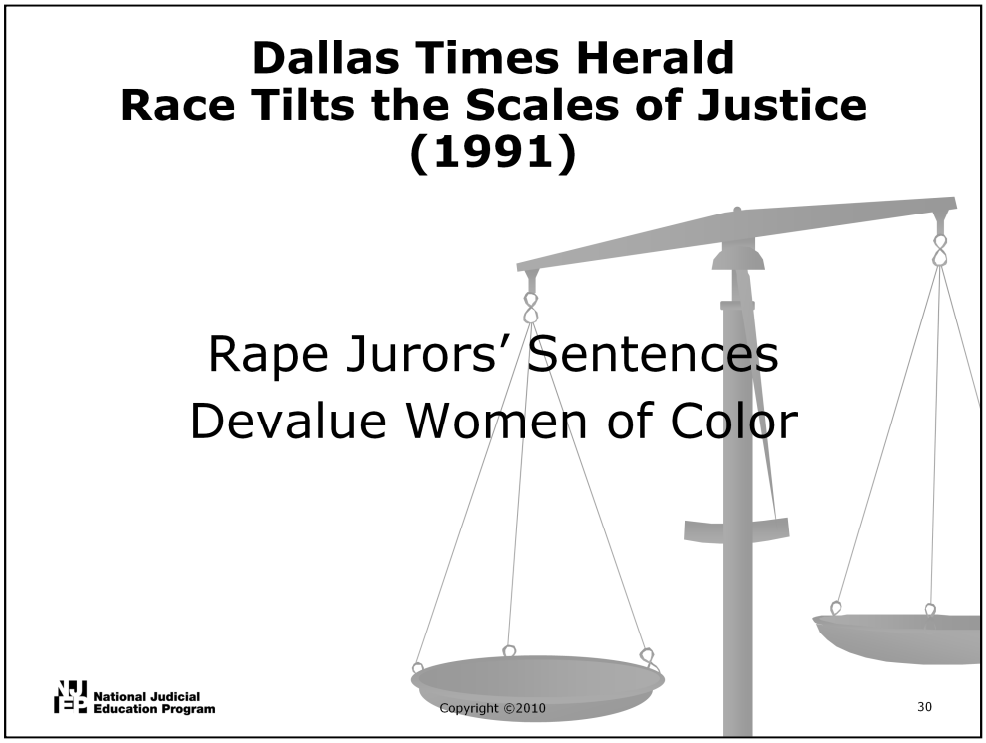
In this case, the victim had testified that she was a lesbian who never had sex with men. She alleged that she met two men at a bar and drank with them. She said they offered to drive her to another party and she accepted a ride with them. She testified that, instead of taking her to a party, they took her to an apartment where they both raped her. The juror also said, "When she got in that truck with them, she assumed the risk."



NOTES

When we think about rape and race, most of us think about the extreme animus toward black men charged with raping white women. This aspect of the rape and race issue did emerge in the LaFree study. "Taken together, the results indicate that processing decisions in these sexual assault cases were affected by the race composition of the victim-defendant dyad, and the cumulative effect of race composition was substantial."

But what also emerged in the LaFree study was a strong devaluation of African American women as victims of sexual assault: "It is clear from the analysis that black offender-white victim rapes resulted in substantially more serious penalties than other rapes…. Moreover, black *intraracial* assaults consistently resulted in the least serious punishment for offenders." For example, in one of the cases a juror said of a 13-year-old black victim that she came from a bad neighborhood and probably wasn't a virgin anyway.

This devaluation of women of color in sexual assault cases is vividly demonstrated by a study of sentencing in Dallas, Texas. In Texas, juries impose sentences.

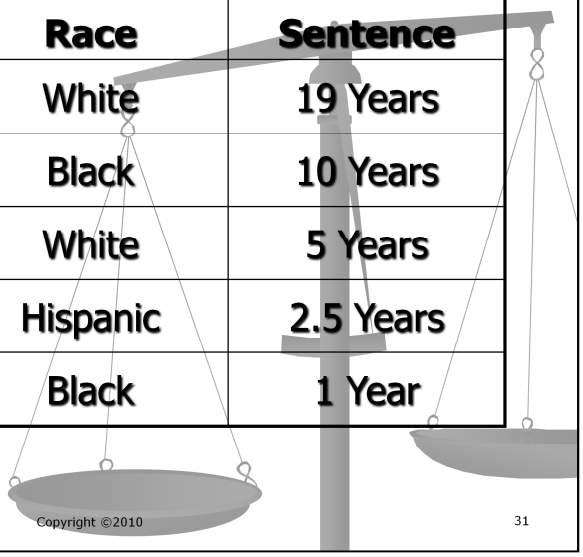
LaFree. at 140

Id. at 145, emphasis supplied

Herndon, Ray F. "Race Tilts the Scales of Justice," Dallas Times Herald, 1990, at A 22.

Dallas Times Herald (1991)

Offender's Race	Victim's Race	Median Sentence
Black	White	19 Years
White	Black	10 Years
White	White	5 Years
Hispanic	Hispanic	2.5 Years
Black	Black	1 Year



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NOTES

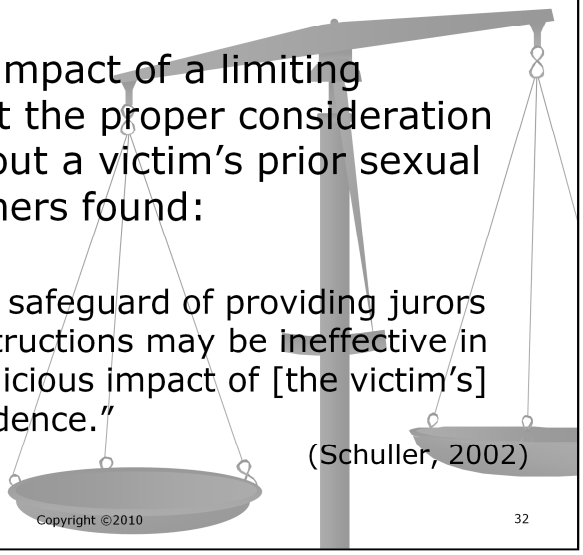
This Dallas study of sentencing and pleas by a local newspaper in 1990 found that the median sentence for a black man who raped a white woman was 19 years and the median sentence for a white man who raped a black woman was 10 years. This is a very troubling differential, but even more revealing were the statistics on same-race rape (which, despite the stereotypes, is what the vast majority of rapes are). The median sentence for cases in which the victim and the offender were both white was 5 years. For cases in which they were both Hispanic, the median sentence was 2.5 years, and for cases in which both were African American, the median sentence for rape was 1 year.

Effectiveness of Limiting Instructions

In studying the impact of a limiting instruction about the proper consideration of testimony about a victim's prior sexual history, researchers found:

- "[T]he proposed safeguard of providing jurors with limiting instructions may be ineffective in curbing the pernicious impact of [the victim's] prior history evidence."

(Schuller, 2002)



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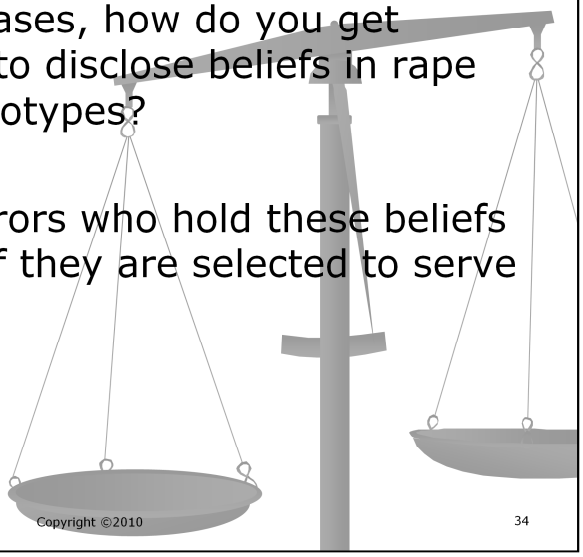
One important question for judges is: do jurors listen to and heed limiting instructions given during a sexual assault trial? In this particular study, the judge had given a limiting instruction about the jurors' permissible use of evidence about the victim's prior sexual history. The researchers found that the jurors did not follow the judge's instruction and, instead, used the evidence to assess the victim's credibility.

NOTES

The real question is: As a judge, what are you supposed to do about this? How are you supposed to consider this information in conducting *voir dire* in sexual assault cases? Here are the key questions for you to consider.

Key Questions

- Given the research about how jurors decide sexual assault cases, how do you get potential jurors to disclose beliefs in rape myths and stereotypes?
- Can potential jurors who hold these beliefs set them aside if they are selected to serve on a jury?



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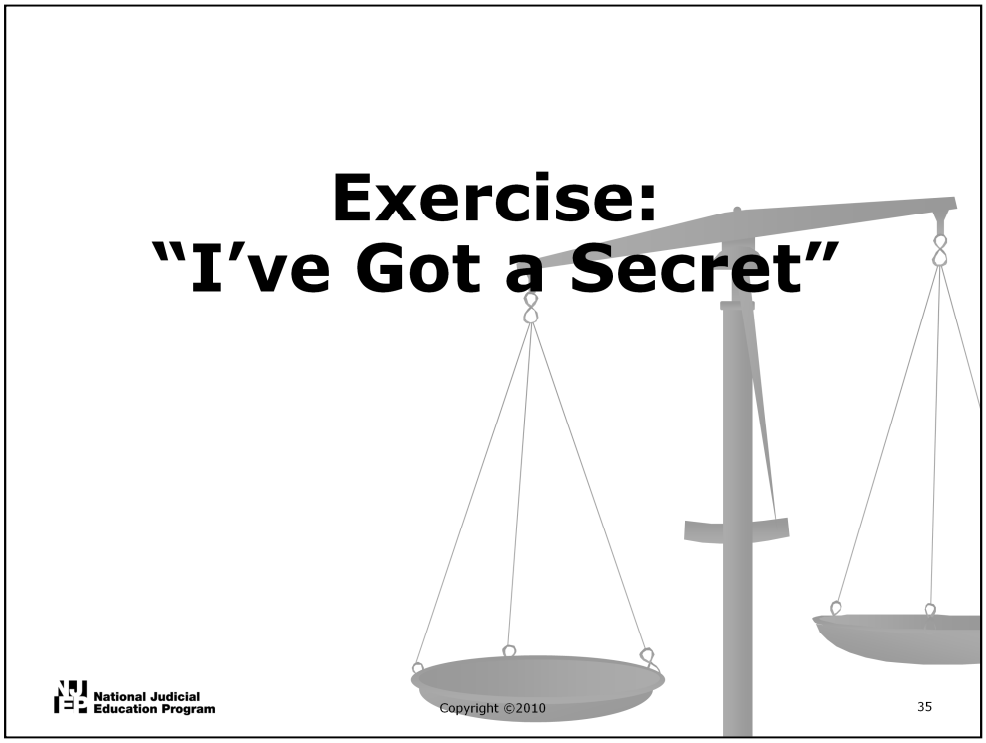
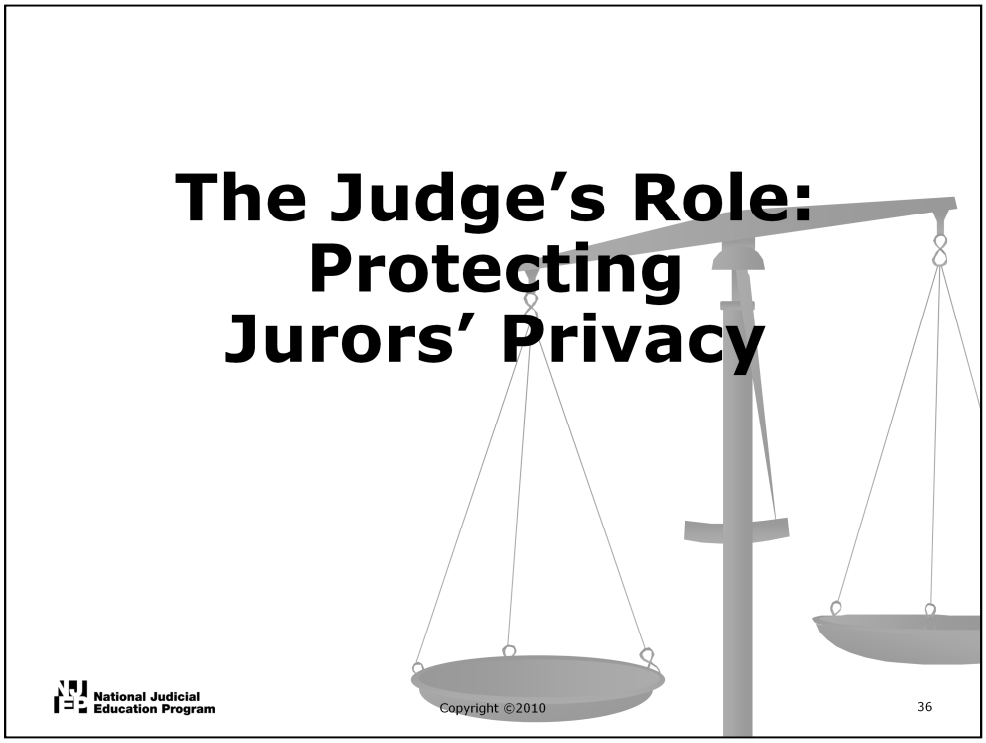
(Depending on how much time you have, you may want to elicit some responses from the participants on these two questions.)



NOTES

This exercise gives you an opportunity to experience how difficult it is to elicit information from potential jurors about their biases or their past experiences with sexual assault. (Use the "I've Got a Secret" Exercise Directions provided in the Faculty Manual for this module to explain what the participants need to do for this exercise.)

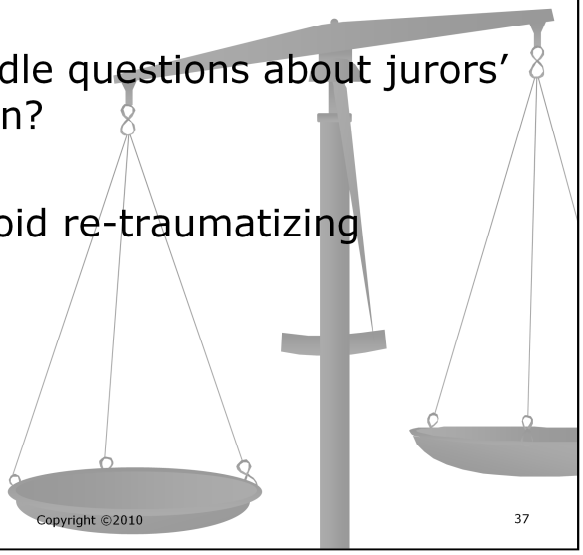


NOTES

We are going to shift gears now to address the judge's role in protecting jurors' privacy in sexual assault cases.

Key Questions

- How do you handle questions about jurors' past victimization?
- How can you avoid re-traumatizing potential jurors?



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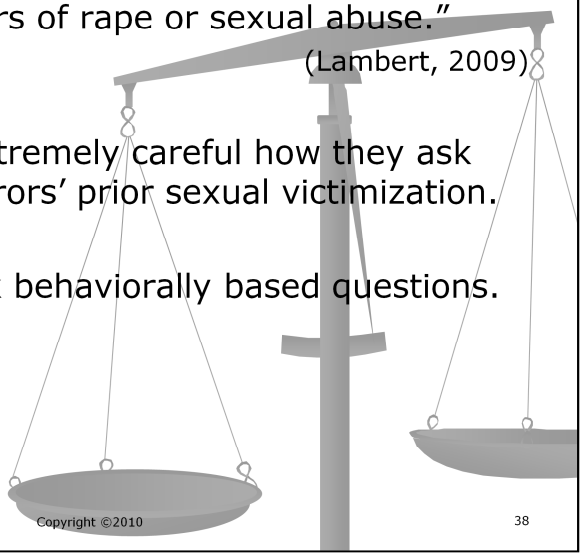
We will now turn our attention to these two questions.

Jurors' Past Victimization

- "Being summoned for jury duty can cause a lot of anxiety for survivors of rape or sexual abuse." (Lambert, 2009)
- Judges must be extremely careful how they ask questions about jurors' prior sexual victimization.
- Judges need to ask behaviorally based questions.



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A jury summons often provokes anxiety in potential jurors. However, the jury selection process also had the potential of re-traumatizing an individual who has been a victim of a sexual assault. One particularly poignant example comes for a case in Colorado. A woman in her 80s was part of a panel being questioned for a sexual assault case. The judge asked the panel members if they had ever been a victim of a sexual assault and told panelists they could approach the bench if they wanted to discuss something privately. The woman asked to approach the bench and disclosed, for the first time in her entire life, that she had been raped as a child. The elderly woman, who was very dignified, was shattered by her disclosure. She started to cry and was excused. She left the courtroom without anyone to talk to or to provide support for her.

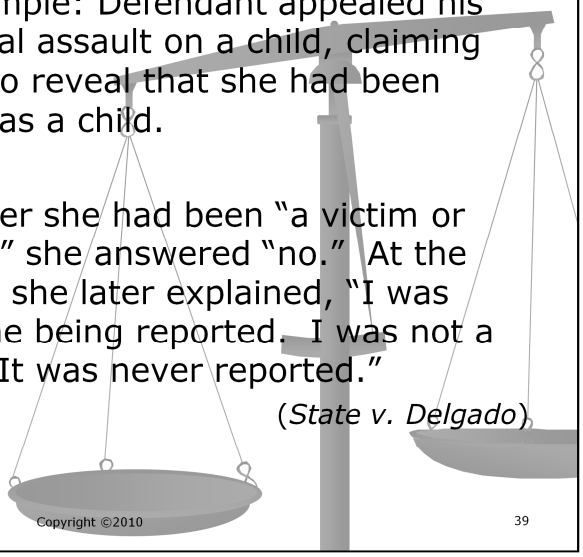
In addition to being mindful of the impact these questions may have on jurors, judges also need to ask the questions very carefully to ensure potential jurors know what is being asked of them. One in eight adult women will be the victim of a forcible rape sometime during her life, according to *Rape in America.* For college women, the estimate is one in four, according to two national studies conducted 15 years apart.

(continued on the next slide)

Jurors' Past Victimization: A Cautionary Tale

- The Wisconsin example: Defendant appealed his conviction for sexual assault on a child, claiming that a juror failed to reveal that she had been sexually assaulted as a child.
- When asked whether she had been "a victim or witness to a crime," she answered "no." At the post-trial hearings, she later explained, "I was relating it to a crime being reported. I was not a victim of a crime. It was never reported."

(*State v. Delgado*)



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Rape is the most underreported crime in the US. For adult women, the reporting rate is 16%; for college women, the rate is only 5%. Many victims do not label what happened to them as "rape" or "sexual assault" or "sexual abuse", even if when it meets the legal definition. Therefore, judges need to be extremely careful how they phrase the questions being asked. Experts recommend asking behaviorally-based questions, such as, "Has anyone every forced you to have sexual intercourse against your will when you were a child or an adult?", rather than just asking whether potential jurors have been victims of a crime or victims of a sexual assault, to minimize confusion on the potential jurors' part.

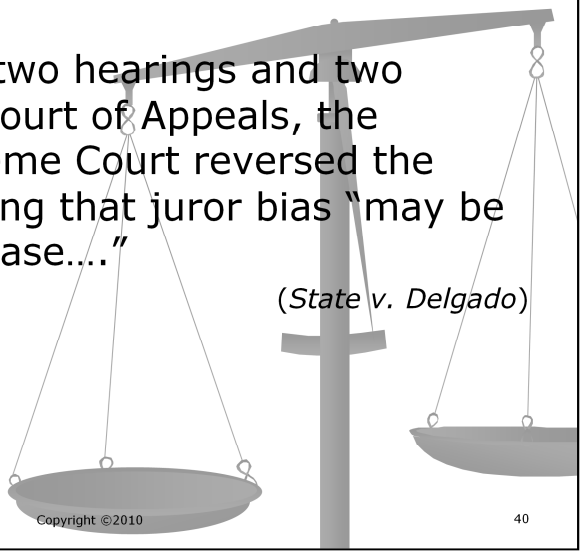
This slide summarizes a Wisconsin case and provides a painful demonstration of what can happen when a juror misunderstands a question about prior victimization.

After the defendant was found guilty by the jury, one of the jurors wrote a letter to the trial court judge, claiming that another juror failed to disclose that she had been a victim of sexual assault or abuse during *voir dire*, but that she revealed her victimization during jury deliberations. Over the course of six years, the juror was forced to testify in two hearings, the case went to the Wisconsin Court of Appeals twice and to the Wisconsin Supreme Court. The trial court, after both hearings, and the Court of Appeals twice held that there was no reversible error, but the Wisconsin Supreme Court reversed, granting the defendant a new trial. The defendant was re-tried and convicted again.

Jurors' Past Victimization: A Cautionary Tale (cont'd)

- After six years, two hearings and two appeals to the Court of Appeals, the Wisconsin Supreme Court reversed the conviction, holding that juror bias "may be inferred in this case…."

(*State v. Delgado*)



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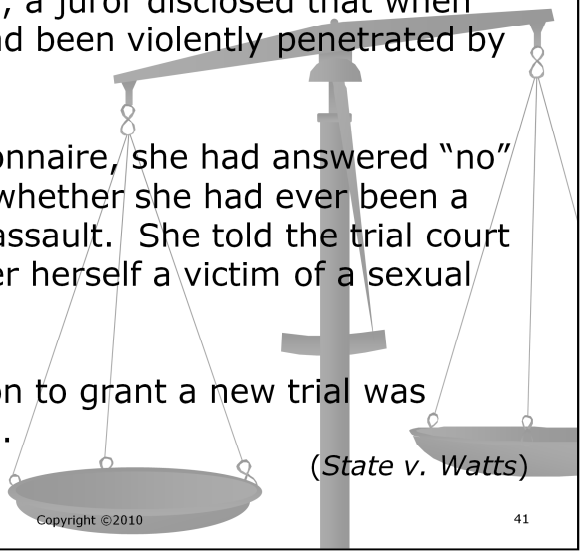
Jurors' Past Experiences: Other Examples

- During deliberation, a juror disclosed that when she was 18, she had been violently penetrated by a date.
- On the jury questionnaire, she had answered "no" to the question of whether she had ever been a victim of a sexual assault. She told the trial court she did not consider herself a victim of a sexual assault.
- Trial court's decision to grant a new trial was reversed on appeal.

(*State v. Watts*)



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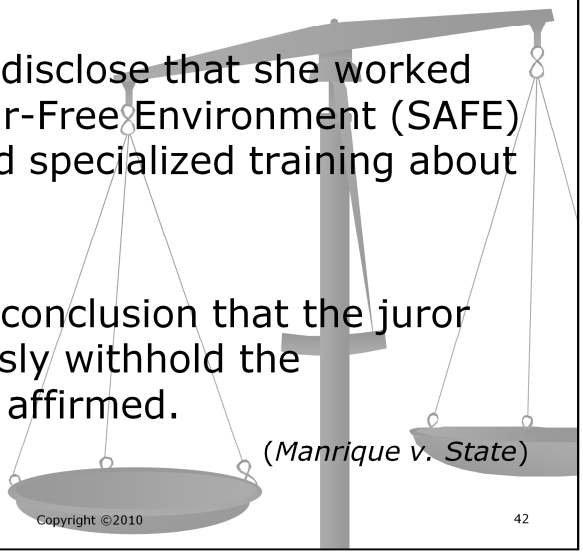
Other examples of cases in which issues arose post-trial about jurors' disclosures during *voir dire.*

Jurors' Past Experiences: Other Examples

- A juror failed to disclose that she worked for Safe and Fear-Free Environment (SAFE) and had received specialized training about sexual assault.
- The trial court's conclusion that the juror did not consciously withhold the information was affirmed.

(*Manrique v. State*)



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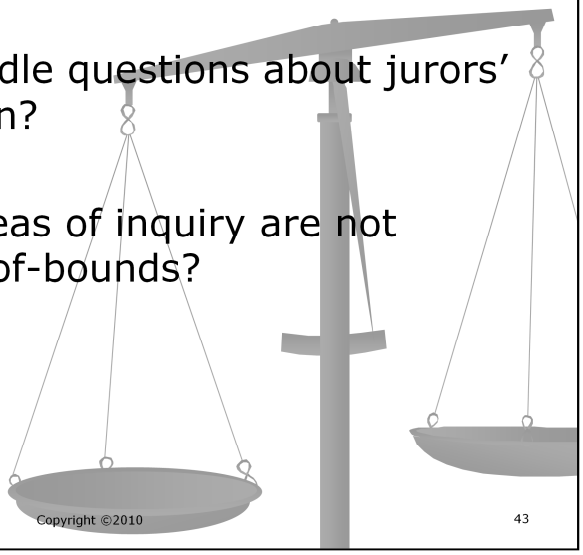
Key Questions

- How do you handle questions about jurors' past perpetration?
- What, if any, areas of inquiry are not relevant or out-of-bounds?



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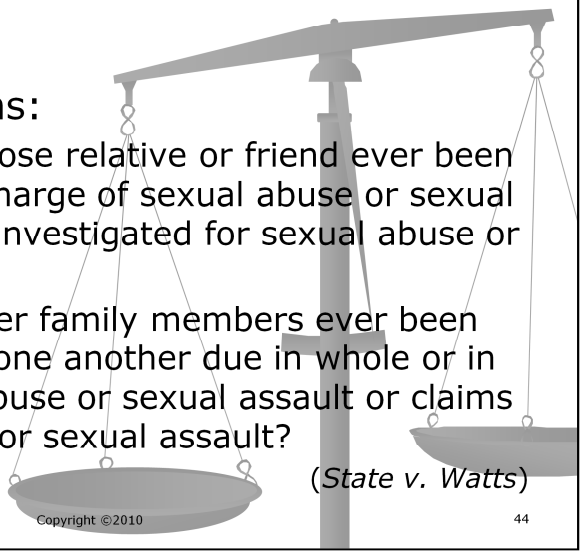
An even more difficult issue is whether potential jurors have perpetrated sexual assault in the past.

Judges also need to consider the limits on the types of questions that jurors can be asked.

Jurors' Past Perpetration

- Difficult to elicit accurate information about this issue.
- Sample questions:
  - Have you or a close relative or friend ever been subjected to a charge of sexual abuse or sexual assault or been investigated for sexual abuse or sexual assault?
  - Have you or other family members ever been separated from one another due in whole or in part to sexual abuse or sexual assault or claims of sexual abuse or sexual assault?

(*State v. Watts*)



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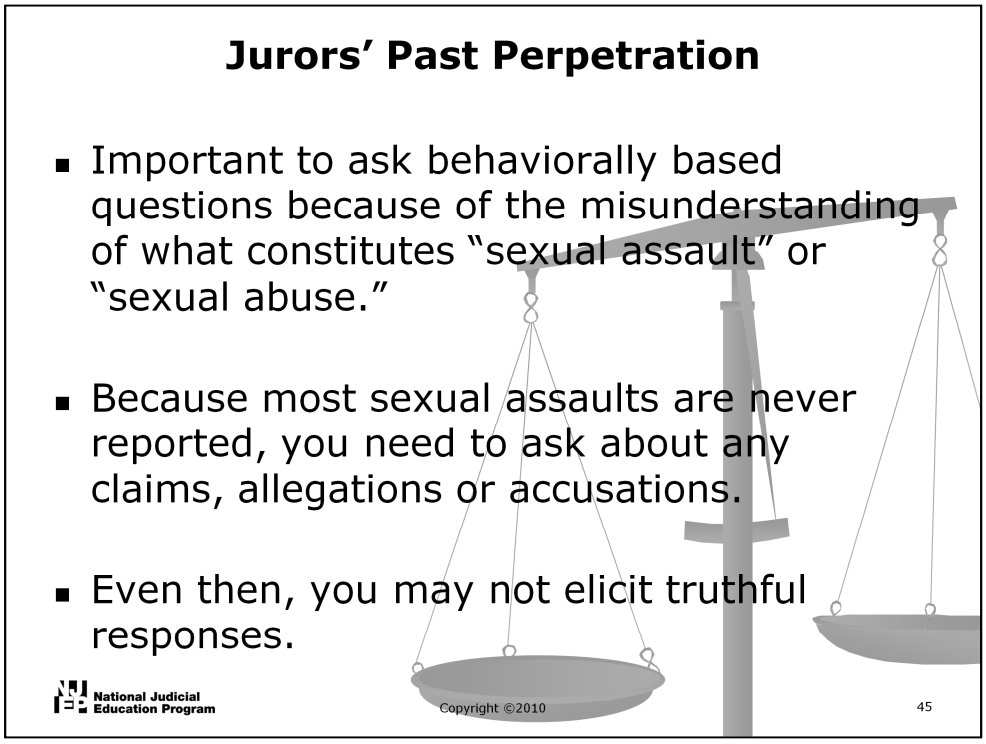
Here are some examples of questions asked about prior perpetration.

The problem with asking the questions in this manner is that the questions only ask about prior charges, investigations or separations from family members. Judges need to keep in mind that most sexual assaults are never even reported, let alone charged or investigated or prosecuted. It is important to also ask about claims, allegations or accusations.

Once again, judges also need to keep in mind the importance of asking behaviorally-based questions, given the myths and misunderstandings about what constitutes "sexual assault."



NOTES

Further information about the *Dominquez* case: A 16-year-old girl had previously reported that one of the jurors had sexually assaulted her. He had been interviewed by the police and the district attorney, but he had not been charged in the case. He did not disclose the incident during *voir dire.* When questioned about his failure to answer the question truthfully, the juror said he thought that he had been asked whether anyone had been "charged with," rather than "accused of" a similar crime.

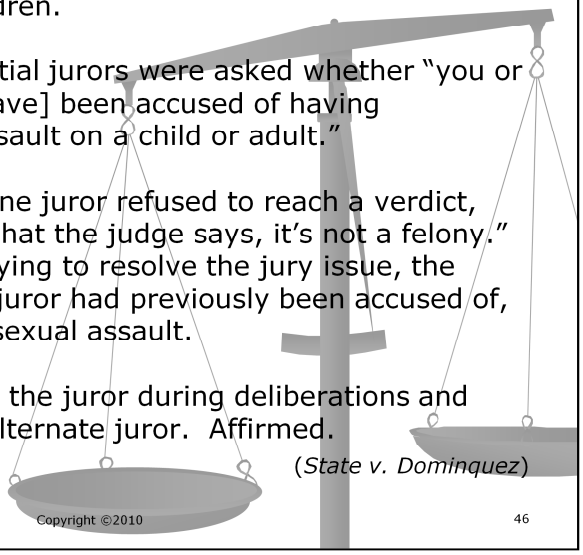
The California Court of Appeals affirmed the trial court's decision to remove the juror during deliberations and replace him with an alternate, holding that "because the juror's concealment during *voir dire* of material information demonstrating potential bias was sufficient to constitute good cause under [the relevant state statute], we affirm the trial court's decision to remove him."

Behaviorally based questions are described on Slide #39. To elicit information about prior perpetration, it is probably best to ask whether the jurors have ever been "accused of" forcing someone (either a child or an adult) to have sexual intercourse against that person's will, rather than whether they were "charged with" or "convicted of" a sexual assault because so few sexual assaults are ever reported and because of the confusion about the definition of "sexual assault" or "sexual abuse."

Jurors' Past Perpetration: California Example

- Defendant was charged with multiple counts of sexual assault on several children.
- During *voir dire*, potential jurors were asked whether "you or someone you know [have] been accused of having committed a sexual assault on a child or adult."
- During deliberations, one juror refused to reach a verdict, stating, "I don't care what the judge says, it's not a felony." While the judge was trying to resolve the jury issue, the police discovered that juror had previously been accused of, but not charged with, sexual assault.
- The trial court excused the juror during deliberations and replaced him with an alternate juror. Affirmed.

(*State v. Dominquez*)



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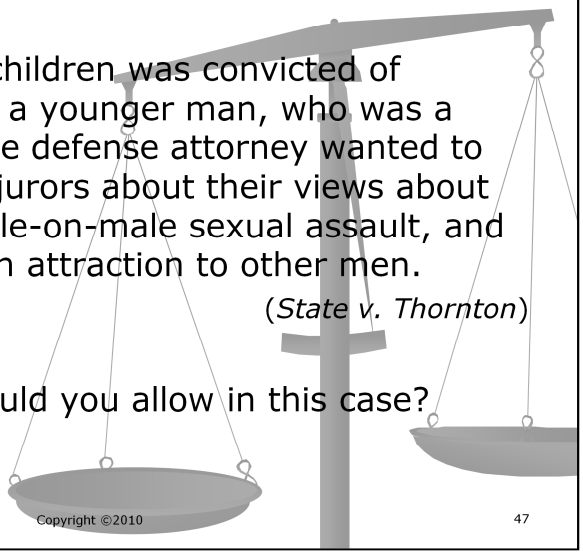
Acceptable Areas of Inquiry?

One example:

- Married man with children was convicted of sexually assaulting a younger man, who was a college student. The defense attorney wanted to question potential jurors about their views about homosexuality, male-on-male sexual assault, and men struggling with attraction to other men.

(*State v. Thornton*)

- What questions would you allow in this case?



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Another difficult question for judges is how far the questioning of potential jurors can go. This case illustrates that dilemma.

What questions would you allow in this case?

Acceptable Areas of Inquiry?

The trial court's ruling:

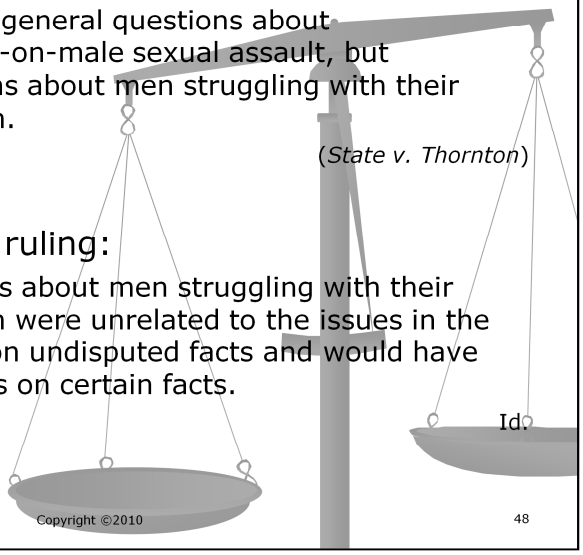
- The trial court allowed general questions about homosexuality or male-on-male sexual assault, but prohibited the questions about men struggling with their attraction to other men.

(*State v. Thornton*)

The appellate court's ruling:

- Affirmed. The questions about men struggling with their attraction to other men were unrelated to the issues in the case, were not based on undisputed facts and would have tested the jurors' views on certain facts.

Id.



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Here is what the courts did in that case.

Jury Questionnaires

- Should you use specially-tailored questionnaires?
- One judge's experience in asking jurors about their prior sexual victimization.

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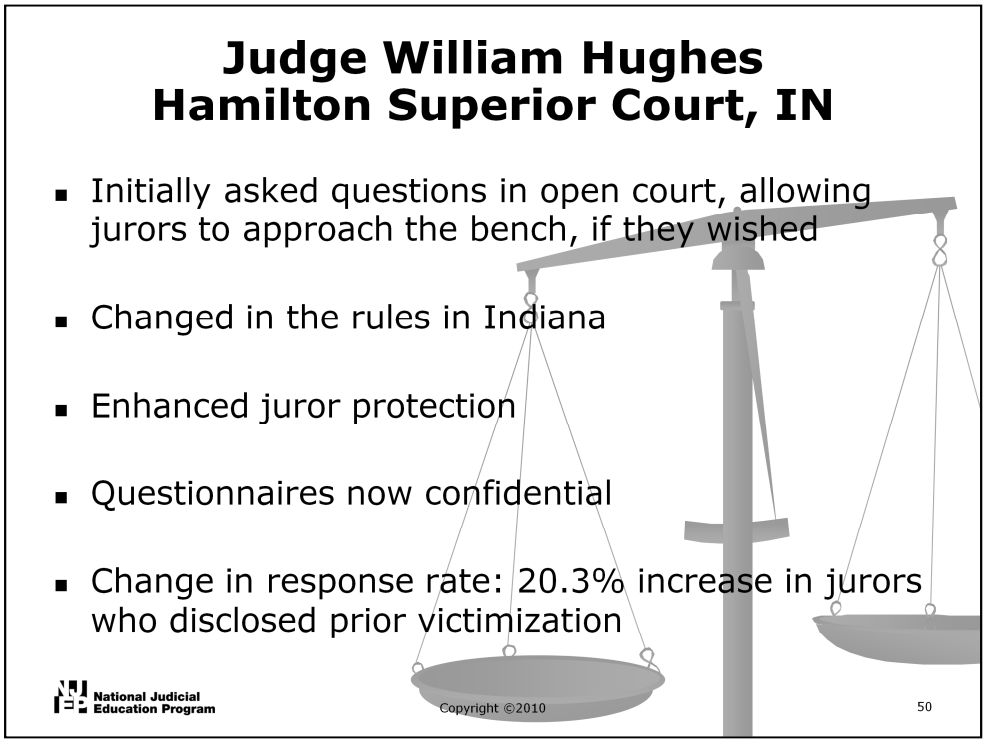
One possible solution is for judges to use specially-tailored written questionnaires in sexual assault cases.

PREFACE FOR NEXT SLIDE
Here is one judge's experience in using a written questionnaire to ask about jurors' prior sexual victimization.

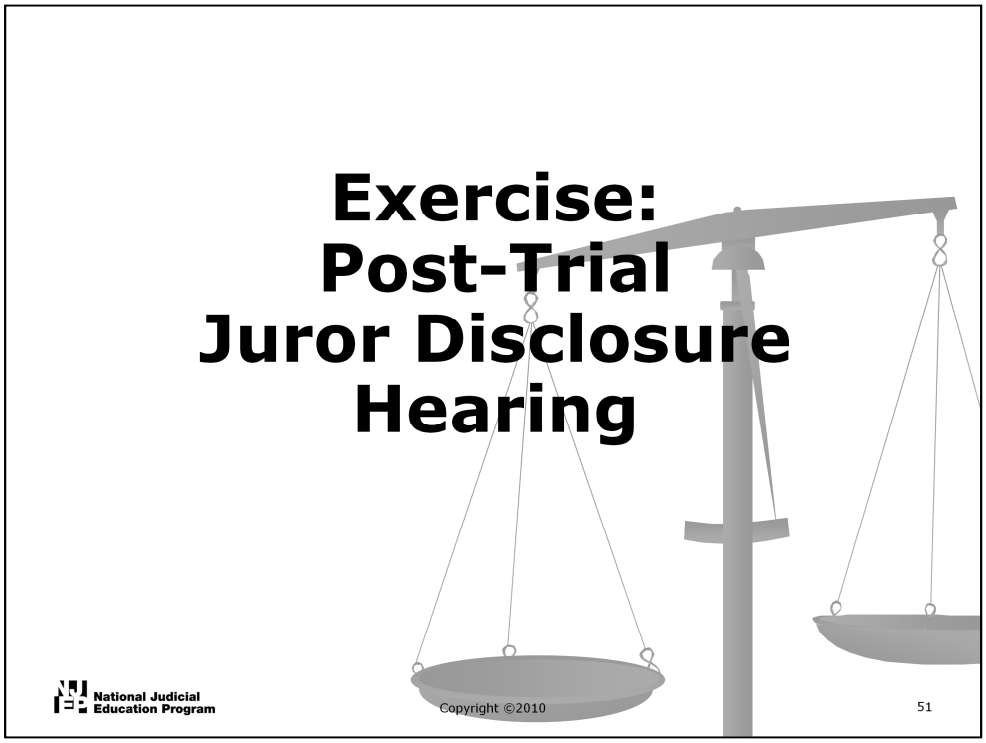


NOTES

Judge Hughes originally asked these types of questions in open court, giving jurors the opportunity to approach the bench if they wanted to discuss something privately. After he attended NJEP's *Understanding Sexual Violence* program and Indiana changed its rules about jury questionnaires, he decided to try using a written questionnaire. Indiana had changed its rules to provide greater protection for juror privacy, making the written questionnaires confidential.

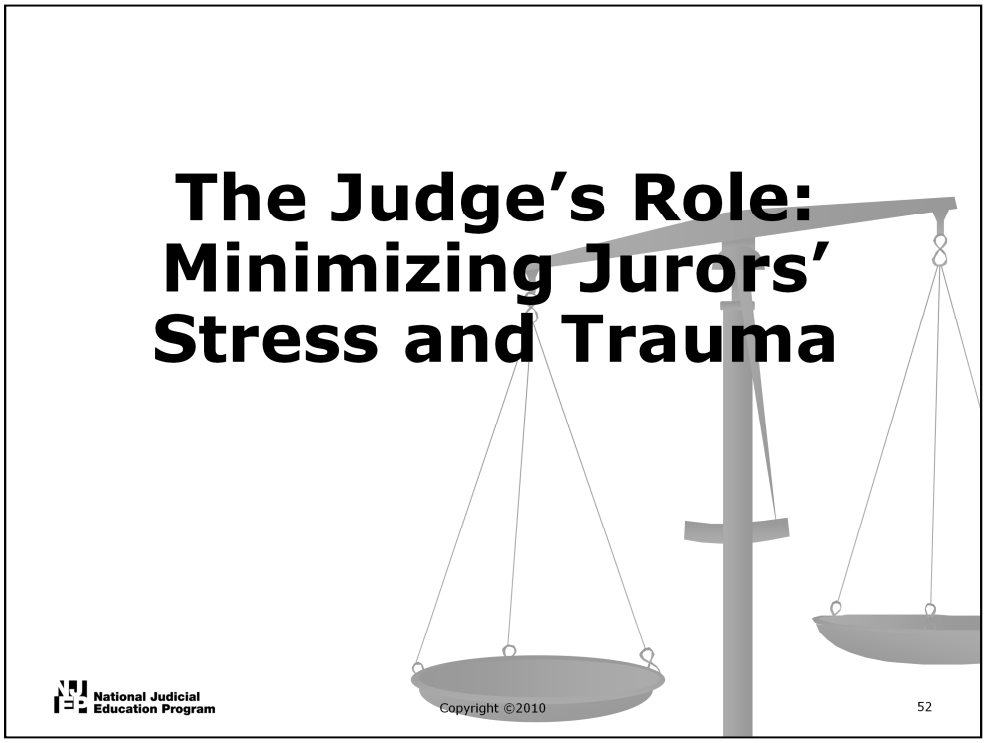
After Judge Hughes began using his written questionnaire, he noted a 20.3% increase in the jurors who disclosed that they had been the victim of a sexual assault.

A copy of Judge Hughes' questionnaire is included on your Resources CD.



NOTES

This exercise gives you an opportunity to apply the material which raises the issue of how to handle post-trial allegations that a juror failed to disclose a pertinent experience or fact during *voir dire*. (Use the Post-Trial Juror Disclosure Exercise Directions provided in the Faculty Manual for this module to explain what the participants need to do for this exercise.)

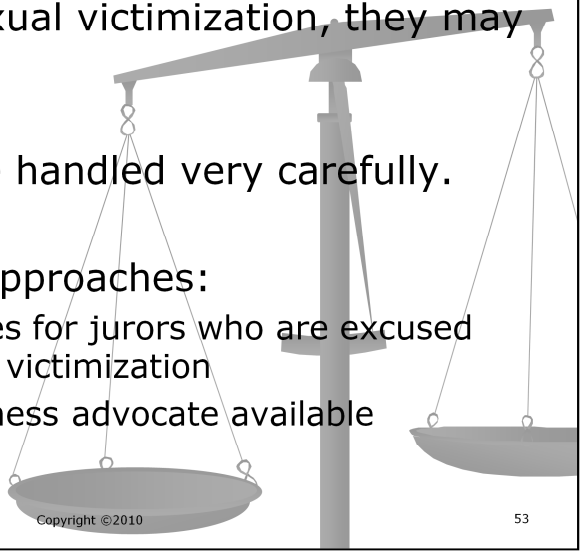


NOTES

The final topic we will address is the judge's role in minimizing jurors' stress and trauma.

Providing Support for Jurors

- When jurors are required to disclose or discuss prior sexual victimization, they may need support.
- This needs to be handled very carefully.
- Some possible approaches:
  - Provide resources for jurors who are excused because of prior victimization
  - Have victim/witness advocate available



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When potential jurors are asked to disclose or discuss their prior sexual victimization, that experience can cause them a great deal of stress and trauma. Some may actually be re-triggered by the disclosure, which may cause them to re-live what happened to them or re-experience the associated trauma. Providing support for jurors in those circumstances can be very tricky for judges, who need to also be mindful of protecting the defendant's rights.

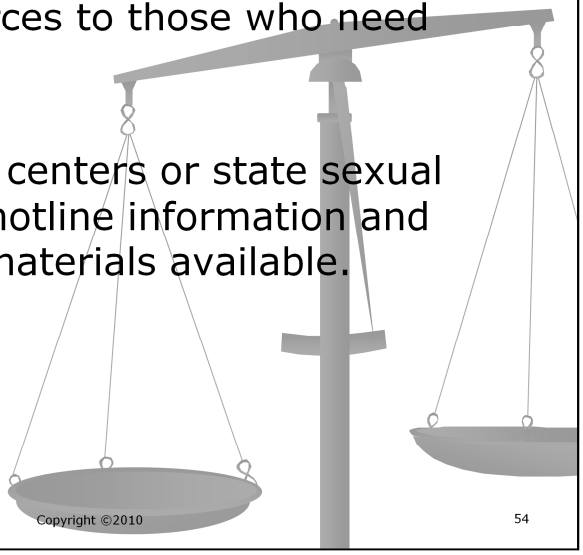
Some approaches used by judges across the country include:

1. Having resources available to give to jurors who are excused from service and are upset by the process, including materials from a local rape crisis center or hotline; or

1. Having someone available from the prosecutor's victim/witness unit, who can provide resources for jurors excused from serving.

Providing Support for Jurors

- Consider de-briefing jurors after trial and providing resources to those who need them.
- Local rape crisis centers or state sexual coalitions have hotline information and other resource materials available.



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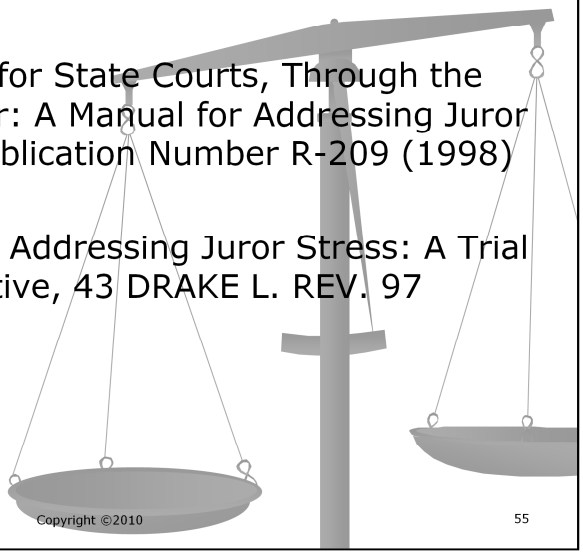
Another approach is for judges to de-brief jurors after trial and provide resources to those who need them. Local rape crisis programs or state sexual assault coalitions usually have materials available that judges can use.

Providing Support for Jurors

- Resources for judges include:
  - National Center for State Courts, Through the Eyes of the Juror: A Manual for Addressing Juror Stress, NCSC Publication Number R-209 (1998)
  - James E. Kelley, Addressing Juror Stress: A Trial Judge's Perspective, 43 DRAKE L. REV. 97 (1994)



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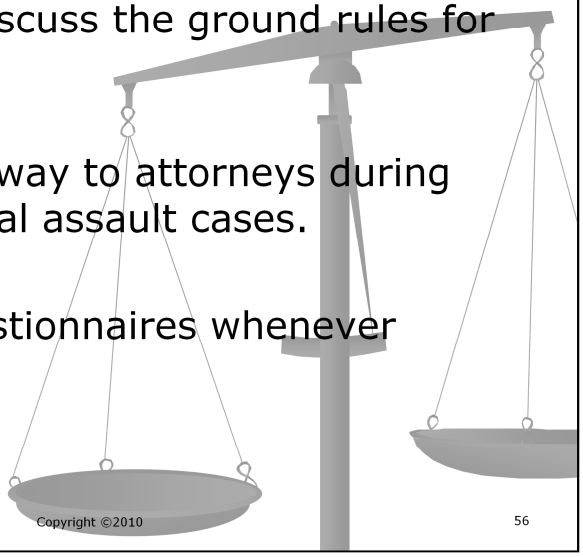
Iowa Judge James Kelley did extensive work on assessing juror stress in homicide cases. Judge Kelley's article, as well as a manual developed by the National Center for State Courts, are both included on your Resource CD. Although these materials do not specifically address sexual assault cases, the information provided should be helpful to judges dealing with juror stress in these types of cases.

Recommendations

- Have a conference with the attorneys before trial to discuss the ground rules for *voir dire*.
- Give greater leeway to attorneys during *voir dire* in sexual assault cases.
- Use written questionnaires whenever possible.



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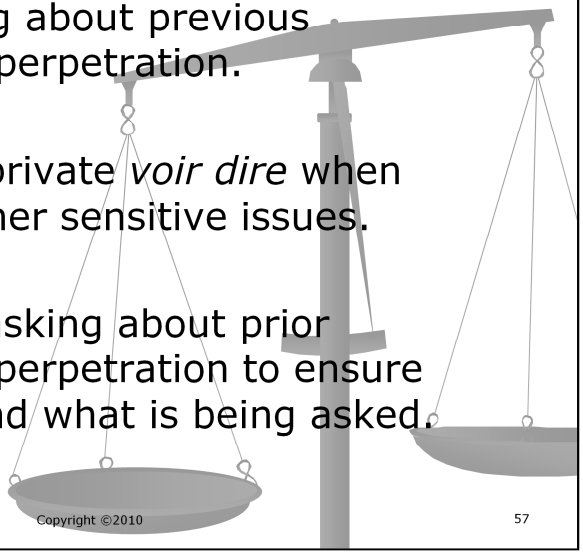
The following recommendations have been provided by judges across the country who attended NJEP's *Understanding Sexual Violence* program.

Recommendations

- Use written questionnaires and private *voir dire* when asking about previous victimization or perpetration.
- Consider using private *voir dire* when asking about other sensitive issues.
- Use care when asking about prior victimization or perpetration to ensure jurors understand what is being asked.



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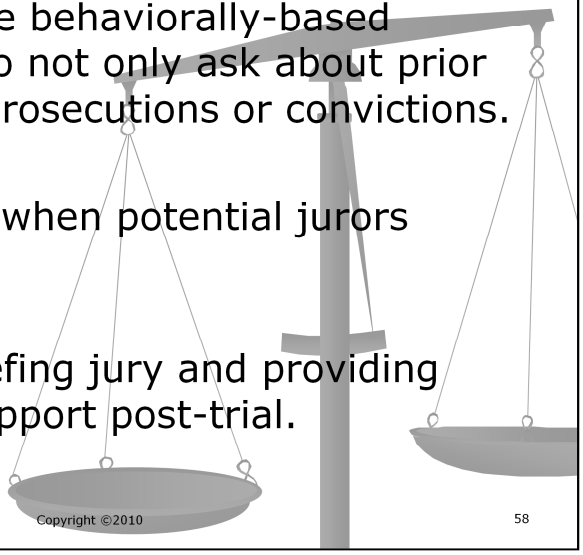
Recommendations

- When asking about prior victimization or perpetration, use behaviorally-based questions and do not only ask about prior investigations, prosecutions or convictions.
- Provide support when potential jurors disclose.
- Consider de-briefing jury and providing resources for support post-trial.



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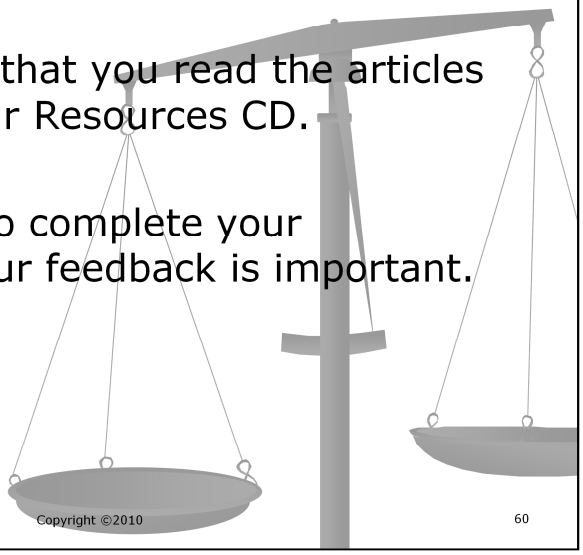
What would you add to this list?

NOTES

This exercise gives you an opportunity to apply the material covered in the lecture portion of this program. (Use the Jury Selection Exercise Directions provided in the Faculty Manual for this module to explain what the participants need to do for this exercise.)

Thank You

- We recommend that you read the articles contained in your Resources CD.
- Please be sure to complete your evaluations. Your feedback is important.



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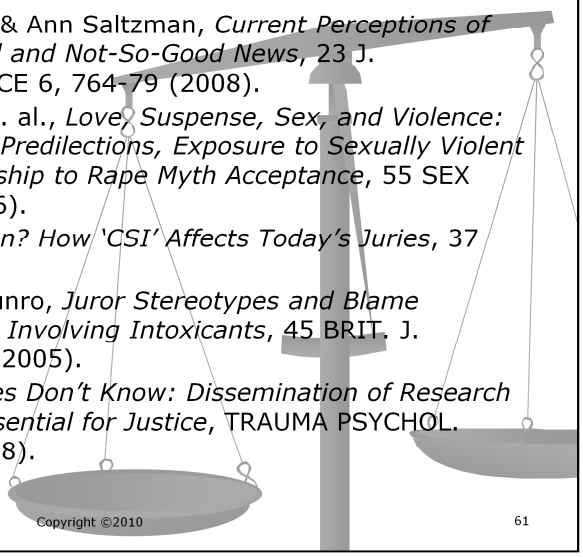

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These slides provide a complete list of the references cited in this presentation.

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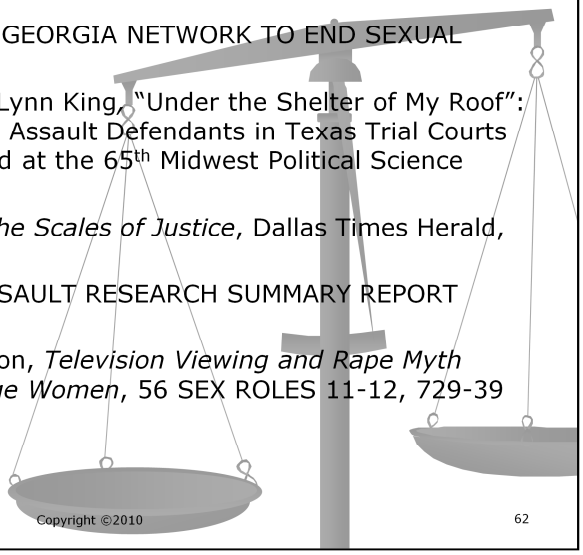

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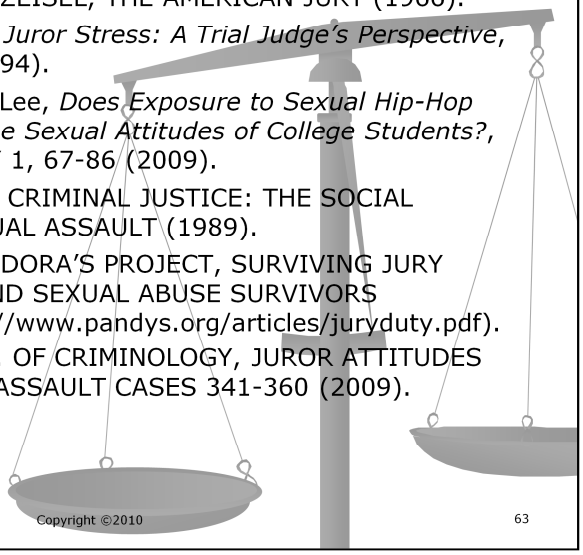

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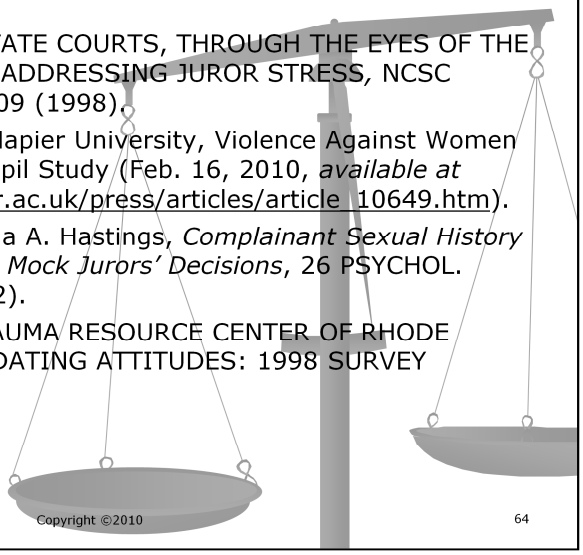

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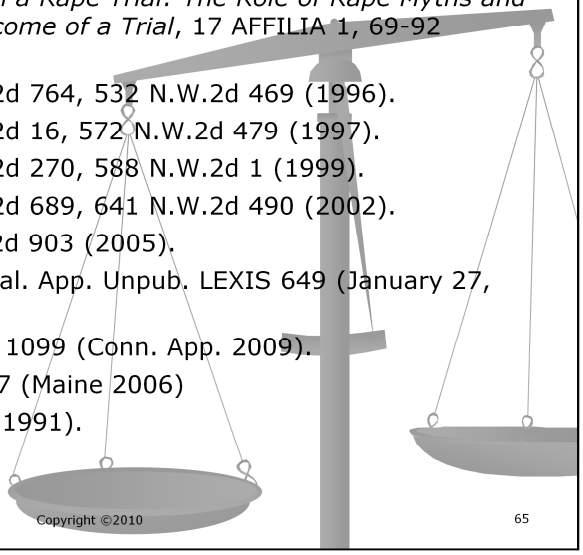

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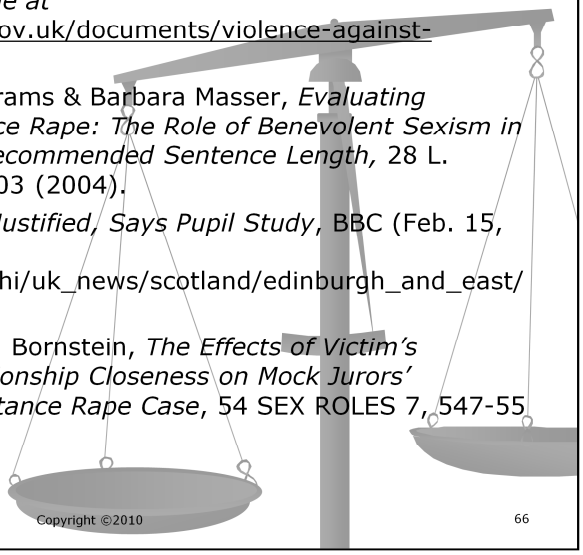

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JURY SELECTION AND DECISION MAKING IN ADULT VICTIM SEXUAL ASSAULT CASES

ANNOTATED TABLE OF CONTENTS

The materials listed below are provided in-full.
Each citation is hyperlinked to the full text of the resource.

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many signs of stress, in most cases the signs were not severe. The study also looked at how post-deliberation conferences with the trial judge affected juror stress levels. While there was no significant difference found in the stress levels of jurors who had these conferences and those who had not, there were also no negative effects to these conferences either.

6. Shannon Lambert, J.D., PANDORA'S PROJECT, SURVIVING JURY DUTY: TIPS FOR RAPE AND SEXUAL ABUSE SURVIVORS (2009), *available at* http://www.pandys.org/articles/juryduty.pdf.

   This article discusses several concerns rape and sexual abuse survivors might have about participating in jury duty, whether for sexual assault cases or cases in general, and provides tips as to how they can survive the process.

7. NATIONAL CENTER FOR STATE COURTS, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS, NCSC Publication Number R-209 (1998).

   Although this manual does not address sexual assault cases specifically, it provides a great deal of practical advice for judges seeking to minimize jurors' stress. It gives practical suggestions for every stage of the process, from the jurors' initial contact through post-trial proceedings.

8. Lynn Hecht Schafran, *Importance of Voir Dire in Rape Trials*, TRIAL, Aug. 1992 at 26.

   Research demonstrates that rape case jurors often base their verdicts on extra-legal factors related to myths and stereotypes about victims, offenders, and the crime itself. This article explains why widely-held myths and misconceptions about rape make thorough *voir dire* essential in these cases.

9. Lynn Hecht Schafran, *What the Research About Rape Jurors Tells Us*, NATIONAL JUDICIAL EDUCATION PROGRAM, UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT (2005).

   This article, from the National Judicial Education Program's two-day judicial education curriculum, summarizes research about how jurors decide sexual assault cases and describes public opinion polls on attitudes about sexual assault. The research with sexual assault juries and the opinion polls on public attitudes toward victim behavior and forced sex show that empanelling an unbiased jury in a sexual assault trial is a serious challenge. Thorough *voir dire* to address these biases as they relate to the case being tried is an essential element to achieve fairness in these trials.

10. Judy Shepherd, *Reflections on a Rape Trial: The Role of Rape Myths and Jury Selection in the Outcome of a Trial*, 17 AFFILIA 1, 69-92 (2002).

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A professor who was selected to be a jury member in a rape trial in 1999 wrote this article. The author details the jury selection process, the case, jury deliberations, and the outcome of the trial (and the re-trial, which took place seven month later). She then used the information she gathered to discuss the pervasiveness of rape myths in American society, the effect of jury selection on the outcome of trials, and the treatment of sexual assault victims by the courts.

American Bar Association

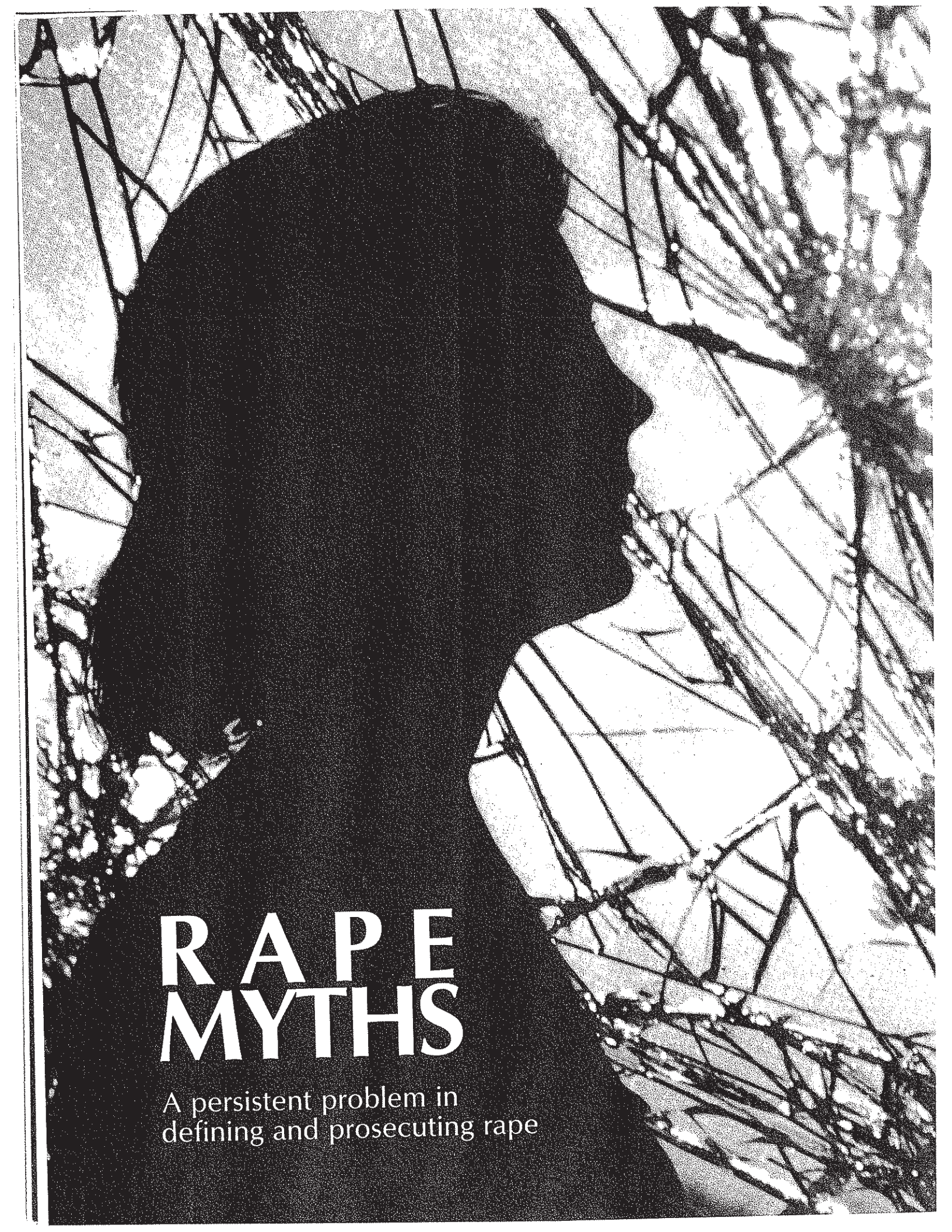
CRIMINAL JUSTICE

Section of Criminal Justice

Summer 1992 Volume 7, Number 2

MYTHS ABOUT RAPE

Persistent problems in prosecuting rapes



RAPE MYTHS

A persistent problem in defining and prosecuting rape

Myths about rape have a corrosive effect on society's ability to prosecute and convict rapists. Their pervasive influence subtly restricts the legal definition of rape and, despite numerous procedural reforms and changes, inhibits conviction of a defendant even where the act alleged is recognized as rape.

On a personal level, the rape victim becomes a victim again and again when she comes in contact with the criminal justice system: at the investigative stage when questioned by medical personnel and the police, at the prosecution stage during the district attorney's trial preparation, and at the trial itself under examination by lawyers and under the scrutiny of the judge and the jury. From the victim's point of view, she becomes the focus of the trial, and it is her actions, not those of the alleged offender, that are dissected and debated.

In the past, because of a number of technical evidentiary rules (the requirements of corroboration and earnest resistance being the most pivotal) and because of deeply ingrained cultural myths surrounding rape and its prosecution, victims of rape and sexual assault were reluctant to come forward. When victims did come forward, prosecutions were few and convictions were rare. Despite two decades of legal reform, lawyers, judges, and—most importantly—jurors are often unaware of the changing nature of the law of rape and its prosecution. More troubling yet, many recent high-profile rape cases have only served to reinforce biases and misconceptions rather than educate the legal community and the public.

This article explores myths about rape and two decades of statutory and case-law changes in the law of rape. For the most part, these legal developments have been ad hoc responses to particular rape myths or evidentiary problems, rather than a systematic revision of the rape laws. However, the net effect has been to radically alter the landscape of rape prosecutions. The article's focus is primarily on New York, which has been a laboratory of sorts, but similar changes are noted in other state jurisdictions and in the Federal Rules.

Even criminal law specialists will benefit from a review of these developments. Few district attorney offices (or police departments) have the luxury of specialized units. Therefore, even experienced prosecuting attorneys are often unaware of the scope of recent changes. Despite the impression given by the publicity that some high-profile rape cases generate, few defense lawyers have ever tried a rape case to verdict.

Attorneys who are not regularly involved in trying criminal cases will also find these issues of interest. Regrettably, clients who become rape victims often need legal assistance to negotiate the criminal process. Victims also need representation in bringing civil actions. Finally, sexual harassment in the workplace involves many of the same issues and problems as a rape case—"delay" in reporting, corroboration, and a pervasive "blame the victim" climate.

Myths about rape

Rape myths are false and stereotyped views or beliefs about rape, rape victims, and offenders. Among the most common myths are:

- The true victim of a rape will immediately seek out and complain to family, friends, or the police.
- Rape usually occurs at night, out-of-doors, and between strangers; the perpetrator uses a weapon and leaves the victim physically injured.
- Rape is an expression of sexual (albeit misplaced) desire.
- Women falsely accuse men of rape.
- The woman invited the sexual assault by her dress, behavior, or being alone in the wrong place.
- A woman's prior consensual sexual relations with the accused (or with others known to the accused) implies consent.
- A woman impaired by drugs or alcohol deserved to be raped.

There are endless variations on the examples listed above, but they have one factor in common: they shift the focus from the perpetrator to the victim from the very moment the offense takes place.

Immediate outcry. While prompt outcry or, more precisely, the lack of a prompt outcry, has traditionally been considered a significant factor in rape prosecutions, frequently there is no prompt outcry, and often the rape is never reported at all.

The fact is that rape is a vastly underreported crime. A comparison of the FBI's Uniform Crime Reports (UCR), which compile data on crimes reported to police in the United States, with the Justice Department's National Crime Survey (NCS), which is based on victimization surveys, reveals that the rape *victimization* rate is about twice the rate of rapes *reported* to the police. (U.S. Dep't of Justice, Bureau of Justice Statistics, *The Crime of Rape* 1–5 (March 1985).) However, the National Women's Study, a government-funded survey released in April 1992, reports that in 1990, more than *five times* as many women were raped as the number of sexual assaults reported by the Justice Department. (David Johnston, *Survey Shows Number of Rapes Far Higher Than Official Figures,* N.Y. Times, April 24, 1992, at 14, col. 5.) That study estimates that at least 12.1 million women in the United States have been the victims of rape at least once in their lives—61 percent when they were minors.

While victims' reasons for not reporting varied depending on a number of factors, the three predominant reasons were:

Mitchell Funk

By RICHARD T. ANDRIAS

1. They considered rape to be a private or personal matter, or something they wanted to resolve themselves.
2. They feared reprisal by the offender, his family, or his friends.
3. The police would be inefficient, ineffective, or insensitive.

(Caroline Wolf Harlow, *Female Victims of Violent Crimes* 3 (Bureau of Justice Statistics Pub. No. NCJ-126826).)

Definitional and sampling problems may account for discrepancies, but some private researchers believe that the earlier government victimization studies grossly understate the true prevalence of rape in our society. One private study of female students found the victimization rate to be *ten to fifteen times* the UCR rates. (N.Y. Governor's Task Force on Rape and Sexual Assault, *Rape, Sexual Assault, and Child Sexual Abuse: Working Towards a More Responsive Society* 46 (April 1990), citing Mary P. Koss, Christine A. Gidycz, and Nadine Wishiewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students,* 55(2) J. Consulting & Clinical Psych. 162–70 (1987).) This finding comports with the April 1992 report of the National Women's Study, sponsored by the National Victim Center and the Medical University of South Carolina's Crime Victims Research and Treatment Center. (Johnson, *supra.*)

"Real" rape. The traditional view of rape in our society is that the crime occurs late at night, outdoors, and between strangers, where the victim is left physically injured. In fact, recent studies reveal that rape more often than not involves people who know each other, and it occurs in a place familiar to them (the home of the victim or the perpetrator).

At first glance, the official government studies confirm the common belief that a woman is far more likely to be raped by a stranger than a nonstranger. The NCS reports that two thirds of the rapes are stranger rapes. Even the government researchers concede, however, that their estimates may be understating nonstranger rapes for a variety of reasons unique to this type of rape: a greater sense of embarrassment; a feeling she should have been able to prevent the attack; a desire to protect the identity of the friend or family member; fear of reprisals; and concern that her account won't be believed. (*The Crime of Rape, supra,* at 2.)

The myth of what constitutes "real rape" in our society protects the nonstranger rapist in a variety of ways: the victim is reluctant to come forward, blames herself, and questions whether she was "really" raped. ("Real rape" is a term popularized by Susan Estrich in *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard Univ. Press, 1987).) If the victim does come forward, she is often met with skepticism and hostility. Nice men don't rape; only psychopaths rape. She must be mistaken. Furthermore, the victim's recovery process is made more difficult by the additional burden of having been betrayed by someone she trusted.

Nongovernmental research studies have found that the percentage may be the reverse of the government's two thirds stranger-rape figure—that in fact two thirds of rapes may involve people who know each other. The National Victim's Center, a Washington, D.C., advocacy center, estimates that "in 80 to 85 percent of all rape cases, the victim knows the defendant." (Tamar Lewin, *Tougher Laws Mean More Cases Are Called Rape,* N.Y. Times, May 27, 1991, at 8, col. 1.) Another 1987 survey of college women (not a sample of the general population) revealed that eight out of ten women knew the men who raped them, and 56 percent of these assaults occurred in a dating context. (Daniel Goleman, *New Studies Map the Mind of the Rapist,* N.Y. Times, Dec. 10, 1991, at C1, col. 6.)

This article does not use the term "date rape." "Date" downplays the nonsexual nature of forcible rape. The juxtaposition of "date" and "rape" implies that a rape is somehow a normal occurrence on a date. Hopefully the term, perpetuated by the media, will go out of fashion.

Rape is a sexual act. The myth is that the act of rape is an expression of a sexual urge or desire; the fact is that rape is a crime involving violent aggression. Sexual arousal may play a part in some rapes, but the crime involves hostile aggression, and force or the threat of force.

While there are studies describing "victim-precipitated rape," most offender research rejects this concept and notes that usually the victim is an easily available target for an aggressive assault. (See the discussion and authorities in Sophia Vinogradov, Norman I. Dishotsky, Ann K. Doty, and Jared R. Tinklenberg, *Patterns of Behavior in Adolescent Rape,* 58 Am. J. Orthopsychiatry 179, 185 (April 1988).) Significantly, the NCS statistics show that while women from 16 to 24 years of age are two to three times more likely to be raped than women in general, women of any age, race, marital status, economic class, and employment status can be victims of rape. (Harlow, *supra,* at 9.)

Police departments and prosecutors' offices are changing the names of their specialized units from "sex crimes" to "special victims" to deemphasize the sexual nature of the crime. While the penal statutes still use the term "sex crimes," modern definitions of rape correctly focus on the violence utilized by the perpetrator.

New York law states that a male is guilty of rape in the first degree when he engages in sexual intercourse with a female by "forcible

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compulsion." (While the New York statute is not gender neutral, as other states' statutes are, it has been rendered so by judicial decision.) Forcible compulsion is defined as the "use of physical force or a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." (N.Y. Penal Law § 130.05(8) (McKinney 1992).)

California's statute employs similar language. Rape is defined, inter alia, as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another." (Cal. Penal Code § 261(2) (West 1992).)

Florida defines sexual battery as a felony when "the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute these threats." (Fla. Stat. § 794.011 (1992).)

Indiana defines rape as follows: "when a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when the other person is compelled by force or imminent threat of force." (Ind. Code Ann. § 35-42-4-1 (West 1991).)

Ironically, the American Law Institute's Model Penal Code, which influenced states to focus on the force used by the offender in the definition of rape, incorporated one of the classic rape myths in its model definition. It made the act a lesser degree of rape where the victim was a "voluntary social companion" on the occasion of the alleged rape and had "previously permitted him sexual liberties." (A.L.I. Model Penal Code, arts. 210–13, § 213.1, at 274 (1980).)

Women "cry rape." The myth is that women falsely accuse men of rape to get back at them or to cover up something. The reality is that there is no empirical evidence to support this claim. (M. T. Notman and C. C. Nadelson, *The Rape Victim: Psychodynamic Consideration,* 133 Am. J. Psychiatry 408–13 (1976).) To the extent that such incidents have occurred, they are but isolated phenomena that have taken on mythic proportions.

After an extensive study of the subject, the New York State Legislature concluded that there was no basis for the general proposition that women falsely accuse men of rape. New York has also banned the use of lie detectors (or the request for a test) as a *precondition* of initiating a rape prosecution:

> [N]o district attorney, police officer or employee of any law enforcement agency shall require, as a prerequisite to initiating a criminal investigation, any victim of a sexual assault crime to submit to any polygraph test or psychological stress evaluator examination for the purpose of subjecting the statements of such victims to analysis to determine the truth or falsity of such statements. (N.Y. Crim. Proc. Law § 160.45(1) (McKinney 1992).)

She asked for it; she deserved it; she consented to it. When a man flashes a roll of bills and is soon thereafter relieved of his property by an assailant, no one absolves the robber because the victim may have used poor judgment. When a woman leaves valuable jewels in her hotel room rather than the hotel safe, no one absolves the burglar because of the owner's lack of precautions. However, where rape or sexual assault is involved, a concept analogous to "contributory negligence" rears its head; the woman's actions are said to have caused the man to assault her, and she "deserved what she got."

This view of rape is demeaning to men and degrading and restricting to women. It is saying that men cannot control themselves when they see a woman alone at night, in an "attractive" outfit, or in a vulnerable situation. In a nonstranger situation, it is saying that men aren't capable of listening, of taking no for an answer, or of accepting limits on intimate sexual activity. It is saying that men believe the woman really means yes when she is saying no.

Brownmiller and others argue that the prevalence of these myths in the society at large and as they appear in the criminal justice system can only be explained from the feminist perspective—that is, they serve to protect men's property interests in the sexual and reproductive functions of women. (See Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975).) A woman's charge of rape is considered serious only to the degree that she conforms to conventional sexual stereotypes or only in terms of her relationship to a man (that is, a man's wife or his unemancipated daughter).

Whatever their origins, these myths are personally and socially restrictive for women. They tell women how they must dress or where or with whom they may associate or travel. In a nonstranger situation, a woman is deemed to have consented to sexual intercourse if she has had prior relations with her acquaintance (or others), visits certain places with him alone, engages in preliminary sexual activity, or indulges in drugs or alcohol. The consequences for a woman's freedom of choice, movement, and activity are devastating.

From a practitioner's point of view, these myths are brought into the courtroom at every turn and influence every aspect of the case:

- Whether the complaint will be made and/or acted on by the authorities. (Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women,* 81(2) J. Crim. L. & Criminology 267 (1990).)
- The way the case will be reported in the media.
- The way the lawyers frame and argue the issues.
- The way the judge rules on the substantive law and other more

Rape Victims on Trial: Competing Rights to Privacy, Press, and Victim Participation

The CJS Victims Committee, in conjunction with the National Judicial College and the ABA Commission on Women, will sponsor a round-table discussion at the 1992 ABA Annual Meeting in San Francisco on Saturday, August 8, from 2:00 pm to 4:00 pm in the Peacock Court of the Mark Hopkins Intercontinental Hotel.

The discussion will focus on issues raised by victims' reforms in the criminal justice system. Moderator **Charles Ogletree**, Professor of Law, Harvard Law School, will lead a panel of nationally recognized defense attorneys, prosecutors, judges, and journalists as they discuss:

- Victims' rights to have their names kept private versus the press's right to publish such public information
- The effects of television and publicity on the defendant and the alleged rape victim, and the propriety of shielding only the victim's background while the defendant is featured daily in the press
- The disparate treatment of cases, depending on the comparative social backgrounds of victims and defendants
- Whether, in order to defend the accused, the victim's character must be destroyed
- The propriety of increasing victim participation through rights of allocution, victim-impact statements, and private counsel for victims at trial

The nationally recognized panel includes:

The Honorable Richard T. Andrias, Justice of the New York Supreme Court

David Austern, General Counsel, Manville Personal Injury Settlement Trust

Angela Jordan Davis, Chief, D.C. Public Defender's Unit

Norman S. Early, Jr., District Attorney, Denver, Colorado

Susan Estrich, Professor, University of Southern California

The Honorable J. David Francis, Chief Judge, Eighth Judicial Circuit, Commonwealth of Kentucky

Deborah P. Kelly, Dickstein Shapiro & Morin, Washington, D.C.; Chair, CJS Victims Committee

The Honorable V. Robert Payant, Dean, The National Judicial College

Lynn Hecht Schafran, NOW Legal Defense Fund

Stuart Taylor, Jr., Senior Journalist, *The American Lawyer*

Randall J. Turk, Miller, Cassidy, Larocca & Lewin, Washington, D.C.

mundane but equally crucial procedural issues.
- Ultimately, how the jury, drawn from a community that is affected by these same myths, will decide.

Rape law reform

During the two decades that the concept of rape myths was being defined, studied, and researched, a parallel reform movement evolved in the realm of substantive and procedural aspects of the law of rape and sexual assault. While these developments substantially altered the landscape of rape prosecution, in most instances the changes were ad hoc responses to particular procedural or substantive problems rather than a coordinated effort to reform the entire law of rape.

Given the rapidity and breadth of change in this area, practitioners would be well served to keep abreast of statutory and case law developments, even if they have tried a rape case in the recent past. As will be noted, changes occur not only in the substantive definitional areas but also in evidence codes and procedural rules. Judges, too, must be on guard to ensure that their jury charges reflect current law and procedure.

Corroboration and scrutiny of the victim's testimony. Understandably, Lord Chief Justice Matthew Hale's oft-quoted seventeenth-century pronouncement on the law of rape has been a lightning rod for modern-day rape law reformers:

> It is true that rape is a most detestable crime and, therefore, ought to be severely and impartially punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the accused, though never so innocent. (1 Matthew Hale, *Pleas of the Crown* 635 (1680).)

Hale's view that it is not merely the victim's behavior but also her veracity that must be scrutinized was the source of the legal rule that became a virtual impediment to prosecution: the requirement of corroboration of the victim's testimony.

At one time, New York's corroboration rule was the strictest in the nation, requiring not just proof oth-

er than the victim's testimony on the rape itself but corroborative proof of all of the material elements: identity, penetration, and force. Given the private nature of the crime, witnesses were rarely available to corroborate the victim's testimony. Prosecutions were few and convictions rare. Whether apocryphal or not, a report accompanying a 1972 bill designed to modify the corroboration requirement in New York cited the 1969 statistic of 18 convictions for 1,085 rape arrests. A follow-up bill in 1974 eliminated the corroboration requirement entirely in forcible rape situations. (N.Y. Crim. Proc. Law ch. 14 §4 (1974).)

Today almost all American jurisdictions have eliminated the requirement of corroboration except in special situations. Where there is a corroboration requirement, it is usually far less stringent than it was in the past.

Earnest resistance. Historically, one of the biggest roadblocks to successful rape prosecutions was the requirement that the victim demonstrate *earnest resistance*. Under Saxon law, rape was a felony punishable by death. Colonial New York was typical in incorporating the death penalty for rape. The statute itself, however, did not specify a requirement of resistance. This requirement was judicially engrafted, undoubtedly as a reaction to the perceived severity of the penalty. It was not until 1881, more than one hundred years after the American Revolution, that the New York State legislature added the specific requirement of resistance to the rape statute.

Traditionally, the crime of forcible rape had numerous formulations,

> but the central notion has always been unlawful sexual intercourse committed upon a female *by imposition* [emphasis supplied]. The term "unlawful" served the function of excluding cases where the actor and the victim were married to each other. The idea of male "imposition" was expressed by the use of such phrases as "without her consent," "against her will," "by force and against her will," and "forcible ravishment . . . against her will." (A.L.I. Model Penal Code, *supra,* at 275.)

New York defined lack of consent as "forcible compulsion," that is, "physical force that overcomes *earnest resistance;* or a threat, express or implied, that places a person in fear of immediate death or *serious* physical injury to himself, herself, or that another person will immediately be kidnapped" (emphasis supplied). New York's formulation was relatively undemanding compared to other jurisdictions' that required the victim to demonstrate her nonconsent by "utmost resistance," that is, physical opposition to the aggression throughout the encounter. (A.L.I. Model Penal Code, *supra,* at 304.)

In the early 1960s, the American Law Institute's Model Penal Code sought to refocus the inquiry from the nature of the victim's resistance to the degree of force employed by the assailant, adopting the following definition of rape: "A male who has sexual intercourse with a female not his wife is guilty of rape if he compels her to submit by force or by threat of imminent death, *serious* bodily injury or extreme pain" (emphasis supplied). By eliminating express language of consent and resistance, the ALI drafters clearly went a long way toward reorienting the inquiry from the victim's behavior to aspects of the assailant's use of force.

In 1982, after five years of attempting to redefine "earnest resistance," the New York legislature eliminated the requirement altogether. The Governor's approval memorandum recognized that the earnest-resistance requirement, among other things, "may further endanger the safety of the victim." (Governor's Approval Memorandum, *1982 New York State Legislative Annual,* at 189.) Within a year, the legislature recognized that the retention of the word "serious" in the definition of forcible compulsion was causing continued confusion by implying that resistance was still required, and "serious physical injury" was dropped. Forcible compulsion is now defined as physical force or a threat, express or implied, which places the victim in fear of immediate death or physical injury. As noted previously, many other states, including California and Indiana, have also eliminated the requirement of a resulting *serious* physical injury; others, including Florida, have retained the "serious injury" language but utilize various degrees of seriousness in defining rape.

Rape shield laws. Historically, defense lawyers were given almost free rein to cross-examine a rape victim about her past sexual conduct with the defendant or others. The theory underlying this line of inquiry was, of course, that a defendant has a constitutional right of confrontation in questioning adverse witnesses. Credibility is always at issue, and where the defense is consent, the defendant seeks to demonstrate consent by establishing the victim's prior relations with the defendant or others. The practical effect of this evidentiary rule was to discourage victims from coming forward, for fear of the double humiliation of having to testify about the sexual incident itself and also about their entire sexual histories.

Despite the argument that traditional rules of evidence are sufficiently flexible to protect the victim (that is, the prejudicial effect of the evidence outweighs its probative value; see Comment, *Rape Shield Statutes: Constitutional Dispute, Unconstitutional Exclusions of Evidence,* 1985 Wis. L. Rev. 1219), all states but two have enacted "rape shield" statutes. The Supreme Court recently found that the notice and hearing requirements of Michigan's rape shield statute were not a per se violation of the Sixth Amendment. (*Michigan v. Lucas,* 111 S. Ct. 1743 1991).) Rule 412(b)(1) of the Federal Rules of Evidence offers similar protection. With varying exceptions (usually involving the source of se-

(*Continued on page 51*)

When the ABA speaks out on criminal justice issues, the public assumes that we speak with authority. Yet the ABA usually takes positions without listening to the ideas and recommendations of non-lawyer experts and without having evaluated their relevant research. We are prisoners of our own environment, confined primarily to the literature of the legal profession.

The ABA can improve the power and the quality of its voice by developing institutional lines of communication with those who have knowledge that we lack. The legal profession is ignorant about some critical questions that research could answer. We lawyers should know that ignorance is no excuse.

CJ

Rape Myths

(*Continued from page 7*)

men, prostitution, or past sexual conduct between the parties), these statutes restrict the use by the defendant of the victim's past sexual history during cross-examination of the victim.

A number of policy grounds have been put forth in support of these enactments. First, society has an interest in victims coming forward. Second, society has an interest in sound convictions. Where the victim's sexual past is admitted into evidence, it often becomes the main issue of the trial, distracting the jury from the defendant's alleged conduct. Third, due to the sensitive nature of the inquiry, the victim is entitled to have her privacy respected and not be harassed or subjected to public humiliation, unless such an examination is absolutely necessary to resolve the case. Despite continuing controversy over their scope and application (Pamela J. Fisher, *State v. Alvey: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law,* 76 Iowa L. Rev. 835 (1991)), these statutes now play an important strategic role in almost every rape case.

Rape trauma syndrome. One of the most striking developments in the trial of a rape case is the growing acceptance by courts of allowing juries to hear testimony by experts on the subject of rape trauma syndrome. Some women react to the trauma of rape by expressing fear, anger, and anxiety. Researchers have found, however, that other women who are equally traumatized can appear controlled, calm, and subdued. (A. W. Burgess and L. L. Holmstrom, *Rape Trauma Syndrome,* 131 Am. J. Psychiatry 981–82 (1974).)

This syndrome may manifest itself by the victim showing no outward agitation; not reporting the incident to friends, family, or police; or failing to identify an assailant who is known to her. This passive response to a violent assault is often inexplicable to lay jurors, so while prosecutors have always been allowed to utilize "prompt outcry" complaints as exceptions to the hearsay rule (*People v. McDaniel,* 577 N.Y.S.2d 669 (2d Dep't 1991)), they also began searching for ways to assist juries in evaluating seemingly damaging testimony about delayed response.

Rape trauma syndrome testimony has been common in New York trial courts for years. Noting that the issue has been discussed and studied for a decade and a half, New York's highest court recently held:

> We realize that rape trauma syndrome encompasses a broad range of symptoms and varied patterns of recovery. Some women are better able to cope with the aftermath of sexual assault than other women. . . . It is also apparent that there is no single typical profile of a rape victim and that different victims express themselves and come to terms with the experience of rape in different ways. We are satisfied, however, that the relevant scientific community has generally accepted that rape is a highly traumatic event that will in many women trigger the onset of certain identifiable symptoms. . . .
>
> (*People v. Taylor,* 75 N.Y.2d 277, 286 (1990).)

The decisive factor in determining whether a particular state permits expert testimony on the subject of rape trauma syndrome or whether a particular court allows the testimony in a specific case has always revolved around the issue of whether the evidence will infringe on the jury's province to make determinations of credibility and fact. The trend is to *not* allow the testimony where it bears directly on whether a rape occurred, and to allow the expert testimony when it is relevant to explain that a complainant's behavior *is consistent with* a claim of rape.

The future: Antidotes to rape myths

In their classic study *The American Jury,* Kalven and Zeisel found that what the law defines as rape and what the jury concludes *is* rape has much to do with the woman's conduct and the prior history of the parties. The female is closely scrutinized, and where there is a hint of contributory behavior on her part, juries are lenient with the defendant. (H. Kalven and H. Zeisel, *The American Jury* 249 (Univ. of Chicago Press, 1971).) More recent detailed research by Burt and Albin has confirmed that the greater the degree of rape-myth acceptance, the narrower the definition of rape, and consequently the less the willingness to convict sexual assailants. Furthermore, the greater the acceptance of interpersonal violence (which they found is the strongest

predictor of rape-myth acceptance), the less the willingness to convict. (Martha R. Burt and Rochelle Semmel Albin, *Rape Myths, Rape Definitions, and Probability of Conviction,* 11(3) J. Applied Social Psych. 212–30 (1981).)

These scientific findings are not surprising. A review of the extensive news reports of several recent high-profile cases reveals the persistent presence of rape-myth acceptance in the press and the public. In New York's St. John's University case, the question of why anyone not looking for sex would visit an off-campus social house where drinking and partying were the order of the day was consistently raised. Similar reactions were apparent in the televised Palm Beach case, questioning why a woman would go to a beach on a moonlit night with a member of the opposite sex if she was not looking for consensual sex. In the most recent national high-profile case, Mr. Tyson's defense was direct and unambiguous: A young woman would only go to a hotel room with him late at night for one purpose—consensual sex.

Rape myths permeate the reporting of these high-profile cases and further infect already biased jury pools. Even the august *New York Times,* which prides itself on its sensitive reporting of these issues, focused on the complainant's past "wild streak" in a full-page analysis of the Palm Beach case. (Fox Butterfield and Mary B. W. Tabor, *Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance,* N.Y. Times, April 17, 1991, at A17, col. 1; see discussion of this article in William Glaberson, *Times Article Naming Rape Accuser Ignites Debate on Journalistic Values,* N.Y. Times, April 26, 1991, at A14, col. 1.) For reasons that no one but the *Times* can comprehend, the Tyson trial was consistently reported in the sports section of the newspaper.

These myths about rape and sexual violence have taken root and spread over generations, and they will not be eradicated in the courtrooms of the nation alone. The New York Governor's Task Force on Rape and Sexual Assault studied these issues in New York and elsewhere, and proposed as a first step broad public education. Its blueprint suggested public education led by the state's chief executive and other state agencies; education in schools and colleges; efforts to sensitize the media about its role in reporting incidents of sexual violence; neighborhood workshops and programs in religious institutions and community centers; and education for all professionals who have contact with rape victims, including health practitioners, police, prosecutors, and the judiciary. Finally, it proposed that the state itself become a model for business and industry in implementing and requiring training about rape and sexual assault for all its employees. (Task Force, *supra,* at 67–83.)

What can be done immediately to further improve the understanding of how rape myths affect proceedings in our criminal justice system and to build upon the technical evidentiary reforms that already have been achieved? One thoughtful proposal has been put forth by Patricia Tetreault. (Patricia A. Tetreault, *Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials,* 7(2) Behav. Sci. & the Law 243–57 (1989).) She suggests that expert testimony is needed regarding common misconceptions about rape and rape-victim behavior to help juries understand and compensate for societal biases against the complainant in a rape trial.

Tetreault makes a persuasive case, and her article should be read and debated. However, the objection to expert testimony on the rape trauma syndrome that was raised in many quarters—that the testimony invades the province of the jury on the ultimate factual issues—is even more applicable to expert testimony on rape myths, because the latter is more general and is not related to a specific issue in the case. However, there are universally accepted methods available for educating juries on the issue of rape myths: the judge's introductory remarks, and expanded voir dire questions.

In their introductory remarks, judges can stress that rape is a crime of violence, that it is not a "sex crime," that there is no typical profile for a rapist, that it is not necessary for the woman to resist where force or the threat of force is used, that it isn't necessary that the woman be injured or seriously

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Lawyer • Statesman • Friend
1923–1992

In loving memory, his partners:
F. Lee Bailey
Edward A. Carhart
Paul M. Rashkind
Ronald C. Dresnick
Bonnie Rippingille

injured for a rape to have occurred, and that jurors will have to feel comfortable hearing and discussing with strangers the subjects of anatomy and bodily fluids. This can be accomplished in the context of a preliminary charge on the law or in a general introduction to the particular issues in the case. Of course, in addition to a discussion of the presumption of innocence and the burden of proof, when requested the court should include a balanced introduction to the defendant's arguments or contentions.

Allowing the lawyers to explore juror attitudes and biases in an expanded voir dire would achieve similar ends. Even "efficient" jurisdictions that now severely restrict lawyer participation in the voir dire examination of the jury could relax the rules, given the serious nature of these cases and the demonstrated effect that these myths have on jurors' perceived notions about rape and rape victims. The court could ask the questions or allow the lawyers additional time to explore juror attitudes. Furthermore, initial screening of jurors could be done individually, with the parties in the judge's robing room, so that jurors would not feel inhibited by having to speak in front of fellow jurors. As always, to ensure that the lawyers learn the true feelings of jurors, open-ended questions capable of being answered in a narrative fashion should be employed.

Clearly, only ambitious educational programs such as those described above will go a long way toward both eliminating sexual assault in our communities and ensuring that victims are treated responsibly and with understanding when an incident does occur and is prosecuted in our courts. However, these programs will take years to implement, even if public monies become available. In the meantime, expanded voir dire and sensitive judicial instructions on the irrelevance of rape myths to the issue before the court will help achieve these goals. **CJ**

Negotiating Immunity

(*Continued from page 12*)

serves its right to use those statements for purposes of cross-examination or rebuttal as well as to use information derived from the interview in obtaining leads to other evidence.

The role of cooperation

Typically, witnesses with substantial criminal involvement do not receive immunity unless they also agree to plead guilty to some lesser or related criminal offense. In white-collar cases, especially since the enactment of the Federal Sentencing Guidelines, many white-collar first offenders—even those who cooperate—will serve prison terms.

Although under the Sentencing Guidelines cooperation with government authorities is a significant factor weighing in the defendant's favor, it is by no means dispositive. Accordingly, it is largely illusory for an exposed corporate executive to think immediately of negotiating for "immunity" as a solution to his or her problems. Even though the executive is willing to testify, it will be difficult to avoid a conviction in exchange for testimony if his or her culpability level is substantial.

Prosecution of an immunized witness

In *Kastigar v. United States,* the Supreme Court upheld the constitutionality of 18 U.S.C. § 6002, finding its prohibition of use and derivative use of the witness's testimony to be "coextensive with the scope of the privilege against self-incrimination." The Court held that the immunity statute bars the use of compelled testimony as an investigatory lead as well as "use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." (*Kastigar,* 406 U.S. at 453, 460 (1972).) In *United States v. McDaniel,* 482 F.2d 305, 311 (8th Cir. 1973), the Eighth Circuit enumerated some of the prohibited uses when it held that the immunity statute forbids "all prosecutorial use of the testimony," including "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."

The *Kastigar* court reaffirmed that prosecutors who seek to bring criminal charges against a witness who has testified under a grant of immunity "have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." (406 U.S. at 460, quoting *Murphy v. Waterfront Comm.,* 378 U.S. at 79 n.18.) A defendant "need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." (*Id.* at 461–62.)

The "heavy burden" imposed on the government by the Supreme Court's decision in *Kastigar* has been made somewhat lighter by subsequent decisions of the courts of appeals. A number of courts have held that "the government is only required 'to demonstrate by a preponderance of the evidence an independent source for all evidence introduced.' " (*United States v. Hampton,* 775 F.2d 1479, 1485 (11th Cir. 1985), quoting *United States v. Seiffert,* 501 F.2d 974, 982 (5th Cir. 1974); see also *United States v. Crowson,* 828 F.2d 1427, 1429 (9th Cir. 1987). See *White Collar Crime: Fifth Survey of Law—Immunity,* 26 Am. Crim. L. Rev.

Hon. J. Richard Couzens & Hon. Tricia Bigelow, *Jury Questionnaire*, CALIFORNIA BENCHBOOK: THE ADJUDICATON OF SEX CRIMES 122-124 (2006).

Appendix 10-A: Sex Crime Questionnaire

1. Have you ever been the victim of any form of sexual molestation? (This includes actual or attempted rape or molestation or unwanted sexual advance by a stranger, acquaintance, family member, or someone else you knew.) If yes, please explain.

    a. If you answered "yes," was the incident reported to anyone, including your friends, family, or law enforcement? If so, please indicate to whom it was reported. If not, why not?

    b. Did the incident result in any formal action taken against the offender? If so, please explain.

    c. If formal action was taken against the offender, were you satisfied with the outcome? Please explain.

2. Do you know of any adult or child, other than yourself, who has been the victim of any form of sexual molestation? This includes actual or attempted rape or molestation or unwanted sexual advance by a stranger, acquaintance, family member, or someone else the person knew. If yes, please explain.

    a. If you answered "yes," did the incident result in any formal action taken against the offender? If yes, please explain.

    b. If formal action was taken against the offender, were you satisfied with the outcome? Please explain.

3. Have you or has anyone you know been accused of having committed a sexual assault on a child or adult? If yes, please explain.

    a. If you answered "yes," did the incident result in formal action taken against the accused? If so, please explain.

    b. If formal action was taken against the accused, were you satisfied with the outcome? Please explain.

4. Do you think that explicit discussion of sex acts will bother you or affect your ability to be fair? If yes, please explain.

5. Did you have any emotional or other reaction when you first heard what this case was about? If so, please explain.

6. The defendant in this case is accused of committing a sexual assault on a child/elder adult/physically disabled person. How will that fact affect your decision in this case?

7. *[If syndrome evidence may be offered]* Psychiatric testimony may be offered in this case concerning the conduct of victims of sexual assault. Do you have any training or experience in psychology? If so, please explain.

a. Do you have any feelings about the value of psychiatric testimony offered in a criminal case? If so, please explain.

b. If you are instructed that you may consider this evidence only for a limited purpose, will you be able to follow that instruction?

8. Based on age alone, do you have any particular feelings or opinions about the accuracy of the testimony of a ___ -year-old child? Please explain.

9. Do you have any specialized training or experience in working with children/senior citizens/persons with disabilities? If so, please explain.

10. Do you believe that sexual molestations, if they occur, should be dealt with in treatment rather than as a criminal prosecution? Please explain?

11. Can you think of any circumstance where the victim of sexual assault brought the event on by his or her own conduct? Please explain.

12. Do you regard the current punishment for sex offenses to be too light, about right, or too harsh? Please explain.

13. Do you belong to or contribute to any organization that places a special emphasis on advocacy on behalf of sexual assault victims? If so, please explain.

14. Do you belong to any organization that advocates for more sexual freedom and less government involvement in consensual sexual relationships, such as the North American Man/Boy Love Association (NAMBLA)? If so, please explain.

15. Do you have any specialized training or experience in working with victims of sexual assault? If so, please explain.

16. Is there any matter you would prefer to discuss privately with the court? If so, please give a brief explanation.

17. *[If relevant to the crime]* Have you or has any member of your family ever had a drug- or alcohol-related problem?

Source: Bigelow and Couzens, California Benchbook: The Adjudication of Sex Crimes, Appendix 10A, pages 122-124. For information about this benchbook, please contact Bobbie Welling, Supervising Attorney, California Administrative Office of the Courts, bobbie.welling@jud.ca.gov

Excerpted from *Trauma Psychology Newsletter* – Fall 2008 (pp. 15-18)

What Juries Don't Know: Dissemination of Research on Victim Response is Essential for Justice

Jennifer J. Freyd
University of Oregon

I recently served as an expert witness for the prosecution in a federal criminal case. It was a new and eye-opening experience for me. I was asked to educate the jury about what we know from research about victim response to sexual assault. It became clear to me that I was only needed because of widespread ignorance about the reality of sexual assault in the general public, and thus in the population of potential jurors. The experience was a stark reminder of the importance of research dissemination and education on societal and criminal justice. Our research can only have an impact if it reaches the right people. In the case of a jury trial the right people are the jurors.

Jennifer J. Freyd

Jurors are asked to rely on their common sense and reason. This works well when common sense and reason coincide with empirical reality. However, the criminal justice system is at risk if jurors show pervasive ignorance or, worse, adherence to dangerous myths. Rather than holding accurate knowledge of victim psychology, many individuals endorse some degree of belief in what researchers have called "rape myths" and "child sexual abuse myths" (Burt, 1980; Collings, 1997; Cromer & Freyd, 2007; Cromer, in press). These myths can work against justice in profound ways. Educating the public about victim response to sexual assault so that jurors can rely on their common sense is thus a crucial duty for trauma researchers and educators.

The criminal case for which I recently served as an expert witness involved abusive sexual contact aboard an aircraft. The victim was at the time a 16-year-old girl and the defendant was her 32-year-old coach. The case was federal because the offense occurred on an airplane.

The defendant admitted to FBI investigators that the sexual acts did occur. There was no prior romance, flirtation, or invitation between coach and athlete. They were returning from an athletic event. The victim had fallen asleep under a blanket in the window seat and the defendant was seated next to her. It was nighttime and dark in the plane. She woke up to him touching her under her clothing. The victim displayed a fairly passive or "frozen" response to finding herself in this predicament.

The age of consent in federal sexual assault cases is 16. The defense attempted to portray the events as consensual sex, relying heavily on the implicit question: If she didn't want the sexual intrusion why didn't she actively object? The defense attorney in closing arguments suggested that the victim and her coach had together created a "bubble of intimacy" on that plane that

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was later burst causing the victim to feel "sexual regret" and claim the sexual acts were without her permission.

In my testimony I had drawn on research about victims to educate the jury that a passive response to sexual assault is not uncommon and I discussed some of the research regarding factors that are associated with such a response, such as fear and perceived powerlessness. During closing arguments, the prosecutor was able to remind the jury that crime victims often do respond passively and to remind the jury of all the substantial evidence contrary to the defense argument of consent. The jury found the defendant guilty.

Consent in sexual assault cases remains a vexed issue in American courts. In the excellent book, Unwanted Sex: The Culture of Intimidation and the Failure of Law, Stephen Schulhofer (1998), traces the history of consent laws. He notes that in the sixteenth century "the common law of theft protected an owner's property only when a wrongdoer physically removed it from the owner's possession, against the will and by force. . ." (p. 3). However "the law evolved, slowly at first, to fill the intolerable gaps," (p. 3). Today the law "punishes virtually all interference with property rights without the owner's genuine consent. Yet there has been no comparable evolution and modernization of the law of sexual assault." (p. 4). In other words, if your front door is unlocked and someone you know walks into your house and takes your laptop computer while you cower in the corner, this is a crime unless you have explicitly given affirmative permission. There is no argument to be made that you have implicitly consented to engage in giving away your possessions by your open door, the prior display of your product, or your silence during the theft. Compare this state of affairs to current beliefs about sexual assault where victims can be blamed for their clothing and are often held responsible for providing active resistance. Furthermore, sexual assault law currently draws inconsistent lines regarding age of consent, and is largely insensitive to other aspects of power differential (such as formal roles of authority and power) that can vastly reduce a person's ability to freely consent.

The combination of insufficient legal clarity about the standards for consent with wide-spread ignorance about victim response opens the door for a defense that blames the victim and potentially holds her responsible for sexual assault while leaving the perpetrator not accountable. It is thus critical for justice that we do even more to educate the public.

Below I offer a list of some of the things we know from research in trauma psychology (and associated references) that are likely not sufficiently known by potential jurors. We need to provide more education about these findings and also evaluate and monitor public understanding of these topics.

1. Passivity during sexual assault is a common response of both child and adult victims.

Studies suggest that anywhere from 1/3 of adult rape survivors (Burgess & Holmstrom, 1976) to ½ of child sexual abuse survivors (Heidt, Marx, & Forsyth, 2004) display a passive, even frozen, response during the assault. Naturally, people do wonder why and how this passive response occurs, but it is important to recognize that separate from questions of motivation and mechanism we know from empirical scientific research on sexual victimization that such a passive response is quite common (Marx, Forsyth, & Lexington, 2008; Rizvi, Kaysen, Gutner, Griffin & Resick, 2008). There are research studies attempting to answer the "why" and "how" questions regarding victim passivity. It appears that there are a number of factors (such as power disparity) and pathways that are associated with a passive response ranging from a conscious decision based on the assessment that it is a wise course of action given the dangers of resisting, to involuntary mental processes such as dissociation and involuntary physiological responses of paralysis or freezing. In the scientific literature on sexual assault this constellation of victim passive/freeze responses is sometimes called "rape induced paralysis" and increasingly often called "tonic immobility" although there is also a more technical use of that term (Marx, Forsyth, & Lexington, 2008).

2. Sometimes victims forget all or part of their assault experience.

Numerous studies have shown that some percentage of trauma victims either display or later report a period of forgetting the event (Elliott, 1997; Sivers, Schooler, & Freyd, 2001; Williams, 1995). Forgetting can occur even after a period of remembering the event (Schooler, 2001). Elliott (1997) investigated memory for a wide range of traumatic experiences in a carefully executed research study using a representative sample of Americans. Elliott reported that overall across different types of trauma 17% reported partial forgetting and 15% a period of complete memory loss (for a total of 32% reporting delayed recall) for various traumatic experiences. Rates of forgetting were higher for certain interpersonal victimization experiences (such as childhood abuse and completed rape) and lower for certain non-interpersonal traumas (such as motor vehicle accidents). Forgetting is apparently more likely in cases involving a betrayal trauma such as when the victim trusted, was very close to, and/or was dependent upon the perpetrator (Freyd, 1996; Freyd, DePrince, & Zurbriggen, 2001).

3. Often victims do not disclose the assault at all or disclose only after a delay. Sometimes victims retract a legitimate accusation.

Numerous studies have discovered that non-disclosure, recanting, and delayed disclosure to be common occurrences for sexual assault (Bolen & Scannapieco, 1999; DeVoe & Faller, 1999; Fergusson, Horwood, & Woodward, 2000; Ullman & Filipas, 2003). Most of those who experience child sexual assault do not disclose until adulthood and many never tell at all (Jonzon & Lindblad, 2004; Smith et al., 2000). Studies have also revealed a pattern of recanting and redisclosure (Elliott & Briere, 1994; Sorenson & Snow, 1991). Non-disclosure, delayed disclosure, and retraction are particularly likely in cases in which the perpetrator is close to the victim (Lyon, 2007; Malloy, Lyon, & Quas, 2007; Tang, Freyd, & Wang, 2007).

4. Assault by a familiar other is both more common and potentially more toxic that assault by a stranger.

Most sexual assault is committed by individuals known to the victim, which increases the likelihood of delayed

disclosure, unsupportive reactions, and worse outcomes (Freyd, Klest, & Allard, 2005; Freyd, Putnam, et al, 2005;; Russell, 1994). Widely held stereotypes about "stranger danger" seem to be particularly confused about the relative risk of assault by someone known to the victim and about the relative harm of assault by such a perpetrator. For instance, if a girl was on a plane next to a man she didn't know and she fell asleep and woke up to him touching her and explained she felt too scared to do anything, would the defense attempt a consent defense? Would it have a chance with a jury? My intuition is no, that this defense only has a chance because they were acquainted. What is it about the fact that a victim knew a perpetrator that potentially opens the consent door despite no prior invitation? Perhaps there are a number of beliefs that people hold about women in relation to sexual assault: for example, that females enjoy being sexually touched by familiar men simply because they are familiar, and/or that they have more freedom to object to unwanted touch by familiar men, and/or that men have implicit rights to touch females they know. None of these ideas are at all correct. Women or girls assaulted by someone known to them are at heightened risk for non disclosure and negative outcome.

5. Victims often display a constellation of reactions after the assault including avoidance of social contact and a drive to shower at even the thought of the event.

Responses to adult sexual assault and child sexual abuse are diverse. Some individuals display great distress whereas others do not. Immediate reactions are likely to include fear, anxiety, confusion, and social withdrawal (Herman, 1992). Victims often report not wanting to be seen by others as well as a desire to shower or cleanse themselves repeatedly for days to months after the assault (see Frieze, Hymer, & Greenberg, 1987; Herba & Rachman, 2007; Koss, 1993; Rizvi et al, 2008; Russell, 1975). Long term, these crimes increase the risk of a host of negative outcomes including PTSD, depression, suicide, and other mental health problems (Yuan, Koss, & Stone, 2006).

6. Disbelieving and blaming the victim can compound the damage done by the assault.

Negative reactions to disclosure, particularly disbelieving and blaming the victim, can be particularly damaging to the well-being of victims of sexual assault (Ullman & Filipas, 2005). As Marx explained: "In our society, the validity of reports of sexual violence is often questioned, and survivors are blamed for their sexual assaults. Furthermore, the consequences of these experiences are often trivialized or ignored by family, friends, police, legal officials, and sometimes even mental health professionals. Unfortunately, such social conditions further create stigma and shame for survivors, thereby compounding the destructiveness of their experiences." (2005, p. 226).

This list of relevant research findings not generally known by the public is far from exhaustive. There is much more we know about trauma psychology in general and the response of victims to sexual assault in particular. If the public and thus potential jurors were better educated prior to serving on a case, expert testimony such as mine would not be needed. An educated public would lead to a better world for both the criminal justice system and society more widely. An educated public would make it more likely that eventually the laws themselves would be improved to better reflect the reality of power dynamics and victim response. An educated public would better defend our freedom from assault. The results of our research are often highly relevant to making fair and good decisions about the treatment, prevention, and responsibility for interpersonal violations. Knowledge of that research is also often highly relevant to how helpfully and effectively we interact with each other in society. May our efforts in research and research dissemination intensify and flourish.

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ADDITIONAL JUROR QUESTIONNAIRE

To the Juror:

You have been selected for potential service on a jury. The case for which you have been called involves allegations of a sexual nature. In order to select a fair and impartial jury, the jury selection process requires that certain items of information be collected from each potential juror. In this case that may include information which might be embarrassing to you if you were asked these questions in open court. Your answers to this questionnaire are not public information. The judge sees your answers, and may share those answers with the attorneys for the parties but only after first asking for your permission to do so. Jury service is a privilege and an obligation of citizenship which should not be taken lightly. Trial by jury is central to our system of justice, and its successful operation requires the intelligent and unbiased judgment of qualified jurors.

1. NAME: _____

2. Have you ever been the recipient of an unwanted sexual contact? ___YES ___NO

3. If your answer to Question 2 was yes, please briefly explain the situation:_____
_____
_____

4. Has any member of your family ever been the recipient of an unwanted sexual contact?
____ YES ____ NO

5. If your answer to Question 4 was yes, who was the person and what was his or her relationship to you?_____
_____
_____

6. Have you ever been accused of or charged with an offense involving sexual contact?
____ YES ____ NO

7. If your answer to Question 6 was yes, please briefly explain the situation:_____
_____
_____

8. Have you ever known anyone who has been a victim of an offense involving sexual contact?
____ YES ____ NO

9. If your answer to Question 8 was yes, who was that person and what was his or her relationship to you? _____
_____
_____

I affirm under the penalties of perjury that the foregoing answers are true to the best of my information and belief.

DATE: _____ _____
Signature

Judge William Hughes' Original Questionnaire

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ADDRESSING JUROR STRESS: A TRIAL JUDGE'S PERSPECTIVE

James E. Kelley [a1]

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I. INTRODUCTION

The public stage of the legal system is the courtroom. The actors include lawyers, judges, witnesses, bailiffs, parties, and jurors. All have a role, some more than one. The intended result of the system's activity is a decision: the conclusion of a controversy. Most controversies do not result in a public trial; they are settled or compromised before the public phase of a trial begins. [1] The cases that do go to trial are the ones in which either the stakes are too high for compromise, or the principles involved seem too important to be negotiated. Thus, juries, and sometimes judges, are asked to decide disputes not otherwise solvable.

The jury trial method for deciding disputes presents "evidence" to a group of nonexpert lay persons, gives them some guiding legal rules, and tells them to make a decision about the facts presented in the trial on the basis of the given legal rules. Lawyers present a story to the jury in order to persuade them that a ***98** particular view of the case is its reality. [2] In effect, a trial is an exercise in creating a reality as a basis for a decision.

Reality is not always neat, pretty, or comfortable to observe, either in everyday life or in the courtroom. Psychiatry and psychology teach that persons exposed to traumatic experiences can have adaptive reactions others may not experience. [3] The most well-known example is what was called "shell shock" in prior wartime, now generally referred to as posttraumatic stress disorder. [4] Some evidence indicates jurors in very difficult cases may exhibit symptoms of stress similar to those seen in persons clinically diagnosed as suffering from posttraumatic stress disorder. [5] Recent attention from journalists [6] and therapists [7] highlight a growing public perception of the stress of jury service in difficult cases. Judges also observe the stress jurors manifest during trials. Some judges regularly talk to jurors after the verdict in particularly difficult trials in order to reduce distress and "close" the jury process. Even these judges often question whether such contacts are appropriate or even helpful.

This Article considers possible judicial responses to juror stress. The Article begins by examining the trial judge's role in jury management and the existing legal rules regarding postverdict contacts with jurors. The Article then discusses media accounts of juror stress and reviews some professional literature suggesting postverdict contacts between judge and jury can effectively reduce juror stress. Next, the Article surveys reports of professional psychological debriefing of jurors. The following section

presents the author's own study of juror stress, which began by sending a questionnaire to jurors who deliberated to verdict in forty-four recent murder trials in Iowa. The study tests two hypotheses: (1) Jurors who decide criminal murder trials are likely to experience stress symptoms related to the case; and (2) jurors in murder cases who have informal postverdict conversations with the trial judge are less likely to experience severe stress symptoms than jurors not provided that opportunity. Finally, the Article recommends standards and techniques for both informal judicial debriefing and formal professional debriefing of jurors.

II. JURY MANAGEMENT

Trial judges manage many facets of the judicial process, [8] including cases and juries. [9] Managing has many meanings. When applied to juries, managing **99* means the judge must plan for the trial, communicate with the jury, lead the jury through the case, and guide the jury in applying the law for the decision.

Trial judges manage a substantial amount of the planning for jury intake. Judges often control the size of the panel needed. They may determine some of the procedures for calling jurors. [10] Juror orientation is often the trial judge's first contact with the jury panel. Many judges actively manage the voir dire process by controlling the scope and content of the questioning.

The trial judge controls, and therefore manages, the jury during trial through evidentiary rulings, admonitions and instructions, recesses, and handling trial interruptions. [11] Judges take responsibility for the comfort [12] and health [13] of jurors while in court. At the end of the trial, the judge controls the jury's exist from the system by determining when and how the jurors are discharged. Postverdict contact with jurors poses certain problems, some with more systemic ramifications than others. Judges still manage these contacts, including the “who” and the “how” of the process.

**100* Judges also make and enforce rules regarding lawyers' contacts with jurors after trials. These rules include ethical strictures, [14] court rules, [15] and general trial standards. [16] In addition, judges attempt to limit intrusions by the news media into the lives of jurors after trial. [17]

Judges are required to follow ethical restrictions regarding their own contact with jurors after trial. Canon 3 of the ABA Model Code of Judicial Conduct prohibits a judge from making any public comment that might reasonably be expected to affect the outcome or fairness of any pending case in any court. [18] The Canon also prevents a judge from making any nonpublic comment that might interfere with a fair trial or hearing in any pending or expected case. [19] This ethical rule further addresses whether a judge may explain the procedures of the court for public information. The relevant portion of the Canon states, “A judge should abstain from public comment about a pending or impending court proceeding in any court.... This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.” [20] When judges attempt to follow the ethical rules and promote public understanding of the legal system, they are often **101* put in an awkward position because they cannot ethically comment on the cases they are most familiar with until all appeals are final. [21]

The new Model Code of Judicial Conduct, adopted by the American Bar Association in 1992, affects a judge's duty when talking to jurors after a verdict. Section B(10) of Canon 3 now provides, “A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.” [22]

The commentary of the ABA Advisory Committee on the Criminal Trial accompanying Standards Relating to Trial by Jury decries the practice of some judges who have been heard, on occasion, to tell the jury they “did the right thing,” or they acquitted a guilty recidivist. [23] If these jurors are immediately assigned to another case, such comments from a judge could influence them in those cases. Avoiding commendation or criticism of the verdict does not mean, however, a judge should avoid all contact with jurors postverdict. If judges understand the reasons for controlling postverdict contact with jurors, they will be able to determine whether and what type of judicial contact is appropriate.

Restrictions on postverdict contacts with jurors generally reflect the long held common-law rule against inquiry into jury deliberations. One commentator posits the rule originating in an English opinion in 1785 and becoming a nearly unquestioned rule in the United States. [24] The rule has now been adopted in Rule 606(b) of the Federal Rules of Evidence and in various states. [25] Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict ... a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict ... or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or ***102** evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. [26]

The United States Supreme Court upheld this Rule against the argument the Rule prevented a criminal defendant from proving a violation of his Sixth Amendment right to a competent jury. [27] The Court held that prohibiting use of juror affidavits about juror intoxication advances three policies crucial to the jury system. First, the prohibition promotes open and frank discussion during jury deliberations. [28] Second, the rule maintains the community's trust in the jury system. [29] Third, it protects jurors from harassment if they return an unpopular verdict. [30] These reasons all focus on protecting the deliberative process by cutting off some types of inquiry into the dynamics of actual jury deliberations in real cases. [31]

When trial courts apply these policy reasons to the question of whether the judge should meet and talk privately with the jury postverdict, the analysis leads to some confusion. If trial judges focus on helping the jury understand its function and duties, while promoting public acceptance of the jury system, then the reasons supporting Rule 606(b) seem irrelevant to the trial judge's problem.

Lessening potential distress in jurors, however, does not impinge on the policies supporting prohibitions on some types of postverdict contact. In fact, one reason for debriefing jurors postverdict is consonant with protecting jurors from harassment. Harassment produces stress. Stressed jurors are less likely to want to be on another jury. Therefore, a rule preventing harassment suggests another reason favoring postverdict contact: reducing juror stress. The basic policy supporting both the rule preventing harassment and a preference for debriefing juries is to preserve the jury system and to promote wide acceptance of jury service.

III. PRIOR STUDIES OF JUROR STRESS

In an article in the Riverside, California Press-Enterprise, four jurors who deliberated to verdicts in different murder trials were interviewed some time after the trials. [32] One juror described violent nightmares about attacks on family and ***103** friends; these nightmares recurred for a year after the trial. [33] Another described his jury service as so emotionally taxing he would rather relive his two active duty years in Vietnam than go through the trial again. [34] A third juror was fearful fourteen years after the trial. [35] The fourth juror, interviewed three and one-half years later, had strong emotions about the trial. The press interview was the first time the juror had been asked how she felt about the experience. She stated how important it was "to talk to somebody about how I feel about it." [36]

A juror interviewed five months after a Connecticut murder trial discussed her anxiety when something on television reminded her of the murder. [37] The same juror complained that although " l ots of work goes into the selection of a jury, ... nothing is done to help with how upset you can feel." [38]

Print journalists are not the only ones intrigued with jurors' reactions to difficult trials. In 1987, the experience of a Lowell, Massachusetts, murder trial jury was the subject of a television documentary. The documentary was shown on ABC's Nightline during the sequestered deliberations of the Oliver North trial jury. [39] After the murder case verdict, the documentary's reporter

interviewed some of the jurors about their experiences. Some jurors reported suffering irritability, sleeplessness, and flashbacks to the scene of the dump where the victim's body was found. [40]

The reactions of jurors who decide difficult issues in murder trials resemble certain clinical signs of posttraumatic stress disorder. [41] Psychiatric literature and studies propose that persons experiencing an event outside the normal range of human events and quite distressing to most people will have similar responses during the process of working through the stressful event. [42] Strains to a person's psychological system can produce a large number of responses, not all of which are maladaptive. Repetition and chronic recurrence of a number of these responses over a long period of time, however, can be signs of a clinical disorder. [43]

A study of jurors after a murder trial in Cincinnati, Ohio, found evidence of stress disorders in some jurors, and stress responses in many. [44] After three sessions with ten of the fifteen jurors, including alternates, psychiatrist and author Dr. Stanley Kaplan determined that four of the jurors fit all of the standard psychiatric ***104*** criteria for diagnosis of posttraumatic stress disorder six months after the trial was over. [45] The jury was "death qualified," and, as part of its verdict, it returned a death sentence. [46] Stress responses included recurrent frightening dreams, upsetting thoughts, anxiety brought on by everyday occurrences reminding them of an aspect of the evidence, and even phobic reactions to places similar to the murder scene. [47] Not all the results were negative. Some jurors emerged with more self-confidence and maturity. [48] Others stated they spent more time with their children, dealing thoughtfully with the children in hopes of preventing them from turning out as badly as the defendant. [49]

Dr. Kaplan noted an interesting phenomenon. Although some of the sessions "reawakened memories of the trial and evoked transient increases in symptoms in some jurors, most said they had benefited from the discussions. They were particularly grateful for the opportunity to discuss their experiences with someone who could understand their thoughts...." [50]

Dr. Kaplan and a colleague have separately reported interviews with forty jurors from this case and three other criminal trials. [51] Twenty-seven of the jurors exhibited one or more physical or psychological symptoms the authors thought were related to their jury duty. [52] Complaints ranged from sleep disturbances, reported by thirteen jurors, to overt physical illness, including headaches, hives, and peptic ulcer flare-up. [53] The report commented on symptoms of posttraumatic stress found in several jurors who served on murder trials. One juror reported that after seeing graphic photographs of the murder victim, she "went home ill" and could not eat for three days. [54] Six weeks after the verdict, this juror said that when someone mentioned the case, she experienced "nervous, unstable feelings inside." [55] She also reported she still dreamt about the case. [56] Another juror mentioned anything reminding her of the trial made her tearful. [57] The same juror reported having trouble sleeping during sequestered deliberations. [58]

Some experimental evidence suggests positive effects accrue from talking with an accepting and trustworthy confidant about traumatic events. [59] These effects can include both reductions in reported physical illness [60] and improvement ***105*** in immune system functioning. [61] Benefits derived from discussing shared traumatic experiences lie at the heart of recommendations from psychiatrists that jurors exposed to disturbing evidence in high profile criminal cases be debriefed by mental health professionals after the trial. [62]

One professional debriefing of a jury has recently been reported. [63] After a six week murder trial in Kentucky, which involved an alcohol-related traffic accident resulting in the death of twenty-seven people, mostly school children, the judge engaged a crisis debriefing team to help the obviously distraught jury. [64] Two psychiatry professors conducted a voluntary two-hour session immediately after sentencing. Eleven jurors, the judge, the court reporter, a bailiff, and one jailer attended. [65] The debriefers described the session's start as follows: "We began the session by acknowledging the amount of stress that the jurors

had been under and by emphasizing the importance of talking about their experience. We also outlined common reactions to stress and their clinical manifestations. The jurors were then invited to share their feelings and perceptions." [66]

The trial occurred in a rural community, where most of the jurors knew either relatives or friends of the defendant. [67] The victims were from a small town almost eighty miles away. [68] Most of the debriefing session focused on the jury's anger at being "caught in the middle." [69] The debriefers moved the discussion towards allowing the jurors to accept that they had done their job as jurors in a way that ensured a fair trial and verdict. [70] The discussion then turned to the cognitive and emotional reactions the jurors could expect. The psychiatrists suggested the jurors might experience sleep disturbances, decreased appetite and concentration, irritability, and intrusive thoughts. [71] Some jurors already had these complaints. [72] The facilitators encouraged the jurors not to misinterpret these signs as anything but a normal response to a stressful event. [73]

The intensity of the session surprised the psychiatrist-debriefers. [74] They thought the jurors' responses were as severe as that of rescue workers or law enforcement officers who are debriefed after working at disaster scenes. [75] The ***106** psychiatrists wrote that the stress placed on jurors had not been fully appreciated in the past, at least in the psychiatric profession. [76] Some of the factors leading to this level of stress, in their opinion, included the length of the trial and the jurors' inability to obtain any emotional release by talking about it during the trial. [77]

Mental health professionals suggest debriefing sessions with jurors after trial should include information about coping with stress and its normal effects. These sessions should offer mutual support and validation of the jurors' shared experience. If jurors can realize they are not alone in their powerful feelings, they can be more comfortable with these feelings and therefore avoid future adverse reactions. [78]

Judges throughout the country apparently have been helping jurors overcome the effects of stress in the jury box. [79] I have routinely debriefed jurors in criminal cases since 1984, and the intensity of the reaction of the jurors in the Kentucky study is not surprising. I have seen the same intensity of reaction in jurors deciding both murder and sexual abuse cases. The reactions I have observed do not appear to depend upon either the size of the community or the amount of publicity about the case. Informal contacts with judges from around the United States indicate some judges do regularly talk to jurors after a verdict is announced in criminal cases. These trial judges are concerned about the effects these informal debriefings have on jurors and whether the practice is effective. They also feel ill-equipped to engage in this type of discussion. [80] No known studies have explored the effects on juror stress levels of private, postverdict conferences with the trial judge.

Psychiatric [81] and psychological [82] literature predicts that encountering an event generally beyond the range of common human experience may produce stress symptoms in susceptible people. The criteria for diagnosing a post-traumatic stress disorder [83] require the subject to experience a very serious stressful event. Such events include assault, rape, flood, earthquake, bombing, torture, airplane crash, military combat, or motor vehicle accidents with serious physical injury. [84] One author indicates his studies show less serious life experiences ***107** also may induce stress symptoms. [85] Certain persons may be more disposed to having stress symptoms because of these experiences. [86] Other studies suggest stress responses may be lowered by a person discussing the stress-producing event. [87] The literature therefore suggests postverdict discussions between the trial judge and jurors could have an effect on jurors' stress levels and later reactions.

IV. A STUDY OF IOWA JURORS

A. Design and Methodology

The Iowa jury study was designed to assess stress levels in a large number of jurors involved in serious criminal cases. A questionnaire was sent to jurors who decided forty-four murder cases in Iowa. The names and addresses of jurors who deliberated to verdict in these Iowa cases between January 1, 1989, and January 30, 1991, were obtained from public records. [88] A three-

page questionnaire was sent to all 528 jurors. All jurors' names and personal information were omitted from the questionnaires. The jurors were assured anonymity. Each questionnaire was coded for the county and case number only. Questionnaires were given serial numbers based on the order received from each trial. Three-hundred fifty responses were received. No follow-up letters were sent. The response rate of sixty-five percent without a follow-up request was unusually high, and greater than reasonably expected. This rate may have been due to the nature of the inquiry, the source of the request (a judge), or a perceived (or unconscious) need of the responding jurors to communicate with someone about their experience. It can be interpreted as partial confirmation that jurors are concerned about the legal system and their part in it.

None of the juries in the Iowa study were sequestered. Two juries heard cases removed from the original county on change of venue. At least two cases were retrials after appellate court reversals; none were repeats of the same case. Juries in Iowa have no responsibility for recommending sentences. Many jurors seemed aware that first degree murder is punished in Iowa by life imprisonment without parole. Dr. Kaplan's work suggests sequestration and death penalty sentencing functions place special stress on jurors. [89] These variables could not be controlled in the study. Their effect must be evaluated in future inquiries.

B. Analysis

The questionnaire was designed to determine the jurors' reactions to the trial and to the trial judge's closing conference with them, if any. Six numbered questions were placed on three sheets. The first question asked for the type of ***108** "private" conference the jury had with the trial judge after the verdict was announced. Three types of private conferences were postulated: a question-and-answer session, informal conversations, and an instructional session about whom to talk to or what to talk about after leaving the courthouse. An answer also was allowed to indicate all three had occurred. The final answer option indicated no posttrial private conference with the judge. A pivotal problem with the study was the inability to control the type and content of any post trial conferences between the judge and jury. Many of the juries considered to have been "debriefed" by a judge may only have had an informal talk about jury procedures or ways to leave the courthouse without meeting the press. Responses to the first question are tabulated in Table 1.

TABLE 1 [90]

JUROR REPORTS OF TYPES OF JUDGE/JURY CONFERENCE

Type	Number
Question and answer	36
Informal conversations	63
Instructional session	27
All of the above	36
No private conference	229

A subpart of the first question asked each juror to describe the private conference with the judge and to indicate what happened in the meeting. This open-ended request and a later question asking for the jurors' recommendations for discussions with the judge provided insight into jurors' thoughts about the trial process. Many pages of textual responses from jurors were received. They were coded by a questionnaire serial number (1-350) and by county and case number. No textual analysis has yet been attempted on these responses. Some pertinent quotes from these juror responses are included in both text and footnotes.

The second question asked whether the juror discussed the case itself and the juror's feelings about the jury experience with others after leaving the courthouse. The form provided response fields including family members, close friends, work colleagues, neighbors, other jurors, and "any others." Responses are tabulated in Table 2.

TABLE 2 [91]

JUROR DISCUSSIONS AFTER LEAVING COURTHOUSE

Discussed case and feelings with:	Number	%
Family members	333	91.7
Close friends	267	73.6
Work colleagues	216	59.5

Neighbors	82	22.6
Other jurors	155	42.7
Any others	34	9.4

***109** The third question had fifteen subparts. The subparts were designed to elicit whether the juror experienced typical stress responses to the evidence presented in the trial. The question used is printed below.

You were a juror in a trial concerning a serious crime. Below is a list of comments made by people after observing evidence of similar crimes. Please check the one box next to each item that most closely describes how frequently these comments were true for you since the trial. If they did not occur, please mark the "Not at all" box.

a. I thought about it when I didn't mean to.

b. I avoided letting myself get upset when I thought about it or was reminded of it.

c. I tried to remove it from memory.

d. I had trouble falling asleep or staying asleep.

e. I had waves of strong feelings about it.

f. I had dreams about it.

g. I stayed away from reminders of it.

h. I felt as if it hadn't happened or wasn't real.

i. I tried not to talk about it.

j. Pictures about it popped into my mind.

k. Other things kept making me think about it.

l. I was aware that I still had a lot of feelings about it, but I didn't deal with them.

m. I tried not to think about it.

n. Any reminder brought back feelings about it.

o. My feelings about it were kind of numb.

After each comment, four boxes appeared in columns headed "Not at all," "Seldom experienced," "Sometimes experienced," and "Often experienced." [92]

The fourth question asked whether the juror "would hesitate to serve on another jury in the future." Due to the imprecise wording of the question, the "yes or no" responses were not consistent and therefore not useful.

***110** The fifth question asked the juror to make recommendations for discussions between judges and jurors after verdicts are announced. The textual responses have not been coded or otherwise analyzed, but some are used in the discussion.

The sixth question asked jurors to indicate their gender, age, marital status, and level of formal education. These demographic variables are shown in Table 3, along with certain comparison information about the general demographics of the Iowa population.

TABLE 3

DEMOGRAPHIC VARIABLES

Demographic Category	Number	%	State-wide %	
Gender: [93]				
Female	196	56	52	
Male	152	43	48	
No response	2	1	0	
Totals	350	100	100	
Age: [94]				
18-40 years	154	44	54	
41-60 years	135	38	19	
Over 60 years	59	17	27	
No response	2	1	0	
Totals	350	100	100	
Marital Status: [95]				
Single	37	10	23.7	
Married	282	81	60.6	
Divorced	19	5	7.3	
Widowed	10	3	8.4	
No response	2	1	0	
Totals	350	100	100	
Education: [96]				
Grade school	20	5.6	*	
High school	102	29	*	
Some college	124	35.3	*	
College graduate	79	23	*	
Graduate degree	21	6	*	
No response	4	1.1	*	
Totals	350	100	*	

***112** No attempt was made in the study to investigate the reasons for differences between the demographic make-up of the jurors studied and the state population. The reasons can be explained, however. In Iowa, jurors are drawn from two sources: drivers' license and voter registration lists. [97] Slight variations may result from using these two lists. Voir dire and jury selection by lawyers adds further variables to the selection process. Some judges suggest lawyers will generally remove prospective jurors likely to have severe stress reactions to expected evidence, especially in a serious case. Also, jurors who indicate in voir dire the stress of a gruesome or difficult case would affect their ability to be impartial will usually be excused for cause. Therefore, a close match between the demographics of the community and the final jury seated for any serious case is seldom obtained.

The high percentage of persons responding who were college graduates, 29% of responding jurors, compared to the state average of 13.9% of the general population over age 25 who have more than 16 years of education, is striking. [98] Two explanations suggest the result. The first explanation is lawyers in these cases may choose more educated jurors. Second, a self-selection process could also be involved: college educated persons may respond more readily to a questionnaire in such a study. Both factors probably influenced the divergence of the population demographics.

Analysis of the responses [99] to the first question revealed twelve juries had been “debriefed” by the trial judge. For purposes of the study, a debriefing was any private postverdict conference with the judge in which jurors' questions were answered, informal conversations were held, and instruction was given about to whom the jurors could talk after discharge. No information was received indicating any judge talked with the jurors about typical psychological stress responses. Of the jurors who returned questionnaires, 91 had been debriefed and 258 had not. One response was not able to be assigned.

Because none of the juries were professionally debriefed by psychiatric or psychological clinicians, the study could not compare stress levels of jurors debriefed by such trained persons. Analysis of the data shows there was no statistically significant difference in the aggregate mean stress levels reported by jurors debriefed by judges and those not debriefed. [100] The small number of jurors **113* experiencing a private postverdict conference with the trial judge made a clear test of the second hypothesis difficult. Data sets comparing 91 responses to 258 responses are not likely to yield statistics with a confidence level of 95%. The inability to control the type or content of the judges' private conferences with jurors was another methodological limitation. The only reasonable conclusion to be drawn from the second question in the hypothesis is that juror stress response is neither increased nor decreased by postverdict judicial debriefing. Confirmation of this hypothesis must await further studies in which the postverdict conferences can be controlled better. [101]

The total stress experienced by a juror was inferred by ranking the questionnaire response to the fifteen stress questions. The frequency of experiencing a stress response was coded numerically, assigning a value of "zero" to the "Not at all" response, "one" to the "Seldom experienced" response, "three" to the "Sometimes experienced" answer, and "five" to the "Often experienced" answer. [102] Under this method, a total stress response of 15 or less would mean the juror experienced very little stress relating to the trial. Of responding jurors, 44% had total stress scores of 15 or lower (n = 156). A total stress response of 60 would indicate a very high level of stress. Only 9/10 of 1% of the responding jurors reported such high stress (n = 3). The mean total stress response for all responding jurors was 19.48, and the standard deviation was 14.623. A breakdown of the total stress scores by quartile is shown in Table 4.

TABLE 4

TOTAL STRESS SCORES—QUARTILE DISTRIBUTION

Stress Score Range	Number	Percentile
0-6	86	0-25%
7-17	82	26-48%
18-28	93	49-75%
28-73	89	76-100%

The raw numbers indicate nodes or clusters of respondents between total stress scores of 2 to 5 (n = 46), between scores of 10 to 15 (n = 50), and between scores of 18 to 20 (n = 32). As predicted by the standard deviation of the total stress scores, 60% of the responding jurors had total stress scores of between 5 and 34.

**114* not been debriefed showed a mean of 19.686. The standard deviation for the debriefed group was 13.069, while for the group not debriefed it was 15.174.

Statistical tests run on the data indicate a difference in stress responses between women and men. On average, women reported statistically significant higher stress responses than men. [103] The explanation offered in psychological literature is that women are more likely to admit stress symptoms than men. [104] An alternate explanation could be women react to stress in the jury trial setting in ways different from men.

The data from the study also show a link between the severity of the stress response and the number of different types of people with whom the juror reported discussing the case experience. [105] The more types of people the juror reported talking to about the case, the higher the reported stress level. This may mean jurors experiencing high stress levels naturally attempt to reduce stress by "talking it out." The psychological literature encourages discussing traumatic events as an adaptive means of reducing stress symptoms. [106]

In Stress Response Syndromes, [107] Horowitz discusses some studies of self-reported stress responses. [108] A question quite similar to that used in this jury study was given to subjects clinically diagnosed as suffering from stress syndromes. One group of thirty-eight patients had experienced the trauma of violence towards themselves. Another group of forty-three had experienced the sudden unexpected death of someone close to them. A comparison of the mean stress responses to similar questions used in the study is shown in Table 5.

TABLE 5

MEAN ENDORSEMENT—STRESS SYMPTOMS

	Horowitz Studies		Iowa Jury Study
Question	**Violence Group n = 38**	**Death Group n = 43**	**Jury Group n = 350**
1	3.39	3.64	2.35
2	3.32	2.88	1.69
3	3.50	1.95	1.28
4	3.00	2.67	1.13
5	3.95	3.60	2.12
6	1.87	1.09	0.65
7	2.66	2.12	0.73
8	1.18	2.05	0.51
9	2.59	2.33	1.15
10	3.35	3.39	2.20
11	3.29	3.53	1.56
12	3.16	3.52	0.76
13	3.34	2.40	1.15
14	3.78	3.77	1.49
15	2.26	2.53	0.69

115 The comparison indicates jurors in serious criminal cases do report stress responses related to their jury experience. On the whole, these responses are much less severe than the responses of Horowitz's clinical subjects. The juror responses do, however, indicate stressed jurors.

C. Conclusions

From the study of Iowa jurors, it appears jurors in serious criminal cases suffer stress symptoms as a result of jury service. Postverdict debriefing by the trial judge does not seem to affect juror stress measurably, either positively or negatively. Because Iowa has no death penalty and Iowa juries have no sentencing function, the study may not be replicable in other states. The penalty for first degree murder in Iowa is life in prison without parole. Although some jurors in the study knew this before trial, others asked about the sentence after the verdict. [109] Another circumstance possibly linked to the low observed stress levels is that no juries in the study were sequestered. [110]

The difficulty of defining debriefing by a trial judge, [111] and the small number of debriefed jurors in the study, [112] make this study more suggestive than ***116*** definitive. It seems likely even a brief intervention, such as a short conversation with the trial judge, helped some jurors avoid serious stress reaction. No firm conclusions about brief intervention by the judge, however, can be drawn from this study. Given the broad definition of debriefing necessary in the study, [113] the effect of different judicial debriefing methods on juror stress must await further investigation when the debriefing methods can be controlled. One conclusion supported by the study is that jurors obtain stress relief from discussing their jury experience with family, friends, and others after the case is over. [114]

From these conclusions certain useful recommendations about jury debriefing can be extracted. Other recommendations can be made from both experience and the other literature reviewed.

V. RECOMMENDATIONS FOR JUROR DEBRIEFING

The Iowa jury study and the general literature do not conclusively show trial judge debriefing of criminal juries has either an adverse or a positive effect on juror stress. The literature postulates, however, a positive result from therapeutic discussions of stressful or traumatic experiences. [115] If the situation indicates a debriefing would aid the jury, trial judges can initiate the process with confidence.

Some commentators suggest professional debriefing should be considered regularly when a case draws high media attention, when the jury is sequestered, or when the trial is unusually long or difficult. [116] It may be a necessity in a notorious case when the jury has a sentencing function. [117] Whichever type of debriefing is selected, certain issues should be considered by the judge.

A. Debriefing by the Trial Judge

An effective way to begin debriefing a jury is for the judge to offer to answer jurors' questions. The first thing jurors usually want to know is whether the judge believes they did the right thing. The primacy of this question is born out by many responses from the Iowa jurors studied. One interesting, but typical, comment came from a juror in a large county.

I lived & breathed that trial for one and a half weeks. Then it was there with me for weeks afterwards. I park next to the _____ County jail daily & all I could see was the defendant sitting in there. I felt that we could have possibly convicted an innocent man. But, one day, a couple of months after the trial, I had a friend of mine find out the defendant's past and the weight of the whole world was lifted from my shoulders. I felt like it was really over. The defendant had been in a courtroom before and if he hadn't killed ***117** anyone before, apparently, he had tried to. I hadn't convicted someone who was as pure as the driven snow. All of this is leading up to something that I think would have helped me after the trial was over and the verdict was read. If the judge had talked to us & possibly showed some sign of approval over the verdict that was decided or even told us that this wasn't the first time the defendant had been in trouble, I think that I might have had a much easier time dealing with it. If the trial I served on had been more cut & dried than it was, the verdict might have been easier to decide on and live with. But being as it wasn't a drug related murder or even a very sensational murder trial, it made it much closer to home, like something that is more likely to happen in your own neighborhood than in downtown (big city). I really wish the judge had said something. [118]

The need to be reassured they did their duty when exercising an often disagreeable task is understandable. [119] In the 350 questionnaires received, 17 jurors commented on the need to know whether they had made the right decision. One typical response in this vein was:

> I feel it's important to allow the jurors to ask questions after the verdict is rendered. It's also important for the judge to tell the jurors they did a good job in reaching their verdict. It's a very difficult job for 12 people to decide the fate of another person—it weighed upon me for several weeks after the trial. [120]

The best response to this question, without violating judicial ethics, [121] would be to tell the jurors the trial judge's function is different from the jury's, and judicial ethics prevent a judge from commending or criticizing a jury's verdict. One juror in the study suggested a debriefing might not be such a good idea if it resulted in devaluing the jury's decision. The objection was stated:

I'm not sure [debriefing] is a good idea because as a juror you must come to a decision that you can live with—many jurors struggle with this & if a posttrial discussion with the judge were to change their mind (feelings) that person may have a difficult time dealing with the original decision. That original decision is something I must live with for the rest of my life—I want to feel good about it. [122]

The judge should assure jurors that by coming to a unanimous verdict, whether guilty or not guilty, they fulfilled the function of a jury in our system of justice. If jurors have not reached a verdict, but are discharged because they are hopelessly deadlocked, they can also be reassured they have fulfilled the function ***118** of a jury by requiring the State to prove its case by evidence convincing twelve people beyond a reasonable doubt. In this situation, it is also appropriate to discuss with jurors the provisions of 606(b) of the Federal Rules of Evidence [123] and to indicate that the attorneys may want to know what evidence was most bothersome. The judge may properly admonish the jurors to avoid indicating who the minority jurors were in order to avoid harassment and maintain confidentiality. [124] A formal statement to the jury in open court may emphasize these points. Appendix A offers a suggested form for such a statement.

Jurors often want to know how and when defendants will be sentenced. [125] This question allows the judge to explain the presentence report, the state's sentencing laws, and the judge's approach to the sentencing process. Jurors may also ask about the defendant's prior criminal history. [126] In states in which the jury does not decide the sentence, [127] it seems appropriate to advise them of the **119* defendant's known prior criminal record, if any. Many jurors are visibly relieved when the defendant's prior record is disclosed after a guilty verdict. [128] They may ask why the defendant's prior record was not mentioned during the trial. This question allows the judge to explain the law about impeachment [129] and some of the rules of "basic fairness" surrounding criminal evidence and procedure. [130] The jury's relief on hearing about the defendant's prior record provides an opening to discuss why the rule against disclosure may protect persons from being convicted for being a "bad person," [131] rather than for the act the State claims they committed.

Jurors need to discuss whether, how, and to whom they can talk about the case after it is over. During the trial, they are repeatedly told they are not to discuss the case among themselves or with anyone else. After the trial, they can talk to anyone they wish about the case, or about their reactions to the case. [132] It may be helpful to advise jurors they retain the right to refuse to talk to anyone about the case. The judge may advise the jury that if someone continues to bother them about the case after the juror tells them they do not want to discuss it, they should report the harassment to the court, as the system has the means to protect their privacy. [133] Advising jurors of this in open court after the verdict also sends the message to the defendant's and victim's friends and family that the court will protect jurors from harassment.

The responses of some jurors in the study indicate that sometimes juries debrief themselves. When asked what recommendations they have for discussions between judges and jurors after verdicts are announced, one juror who had no judicial debriefing wrote:

> I never felt like I had the need to talk to the judge afterwards, but after the verdict, about half of the jurors went to a bar/restaurant and talked for about an hour. I felt that was a good thing—we had the chance to share our thoughts & feelings about the intense experience we went through together. Talking about it helped me. I felt like it helped tie up loose ends. [134]

Another juror, who was debriefed, had a similar experience:

> **120* I liked the private conference. Nearly everyone stayed to talk to the judge and also to the lawyers. I was a juror who was of the minority opinion (3-no, 9-yes) when we first began to deliberate. I had to go back through my notes item by item to make up my mind about the case. The conference allowed me time to debrief. The majority of the jurors did go to a place to eat and have a drink after the case was done. This gave us an opportunity to talk and share our feelings. [135]

A judge debriefing a jury should at least mention some of the stress responses a juror might expect. The judge can properly mention typical stress responses: sleep disturbances, dreams about the case or evidence, strong feelings about the evidence, avoidance of reminders of the case, and even unbidden thoughts about the evidence or facts of the case. [136] Even if no questions are asked, it seems proper to advise the jurors these responses are normal, [137] but if they persist for a long period of time, [138] the juror should consult a counselor. It is also appropriate to suggest the jurors talk out their feelings about the case and the evidence with a spouse or other close, trustworthy friend, because these discussions can help them work through the experience.

Many judges may feel uncomfortable holding jury debriefing sessions. Although judges are not trained to be therapists, active listening strategies are useful for judges who debrief. The techniques of tension-reducing dialogue, if used by judges in debriefing sessions, lead to great rewards for both the judge and the jurors. The judge should listen with an empathetic attitude. This encourages jurors to express their feelings. The judge should allow jurors to complete their statements without interruption. Interjecting the judge's own thoughts and feelings is generally counterproductive. The judge should, from time to time, replicate, or repeat back, what was said by a juror. Repetition lets the jurors know the judge is listening to them. The judge should carefully censor any devaluing or "put down" statements. It is never a good idea in a debriefing session to challenge

feelings expressed by any juror. Using these methods, judges confirm that the courts and the legal system hear and act on the valid concerns of the community.

Formalizing the use of these feedback mechanisms may also have other systemic benefits. Professor Patrick Kelley has suggested the jury system helps to form tort law by affirming the community's expected behaviors through jury *121 verdicts. [139] The same analysis may apply to criminal jury verdicts, although attenuated through the lens of legislation. If this is true, then the feedback mechanism of jury debriefing can provide positive systemic benefits. Owen M. Fiss has suggested a community must have a belief in certain shared public values and be willing to act on them. [140] Fiss posits the judiciary has a "responsibility for giving meaning and expression to those values." [141] Although this analysis seems focused on appellate judges, the combination of Fiss's and Kelley's analyses does suggest another reason for trial judges to routinely debrief juries: reinforcement of shared public values.

Judges can also learn much from postverdict debriefing. Jurors often provide insights on which instructions work and which ones need careful revision. [142] The jury's perceptions of some court procedures can also be enlightening. For example, many jurors are quite upset with the unfamiliar process of polling a jury in a criminal case. Without some explanation, jurors may be fearful. As one juror in the study wrote, "Why must the jury be polled? Giving our name and place of employment in front of the accused, also. Some of us were fearful of retribution from friends/family of the defendant—especially since we had to be escorted under police protection from the courthouse to our cars." [143] Another juror thought the procedure was unnecessary, and wrote, "Immediately after the verdict was announced—the criminal's lawyer wanted all of the jury polled as to how they voted—in front of the criminal. I thought that was ridiculous—after all we had just brought in a unanimous verdict of guilty." [144] Considering these responses, judges might well change their procedure and explain the process prior to the actual poll.

Some judges fear if they debrief juries they will impair their proper function as judge. Citing the rules on jury misconduct, [145] judges suggest that during debriefing the jury may disclose some jury misconduct, such as improper experiments, [146] discovery of inadmissible evidence, [147] or outside influences. [148] Neither *122 the rules of judicial ethics nor the necessity for fidelity to the law of the jurisdiction require inquiry by the judge into areas of potential misconduct, or prohibit judges from disclosing evidence of misconduct if it comes to their attention. Because the trial judge will have to rule on any posttrial motions involving alleged juror misconduct, caution is imperative.

At the start of any debriefing conference, the trial judge should announce certain ground rules. One has already been discussed: the judge will not comment on the verdict and will not agree or disagree with it. [149] Another is no one should discuss or comment on the way the jury arrived at the verdict or anything said during deliberations. [150] Suggesting ground rules allows the judge to explain the reasons for protecting jury deliberations and provides the opportunity to discuss the evidence rules regarding jury testimony or affidavits. [151]

If the judge explains the rules that prevent jurors from being brought into court as witnesses concerning jury room deliberations and explains the exception for evidence of outside influences, then it is very unlikely the issue of jury misconduct will ever arise. If misconduct comes to the judge's attention, he or she is under an ethical requirement to disclose it to the attorneys involved so they can take any necessary action.

These recommended rules for judges debriefing juries would be useful in most criminal cases. In fact, they would be effective in most murder or serious felony trials. [152] The high-profile, media-attended case, however, may require more specialized jury debriefing.

B. Debriefing by Professionals

Because the trial judge has ultimate responsibility for jury management, the judge must decide whether to provide the jury with professional debriefing. [153] This decision is difficult for the trial judge. A sensitive judge may be able to determine during

pretrial proceedings whether the case will likely require jury debriefing. The necessity often does not become apparent to the trial judge, however, until the trial is in progress. [154]

Some case attributes known before trial are predictors of potential high juror stress. These include: a case in which a public figure is either the victim or *123 a defendant, [155] a case receiving national news media attention, [156] or a case involving sensational allegations or potentially disturbing evidence. [157] If the constellation of case characteristics includes a possibly lengthy trial, jury sequestration, or jury sentencing functions, [158] juror stress will likely be heightened. When three or more of these characteristics converge, the trial judge should seriously consider preparing for postverdict professional debriefing.

After voir dire, the trial judge should know a good deal about the jurors' stability and sensitivity levels. During the trial, the judge should remain aware of juror reactions. The final decision about professional debriefing should only be made after balancing the jurors' needs with the added risk of intrusion into the jurors' lives, [159] and the decision would best be made near the end of the trial, or even while deliberations are underway.

Once the judge has decided to provide professional debriefing, the next decision is choosing the debriefer, or the debriefing team. Making this determination is not a usual judicial function. In four reviewed instances of professional debriefings, two judges asked professors of psychiatry to provide the service. The first was in a Kentucky case, discussed previously. [160] The debriefers, Dr. Theodore B. Feldmann and Dr. Roger A. Bell, are professors of psychiatry at the University of Louisville School of Medicine, Louisville, Kentucky. The second judge, in a Wisconsin case, called in the same debriefers at the urging of the state court administrator. [161] The third judge called on psychologists experienced in debriefing police and emergency response teams. [162] The fourth, a judge in Santa Clara County, California, invited a psychiatric social worker to debrief a murder trial jury. [163]

The sparse literature on the subject does not shed much light on deciding whether to use a professional debriefer. If the necessity for professional debriefing is clear before the trial starts, the judge may begin the search by consulting local mental health centers, nearby medical schools, or other community or regional resources. Judges should consult their court administrators when considering debriefing because the administrator will be involved in both the fiscal and physical plant aspects of planning for the debriefing. As with most difficult decisions, advance thought and preparation will smooth the decision process.

The judge should also determine who, aside from the jury, should attend the session. In one reported instance, the trial judge, the court reporter, a bailiff, *124 and a jailer all attended the session. [164] The debriefers were initially seen as “strangers” to the situation. The reluctance of the jurors to discuss their feelings in the session was overcome by the trial judge's participation. [165] Validation of the process by an authority figure, the judge, may enhance juror participation. It also provides strong evidence that the judicial system pays attention to the needs and feelings of all participants.

VI. CONCLUSION

Jurors in difficult criminal cases often experience stress as a result of their service. The judicial system should be sensitive to this fact and should respond appropriately. Postverdict debriefing of criminal trial juries, either by informal conferences with the trial judge or by formal professional sessions, is an appropriate response.

Trial judges who debrief juries will reap many benefits. The community will learn the court system is concerned with jury participation in the law process. Public relation benefits will lead to more support for the courts and their needs. The debriefing judge will learn which procedures and practices create juror support, and which do not. The early warning function of conversations with jurors can help the trial judge improve the performance of both the judge and the system. A less obvious benefit is that debriefing juries also tends to reduce judicial stress. The judge's job satisfaction will be enhanced by the feedback available in postverdict conversations with jurors.

Professional debriefing can provide many of the same systemic benefits for the courts. If the trial judge participates, the reduction of judicial stress will improve judicial performance. If the rules of judicial ethics are carefully followed, the courts will keep their reputation as fair forums unsullied.

Properly handled, debriefing juries postverdict can help ensure continued public support for the American jury trial system without compromising ethical or legal values. Our trial courts will therefore continue to peacefully settle disputes about appropriate behavior by enforcing shared community values of fairness and the rule of law.

*125 APPENDIX

Now that you have concluded your service on this case, I thank you for your patience and conscientious attention to your duty as jurors. You have not only fulfilled your civic duty, but you have also made a personal contribution to the ideal of equal justice for all people.

You may have questions about the confidentiality of the proceedings. Because the case is over, you are free to discuss the case with any person you choose. However, you do not have to talk to anyone about the case if you do not want to. If you tell someone you do not wish to talk about it and they continue to bother you, let the Court know, for we can protect your privacy. If you do decide to discuss the case with anyone, I would suggest you treat it with a degree of solemnity, so that whatever you say, you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of all the parties. Also, if you do decide to discuss the case, please respect the privacy of the views of your fellow jurors. Your fellow jurors fully and freely stated their opinions in deliberations with the understanding they were being expressed in confidence.

Again, I thank you for your willingness to give of your time away from your accustomed pursuits and faithfully discharge your duty as jurors. You are now excused.

Footnotes

a1 District Court Judge, Seventh Judicial District of Iowa. B.A., University of Notre Dame, 1963; J.D., University of Iowa, 1966. This Article is in partial fulfillment of the requirements for the Master of Judicial Studies degree program at the University of Nevada, Reno in cooperation with The National Judicial College.

1 See, e.g., Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U.CHI.L.REV. 494, 511-12, 558 (1986) (reporting only 5 to 12% of federal court civil case dispositions are by trial). Settlement conferences in state courts are also reducing the number of civil trials. See Kristena A. LaMar, Pre-Trial Settlement Conferences in Multnomah County, 27 WILLAMETTE L.REV. 549, 556 (1991) (reporting a settlement rate of 88% of civil cases over a three-year span in an urban Oregon state court).

2 Other authors have postulated that the work of lawyers is to create reality in the courtroom by using specifically "legal" rhetorical arts. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981); JAMES B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); Gerald B. Wetlaufer, Rhetoric and Its Denial in Legal Discourse, 76 VA.L.REV. 1545, 1559 (1990).

3 MARDI J. HOROWITZ, STRESS RESPONSE SYNDROMES 17-35 (2d ed. 1986).

4 Id.

5 See infra text accompanying notes 41-58.

6 See infra text accompanying notes 32-40.

7 See infra text accompanying notes 45-78.

8 See, e.g., ERNEST C. FRIESEN, JR., ET AL., MANAGING THE COURTS 133 (1971); E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U.CHI.L.REV. 306 (1986); Judith Resnik, Managerial Judges, 96 HARV.L.REV. 374 (1982).

Even the United States Supreme Court has acknowledged trial judges should "manage" litigation. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 171 (1989). The majority opinion brought, however, a strong dissent from Justice Scalia, joined by Chief Justice Rehnquist, stressing limited judicial power, strict statutory and rule construction, and the purity of the "adversarial" system as opposed to case management by inquisition. Id. at 181 (Scalia, J., dissenting). Some commentators argue the Supreme Court has increased the need for judicial management of cases through amendments to the Federal Rules of Civil Procedure. See, e.g., Paul D. Carrington, The New Order in Judicial Rulemaking, 75 JUDICATURE 161, 164 (1991).

9 In 1982, the National Judicial College, the oldest institution providing specialized training for trial court judges, offered only one course with the word "management" in its title: "Court Management—Managing Delay." In 1992, the College offered six courses related to managing by trial judges.

10 See, e.g., Michael H. Graham & Richard S. Pope, One Day/One Trial or a One Week Term of Jury Service: The Misleading Marketing of Modern Jury Management Systems, 45 MO.L.REV. 255 (1980). Much of the literature is directed specifically at judges. See, e.g., G. Thomas Munsterman, How to Manage Your Jury by Computer, 28 JUDGES' J., Spring 1989, at 22, 24, 52.

11 These judicial functions are presently receiving more study and development. See, e.g., Put Time on Your Side: Modern Trial Techniques Can Help You—If You Master Them, 29 JUDGES' J., Fall 1990 (issue dedicated to studying techniques to make trials more efficient); Howard R. Cabot, Expediting Trials Through Rule 611, DEFENSE, May 1991, at 21.

12 See STANDARDS RELATING TO JUROR USE AND MANAGEMENT Standard 14, Standard 19(c) and commentary (1983); RICHARDSON R. LYNN, JURY TRIAL LAW AND PRACTICE §§ 6.1, 6.5 (1986).

13 See, e.g., United States v. Diggs, 649 F.2d 731, 737-38 (9th Cir.1981) (trial judge allowed jury to separate during extended mid-trial recess due to illness of one juror); People v. Prisco, 326 N.Y.S.2d 65, 66-67 (App.Div.), aff'd, 286 N.E.2d 279 (N.Y.1971), and cert. denied, 409 U.S. 1039 (1972) (trial judge called for medical care for a juror who became ill after the jury had commenced deliberation).

14 IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (1971); see also id. EC 7-29 to 7-32; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (1980); id. EC 7-29 to 7-32. For a general discussion of the problem, see LYNN, supra note 12, at 225-29; Dale R. Agthe, Annotation, Propriety of Attorney's Communication with Jurors After Trial, 19 A.L.R.4th 1209 (1983).

15 See, e.g., United States v. Davila, 704 F.2d 749, 753-54 (5th Cir.1983) (citing a local rule in the Western District of Texas that prevented a lawyer from interviewing jurors after trial without prior approval of the court). In Davila, the court admits protecting jurors after trial has been a difficult subject for judges. Id. at 754 n. 8.
In Rakes v. United States, 169 F.2d 739 (4th Cir.), cert. denied, 335 U.S. 826 (1948), the Fourth Circuit stated a lawyer who interviews jurors after trial "acts at his peril, lest he be held as acting in obstruction of the administration of justice." Id. at 745-46. For a comprehensive discussion of this subject, see Note, Public Disclosure of Jury Deliberations, 96 HARV.L.REV. 886 (1983).

16 See, e.g., STANDARDS RELATING TO TRIAL BY JURY § 5.6 (1968). A similar standard has been proposed to apply to prosecutors. STANDARDS RELATING TO THE PROSECUTION FUNCTION § 5.10 (1971).

17 Some federal trial courts have restricted news media interviews of jurors after verdict, ostensibly to protect jurors from harassment. See, e.g., United States v. Doherty, 675 F.Supp. 719, 724 (D.Mass.1987). See generally Tim A. Thomas, Annotation, Validity and Effect of Restraints on Postverdict Communication Between News Media and Jurors in Federal Case, 93 A.L.R.Fed. 415 (1989). The circuit courts of appeal, however, have limited trial court orders that prohibit all press access to jurors after verdict. See, e.g., Journal Publishing Co. v. Mechem, 801 F.2d 1233 (10th Cir.1986) (holding a restriction in a criminal case overbroad); United States v. Sherman, 581 F.2d 1358 (9th Cir.1978) (holding a restriction in a criminal case overbroad). Reasonable restrictions on press interviews, clearly tailored to prevent harassment, have been approved. See, e.g., United States v. Harrelson, 713 F.2d 1114 (5th Cir.1983), cert. denied, 465 U.S. 1041 (1984); In re Express-News Corp., 695 F.2d 807 (5th Cir.1982).

18 MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

19 Id.

20 Id.

21 Id. Canon 3B(9) cmt.

22 MODEL CODE OF JUDICIAL CONDUCT Canon 3B(10) (1992). There is no standard similar to section B(10) in any preceding code of judicial ethics. A fairly equivalent suggestion, however, is found in STANDARDS RELATING TO TRIAL BY JURY § 5.6 (1968). The commentary supplementing § 5.6 indicates a fear that any comment by the judge, favorable or not, might influence the jurors in other cases, especially when the jurors may be called to serve in another case during a long term of jury duty. In areas in which a "one-day, or one trial" term of jury service is in effect, this fear seems unfounded.

23 STANDARDS RELATING TO TRIAL BY JURY § 5.6 cmt. (1968).

24 See 8 JOHN WIGMORE, EVIDENCE § 2352, at 696-97 (John T. McNaughton ed., 1961).

25 See, e.g., IOWA R.EVID. 606(b). The Comment of the Iowa Supreme Court Advisory Committee on Study of the Federal Rules of Evidence noted, "Rule 606(b), like Iowa common law, protects the sanctity of the jury room regarding matters that inured in the verdict, while allowing disclosure of extraneous misconduct." Id. 606(b) cmt.

26 FED.R.EVID. 606(b).

27 Tanner v. United States, 483 U.S. 107 (1987).

28 Id. at 120-21.

29 Id.; see VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 248 (1986).

30 Tanner v. United States, 483 U.S. at 121; see Note, supra note 15, at 888-92.

31 The inability to study real juries deliberating real cases has been decried by some social scientists. See HANS & VIDMAR, supra note 29, at 98-99; HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY vi-vii (1966). For a discussion of how the Chicago Jury Project created a furor leading to Congressional Committee hearings, see Valerie P. Hans & Niel Vidmar, The American Jury at Twenty-Five Years, 16 LAW & SOC'Y INQUIRY 323, 325-26 (1991). As a result of those hearings, a federal statute now makes it a crime to record or listen to the proceedings of a federal petit jury, but does not prohibit jurors from speaking after deliberations are completed and a verdict rendered. 18 U.S.C. § 1508 (1988). Even without similar state legislation, the urge to protect the process remains strong in our jurisprudence. See, e.g., Doe v. Johnston, 476 N.W.2d 28, 34-35 (Iowa 1991).

32 Steve Pokin, The Jurors' Trial, RIVERSIDE PRESS-ENTERPRISE (Cal.), Apr. 21, 1991, at F1.

33 Id.

34 Id.

35 Id.

36 Id. at F5.

37 Daniel Goleman, For Many Jurors, Trial Begins After the Verdict, N.Y. TIMES, May 14, 1991, at C1.

38 Id.

39 Nightline: Sequestered Juries (ABC television broadcast, May 1, 1989) (transcript on file with author).

40 Id.

41 HOROWITZ, supra note 3, at 17-35. The diagnostic criteria for post traumatic stress disorder are found in AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.89 (3d ed. 1987) [hereinafter MANUAL].

42 HOROWITZ, supra note 3, at 17.

43 Id. at 31-34; MANUAL, supra note 41, § 309.89.

44 Stanley Kaplan, Death, So Say We All, PSYCHOL. TODAY, July 1985, at 48.

45 Id. at 50.

46 Id.

47 Id. at 52-53.

48 Id. at 53.

49 Id.

50 Id.

51 Stanley M. Kaplan & Carolyn Winget, Occupational Hazards of Jury Duty, 20 BULL.AM.ACAD.PSYCHIATRY & L. 325 (1992).

52 Id. at 327.

53 Id. at 327-29.

54 Id. at 332.

55 Id. at 328, 332.

56 Id. at 332.

57 Id. at 331.

58 Id.

59 James W. Pennebaker & Joan R. Susman, Disclosure of Traumas and Psychosomatic Processes, 26 SOC.SCI. & MED. 327, 331-32 (1988).

60 Id. at 328, 330.

61 Id. at 330.

62 Kaplan, supra note 44, at 53; Theodore B. Feldmann & Roger A. Bell, Crisis Debriefing of a Jury After a Murder Trial, 42 HOSP. & COMMUNITY PSYCHIATRY 79 (1991).

63 Feldman & Bell, supra note 62.

64 Id. at 79.

65 Id. at 80.

66 Id.

67 Id.

68 Id.

69 Id.

70 Id. Jurors often exhibit a strong need to be assured they "did the right thing" in many situations. See infra text accompanying notes 119-20.

71 Feldman & Bell, supra note 62, at 80; see also HOROWITZ, supra note 3, at 22-34.

72 Feldmann & Bell, supra note 62, at 80.

73 Id.

74 Id. at 81.

75 Id. Between 1986 and 1988, eight states set up Critical Incident Stress Debriefing networks in an attempt to cut the turnover in emergency response team members after especially overwhelming emergency medical incidents. Program Fights Rescue Worker Turnover, GOVERNING, June 1988, at 10. Units composed of mental health professionals and emergency response personnel are used to educate rescue workers about stress symptoms and to help them talk about their reactions. Id. Results are claimed to be positive. Id. at 10-11.

76 Feldmann & Bell, supra note 62, at 81.

77 Id. Jurors are regularly admonished not to discuss the case with anyone, even family members, during all recesses. They are not even to discuss it among themselves until they deliberate. Most jurors take the admonitions of the judge very seriously. See Kaplan, supra note 44, at 52 (stating isolation from usual support systems poses a problem for jurors during trial).

78 Feldmann & Bell, supra note 62, at 81; see also Kaplan & Winget, supra note 51, at 333.

79 See, e.g., TIMOTHY R. MURPHY ET AL., A MANUAL FOR MANAGING NOTORIOUS CASES 77-78 (1992); Feldmann & Bell, supra note 62.

80 Although at least one videotape instructional program is available to courts, its existence is not well-known in many jurisdictions. Jurors Are Victims Too!, presentation by Washington Victim/Witness Services (Media Group Int'l 1987) (copy on file with author).

81 HOROWITZ, supra note 3; Feldmann & Bell, supra note 62; Kaplan, supra note 44.

82 Pennebaker & Susman, supra note 59.

83 MANUAL, supra note 41, § 309.89.

84 Id.

85 HOROWITZ, supra note 3, at 31-32.

86 Id. at 34.

87 Pennebaker & Susman, supra note 59, at 331. See generally HOROWITZ, supra note 3; Kaplan, supra note 44.

88 The author is deeply indebted to the Clerks of Court in all 99 Iowa counties for researching their records and providing the names and addresses of the jurors.

89 See Kaplan, supra note 44; Kaplan & Winget, supra note 51.

90 Response numbers total more than 350 because multiple responses were counted.

91 Response numbers total more than 350 because multiple responses were counted.

92 The wording was adapted from HOROWITZ, supra note 3, at 30 tbl. 3-3.

93 State-wide gender statistics for the State of Iowa are taken from U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION GENERAL POPULATION CHARACTERISTICS IOWA (1992) [hereinafter COMMERCE REPORT].

94 State-wide age statistics for the State of Iowa are taken from the 1990 census statistics. COMMERCE REPORT, supra note 93. Because the census classifies age groups differently than did the study, the 18-40 age group in the study is compared to the 18-44 age group in the census data. Likewise, the 41-60 age group in the study is compared to the 45-59 age group in the census data. The last age group is the same in each data set.

95 Statistics for state-wide marital status of the Iowa population were obtained from INFORMATION PUBLICATIONS, ALMANAC OF THE 50 STATES 124 (1992).

96 Educational attainment data for the entire Iowa population were not available for the same categories used in the study. The most recent statistics indicate 71.5% of the Iowa population over the age of 25 years have 12 or more years of education, and 13.9% have 16 or more years of education. 1992 COUNTY AND CITY EXTRA, ANNUAL METRO, CITY AND COUNTY DATA BOOK 207 (Courtenay Slater & George Hall eds., 1992).

97 IOWA CODE § 607A.22 (1993).

98 See supra note 96.

99 Statistical analysis of the responses was done on an IBM 3090 computer running the Statistical Package for the Social Sciences-X, release 3.0. By random sample, the data entered in the computer were checked against the questionnaires for accuracy. In 11 randomly selected questionnaires, each consisting of 39 fields of data, only one error was noted, a reasonably low rate. The author is indebted to Dr. E. Altmaier, Assistant Dean, College of Education, University of Iowa, and her graduate students for coding, entering computer data, and helping choose the statistical methodology. Any mistakes in conclusions are solely those of the author.

100 A one-way "t" test was employed to find if the mean stress scores of jurors who had been debriefed by a judge ($n = 91$) were significantly different from those who were not debriefed ($n = 258$). The t test gives a probability of whether the two samples were drawn from the same or different populations. A high probability indicates any differences between the two samples likely result from random error. A low probability indicates what is called a "statistically significant" difference between the two samples; that is, it is not likely the result is due to pure chance alone. In general, a probability level of less than .05 suggests the result would occur by chance less than 5% of the time.
The t value for this data was .1845, and the probability level was .8316. Thus, the differences between the two sample populations could only be due to chance.

101 The National Center for State Courts has proposed a research project to study juror stress. Thomas L. Hafemeister & W. Larry Ventis, Juror Stress: What Burden Have We Placed on Our Juries?, 16 STATE CT.J. 35, 43 (1992). One of its goals is to develop recommended procedures for prevention and treatment of juror stress. Id.

102 These are the same values assigned in the study reported in HOROWITZ, supra note 3, at 30 tbl. 3-3.

103 The two-tailed t test showed a t value of 40.9331 and was significant at $p < .01$ ($n = 348$).

104 See Kaplan & Winget, supra note 51, at 3.

105 The t value for this data was .1271 and was significant at $p < .01$ ($n = 350$).

106 Pennebaker & Susman, supra note 59, at 331-32.

107 HOROWITZ, supra note 3.

108 Id. at 30-33.

109 See infra text accompanying notes 125-131.

110 Kaplan and Winget have suggested sequestration is a factor in heightening stress in jurors. See Kaplan & Winget, supra note 51, at 327.

111 See supra text accompanying note 99.

112 See supra text accompanying notes 100-01.

113 See supra text accompanying note 99.

114 See supra text accompanying notes 105-06.

115 Feldmann & Bell, supra note 62, at 79; Kaplan, supra note 44, at 52-53; Pennebaker & Susman, supra note 59, at 331-32; see generally HOROWITZ, supra note 3.

116 MURPHY et al., supra note 79, at 79-81; see also Victoria Slind-Flor, Counties Begin to Help Jurors Cope Afterward, NAT'L L.J., Jan. 20, 1992, at 3.

117 See Kaplan, supra note 44, at 52-53.

118 Quote from questionnaire number 233 (on file with author).

119 See Feldmann & Bell, supra note 62, at 80; Marjorie O. Dabbs, Note, Jury Traumatization in High Profile Criminal Trials: A Case for Crisis Debriefing?, 16 L. & PSYCHOL.REV. 201, 207 (1992).

120 Quote from questionnaire number 298 (on file with author).

121 See supra text accompanying notes 18-23.

122 Quote from questionnaire number 224 (on file with author).

123 FED.R.EVID. 606(b); see supra text accompanying notes 25-31.

124 Jurors appreciate knowing with whom they may speak after the trial. As one debriefed juror put it, “He [the judge] mentioned that the lawyers & the press might want to talk to us—they could even call us at home. However, we did not have to talk to them.” Quote from questionnaire number 298 (on file with author). Another juror stated, “I would have benefitted [sic] from an instructional session on who to talk to and what to avoid disclosing about the deliberations. I felt a tremendous amount of responsibility—I didn't want any of my actions to be cause for mistrial—if that were ever possible.” Quote from questionnaire number 252 (on file with author).

125 As one juror wrote, “Jurors in my estimation are typically not aware of the workings of the judicial system. Maybe a post-verdict meeting would be helpful in broadening their understanding of the system.” Quote from questionnaire number 261 (on file with author). Another debriefed juror commented:
I would have like[d] for the judge to explain better what the sentence would entail. Such as chance of parole, appeals if possible, this sort of thing, but in all I felt comfortable with our decision on this case and how the judge handled our questions after everything was done.
Quote from questionnaire number 056 (on file with author).

126 Many jurors want to know the defendant's prior criminal record. As one juror in the study wrote: “The judge's explanation of the criminal's background and appreciation for and support of our verdict helped allay some of my feelings of discomfort.” Quote from questionnaire number 284 (on file with author). Another juror who was not debriefed commented that a debriefing session would be good, because “[s]pecial details (past crimes of suspect, etc) which weren't allowed to be discussed in our presence could have then been disclosed at that time.” Quote from questionnaire number 068 (on file with author).

127 One juror in the study commented on the standard instruction that members of the jury are not to concern themselves with the sentence the defendant might receive if they find him guilty. The juror thought the instruction was almost insulting, and wrote:
We were told that our responsibility ended with finding him guilty or not guilty—that we had nothing to do with the sentence he would receive. While that's true, it's nearly impossible to separate the two in your mind—you know that if you find that person

guilty, you are indeed responsibility [sic] for the sentencing he will receive—especially in a case of mandatory sentencing. I thought it was a little incredulous that this statement was even made—it certainly was meant to take the pressure off of us and to relieve any "guilt" we might be feeling about taking him away from his family—but it doesn't work. We were all intelligent people—this type of reasoning is meant for the dimwitted!
Quote from questionnaire number 172 (on file with author).

128 This response was found in many of the comments from the jurors. See supra note 118.

129 FED.R.EVID. 609(a); IOWA R.EVID. 609(a).

130 E.g., FED.R.EVID. 609(b)-(d); IOWA R.EVID. 609(b)-(d).

131 See FED.R.EVID. 404; IOWA R.EVID. 404.

132 See Appendix A for a suggested form.

133 See, e.g., CAL.CIV.PROC.CODE § 206 (West 1991). This statute provides, in part, before discharging a criminal case jury, the trial judge must advise them they have an "absolute right" either to discuss or not to discuss the deliberations or the verdict with anyone. Id. It also states the defendant, his or her attorney or representative, or the prosecutor may discuss the jury deliberations or verdict with a member of the jury, "provided that the juror consents to the discussion and that the discussion takes place at a reasonable time and place." Id. A violation of the statute is to be "considered a violation of a lawful court order" and may be punished by a fine. Id.

134 Quote from questionnaire number 180 (on file with author).

135 Quote from questionnaire number 050 (on file with author).

136 See HOROWITZ, supra note 3, at 24 (intrusive stress symptoms); Feldmann & Bell, supra note 62, at 80; Kaplan, supra note 44, at 52.

137 In response to the open-ended question of what a postverdict discussion with the judge should include, one juror in the Iowa study suggested "probably something concerning how it is 'normal' to feel after participating in a jury that dealt with such a serious issue. I found myself wondering whether others in the same position felt the way I did." Quote from questionnaire number 064 (on file with author). Another juror responded that the discussion should let them know "about what it is OK to feel." Quote from questionnaire number 040 (on file with author).

138 MANUAL, supra note 41, § 309.89, classifies the Post Traumatic Stress Disorder only when a constellation of symptoms persists for more than one month.

139 Patrick J. Kelley, Who Decides? Community Safety Conventions at the Heart of Tort Liability, 38 CLEV.ST.L.REV. 315, 382 (1990).

140 Owen M. Fiss, The Death of the Law?, 72 CORNELL L.REV. 1, 14 (1986).

141 Id.

142 See, e.g., quote from questionnaire number 172, supra note 127.

143 Quote from questionnaire number 031 (on file with author).

144 Quote from questionnaire number 269 (on file with author). Another juror said, "The only thing I did not like was when they polled the jury after the verdict. If you come back with a guilty verdict then they know everyone agreed that they were guilty, so why ask them in front of everyone?" Quote from questionnaire number 265 (on file with author).

145 See generally, LILLIAN B. HARDWICK & B. LEE WARE, JUROR MISCONDUCT ch. 6 (1990).

146 E.g., State v. Houston, 209 N.W.2d 42, 44-45 (Iowa 1973).

147 E.g., State v. Holland, 485 N.W.2d 652, 655-56 (Iowa 1992). During deliberations the jury found the defendant's parole work release center identification card in the wallet seized from the defendant at the time of arrest. Id. at 655. After the verdict, one juror asked both the prosecutor and the defense attorneys if the jury would be called back to determine if the defendant was a habitual offender. Id. When asked why, the juror related the jury's discovery of the identification card in the defendant's wallet. Id. The trial judge's denial of a new trial was affirmed because the evidence of guilt was nearly overwhelming. Id. at 656.

148 See HARDWICK & WARE, supra note 145, § 7.02[3].

149 See supra text accompanying notes 20-21.

150 One judicial practice committee has strongly suggested no discussion be held about the facts of the case or of the evidence. JURY MANAGEMENT AND UTILIZATION COMMITTEE OF THE NINTH CIRCUIT, MANUAL ON JURY TRIAL PROCEDURES 132 (1990). This recommendation seems unduly restrictive if it is interpreted as prohibiting any postverdict debriefing conferences. Indeed, lawyers can ethically contact jurors after trial for purposes of self-education. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 319 (1967). See generally Joanne Pitulla, Ground Rules for Post-trial Contact with Jurors, A.B.A.J., Apr. 1992, at 102; Agthe, supra note 14.

151 See supra text accompanying notes 24-31.

152 In the author's own experience, these suggested rules have worked well in postverdict jury conferences in over 150 criminal and many civil jury trials.

153 See supra text accompanying notes 8-17; Dabbs, supra note 119, at 215.

154 See Feldmann & Bell, supra note 62, at 79; MURPHY et al., supra note 79, at 81.

155 MURPHY et al., supra note 79, at 3.

156 See, e.g., Feldmann & Bell, supra note 62, at 79, 80.

157 The recent case of Jeffrey Dahmer is an example. See Slind-Flor, supra note 116, at 3.

158 MURPHY et al., supra note 79, at 81; Kaplan, supra note 44.

159 MURPHY et al., supra note 79, at 81.

160 See supra text accompanying notes 63-77; Feldmann & Bell, supra note 62, at 79.

161 Interview with Honorable Laurence C. Gram, Jr., Judge of the Wisconsin Circuit Court, Milwaukee, Wis. (Mar. 12, 1992). Judge Gram presided at the Jeffrey Dahmer trial. He reported that his decision to provide debriefing services to the jury was influenced by the Wisconsin State Court Administrator's offer to supply the psychiatric debriefers without cost to the county.

162 MURPHY et al., supra note 79, at 81.

163 Slind-Flor, supra note 116.

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Surviving Jury Duty:

Tips for Rape and Sexual Abuse Survivors

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By: Shannon

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Being summoned for jury duty can cause a lot of anxiety for survivors of rape or sexual abuse. For those who dealt with the police and court system, you may be concerned about flashbacks or panic when confronted with another courtroom. Even those who did not pursue legal action following sexual assault, you might be concerned about what you will have to disclose to the judge and attorneys and about the potential to be seated on a case involving abuse or violence.

The good news is that jury duty doesn't have to be stressful; you might even find it interesting! This article will discuss some basic facts about jury duty and how to cope with the stress of performing this civic duty.

Receiving the Summons

Most states summon prospective jurors through the mail. You will receive a summons with instructions on when and how to report for duty.

You might be tempted to ignore this summons – but please don't do so! Not only is jury duty an important civic responsibility, but there can be real consequences for failing to report. You could be fined or even subject to arrest. In some states, police officers are sent to pick up absent jurors. Ignoring your summons could result in far more stress.

Deferring Service

If you have a conflict, or don't feel that you can emotionally or physically perform jury duty, you can request a deferral on your service. Your summons should include information on who to contact to make such a request. Be sure to handle a deferral request promptly. You may need to provide a letter from a doctor or psychologist that states why you are unable to serve as a juror. You may be required to appear on your summons date and make the deferral request at that time.

Reporting to the Courthouse

Different courts have different reporting requirements. In some areas, you must physically report to the courthouse each day of your service. In other areas, you phone ahead to find out when you must appear. Your summons will provide this information for you.

How to Dress

Dress comfortably; jury duty involves a lot of waiting. However, you will be in a courtroom, so please choose conservative and appropriate clothing. You don't need to wear a suit, but you should wear business casual clothing. Avoid sleeveless shirts, shorts, or torn clothing. You should also dress in layers; some courtrooms are cold!

What to Bring

Keep in mind that courtrooms really aren't like they're depicted on TV. Things are usually far more mundane and less dramatic. The main thing to expect is probably boredom, at least during the waiting stage.

Because much of your time will be spent waiting, bring a book or magazine. Some courts will allow laptop computers and have wireless, but many do not; call ahead to find out if they are permitted and if storage is provided, as you will not be able to bring them into the courtroom.

What to Expect

Jury service varies widely by jurisdiction, so this section will cover the issues most relevant to survivors with general information that is probably applicable to most situations.

Usually, when you arrive for jury duty you will have orientation. Then certain jurors will be selected randomly to join a jury pool. These prospective jurors will be escorted to a courtroom. Some people will be asked to sit in the jury box to participate in jury questioning, called *voir dire*. The judge will give you some brief information on the case, and you will be read a list of names and asked if you know anyone involved. The judge and attorneys will then ask you some questions. It is important that you answer these questions completely and honestly; you are considered to be under oath, and being untruthful can have consequences.

Being on a jury does to some extent limit your privacy - you'll be asked questions

about your family, job, and education. If you are seated on a prospective juror panel in a criminal trial, you will be asked if you have ever been a witness in court or a victim of a crime. The judge or attorney will likely follow up on your "yes" answer and ask if your experience would prevent you from being an unbiased juror. Answer these questions truthfully. You will usually be answering these questions in front of other prospective jurors, several attorneys, the parties to the case, and maybe even spectators. If the question is too difficult to answer in front of other people, tell the judge this. Ask if you can answer the question privately with just the judge and the attorneys.

If you have never told about your rape or abuse, or if you're not comfortable saying it out loud, that is okay. Again, be honest and, if you can, tell the judge that you were the victim of a crime but it's very upsetting to you and you cannot talk about it without a lot of anxiety. If you cannot say that, just say something happened and you're dealing with it but cannot talk about it. The judge might simply excuse you at this point, or she or he might ask you to come to the sidebar or chambers to talk more. Remember that your safety is important, and if you cannot go into details or even a summary, you should not be forced to. Just be honest about what you're feeling; you should be treated with compassion and not be forced to disclose something you are not ready to tell.

As an attorney with a lot of experience in the courtroom, I have observed at least 50 jury trials. In every *voir dire*, the judge has ended his or her portion of the question with a variation of this question: "Do any of you have anything weighing on your mind that would prevent you from being able to serve as a juror?" Raise your hand, say yes, and the judge will ask more. If you are feeling panicked, be honest about this as well. Once I observed a woman say she wasn't comfortable saying out loud what she was experiencing. She was dismissed at that point. I asked the judge what his other option would have been, and he said most judges would offer the prospective juror the chance to go to chambers with the judge and attorneys to discuss it. Jury service should not harm your emotional health, and most judges and lawyers I know don't want a juror who is being traumatized by his or her service - both for the health of the juror, and the good of the case.

For rape and sexual abuse survivors, the biggest fear is usually being placed on a jury in a civil or criminal case involving sexual violence. That fear is understandable – just the thought of listening to such difficult testimony can raise your anxiety level. However, remember that the vast majority of trials do not involve these issues. They are often about other crimes, or civil matters that involve property or car accidents. The odds of you being called to a sexual violence trial are very slim.

If you are summoned to a panel for a sexual violence case, jury questionnaires

commonly precede *voire dire*. These questionnaires cover the more sensitive topics in writing. Here is an example of a typical jury questionnaire: http://www.fjc.gov/public/pdf.nsf/lookup/dpen0022.pdf/$file/dpen0022.pdf

Usually, the attorneys will review your answers, and if you have disclosed sexual violence you will be brought into the judge's chambers or an empty courtroom to meet with the judge and attorneys, and privately answer follow-up questions.

As a survivor, it is highly unlikely that you will be selected to serve on a jury involving any type of victim crime. No matter how good your intentions are, it is difficult to eliminate all bias to serve in this role effectively. A decision to dismiss you from the jury panel is not made to penalize you for disclosing your history nor does it mean that you aren't honest or thoughtful; rather, the goal is the fair administration of justice which requires an unbiased jury. Additionally, though jury service can seem impersonal, it is no one's best interest to subject a juror to unnecessary trauma.

If you are selected to be a juror, you will be instructed on how long the trial will last, when and where you should report, and other information you need to know. Try not to be upset if you are selected: most jurors have a very rewarding experience and it can be exciting to be the fact-finder and decision maker in a case!

Coping Tips

I believe that knowledge about service and what to expect is a valuable tool for reducing stress. The unknown seems only to exacerbate anxiety! Your local court's website will likely provide more information specific to your courthouse, so be sure to locate the website and see what information is available.

Here are some additional suggestions for coping with the stress jury duty can bring up:

Take care of yourself

Be sure to eat well and get enough sleep before you report for jury duty. Taking good care of your body can help you deal with stress more effectively.

Seek support

If you have a therapist, speak to him or her about your concerns and try to work out a plan for dealing with stress. You can also join the Pandora's Aquarium online

support group to get additional tips from other survivors who've been through jury duty.

Learn grounding techniques

You can find helpful suggestions for coping with stressful situations in these articles: Grounding Exercises and Common Responses to Trauma and Coping Strategies.

Take care of yourself after jury service

Some jurors report experiencing the symptoms of post-traumatic stress after they serve on a difficult trial. If you find yourself needing additional support after your service, please schedule an appointment with a therapist to process what you experienced.

Four Things to Remember

In sum, keep these four important things in mind:

1) Just because you've been called for service doesn't mean you will serve on a triggering case! Odds are, you will not serve on a case at all before you are dismissed from service (and you might even be disappointed about that!).

2) Be honest about your history and your needs. Jurors are usually treated very well and compassionately by judges and attorneys, because the judge wants a safe courtroom and the attorneys want a juror who will side with them! Service does not have to be traumatic, so speak up if your needs aren't being met or if you need assistance.

3) Be polite in your interactions with all court staff. You catch more flies with honey than vinegar.

4) **You will make it through this**! You might even surprise yourself and find jury service very rewarding.

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THROUGH THE EYES OF THE JUROR:

A MANUAL FOR ADDRESSING JUROR STRESS

National Center for State Courts

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- Superior Court of Maricopa County, Arizona (Phoenix).

They graciously granted us interviews, provided us with relevant documentation, and allowed us access to their jurors. Their assistance was invaluable. In addition, the Third Judicial Circuit (Baltimore County) and the Fifth Judicial Circuit (Howard County) in Maryland provided pilot information on which the current study was based. We also had an opportunity to obtain information from jurors in the Sixth (Montgomery County) and Seventh (Prince George's County) Judicial Circuits in Maryland.

Hundreds of judges from across the country and hundreds of jurors from the project sites also took time to complete questionnaires on their perceptions of and experiences with juror stress. Their insights and suggested strategies for alleviating juror stress are woven throughout the manual.

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Chapter 1

Introduction

> A thousand people show up downstairs at 8 am. We don't participate in orientation, and they are not a visible component in our lives. The judicial system is not responsive to jurors.
>
> —Judge

Our system of justice prides itself on protecting the rights of litigants and witnesses, but few protections and little attention are afforded the individuals we rely on to make the system work—individuals who walk into the court and who may subsequently find themselves deciding the fate of others. Despite their vital role to the system, the system can be surprisingly unaccommodating to them. Anecdotal reports of juror mistreatment range from benign neglect to outright disrespect.[1] There are many explanations for this treatment, such as the need to avoid contact with jurors to ensure the integrity of the judicial process, an expectation of civic responsibility, and the practical reality of overburdened court staff facing seemingly ever-increasing caseloads. Such explanations, however, do not excuse the judicial system's failure to meet its responsibility for its jurors.

"Perhaps someone could have made us feel a little more human—at times I felt like rats in a cage!"
—Juror

"If the juror feels invisible, it only adds to the hardship of jury service—the cattle syndrome works to the detriment of the court."
—Judge

JUROR STRESS

Jurors confront numerous sources of stress at every stage of jury duty, even in routine trials. Beginning with the summons to jury service, they experience disruption of their daily routines, lengthy waits with little information and often in unpleasant surroundings, anxiety from the scrutiny of lawyers and the judge during voir dire, tension from sifting through conflicting versions of facts and unfamiliar legal concepts, conflicts during deliberations, and isolation following the verdict and their release from jury service. Notorious trials often involve other sources of stress, including more severe disruptions of daily routine due to lengthier trials and jury sequestration, significant media publicity, and more troubling evidence and testimony introduced at trial. Symptoms of juror stress manifest themselves as a number of

"Entering a jury box for the first time is entering unknown territory with different rules, limitations and expectations. The jury process is separate and distinct from the trial process. It is a most peculiar isolation. It has no familiar cues and it can be an uneasy experience. Experiencing it is the only possible preparation. The burden of the responsibility is something else you cannot prepare for."
—Juror

[1] *See, e.g.*, Mark Curriden, *Jury Reform*, A.B.A. J., Nov. 1995, at 72.

physical and psychological reactions, including increased anxiety and frustration, disrupted eating and sleeping routines, nausea, depression, and anger and hostility.

SIGNIFICANCE OF JUROR STRESS FOR THE JUDICIAL SYSTEM

"They'd have to handcuff me to be a juror again."

—Juror

Recent examinations of the institution of the American jury trial suggest that juror stress is one factor contributing to the unwillingness of citizens to serve as jurors.[2] The implications of this effect are troubling for our justice system. As greater numbers of citizens devise ways to avoid jury service and the stress associated with jury service, juries become less representative of their communities. This can contribute to the decline of public trust and confidence in jury verdicts in particular and the justice system in general.

I think there is a problem driven by the fact that jurors are at the bottom of the totem pole. Judges by their training are more responsive to their contemporaries and lawyers in front of them. . . . Jurors . . . are here and gone; they are not a constituency of the court."

—Judge

The jury system presents a unique opportunity for courts to have a positive interaction with individuals from the communities they serve.[3] The Jury Standards Task Force and the ABA Jury Standards Committee described the opportunity in their Guiding Statement:

> The significance of the jury is not limited to its role in the decision making process; jury service also provides citizens with an opportunity to learn, observe, and participate in the judicial process. The jury system affords an opportunity for citizens to develop an active concern for and interest in the administration of justice.[4]

It is important for courts to take full advantage of this opportunity by providing a positive jury experience. "A juror, who is present to assist the judicial system and whose participation is also encouraged, should be protected from the potentially negative health effects of the trial process."[5]

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[2] *Id.*

[3] In a study of individuals reporting for jury duty, 52 percent said they would look back on their jury duty with fondness, and 56 percent indicated they would volunteer again.

[4] COMMITTEE ON JURY STANDARDS, AMERICAN BAR ASS'N, STANDARDS RELATING TO JUROR USE AND MANAGEMENT vii (1993) [hereinafter ABA JURY STANDARDS].

[5] Daniel W. Shuman et al., *The Health Effects of Jury Service*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 949, 960 (David B. Wexler & Bruce J. Winick eds., 1996).

THE JUDICIAL SYSTEM'S RESPONSE TO JUROR STRESS

The judicial system and its actors, including judges and court staff, constitute social forces that can exacerbate or help reduce juror stress levels.[6] This manual discusses steps judges and court staff can take at each stage of the judicial process to alleviate rather than exacerbate the inevitable stress that comes with a jury summons.

Many of the suggested strategies will be familiar as standards of good trial court management, as articulated by the Commission on Trial Court Performance, and of good jury management, as recommended by the Jury Standards Task Force and the ABA Jury Standards Committee. For example, Trial Court Performance Standards 1.2, Safety, Accessibility, and Convenience, and 1.4, Courtesy, Responsiveness, and Respect, urge court employees to be responsive to individuals unfamiliar with court facilities and proceedings.[7] Standards 2.1, Case Processing, and 2.2, Compliance with Schedules, urge the prompt resolution of cases and the timely performance of all court activities.[8]

Likewise, Standard 16, Juror Orientation and Instruction, in *ABA Jury Standards* recommends providing information to jurors throughout the jury process—a practice likely to increase an individual's sense of control and predictability.[9] In addition, some jury system reforms currently being tested, such as allowing jurors to take notes and to ask questions during trials, also may increase their perceived control over the process.

This manual views these standards and innovative practices from the perspective of the juror's experience rather than from a management and operational perspective. It identifies court policies, procedures, and practices consistent with these standards that can be used to decrease juror stress.

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[6] The proposition that legal actors are social forces that can have therapeutic or anti-therapeutic consequences is fundamental to the therapeutic jurisprudence heuristic. *See* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).

[7] *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 8-9 (1997) (National Criminal Justice Reference Ctr. No. 161570).

[8] *See id.* at 11–12.

[9] *See* ABA JURY STANDARDS, *supra* note 4, at 140–53.

BACKGROUND ON THE MANUAL

The manual is based on a study, funded by the State Justice Institute and conducted by the National Center for State Courts in cooperation with the College of William and Mary's Psychology Department, to determine the extent and sources of juror stress. At the time, issues associated with juror stress had received almost no systematic attention; their formulation was being driven principally by media accounts of notorious cases such as the Reginald Denny and Rodney King beating cases, the rape trial of William Kennedy Smith, the murder trial of serial killer Jeffrey Dahmer, and the fraud trial of television evangelist Jim Bakker.[10] Although much was written and discussed about jurors' experiences in these cases, little empirical information was available to place the media reports of juror stress into a broader context of the prevalence and severity of stress experienced by jurors in general. How widespread is juror stress? What are its primary causes? And what, if anything, should courts do about it?

According to a survey of jurors, 86 percent of the 37 jurors sitting on death penalty cases reported experiencing stress; 25 percent of the 432 unassigned members of the jury panel also reported experiencing stress.

Through a combination of survey and field research, project staff obtained information from over 1,300 judges, jurors, and unassigned members of the jury panel about the prevalence and causes of juror stress (see Appendix A for more details on the study). Findings indicated that although few individuals experienced *clinical* stress as a result of their juror experience, approximately one-third of *all* individuals who reported for jury duty reported experiencing *some* stress as a result of their jury duty and over half thought other jurors experienced stress during jury duty. The findings supported commonsense notions that stress is higher for jurors sitting on cases involving capital offenses and gruesome evidence. In general, the more severe the offense and the longer the trial, the more jurors reported stress and the more judges suspected stress. Surprisingly, findings also revealed that individuals who report for jury duty and who do *not* have an opportunity to serve as a juror report experiencing stress as well.

Sources and levels of stress varied depending on the individual's particular juror experience. For example, individuals sitting on capital cases rated the decision to give the death penalty as a source of considerable stress, whereas individuals involved in less serious cases reported disruptions of their normal routine as stressful. Symptoms of stress also varied depending on juror

[10] *See, e.g.*, *Big Cases Bring Lots of Stress*, NAT'L L.J., Feb. 22, 1993, at S14; Thomas L. Hafemeister & W. Larry Ventis, *Juror Stress: Sources and Implications*, TRIAL, Oct. 1994, at 69.

experience. Anxiety, irritation, agitation, and boredom characterized the stress experienced by most jurors reporting stress. However, jurors serving on lengthier and more serious cases reported more severe symptoms such as nightmares, feelings of detachment, and disturbing memories.

Although stressors varied across individuals and cases, four general themes emerge from the survey and interview data pertaining to sources of stress regardless of the individual's particular experience. First, individuals who participate in the jury process often perceive a lack of predictability and control over their experience. Research shows that stress is reduced to the extent that an individual perceives control over a situation.[11] Many individuals report anxiety over what is expected of them and what will be happening at each new step in the process (e.g., reporting for jury duty, jury selection, the trial process, and jury deliberations). Second, jurors and potential jurors report frustration over a process that at times seems slow and arcane and does not make the best use of their time. Third, jurors and potential jurors identify discourteous, insensitive, and unhelpful staff as contributing to their level of stress, and fourth, they find the facilities, in which they sometimes spend considerable time, unpleasant and unaccommodating.

"If there is one key element to the successful melding of a group of strangers into a resonant orchestra, it is, in my opinion, the judge. . . . I was fascinated by the complicated role the judge plays in simultaneously balancing all aspects of the trial so we can have the optimum climate to do our respective tasks well."
—Juror

OVERVIEW OF THE MANUAL

The five remaining chapters of the manual identify key stressors and strategies for addressing them within five major stages of the juror process: initial contacts, voir dire, trial, deliberations, and post-trial proceedings. In general, the strategies address the broad categories of stressors outlined above: perceived lack of control and predictability, inefficient use of time, unresponsive court staff, and unpleasant environment. The

[11] In a classic experiment, participants were asked to rate their preferences and anxiety levels under various situations of threat. The situations varied based on whether the participants could control the administration of a small electric shock and whether they received consistent information to predict the shock's actual occurrence. Results indicated that participants preferred the situations that allowed them to control the shock and accurately predict its occurrence. Predictability allowed participants to prepare for the event and rest when they knew nothing was going to happen. In contrast, in the unpredictable condition (no warning or inconsistent warning), participants reported having conflicting expectations, surprise, frustration, anger, and even depression. *See* Lawrence A. Pervin, *The Need to Predict and Control Under Conditions of Threat*, 31 J. PERSONALITY 570 (1963).

strategies are based on findings from the general stress literature, suggestions from judges and jurors, and the results of current jury reform efforts.[12]

To some extent, the strategies depend on the characteristics of a court and its judges and staff. For example, juror orientation might best be accomplished by the jury commissioner, the court manager, a judge, a videotape, or some combination of the above, depending on the size of a court, the number of jury trials it has in a week, and the willingness of judges and other court staff to participate in the orientation. With one caveat, the strategies are presented as suggestions to be modified to best fit the judge and the specific court.

The caveat is not to underestimate the importance of the judge in interacting with individuals reporting for jury duty. A theme that emerged from both the study's data and the Advisory Council's discussions was the positive effect a judge can have on an individual's perception of the jury process. A judge's willingness to welcome jurors at orientation or thank them for their service (whether they sat on a jury or were never selected) sends a message that the jury service is important and that the court values their participation in the process. Thus, although Chapters 3 through 6 address issues of primary concern to judges, judges may wish to review Chapter 2 as well, which addresses more administrative issues.

[12] At the time of this publication, considerable research on juror effectiveness and satisfaction is underway. The reader is encouraged to keep abreast of this jury reform research to identify new strategies and enhance existing ones.

Chapter 2

Initial Contacts

Lessons Learned

- ☐ Receiving a summons for jury duty is unsettling for some individuals.
- ☐ The lack of basic information about how to get to the courthouse, where to park, and what to expect when reporting heightens juror anxiety.
- ☐ The loss of income and ancillary costs associated with jury service present difficulties for some individuals.
- ☐ Individuals reporting for jury duty are often irritated by the extensive amount of time they spend waiting in areas that are small, dingy, and uncomfortable.
- ☐ Individuals react negatively and may feel undervalued as a result of the "assembly-line" mentality of some court officials when processing prospective jurors.
- ☐ Prospective jurors are frustrated by the seemingly inefficient use of jurors' time.
- ☐ Many individuals are unprepared for, and amazed at, how much time they spend waiting.
- ☐ Some individuals have safety concerns about getting to and from the courthouse.

The stress associated with jury duty often begins before the actual commencement of a trial. The unexpected arrival of a jury summons, the confusion of reporting for jury duty, the tedium of waiting to be called for a jury panel, and the anxiety about the costs of jury duty are all notable (albeit, not severe) sources of stress for jurors. This chapter will focus on these stress factors and possible strategies for reducing their negative effects.

PROVIDE REASONABLE NOTICE/ALLOW SOME FLEXIBILITY

Juror stress and frustration typically result when jurors are thrust into situations in which they have little control. The amount of notice given to jurors before having to report generally is within the control of local court personnel. Many jurors in the study noted that having sufficient notice in which to arrange for time away from home or work would minimize the stress associated with these disruptions.

Another method of increasing jurors' sense of control is to give them a choice about when to serve. Many courts have a rigid system in which jurors must be exempted or excused for specific, formal reasons or serve the date they are called. Alternatively, some courts permit jurors to defer jury service. ABA Jury Standard 6(c) recommends that "deferrals of jury service for reasonably short periods of time may be permitted by a judge or duly authorized court official."[13] This method allows jurors to serve at a time that is optimal for their schedules, during which they can focus fully on the job at hand.

PROVIDE BASIC INFORMATION

"Need more information from the court about the process and what to expect."

—Juror

Individuals reporting for jury duty are often nervous about where they have to go, how they are to get there, and what they will have to do. The American Bar Association recommends that "the information provided to prospective jurors be sufficiently comprehensive and detailed to relieve their anxiety and aid them in their duty as jurors."[14] The ABA suggests that practical information (e.g., court hours, first-day activities, appropriate dress, what to bring to court, compensation, procedures for requesting an exemption or postponement of jury duty) be provided with the initial summons. Information about public transportation schedules, routes to the courthouse, and the location of convenient parking areas relieves jurors' concerns about these immediate items.

Educating jurors about juror service may begin even before a summons is issued in the form of a public outreach campaign that teaches the community about jury duty. Some courts have established a Jury Service Appreciation Week, and others use advertising and media outlets or local school programs to educate the public about jury service.[15] Another approach courts are using

[13] ABA JURY STANDARDS, *supra* note 4, at 49.
[14] *Id*. at 143.
[15] For more information about public outreach strategies, *see* JURY TRIAL

is to broadcast jury orientation information over public access cable channels to provide information on jury schedules, parking, compensation, and security concerns.[16]

Once jurors arrive at the courthouse, the juror registration site should be easy to find and adjacent to the juror lounge/waiting area.[17] Many courts provide jurors with handbooks detailing various aspects of jury duty. Other courts show videos or conduct question-and-answer sessions to help jurors acclimate to courthouse procedures. One court official noted that it was important to provide the information through a variety of media—handbooks, verbal instructions with questions, and videotapes—because different jurors respond better to different media.

In general, court officials agreed that the more information provided the better. In response to a question about what's needed to help minimize juror stress, one judge emphasized this need at all steps in the process:

> [We need] general public service statements on the importance of jury service, educational programs on the subject, better initial communication, and better communication during the period of service.

BE SENSITIVE TO FINANCIAL CONCERNS

Some employers do not compensate employees who take leave for jury duty, causing jurors to lose income for the period they serve. Daily flat-rate juror fees rarely offset lost wages. Other employers continue to pay employees while on jury duty but require them to make up for work they have missed. Self-employed and unemployed individuals and full-time homemakers often experience an even greater hardship. One self-employed juror explained the frustration:

When asked about other sources of stress, one juror said "My boss back at work."

—Juror

> There was no consideration or compensation for the self-employed. We have no employer paying us while we do jury duty. If we don't work, we don't have money coming in. We have to do jury duty all day and then go and do our self-employ work at night. We still have due dates and

INNOVATIONS 25–28 (G. Thomas Munsterman et al. eds., 1997) [hereinafter JURY TRIAL INNOVATIONS].

[16] *See id*. at 46.

[17] *See* ABA JURY STANDARDS, *supra* note 4, at 129.

people depending on us to get the work done and no one to fall back on.

The amount of monetary compensation jurors receive varies across jurisdictions, usually ranging from $5 to $40 per day. Based on the median household income of jurors, a conservative estimate of lost wages is approximately $86.[18] Fortunately, many employers make up the difference between court compensation and lost wages, but court officials should be sensitive that some jurors may be under more financial pressure than others.[19]

Jurors also view incidental costs while on jury duty, such as transportation and parking costs, meals, and child care costs, as sources of stress and financial hardship. In rural settings, transportation may be difficult because of the greater distance between one's home and the courthouse. In urban settings, accessible public transportation and parking fees become more cogent issues.

"If our goal is access to the courts and greater diversity, we need to examine the funds we make available for jury duty."
—Judge

ABA Jury Standard 15 recommends a balance among civic duty, length of jury service, and compensation.[20] It suggests limiting the term of service to one trial/one day, if possible; asking citizens to serve the first day as part of their civic obligation with only nominal compensation for out-of-pocket expenses; and compensating jurors with a reasonable fee for each subsequent day of service. In addition, some recognition by court officials that jurors are contributing to the system and are providing a valuable service may help jurors see the experience as worthwhile rather than strictly a hardship. In this context, court officials should ensure that all individuals who appear for jury duty, *whether they actually serve on a jury or not*, are acknowledged for their contributions. A few words of appreciation from a judge can mean a lot to some jurors and can help offset the more disruptive aspects of jury service.

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[18] This figure was determined by assuming that the juror contributed half of the family income in a full-time position (i.e. $45,000/2 = 22,500). This figure was then divided by the number of working days in a year (260).

[19] A 1990 nationwide study examined the incidence of employer compensation for jury duty and found that approximately 85 percent of full-time salaried employees receive compensation for jury duty; however, only 34 percent of part-time employees are compensated, and commission-based employees often lose all commission income. *See* JANICE T. MUNSTERMAN ET AL., NATIONAL CTR. FOR STATE COURTS, THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 58 (1991) [hereinafter JURY SYSTEM PERFORMANCE].

[20] *See* ABA JURY STANDARDS, *supra* note 4, at 134–35.

CREATE A GOOD FIRST IMPRESSION

The juror assembly room may be the first direct contact a juror has with the court. Jurors gain their first impression of the entire process from their juror assembly room experience. Comments from judges, other court officials, and jurors indicate that this first impression is often mixed at best.

"Provide a nicer, more comfortable waiting area and refreshments. We are going out of our way for this service."
—Juror

Many juror assembly rooms are too small, austere, and generally uninviting. In contrast with the imposing décor of most courtrooms, a small or dingy juror assembly room may send jurors an unintended message about their role and worth in the justice process. Juror rooms should have comfortable furniture, adequate lighting, appealing décor, telephone access, ample space, and easy access to vending machines, smoking areas, and clean restrooms. Several jurors also indicated that the availability of reading material, games, or a television would help pass the time more quickly. In addition, some jurors noted that merely providing tables and access to outlets would allow them to do some work while they are waiting.

"Treat people like you want to be treated."
—Bailiff

Jurors also base their first impressions on their interactions with court staff. Faced with the press of business, some court officials get caught up with the "cattle call" aspect of just moving sometimes hundreds of people through the system. One jury assembly room official noted the problem:

> I don't even see their faces anymore. I have had people I know complain that I ignored them when they came in for jury duty. I said sorry—I never even look at the faces.

Notwithstanding the large number of individuals reporting for jury service in some jurisdictions, court officials should make every effort to be polite and sensitive to jurors' unfamiliarity with the situation. Staff should try to keep jurors informed about the process, explain necessary delays, and give jurors choices and control over their experiences when feasible.

"Take extra time in orientation, repeat things . . . joke once in a while to relax."
—Court official

During the orientation, court officials should acknowledge the importance of juries to the legal system and to democracy and should thank the jurors for their willingness to serve. As one jury manager noted:

> It makes a big difference who does the orientation. If the person is positive and confident, it creates an atmosphere that rubs off on jurors. If not, the jurors are very sensitive and will reflect it all day.

STRIVE FOR EFFICIENCY

"[It was] very tiring just sitting in the jury panel room."

—Juror

Adequate staffing is essential for an efficient and fairly administered jury system. The ABA suggests that a single administrator should be responsible for administering the jury system[21] and recommends that the court monitor the jury system to ensure "the efficient use of jurors."[22] Jurors become frustrated with jury service and the justice system generally when asked to serve a long term during which they witness inefficient use of potential jurors.[23] The seemingly cavalier attitude on the part of some judges and other court officials regarding the juror's time does not help. One judge commented that more planning into how many jurors are needed per week would help address the problem of excessive waiting time.

The ABA recommends that "jurisdictions reduce to the shortest extent possible both the amount of time during which persons are required to remain available for jury duty and the time spent at the courthouse."[24] One approach to limiting the term of jury service is to implement a one-trial/one-day system in which jurors serve for one day or for the length of one trial. If a one-trial/one-day system can be not feasible, jury service that is limited to one week can still have a beneficial effect on juror satisfaction.

"Plan more in advance how many jurors are needed to cover cases for the week."

—Juror

ABA Standard 13 deals entirely with efficient use of jurors:

(a) Courts should employ the services of prospective jurors so as to achieve optimum use with a minimum of inconvenience to jurors.

(b) Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both the number of individuals summoned for jury duty and the number assigned to jury panels.[25]

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[21] *See Standard 10(c), in* ABA JURY STANDARDS, *supra* note 4, at 95.
[22] *See Standard 12(d), in* ABA JURY STANDARDS, *supra* note 4, at 111. *See also Standard 13, in* ABA JURY STANDARDS, *supra* note 4, at 115–16.
[23] *See* JURY SYSTEM PERFORMANCE, *supra* note 19, at 37–47.
[24] ABA JURY STANDARDS, *supra* note 4, at 43.
[25] *Id*. at 115.

Although predicting the precise number of jurors that a court will need at any given time is a difficult task, a careful evaluation of past juror usage can provide an accurate basis to estimate the optimal number of persons to summon for jury duty.[26] This prevents severe overcrowding in juror waiting rooms and utilizes jurors' time more efficiently. Implementation of a call-in system also helps tailor the number of persons summoned for jury duty to daily fluctuations in the needs of the court.

REDUCE BOREDOM

Despite all efforts, however, waiting time can only be reduced, not eliminated. As noted earlier in the chapter, providing reading materials or other forms of diversion will help jurors pass the time during inevitable waiting periods.

Courts can establish a "self-perpetuating" library by asking jurors to bring in a book they no longer want. Jurors who find a book they want to read can keep it. Magazines and newspapers also help pass the time. Magazines can sometimes be obtained for free through the post office.

Another approach to alleviating juror boredom and frustration is to allow jurors to leave the courthouse during lengthy breaks. To ensure jurors are available when they are needed, courts may provide them with beepers or establish a time when they must return to court.[27] Some courts also provide work areas equipped with telephones, electrical outlets, and modem access for computers.[28]

"Particularly in winter, it is dark and the streets are empty. Some jurors are very uncomfortable going home then."
—Court official

Court officials also can foster some interaction among waiting jurors by encouraging lunch groups. Snack bars, vending machines and coffee nearby also help break the monotony and provide opportunities for informal conversations.

ALLEVIATE SAFETY CONCERNS

Finally, courts also need to respond to jurors' concerns about personal safety, especially in urban courts or courts where parking is some distance from the courthouse. Making sure jurors are released before sundown or escorting jurors to parking areas or public transportation stops can address these concerns and alleviate juror stress.

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[26] *See* G. THOMAS MUNSTERMAN, NATIONAL CTR. FOR STATE COURTS, JURY SYSTEM MANAGEMENT 101–09 (1996).
[27] *See id.*
[28] *See* JURY TRIAL INNOVATIONS, *supra* note 15, at 48.

Chapter 3

Voir Dire

Lessons Learned

- ☐ Jurors are apprehensive about what the voir dire process entails.
- ☐ Jurors are anxious about revealing embarrassing or humiliating personal information in public.
- ☐ Jurors worry about revealing identifying information in the presence of the defendant and the defendant's family and friends.
- ☐ Jurors are frustrated by how long the process takes and how much time they spend waiting. They would like information and updates on the schedule.
- ☐ Jurors get upset when they perceive judges or attorneys as grandstanding, not listening to jurors' responses, or bored by the proceedings.
- ☐ Jurors express irritation over the court's cavalier attitude regarding their participation in the process. They do not think the court is aware that they are taking time away from other responsibilities and commitments and that their schedules are important, too.
- ☐ Jurors may be confused and uncomfortable when publicly struck from the jury.
- ☐ Jurors may experience physical discomfort because of environmental stressors such as temperature, noise level, and lighting.

The voir dire process is intended to ensure that a fair and impartial jury is selected. Although vitally important to the judicial system, the jury selection process can be stressful for

"The first day of jury selection is one of the biggest stress days."
—Bailiff

prospective jurors who are asked detailed questions about their backgrounds and attitudes. As one bailiff in the study noted:

> Sometimes there are 200 people in the courtroom at a time. Sitting in a jury box and talking in front of 200 people can be stressful. . . . Can tell from their faces or how they speak (may speak real rapidly), or from their body language (lips trembling, real fidgety, mouth dry).

Individuals who have been through the process have lamented that they felt as if *they* were on trial. Many fear being embarrassed or humiliated. In addition, individuals are often unfamiliar with the process and unaware of how lengthy it can be. They are apprehensive about a process that requires a loss of privacy and wonder what the extent of that loss will be.

Although choosing a jury requires both parties to know about the jurors' backgrounds and attitudes, there are ways to minimize the stress experienced by individuals participating in the process. No one wants a juror to feel stress, particularly because of one party or the other. This chapter offers some suggestions for reducing stress during this critical stage of the judicial process.

EXPLAIN THE VOIR DIRE PROCESS

"I couldn't understand the voir dire process; I spent two days trying to figure it out."
—Juror

A clear explanation about the voir dire, its purpose, and its importance in trial proceedings removes much of the mystery about the need to ask certain questions. ABA Jury Standard 16(a)(iii) reinforces the importance of providing potential jurors with information on the voir dire process: "Courts should provide some form of orientation or instructions to persons called for jury service upon reporting to a courtroom for voir dire."[29] The standard recommends that the orientation include information such as:

- an explanation of the purpose of the voir dire examination;
- an explanation of the difference between peremptory challenges and removals for cause;
- introductory information on the particular case;
- an estimate of how long the trial may last; and

[29] ABA JURY STANDARDS, *supra* note 4, at 140.

- an indication of whether the jury will be sequestered and, if so, for how long and why.[30]

Generally, the judge provides the orientation for prospective jurors. For example:

> We are about to start the jury selection process. It is a process of inquiry where I or the lawyers will question you about your lives and viewpoints. We do not mean to be intrusive. Sometimes it is an obligation of lawyers to question. If you are excused, it is nothing personal. Sometimes a juror has had a particular set of experiences or background that may affect the juror's reactions to this particular trial, and one of the attorneys may decide that another juror would be able to focus more on the evidence in this case. If you feel your privacy might be infringed, say so and we can talk about it privately.

BE SENSITIVE TO PRIVACY CONCERNS

The threat of voir dire to a juror's privacy is a fundamental issue courts must address. Although the disclosure of mental illness, chemical addiction, or extramarital affairs may not be significant to individuals in large cities, these matters may be devastating, if disclosed, to individuals from small or medium-sized communities. The importance of judges being sensitive to these issues and controlling attorneys' use of questions related to these areas cannot be overemphasized. Responses from jurors indicate that some judges and attorneys may view voir dire as an opportunity to gain as much information as possible about each juror rather than just enough information to determine if a juror can be fair and impartial.

Several participants in the study noted the importance of telling prospective jurors in advance about the possibility of meeting with the judge individually if they are uncomfortable about answering a question in open court.[31] Some courts have prospective jurors complete confidential questionnaires on which they can indicate questions they prefer not to answer in open court. One judge commented that providing the prospective juror

[30] *Id*. at 144–45.
[31] For a description of *in camera* voir dire, see *§ III–4 Privacy Considerations in Voir Dire*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 65–67.

with an opportunity to see the judge at the bench or in chambers makes the individual aware that he or she has some control and is not just a passive participant.

ADDRESS SECURITY ISSUES

Answering questions of a personal nature in front of a group of strangers can be a stressful experience. It may be particularly stressful if prospective jurors are concerned for their safety. Judges and court personnel should not underestimate jurors' concerns for their safety. Even in less serious cases, jurors may be worried about their safety if the charge involved the use of force or if the parties and/or spectators in the courtroom seem hostile. Fear of retaliation can continue long after the proceeding is completed. The court should be sensitive to and consider ways to alleviate jurors' concerns for safety. One judge notes:

> One method I have used to reduce juror stress in this area is to advise the jury at the start of voir dire that the information regarding jurors was only submitted to the attorneys the morning of trial. I then advise them that the computer printout from their questionnaires will be retrieved by the Court after voir dire and will not be left with counsel. At the end of voir dire, as soon as the lawyers have exercised their strikes, I request counsel to deliver back to the bench their copies of the computer printout of juror information. This is done in front of the entire panel, not only the jurors who are seated and have been questioned. The feedback on this procedure has been positive and has helped reduce some juror anxiety.

"I don't think the defendant and his friend and family have to know what my name is, where I live and where I work. We could have kept some of that information confidential. This information was all given to anyone in that courtroom."

—Juror

An innovation that has been tried in a few jurisdictions and that may lessen the intrusiveness of voir dire questions to prospective jurors is the use of routine anonymous juries.[32] This technique involves withholding prospective jurors' names and addresses from the parties, their counsel, the public, and the media.[33] If jurors understand that names are withheld on a routine basis, they should not infer from the use of anonymity that particular parties are dangerous—a concern when anonymous

[32] *See* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123 (1996).
[33] *§ III–8 Routine Use of Anonymous Juries*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 81. *See also* J. CLARK KELSO, JUDICIAL COUNCIL OF CALIFORNIA, FINAL REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT 33–36 (1996).

juries are used selectively. Anonymity may lessen the stress felt by some jurors when required to reveal private information. In addition, the prospective juror has control over whether to reveal his or her identity to another person once jury duty is completed.[34]

PROVIDE A CONTEXT FOR VOIR DIRE QUESTIONS

Participants in the study suggested providing the jury panel with more specific information about the case to help prospective jurors understand the reason for specific voir dire questions that might seem odd, argumentative, or too personal otherwise. Some of the judges also suggested informing the prospective jurors that the trial could include gruesome photographs, foul language, and graphic descriptions of criminal acts. Although this preparation may be helpful to the prospective jurors, some judges and attorneys may be apprehensive about discussing the nature of anticipated evidence that has not yet been determined admissible. Yet many jurors may not be able to serve if the evidence is pornographic or could be considered obscene.

One approach some jurisdictions use to inform prospective jurors about the case and the nature of the evidence is to allow counsel to make brief opening statements—or even the entire opening statements—to the jury panel. This approach allows the attorneys to provide jurors some context for understanding the issues as opposed to simply reading the charges or the allegations (which are usually written in legal or statutory language). The opening statements set the stage for the relevancy of the voir dire questions that follow. One advantage of this approach is that the judge and counsel meet prior to voir dire and agree on the nature of the statements and the evidence that can be referenced during questioning.[35]

SHORTEN THE VOIR DIRE PROCESS

"The waiting was the only stressful part."
—Juror

Some courts post a list of the basic voir dire questions and ask each prospective juror to answer the questions. In this way, the parties hear the juror speak and quickly obtain a great deal of information.

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[34] For more information on juror privacy, see David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1 (1997).

[35] For more information on opening statements to the jury panel, see *§ III–2 Opening Statements to the Entire Jury Panel*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 57–59.

ABA Jury Standard 7(a) recommends the use of questionnaires to shorten the voir dire process: "To reduce the time required for voir dire, basic background information regarding panel members should be made available in writing to counsel for each party on the day on which jury selection is to begin."[36]

There are two types of pretrial questionnaires. The first is included with the initial questionnaire or summons for jury duty and "should be phrased and organized so as to facilitate quick and accurate screening, and should request only that information essential for providing basic background information ordinarily sought during voir dire examination."[37] This information includes "the age, gender, occupation, educational level, marital status of the prospective juror, the dates of any prior jury service, the geographic area in which he or she lives, the occupation of his or her spouse, and the age(s) of his or her children, if any."[38]

The second type of questionnaire requests case-specific information.[39] Typically the questionnaire seeks the following kinds of information:

- biographical and demographic information;
- knowledge of the parties in the case, including the attorneys representing the parties and witnesses testifying for the parties;
- awareness of the case, including first-hand knowledge or knowledge gained from pretrial publicity;
- opinions about the case, including pre-existing attitudes and beliefs about relevant case information; and
- pre-existing attitudes, beliefs, values, and experiences, including prior jury service or prior experience with the justice system as a victim, party, or witness.[40]

"The jury questionnaire is a big improvement; things move quicker."
—Juror

Case-specific questionnaires can speed the voir dire process and solicit more honest answers. The questionnaires should be kept short, though. Otherwise, the time required for

[36] ABA JURY STANDARDS, *supra* note 4, at 58.
[37] *Standard 11(c)(ii)*, *in* ABA JURY STANDARDS, *supra* note 4, at 101–02.
[38] *Id.* at 107 (citation omitted).
[39] Some jurisdictions combine general and case-specific questions into one questionnaire and ask prospective jurors to complete it prior to voir dire.
[40] JURY TRIAL INNOVATIONS, *supra* note 15, at 61. For a full description of using questionnaires to assist in voir dire, see *§ III–3 Questionnaires to Assist Jury Selection*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 60–64.

counsel to copy and study lengthy questionnaires will translate into more waiting time for jurors.

The use of brief pretrial questionnaires aids the judge and counsel in efficiently using voir dire time. The questionnaire data can help judges and attorneys identify individuals who should be excused early in the process and can help focus subsequent voir dire questions to the remaining panel members on the most relevant issues. Prospective jurors in the study indicated boredom and even anger over repeatedly asking each juror for the same information. As one juror remarked:

> The judge's questions were very verbose, lengthy, and boring (15–20 questions). Everyone in the room heard them over and over; always the same questions. There should be a more efficient way—prepare questionnaires in advance to be filled out.

Although the use of case-specific questionnaires can facilitate the voir dire process, their use may not be warranted in all cases. For example, they may not be practical for short trials because of the time needed to develop the questionnaire and review the results.

In addition, the use of case-specific questionnaires raises concerns related to the confidentiality of questionnaire information. Some jurisdictions destroy the questionnaires as soon as the trial is over; others include the questionnaires as part of the public record. During notorious trials, members of the press may request the questionnaires.[41] One judge in the study decided against using questionnaires because of concerns about confidentiality:

> I'm backing off from use of the questionnaire because they may be released to the public. Not sure if I can guarantee anonymity. Seems unfair to use questionnaire and then release it to the press. A transcript is more expensive to the press than obtaining a copy of the questionnaire. If media's deadline passes, they lose interest.

In general, the court should inform prospective jurors about the confidentiality of their questionnaire information. Providing an option to "check a box" if the prospective juror wants to discuss something privately, or allowing prospective

[41] TIMOTHY R. MURPHY, NATIONAL CTR. FOR STATE COURTS, A MANUAL FOR MANAGING NOTORIOUS CASES 66 (1992).

jurors to notify the court if they want a specific piece of information deleted before the questionnaire becomes part of the public record, may help ensure that questionnaires yield candid information as well as facilitate the process.

MAINTAIN CONTROL OF THE PROCESS

"Some judges go on auto-pilot during voir dire or will be busy doing something else. Seventy percent of the questions are repetitious."
—Judge

Judges in the study noted the importance of having the judge maintain control over the voir dire process:

> Juror stress is often caused by the judge not having control in the courtroom. If attorneys grandstand once, TV cameras should be out of there. Taking control doesn't mean being a tyrant. Always be nice to jurors. Just so they can tell the judge is the boss, not the attorney.

This recognition of the judge's ultimate responsibility for the voir dire process is consistent with ABA Jury Standard 7.[42]

Several judges emphasized the need to be vigilant regarding attorney behavior during voir dire. If attorneys are not listening closely to juror responses or are asking for information already provided on a questionnaire, some jurors become frustrated and angry. The judge should instruct the attorney that the information has been provided already and to refrain from repetitious questions.

SET A COMFORTABLE TONE

Interviews with judges, court staff, and prospective jurors indicate the importance of the judge in setting the tone of the voir dire process. As staff from one court's juror assembly room noted:

> The way jurors come back from voir dire varies with the judge; some come back happy, others very grumpy. Some judges are considerate: let them know what's going on. On Tuesday, one panel was left to sit in the courtroom for one and one-half hours because no one told them to go back to the jury assembly room.

Judges in the study suggested using an informal and conversational tone when questioning prospective jurors. They advised avoiding an "air of aloofness and stiffness." For example, one judge commented:

[42] *See* ABA JURY STANDARDS, *supra* note 4, at 58–73.

> Try to have a real friendly conversation as opposed to an interrogation. Look at them, scribble notes, don't look like recording; nod, smile, give eye contact. Explain that a question applies to many.

In one court observed, the judge attempts to alleviate juror "stage fright" by responding to the "posted" voir dire questions first and then asking the jurors to follow his example.

Although the pretrial process may be lengthened, maintaining a less formal atmosphere may be easier if individualized voir dire is used.[43] With this technique, panel members are questioned individually by the judge and/or counsel. Among the advantages of this technique are:

- Individualized voir dire typically takes place in a less formal setting and requires a less formal conversational tone by the judge and attorneys. The relative lack of formality tends to place panel members more at ease, encouraging them to respond to questions more candidly than they might otherwise respond.
- Individualized voir dire takes place out of the presence of other panel members, relieving panel members' discomfort about revealing personal information in front of each other.[44]

"Always start with general questions. Tell them that you are not there to pry."
—Judge

Judges suggested starting the voir dire with an individual panel member using general, non-threatening questions to lessen the individual's anxiety and build rapport. They also suggested framing sensitive questions in a way that allows the individual to affirm without necessarily admitting to specific behaviors. For example, "Have you, a spouse, or family member ever been arrested?" allows the individual to say "yes" without admitting to an arrest record.

Some judges' demeanors may be intimidating to prospective jurors. One approach for overcoming this is to have counsel conduct the voir dire questioning.[45] The judge still maintains control over the process to ensure that questions do not inappropriately infringe on panel members' privacy, that counsel

[43] For a complete description of individualized voir dire, see *§ III–5 Individualized Voir Dire*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 68–70.
[44] JURY TRIAL INNOVATIONS, *supra* note 15, at 69.
[45] For a full description of lawyer-conducted voir dire, see *§ III–1 Lawyer-Conducted Voir Dire*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 53–56.

do not unnecessarily delay the process, and that counsel do not engage in pretrial argument.

"Always be courteous to jurors—understand that they are taking time away from family and job to be here. They are the backbone of the legal system. Give them a chance to talk to you."

—Bailiff

Both judges and other court staff also indicated the importance of paying attention to panel members' facial expressions and body language during voir dire. Nonverbal cues may help the judge determine if clarification of a point of information is necessary, if a prospective juror is worried about disclosing information and thus may need to talk in private, or if a break is warranted. Sometimes little gestures, such as providing a glass of water to someone coughing or tissues to someone sniffling, can help establish an environment in which panel members are more comfortable about informing court staff when a problem or need arises.

Finally, letting the jury panel know the basic schedule and providing updates throughout the day helps give the panel members a feeling of control and predictability. They have some idea when lunch and breaks are coming, and they can make better-informed decisions about matters such as the need to extend day care for a child. Such basic information can help ease the prospective juror's mind and, consequently, allow better focus on the voir dire process.

CONSIDER OPTIONS FOR "STRIKING"

Judges and counsel should consider the effect of various procedures for "striking" a prospective juror from the panel. Being struck from the panel in front of others in the courtroom with no explanation can be confusing, embarrassing, and/or frustrating. ABA Jury Standard 9(h) recommends the following procedure:

> Following completion of the voir dire examination, counsel should exercise their peremptory challenges by alternately striking names from the list of panel members until each side has exhausted or waived the permitted number of challenges.[46]

With this approach, the court announces which individuals comprise the jury rather than who is omitted. In addition, the striking is done in a written manner rather than verbally in front of the court.[47]

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[46] *See* ABA JURY STANDARDS, *supra* note 4, at 77.

[47] *See* G. Thomas Munsterman et al., *The Best Method of Selecting Jurors*, JUDGES J., Summer 1990, at 8.

LIMIT COURTHOUSE WAITING TIME

"They get irritated over just sitting in the courtroom all day; hallways hot and facilities bad."
—Court staff

Many individuals in the study, including court staff, were frustrated with the amount of time prospective jurors were kept waiting during the voir dire process. Study participants provided several examples of individuals waiting for hours to be interviewed and waiting for hours for other panel members to be interviewed before all panel members were allowed to leave. The dissatisfaction is represented by the following prospective juror's comment:

> We were all required to stay all day and sit through the whole panel. Groups of 7 or 8 went up front for questioning, but everyone else had to sit in the gallery the entire time. I never even got to the point of going up front. I didn't feel very useful being there. There must be a better use of my time than to sit around mindless.

As discussed in Chapter 2, much of the dissatisfaction of prospective jurors, in this case panel members, could be alleviated by following ABA Jury Standard 13, which addresses the efficient use of jurors' time. Standard 13(b) and (c) specifically address the voir dire situation:

> (b) Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust . . . the number assigned to jury panels.
>
> (c) Courts should ensure that each prospective juror who has reported to the courthouse is assigned to a courtroom for voir dire before any prospective juror is assigned a second time.[48]

Several judges in the study suggested practices to reduce the amount of time prospective jurors spend waiting in the courthouse. For example, one judge noted that for difficult trials that require questioning prospective jurors individually,[49] the court assigns numbers to panels. The judge asks the panel members to call in each day to see when they are needed. This

[48] ABA JURY STANDARDS, *supra* note 4, at 115–16.
[49] *See § III–4 Privacy Considerations in Voir Dire*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 65–67. *See also § III–5 Individualized Voir Dire*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 68–70.

procedure results in seven jurors being called per half day rather than 40 or 50, many of whom would not be questioned until subsequent days. The end result is there are fewer individuals "just sitting around and asking questions and feeling antsy."

Chapter 4

Trial

Lessons Learned

- ☐ Some jurors are intimidated by the formality and procedural complexity of the trial process.
- ☐ The role of the juror as strictly a passive listener is uncomfortable, boring, and frustrating for some individuals.
- ☐ Juror stress occurs most in cases (both civil and criminal) that involve actions causing severe harm to an individual.
- ☐ Viewing gruesome evidence can be particularly stressful for some jurors, especially when presented with no forewarning.
- ☐ Trials that are tedious or long can challenge jurors' concentration. The struggle to remain attentive can be stressful for jurors.
- ☐ The emotional tone and level of tension in the courtroom influence jurors' stress levels.
- ☐ Some jurors may be concerned about their privacy and safety.
- ☐ Some jurors may be anxious about a media presence in the courtroom and may be unaware of any parameters governing media behavior.
- ☐ Unexplained and frequent interruptions of the trial schedule increase juror frustration and irritation with the trial process.

Just as juror bias is a legitimate concern during voir dire, a principal concern during the evidentiary portion of jury trials is that jurors remain "untainted" by factors other than properly

admitted evidence, thus preserving their ability to function as impartial decision makers. Paradoxically, many procedures used to protect the integrity of the jury—such as no-contact rules between attorneys and jurors; prohibitions on discussions about the case with family, friends, and even other jurors; and sequestration—contribute to juror stress.[50]

"Not being able to talk with my family was tough—particularly if tears started to well up in my eyes, and I couldn't explain why. I couldn't participate in family dinners at home."

Jurors are placed in an unfamiliar role and environment and deprived of their usual coping strategies such as turning to family and friends for support. Moreover, some of the cases presented to juries for resolution provoke strong emotional and psychological responses by jurors. Cases involving extreme violence, severe injury, or graphic sexual material, by their very nature, can cause feelings of anger, shock, sadness, and even fear by jurors. This chapter offers suggestions for reducing the frustration and stress jurors experience as a result of these kinds of factors during the evidentiary stage of jury trials.

EXPLAIN THE TRIAL PROCESS

"The biggest source of stress for jurors is coming into an unknown environment: They don't know the system or what is expected of them."

—Bailiff

The intricacies and formalities of the trial process may be confusing and intimidating to many jurors, particularly those who are experiencing their first contacts with the court system. Perhaps this is one reason why judges reported maintaining rapport with and explaining the trial process to jurors as the strategies they used most often to minimize juror stress. As one judge remarked:

> Being human makes a big difference. When they walk in, they're nervous. Welcome them, explain what's going to happen and communicate with them throughout the process. A judge can get caught up in the numbers and forget that, for the jury, it's a unique experience.

"I warn them that attorneys and court officials may move away from them in the hallways or on the elevators. It's not personal; they're following my instructions to avoid contact with jurors while the trial is ongoing."

—Judge

Providing an explanation of the trial process is consistent with ABA Jury Standard 16, which reads in part that preliminary instructions "should explain the jury's role and responsibilities, the basic underlying principles of law to be applied in the case, and the order and nature of the presentations."[51] Preliminary instructions about the applicable law governing the case give jurors a conceptual framework in which to evaluate the evidence presented at trial.[52]

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[50] *See* Roger A. Bell & Theodore B. Feldmann, *Crisis Debriefing of Juries: A Follow-up*, 3 Am. J. PREVENTIVE PSYCHIATRY & NEUROLOGY 55, 57 (1992).
[51] ABA JURY STANDARDS, *supra* note 4, at 148–49.
[52] *See generally* William W. Schwarzer, *Communication with Juries:*

Several judges in the study inform jurors about the trial process even before jurors are officially sworn in. Typically the judges cover topics such as the proper conduct of jurors (including no-contact rules); the importance of maintaining an open mind until all evidence is heard; the role of the judge and attorneys during the trial; the fact that attorneys are supposed to be adversarial; definitions of the charges, such as fraud, so the jurors know what to focus on during the trial; the concepts of burden of proof and reasonable doubt in criminal cases and similar terms in civil cases; and the differences between law and fact and the reason why sidebars are sometimes necessary. Some judges provide jurors copies of the instructions in writing.

Although providing such basic information may seem insignificant, it can improve juror performance by having better-informed and more relaxed jurors. One judge noted that his efforts to keep jurors informed do not go unnoticed:

> Attorneys and jurors frequently remark that they very much appreciate instructions in writing after they have been given orally. Jurors also frequently comment upon how helpful it is to have been given a well thought out and carefully organized explanation of the trial process.

The fact that such efforts are noticed may mean that they are not done as routinely as they should be.

ALLOW ACTIVE JUROR PARTICIPATION

Under traditional trial procedures, jurors are expected to play a passive role, quietly listening and absorbing the presented evidence and testimony in preparation for their deliberations. However, contemporary research about juror decision making reveals that this passive role is actually unfamiliar and very uncomfortable for most jurors.[53] Traditional jury admonitions, such as prohibitions on juror note taking and questioning of witnesses, often make the jurors' task more difficult by hindering their ability to concentrate and to process new information. One juror in the study noted that taking notes helped him remain more objective, thus reducing his stress levels.

"I tell new bailiffs to think how it would feel if you had to sit there and couldn't ask questions. You have to just sit there listening to other people talk."
—Bailiff

Problems and Remedies, 69 CAL. L. REV. 731, 755–58 (1981) (discussing the importance of timing and delivery of jury instructions).

[53] *See* The Honorable B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1238–47 (1993); JURY SYSTEM PERFORMANCE, *supra* note 19, at 14–15.

Based on studies indicating that juror comprehension and satisfaction are increased if jurors are allowed a more active role in trials,[54] the Commentary to ABA Jury Standard 16(C) recommends that jurors be permitted to take notes and submit questions in writing to the judge to ask witnesses during trials.[55] The procedures for both of these techniques are described in *Jury Trial Innovations*.[56]

One caveat related to the application of these techniques is to emphasize that the activities are allowed but are not required. Some jurors indicated that they were given notepaper and a pen but no guidelines for using them. One judge said she makes very clear that note taking is an option:

> I tell them to take as many notes as they like, but that if they're not a note taker, don't be intimidated by your neighbor who is. Do what you are comfortable with. We will read back the transcript if your memory fails. For some jurors who are not real literate, note taking can increase stress levels, and some jurors can't listen and take notes.

Thus, while some jurors might welcome a more participatory role, it may be threatening to others if it is not accompanied with specific instructions.

"There were crime scene photographs of bodies not found for two weeks projected on a large screen—very sickening and not necessary."

—Juror

CONTROL PRESENTATION OF GRUESOME EVIDENCE AND TESTIMONY

Viewing particularly grisly evidence or listening to emotionally disturbing testimony was reported by some jurors as one of the most stressful aspects of serving on jury duty.[57] This applies as much to evidence presented in civil trials, such as personal injury cases, as to evidence presented in criminal trials. As one jury commissioner noted: "Civil trials often get the most gruesome evidence—attorneys try to work on the sympathies of the jurors to increase the damages awarded."

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[54] *See, e.g.,* Larry Heuer & Steven Penrod, *Juror Note-taking and Question Asking During Trials*, 18 LAW & HUM. BEHAV. 121 (1994); David L. Rosehan et al., *Note taking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53 (1994).

[55] *See* ABA JURY STANDARDS, *supra* note 4, at 150–51.

[56] *See* JURY TRIAL INNOVATIONS, *supra* note 15, at 141–47.

[57] In the juror survey, 28 percent of jurors who reported that disturbing evidence was presented at trial found the evidence moderately to extremely stressful.

Being unprepared to see gruesome evidence and testimony can exacerbate the sense of shock and stress experienced by jurors. Several judges in the study recommended warning jurors about upcoming evidence:

> Warn jurors before the photos are shown. Let them know the photos are coming rather than just slapping the photos in front of them. That way they can brace themselves. Just by saying the photos are coming, you blunt their edge.

"It would help if they would tell us in advance—warn us that it's something we're going to remember for the rest of our lives."
—Jury members

In fact, some judges argued that these warnings should be made as early in the trial as possible (even during voir dire) and should be repeated once or twice before the evidence or testimony is presented to the jury. These warnings help jurors become "desensitized" to the gruesomeness of the evidence.

Judges also view timing as an important factor in reducing the shock associated with gruesome evidence. For example, several judges noted that they avoid having such evidence presented immediately before or after lunch, and some judges order a recess immediately following the presentation of disturbing evidence to give jurors an opportunity to compose themselves. Other judges monitor juror facial expressions and body language and call recesses if warranted:

> For graphic photos, jurors will look down or make faces. They may cry and that's ok. If they're embarrassed or distraught, I'll take a recess.

Limiting the volume of gruesome evidence is another technique used to reduce the emotional effect on jurors. The purpose of photographs that depict gruesome evidence (or any evidence, for that matter) should be to give the jury new information, not just to amplify the gore or work on the sympathies of the jurors. Blocking out particularly offensive or disturbing parts of photographs is also an option for minimizing the impact of gruesome evidence. Similarly, the judge should admonish the attorneys to avoid having witnesses testify about the same disturbing event needlessly.

According to a survey of judges, 75 percent of trial judges who did not allow certain evidence to be admitted at trial found the strategy to be moderately to extremely effective in reducing juror stress.

Reducing the length of time jurors are exposed to gruesome evidence is another approach for alleviating juror stress in these types of trials. Demonstrative evidence should not remain in front of jurors indefinitely. One juror, for example, protested that the prosecutor displayed photographs of the victims and crime scene for several days at a time:

> It was a really sleazy thing to do. The photo showed the victim's dead, nude body—a total lack of respect for the dead. I had nightmares about it. I called out in my sleep, but I couldn't tell my husband what was wrong. It was very disturbing—offensive and unnecessary. The prosecutor is supposed to be for the people, but he wasn't acting for me.

"Don't leave photos right up in front of the jury for a long time. Adds stress and distracts from the testimony. It can be counter-productive for attorneys who may be blamed for introducing them and leaving them up there."

—Judge

In some instances, gruesome photographs are handed directly to jury members for their viewing. Several judges in the study inform jurors that they have to look at the photographs only once and then avert their eyes or turn the photographs over.

REDUCE BOREDOM DURING TRIALS

The vast majority of jurors take their duties very seriously and make a concerted effort to pay close attention to the evidence and testimony of witnesses. Nevertheless, some cases—because of either the tedious nature of the material or the presentation skills of the attorneys—tax jurors' (and even judges') ability to maintain their concentration on the trial proceedings. For example, attorneys sometimes read lengthy depositions to the jury when witnesses are unavailable to testify. Although boring trial proceedings do not provoke the shock and fear associated with gruesome evidence, the struggle to keep awake and attentive is stressful for many jurors.

Eighty-seven percent of the trial judges surveyed found that providing additional breaks for jurors is a moderately to extremely effective strategy for reducing juror stress.

The ideal solution to relieving juror stress during these cases is to make the trials more interesting. During pretrial conferences, for example, the judge can encourage attorneys to prepare deposition summaries to present to the jury rather than reading the whole deposition.[58] Using demonstrative evidence such as charts, graphs, and video technology also can communicate a great deal of information in an effective and efficient manner, thus saving the jury from long witness presentations.[59] Stipulating to the admissibility of exhibits and deposition testimony also streamlines the trial proceedings by eliminating the need to present foundational evidence during trial.[60]

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[58] *See § IV–10 Deposition Summaries*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 120–22.
[59] *See § IV–9 Computer Simulations*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 117–19.
[60] *See § IV–2 Pretrial Admission of Exhibits and Deposition Testimony*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 95–97.

In many cases, however, the nature of the evidence does not lend itself to a more riveting presentation format. In these cases, judges can attempt to break up the proceedings with more frequent recesses to permit jurors an opportunity to stretch and get coffee or snacks before returning to trial. Judges and court staff also should be attentive to the courtroom environment for characteristics that would add to the difficulty in concentrating. For example, dim lighting, background noise from air conditioners or radiators, and overly warm or stuffy courtrooms can make jurors sleepy or easily distracted.

CONTROL COURTROOM DISRUPTIONS

Jurors quickly become attuned to the emotional tone of the courtroom, which in most instances is one of controlled solemnity. Occasionally, however, unexpected things happen that interrupt the proceedings and threaten the decorum of the courtroom. On such occasions, the judge needs to maintain control of the courtroom. As one judge noted: "A weak judge causes juror stress."

Persons appearing as witnesses or sitting in the gallery can disrupt trial proceedings and jurors' sense of safety and purpose. A judge in a murder trial related one example when the mother of the murder victim became hysterical during the trial and had to be forcibly escorted from the courtroom. The jurors were visibly upset by the disturbance. Rather than just proceeding with the trial, the judge, with the attorneys' permission, took a few minutes to talk with the jury about the outburst. He noted that the jurors might understandably feel sympathy for the victim's mother, but that they should not let those feelings interfere with their rational decisions during the trial and deliberations.

Seventy-six percent of trial judges who personally addressed stress with jurors during the trial considered the strategy moderately to extremely effective for reducing juror stress.

Such disturbances are not uncommon in high-stress trials. Even in cases in which members of the audience are not uncontrollably disruptive, reactions such as weeping, glaring, and whispering among themselves can still distract the jury. To minimize the amount of disruption, the judge or court staff can ask these individuals to seat themselves out of the jury's immediate line of sight.

In some instances, attorney actions cause disruptions. Although a certain amount of confrontation between attorneys is expected, jurors sometimes become overwhelmed at the level of bickering and sniping displayed by attorneys. One judge commented that he calls attorneys into his chambers if he thinks the arguing is gratuitous. He tells the attorneys that it is

"I had a civil case where the attorneys were totally antagonistic, arguing every point. It made the jury very uptight."
—Judge

unnecessary and that it is "turning the judge and the jury off." Another judge indicated that she "made an attorney apologize to the jury and the court for sniping." Her perception was that the jury understood what she was doing and appreciated it.

Pro se cases also can be a source of stress for jurors. Pro se parties can be overly repetitious, ignore rulings by the judge, and talk over the opposing attorney or witnesses. In addition to monitoring such behaviors, judges may want to offer more frequent breaks during such trials.

DISCUSS SAFETY ISSUES

"Our names got out. They'd call our names when we were seated."
—Jury

Listening to testimony in criminal trials, especially those dealing with violent crime, can heighten jurors' sense of anxiety for their own safety and well-being. One jury described their heightened sensitivity to their environment:

> During breaks and lunches, you felt like everyone was looking at you and following you. In the lunchroom you could see, through the curtain, the defendant's family. We'd come out of the elevators and they'd be waiting.

Courts routinely take precautions to protect the safety and privacy of jurors. In extreme cases, courts even authorize the use of "anonymous juries" in which identifying information about the jurors is withheld from the parties, their attorneys, and the public.[61] Some courts provide escorts to parking lots and other court areas, and some court facilities are specifically designed to protect jurors from routine interaction with the public; for example, with private doors from the jury room to courthouse exits, private bathrooms for jurors' use, and separate seating areas in courthouse cafeterias.

"We were never told what protection was available to us. It would've helped to know the options."
—Jury

In addition to possibly prejudicing the jury toward the defendant, some judges and court staff intentionally do not tell jurors about special safety precautions to avoid raising jurors' anxiety levels unnecessarily. However, jurors are usually sufficiently attuned to their environment to realize when the situation warrants extra security. Thus failing to inform them

[61] *See generally* 18 U.S.C. § 3432 (Supp. 1996) (authorizing the use of anonymous juries in capital cases to protect the life or safety of the jurors and their families); Hamer v. United States, 259 F.2d 274 (9th Cir. 1958) (holding that use of an anonymous jury did not deprive the defendant of his Sixth Amendment rights since voir dire was sufficient to ensure the selection of an impartial jury).

about steps taken may actually have the opposite effect of heightening jurors' fears.

Judges and court staff should balance the need to avoid jury prejudice toward the defendant with the need to inform jurors of special safety precautions. To be helpful without being prejudicial is a delicate balance and case-specific. Judges and court staff can, if deemed appropriate, inform jurors about the security measures taken on their behalf and advise jurors to alert court staff in the event that they feel uneasy or threatened. Such discussions reassure jurors that court staff have given appropriate consideration to security issues and will consider additional measures if necessary.

PROVIDE INFORMATION ABOUT MEDIA CONTACTS

Eighty percent of judges who took steps to shield jurors from the media found the strategy to be moderately to extremely effective for relieving juror stress.

Only the most high-profile trials generate extensive media coverage. Even cases that have received considerable local publicity rarely have more than a reporter or two sitting unobtrusively in the gallery. Nevertheless, the extensive attention given to the jury in recent high-profile trials (e.g., the O.J. Simpson murder trial; the Oklahoma City bombing trials of Timothy McVeigh and Terry Nichols) has prompted both jurors and court staff to seek appropriate measures to shield jurors from offensive or harassing contacts by the media.

Except under the most limited circumstances, information concerning individuals serving as jurors is a matter of public record to which the media have a right of access.[62] Media do not, however, have a right to interfere with the efficient administration of justice or the integrity of the trial process. The trial judge is thus entitled to impose some restrictions on the media, such as prohibiting any photography in the courtroom, prohibiting media interviews in courthouse corridors, prohibiting disruptions from reporters while in the courtroom (e.g., when exiting to file their stories), and prohibiting contact with jurors during the trial.

Most media personnel understand and respect these basic rules of trial conduct. Most jurors, however, are unaware of restrictions on the media and may be fearful of media attention. Judges and court staff can alleviate fears by informing jurors of the rules governing media coverage of trials, particularly those concerning jurors. Jurors should be advised to alert the judge or court staff immediately if a reporter attempts to contact the jurors or their families while they are on jury duty. It is also helpful to

[62] *See* Press Enterprise, Inc. v. Superior Court, 464 U.S. 501 (1984).

assure jurors that the court will provide them with information and advice for dealing with media attention after their jury service is complete (see Chapter 6).

MINIMIZE DISRUPTIONS OF THE SCHEDULE

"The delays seem to enhance the uncertainty, the unknown, and stress.
—Judge

A trial does not necessarily have to be a stirring courtroom drama to keep jurors interested and engaged in the proceeding. Most jurors report that jury service was a positive and educational experience, even for the most mundane cases. As a practical matter, most trial proceedings progress at a reasonable pace (particularly in contrast to the pace that normally characterizes juror orientation and voir dire procedures).

Eighty-six percent of judges who required (and 85 percent who encouraged) attorneys to make motions outside the presence of the jury found the strategy to be moderately to extremely effective for reducing juror stress.

Even with the best managed trial calendar, however, unavoidable disruptions occasionally occur that must be resolved outside the presence of the jury. Short recesses during the trial are not upsetting to jurors and sometimes are welcomed as much-needed breaks. However, frequent disruptions or breaks for long periods of time can be tedious and stressful for jurors.

Many judges routinely schedule non-jury matters with an eye toward using jurors' time as efficiently as possible. For example, they will set aside time at the beginning of the day before jurors arrive or at the end of the day after jurors have left to hear trial motions or attend to administrative matters.

Eighty-seven percent of trial judges who asked jurors about their wishes about lunchtime, quitting time, and so forth considered the strategy moderately to extremely effective for reducing juror stress.

Despite the best efforts of judges and attorneys, most trials involve some "downtime" for jurors. For those periods, the jury's accommodations, either the jury deliberation room or the jury assembly room, should be as pleasant as possible (e.g., comfortable seating, conducive to working, well-ventilated, good lighting). If a disruption in the trial will be substantial, the judge should consider allowing jurors to leave the courthouse with instructions to return at a specific time.

Because the disruption of everyday routine is one source of juror stress, informing jurors about the expected trial schedule, and sticking to that schedule, is one effective strategy for alleviating stress, especially in longer trials.[63] Ideally, trial schedules should include sufficient time for jurors to conduct private business, such as doctors' appointments or household errands. Some judges, for example, reserve one afternoon or one day a week in lengthy trials as "non-jury" time to give jurors an

[63] In one court, a schedule is printed for cases that last more than a week. The schedule includes the name and phone number of the bailiff, secretary, and judge associated with the case.

opportunity to attend to personal affairs. Before making major adjustments in the trial schedule, such as those that entail staying late or working through lunch to accommodate a witness's availability, judges should consult with the jurors to ensure that the revised schedule will not disrupt jurors' prearranged plans (e.g., picking up children from childcare).

Chapter 5

Jury Deliberations

Lessons Learned

- ☐ Jurors are concerned about participating in jury deliberations.
- ☐ Jurors worry about making a mistake when reaching a verdict.
- ☐ Confusing jury instructions can increase the level of tension in the deliberation room.
- ☐ Jurors are apprehensive about sequestration.
- ☐ Alternate jurors often feel excluded from the process and thus have no sense of closure.
- ☐ Jurors are frustrated by jury deliberations that are unproductive and disorganized.
- ☐ Jurors may behave quite differently during the deliberation process when tensions are much higher.
- ☐ Jurors appreciate the small gestures of court staff to make their experience less stressful.
- ☐ Jurors can feel claustrophobic and uncomfortable in jury deliberation rooms without sufficient light, ventilation, or space.

Deliberating on the case is the culmination of the jury's purpose in the courts. Understandably, it is also one of the most stressful aspects of jury duty for most jurors. Jury deliberations and discussions, deciding on a verdict, and the fear of making a mistake were ranked among the top sources of stress by the study participants. One juror commented on some of the inherent stresses of juror decision making:

> The majority disagreed with me at first, then began to agree which made me equally uncomfortable. There were a couple of jurors who never said anything. I worry that they will regret their decision later and that memory will stay with them.

Jurors have a tremendous responsibility placed on them. Some of the difficulties they face are unavoidable, but there are strategies courts can take to alleviate the stress of jury deliberations.

PROVIDE CLEAR INSTRUCTIONS

Eighty-eight percent of trial judges surveyed indicated that explaining jury instructions clearly is moderately to extremely effective for reducing juror stress.

Actively orienting jurors to the trial process and helping them understand their roles are important tools for reducing juror stress. Before the jury retires to deliberate, the trial judge should "instruct the jury on the law, on the appropriate procedures to be followed during deliberations, and on the appropriate method for reporting the results of its deliberations."[64] Unclear jury instructions can contribute to jurors' overall feelings of confusion and stress. Research has demonstrated that juror comprehension of instructions is low.[65] One judge reported that the most common juror question is whether they can use a dictionary during deliberations.

"Jury instructions not real clear . . . didn't provide anything on the process; we took turns reading them out loud which seemed to make them more clear."
—Juror

Jurors need instructions that are written in plain English. *ABA Jury Standards* recommends that judges deliver instructions that are readily understood by individuals unfamiliar with the legal system.[66] Writing instructions in language that avoids legal abstractions and using case-specific language helps jurors understand the instructions in the context of the case and avoids the confusion that generic terms can cause.[67] Instructions should use easily understandable ("jury-friendly") and consistent terminology instead of the traditional legal jargon.[68] The content of the instructions can be simplified by deleting any unnecessary

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[64] *Standard 16(c)(ii)*, *in* ABA JURY STANDARDS, *supra* note 4, at 141.
[65] *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12 (1982); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 74 JUDICATURE 249 (1991).
[66] *See* ABA JURY STANDARDS, *supra* note 4, at 148.
[67] In complex cases, judges should consider providing each juror with a copy of the instructions and, if applicable, a copy of complex special verdicts. *See § VI–5 Written or Recorded Instructions for Jurors*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 174–76.
[68] *See § VI–2 Plain English Jury Instructions*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 163–67.

information and focusing on the factual issues and legal rules that must be used by the jurors.

Using an informal, conversational tone when giving the instructions aids juror comprehension. Participants in the study suggested using short sentences and taking the time to carefully explain instructions to jurors. Short breaks also can be helpful, especially if the instructions are lengthy. Audio-visual aids (overhead monitors, visual aids) as well as written copies of the instructions also can assist understanding and retention of instructions. Finally, judges should inform jurors of the proper procedures for requesting clarifications of the instructions once deliberations are underway.[69]

"We received a ream (102 pages) of jury instructions that we were told not to write on. . . . For every page of this, had another page that apparently contradicted."
—Juror

Before entering deliberations, jurors should feel comfortable about required procedures as well as applicable legal issues. Consider the unnecessary embarrassment described by one juror who participated in an extremely difficult deliberation:

> We were all shaking waiting to go back in; everyone was near tears. Then we found out we filled out the verdicts incorrectly—felt foolish. We had to march back into the deliberation room and re-sign.

Full instructions about completing necessary forms and the process for returning the verdict should be provided before the jury retires.

PREPARE JURORS FOR SEQUESTRATION

Judges rated sequestration for an entire trial as the second most significant source of juror stress.[70] Jurors may worry about how sequestration will affect them, their family, or their jobs. They have practical concerns about where they will sleep and eat and how they will contact their families. Keeping the jury informed about the likelihood of sequestration can help jurors prepare. In fact, jurors should be told about the possibility of sequestration at the outset of jury selection, and the mechanics should be explained clearly. They should be updated throughout the trial of the likelihood of sequestration and encouraged to make advance preparations. For example, one judge surveyed said he

"Find a decent place for them to stay. Hand-pick bailiffs that handle them—to the extent you can. It makes a big difference—affects how safe they feel and sends a message regarding the professionalism of the entire operation."
—Judge

[69] For more information on juror questions during deliberations, see *§ VI–6 Juror Questions About Instructions*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 177.

[70] On a five-point scale beginning with 0 (4 = extremely stressful), the average rating for sequestration was 3.06.

lets jurors know prior to deliberations that they may be sequestered and recommends that they bring basic necessities and toiletries with them to court.[71] Forewarning gives jurors time to address the personal problems (e.g., childcare) that come with sequestration.

ABA Jury Standard 19 states that the trial judge has "the responsibility to oversee the conditions of sequestration"[72] and that procedures should be promulgated to ensure that "the inconvenience and discomfort of the sequestered jurors is minimized."[73] To this end, the ABA recommends that guidelines be developed to address all aspects of sequestration: restrictions, lodging, transportation, meals, medical treatment, laundry, exercise, and recreation, including provisions for contact with family, friends, and the general public. If the jury is to be sequestered, having guidelines in place simplifies the process and allows the judge to give jurors full details about what will happen to them. Providing jurors with this information helps them maintain a feeling of control, both in the courtroom and in their personal lives.

CONSIDER OPTIONS FOR THE ALTERNATE JURORS

It is natural for jurors to want to experience a sense of closure at the end of the case. Some jurors in the study indicated that serving as an alternate juror was frustrating—"like being all dressed up for the prom and not getting to go." When the trial ends, they suddenly are excluded from the deliberation process. These feelings may be exacerbated in courts where jurors are not informed of their status until just prior to closing remarks or immediately before jurors begin deliberations.

One suggestion for reducing disappointment and frustration is to inform jurors of their status early in the proceedings. Another option is to allow alternates to observe, but not participate in, deliberations.[74] A third option, for use in civil cases, is to select a jury that is larger than the minimum jury size necessary.[75] All jurors are sworn in and participate in

[71] It would be the *highly unusual* trial that results in the issue of sequestration being revealed to the jury only at the trial's conclusion.
[72] *Standard 19(b)*, *in* ABA JURY STANDARDS, *supra* note 4, at 173.
[73] *Standards 19(c)(ii)*, *in* ABA JURY STANDARDS, *supra* note 4, at 173.
[74] *See § VI–7 Permitting Alternates to Observe Deliberations*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 180.
[75] This option is subject to local procedural rules.

deliberations. If one juror is excused, the trial continues with the smaller jury (a minimum jury size is set by law).[76]

PROVIDE GUIDANCE ON DELIBERATION PROCESS

Lengthy deliberations, fear of making a mistake, and conflict with other jurors all contribute to making time spent in the deliberation room difficult. Although courts must consider the integrity of the deliberation process and avoid interference in juror decision making, there are ways to improve the efficiency and civility of the process.

"Judges and attorneys are not very good with process. We assume jurors come equipped to do the job."
—Judge

Many jurors related stories about the difficulties of deliberations. One said the jury "reached a point where we didn't know what to do—not deadlocked; we just needed a suggestion for group dynamics, on how to approach." As part of the pre-deliberation instructions, the judge could suggest procedures to help deliberations proceed with efficiency and focus. These may include guidance on applying the instructions or recommending a general framework with which to approach deliberations. *Jury Trial Innovations* identifies several areas in which juries may benefit from judicial assistance, including advice on "selecting a presiding juror (if not previously selected), avoiding early public votes on the verdict, conducting small group discussions that provide all jurors with an opportunity to present their opinions, allocating tasks (such as taking notes on deliberations) among jurors, and handling disagreement or deadlock."[77] In tense criminal trials or in situations in which jurors are not jelling well, one judge tells jurors that they may find it helpful to set some ground rules: "Do not interrupt one another; listen to each other; if you disagree, disagree respectfully; don't put someone down because we all feel bad when we are put down by someone." Providing jurors with this kind of general guidance as they begin deliberations may increase the efficiency and ease of deliberations.

"There should be more guidelines on what is expected of jurors; don't really understand responsibilities . . . No one knows how to go about it."
–Juror

"No plan or instructions on how to deliberate was very stressful; no guidelines on juror conduct."
—Juror

Court officials acknowledged the need to advise the jury on how to get along and to reinforce the importance of the jury's job. Several jurors indicated that they nearly came to blows in the deliberation room. Participants told stories of single jurors feeling slighted and holding up deliberations and of "bully jurors" who tried to influence others as demonstrated by the following juror's comments:

"When they go to deliberate, jurors don't always treat each other nicely; can be a very ugly life experience for them. Should explain what we won't tolerate in that situation."
—Judge

[76] *See § III–10 Variable Jury Size/No Alternate Juror*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 87.
[77] *§ VI–4 Suggestions for Jurors on Conducting Deliberations*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 171.

> The deliberations brought out the ugly side of people—too much emotions, pounding the table, throwing pencils around, and misdirected emotion if they didn't get their own way. It's been a long time since I had to deal with temper tantrums. They became personal in their attacks toward one another. . . . I felt like a nursery school teacher trying to lead kids back to control of their tempers. . . . I was alarmed at the way people would go after others. Some jurors appeared traumatized by the personal attacks. . . . I wasn't prepared for Mid-East type negotiations.

"I think jurors need greater guidance in how to conduct deliberations to work toward a unanimous verdict."

—Judge

One judge suggested building a more cooperative work environment by asking jurors to decide on scheduling logistics such as when to go to lunch or take breaks. The process of building rapport and achieving consensus on these easier decisions may be helpful as a starting point for deliberating more difficult questions.[78] He also suggested stressing goals jurors have in common, such as justice, equity, and public good, and encouraging jurors "to take ownership and responsibility in the process." Although the court can do little to help jurors while they are deliberating, guidance from the judge before starting can help manage group dynamics and avoid an impasse.

Another approach to managing the deliberation process efficiently is to provide jurors with written or recorded jury instructions. In addition to increasing comprehension, written instructions can help jurors deliberate.[79] Avoiding discussion over the meaning or application of instructions also may reduce deliberation time and avoid interrupting discussions to consult the judge.

MAKE JURORS MORE COMFORTABLE

"Through bailiff and court, let jurors know they are important and court staff are even ready to respond to any need they may have."

—Judge

Some factors that make deliberations stressful, such as disturbing details of cases jurors must hear and discuss, are beyond the control of the court. Although the judge and court

[78] During lengthy trials, partial sequestration—keeping jurors together during the court-day, including breaks and lunches—also helps develop rapport among jurors and aids in better deliberations.

[79] *See* SPECIAL COMMITTEE ON JURY COMPREHENSION, AMERICAN BAR ASSOCIATION, JURY COMPREHENSION IN COMPLEX CASES 51–52 (1989). There are other advantages to providing each juror with a copy of the jury instructions. *See § VI–5 Written or Recorded Instructions for Jurors*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 174–75.

staff are limited in their ability to help with these major stressors, study participants frequently indicated the importance of small gestures by court staff in improving their deliberation experience.

Several jurors noted the importance of a relaxed courtroom environment. Courts that follow the rules, but maintain a more informal atmosphere, help lessen juror anxiety. Jurors are already apprehensive about the deliberation process, and a relaxed staff can increase juror comfort.

Maintaining a positive rapport with jurors was the most frequently cited judicial strategy for alleviating juror stress. Judges can set a positive tone and atmosphere in the courtroom, encouraging jurors to communicate when they have needs, concerns, or questions. Bailiffs can also help monitor tension levels and keep the judge informed of problems.

"We need to be more proactive in making them comfortable."
—Judge

Many judges let the jurors decide their own deliberation schedule. One judge informs jurors that "the schedule is up to them—roughly 9:00–4:30, but it's ok to work around traffic, meet dentist appointments, go out for lunch, take Friday off." Several court staff noted that such policies seem to relieve some of the feelings of tension in the deliberation room. It is also consistent with ABA recommendations that the judge consider the preferences of jurors when setting hours for jury deliberations:

> The judge should make the options known to the jury and give them time to discuss these options among themselves. . . . [T]he judge should ascertain whether the jurors appear to be fatigued and should inquire . . . whether the deliberations would interfere with the religious beliefs or practices of any member of the jury.[80]

Courts can establish routine policies to facilitate decisions on the length of daily deliberations, break schedules, and procedures for how jurors can communicate with the court. Soliciting input and accommodating juror needs foster a sense of control over the process. The best interests of all parties are served when jurors are satisfied with their schedule, can plan their personal lives accordingly, and are focused on the job at hand.

Finally, providing a pleasant physical environment and amenities for jurors, such as coffee in the jury room, improves the jury experience. At a minimum, the court should provide for the basic needs of the jurors so that they can do their job. ABA Jury Standard 14(c) describes the deliberation room:

"Deliberation room should be their space during the trial . . . their sanctuary. By making them more comfortable, helps them through the process."
—Judge

[80] ABA JURY STANDARDS, *supra* note 4, at 170–71 (citation omitted).

> [A] well-ventilated room large enough to accommodate a conference table and chairs as well as to allow some freedom of movement. Adequate writing facilities should be provided. . . . Closets and restrooms should be near the room entrance. . . . Jury deliberation rooms should be designated as nonsmoking areas.[81]

If possible, private juror restrooms are preferable so that jurors are not forced into contact with the victim, lawyers or other parties involved in the case.

In addition to providing for these basic needs, courts should make the jury room as pleasant as possible. Participants noted several small amenities, such as good lighting, space to leave food or books, and a microwave, that improve the quality of time spent in the deliberation room. One court hung travel posters on the walls of the deliberation room to give jurors something "peaceful and serene" to look at when deliberations become stressful.

[81] *Id.* at 130.

Chapter 6

Post-trial Proceedings

Lessons Learned

- ☐ Jurors have questions about procedures and decisions made during the trial that they do not understand.
- ☐ Jurors worry about the accuracy of their verdict.
- ☐ Jurors may fear retribution by the defendant or family and friends of the defendant.
- ☐ Jurors are anxious about meeting the press after the trial.
- ☐ Jurors are concerned about their privacy after the trial and worry that their conversations during deliberations will be discussed publicly.
- ☐ Jurors may not understand stress symptoms they are experiencing or may not be prepared for symptoms that occur following the trial.
- ☐ In addition to providing feedback for improving the jury system process, exit questionnaires allow jurors to release pent-up feelings about their jury experience.

"There needs to be a debriefing process after deliberations! This would help greatly in reducing stress or adverse after effects."
—Juror

The trial is over, the verdict has been given, and the court has officially dismissed the jury from service. This time holds mixed emotions for many jurors. They may feel a sense of relief that their term of service is over and enjoy feelings of accomplishment for completing the job. Jurors also may experience a flood of difficult emotions, particularly following long trials, trials with high levels of stress, and/or complex trials. These emotions stem from several sources, and each emotion is a normal reaction to the unusual experience of serving on a jury. Judges in the survey recognized the importance of this period: They ranked judicial post-trial debriefing of jurors as fourth among 42 strategies for effectively addressing juror stress. The

"Judge . . . debriefed for one hour after trial and that made the whole thing worthwhile; now willing to do again."
—Juror

nature of post-trial communications to alleviate juror stress is the subject of this chapter.

CONSIDER WHAT TYPE OF DEBRIEFING IS NEEDED

Three main techniques are used to address the jury after the trial: discharge instructions, post-trial debriefings by a judge, and post-trial debriefings by a mental health professional.[82] Jurisdictions, as well as judges within jurisdictions, vary with regard to the method or combination of methods they use to address jurors after the trial.[83]

For trials that involve relatively low levels of stress, jurors may need only general discharge instructions from the trial judge prior to being dismissed. Discharge instructions can help jurors in relatively low-stress trials by providing information on what to expect once the trial is finished.[84] This includes instructions regarding what they can say to whom and tips for dealing with and/or avoiding the media. For criminal trials with a separate sentencing date, jurors should also be informed when to return if they wish to hear the sentence. During discharge instructions the judge should thank jurors for their service and reinforce the court's appreciation of their time investment. In general, informal meetings with the trial judge provide a sense of closure for the jurors.[85]

"No one else understands as well as other jurors; helps being able to talk to other jurors after its over."

—Juror

In other cases where moderate or more severe levels of stress occur during the trial, judges may choose to hold a more lengthy discussion with the jurors (a judicial debriefing) or bring in a mental health professional to conduct a debriefing.

A debriefing session is often needed when the trial provokes a great deal of media attention, the testimony is especially gruesome, or the trial is exceptionally long. The

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[82] For some trials, it may be helpful to have the debriefing done by a judge *and* a mental health professional or have a mental health professional easily available, if needed, for consultation with the judge and/or the jury.

[83] This chapter presents options for material that can be presented during debriefing sessions. The various techniques and the kinds of topics covered can be combined to address the individual needs of each case within the procedural and statutory guidelines of each jurisdiction.

[84] *See* ABA JURY STANDARDS, *supra* note 4, at 151–52.

[85] *See generally* the Honorable James E. Kelley, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 DRAKE L. REV. 97, 116 (1994) [hereinafter *Addressing Juror Stress*] (suggesting that "even a brief intervention, such as short conversation with the trial judge" may help avoid a serious stress reaction).

primary advantage of a mental health debriefing is the presence of someone with professional expertise who can immediately address any serious or severe reactions to stress, such as depression, nightmares, and insomnia. A debriefing by a neutral party also avoids any question of the appropriateness of judicial involvement in a debriefing.

Only 15 percent of the 118 judges responding to the second judge survey reported the use of a mental health expert in conducting a post-trial debriefing. In comparison, 74 percent reported conducting judicial debriefings. The infrequent use of mental health experts may be explained, in part, by the relatively few reports of severe stress among jurors. Based on the jurors' reports of stress, a distinct minority of high-stress cases warrant a professional mental health debriefing. Judges, however, should be aware of the alternative and know where to access a qualified professional (i.e., psychologist, psychiatrist, or social worker with expertise in post-traumatic stress disorder) to conduct a jury debriefing when necessary. If the court has a victims' assistance program (or other component of the court that deals with mental health issues, such as a court clinic), the staff may be familiar with local mental health professionals experienced in helping individuals deal with post-traumatic stress. Although these mental health professionals may not have conducted juror debriefings per se, they probably will have a better sense of what a debriefing, should cover.[86] If a jurisdiction does not have a victim assistance program or other in-house or contractual source of mental health services, court officials can seek references from mental health centers, nearby medical schools, university departments of psychology and social work, professional associations with referral services,[87] or other sources of mental health services.

Some judges use the judicial debriefing as an opportunity to "screen" the jury to determine if an additional mental health debriefing is necessary for the full jury or if additional assistance may be necessary for some jury members. Some judges follow up with jurors who seem particularly disturbed by the trial or ask the

[86] The court can increase the effectiveness of the mental health professional by providing information on the jury process, the specific stressors or issues involved in the trial, and the most frequent problems experienced by jurors.

[87] Some professional associations have referral services that can provide the names of mental health professionals with knowledge of the court process and juror stress.

jurors to call the judge or someone else within a set period of time.[88]

In general, good debriefing sessions reduce stress and offer information on mental health services for those who might need it, provide closure, promote confidence in the judicial system, and enhance satisfaction. The next section offers suggestions for optimizing the debriefing process.

OPTIMIZE THE DEBRIEFING SESSION

- *Consider the best time to debrief.* Timing the debriefing is important. If the verdict is returned early in the day, remaining for the debriefing can provide jurors an excellent opportunity to decompress before meeting the press. However, if it is late in the day, jurors may be tired or burned out from their deliberations and thus should be directed to return the following day for debriefing. The latter is typically easier to arrange when a professional from outside the court conducts the debriefing, as the exact time a jury will bring the verdict in is uncertain. In addition, some jurors reported being numb and emotionally exhausted immediately after the trial and thus could not take full advantage of what was being said.[89]
- *Make the juror feel comfortable.* The judge should set the stage for the debriefing process. Debriefings may be held in the courtroom, the judge's chambers, or in the deliberation room. There are advantages and disadvantages to each choice—judges can determine the best location considering available space and the individual experiences of each jury.[90] In any location, the judge should take steps to diminish the psychological distance between judge and juror—removing the judicial

[88] Judges may find it helpful to speak with a mental health professional about the likely symptoms of stress that would warrant a referral to a mental health professional.

[89] One juror suggested that the court provide exiting jurors with written information about what they can expect so that they can take this information with them and read it later. She also suggested providing a number they can call for assistance. "All coping skills are not equal, and if the state can ask people to make the sacrifices we must make to serve, then it seems appropriate that they have something in place to assist those who don't carry the burden as well as others."

[90] For more information, see *Appendix 12: Suggested Procedures for Judges Conducting Juror Debriefings*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 297–302.

robe or coming down off the bench to speak to jurors on the same level.

Many judges may feel uncomfortable conducting jury debriefings. Judge James Kelley suggests several strategies judges can use to increase the judge's effectiveness: listen with an empathetic attitude, do not interrupt jurors, occasionally repeat back what was said by a juror to show you are listening, and censor any "put down" statements.[91] While study participants generally agreed that the presiding judge should conduct the debriefing, they did acknowledge that some judges "don't have the personality for it," in which case the debriefing should be conducted by another court official or mental health professional.

The judge or mental health professional should make it clear that participation in a debriefing is voluntary and no one should be singled out or questioned if he or she does not choose to participate actively in the discussion. Some jurors, although quiet, may be relieved to hear their concerns expressed by other jurors. One judge indicated that jurors may "need to understand that this conversation is not on the record and that the trial is over now." To help jurors feel comfortable and encourage conversation, some judges clear the courtroom entirely; others indicated that they allow attorneys to remain for the purpose of education, dismissing them only if the jurors seem nervous or request that the attorneys not be present.

- *Encourage productive communication*. Jurors may need some encouragement to begin the post-trial debriefing. One judge suggested asking a direct question to "prime the pump." Get the conversation started using open-ended questions—ask jurors if they have any questions about the trial process or comments about their experience. The jurors should drive the content of the debriefing, and any appropriate questions should be answered.[92]

  Though the object is to encourage open communication, the judge and/or mental health professional conducting the debriefing needs to maintain control over the discussion. Judges suggested introducing the debriefing process by stating the purpose of the meeting and setting any ground rules for the discussion

[91] *See Addressing Juror Stress*, *supra* note 85, at 120.

[92] Subject to ground rules, some questions and comments can be put into writing. This approach may increase juror participation in the process, as well as facilitate more open and honest comments.

(e.g., only one person speaks at a time, be sensitive to the confidentiality of others' remarks, talking about the deliberation process is "off-limits"). Do allow jurors to vent some feelings about the process, but do not allow them to start discussing other jurors' behavior or allow the debriefing to degenerate into a conflict between two jurors or a continuation of arguments from the deliberation room. Judges may watch for signs that jurors are uncomfortable—facial expressions or avoiding eye contact with the jurors who are talking. Judges reported that by controlling the process carefully, they rarely hear about possible juror misconduct or information that may lead to a new trial.

ENSURE DEBRIEFING ADDRESSES JUROR NEEDS

- *Cover "lingering" questions.* A debriefing session is an excellent time to answer questions that were not appropriate for discussion during the trial. Many jurors in the study described their frustration over delays and frequently felt that their time was wasted waiting for the judge or attorneys. Judges may take this opportunity to explain the reasons for the delays. Jurors also may be curious about conversations conducted outside of their presence or may wonder why certain evidence was not presented. The debriefing is an opportunity to explain trial procedures or rules of evidence that jurors may not have understood.

  Some judges are comfortable discussing their opinions about jurors' specific questions; for example, the reasons why a certain witness did not testify. In criminal trials, jurors often want to know what will happen to the defendant next; some judges use the debriefing to tell jurors about the defendant's prior record or explain how the sentencing process works.[93]

"Jurors appreciate the concern for their well-being and comfort; jurors like the attention given to questions they have about the process."
—Judge

- *Reassure jurors.* Some jurors have questions about their verdict. Concerns about having made the wrong decision can haunt jurors long after the trial is over. A debriefing enables the judge to assure jurors that they did a good job, without commenting on the verdict.[94] Judges may take this opportunity to empathize with jurors about how hard it is

"*Whether you agree or not, you can't comment. . . . Their job is tough enough as it is.*"
—Judge

[93] *See Addressing Juror Stress*, *supra* note 85, at 118.
[94] *See id*. at 117.

to be a juror and to note that most cases that go to trial are sharply contested and difficult to decide. One judge tells his jurors that "juries make the best decision 99% of the time, and if they didn't it's because they got bad evidence or testimony and that's not their fault, but the fault of the attorneys or the judge." Judges can emphasize that jurors fulfilled their duties to the court and can encourage them to take pride in the process, de-emphasizing the verdict. In the study, several jurors reported that the debriefing process made them feel better about the verdict.

Jurors also may have concerns about retribution, either by the defendant or the defendant's family and friends. These fears are especially prevalent in trials involving violent or gang-related crimes. One juror described "concerns that the attorney was passing names on to the defendant—worried about the defendant coming back and getting me."[95] After the verdict, jurors should be informed of precautions to protect their privacy and any additional security precautions that are being taken. Judges can reassure jurors that incidents of retribution are extremely rare but provide them with information about contacting the court if a threat does occur.

"Stressed from deliberation and verdict, didn't want to have to explain to reporters."
—Juror

- *Help jurors deal with media and attorneys*. After the trial, jurors are sometimes anxious about meeting the parties involved in the trial or with reporters. They worry that their discussions in the deliberation room will not remain private. Some express confusion about whether they are required to speak to the media. ABA Standard 16(d)(i) and (ii) recommend that judges "release the jurors from their duty of confidentiality" and also "explain their rights regarding inquiries from counsel or the press."[96] Several of the judges in the study also take this opportunity to remind jurors to respect the privacy of the other jurors when discussing the case with the media or attorneys.

  To protect jurors from harassment, some courts inform jurors of constraints on the parties and their attorneys regarding future contact with jurors and provide instructions on how to invoke the protection of the court, if needed.[97] Some courts also provide alternate exits for jurors who want to avoid the press.

"I still have nightmares about what I heard. It was after the trial that I was bothered the most—no nightmares during the trial."
—Juror

[95] *See* discussion *infra* Chapter 3, "Address Security Issues."
[96] ABA JURY STANDARDS, *supra* note 4, at 141.
[97] For more information, see *§ VII–1 Advice Regarding Post-Verdict Conversations*, *in* JURY TRIAL INNOVATIONS *supra* note 15, at 197–99.

"The night we stayed in the motel, I dreamed [the defendant] had gotten loose and was there in the room with us while we were deliberating on the verdict. I was terrified."
—Juror

- *Normalize juror stress.* Many jurors experience similar symptoms of juror stress. These may include insomnia, anxiety, guilt, intrusive thoughts, nightmares, or depression. Talking to jurors about these symptoms validates their feelings and helps them understand that what they are experiencing is normal. It is also important to warn jurors that even though they haven't experienced these signs of stress during the trial, they may in the future. People react differently to stressful situations. Some may continue to have symptoms for a while after the trial.[98] Some may have a reoccurrence of symptoms at specific times, such as the anniversary of the trial or sentencing. In a mental health debriefing, the facilitator may go beyond simply discussing stress symptoms to help jurors reflect on and express feelings to relieve them of the efforts needed to suppress them. Reassuring jurors that stress symptoms are a normal reaction to an abnormal experience can in itself bring considerable relief of stress.

SEEK POST-TRIAL JUROR FEEDBACK

A variety of post-verdict procedures allow the court to identify areas in which the court can improve services to jurors. Communicating with jurors through debriefings, individual meetings, or exit questionnaires can reveal areas in which the court can help jurors now and in the future.

Although once the trial is over it may be too late to respond to some juror concerns, juror feedback about the process may be helpful for improving the experience of future jurors. Some courts use exit questionnaires to track jurors' feelings about jury duty and to identify areas of juror dissatisfaction. Although questionnaires are not necessary for every trial, they provide another forum for jurors to release pent-up feelings about their experience of juror duty. *Jury Trial Innovations* suggests that to be useful to the court, questionnaires should be distributed often enough to monitor juror attitudes about jury service during periods of high and low juror usage. Questionnaires should be administered to people at all stages of the juror selection and trial process, including alternate jurors, excused jurors, and individuals who were not selected for jury service.[99]

[98] Judges may find it appropriate to inform jurors of additional mental health resources.

[99] For more information, see *§ VII–5 Juror Exit Questionnaires*, *in* JURY TRIAL INNOVATIONS, *supra* note 15, at 209–10.

Importance of Voir Dire in Rape Trials

Lynn Hecht Schafran

In March 1992 police in Queens, New York, arrested a man in the act of raping a 61-year-old homeless woman. The grand jury wanted to know why she was outdoors at two in the morning.[1]

A little-known fact about the Mike Tyson rape trial is that it took place in the same city as the most extensive study of rape trial jurors ever conducted. From 1978 to 1980 a team of sociologists watched all 38 Indianapolis jury trials for forcible sexual assault and then conducted 90-minute interviews with 331 of the 456 jurors who sat in those cases.[2]

The jurors were deeply influenced by stereotypes about appropriate roles and behavior for women and frequently cited the complainant's reputation as the basis for their verdict. Women who violated traditional norms of "womanly" behavior—by being sexually active outside of marriage, drinking, taking drugs, being away from home at the time of the attack, even holding a blue-collar job such as school bus driver—were less likely to be believed.

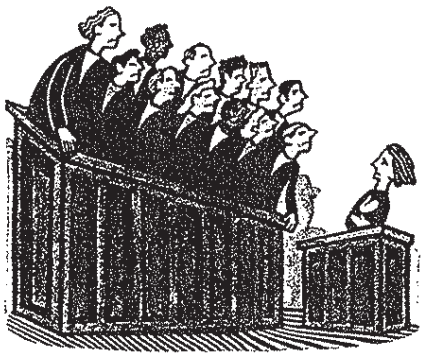
If the complainant knew the defendant, the jurors were extremely unwilling to convict. And if the complainant was black, no matter what the race of the rapist, she was met with particular skepticism. The jurors in the survey were apparently influenced by stereotypes about black women as more likely to consent to sex or less likely to be harmed by forced sex.

How did people with these attitudes get to sit on rape juries? Obviously there was a failure of voir dire. The necessity for a thorough voir dire in rape cases is patent, yet voir dire is disappearing before our eyes.

That it is under attack is hardly news. For more than 20 years commentators have been deploring cutbacks in jury examinations.[3] Today the country is a patchwork of voir dire practices. Although a few states still permit lawyers great latitude, an increasing number of states follow the federal practice of having the judge conduct the entire voir dire and keeping it very brief.

The pressure to minimize voir dire in this period of vanishing court resources is enormous and understandable. But it is particularly disturbing that voir dire is disappearing when the kinds of rape cases in which it is most needed are beginning to be brought in larger numbers. Despite the Tyson verdict, recent cases across the country show that the attitudes of the jurors in the Indianapolis study continue to be widely held and that inadequate voir dire continues to be a major factor in rape trial verdicts.

In Fort Lauderdale in 1989, a jury exonerated a rapist who kidnapped his victim from a parking lot at knife point on the ground that her clothing was provocative.[4] The prosecutor, when questioned about the jury's attitude, claimed



that he was legally barred from questioning jurors about their attitudes toward women in sexy clothing.[5]

New York City was stunned in 1991 by the acquittal of three male St. John's University students who orally sodomized a female student after stupefying her with liquor. The administrative prosecutor failed to question the prospective jurors about their biases. He explained, "We didn't realize that people's attitudes about sex were so ingrained and crossed a wider cross-section of the population than we anticipated."[6] This case also illustrated how ingrained is the racism toward black victims documented in the Indianapolis study. The victim was the black daughter of immigrants; her six assailants were sons of the white middle class.[7]

A juror's comment about the 1991 Palm Beach trial of William Kennedy Smith illustrates that in addition to the victim's reputation, jurors' decisions turn on stereotypes about who is and is not a rapist. After the verdict, juror Lea Haller told the media, "I think he's too charming and too good-looking to have to resort to violence for a night out."[8]

The myth that rapists are subhuman-looking men with no access to consensual sex is tenacious. Yet according to Dr. Nicholas Groth, a pioneer in sex-offender treatment, "All the offenders we have seen were sexually active males involved in consenting sexual relationships at the time of their offense."[9] When sociologist Diana Scully interviewed 114 incarcerated rapists, 89 percent estimated that before entering prison they had engaged in consensual sex at least twice a week; 42 percent of the prisoners said they had consensual sex at least once a day.[10]

With respect to unincarcerated, undetected date rapists, Professor Eugene Kanin of Purdue University, who has been working in the area of sexual aggression for decades, studied 71 self-disclosed date rapists—all white, middle-class, undergraduate college students. He found the rapists to be "dramatically more [sexually] active than the controls." Kanin concluded, "The evidence does not lend to stereotyping these men as the sexually deprived. . . . In fact, comparatively speaking, these men very successfully pursued a lively and positive interest in women, dating, and sexual activity."[11]

Voir dire is also essential to deal with potential female jurors' need to distance themselves from the victim's situation. Linda Fairstein, chief of the Manhattan district attorney's Sex Crimes Unit, has observed that women are often not good jurors in acquaintance-rape cases. For many women, the need to shield themselves from their own vulnerability to sexual assault is paramount. If they can insist that the victim engaged in behavior that they would never engage in, such as visiting a bar or going to a man's apartment, they can convince themselves that they are not at risk.[12]

'Friendly Fire'

Contrary to the stereotype of rapists as brutal strangers, data from rape crisis centers, police, and studies reveal that the overwhelming majority of rapes are committed by someone known to the victim: a family member, friend, coworker, employer, neighbor, fellow student, acquaintance, or date. A national study released in April indicated that only 22 percent of rapes are committed by strangers.[13] Yet, as the Indianapolis study demonstrated, jurors are particularly unwilling to believe that a man could be guilty of rape if the victim knew him.

Prosecutors have historically been reluctant to bring nonstranger-rape cases because of their own biases about rape and their belief that a jury would not

convict the defendant.[14] Now, in a period of public education and change, more and more prosecutors are willing to pursue these cases. But acquaintance-, date-, or marital-rape trials cannot be fair if jurors subscribe to the myriad myths and stereotypes with which rape is uniquely burdened. As Judith Rowland, director of the California Center on Victimology and the first prosecutor to introduce rape-trauma syndrome, has written—

> There is so much "baggage" . . . to jettison before a good jury is selected. Judges need to allow greater latitude to prosecutors . . . in separating those jurors who cannot overcome their biases from those who can. In states which require judges to do the bulk of the questioning, it is critical that they know why, and understand how, jury selection often decides the case—before the first witness takes the stand or a single jury instruction is read.[15]

Voir dire must employ open-ended questions to probe for beliefs such as these: a woman loses her right to say no to sexual activity when she goes to a bar or a man's apartment or gets into his car; when a woman says "no," she means "yes"; only serious physical injury demonstrates nonconsent; handsome men or rich men or married men don't commit rape; sexual assault cannot be rape if the parties knew one another, were living together or married, or had engaged in sexual activity that fell short of intercourse.

When the victim did not immediately report to the police, as is often the case,[16] jurors must be questioned about their understanding of why a rape victim would not rush to the station house to describe her humiliating and frightening ordeal to strangers. Can they appreciate how the trauma of rape can—together with fear of retaliation, fear of losing privacy, and fear of not being believed—prevent rape victims from making a "prompt outcry"?

In cases where there are inconsistencies in the written reports from the hospital, police, and prosecutors, jurors need to be reminded that additions or omissions of detail are commonplace when anyone recounts the same incidents repeatedly over time. They need to know that this is particularly so when the witness has experienced the devastation of rape and must recount this extremely personal crime to strangers.

In cases where consent is the defense, there is rarely physical evidence and almost never a witness. Jurors are extremely reluctant to convict a rapist on the word of a woman alone. Therefore, jurors must be reminded that most muggings and robberies are one-on-one crimes with no witnesses and that the standards for conviction in a rape case are no different.

Voir dire must educate jurors, especially men, to consider resistance from the complainant's point of view, not that of the traditional "reasonable man." They should understand why men's larger size and strength is usually enough of a threat to force women to capitulate. Voir dire must also make potential women jurors aware of their own possible biases. As noted above, many women jurors avoid acknowledging their own vulnerability by blaming the victim.

Developing information about juror bias in rape cases takes skill, time, and a thorough knowledge of how these biases operate. The kind of voir dire essential to a rape trial cannot be accomplished with a questionnaire and a few closed-ended questions addressed to the whole jury panel. The arguments for efficiency in voir dire are not without foundation, but efficiency should not be bought at the price of rape victims' rights. □

Notes

1 Interview with Marjory Fisher, Bureau Chief, Special Victims Bureau, Queens County District Attorney's Office, in New York, N.Y. (Apr. 23, 1992).

2 Lafree, Reskin & Visher, *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985).

Hulk Hogan, She's Not

*In 1955, Jerry Hunter was charged in Clackamas County, Oregon, with the crime of "unlawfully and wilfully particip[ing] in a wrestling competition and wrestling exhibition." Hunter—"being a person not of the male sex, to wit: of the female sex"—had violated a state law limiting participation in the sport to men. Arguing that the statute was unconstitutional, Hunter appealed to the Oregon Supreme Court, whose defense of the law is reproduced here in part (*Oregon v. Hunter, *300 P.2d 282 (Or. 1956)):*

In addition to the protection of the public health, morals, safety, and welfare, what other considerations might have entered the legislative mind in enacting the statute in question? We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal.

It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled.

In the business and industrial fields as an employee or as an executive, in the profession, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere men, and, we are frank to concede, in many instances had outdone him. In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges?

Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not. . . .

The judgment is affirmed.

What the Research About Rape Jurors Tells Us

By Lynn Hecht Schafran, Esq.
Director
National Judicial Education Program

Juries are an endless source of fascination to judges, lawyers and social scientists. The first large-scale jury research was conducted by Harry Kalven and Hans Zeisel in the 1960s.[1] They observed jury deliberations and surveyed judges in detail about individual cases and the judges' agreement or disagreement with jurors' decisions in these cases. From their sample of 3,576 criminal jury trials they focused particularly on the impact of extralegal information in the 25% of cases where there was judge/jury disagreement, and how this extralegal information accounts for the fact that in the vast majority of cases where there was disagreement, the jury was more lenient than the judge would have been.

Within the group of cases of particular interest to Kalven and Zeisel was one group where the judge/jury disagreement was sharpest. These were the 42 cases of what the researchers called "simple rape." That is, one perpetrator, the parties knew each other, no weapon was used, and there was no physical injury extrinsic to the rape. There were 42 of these cases, and only 3 convictions. The researchers found almost 100% disagreement between judge and jury in the half of these cases where there was a rape charge and a lesser included offense. The judge would have convicted of rape; the jury went for the lesser offense.

In cases where the juries had to choose between finding the defendant guilty of rape or acquitting him, juries acquitted where judges would have convicted. Kalven and Zeisel described the actions of all these juries as "the jury chooses to redefine the crime of rape in terms of its notions of assumptions of risk."[2] In other words, if she went to a bar, went to the defendant's apartment, etc., she assumed the risk.

Now fast forward 20 years to the early 1980s. Has anything changed? In the early 1980s Gary LaFree led a team of social scientists in a major jury study of sexual assault cases in Indianapolis.[3] The researchers conducted in-depth 90-minute interviews with 331 men and women who had sat on rape case juries.

They found that jurors made their decisions based on the victim's "character" and lifestyle even where there was proof of use of a weapon or victim injury. Jurors were less likely to believe in the defendant's guilt when the victim reportedly drank or used drugs, was acquainted with the defendant, or engaged in sex outside marriage. LaFree wrote that the jurors disregarded the evidence and decided cases on the basis of their personal values. And these values were so rigid with respect to appropriate behavior for women

[1] Harry Kalven Jr. and Hans Zeisel, THE AMERICAN JURY (1966).
[2] *Id.* at 254
[3] Gary D. LaFree, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989)

that they even disbelieved women who held non-traditional jobs, for example, a woman who drove a school bus.

Another factor that emerged starkly in the LaFree study is the issue of race.

When we think about rape and race, most of us think about the extreme animus toward black men charged with raping white women. This aspect of the rape and race issue did emerge in the Indiana study. "Taken together, the results indicate that processing decisions in these sexual assault cases were affected by the race composition of the victim-defendant dyad, and the cumulative effect of race composition was substantial."[4] But what also emerged was a strong devaluation of African-American women as victims of sexual assault: "It is clear from the analysis that black offender-white victim rapes resulted in substantially more serious penalties than other rapes…. Moreover, black *intraracial* assaults consistently resulted in the least serious punishment for offenders."[5] For example, in one of the cases a juror said of a 13-year-old black victim that she came from a bad neighborhood and probably wasn't a virgin anyway.

This devaluation of women of color in sexual assault cases is vividly demonstrated by a study of sentencing in Dallas, Texas. In Texas, juries impose sentences. When prosecutors make plea bargains, it is, in the words of the Dallas prosecutor at the time, the "juries [who] set the benchmark."[6] A study of sentencing and pleas by a local newspaper in 1990 found that the median sentence for a black man who raped a white woman was 19 years and the median sentence for a white man who raped a black woman was 10 years. This is a very interesting differential, but even more revealing were the statistics on same-race rape (which, despite the stereotypes, is what the vast majority of rapes are). The median sentence for white on white rapes was 5 years, for Hispanic/Hispanic rape 2.5 years, and for black on black rape 1 year.

The origins of this devaluation of women of color who are victims of sexual assault go back to slavery. White men repeatedly raped black female slaves with total impunity. To avoid acknowledging, even to themselves, the truth of what they were doing, these men invented the victim-blaming myth of the promiscuous black woman who had seduced them.

Rape, Racism, and the Law in 6 Harvard Women's L. J. 103 (1983)[7] is an article about this aspect of rape and race that I recommend to you because we are clearly living with this attitude still today. The comfort people feel with this attitude is such that some will even express it openly. A few years ago in Westchester County, N.Y., a black woman was raped on the examining table by a white doctor. At first he denied sexual contact. When the DNA came back he claimed that the sex was consensual and he denied it only so his wife would not know what he'd done. After he was acquitted, a

[4] *Id.* at 140
[5] *Id*. at 145, emphasis supplied
[6] Herndon, Ray F. "Race Tilts the Scales of Justice," Dallas Times Herald, 1990, at A 22.
[7] The author is Jennifer Wiggins.

white male juror wrote to the prosecutor, "We thought a black female like that would be flattered by the attention of a white doctor."[8]

Other jury research has found jurors preoccupied with the victim's resistance. In the recent past, rape laws in every state called for utmost resistance, but that has been phased out of the law. Yet in the LaFree study of Indiana jurors, 32% believed that a woman's resistance to her attacker is a critical factor in determining the rapist's culpability and 59% believed a woman should do everything she can to repel her attacker.

Given that jurors are screened — that is, they go through a *voir dire* process intended to eliminate those who cannot follow the law — one might think that juror attitudes would look different than those of the general population, but they do not. For example, in 1991 Time/CNN commissioned a national opinion poll on these issues and found that 38% of men and 37% of women said that a raped woman is partly to blame if she dresses provocatively. A 1998 survey among a properly randomized sample of Georgia residents aged 18 to 49 revealed that sexual stereotypes and myths regarding sexual assault and rape persist.[9] When asked how strongly they agree or disagree with the statement, "Many women cry rape—saying they have been raped when it really hasn't happened," 49% of men and 42% of women polled expressed some degree of agreement with the statement. We know that the vast majority of rapes involve no weapons. But 48% of men and 48% of women in the Georgia study believed that sexual assault necessarily includes the use of a gun or other weapon. We know the particularly devastating effects of marital rape. But in the Georgia study, 20% of men and 9% of women believed a woman has no right to say "no" to her husband. And if you think the next generation of jurors is going to think differently, in a 1988 survey of 1,700 6th to 9th grade students in Rhode Island, 65% of the boys and 57% of the girls said that in a dating relationship, it was acceptable for a man to force a woman to have sex if the couple had been dating more than six months. Half of the students said that a woman who walks alone is asking to be raped.

You may have been struck by the fact that the percentages of men and women, and boys and girls are so close on many of these questions. Another aspect of juror attitudes that has fascinated researchers and tripped up many a prosecutor is the apparent hostility of many women jurors toward the complaining witness. New prosecutors are frequently surprised by how censorious women jurors are of the complainant's behavior.

The assumption is made that because women are most at risk of rape, they will be most sympathetic to the alleged victim. But for many women, that is exactly why they are hostile. It is a matter of psychological self-protection. *If I can distance myself from you; if I can say that I would never go to a bar or a man's apartment or accept a ride from someone I only knew slightly, then I don't have to acknowledge my own vulnerability.* This is an enormously powerful motivator. As Aristotle put it — "If

[8] Telephone interview with Barbara Eggenhauser, Assistant District Attorney, Westchester County, New York (April 21, 1992).
[9] Global Strategy Group, Inc., for the Georgia Network to End Sexual Assault (1998).

people claiming pity are too close to oneself, then we feel about them as if we were in danger ourselves" and we do not extend our pity to them.

Now all of this, of course, is going on subconsciously. The question of how to surface it, and get women to set it aside and attend to the evidence and the law, or remove them from the jury if they cannot, is the challenge, as it is with all types of bias in these cases.

A particularly hard case is the male juror who has engaged in conduct that meets the legal definition of rape, but who never viewed his behavior as criminal. Such a juror may come to understand the true nature of his conduct during trial and realize, consciously or subconsciously, that if he votes to convict the defendant he is acknowledging his crime and convicting himself. Or he may identify with the behavior and not think the defendant did anything wrong. In either case, he will vote to acquit, no matter what the evidence.

What can be asked during *voir dire* to meet these challenges we now take up with you.

Reflections on a Rape Trial: The Role of Rape Myths and Jury Selection in the Outcome of a Trial

Judy Shepherd

This article reviews arguments and jury deliberations from a rape trial that took place in spring 1999 and was retried 7 months later. It presents the circumstances of the case, the evidence and arguments of the prosecution and defense, discussions among jurors during the first trial, and the outcome of each trial. It also raises questions about the treatment of sexual assault victims in the courts, the effect of jury selection on the outcomes of trials, and the persistence of myths regarding women and sexual assault in American society.

Sexual assault continues to be the most underreported violent crime in the United States. According to a report by the Bureau of Justice Statistics (Rennison, 1998), only 31.6% of all rapes and sexual assaults were reported to law enforcement officials in 1998 compared to 62% of all robberies, 57.6% of all aggravated assaults, and 40.3% of all simple assaults. Even with such underreporting, 330,000 women aged 12 and older were the victims of rape, attempted rape, or sexual assault in the United States in 1998, a 7.1% increase from 1997 (Rennison, 1998).

The common rationale for such underreporting of this serious crime is the treatment that victims receive from societal institutions, especially the legal system. The difficulty of bringing a rape case to trial and of obtaining a conviction for this crime has been well documented. For example, in 1984, Russel

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found that "less than 1% of rapes and attempted rapes result in convictions in the U.S." (as cited in Ward, 1995, p. 196). Furthermore, a 3-year investigation of state rape prosecutions by the Committee on the Judiciary, U.S. Senate (1993) revealed:

> Ninety-eight percent of rape victims will never see their attacker apprehended, convicted and incarcerated;
>
> Over half (54 percent) of all rape prosecutions result in either a dismissal or an acquittal;
>
> A rape prosecution is more than twice as likely as a murder prosecution to be dismissed and 30 percent more likely to be dismissed than a robbery prosecution;
>
> Approximately 1 in 10 rapes reported to the police results in time served in prison; 1 in 100 rapes (including those that go unreported) is sentenced to more than 1 year in prison;
>
> Almost one-quarter of convicted rapists are not sentenced to prison, but instead, are released on probation;
>
> Nearly one-quarter of convicted rapists receives a sentence to a local jail—for only 11 months (according to national estimates);
>
> Adding together the convicted rapists sentenced to probation and those sentenced to local jails, almost half of all convicted rapists are sentenced to less than 1 year behind bars. (p. 1)

This article presents an in-depth case study of a rape trial that occurred in Alaska in the spring and fall of 1999, with particular attention to the jury selection process and the reliance on rape-myth arguments throughout the deliberations. It also points to areas for further research and advocacy regarding attitudes toward rape and the treatment of rape victims in this society.

REVIEW OF THE LITERATURE

The acceptance of the myths about rape, which are commonly held beliefs that shift the blame for a sexual assault from the assailant to the victim and serve to minimize the prevalence and seriousness of rape (Stout & McPhail, 1998), has been the focus of many studies. Common myths include the beliefs that "victims are lying, victims are malicious, sex was consensual, and rape is not damaging. . . . The underlying assumptions

about rape suggest that women are essentially responsible for male sexual behavior" (Ward, 1995, p. 25). Ward (1995), who studied attitudes toward rape on college campuses, found in 1980 that only 36% of those surveyed disagreed with the statement that rape is provoked by women's appearance and behavior, and 60% maintained that women who go out alone put themselves in a position to be raped. In a 1991 attitude survey by Halcomb and others (as cited in Ward, 1995),

> 24% of the respondents agreed with the statement, "women frequently cry rape falsely" and 22% agreed that rape is often provoked by the victim, 22% agreed a woman could prevent a rape if she really wanted to, 32% agreed that some women ask to be raped and may enjoy it, and 29% agreed that if a woman says no to having sex, she means maybe or even yes. (p. 45)

Several studies have demonstrated that gender is correlated with the acceptance of rape myths. According to Ward's (1995) review of the literature on rape attitudes, "Studies show men are more accepting of rape myths than women (Margolin et al., 1989), more tolerant of rape (Hall et al., 1986), and have less empathy towards victims (Bradley et al., 1991)" (p. 45). Ward also cited Giacopassi and Dull's 1986 study that found that men were more likely to agree that normal men do not commit rape and that women were more likely to disagree with the statement that "women who ask men out are probably looking for sex, that women say no but mean yes, and that date rape should not be considered as serious as stranger rape" (p. 46). After reviewing studies on attitudes toward rape, Ward concluded, "The sensitive issue of coercive sex between people who know each other, the most common form of sexual violence, appears to be trivialized more frequently by men" (p. 46).

It is also important to note that

> the danger of false rape complaints has been vastly overrated. The police find the number of false rape charges to be comparable to the level of false charges brought in other types of crimes. There are rare occasions when individuals falsely accuse others of crimes, but evidence suggests that the episodes are no more

> frequent in rape cases than in other serious cases. (Hans & Vidmar, 1986, p. 206)

And as Stout and McPhail (1998) noted,

> Although false charges of rape are often widely publicized, FBI statistics (as cited in Lonsway & Fitzgerald, 1994) suggest that only 2% of rape charges are false; this rate is lower than or comparable to the rate for other felonies. (p. 261)

Educational level has also been correlated with the acceptance of rape myths, as noted in Ward's (1995) review of studies of rape. Burt (as cited in Ward, 1995), who sampled approximately 600 adults in Minnesota, found that "education exerted a direct effect on the rejection of stereotyped, prejudicial views of rape. Better educated respondents were less willing to endorse such statements as, 'in the majority of rapes, the victim is promiscuous or has a bad reputation'" (p. 47). Other studies on educational level found similar results. Jeffords and Dull (as cited in Ward, 1995) found that supporters of marital rape legislation in Texas were more likely to be female, single, young, and well educated, and Williams (as cited in Ward, 1995), in a survey of 1,000 San Antonio residents, found education to be the most powerful predictor of attitudes toward rape.

A review of the literature on jurors' attitudes, based on mock juries or posttrial interviews, demonstrated that jurors are influenced by the prior relationship of the victim and assailant as well as the victim's character. In reviewing Kalving and Zeisel's studies on jury trials, Epstein and Langenbahn (1994) noted "not only that juries are prejudiced against the prosecution in rape cases, but also that they were extremely lenient with defendants if there was any suggestion of 'contributory behavior' on the part of the victim" (p. 66). One contributing behavior that clearly affects perceptions of rape is the consumption of alcohol. According to a study by Richardson and Campbell (as cited in Ward, 1995), "People are more likely to see intoxication as contributing to the woman's responsibility in sexual assault" (p. 76). A study by Lafree (as cited in Hans &

Vidmar, 1986), which included posttrial interviews with 331 jurors who heard cases of forcible sexual assault, found that none of the measures of evidence, including eyewitnesses, the number of prosecution witnesses and exhibits, the use of a weapon, or injury to the victim, affected jurors' beliefs about the defendant's guilt or innocence prior to deliberations. However, jurors were affected by the characteristics of the victim and defendant. When the victim held a blue-collar job, when she reportedly had sexual intercourse outside marriage, or when she drank or used drugs, jurors were more likely to believe the defendant was innocent. Jurors who had conservative attitudes about sex roles were especially likely to believe the defendant was not guilty of rape when they learned that the victim used drugs or alcohol. Thus, in cases where the victim's word was a primary issue, jurors were influenced more by the character of the victim than by hard evidence, even corroborative evidence.

Another factor that has been found to contribute to the outcomes of rape trials is whether physical force was used. Deitz (as cited in Ward, 1995) found in jury simulation studies that guilty verdicts are less likely to be rendered in rape cases when there is no evidence that the victim resisted, and Wyler (as cited in Ward, 1995) noted that "women who resist attempted rape are perceived as less responsible and less to blame for their assault than those who do not resist" (p. 77). Also, Williams (as cited in Ward, 1995) found that "when the victim is acquainted with the rapist, the latter is less likely to be charged or convicted" (p. 110).

In light of these studies, Hans and Vidmar (1986), who extensively studied the jury system, noted:

> The results of these studies on jury decisions in rape cases, taken together, are troubling in some respects. Widespread adherence to rape stereotypes and myths make it difficult not only for victims who fail to match the pristine picture of the ideal victim, but also for [the defendant] whose courtroom appearance and lifestyle make him seem like a rapist. (p. 214)

All the studies on jurors' attitudes just reviewed were either with mock juries made up of university students, in which no challenges and dismissals were involved, or posttrial interviews with jurors. The case study reported in this article is unique in that I served as a juror and thus had the opportunity to participate in and note (immediately after the deliberations) the jurors' arguments and the dynamics of the jury, which were not recorded or open to the public.

METHOD

In spring 1999, I was chosen to serve as a juror on a rape and burglary (forcible entry) trial. Because I teach in both the Social Work Department and the Women's Studies Program at the University of Alaska, the lack of challenges to my serving as a juror was a surprise. My service as a juror gave me a unique opportunity to learn firsthand about the court system, to become knowledgeable about court proceedings in a rape trial, to become aware of the treatment of jurors and the dynamics of juries, and to be a participant in a jury's deliberations. This trial lasted 6 days, with jury deliberations covering 2 days.

At the end of each day of jury deliberations, I went directly to my office and recorded as precisely as I could information on arguments and proceedings of the trial and discussions that took place during the deliberations. I recorded only arguments and comments presented during the deliberations but no information about specific jurors, and I did not link comments made during the deliberations to any particular juror.

When this case was retried 7 months later, I attended almost every day of the 9-day trial, including the jury selection proceedings. Doing so afforded me the opportunity to ascertain how the makeup of juries is affected by peremptory challenges and to check the accuracy of details in my notes from the first trial regarding the presentations of the defense's and prosecution's cases as well as to record any differences in evidence presented during the two trials. All this information gave me the opportunity to check the validity of my impressions as a parti-

cipant observer during the first rape trial and to gain a fuller picture of the case, the court proceedings, and the outcome of the trial. Because I could not take down verbatim quotes during the first trial, I used statements made by the attorneys for the defense and prosecution during the jury selection proceedings and opening and closing statements at the second trial to present exact quotations. The arguments presented by the defense and prosecution were consistent in the two trials. The only significant difference between the cases in the two trials was the amount of expert testimony and evidence presented on DNA in the second trial.

THE CASE

Description

The alleged rape and burglary (forced entry) that was the focus of this trial took place in fall 1998 in a primarily Athabascan Indian village in Alaska. The village is not on the road system and has a population of 150 to 200 people. It is a wet village, meaning that alcohol can be purchased and consumed within the village boundaries. In this remote village, the only law enforcement presence is one village public safety officer (VPSO), whose job is to keep order in the community. The VPSO does not carry a gun and does not make arrests or investigate felony crimes. In the case of an allegation of a serious crime, such as a rape, the VPSO would take the victim's statement and then call state troopers, who would fly into the village to investigate the crime. In this village, routine health care is provided by a health aide, a local resident who is trained in basic first-aid techniques. The health aides in the villages are instructed in procedures to follow in cases of alleged rape and are given rape kits to use during their examinations of victims. The kits include swabs for collecting evidence and procedures to follow so that evidence is not contaminated.

The incident that was the focus of this trial took place on a weekend of celebrations in the village that included a softball

tournament and a wedding and brought many out-of-town visitors to the village. The alleged crime was the rape of a 66-year-old Alaska Native woman from the village where the incident occurred. The alleged victim had lived her entire life in the village, had never received any formal schooling, was the mother of 12 children and a grandmother, and recently had back surgery and walked with a slight limp.

The alleged assailant was a 55-year-old Alaska Native man from a neighboring village who had known the alleged victim since childhood and who occasionally hunted and fished with her husband and brother. He stated that he was in the village where the attack took place to visit his brother who lived in the village and to partake in the celebrations.

The Prosecution's Case

According to the alleged victim, she had been visiting the homes of friends and relatives on the evening before the assault and had consumed some alcoholic beverages along with her friends. In the evening, she returned to her home alone (her husband was out of town fishing) and locked the door to her house and went to bed. At around 5:00 a.m., someone knocked on her door. Thinking it was her brother who had planned to come over for coffee, she opened the door. According to the alleged victim, the alleged assailant pushed her into the house and into the bedroom, pulled off her pants, raped her, and then left her house. The alleged victim stated that she felt dirty and showered and burned the clothes she had been wearing along with the trash. When her grandson came over to do laundry later in the day, he found her lying on the couch looking depressed. He asked her what was wrong, and she told him that she had been raped and asked him to get the VPSO.

The VPSO took the alleged victim's statement in which she identified the alleged assailant and then drove her to the village health clinic, where she was given a pelvic examination. A swab from her vaginal area was taken and subsequently sent to the crime lab in Anchorage as possible evidence. The alleged victim was later sent by plane to the hospital in the nearest

urban center for an examination with a culpascope, a machine that takes pictures of the inside of the vagina to see if internal bruising, which may be consistent with forced sexual intercourse, is present. The alleged victim underwent a second culpascope examination 9 days after the first examination. The second examination, a standard procedure in the case of a sexual assault, is used to determine whether any bruising that was present in the first examination is also present 9 days later. If the bruising is not present in the second examination, it is assumed that a trauma, such as a sexual assault, caused the bruising, which has subsequently healed. If the bruising or anomaly in the vaginal area is still present in the second examination, it is assumed that this is a normal condition for the woman examined and was not the result of trauma to the vaginal area.

In the courtroom, the alleged victim identified the alleged assailant as the man who had entered her home and raped her. This was the same man she identified to the VPSO, the village health aide, and the hospital nurse.

The evidence presented by the prosecuting attorney included a chart showing the match between the accused assailant's DNA and the semen that was on the swab taken during the initial examination of the alleged victim. The DNA analysis was done by the crime lab in Anchorage using a six-marker test. The alleged assailant accused another man, who he said had sexual intercourse with the alleged victim, but the DNA profile precluded this possibility. The prosecuting attorney explained that an Athabascan database establishing the statistical probability of another DNA match in the Athabascan population had not been established; however, research on neighboring Alaska Native populations showed that the likelihood of a similar DNA profile using the six-marker test would be in the range of 3,000 to 1.

The prosecuting attorney also showed full-color photographs and a television-screen image of the alleged victim's vaginal area taken from the culpascope examination, which showed severe internal bruising. The nurse who examined the alleged victim testified that the bruising evident in the pictures was consistent with a sexual assault. The bruising in the vaginal

area was not evident 9 days later, demonstrating that such bruises were not normal for this woman.

The Defense's Case

The accused assailant maintained that he "never touched that woman," and the defense attorney claimed this was a case of mistaken identity and an inadequate targeted investigation by the VPSO and state troopers. The defense attorney discredited the alleged victim's identification of the alleged assailant, stating that she had been drinking and thus would have difficulty identifying anyone. The questions that the defense attorney asked the alleged victim included, "Weren't you drunk? Weren't you obnoxious? Did you drink this much or this much? Is 'My back hurt' all you said to the assailant?"

The defense attorney also discounted the utility of DNA evidence, noting that it gave information only on a DNA match, but there was always a possibility that there were other matches. He also focused on the lack of established DNA probability ratios for Athabascan Indians and challenged the statistical background of the state's DNA expert and her credibility as an expert witness. He further argued that the culpascope examination provided no useful information because there was a strong possibility that a 66-year-old woman would not lubricate during sexual intercourse, and thus the bruising apparent in the culpascope pictures could have been the result of vigorous consensual sex. He also questioned the credibility of the nurse who explained the culpascope pictures because of the length of training she had received on the culpascope.

Witnesses who were called by the defense included a woman (who appeared to be intoxicated on the stand) who stated that the alleged assailant had slept on her living room floor on the night of the attack and the VPSO's wife, who testified that she saw the alleged assailant knock on the alleged victim's door the morning of the attack. The defense asked her what the man was wearing to determine if it was the same man the alleged victim identified. The VPSO's wife stated emphatically that the man

she saw knocking on the alleged victim's door was the same man she saw the next day at the softball field and was the alleged assailant who was present in the courtroom, only he was wearing a different jacket on the morning she saw him at the alleged victim's house.

In his concluding remarks, the defense attorney maintained there were too many unanswered questions in this case. He stated:

> We're not here to say [alleged victim] didn't have sex with someone. What she did and who she did it with is her business. Maybe she doesn't want to reveal that. We're saying this man didn't do it. He had no reason to hurt that lady. He didn't break in to physically assault her or hurt her. This wasn't like breaking in to jimmy a door. No one forced their way into this house. Her husband was away. She partied. One way she partied was she got drunk. She got pretty good and drunk. She was so drunk she said it happened on Friday morning but didn't report it 'till 15 hours later. She may have had sex with somebody when she was passed out, and she may think it was [defendant], but she is wrong.

According to Epstein and Langenbahn (1994), defense attorneys use the following three basic strategies in rape cases: consent, identification, and denying that the crime occurred. In the consent defense, the attorney acknowledges that the defendant engaged in sexual relations with the complainant but argues that the complainant consented. In the identification defense, the attorney neither denies nor acknowledges that rape occurred but claims that the accused was not the attacker. In the third defense, the attorney argues either that the alleged acts do not constitute rape or that no such acts occurred.

In this case, the defense used the identification strategy by claiming that this was a case of mistaken identity. He attempted to establish that the alleged assailant had on different clothes than the man who had been seen by the VPSO and his wife knocking on the alleged victim's door. He noted that DNA testing is not an accurate test and that there was a likelihood of a similar DNA profile. He called a witness who stated that the

alleged assailant was asleep on her floor along with several others the morning of the attack, and he claimed that the state trooper had too quickly arrested the alleged assailant without looking for other possible suspects. The defense attorney also noted that the alleged victim was drunk and that the bruising evidenced in her vaginal area could be the result of "vigorous sex," not necessarily sexual assault. Thus, in accordance with the literature on public perceptions of good rapes versus bad rapes, the defense attorney attempted to present this case as a dubious or bad rape, an acquaintance rape in the alleged victim's home where there was no sign of a physical struggle and where the alleged victim had consumed alcohol.

OUTCOME OF THE FIRST TRIAL

The jury deliberated on this case for approximately 12 hours over the course of 2 days. The outcome was a deadlocked jury, meaning that no consensus was reached. Deadlocked juries occur in about 1 in 20 cases (Hans & Vidmar, 1986). With a deadlocked or hung jury, the alleged assailant would go free unless the prosecution thought that there was a strong enough case to go forward with a retrial and the alleged victim agreed to undergo a second trial.

Jury Selection

To understand this trial's outcome, one must first consider the jury selection process and resultant makeup of the jury. The jury selection process for the first trial lasted a day and a half. In this process, the names of 14 jurors (12 jurors and 2 alternates) were chosen at random out of a pool of approximately 40 people. Each of the 14 potential jurors gave information on his or her place of residence, occupation, spouse's occupation, number of children and ages, birthplace, interests, involvement in prior lawsuits, previous experience as a juror, and whether he or she knew anyone associated with the trial. The potential

jurors were each interviewed by the prosecution and defense attorneys.

Potential jurors can be dismissed in two ways. They can be released for cause, meaning that because of prior knowledge of the case, a relationship with someone associated with the trial, or previous experiences that may prejudice them, they could be deemed unable to be objective and thus would be dismissed. They can also be dismissed from a case through peremptory challenges. In criminal cases in Alaska, each lawyer is allowed 10 peremptory challenges (and an additional challenge for each alternate on a case) in which potential jurors can be dismissed from the case without stating a cause. In this case, the defense attorney first asked questions of all potential jurors as a group. The following examples of the questions he asked illustrate the criteria that the defense used to select jurors who were favorable to his case and his attempt to build his case during the jury selection process: Do you feel when police investigate crimes they have an obligation to be thorough and investigate both sides? How many know enough about fingerprint evidence to know it might be useful in an investigation? Raise your hand if you feel fibers and hair are useful to an investigation. Raise your hand if you have ever had mistaken identity happen to you. Do any of you personally know of anyone who when they are real drunk has made a claim that is fantastic or unbelievable? Do you feel police investigators have a duty to produce evidence they know exists? Raise your hand if you know what the letters *DNA* stand for. Have any of you had special courses in the fields of biology? Any particular courses in DNA? Any particular training in statistics? Is there anybody that cannot accept the proposition that the accused does not have the burden of proving anything? Have you ever had to rely on lab tests and later found out the lab test was wrong? Anybody here ever heard the phrase "There are lies, damn lies, and statistics?"

The prosecuting attorney's questions focused on whether anyone had been on a jury and if so, whether the jury had reached a verdict. He also asked the potential jurors about their views on drinking.

In the first trial, those who were dismissed by the defense attorney included a woman who had written a master's thesis on DNA, an individual related to a police officer, a lawyer and relative of a lawyer, and a middle-aged Alaska Native woman. The prosecuting attorney dismissed anyone who had a prior negative experience with the courts; the prosecution's other reasons for dismissals were not clear to me. The jury that remained was made up of 8 men and 4 women. All the jurors were non-Native and Caucasian and currently resided in the urban center where the trial was held; 2 of the jurors (both female) had college degrees.

Because I was a potential juror, I did not have the opportunity to take notes on all who were selected and dismissed during this trial. However, during the retrial of this case, I kept notes on all the potential jurors and compared the initial and final juror seatings. From this analysis, I found that in the retrial, the defense dismissed significantly more women (6) than men (3) and that of the 8 individuals who were dismissed, 7 were in occupations that required a college degree. Thus, in keeping with the literature on the believability of rape myths (that level of education and gender are the best predictors of acceptance of rape myths), the final jury seated after the defense and prosecution challenges would be expected to be more likely to believe rape myths than the initial jurors who were randomly selected.

Jury Deliberations

In the first deadlocked jury, 5 jurors voted for a guilty verdict (3 women and 2 men), and 7 voted for acquittal (1 woman and 6 men). However, during most of the jury deliberations, 2 female jurors held out for a guilty verdict while others argued either for an acquittal or were undecided. Throughout the deliberations, 7 of the 8 male jurors sat at one end of the table, and all 4 female jurors and 1 male juror sat together at the other end. At the final vote, the 3 female and 1 male jurors who sat together voted guilty, and 6 of the 7 male jurors who sat together voted for acquittal.

The jurors who voted for acquittal agreed with the defense attorney's arguments. Many thought that the alleged victim was not credible because she had consumed alcoholic beverages and suspected that she was lying to cover up consensual sex. Most of the jurors agreed with the defense attorney that both the DNA evidence and the pictures taken from the culpascope examination should not be considered in this case because DNA tests show only a probable match and the severe bruising evident in the alleged victim's vaginal area could have been the result of vigorous consensual sex. Also, many jurors believed that the state did a sloppy job of investigation and that a targeted investigation had occurred. The sentiment among some jurors was that the VPSO's wife started spreading the word around the village that the man she saw knocking at the alleged victim's door that morning committed the rape because "she wanted to be a big cheese" and was "the perfect police officer's wife." Some jurors believed that she told her husband her feelings, which he then told the state trooper, and that the trooper immediately arrested the alleged assailant upon entering the village.

Examples of statements made during jury deliberations in the first trial are presented next, organized in relation to some of the commonly held rape myths presented in Stout and McPhail (1998). The jurors' comments demonstrate arguments that were used in and affected the outcome of the trial. It is important to remember that in this case, the alleged victim identified the alleged assailant consistently, and the alleged assailant maintained that he never touched the woman. Also, no one other than the alleged assailant made any claims that the alleged victim had slept with anyone else, and the man that the alleged assailant claimed had sex with the alleged victim had a DNA profile that excluded him as a sexual partner.

1. Women routinely lie about rape for their purposes: "She had sex with someone else and said it was him to cover it up." "She claimed rape so her husband wouldn't get mad." "It wasn't [the defendant] but someone with close DNA."

2. Only bad women are raped: "She was drunk." "How could she recognize who it was?"
3. You can't rape an unwilling woman: "When asked what she said to him, she said 'My back is hurting.' Why didn't she just say no?" "She didn't fight him off."
4. Women who are raped must have provoked the rape by leading men on or dressing provocatively: "She had consensual sex with him and wanted to cover it up so her husband wouldn't get mad." "She encouraged him at [name's] house and later he came over and it went too far." "'Don't, stop' can mean two different things."
5. Most rape is committed by African American men against European women: This myth was not evident in this trial, but racism was apparent as can be seen in such comments as, "They were all soused and lying." "They were all soused; it just depends which drunk you want to believe." "Want to know my personal experience with Natives and sex? They all cover up for one another." "I lived in a village; I know how they party."
6. Most women secretly desire rape and enjoy it: "He was on top of her, and then she started feeling guilty and worried her husband would find out."
7. It can be called rape only if the assailant is a stranger who has a weapon and causes great physical injury: "She had no bruises."
8. Our society abhors rape and gives rapists long and harsh sentences: "We could ruin a guy's life." "If there is a reasonable doubt, we are required to give a verdict of not guilty." "I think he's guilty, but I don't feel comfortable passing a guilty verdict and knowing he's going to prison."

DISCUSSION OF THE OUTCOME OF THE FIRST TRIAL

The outcome of this trial was a shock to me because I found the alleged victim to be believable (she was a 66-year-old grandmother who consistently identified the alleged assailant, who was reported to be extremely distraught by all who came in contact with her after the assault, and who broke down in tears on the stand when discussing the sexual assault). I also thought that the state had provided sound scientific data that a sexual

assault had occurred and that the alleged assailant was linked in several ways to the crime. During the trial, I thought that without scientific tests, the prosecution would have had great difficulty getting a conviction in this case but that with DNA evidence linking the alleged assailant to the crime and with pictures taken during the culpascope examination showing severe bruising of the victim's vaginal area, a conviction would be the outcome. The fact that both the DNA evidence and the results of the culpascope examination were disregarded was surprising. In regard to the pictures showing serious vaginal bruising being disregarded because of the alleged victim's age and lack of lubrication, I asked the other jurors, "Why would a woman who just had recent back surgery and who bruised so severely have consensual sex?" Their response was that she was too drunk to care or feel any pain. Thus, this jury's verdict was consistent with Lafree's (as cited in Hans & Vidmar, 1986) findings that jurors may disregard even corroborative evidence if they believe that the alleged victim's character is questionable.

The jurors' fascination with a targeted investigation and the idea of mistaken identity was also surprising. Throughout the jury deliberations, I thought that sexism was evident because many jurors discredited both the crime lab expert ("Who does she think she is strolling in here with a suit and briefcase?") and the female nurse who did the culpascope examination ("Why did the state bring a nurse; a doctor would have had instant credibility?"). Similarly, many jurors thought that the VPSO's wife, who stated she saw the alleged assailant knock on the alleged victim's door, contributed to a targeted investigation although neither attorney implied or even mentioned this possibility. Most of the jurors did not consider the alleged victim to be believable, believing that she was lying to cover up other sexual escapades or consensual sex with the alleged assailant. Most of the jurors thought that the state did not prove its case because fingerprints were not taken, clothing and bedclothes were not tested for semen, and other suspects were not considered, although a DNA specimen was taken during the vaginal examination and the alleged victim consistently identified the alleged assailant.

In conclusion, one could say that in this sexual assault case, most jurors thought there was reasonable doubt that the alleged victim had been sexually assaulted. Rather, they believed that the alleged victim either had consensual sex with the alleged assailant or consensual sex with someone else but was not raped and did not suffer harm. When statements made during the jury deliberations were considered in regard to common rape myths, it became apparent that almost every myth was validated by some jurors and used as an argument for acquittal. Many male jurors could identify on some level with the alleged assailant, as was evidenced by comments such as these: "Mistaken identity happened to me once"; "'Don't, stop' can mean two different things, and it's hard to know which"; and "Would you want to ruin a man's life?" The lack of gravity about this sexual assault trial was apparent in such jurors' comments as the following: "Why don't they have *Playboy* magazines here to read?" in reference to reading materials supplied in the jurors' quarters. Other comments that trivialized the case included "They were all soused; it just depends which drunk you want to believe" and "They all cover up for one another." At the end of the deliberations, when the final vote had been taken, a male juror stated, "Seven to five, we still kicked ass."

The outcome of this trial raises some serious questions regarding our judicial system in general and sexual assault trials in particular. The first concern is with the jury selection process. If this jury were indeed a representative sample of the community and a true jury by peers, the outcome would be disturbing in terms of prevalent attitudes toward women and sexual assault. As I mentioned earlier, throughout the jury deliberations, it was apparent that the majority of jurors strongly held many rape myths. Unfortunately, it is obvious that this jury was neither a randomly selected cross-section of the community nor a jury of peers. Potential jurors were excluded if they knew anything about DNA or were familiar with the law or law enforcement officers, more women than men were excused, and the only Native woman who was selected as a potential juror was excused. The result was a jury consisting of twice as many men as women, with only two jurors in occupations

requiring college degrees and no Alaska Natives or residents of rural villages.

In 1999, Supreme Court Justice Sandra Day O'Connor called for a review of lawyers' rights to exclude possible jurors without giving a reason or for cause because they heard about the case from the media. She said that these practices give the impression of "unrepresentative juries." O'Connor warned that

> the use of unlimited "cause" challenges to prospective jurors, coupled with extensive media coverage of some cases, leaves some courts to search out the most ignorant and poorly informed citizens to serve as jurors in high-profile cases, because only those citizens are likely to have avoided forming any opinion. ("O'Connor Urges Examination," 1999, p. A-8)

Furthermore, in this case, both the alleged assailant and the alleged victim were from small rural villages, but the jurors were all non-Natives living in an urban area. Such a jury allows for stereotypes and suppositions that would probably not enter into the deliberations of a true jury of one's peers. Blatantly racist comments, including suppositions about Natives' alcohol consumption and sexual practices, were made, as were comments about small villages and the way people gossip and stick together. It is important to note that felony trials in interior Alaska are routinely scheduled in the urban center, although the defense can request that a trial be moved to a regional center closer to the village. In a regional center, however, it would probably be difficult to select jurors who had no prior knowledge of the case or anyone involved in it.

Another issue of concern in this trial was the treatment of the alleged victim, who was asked grilling questions about her alcohol consumption. In addition, although the defense attorney said in his concluding statement that he would not go into the sex life of a 66-year-old woman, he implied that the jurors should consider it (which they clearly did), asking such questions in the retrial as, "Can you tell this jury that absolutely you did not have sex with anyone there?" Full-color pictures of the alleged victim's genital area taken during the culpascope examination were passed around to the jurors and displayed on two

television screens with the caption, "Genital Area of [alleged victim]." If a 66-year-old grandmother is treated this way and suspected of lying to cover up sexual escapades, one wonders what would be included in the court proceedings and jury deliberations of a date rape trial of a young woman.

THE RETRIAL

Seven months after the original trial, a retrial was held, conducted by the same judge with the same prosecuting and defense attorneys. The jury was different in its gender makeup (7 men and 7 women), and one of the jurors was married to an Alaska Native woman. At the retrial, I took detailed notes on all the potential jurors who were called and questioned by the prosecuting and defense attorneys to ascertain how peremptory challenges changed the makeup of the jury.

Of the initial randomly selected pool of 14 jurors in the second trial, 9 were women and 5 were men, and in terms of educational background related to current occupation, there were 2 undergraduate college students, 1 doctoral student, 1 accountant, and 3 school teachers. No Alaska Natives were included in this initial pool. Both the defense and prosecution dismissed 9 jurors each, which meant that 32 potential jurors were reviewed for this case.

The nine potential jurors who were dismissed by the defense in the second trial were six Caucasian women and three Caucasian men, eight of whom were either college students or in careers that required college degrees. Of the nine jurors who were dismissed by the defense, eight were in occupations that require college degrees: three college students, one high school math teacher, two accountants, one social worker, and one engineer. Thus, there was a high level of educational attainment in that seven potential jurors were seeking or had completed postsecondary degrees. The defense also dismissed an Alaska Native woman. The nine who were dismissed by the prosecution included six men and three women. Occupational

status did not seem to matter in the prosecution's dismissals as much as attitudes toward drinking (two persons were dismissed who believed that drinking was wrong) and prior experience with the courts either for driving while intoxicated, child custody, or past service as a juror on a criminal trial. After peremptory challenges, the final jurors included 7 men and 7 women. Two of the men were school teachers, but no other jurors were in occupations in which an educational degree beyond the secondary level was required. Thus, peremptory challenges in this case changed the juror pool in terms of its gender makeup and educational level as determined by current occupational status. As one female observer during the jury selection process stated, "They sure don't want any smart women on that jury, do they?"

Additional evidence presented by the state in the second trial included a database for the probability of a DNA match in the Athabascan population, a more sophisticated DNA analysis done by a Seattle laboratory with results presented by its director (a man with a Ph.D.), a local respected (male) physician's corroboration of the nurse's culpascope conclusions, and a young girl who said the assailant made lewd comments to her on the morning of the alleged rape. The defense again used the mistaken identity argument and attempted to discredit the alleged victim because she was drunk and had not fought off her assailant. The prosecution meticulously presented the DNA evidence showing the probability of another matching DNA profile in the Athabascan population to be in the range of 1 to 2.5 million.

After fewer than 3 hours, the jury in the second trial found the alleged assailant guilty of both first-degree rape and first-degree burglary. Jurors' comments to the judge on returning to the jurors' room after the verdict had been given indicated that the DNA evidence convinced them because this was argued as a case of mistaken identity. However, in both trials, some jurors questioned why the defense did not use the argument that this was a case of consensual sex. In both trials, some jurors stated that there would not have been a case if the defense had argued

consensual sex (i.e., the alleged victim's testimony and evidence of bruising from the culpascope examination would not have mattered).

CONCLUSION

Participation as a juror in this 1999 sexual assault trial was a disconcerting and eye-opening experience both in terms of the jury selection process and the sexist, racist remarks that were evident in the jury's deliberations, which are not open to the public or recorded. Because this was a review of only one trial in one location, it is possible that the deliberations and outcome of the trial can be attributed merely to the poor job of jury selection and case presentation by the prosecuting attorney or to the uniqueness of the region where the trial took place. This would be a comforting thought and might be the case. On the other hand, in light of the previously mentioned findings that (a) almost all rape victims never see their attackers caught, tried, and imprisoned; (b) about 25% of convicted rapists never go to prison; and (c) another 25% receive sentences in local jails, where the average sentence is 11 months, the outcome of this trial does not appear to be an aberration. Rather, it seems consistent with the outcomes of other sexual assault trials, and thus an examination of jury selection and deliberations in this trial can perhaps contribute to an understanding of why the rates for reporting of and conviction for rape are so low in the United States.

Involvement as a juror in the first trial led me to conclude that there are several areas that people who are concerned about violence against women must focus. First, the court system needs to be monitored in regard to the treatment of rape victims and the representativeness of jurors. Gender, educational background, and racial and class representation are important considerations for a true trial by peers. Ten peremptory juror challenges coupled with challenges for cause can dramatically alter the composition of juries and affect the outcomes of trials. As Ward (1995) noted, "Legal analysts frequently argue

that on many occasions the evidence presented at a rape case does not reliably predict a verdict as trial outcome is based more on jurors' attitudes about rape" (p. 111).

Second, more research is necessary in relation to factors that affect the outcomes of sexual assault trials and the sentencing of assailants, and this research should be widely publicized. Third, rape victims still need to know clearly what they will face in court in terms of the continued prevalence of rape myths, peremptory challenges, and the state's need to prove the case beyond a "reasonable doubt."

Finally, and of utmost importance, there is a need for more education about sexual respect and sexual assault in the American educational system and workplace. Rape myths are still persistent in our society in spite of the efforts of women's groups and feminist researchers. As Stout and McPhail (1998) stated, "Changes in laws have made it somewhat easier for rapists to be prosecuted and for rape victims to be protected, yet if the jury still believes in rape acceptance myths, all is lost" (p. 283). Rape myths serve "to blame women for the rape and shift the blame from the perpetrators to the victim and allow men to justify their sexual aggression. Accepting rape myths also serves to minimize the seriousness and prevalence of rape" (Stout & McPhail, 1998, p. 260). Educational programs in schools, workplaces, and universities must strive to reach a broad audience, which includes those who are the most likely to hold rape myths. From a more societal perspective,

> Rape is not an isolated symptom to be plucked out of society. It is an act that is often supported, condoned, tolerated, encouraged, and regulated by a patriarchal society that gives men a sense of entitlement and privilege. The conditions in society that allow rape to flourish must be confronted. (Stout & McPhail, 1998, p. 284)

This case demonstrated that DNA evidence, culpascope pictures of bruising consistent with sexual assault, and the victim's identification of the assailant can all be readily disregarded by jurors who believe common rape myths that blame the victim and minimize the seriousness of the crime. As I

noted previously, members of both juries stated that in this case, a defense argument of consensual sex would have been readily believed. Only through careful monitoring of legal procedures that include the selection of a jury for representativeness from one's community and one's peers and through widespread educational efforts regarding sexual assault can we expect to see a change in both the rate of reporting and prosecution for rape.

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