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WRITING AND READING ABOUT RAPE:

A PRIMER

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WRITING AND READING ABOUT RAPE: A PRIMER*

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INTRODUCTION

*What do you know about rape?
What kind of a juror would you be in a rape case? What kind of a judge?
How well informed do you think the criminal justice system is about rape? What do you think is happening across the country right now in rape trials and in sentencing decisions about rapists?*

This Article is in three parts. Part I is a closed-book writing exercise for you, the reader. Part II is a commentary on your answers that provides the most current data about rape, rape victims, and rape offenders. Part III describes what our courts generally do and do not know about rape, and the many ways that rape trials can be made more humane for the complaining witness without undermining defendants' rights.

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I. "THE JURY STORY" EXERCISE

This exercise is called "The Jury Story."

It is a story with a twist.

You are the storyteller—and you are telling the story to yourself.

The story is only for you.

After you write your story, this Article will ask you about some of its elements. For example, "Did you describe the weather?" But again, the story you write is only for yourself. How much you learn will depend upon how candid and detailed your story is.

Instructions:

Imagine that you are an ordinary member of the jury pool in your community. Just an average woman or man, no better or worse informed than anyone else. If you are someone with special knowledge of this area, such as a judge, put that aside and imagine yourself as a potential juror for purposes of this exercise.

You received a notice for jury service. Now you are sitting in the large jury room waiting to be called for a case. Nothing notorious is going to trial, so you have no idea what the case will be, and you are idly wondering about the kind of trial for which you will be called.

Then you hear some other jurors say that the case you will be called for is a rape trial. It is human nature to make a story out of even the least scrap of information, so as you sit, waiting to be called, your mind tells a story about this rape. Since you have a pencil and paper and time to spare, you write down the story that develops in your mind.

That is what you are to do. Take at least ten minutes and write down the story that flashed into your mind just now when you read the word "rape." Be as specific and detailed as you can. For example, who were the people involved? What were their characteristics, such as age and appearance? What were the victim and offender doing two hours before the rape? How did they encounter one another? Where did the rape occur? What time did it occur? What happened before, during, and after the attack? Add as much detail as you can.

Do this exercise with a timer so you take at least the full ten minutes. Remember, the story you write is only for yourself, and what you will learn about your own level of knowledge depends on how fully you complete the exercise.

II. "THE JURY STORY" COMMENTARY

Over the last two decades, research into rape and attitudes toward rape has revealed a literal chasm between reality and perception. Stereotypically, rape is perceived as an infrequent crime committed by a sex-starved, weapon-wielding stranger, often black, on a provocatively dressed woman, often white, in a back alley. After the rape, she runs to the police to report the crime and then to the hospital to receive treatment for the savage physical injuries she sustained while resisting to the utmost. In reality, the overwhelming statistical profile of rape documents a commonplace crime committed by a man with an active consensual sex life on a woman of his own race, whom he knows, in her own home, without a weapon. She offers little physical resistance because she fears incurring serious physical injury or death or was taken totally by surprise because she did not fear a "friend." She sustains no physical injury other than the rape itself, but her psychological injuries are profound. She never reports the rape to the police.

Following is a series of questions about the story you wrote during "The Jury Story" exercise and a commentary on each that will allow you to compare your story with widely held rape myths and the most current data about rape, rape victims, and rape offenders. The questions and commentary are preceded by a table of contents to facilitate your future reference. The table of contents was placed here rather than at the beginning of this Article to avoid suggesting scenarios for "The Jury Story" exercise.

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A. *Myths and Facts About Rape*

1. Stranger and Nonstranger Rape Statistics

Question: Did your story describe a rape in which the victim and the rapist were strangers?

Comment: The stereotyped image of a rapist is a stranger who jumps from the bushes. In fact, *the vast majority of rapes are committed by someone known to the victim.*¹

The most current and complete study of the incidence of adult rape and sexual assault in the United States is *Rape in America*,² conducted by the Crime Victims Research and Treatment Center of the Medical University of South Carolina and published in April 1992. For this study, a nationally representative sample of 4,008 women was interviewed once a year for three years, utilizing four highly specific questions. The questions were:

- Has a man or boy ever made you have sex by using force or threatening to harm you or someone close to you? Just so there is no mistake, by sex we mean putting a penis in your vagina.
- Has anyone ever made you have oral sex by force or threat of harm? Just so there is no mistake, by oral sex, we mean that a man or boy put his penis in your mouth

¹ See CRIME VICTIMS RESEARCH AND TREATMENT CENTER, *RAPE IN AMERICA: A REPORT TO THE NATION* 5 (1992) [hereinafter *RAPE IN AMERICA*].

² *Id.* The full report is available from the National Victim Center, 2111 Wilson Boulevard, Suite 300, Arlington, Va. 22201, or the Medical University of South Carolina Crime Victims Research and Treatment Center, Department of Psychiatry and Behavioral Sciences, Charleston, S.C. 29425. The study was funded by the National Institute of Drug Abuse because so many rape victims turn to alcohol and drugs to relieve their psychological trauma. *Id.*

or somebody penetrated your vagina or anus with his mouth or tongue.

- Has anyone ever made you have anal sex by force or threat of harm?
- Has anyone ever put a finger or object in your vagina or anus against your will by using force or threat?³

*The findings showed that only 22% of forcible rapes and sexual assaults are committed by strangers.*⁴

Rape in America reported the following breakdown for the rapes committed by nonstrangers: 9% were committed by husbands and ex-husbands; 11% by fathers and step-fathers; 10% by boyfriends or ex-boyfriends; 16% by other relatives; and 29% by other non-relatives such as friends and neighbors.⁵

Do these statistics surprise you? If they do, are you surprised because you did not think a sexual act could be a rape if the parties knew each other, or because you believed most rapes are committed by strangers? A great many people—including even victims as discussed later in this Article⁶—do not realize that sexual penetration achieved by force and against the victim's will is rape and a criminal act even when the parties are nonstrangers.

As to the statistics, the *Rape in America* national data actually show a higher proportion of stranger rapes than the data from state and local rape crisis centers. For example, a 1985-1987 survey by the Massachusetts Department of Public Health found that only 18% of sexual assaults reported to rape crisis centers involved assaults by strangers.⁷ During 1987 and 1988, the Minnesota Program for Victims of Sexual Assault provided services to 5,766 sexual assault victims, only 10% of whom reported being assaulted by strangers.⁸

Until recently, it was mistakenly believed not only by the public but also by the authorities that stranger rape was far more

³ *Id.* at 16.

⁴ *Id.* at 5.

⁵ *Id.* at 5. Three percent of the respondents were either unsure of their relationship to the rapist or refused to answer. *Id.*

⁶ Mary P. Koss et al., *Stranger and Acquaintance Rape*, 12 *PSYCHOL. OF WOMEN Q.* 1 (1988); see *infra* notes 145-146 and accompanying text.

⁷ MASSACHUSETTS SUPREME JUDICIAL COURT GENDER BIAS STUDY COMMITTEE, *GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS 100* (1989) [hereinafter *MASSACHUSETTS REPORT*].

⁸ *Report of the Minnesota Supreme Court Task Force on Gender Fairness in the Courts*, 15 *WM. MITCHELL L. REV.* 829, 894-95 (1989) [hereinafter *Minnesota Report*].

prevalent than nonstranger rape.⁹ The 1985 Department of Justice, Bureau of Justice Statistics report, *The Crime of Rape*, stated that women were twice as likely to be raped by strangers than by nonstrangers.¹⁰ This report generated a firestorm of criticism from rape crisis centers and researchers in the field who knew that the vast majority of rape victims they were seeing or identifying in their studies were victims of nonstranger rape.¹¹ In sum, *approximately 80% of rapes are committed by someone known or related to the victim.*¹²

2. Type of Rape

Questions: What type of sex acts did you say took place? Did you assume that "rape" meant only penile-vaginal penetration?

Comment: Although the term "rape" has traditionally meant penile-vaginal penetration, many state statutes today state that *rape is any type of sexual assault that involves forced penetration; that is, vaginal, oral, digital (or other body part) and object rape.*¹³

Of these several types of penetration, Dr. Nicholas Groth, one of the country's most prominent experts on sex offenders, has written:

[F]rom a clinical rather than a legal point of view, it makes more sense to regard rape as *any* form of forcible sexual assault, whether the assailant intends to effect intercourse or some other type of sexual act. There is sufficient similarity in the factors underlying all types of forcible sexual assault—and in the impact

⁹ See CHARLES W. DEAN & MARY DEBYRON-KOPS, *THE CRIME AND THE CONSEQUENCES OF RAPE* 40 (1982). The belief that stranger rape is more prevalent than nonstranger rape has been promoted, in part, by media images and failure of research efforts. *Id.*

¹⁰ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *THE CRIME OF RAPE* 2 (1985) [hereinafter *THE CRIME OF RAPE*].

¹¹ Elizabeth Ozar & Maurizia Toro, *Why Rape Statistics Lie*, N.Y. TIMES, April 12, 1985, at A2 (letter to the Editor) (stating that misleading statistics pose a threat to women because they "encourage the myth that this won't happen to me").

¹² *RAPE IN AMERICA*, *supra* note 1, at 5 (75% of rapes committed by nonstrangers); MASSACHUSETTS REPORT, *supra* note 7, at 100 (only 18% of rapes reported to rape crisis center committed by strangers); *Minnesota Report*, *supra* note 8, at 895 (83% of rapes reported to Minnesota Program for Victims of Sexual Assault committed by nonstrangers).

¹³ Twenty-five state statutes include all forms of forced sexual penetration as rape; two states include all but digital/body part rape; six states include all but digital/body part and object rape; two states include only vaginal and anal intercourse; one state includes any vaginal penetration; fifteen states include only vaginal intercourse. Memorandum from Rosemary Yu to Danielle Ben-Jehuda (Sept. 21, 1992) (on file with author).

such behavior has on the victim—so that they may be discussed meaningfully under the single term of rape.¹⁴

Dr. Anna Salter, a national expert in the treatment of sexual assault victims and offenders, reported that victims forced to perform fellatio or submit to cunnilingus or anal penetration often have even more trauma than victims of penile-vaginal rape because of the shame many people feel about these kinds of sexual acts.¹⁵

In the *Rape in America* study, 507 rape victims provided information about a total of 714 rape incidents as follows: 424 forced penile-vaginal penetration rapes; 122 forced oral penetration rapes; 53 forced anal penetration rapes; and 189 forced digital/object penetration rapes.¹⁶

3. Physical Injuries Apart from the Rape Itself

Question: Did you write that the victim sustained injuries such as knife wounds, broken bones, severe lacerations, heavy bruising, or vaginal tears?

Comment: A second mainstay of the myths and stereotypes about rape is that a "true victim" is one who sustains serious physical injury. Jurors want evidence of substantial physical damage, which they perceive as proof of the victim's lack of consent. Jurors equate the victim's injuries with her level of resistance, which they take to be a measure of the rapist's use of force.

In fact, physical injuries apart from the rape itself are rare. In the *Rape in America* study, 70% of victims reported no physical injuries; 24% reported minor physical injuries; and only 4% reported serious physical injuries.¹⁷

Even though few sustained serious injuries, *almost half of all victims (49%) feared serious physical injury or death.*¹⁸ This fear has important implications for women's perceptions of force and the threat of force and whether and how women resist, as discussed below.

¹⁴ A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 3 (1979).

¹⁵ Telephone Interview with Dr. Anna C. Salter, Assistant Professor of Clinical Psychiatry and Maternal and Child Health, Dartmouth Medical School (June 8, 1992).

¹⁶ Letter from Dr. Bonnie Dansky, Medical University of South Carolina Crime Victims Research and Treatment Center to Lynn Hecht Schafran, Director, National Judicial Education Program (Aug. 15, 1992) (on file with author).

¹⁷ *RAPE IN AMERICA*, *supra* note 1, at 5.

¹⁸ *Id.*

4. Force and Resistance

Questions: In your story, did the rapist use substantial force? Did he have a weapon? Did your victim resist? How did she resist? Did she use a weapon herself, perhaps Mace? Did she kick, punch, scream, or run away?

Did you write that the victim's resistance and expression of non-consent were purely verbal—did she just say "No"?

Did you write that the victim was unable to express anything because she was frozen with fright, or that she decided that total passivity and apparent cooperation were the way to survive? Did you write that the attack happened so fast that the victim had no time to resist?

Comment: A weapon is another element in the stereotyped image of the rapist: the man who jumps from the bushes with a knife or a gun. In fact, *the majority of rapes involve no weapons at all*. Approximately 80% of rapes are committed by nonstrangers. The Bureau of Justice Statistics found that a weapon was used in only 15% of nonstranger rapes.¹⁹ This is probably an artificially high percentage because the Bureau of Justice Statistics survey was not adequately phrased to capture all those in its sample who were victims of rape.²⁰ Weapons were used in 30% of stranger rapes in the Bureau of Justice Statistics sample.²¹

If so few rapists employ weapons, why is there so much rape? Don't women resist?

As Professor Susan Estrich has pointed out, the legal paradigm of force and resistance is based on the way men fight in a barroom brawl, which is not the way women respond to threats and force.²² Moreover, not only are women not socialized to rough-house, get dirty, or use physical force, they are actively socialized

¹⁹ CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME, NCJ-126826, at 12 (1991) [hereinafter FEMALE VICTIMS].

²⁰ *Rape Incidence: A Review and Assessment of the Data, Hearings Before the Senate Judiciary Committee* 101st Cong., 2d Sess 7-11 (1990) (testimony of Mary P. Koss, University of Arizona, on behalf of the American Psychological Association). The Bureau of Justice Statistics ("BJS") relies on the National Crime Survey ("NCS"), which all, including BJS, agree has extensive methodological flaws. *Id.* For example, it does not ask about rape but about "attacks," and it records as rapes only penile-vaginal assaults. The NCS has recently been redesigned due to criticism that it failed to detect a substantial proportion of rape cases. The new questions are to be added in 1993. *Id.*

²¹ FEMALE VICTIMS, *supra* note 19, at 12, table 29.

²² Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1126 (1986), also published as SUSAN ESTRICH, *REAL RAPE* 24 (1987).

to be polite, never give offense, and never say "no," because that could hurt someone's feelings.²³

Few women are trained to fight, and even those who are may decide that in the circumstances the best way to survive is not to make the rapist angry by fighting back. Law enforcement and other experts on rape advise women that if they cannot immediately escape, they should not physically resist lest they subject themselves to greater injury.²⁴ Because of the studies indicating that resistance can escalate the violence, most authorities advise women to go with their "gut instinct" in deciding whether and how to resist.²⁵

This creates a Catch-22 for rape victims. While experts advise women not to resist further once they realize that screaming is useless and running away is impossible, if women do not demonstrate earnest physical resistance they are not believed.²⁶ Although the resistance requirement has been eliminated by statute in most states,²⁷ it lives in the minds of judges and juries.²⁸ People want to

²³ ESTRICH, *supra* note 22, at 64-65.

²⁴ See Robert Prentky, *Victim Responses by Rapist Type: An Empirical and Clinical Analysis*, 1 J. OF INTERPERSONAL VIOLENCE 73 (1986); Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 404-05 (1988); see also LINDA B. BORQUE, *DEFINING RAPE* 53-54 (1989) (surveying researchers' conclusions as to relative value of verbal or physical resistance). Women should be aware that initial resistance strategies can be effective. Koss et al., *supra* note 6 (suggesting that evidence indicates behavior identified as most effective for avoiding rape—yelling or running away—not used by victims as "often as their demonstrated effectiveness warrants"). Research presented to the American Psychological Association indicates that the most effective tactics to avoid date rape are: indicating that you are not interested in having sex early in the encounter; physical resistance; screaming; and claiming to have a venereal disease. *Id.* The most powerful tactic was informing the attacker that "this is rape and I'm calling the cops." See Daniel Goleman, *When the Rapist Is Not a Stranger: Studies Seek New Understanding*, N.Y. TIMES, Aug. 29, 1989, at C1.

²⁵ Interview with Aileen Adams, Esq., Legal Counsel, Santa Monica Rape Treatment Center, in Los Angeles, Cal. (Oct. 14, 1992).

²⁶ See Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2691. Lack of consent is often characterized as a basic element of rape. *Id.* at 2689. If a victim resists an attack, it is assumed that this resistance notified the rapist she does not consent to his actions. *Id.* Thus, when a rapist forces himself on the victim, it is believed that he intended to act without consent. *Id.* Conversely, courts interpret submission or lack of resistance as evidence of consent and that the defendant did not force his victim. *Id.* at 2691-97.

²⁷ See Martha Charallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 799 (1988); Note, *Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience*, 47 ALB. L. REV. 871, 872-74 (1983).

²⁸ See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1049-55 (1991). A study by Huber Field and Leigh Bienen revealed that potential jurors believe that a woman's resis-

see that the victim fought back. As noted above, jurors want substantial physical evidence of resistance, such as torn clothes and bruises. Physical injuries are taken as evidence that the rape was accomplished by force and that the victim did not consent. The message of the ancient Roman story of the Rape of Lucretia—death before dishonor—still colors what many people believe is the way a “true victim” of rape would react.²⁹

This lingering demand for evidence of physical resistance reflects a lack of awareness of how rape usually happens and of the dangerousness of resistance. The fact is that *men's greater size and strength are in themselves threatening to women and are often enough either to intimidate the victim or to overcome her resistance.*³⁰ Moreover, the demand that a rape victim must physically resist is discriminatory because society does not demand resistance for any other crime. Victims are not required to resist muggers, robbers, or kidnappers.

Some women do not resist because they are literally frozen with fright.³¹ For other victims of both stranger and nonstranger rape, the psychic stress is so extreme that they disassociate during the rape, saying later that they felt it was a terrible dream, or that it was as if the attack were happening to their body and they were watching it from the outside.³² Some black out entirely.³³

tance to her attacker should be a critical factor in determining the rapist's culpability. *Id.* In deciding if a rape occurred, 32% of jurors responded that resistance should be the determining factor and 59% believed that a woman should do all she can to repel her attacker. *Id.* at 1047.

²⁹ As an example of this view, consider the dissenting opinion from a Maryland Court of Appeals decision affirming a rape conviction, which describes the “proper” response of a rape victim:

She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend. She must make it plain she regards such sexual acts as abhorrent and repugnant to her natural sense of pride. She must resist unless the defendant has objectively manifested his intent to use physical force to accomplish his purpose.

State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting), cited in *Estrich*, *supra* note 22, at 1113.

³⁰ See, e.g., DIANE E.H. RUSSELL, *THE POLITICS OF RAPE* 19 (1974) (describing how a rape victim can be totally immobilized by a man's size).

³¹ See SEDELLE KATZ & MARY ANN MAZUR, *UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS* 172-73 (1979); see also *People v. Barnes*, 721 P.2d 110, 118-21 (Cal. 1987) (describing “frozen fright” response of some rape victims which contradicts traditional concept that woman who does not resist has consented).

³² See RUSSELL, *supra* note 30, at 19. The author relates the thought process of one rape victim during the attack on her:

I felt that I was outside my body, watching this whole thing, that it wasn't hap-

This is true even if a victim is trained in law enforcement self-defense techniques. A San Diego policewoman acting as a decoy to catch a rapist reported that she so totally blanked out when the man grabbed her that she had no recollection of being dragged forty feet and would deny that she ever screamed had she not heard the tape made by the rest of the stakeout team.³⁴

Even when no force is used beyond the intimidation factor of the man's greater size and/or strength, women experience great fear and indeed often fear for their lives. "I thought he was going to kill me" is a common statement from rape victims.³⁵ In the *Rape in America* study, almost half (49%) of the victims reported fearing death or serious physical injury during the attack, although few sustained actual physical injuries.³⁶

An especially important point is that in most rapes there is little opportunity to fight. The victim is with someone she knows. She does not expect a sexual assault so she is not on guard and is quickly and easily overpowered. In *Commonwealth v. Berkowitz*,³⁷ the victim was chatting in a dorm room with the defendant while waiting for her boyfriend. The defendant pulled up the victim's upper clothing and fondled her; she said "no" and he raped her—all within approximately ninety seconds.³⁸

Just how far from reality beliefs about rape and resistance can

pening to me, it was happening to someone else. It was a strange feeling, absolutely unreal. I was terrorized, but it's very hard to describe the shock of what was happening. At first, I went into a state of shock where I just shook and shook and shook. And I was freezing cold. Just freezing cold.

Id.

³³ See DIANE R. KASS, *THE RAPE VICTIM* 147 (1978). The physiological responses of victims range from choking, gagging, nausea, vomiting, pain, urinating, and hyperventilating to losing consciousness and epileptic seizures. *Id.*

³⁴ JUDITH ROWLAND, *THE ULTIMATE VIOLATION* 45 (1985).

³⁵ See, e.g., *Smith v. State*, 601 So. 2d 201, 204 (Ala. Crim. App. 1992) (victim believed attacker would kill her if she did not follow his instructions); *State v. Rogers*, 519 So. 2d 246, 248 (La. Ct. App. 1988) (victim believed defendant would kill her if she resisted); see also *People v. Grant*, 596 N.E. 2d 813, 819 (Ill. App. Ct. 1992) (13 year-old victim sleeping in same bed with two of her siblings did not cry or scream when defendant raped her out of fear that he would hurt her or her siblings).

³⁶ *RAPE IN AMERICA*, *supra* note 1, at 5.

³⁷ Crim. No. 241-1988 (Ct. C.P. Monroe County 1990), *rev'd* 609 A.2d 1338 (Pa. Super. Ct. 1992).

³⁸ *Id.* record at 176. The jury found the defendant guilty, but the Pennsylvania Superior Court held that because no force was used, her "no" was not enough to make it rape. *Berkowitz*, 609 A.2d at 1338. By contrast, the New Jersey Supreme Court this year overruled a similar opinion from an appellate court. See *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992).

be is apparent in the assertion long included in F. Lee Bailey and Henry Rothblatt's widely used treatise on defending sex crimes cases that, according to medical experts, "the average woman is equipped to interpose effective obstacles to penetration by means of the hands, limbs, and pelvic muscles,"³⁹ and the oft-made assertion that rape is impossible because one cannot thread a moving needle.

Finally, discussions of force and resistance in rape cases are bedeviled by the continuing belief on the part of many men that a little force is a necessary and appropriate part of sex. As Massachusetts Appellate Judge Frederick Brown has written:

It is time to put to rest the societal myth that when a man is about to engage in sexual intercourse with a "nice" woman "a little force is always necessary." . . . I find no social utility in establishing a rule defining nonconsensual intercourse on the basis of the subjective (and quite likely wishful) view of the more aggressive player in the sexual encounter.⁴⁰

5. Men's Assumptions About What Signals Consent

Questions: Did you write that the man assumed the woman was consenting to sex because she wore a sexy dress, or had a few drinks, or went to his room or permitted him to spend a lot of money on a date?

Comment: Rape crisis counselors have reported that a major factor in high school and college date rapes is men's belief in rape myths about what behavior by women indicates consent to sex.⁴¹ Many men assume that a woman who wears what the man defines as sexy clothing, or drinks with him, or goes to his room, or permits him to buy her an expensive dinner is implicitly consenting to sexual intercourse. These assumptions prevail even when the woman is verbally or nonverbally saying "no." Historically, rape law was premised on a view of women as permanently sexually available to men, so that only "utmost resistance" on a woman's part—often defined as fighting to the death—was adequate notice

³⁹ F. LEE BAILEY & HENRY ROTHBLATT, *CRIMES OF VIOLENCE: RAPE AND OTHER SEX CRIMES* 277 (1973).

⁴⁰ *Commonwealth v. Lefkowitz*, 20 Mass. App. Ct. 513, 521 (1985) (Brown, J., concurring).

⁴¹ Interview with Aileen Adams, Esq., Legal Counsel, Santa Monica Rape Crisis Treatment Center, in Los Angeles, Cal. (Oct. 14, 1992).

to the man that she was not consenting. Although this attitude dies hard, the law is evolving to recognize that the standard should be an assumption that no one is sexually available until she or he clearly says yes. The Illinois sexual assault statute, for example, defines consent as words or actions by a person indicating "a freely given agreement to the act of sexual penetration or sexual conduct in question."⁴² The Washington State statute provides that "[c]onsent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse."⁴³ *The New Jersey Supreme Court held this year that "any act of sexual penetration engaged in by the defendant without the affirmative and freely given permission of the victim to the specific act of penetration constitutes the offense of sexual assault."*⁴⁴

6. Ages of Victims and Prevalence of Rape

Questions: How old was the victim in your story? Less than 11? Between 11 and 17? 18 or older?

Comment: These three age groups relate to the *Rape in America* study. The study was intended to develop information about the sexual assault of adult women, defined as women 18 or older. The study also asked women about the first sexual assault they had ever experienced. The answers lead the researchers to conclude that "rape in America is a tragedy of youth."⁴⁵

In asking their subjects about the age at which they were first assaulted, the researchers learned that 29% of forcible sexual assaults occurred when the victim was less than 11 years old; 32% when the victim was between 11 and 17; 22% when the victim was between 18 and 24; 7% when the victim was between 25 and 29; and 6% when the victim was older than 29.⁴⁶ Thirty-nine percent of respondents said they had been raped more than once. Another 5% were uncertain as to how many times they had been raped.⁴⁷

The discovery that 61% of their respondents were raped for the first time before they were eighteen was a great surprise to the *Rape in America* researchers. It lead them to conclude that their

⁴² ILL. ANN. STAT. ch. 38, paras. 12-17 (Smith-Hurd 1983).

⁴³ WASH. REV. CODE ANN. § 9A.44.010(6) (West 1982).

⁴⁴ *State ex. rel. M.T.S.*, 609 A.2d at 1266 (emphasis added).

⁴⁵ RAPE IN AMERICA, *supra* note 1, at 3.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 3.

initial finding that 638,000 women over the age of eighteen were raped in the one year period spanning 1989-1990 reflected *well less than half* of the rapes in that period, because the study failed to include rapes of young women and girls under eighteen, or males of any age.⁴⁸ Thus, the one year figure for rapes in this country according to *Rape in America* is at a minimum 1,500,000. This figure is considered to be quite conservative by some rape experts.⁴⁹ Other *highly respected researchers have concluded that there are approximately two million rapes per year in the United States.*⁵⁰

Rape in America concluded that overall at least 12.1 million American women have been victims of rape at some point in their lives and that an estimated 5.3 million have been raped more than once.⁵¹

Question: Was the victim in your story extremely young—just a few months or years old? Or extremely old—75 or 99?

Comment: So many people assume that rape is about sexual attraction rather than about power and control that most cannot believe a man would rape a tiny child or an elderly woman. Some people are also confused about the physical possibility of an adult man raping a little girl and believe it to be literally impossible.

Unfortunately, there are many cases on record of rapes at both ends of the age spectrum. For example, in 1991 in New York City, a 3-year-old girl was raped in a public park.⁵² In 1990 in Newark, New Jersey, a 2-year-old girl died after being raped by a 21-year-old man.⁵³ In 1983 a 5-month-old baby was raped by her father's cousin in their Long Island, New York home.⁵⁴ As to elderly women, the study of rape victims that originated the term "rape trauma syndrome" included victims up to 73.⁵⁵ In 1991, a 99-year-

⁴⁸ *Id.*

⁴⁹ Interview with Aileen Adams, Legal Counsel, Santa Monica Rape Crisis Treatment Center, in New York, N.Y. (June 27, 1992).

⁵⁰ See, e.g., MAJORITY STAFF OF THE SENATE COMM. ON THE JUDICIARY, 102d. CONG., 1ST SESS., VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 28 (Comm. Print 1991) (citing testimony of Dr. Mary P. Koss, University of Arizona) [hereinafter SENATE JUDICIARY COMMITTEE REPORT].

⁵¹ RAPE IN AMERICA, *supra* note 1, at 3. An additional .6 million women were not sure how many times they had been raped. *Id.*

⁵² Lee A. Daniels, *Man Seized in Rape of 3-Year-Old in Public*, N.Y. TIMES, July 17, 1991, at B1.

⁵³ *Man Held in Death of 2-Year-Old Girl*, N.Y. TIMES, Dec. 26, 1990, at B6.

⁵⁴ Robert Weddle, *5-Month-Old Baby Raped by Relative*, N.Y. POST, June 18, 1983, at 7.

⁵⁵ See Ann Burgess & Lynda Holstrom, *Rape Trauma Syndrome* 131 AM. J. PSYCHIA-

old woman was raped in her own home in Houston, and the rape crisis center that treated her stated that it had seen other victims over age 80.⁵⁶ *These rapes of little girls and elderly women tell us that the myth that rape is a spontaneous reaction to alluring, nubile women is just that—a myth.*

7. Appearance of the Victim

Questions: In your story, did you describe what the victim was wearing? If yes, did you describe her clothing as a miniskirt or something sexy or provocative?

Comment: In a Florida case, a jury exonerated a knife-wielding rapist because it considered the victim's clothing provocative.⁵⁷ There is a widespread assumption that provocative clothing on a woman "causes" rape, in the sense that the man is unable to control his sexual impulses when he sees a woman in a sexy dress. In a recent opinion poll, 38% of men and 37% of women said that a raped woman is partly to blame if she dresses provocatively.⁵⁸ However, even when rapists themselves talk about victims' clothing, they do not describe themselves as having been overcome by lust at the sight of a woman in tight jeans. Rather, they use the woman's clothing to substantiate their own assertions about their victim's reputations. When sociologist Diana Scully conducted in-depth interviews with 114 incarcerated rapists, she found that 22% of those who still denied the rape and 17% of admitters described the victim as seductively attired, although they were not asked about her appearance. As Scully writes, "The intent of these discrediting statements is clear. The men were attempting to justify or excuse their own behavior by arguing that the women were 'legitimate' victims who deserved what they got."⁵⁹

TRY 981 (1974).

⁵⁶ See Carol J. Castaneda & Carolyn Pesce, *99-Year-Old Attacked in Own Home*, USA TODAY, Oct. 1, 1991, at 3A.

⁵⁷ James F. McCarthy, *Jury Blames Woman in Rape Case*, MIAMI HERALD, Oct. 5, 1989, at 1A. This case so outraged the community that Florida passed a law barring the introduction into evidence of a rape victim's clothing for the purpose of showing that it incited the assault. See FLA. STAT. ch. 794.002(3) (1991).

⁵⁸ Survey of 500 Adult Americans Taken by Telephone for Time/CNN by Yankelovich Partners, Inc. (May 8, 1991) (on file with author). Sampling errors of 4 percentage points.

⁵⁹ DIANA SCULLY, UNDERSTANDING SEXUAL VIOLENCE 109 (1990).

8. Characteristics of the Victim

Questions: Did you give a description of the victim apart from her clothes? Did you describe her job, or her character?

Did you say she was a college student? A school bus driver? A prostitute? A nun? The married mother of two children? Pregnant? A quadriplegic in a wheelchair or a hospital bed?

Comment: The stereotyped picture of rape paints the victim as a tease who invites the attack, no matter who she is or what the circumstances are. In the documentary film *Rape: Face to Face*, for example, a woman raped in a parking lot in below freezing weather while wearing a down parka recounts being asked by police what she was wearing and whether, when she was entering her car, she bent over in a provocative way.⁶⁰

In fact, *a rape victim can be anybody*. As the pioneer sexual assault researcher Dr. Nicholas Groth has written, "There is no place, season, or time of day in which a rape has never occurred, nor any specific type of person to whom it has never happened."⁶¹

There are, however, some women who are particularly vulnerable to rape. Joanne Doucette, National Coordinator for the Canadian DisAbled Women's Network, told a recent conference that "[m]ost members of our community have been sexually assaulted. . . . The more disabled you are, the more likely you are to be assaulted."⁶² She described the case of a man who ran a taxicab service called the Freedom Machine expressly for the purpose of sexually assaulting disabled women.⁶³

9. The Myth of Victim Enjoyment

Question: Did you write that the victim was sexually aroused during the rape and enjoyed it?

Comment: One of the most pernicious myths about rape—promoted in everything from *Gone With the Wind* to *Playboy* cartoons⁶⁴—is that women enjoy it. There has been much dis-

⁶⁰ *RAPE: FACE TO FACE* (Filmmakers Library 1985). To obtain a copy of this film, contact the distributor at 124 E. 40 St., New York, N.Y. 10016; (212) 808-4980.

⁶¹ GROTH, *supra* note 14, at 7.

⁶² *Women with Disabilities*, LEAF LINES, Summer 1992, at 5.

⁶³ *Id.*

⁶⁴ See *THE PLAYBOY CARTOON ALBUM 2*, at 51 (Hugh M. Hefner ed., 1968). A cartoon of which *Playboy* was so proud that it published it in its Cartoon Album showed a ransacked office, a man in a suit—obviously the boss—whose arms are being untied by a police officer, and a woman—obviously a secretary—with her arms bound, her clothes in complete disar-

cussion over the years as to whether rape is about sex or violence or both. *From the victim's point of view, there is only one answer: rape is not enjoyable or even simply "bad sex." It is violence of the most terrible kind.* Through the violent use of the sexual act, the rapist invades the victim's normally private and protected physical and psychological boundaries.

For the victim, rape is about sex only in the sense that, because it involves sexual acts, it severely affects a victim's subsequent sexual functioning. This means not only her body image and sense of shame about sex, but also her entire life. As stated in the *Men Stopping Rape* training curriculum developed by the Men's Anti-Rape Resource Center:

[W]e express who we are as sexual beings in all aspects of every day behavior. Much, if not all, of how we express ourselves as human beings, reflects to a large extent an expression of ourselves as sexual beings: the way we dress, walk, talk, drive, etc., etc., etc., are all, in some ways, an expression of our sexual selves. When someone attacks that part of ourselves, it becomes difficult to do much of anything that does not, in some way, remind people of how s/he was attacked, and the part of her/him-self that was attacked.

For example, a woman is raped by a man that she knows and was attracted to. From that point on, she is reminded by men that she's attracted to of [sic] the attack; when she feels attractive, it reminds her of the attack; when she goes to sleep, she's reminded of the attack; etc., etc., ad nauseam.⁶⁵

An aspect of this "is rape sex" question that confuses people is the fact that a small number of victims do experience sexual stimulation during rape. The defense uses this to claim that sexual sensations equal enjoyment equals consent. Moreover, the victim feels terrible guilt for this "sexual" reaction to a violent act.

Physiologically, these sexual sensations have nothing to do with the pleasurable response of consensual sex. Because there is so much fear involved in rape, there is a significant disconnection between the higher cortical centers and the rest of the body. In this state, stimulation in the vagina causes primitive centers in the spinal cord to respond and transmit sensations over which the vic-

ray and an ecstatic smile on her face. *Id.* The boss is saying to the cop, "Other than that, they didn't touch a thing." *Id.*

⁶⁵ RUS E. FUNK, WILLY, CLARENCE, MIKE AND ME: A TRAINING FOR MEN TO TALK WITH MEN ABOUT RAPE 16 (1992).

tim has no control.⁶⁶

The experience of rape is terrifying, degrading, and humiliating, whether the rapist is a stranger or, as in the vast majority of cases, someone the victim knows. Indeed, when someone the victim knows and trusts turns into a rapist, the victim may be even more shocked than by a stranger assault. Many people cannot believe that nonstranger rape is so damaging because they perceive it is nothing more than "bad sex." But that is not the way victims see it.

10. Male Victims

Question: This Article has been referring to the victim as "she." Did you write about a rape in which the victim was a man?

Comment: Although the large majority of rapes do involve a male rapist and a female victim, *men, too, are rape victims, and not only in prison.* Male-male rapes comprise 5% of reported rapes and are believed to be even more underreported than male-female rape because the stigma is even more extreme.

For example, a victim advocate testified to the Wisconsin Equal Justice Task Force as follows:

I have worked with male victims, and sometimes they suffer gender bias because when they tell their story the homophobia that exists is absolutely unreal. And so most of them will not come forward to even make a charge. They just suffer it through with repeated returns to therapy or addiction, drug and alcohol situations.⁶⁷

Male rape is not only committed against homosexual men. As one straight man raped while hitchhiking has observed, if raping a woman or a child makes the rapist feel powerful, consider how much more powerful he feels if he rapes a man.⁶⁸

Men can also be raped by women. A few cases are known of violent attacks on men by groups of women. Just as women can experience sexual sensations during rape, men can respond sexually out of fear, so that it is adrenalin causing the erection, not

⁶⁶ TIMOTHY BENNEKE, *MEN WHO RAPE* 133-34 (1982).

⁶⁷ WISCONSIN EQUAL JUSTICE TASK FORCE, *FINAL REPORT* 69 (1991) [hereinafter *WISCONSIN REPORT*].

⁶⁸ Fred Pelka, *Raped: A Male Survivor Breaks His Silence*, *ON THE ISSUES*, Spring 1992, at 9, 10.

sexual arousal.⁶⁹ Rape of any kind is as psychologically destructive for male victims as for female victims.⁷⁰

11. Rape Is About Sex and Violence

Question: Do you think that some other people might perceive your story as being about a sexual encounter rather than a violent crime?

Comment: As noted earlier, the question is constantly posed whether rape is an expression of sex or an expression of violence. This is a false dichotomy. Part of the problem in the answers usually given rests in the fact that the question is not clearly differentiated to ask: From whose point of view—the rapist's or the victim's? Because the male fantasy of rape projects a woman first resisting, but then enjoying the assault, any acknowledgment that rape is about sex as well as violence—from the point of view of the rapist—may make the victim appear complicit. As discussed at several points in this Article, for the victim, rape is a violent, terrifying, degrading act even when, as in the vast majority of rapes, the rapist is someone she knows, there is no violence extrinsic to the rape itself, and she sustains no physical injury apart from the rape itself. What rape means to the rapist, however, is a different story.

Sociologist Diana Scully, who, as noted, has conducted in-depth interviews with 114 incarcerated rapists, analyzed the debate as to whether rape is about sex or violence as follows:

In an effort to change public attitudes that are damaging to the victims of rape and to reform laws seemingly premised on the assumption that women both ask for and enjoy rape, the feminist position has emphasized the violent and aggressive character of rape. Often these arguments disclaim that sex plays any part in rape at all. This contrasts with the psychopathological position, which emphasizes the sexual nature of rape and ignores the violence. I argue, however, that both positions miss the mark. *Rape is a violent act, but it is also a sexual act, and it is this fact that differentiates it from other crimes.* Further, it is illogical to argue, on the one hand, that rape is an extension of normative male

⁶⁹ Albert Rosenfeld, *When Women Rape Men*, OMNI, Dec. 1982, at 28.

⁷⁰ A. Nicholas Groth & Ann W. Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806 (1980). Men who are raped may experience certain reactions that differ from female victims' experiences, such as confusion of rape by male perpetrators with homosexuality, and confusion over gender identity, roles, and sexual orientation. *Id.*

sexual behavior and on the other hand, that rape is not sexual. As [Catherine] MacKinnon . . . correctly observes, rape is not less sexual for being violent, nor is it necessarily true that the violent aspect of rape distinguishes it from legally "acceptable" intercourse. For example, marital rape is not legally recognized in most of the United States. It is unfortunate that the rather swift public acceptance of the "rape as violence" model, even among groups who otherwise discount feminist arguments, has unintended implications. . . . [E]mphasizing violence—the victim's experience—is . . . strategic to the continued avoidance of an association between "normal" men and sexual violence. Make no mistake, for some men, rape is sex—in fact, for them, sex is rape. The continued rejection of this possibility, threatening though it may be, is counterproductive to understanding the social causes of sexual violence.⁷¹

Another reason the "rape equals violence" equation has gained such currency is that until the last few years, research into the psychology and motivations of rapists had been significantly distorted by the population of rapists to which researchers had access. Professor Eugene Kanin who conducted the first study of undetected date rapists points out that since only a small percentage of rapes are reported, and unfounding rates are high, few rapes end in arrest and even fewer in incarceration.⁷²

Our knowledge about the rapist . . . is essentially derived from the study of criminal failures, that very small percentage of offenders who are not only apprehended but also convicted. Furthermore, this extraordinary selectivity may also be responsible for leaving us with a relatively homogeneous population of rapists, that is, a population whose offenses are of such a nature, e.g., involving extrinsic violence, gang rape, object rape and stranger rape, that they are significantly more apt to be reported, prosecuted and convicted. And this homogeneity may be disarmingly responsible for the parochialism regarding the nature of rape found in professional writings, namely, the perspective that categorically views rape as a nonsexual offense.⁷³

Scully's assertion that for some men "rape is sex" and "sex is rape" is born out by the experiences of those who treat sex offend-

⁷¹ SCULLY, *supra* note 59, at 142-43 (emphasis added) (footnote omitted).

⁷² For statistics on reporting, unfounding, attrition, convictions and incarceration, see *infra* notes 119-136 and accompanying text.

⁷³ Eugene Kanin, *Date Rape: Unofficial Victims and Criminals*, 9 VICTIMOLOGY 95, 95-96 (1984).

ers. One aspect of cognitive-behavioral sex offender treatment is an effort to replace attraction to deviant sexual arousal with attraction to normal sexual arousal. To accomplish this, offenders in treatment are asked to develop appropriate fantasies which they verbalize into a tape recorder while masturbating to orgasm. Roger Wolfe of Northwest Treatment Associates in Seattle has described the difficulty many sex offenders have in developing appropriate fantasies and the need for close therapist monitoring of the content of these tapes. According to Wolfe:

[The offenders'] perceptions of what is an appropriate fantasy are incredible. We have clients come in with their initial tapes and say, "I had a wonderful appropriate fantasy," and it turns out to be a tape describing what is essentially a rape!⁷⁴

12. Characteristics of Rapists

Questions: In your story, how did you describe the rapist? Did you say he was a loner and a loser who looked like a degenerate? Did you say he was married or living with a woman or had a steady girlfriend? Did you say he was handsome? Did you say he was a star athlete? Did you say he was an upper-class male such as a physician or the college-student son of the owner of the city's primary newspaper?

Comment: The myth of rape depicts the rapist as a loutish-looking, lower-class male with no access to consensual sex. In fact, *sex offenders look like everyone else, come from every class, and almost always have access to consensual sex.*

Women have been raped by physicians⁷⁵ and millionaire celebrities,⁷⁶ as well as by homeless vagrants. High school, college, and professional athletes frequently engage in gang rape as an expression of male bonding.⁷⁷ Last year, the son of the owner of the Tampa Tribune and four of his male friends brought a woman to his parents' elegant home on the pretext of giving her a ride to her house. One of the men gave her LSD and raped her with his fingers

⁷⁴ Interview with Roger Wolfe, by Fay H. Knopp, Sept. 30, 1981, *quoted in* FAY H. KNOPP, *RETRAINING ADULT SEX OFFENDERS: METHODS AND MODELS* 12 (1984).

⁷⁵ See, e.g., *Commonwealth v. Helfant*, 496 N.E. 2d 433, 436 (Mass. 1986).

⁷⁶ See E.R. Shipp, *Tyson Found Guilty on 3 Counts as Indianapolis Rape Trial Ends*, N.Y. TIMES, Feb. 11, 1992, at 1.

⁷⁷ David L. Moore, *Athletes and Rape: Alarming link*, USA TODAY, Aug. 27, 1991, at C1.

and objects such as a mini-liquor bottle and a shoe horn.⁷⁸ In the words of police detective Bradford Conley, a 15-year veteran of the Atlanta sex-crimes unit, "We have all types . . . from cut off jeans to pinstripe suits, from those who live in the ghetto to those who work in the boardroom."⁷⁹

With respect to the myth that rapists act out of need for a sexual outlet, Dr. Nicholas Groth has written that "[a]ll the offenders we have seen were sexually active males involved in consenting sexual relationships at the time of their offense."⁸⁰ When sociologist Diana Scully conducted extensive interviews with 114 incarcerated rapists, 89% estimated that before entering prison they had engaged in consensual sex at least twice a week; 42% indicated that they had consensual sex at least once a day.⁸¹

With respect to unincarcerated, undetected date rapists, Professor Eugene Kanin of Purdue, who has been studying sexual aggression for decades, studied seventy-one self-disclosed, unincarcerated date rapists: all white, middle-class, undergraduate college students. He found these rapists to be "dramatically more [sexually] active than the controls." Kanin concluded that "[t]he 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."⁸²

13. Mental Disease Among Rapists

Question: Did you write that the rapist was mentally ill or had a mental defect of some kind?

Comment: Another myth about rapists is that they are "sick," that they are in some way mentally ill or psychotic. Here, too, the

⁷⁸ See *What a Case of Depravity Tells Us*, TAMPA TRIB., Mar. 21, 1992, at 10. One of the men was stopped by his buddies from raping the victim with a statue of Jesus Christ on the ground that to do so would be sacrilegious. See Orval Jackson, *Witness Says Contact Wasn't Rape*, TAMPA TRIB., Mar. 17, 1992, at 1. Three of the men involved were granted immunity and another took a plea bargain. The assailant was convicted of giving the woman LSD and tampering with evidence, but not of the rape itself. *Id.*

⁷⁹ David Gelman et al., *The Mind of the Rapist*, NEWSWEEK, July 23, 1990, at 47.

⁸⁰ A. Nicholas Groth & William F. Hobson, *The Dynamics of Sexual Assault*, in *SEXUAL DYNAMICS OF ANTI-SOCIAL BEHAVIOR* 161, 161 (Louis B. Schlesinger & Eugene Revitch eds., 1983).

⁸¹ SCULLY, *supra* note 59, at 71. Scully noted that if the frequency data seem high, one should be aware that the offenders were at their peak years for sexual activity. *Id.*

⁸² Kanin, *supra* note 73, at 99.

perception is completely inaccurate. Rather, as observed by Dr. William Pithers, Director of the Vermont Center for the Prevention and Treatment of Sex Offenders, "*They're not all mad dogs. Rape is a sick act committed by sane people.*"⁸³ In sociologist Diana Scully's study of 114 incarcerated rapists, only 26% had any history of emotional problems.⁸⁴ Empirical studies indicate that only approximately 5% of rapists are psychotic at the time of the attack.⁸⁵

The percentage of rapists who could be considered mentally ill drops even further when one takes into account young college men of the type studied by Professor Eugene Kanin of Purdue, Professor Barry Burkhart of Auburn University, Professor Mary Koss of Arizona University and Professor Neil Malamuth of the University of California.⁸⁶ In these studies, 12-15% of the sample acknowledged engaging in coerced intercourse. These unincarcerated, undetected, self-disclosed date rapists were ordinarily white, male, middle-class college undergraduates. Additionally, every study that has examined ordinary college men's attraction to sexual aggression has found that approximately 30% say they would rape if they knew they would never be caught.⁸⁷

14. Rape and Race

Question: In your story, were the victim and the rapist of the same race?

Comment: One of the most enduring myths about rape is that it is commonly committed by black men on white women. Department of Justice data from the National Crime Survey demonstrate the falsity of this perception. According to the Bureau of Justice Statistics data from 1973-1987, 83% of the rapes committed on

⁸³ See Gelman et al., *supra* note 79, at 47 (emphasis added).

⁸⁴ See SCULLY, *supra* note 59, at 142-43.

⁸⁵ See Gene G. Abel et al., *Aggressive Behavior and Sex*, in *PSYCHIATRIC CLINICS OF NORTH AMERICA* 3 (1980).

⁸⁶ See Kanin, *supra* note 73; Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, 55 *J. CONSULTING & CLINICAL PSYCHOL.* 162 (1987); Neil Malamuth et al., *Characteristics of Aggressors Against Women: Testing a Model Using a National Sample of College Students*, 59 *J. OF CONSULTING & CLINICAL PSYCHOL.* 670 (1991); Karen Rapaport & Barry Burkhart, *Personality and Attitudinal Characteristics of Sexually Coercive College Males*, 93 *J. OF ABNORMAL PSYCHOL.* 216 (1984).

⁸⁷ Neil Malamuth, *Rape Proclivity Among Males*, 37 *J. OF SOCIAL ISSUES* 138, 138 (1981).

white women by nonstrangers were committed by white men, and 91% of the rapes committed on black women by nonstrangers were committed by black men.⁸⁸ As already discussed, the vast majority of sexual assaults are committed by someone known to the victim. Therefore, these Bureau of Justice Statistics figures reveal that the vast majority of rapes are intraracial.

In the stranger rape category, 14% of stranger rapes involving black women were committed by white men and 30% of stranger rapes involving white women were committed by black men.⁸⁹ Thus, *in stranger, as well as nonstranger rape, the large majority of cases involve victims and rapists of the same race.*

By focusing its attention on cases involving black men and white women, the public loses sight of black victims and devalues their credibility and their injury. In the most extensive study of rape trial jurors ever conducted, a team of sociologists watched all thirty-eight Indianapolis jury trials for forcible-sexual assault held between 1978 and 1980 and then conducted ninety-minute interviews with 331 of the jurors who sat in those cases.⁹⁰ These jurors were extremely skeptical of black complainants, no matter what the race of the rapist. Apparently influenced by stereotypes about black women as promiscuous and more likely to consent or less harmed by forced sex, these jurors were extremely dismissive of black victims' claims.⁹¹

In one of the most egregious recent cases, a black woman on welfare alleged that she was raped on the examining table by a white physician to whom she had gone for an obstetrical examination.⁹² The physician first denied all sexual contact. On the eve of trial, when the DNA results came back positive, he changed his defense to consent. In response to the public outcry over his acquittal, a member of the jury, described by the prosecutor as an older, white-haired gentleman, wrote the prosecutor that the jury thought "a black woman like that might be flattered by the attention of a white doctor."⁹³

The origins of the racist myths about black women's promis-

⁸⁸ FEMALE VICTIMS, *supra* note 19, at 10.

⁸⁹ *Id.*

⁹⁰ Gary LaFree et al., *Jurors' Response to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOCIAL PROBS. 389, 393 (1985).

⁹¹ *Id.* at 401-02.

⁹² *Scarsdale Doctor Cleared of Raping Patient*, N.Y. TIMES, Aug. 7, 1991, at B3.

⁹³ Telephone interview with Barbara Eggenhauser, Assistant District Attorney, Westchester County, N.Y. (April 21, 1992).

cuity date back to slavery. Black women and men, because they came from Africa, were thought by whites to be closer to "the animal" and therefore to be more highly sexed than whites. During slavery, black women were subject to repeated rape by slave owners and overseers. White society, to cover these crimes, generated a myth of black women as highly sexed. As the prominent historian Gerda Lerner has written:

By assuming a different level of sexuality for all blacks than that of whites and mythifying their greater sexual potency, the black woman could be made to personify sexual freedom and abandon. A myth was created that all black women were eager for sexual exploits, voluntarily "loose" in their morals and, therefore, deserved none of the consideration and respect granted to white women. Every black woman was, by definition, a slut according to this racist mythology; therefore, to assault her and exploit her sexually was not reprehensible and carried with it none of the normal communal sanctions against such behavior.⁹⁴

The corollary of this myth became that if black women are so lustful, black men must be equally lustful and therefore not to be trusted around white women.⁹⁵ This aspect of racism continues to be apparent in sentencing. In Professor Gary LaFree's study of Indiana rape trials, he found that black men who raped white women were much more seriously sanctioned than black men who raped black women. In LaFree's words, "the results strongly supported the argument that official reactions to black men charged with rape depend on the race of the victim."⁹⁶

Similar findings emerged from a study of 1988 sentencing outcomes in Dallas, Texas, which is unusual in its continued reliance on jury sentencing in noncapital crimes.⁹⁷ Eighty-eight percent of the 121 rape cases were resolved through plea bargains and the District Attorney acknowledged that "juries set the benchmark

⁹⁴ BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 163 (Gerda Lerner, ed., 1973).

⁹⁵ Angela Y. Davis, *Rape, Racism and the Myth of the Black Rapist*, in *WOMEN, RACE AND CLASS passim* (1981).

⁹⁶ GARY LAFREE, *RAPE AND CRIMINAL JUSTICE* 134 (1989). There were too few rapes of black women by white men to permit a comparison of white men's sentences by race of victim. *Id.* at 129.

⁹⁷ Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES HERALD, Aug. 19, 1990, at A1. The article discusses the roles and interrelationship of race and class in all sentencing, pointing out that poor victims are generally devalued by the courts, and that being poor and black or Hispanic is "probably doubly bad."

sentences in Dallas, and that his prosecutors consider those sentences when they negotiate plea bargains."⁹⁸ The median sentence for a black man who raped a white woman was 19 years; that for a black man who raped a black woman, 1 year.⁹⁹

15. Where Rape Occurs

Questions: Where did the rape in your story take place? Was it in a public place like the street or a park? Or was it in the victim's or the rapist's home?

Comment: In the stereotyped picture of rape, a stranger jumps from the bushes in a park or lurks in an alley awaiting his victim. But according to Bureau of Justice Statistics data, 41% of completed rapes took place at the victim's home and 19% took place at or near a friend's home. Only 18% occurred on the street. The other rapes occurred in a wide variety of places such as parking lots, commercial buildings, and schools.¹⁰⁰ These data probably understate the percentage of rapes occurring at or near the victim's or a friend's home because, as discussed earlier, Bureau of Justice Statistics data severely understate the percentage of nonstranger rapes.

16. Rape Planning

Question: The instructions for this exercise asked you to write about what happened *before* the rape. Did you write that the rapist planned the attack or that it was impulsive?

Comment: Another enduring myth about rape is that it is men's spontaneous response to the way women dress and act. A man sights a provocatively dressed woman passing by, is overcome by lust, and cannot help himself.

Extensive research with rapists documents that this is not the case. There is now a substantial body of empirical research, built up over the last two decades, that looks at the characteristics, motives, and *modus operandi* of all kinds of rapists. Mental health professionals connected with correctional institutions, hospitals, and universities, and social scientists affiliated with correctional

⁹⁸ *Id.* at A22.

⁹⁹ *Id.* The median sentence for a white man who raped a black woman was 10 years. White-white rapes produced median sentences of 5 years; Hispanic-Hispanic rapes produced median sentences of 2.5 years. *Id.*

¹⁰⁰ FEMALE VICTIMS, *supra* note 19, at 8.

and academic institutions have studied adolescent and adult incarcerated rapists as well as undetected rapists (many of the "date rape" variety) who have disclosed their sexual assaults in confidential research.¹⁰¹

This research reveals that *a significant percentage of stranger and nonstranger rapes are planned and premeditated*. Although some "date rapes" occur in the heat of the moment, it is also the case that many date and acquaintance rapists go on dates or pick up women with the absolute intention of having sex and with no intention of respecting the woman's protestations if she is not equally interested. There are even rapists who deliberately court their victims, develop a consensual sexual relationship, and then rape them.¹⁰²

Gang rapes by fraternities or groups of athletes are notorious examples of planning.¹⁰³ An example is a 1990 case that drew national attention involving a group of lacrosse players from St. John's University in Queens, New York. The ringleader pretended to befriend a female fellow student and offered her a ride to her home. On the pretext of needing money for gas, he drove her to the off campus house he shared with his teammates. Once there, he pretended that he had to make a phone call and invited her into the house to wait. Once she was inside, he forced liquor on her until she was incapacitated, at which point he assaulted her and then left her to his buddies. His teammates—some admittedly and some allegedly—forced the victim to have oral sex, slapped her in the face with their penises, and fondled her breasts.¹⁰⁴

¹⁰¹ See, e.g., Neil Malamuth & Karol Dean, *Attraction to Sexual Aggression*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* (Andrea Parrot & Laurie Bechkofer eds., 1991) [hereinafter *ACQUAINTANCE RAPE*]; A. Nicholas Groth, *Rape: Power, Anger and Sexuality*, 34 *AM. J. OF PSYCHIATRY* 1239, 1239 (1977); Kanin, *supra* note 73, at 95; Malamuth et al., *supra* note 86; ROBERT A. PRENTKY & RAYMOND A. KNIGHT, *Identifying Critical Dimensions for Discriminating Among Rapists*, 59 *J. OF CONSULTING AND CLINICAL PSYCHOL.* 643 (1991); SCULLY, *supra* note 59.

¹⁰² Liz Hecht, *Stalking the Personals*, *NEW YORK WOMAN* (1991); see also JULIA R. SCHWENDIGER & HERMAN SCHWENDIGER, *RAPE AND INEQUALITY* 482 (1986).

¹⁰³ See generally PEGGY SANDAY, *FRATERNITY GANG RAPE* (1990).

¹⁰⁴ See Edward Frost, *Inside Stories Reveal Details of Sex Case*, *NAT. L.J.*, June 24, 1991, at 8 (describing attack); Heidi E. Herr, *St. John's Lessons in Misogyny*, *WHAM! FRONTLINER*, Spring 1992, at 3; Alisa Solomon, *Unreasonable Doubt*, *VILLAGE VOICE*, Aug. 6, 1991, at 2; Curtis L. Taylor, *Sex Suspect 'Wasn't There'*, *NEWSDAY*, Feb. 4, 1992, at 20; Nicholas Varchaver, *Inside the St. John's Jury Room*, *MANHATTAN LAWYER*, Sept. 1991, at 17.

Three of the six defendants, including ringleader Michael Calandrillo, admitted the complete truth of several aspects of the victim's charges in their plea bargains. See Tran-

The one category of rape that is clearly unplanned is "bonus rape," in which a burglar finds a woman in the home he has chosen to burglarize and decides to commit rape as well as the crime initially intended. In Diana Scully's interviews with 114 incarcerated rapists, she found that 39% had also been convicted of burglary or robbery and that for many of these men the decision to rape was made when they found a woman alone in a store or in her home in the course of a theft.¹⁰⁵

17. Rape Fantasies

Questions: When you wrote about what happened before the rape, did you write that the victim fantasized about being raped? Did you write that the rapist fantasized about raping?

Comment: Another myth is that women fantasize pleasurably about rape, find the idea sexually exciting, and unconsciously wish for and welcome the event. This myth is enshrined in Wigmore's Treatise on Evidence. Wigmore, drawing on Freud, wrote that every woman who alleges sexual assault should be examined by a psychiatrist to be certain she is not fantasizing.¹⁰⁶

Research into the content of women's fantasies has disclosed that *when women fantasize about rape (as opposed to scenes of sex with a stranger in which they control the fantasy) they perceive it as an extremely negative, terrifying event.*¹⁰⁷ What is almost never raised in discussions claiming that women fantasize pleasurably about rape is the question whether men fantasize about rape as a desirable event. There is substantial research showing that *male rape fantasies are fairly common and often involve the woman enjoying the rape after initial resistance.*¹⁰⁸ Not

script of Plea Proceeding at 7-11, *People v. Calandrillo*, Indictment No. 2322/90 (N.Y. Sup. Ct. Queens County Feb. 11, 1992) (defendant admitting to placing his penis in victim's mouth without consent and leaving victim alone, half naked, with other defendants); Transcript of Plea Proceeding at 5-7, *People v. Gerber*, Indictment No. 5413/90 (N.Y. Sup. Ct. Queens County Jan. 7, 1992) (defendant admitting to touching victim's breast without her consent, while she was intoxicated); Transcript of Plea Proceeding at 7-9, *People v. Rielly*, Indictment No. 5413/90 (N.Y. Sup. Ct. Queens County May 23, 1991) (defendant admitting to touching victim's breast without her consent).

¹⁰⁵ SCULLY, *supra* note 59, at 141-42.

¹⁰⁶ See 3A JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 924a, at 737 (James H. Chadbourne rev. 1970).

¹⁰⁷ Eugene J. Kanin, *Female Rape Fantasies: A Victimization Study*, 7 VICTIMOLOGY 114, 119 (1984).

¹⁰⁸ See SCULLY, *supra* note 59, at 150-51; TIMOTHY BENNEKE, MEN ON RAPE 63-66 (1982); ANNA SALTER, TREATMENT SKILLS FOR PROFESSIONALS WORKING WITH SEX OFFENDERS

every man who fantasizes about rape acts out his fantasy, but rape fantasies are typical thought patterns for rapists.¹⁰⁹

18. Use of Alcohol

Questions: Did you write that the victim and/or the rapist were drinking before the rape? If yes, did you write that the rapist acted as a result of intoxication? Did you write that the victim was at fault for drinking too much and not controlling the situation?

Comment: Many sexual assault cases involve situations in which the rapist, the victim, or both were drinking. Alcohol is perceived as a "cause" of rape, as well as a cause of domestic violence. In fact, *alcohol is not a cause, rather, it loosens the inhibitions of those inclined to commit rape and battering.*¹¹⁰ Research on this issue indicates that alcohol facilitates male aggression¹¹¹ and serves as an excuse for unacceptable sexual arousal and behavior.¹¹² Rapists who consume alcohol blame their actions on the beer and liquor, thus mitigating any sense of personal responsibility, and they expect others to blame their behavior on the alcohol, again mitigating personal responsibility. Rapists and batterers often drink deliberately to give themselves an excuse to act out their aggression.¹¹³

There is a double standard concerning men's and women's use of alcohol. His drinking excuses him. Hers is held against her. Men

203 (1989); KNOPP, *supra* note 74, at 96-97.

¹⁰⁹ See Daniel Goleman, *New Studies Map the Mind of the Rapist*, N.Y. TIMES, Dec. 10, 1991, at C1. Researchers estimate that 25% of rapists are literally acting out a "fantasy in which they force a woman to have sex, and then she falls in love with them." *Id.*

¹¹⁰ See SUSAN BROWN MILLER, *AGAINST OUR WILL* 184 (1975); SALTER, *supra* note 108, at 229; Daniel H. Coleman & Murray A. Strauss, *Alcohol Abuse and Family Violence*, in *DRUG ABUSE AND AGGRESSION* 105 (Gutheil et al., eds., 1983). See generally DIANE E.H. RUSSELL, *SEXUAL EXPLOITATION* 137-52 (1984) (discussing factors reducing inhibitions against rape).

¹¹¹ W. Burky et al., *Dating Violence Among High School Students*, THE SCHOOL COUNSELOR 353, 353-58 (1988) (alcohol consumption facilitated sexual attack); E.R. DeSouza et al., *Perceived Sexual Intent in the U.S. and Brazil as a Function of Nature of Encounter, Subject's Nationality, and Gender*, 29 J. OF SEX RES. 251 (1992) (studies comparing alcohol consumption indicated that intoxication may catalyze sexual aggressiveness).

¹¹² See Deborah R. Richardson & Georgia S. Hammock, *Alcohol and Acquaintance Rape*, in *ACQUAINTANCE RAPE*, *supra* note 101, at 88 (alcohol often used to justify unacceptable sexual encounters).

¹¹³ See Richardson & Hammock, *supra* note 112, at 89 (people frequently use alcohol as a justification for bad behavior); Amy Callahan & Suzette Parmley, *College Students Confront the Threat of Date Rape*, BOSTON GLOBE, Sept. 2, 1990, at 1 (Boston College campus police stated alcohol was involved in 90% of sexual assaults at college, increasing probability that those who committed assaults consumed alcohol to use as an excuse).

who drink are expected to lose control. Women who drink to excess are often held responsible for the men's behavior as well as their own.¹¹⁴

19. False Allegations/Unfounded Complaints

Questions: Did you write about a trial premised on a false allegation? For example, was there consensual sex and then the woman became angry at the man and charged him with rape; or was there no sexual activity at all, but the woman made up a story about rape to get attention or to destroy the man's reputation?

Comment: Many commentators have observed that rape laws have historically been premised on men's fear of women making false allegations of rape.¹¹⁵ Lord Matthew Hale's jury instruction, barred in many states,¹¹⁶ but still permitted in twenty-six,¹¹⁷ asserts that an accusation of rape "is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent."¹¹⁸

Discussion of so-called false allegations is confused by the confounding of false allegations with cases that are "unfounded"; that is, determined by police or prosecutors to be unverifiable, nonserious, or unprosecutable. For example, in 1975 the FBI published statistics showing that there were more false reports of rape than of any other crime.¹¹⁹ In fact, the FBI does not publish statistics on false reports and was instead referring to "unfounded" com-

¹¹⁴ See Richardson & Hammock, *supra* note 112, at 89 (alcohol is used as tool to excuse men and blame women for rape); RUSSELL, *supra* note 110, at 148-49 (alcohol operates to advantage of rapist by assisting to exonerate him while blaming the victim); see also DeSouza, *supra* note 111, at 252 (studies have shown women who drink before being raped are more often considered the party at fault).

¹¹⁵ E.g. DUNCAN CHAPPEL ET AL., *FORCIBLE RAPE: THE CRIME, THE VICTIM AND THE OFFENDER* 74 (1977) (noting rape laws historically reflected fear rape charges would result in false convictions); DEBORAH L. RHODE, *JUSTICE AND GENDER* 244-45 (1989).

¹¹⁶ See, e.g., *Mart v. State*, 494 So. 2d 1139, 1143 (Fla. 1986) (eradicating Lord Hale's jury instruction from Florida law); *State v. Willis*, 394 N.W. 2d 648, 651 (Neb. 1986) (holding state legislature intended to dispel Lord Hale's conception of rape when it altered state's first degree sexual assault statute); *State v. Bashaw*, 672 P.2d 48, 50 (Or. 1983) (stating that Lord Hale's jury instruction should not be used).

¹¹⁷ A. Thomas Morris, Book Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L. J. 154, 155 n. 12-14 (1988).

¹¹⁸ Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 10 (1977) (summarizing early rape law).

¹¹⁹ FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 10 (1975).

plaints.¹²⁰ These FBI statistics do not correctly identify what they purport to measure.

In most jurisdictions, police can declare a complaint unfounded in their initial report.¹²¹ Thus, cases can be declared unfounded after a routine, cursory investigation.¹²² In so doing, police are often influenced by extra-legal considerations and biases and thus evaluate victim credibility within the context of the rape myths described in this Article.¹²³ Belief in rape myths raises the number of "unfounded" reports. Even in cases where victims sustained bruises, black eyes, cigarette burns, and bitten nipples, police have "unfounded" cases if there was a previous sexual relationship between the parties.¹²⁴ Police are more likely to believe a victim if it is a stranger rape, if there was more than one offender, if weapons were used, if the victim made a prompt report, or if the victim had a reputation for chastity.¹²⁵

In Oakland, California, in 1990, 228 rape cases were reopened for investigation following disclosure that one in four reported rapes and attempted rapes were classified as "unfounded."¹²⁶ The

¹²⁰ Telephone Interview with Mary Simons, FBI Uniform Crime Report Unit, Washington, D.C. (Sept. 18, 1992).

¹²¹ LAFREE, *supra* note 96, at 56.

¹²² See *id.* (noting police discretion in decision to arrest).

¹²³ See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 984 (1991) (noting male police response based on stereotypes of women); Rene Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. FAM. L. 559, 564 (1990-91) (most marital rape charges did not survive police investigation); see also Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 709 (1989) (police criticized for failure to enforce rape and domestic violence complaints). See generally MICHAEL K. BROWN, *WORKING THE STREET* 214 (1981) (police take into account race, sex, personality, characteristics and drugs in evaluating whether to make an arrest); HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 34-35 (discussing police role in rape complaints); JEAN MACKELLAR, *RAPE: THE BAIT AND THE TRAP* 82-83 (1975) (questions police asked of typical rape victim indicate police believe in rape myths).

¹²⁴ KATZ & MAZUR, *supra* note 31, at 210; see also Augustine, *supra* note 123, at 563 (married women who report rape less likely to receive assistance from police intervention).

¹²⁵ KATZ & MAZUR, *supra* note 31, at 210; MACKELLAR, *supra* note 123, at 87 (if victim had friendly relationship with offender before incident, case has little chance in court); Pamela L. Wood, *The Victim in a Forcible Rape Case: A Feminist View*, in *RAPE VICTIMOLOGY* 194, 205-12 (George Schultz ed., 1975) (historically, lack of chastity, failure to resist, and waiting to report rape have adversely affected likelihood that woman will be believed); Berger, *supra* note 118, at 15-20 (courts consider a woman's virtue in evaluating whether she consented); see also *People v. Collins*, 186 N.E.2d 30, 33 (Ill. 1962) (considering prior sexual conduct in evaluating issue of consent), *cert. denied*, 373 U.S. 942 (1963).

¹²⁶ *Prosecution Seen as Unlikely in 228 Rape Cases in Oakland*, N.Y. TIMES, Nov. 13, 1990, at B10 (prosecution of cases considered unlikely because victims were hard to find or

police conceded that in some cases victims were not interviewed by the police and were never contacted after the initial reports were made. Many of these victims were women of color, prostitutes, or drug users, or they were acquainted with their assailants. "Candidly, we blew it," the police chief said.¹²⁷

The military is notorious for summarily "unfounding" rape cases.¹²⁸ During the Persian Gulf War, for example, female soldiers' reports of sexual abuse by their male colleagues were summarily ignored.¹²⁹ It was only after the public scandal over the Navy's poor handling of the Tailhook convention incident, at which twenty-six women were sexually abused by a gauntlet of Navy pilots,¹³⁰ that charges about assaults during the war began to be taken seriously.¹³¹

With respect to actual false allegations, certainly these do happen.¹³² But on a statistical basis they appear to be infrequent, even less frequent than false allegations in other types of cases.¹³³ The Portland Oregon police reported in 1990 that of the 431 rape and attempted rape complaints received, 1.6% were determined to be false compared with 2.6% of stolen vehicle reports that were

unwilling to cooperate).

¹²⁷ *Oakland to Reopen Rape Cases Again*, S.F. EXAMINER, Sept. 18, 1990, at A1.

¹²⁸ See, e.g., Molly Moore, *Navy Failed to Prosecute in 6 Rapes*, WASH. POST, Oct. 22, 1990, at A1 (Navy had serious problem with rapes at training center in Orlando, but offenders did not receive appropriate punishment); *CNN News: Military Rape Victims Plead for Recognition of Problem* (CNN broadcast, June 30, 1992), available in LEXIS, Nexis library, Script file (female military members complaining of rape received little assistance from Veteran's Administration).

¹²⁹ Elaine Sciolino, *Military Women Report Pattern of Sexual Abuse by Servicemen*, N.Y. TIMES, July 1, 1992, at A1; Letta Taylor, *Operation Parity: Assaults Renew on Debate Over Role of Women*, NEWSDAY, July 27, 1992, at 6 (Army records indicate at least twenty-four women raped during Gulf War and officers slow to respond to complaints).

¹³⁰ Ron Martz, *Lessons from the Hill—Military is Beginning to Change Attitude*, ATLANTA J. & CONST., Oct. 5, 1992, at C4 (admirals forced to retire after poorly investigating Tailhook scandal); Eric Schmitt, *Navy Investigations: A Raft of Failures*, N.Y. TIMES, June 28, 1992, A6.

¹³¹ *Court-Martial Is Set on Sex Assault Charge*, N.Y. TIMES, Aug. 30, 1992, at A27.

¹³² See, e.g., William Robbins, *Sentence for Lie on Rape Charge Creates Debate*, N.Y. TIMES, July 8, 1990, at A10 (court ordering woman to apologize in newspaper and radio for false allegations of rape).

¹³³ See Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 691-92 (experts believed that only 2-4% of victims falsely assert that rape occurred); Deborah G. Goolsby, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1192 (only 2-4% of rape is falsely reported yet officials are skeptical about believing rape occurred); Torrey, *supra* note 28, at 1028 (rapes were believed to be false accusations absent strong physical evidence while ironically, statistics indicate less than 5% of rape charges are inaccurate).

false.¹³⁴ A 1989 comparative analysis of data on false rape allegations reported a rate of 2%.¹³⁵

Contrary to Lord Hale's allegation, rape is an extremely difficult crime to charge and the easiest of all to defend. Professor Gary LaFree of the University of New Mexico conducted an elaborate study of attrition and case outcome in the rape cases reported to Indianapolis police in 1970, 1973, and 1975. He determined that of the 881 rape cases reported, 326 resulted in arrest, 103 ended in some type of sentence, and only 82 men were incarcerated.¹³⁶

20. Prompt Complaint After the Rape

Questions: The instructions for this exercise asked you to write about what happened *after* the rape. Did you write that the victim made an immediate report to the police? Did you write that the victim made an immediate report to a rape crisis center? Did you write that the victim made an immediate report to a friend or family member?

Comment: It is widely assumed that a "true" victim of rape will immediately go to the authorities.¹³⁷ The assumption that victims report promptly to the police is so strong that victims who delay reporting are presumed to be fabricating.¹³⁸ Yet data from numerous sources demonstrate that *rape is rarely reported to anyone, and women who do report the crime often wait days, weeks, months, or even years before confiding in a family member, a friend or a rape crisis counselor, much less going to the police.*¹³⁹

Rape in America found that only 16% of sexual assaults were reported to police.¹⁴⁰ Other studies have found even lower report-

¹³⁴ *Rape: Shattering Myths*, THE SUNDAY OREGONIAN, Jan. 5, 1992, at A11.

¹³⁵ KATZ & MAZUR, *supra* note 31, at 212-13.

¹³⁶ LAFREE, *supra* note 96, 129-131.

¹³⁷ See MACKELLAR, *supra* note 123, at 83 (interrogators of rape victims often surprised when charge not brought immediately).

¹³⁸ See BROWNMILLER, *supra* note 110, at 366 (rapes reported within hours of event more likely to be believed while those reported later cast significant doubt on victim's credibility).

¹³⁹ See ELAINE HILBERMAN, THE RAPE VICTIM 33-40 (1976) (discussing many reactions to rape, one of which is shock, accounting for many rape victims who do not immediately report crime); Jean Wolfe & Virginia Baker, *Characteristics of Imprisoned Rapists and Circumstances of the Rape*, in RAPE AND SEXUAL ASSAULT 265 (acknowledging rape as most underreported crime). See generally Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 935-36 (1975) (indicating that victims of crime do not report it because of belief that nothing would be done).

¹⁴⁰ RAPE IN AMERICA, *supra* note 1, at 7.

ing rates.¹⁴¹ For example, the Senate Judiciary Committee found a reporting rate of 7% for rapes compared with 53% for robberies.¹⁴² Of the small number of reported rapes in the *Rape in America* study, one-quarter were reported to police more than twenty-four hours after the rape occurred.¹⁴³ In a study of 1,000 rape victims who reported to the Beth Israel Hospital Rape Crisis Intervention Center in Boston over a ten year period, the time frames ranged from less than three hours to two weeks after the rape.¹⁴⁴

There are many reasons why victims do not report a rape. These include:

a. Not Knowing the Assault was Legally a Rape

A film about nonstranger rape titled *Someone You Know* opens with the story of a woman so viciously assaulted by the airline captain with whom she had formerly lived that she cut off all her hair so no one would ever pull her by her hair again. She reported to the police that she had been beaten, dragged around, and assaulted in many ways, but not that she had been raped. She said she did not know that you could be raped by someone you knew. The film's narrator reports that the jury did not know it either. It convicted the defendant of sodomy and assault, but not of the charged rape.¹⁴⁵

Professor Mary Koss of the University of Arizona conducted a study for the National Institute of Mental Health of 3,187 female students on thirty-two college campuses. She found that 489 of them had been forced to engage in sexual activity that met the legal definition of rape, but only 57% of this group labelled their experience rape. The others did not realize that forced sex is rape even when the victim knows the rapist or when the forced acts are other than penile-vaginal penetration.¹⁴⁶

¹⁴¹ See, e.g., SUZANNE S. AGETON, *SEXUAL ASSAULT AMONG ADOLESCENTS* 26, tbl. 3-1 (1983) (reporting of sexual assaults among adolescents far below 16%).

¹⁴² SENATE JUDICIARY COMMITTEE REPORT, *supra* note 50, at 7.

¹⁴³ *RAPE IN AMERICA*, *supra* note 1, at 7.

¹⁴⁴ Daniel C. Silverman et al., *Blitz Rape and Confidence Rape: A Typology Applied to 1,000 Consecutive Cases*, 145 AM. J. PSYCHIATRY 1438, 1440, tbl. 1 (1988).

¹⁴⁵ *Someone You Know: Acquaintance Rape* (Dystor Television 1986). To obtain a copy of this film, contact the distributor Coronet/MTI Films and Video, Deerfield, Ill. 60015; 1-800-621-2131.

¹⁴⁶ Koss et al., *supra* note 6, at 4.

b. *Fear of Retaliation*

Many victims fear that the rapist will retaliate. In *California v. Panichas*,¹⁴⁷ for example, one of the rapist's many victims was the sister of his receptionist. The victim was terrified that if she told her sister what had happened, her sister would refuse to go to work and the rapist would know she had told. As a result, she initially claimed to her sister and then to the police that a masked man had jumped into her car and raped her.

c. *Fear of Being Disbelieved and Blamed*

In the *Rape in America* study, 69% of rape victims were somewhat or extremely concerned about people thinking that the rape was their fault or that they were responsible.¹⁴⁸ Fear of being disbelieved may play a particular role in black women's reluctance to report. A study of black and white rape victims in Los Angeles found the former "significantly less likely to disclose incidents involving sexual assaults."¹⁴⁹ The author posited that black women's lesser credibility as rape victims¹⁵⁰ together with their negative experiences with and expectations of the police may be controlling factors in their declining to report.¹⁵¹

d. *Fear of Loss of Privacy*

In the *Rape in America* study, 71% of victims were somewhat or extremely concerned about their family's knowing that they had been sexually assaulted; 68% were worried about people outside their families knowing; and 50% were worried about their names being made public by the news media.¹⁵²

Sexual assault is unlike any other crime. Mugging victims do not worry that neighbors will talk about what they did to invite

¹⁴⁷ No. G008080, at 6-7 (Cal. Ct. App. 1991).

¹⁴⁸ RAPE IN AMERICA, *supra* note 1, at 6; see Berger, *supra* note 118, at 15-20 (describing incidence of questioning woman's chastity when she brings rape charges); see also SCHWENDIGER & SCHWENDIGER, *supra* note 102, at 17-29 (indicating that women defer reporting of sexual assaults due to traditional myths that blame victims).

¹⁴⁹ See Gail Wyatt, *The Sociocultural Context of African American and White American Women's Rape*, 48 J. OF SOCIAL ISSUES 77, 86 (1992).

¹⁵⁰ *Id.*; see also *supra* notes 87-95 and accompanying text.

¹⁵¹ Wyatt, *supra* note 149, at 86-87; see also JOYCE E. WILLIAMS & KAREN A. HOLMES, *THE SECOND ASSAULT* 178-79 (1981) (stating black women less likely to disclose details of rape due to racial prejudice).

¹⁵² RAPE IN AMERICA, *supra* note 1, at 6.

the mugging or that everyone will think of them as stigmatized.¹⁵³ Many rape victims decide that it is in their best interests to hide the rape and try to go on with their lives as if nothing happened.¹⁵⁴ This is particularly true for victims of nonstranger rapes.¹⁵⁵ Such suppression leaves many psychological issues unresolved, causing problems in later life.¹⁵⁶

e. Fear of the Criminal Justice System

A significant percentage of victims fear that if they report the rape they will be humiliated and blamed by everyone in the criminal justice system from the police to the jurors. They have heard women who have gone through with reporting the crime and enduring a trial describe it as a second rape.¹⁵⁷ Because, for all these reasons, a delayed complaint is the norm rather than the exception for the small percentage of rape victims who do report, and because a prompt complaint is such a critical issue for jurors, prosecutors are increasingly having an expert witness testify when failure to report promptly is an issue.¹⁵⁸

Although the vast majority of rapes are committed by someone known to the victim, stranger rape is far more likely to be reported to police and rape crisis centers than nonstranger rapes. The victims of stranger rape are more likely to think of themselves as victims of a crime of sexual assault and more likely to think that police will believe them.¹⁵⁹ Because nonstranger rape is so phenomenally underreported, experts in the field refer to it as "hidden rape."¹⁶⁰

¹⁵³ See MACKELLAR, *supra* note 123, at 79 (unlike other crimes victim of rape must prove assailant guilty and defend her own innocence).

¹⁵⁴ See KATZ & MAZUR, *supra* note 31, at 185-86 (women tend not to report rape due to shame and embarrassment associated with being victim).

¹⁵⁵ 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS 100 (1990) [hereinafter ILLINOIS REPORT].

¹⁵⁶ Silverman et al., *supra* note 144, at 1439.

¹⁵⁷ ILLINOIS REPORT, *supra* note 155, at 100.

¹⁵⁸ KATZ & MAZUR, *supra* note 31, at 230-31 (explaining delayed reporting as result of psychological after-effects); Fischer, *supra* note 133, at 704-11 (noting use of experts at trial to report on rape trauma syndrome to explain victim's delayed reporting); see also *People v. Taylor*, 552 N.E.2d 131, 131 (N.Y. 1990) (allowing expert testimony on rape trauma syndrome to explain victim's conduct).

¹⁵⁹ See MACKELLAR, *supra* note 123, at 86-87 (victims of stranger rape are more likely to report rape and be believed).

¹⁶⁰ See generally ACQUAINTANCE RAPE, *supra* note 101, *passim*.

f. Denial/Suppression

Denial of all or part of the assault or that it was a rape is an extremely common response. In the case of the New York woman who accused three Mets players of gang rape, she said that after the attack she made the bed and that she did not realize that she had been raped until three days later.¹⁶¹ Such behavior is consistent with an attempt to deny the rape, maintain a belief in normalcy, and regain control of one's life.

The phenomenon of "denial" makes some victims deny at first that they knew the rapist and later acknowledge that they did. Shock can also cause victims to make inconsistent statements about where the rape occurred. The victim may acknowledge that she knew the rapist, yet may not be able to tell the police his name.

g. Psychogenic Amnesia

Some victims completely block any memory of the assault from their minds and do not report until the memory returns because they did not "know" that anything happened to them.¹⁶² Other victims may lose partial memory. In one New York gang rape case the victim could only remember the face of one attacker. A year later she snagged her hair on something in her home and her head was jerked backward in a motion similar to what happened during the rape. This caused the mental picture of a second attacker to return. She reported it to the prosecutor who went forward with a second indictment.¹⁶³

21. Victim Impact

Questions: When you wrote about the aftermath of the rape, did you write about the victim's response in the weeks immediately after the event? Did you write about her response six months later? More than one year later?

¹⁶¹ Michael Marriott, *State Attorney Says Mets Will Not Face Criminal Charges*, N.Y. TIMES, Apr. 10, 1992, at B13, B17; see also HILBERMAN, *supra* note 139, at 33-40 (explaining various reactions victims must deal with in attempting to overcome the trauma); KATZ & MAZUR, *supra* note 31, at 215-31 (same).

¹⁶² See STEDMAN'S MEDICAL DICTIONARY 1164 (1982) (defining "psychogenic amnesia" as loss of memory resulting from severe emotional distress).

¹⁶³ Interview with Marjory Fisher, Esq., Chief, Special Victim's Bureau, District Attorney's Office, Queens County, N.Y., in New York, N.Y., May 12, 1992.

If you wrote about the short term response, did you say the victim was briefly shaken up but quickly went on with her life? Did you say she was deeply traumatized and suffered from nightmares, extreme fear, flashbacks, phobias, and an inability to trust others and form relationships?

What did you write about the victim one year later? Did you say she had put the rape completely behind her? Did you say she was still deeply traumatized? Did you say she continued to suffer the effects of the rape far more than one year later? More than five years? For life?

Comment: In speaking of rape, the question is often asked "Was she injured?" meaning did the rapist slash the victim's face or break her arm. This is "injury" as the law has always understood it. In reality, rape rarely involves those kinds of injuries, but it always involves psychological trauma. Failure to understand that *rape is in and of itself a profound injury with lifetime consequences* is a major factor in the devaluation of this crime.

Many people mistakenly assume that if the rape did not involve serious physical injury, there was no injury.¹⁶⁴ Nonstranger rape is particularly misunderstood, often perceived as nothing more than "bad sex."¹⁶⁵ This is particularly true if the victim and the defendant were having a sexual relationship or were or are married.

In fact, both stranger and nonstranger rapes, including marital rapes, produce severe, long lasting psychological trauma.

a. How the Trauma of Stranger and Nonstranger Rape Compare

Most people, including judges, lawyers, and police, are not aware that *rape by someone known to the victim is as traumatic, if not more traumatic, than stranger rape* because self-blame is increased and the ability to trust others is destroyed.

b. Blitz Rape/Confidence Rape

"Blitz rape" and "confidence rape" are terms developed by the clinician/researchers who first described Rape Trauma Syndrome that describe stranger and nonstranger sexual assaults. Blitz rape

¹⁶⁴ See Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, FORDHAM URB. L.J. (forthcoming 1993).

¹⁶⁵ See CAROLYN HURSCH, *THE TROUBLE WITH RAPE* 78 (1977).

is "a sudden surprise attack by an unknown assailant."¹⁶⁶ Confidence rape involves "some nonviolent interaction between the rapist and victim before the attacker's intention to commit rape emerges."¹⁶⁷

Clinical experience indicates both overlap and differences in the issues, concerns, and symptomatic presentations of blitz and confidence rape victims.¹⁶⁸ The finding that has been of great surprise to individuals not familiar with rape trauma syndrome is that women raped by someone they know often have a harder time recovering. These victims are more likely to keep their rape secret because of guilt and shame; more likely to be blamed by themselves and others; and less likely to believe themselves deserving of sympathy and professional help.¹⁶⁹

Nonstranger rape also has a unique effect on the victim's ability to form relationships. According to Veronica Reed Ryback, director of the Beth Israel Hospital Rape Crisis Intervention Center, "[a]nother name we give acquaintance rape is confidence rape because it's such a betrayal of confidence. . . . The perpetrator has used the relationship to gain access to the victim, and the victim's beliefs about who she is and who she can trust are shattered."¹⁷⁰

According to a study by Beth Israel Hospital clinicians:

The immediate concerns of blitz rape victims center around their sense of safety, their fear that the rapist may return, and their self-blame for having failed to ward off their attacker. They may respond like typical trauma victims with nightmares, flashbacks, sleep and appetite disturbances, heightened startle response, anxiety, and depression. Treatment—usually sought soon after the rape—may include psychotherapy, medication, and behavior desensitization.

The confidence rape victims' chief concerns are [those of the blitz rape victim plus even more extreme] guilt and self-blame. The rape may be revealed only years later. There is often significant delay between the rape and the victim's request for help. The victims need to be assured that they are deserving of help

¹⁶⁶ Sally I. Bowie et al., *Blitz Rape and Confidence Rape: Implications for Clinical Intervention*, 44 AM. J. OF PSYCHOTHERAPY 180, 180 (1990). The clinician/researchers were Ann Burgess and Lynda Holmstrom.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 184-85.

¹⁷⁰ Allison Bass, 'Date Rape' Victims Bear Scars Longer, Study Finds, BOSTON GLOBE, Sept. 30, 1991, at 1.

and need the meaning and definition of rape clarified. Providing services may require active and sustained involvement on the part of clinicians. Confidence rape victims will have strong doubts about their ability to discern who is truly trustworthy. They tend to isolate themselves socially.¹⁷¹

In the study of 3,187 female college students by Professor Mary Koss noted earlier, of the 489 women identified as having experienced sexual violence that met the legal definition of rape, 70 were victims of stranger rape and 419 were victims of non-stranger rape.¹⁷² The two groups of victims did not differ in the psychological symptoms they were experiencing at the time of the study: depression, anxiety, and a decrease in relationship quality and sexual satisfaction. Among all victims, 27.8% had considered suicide to the point of thinking about methods.¹⁷³ The researchers concluded that "the responses to psychological symptom scales among all groups of victims indicated a lingering, potentially clinically significant impact of rape which did not vary in severity according to the victim-offender relationship."¹⁷⁴

c. Marital Rape

The most misunderstood area of sexual assault is marital rape. Some people simply do not believe that a man can rape his wife.¹⁷⁵ Others assume that since the couple is accustomed to having sexual intercourse the rape is just "bad sex."¹⁷⁶

Studies of marital rape have shown that these rapes sometimes involve levels of violence as high as that for stranger rape.¹⁷⁷ In a 1992 South Carolina case, the defendant tied his wife to the bed, covered her eyes and ears with duct tape, slapped her genitals, raped her and threatened her with a knife, which he also used to trace circles around her breasts.¹⁷⁸

¹⁷¹ Bowie et al., *supra* note 166, at 187-88.

¹⁷² Koss et al., *supra* note 6, at 6-7.

¹⁷³ *Id.* at 13.

¹⁷⁴ *Id.* at 22.

¹⁷⁵ Cf. DIANE E.H. RUSSELL, *RAPE IN MARRIAGE* 17 (1982) (noting that until recently rape law excluded marital rape by definition).

¹⁷⁶ See DAVID FINKELHOR & KERSTI YLLO, *LICENSE TO RAPE* 13-15 (1985).

¹⁷⁷ See Koss et al., *supra* note 6, at 1; FINKELHOR & YLLO, *supra* note 176, at 22-36 (providing accounts of brutal raping of women by husbands).

¹⁷⁸ *Prosecutor: Man Taped Wife's Rape*, THE STATE, Apr. 16, 1992 at 1B. Even though the husband videotaped the rape, the jury acquitted him. *Id.*; see also Swila Decker, 150 at Capitol Protest Rape Verdict, THE STATE, Apr. 22, 1992 at 1A.

Marital rape occurs independently of and in conjunction with wife battering. Diana Russell, a sociologist and prominent researcher in the area of violence against women, reported statistics for marriages in which the wife was abused. In 23% wife rape was the major or only problem and in 22% wife rape and wife beating were problems of about equal significance.¹⁷⁹ Russell also found that wife rape occurred frequently in higher income groups.¹⁸⁰

The psychological trauma of marital rape is especially profound because trust is shattered in the individual whom the woman has the most reason to trust—her husband.¹⁸¹ In Professor Mary Koss's study, "[w]omen raped by husbands or family members, particularly when compared with women raped by nonromantic acquaintances or casual dates, gave more severe ratings of their anger and depression and of the offender's aggression."¹⁸² The fear of repeated attacks is especially severe because, unless the wife immediately leaves or is able to force the man to leave, she must live with not only the rape, but also the rapist.

d. Duration of Rape Trauma

Psychological studies have documented the long term trauma of rape. Six months after the rape the majority of victims still experience what one researcher called a distinct "core of distress."¹⁸³ At fifteen to thirty months after the rape more than 40% of victims still suffer sexual dysfunction, restricted social interaction, suspicion, fears, and depression.¹⁸⁴ Three years after the rape, a variety of psychological symptoms persist, leading researchers to believe that many victims never recover completely.¹⁸⁵

Physical injuries of the traditional type, such as bruises and broken bones, usually heal in a relatively short time. The impact of

¹⁷⁹ RUSSELL, *supra* note 175, at 91.

¹⁸⁰ *Id.* at 130-31 (indicating that marital rape more common in lower income groups, but also occurs in higher income groups).

¹⁸¹ Dean G. Kilpatrick et al., *Rape in Marriage and in Dating Relationships: How Bad is it for Mental Health?* in HUMAN SEXUAL AGGRESSION: CURRENT PERSPECTIVES 335, 343 (Robert A. Prentky and Vernon L. Quinsey eds., Annals of the New York Academy of Science, vol. 528, 1988).

¹⁸² Koss et al., *supra* note 6, at 14.

¹⁸³ Dean G. Kilpatrick et al., *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHOPSYCHIATRY 658, 668 (1979).

¹⁸⁴ See Fischer, *supra* note 133, at 705-06 (citing symptoms experienced by victims up to two and one half years after assault).

¹⁸⁵ *Id.*

rape, however, is like an invisible permanent disability. In the film *Someone You Know*, a cross-section of female victims describe the impact of the rape on their daily lives, their family and social relationships, their work and schooling, for as long as ten years after the assault. As to their expectations for the future, one woman said, "How can I expect to marry when I'm too frightened to go on a date?"¹⁸⁶

Some victims do appear to recover well. In one study between 20% and 25% of untreated victims were relatively symptom-free one-year post-rape and some victims reported functioning better at this time than they did pre-rape.¹⁸⁷ However, we are coming to understand that psychological trauma has no end point. As Dr. Judith Herman, a pioneer in the treatment of sexual abuse, wrote in her new book demonstrating the commonalities of the psychological trauma of combat, being taken hostage, torture, child abuse, child sexual abuse, incest, domestic violence, and rape,

Resolution of the trauma is never final; recovery is never complete. The impact of a traumatic event continues to reverberate throughout the survivor's lifecycle. Issues that were sufficiently resolved at one stage of recovery may be reawakened as the survivor reaches new milestones in her life.¹⁸⁸

e. Response to the Victim Impacts Recovery

Whether, how soon, and how well a rape victim recovers is strongly influenced by the response to her disclosure from family, friends, law enforcement personnel, and the courts, as well as the circumstances of her life situation. The rape victim who must go

¹⁸⁶ *Someone You Know: Acquaintance Rape*, *supra* note 145.

¹⁸⁷ Dean Kilpatrick et al., *Effects of a Rape Experience: A Longitudinal Study*, 37 J. OF SOC. ISSUES 105, 119 (1981).

¹⁸⁸ JUDITH HERMAN, *TRAUMA AND RECOVERY* 211 (1992). These milestones are typically marriage, divorce, a birth or death in the family, illness or retirement.

Hopefully, the information coming to public attention about the way rape trauma fits into the spectrum of post-traumatic stress syndromes that affect men as well as women will promote understanding of the psychological trauma of rape. The example of Vietnam veterans who experience nightmares, flashbacks and depression long after the war can help others to understand rape victims' nightmares, flashbacks and depression long after the assault.

However, I believe that rape will continue to stand out among these injuries as the one whose harms will be more difficult to appreciate. Combat, hostage taking, torture, child abuse and domestic violence all involve readily understood fist-in-the-face violence. Child sexual abuse is generally condemned by society. But the fact that rape involves a sexual component distorts understanding of this crime.

on living alone in a dangerous community, and who receives no validation or support from the police because of her race or economic class, is far more likely to self-medicate with drugs or alcohol than the rape victim who can return to live with her family in a safe neighborhood and is fully supported and validated by those who know her and the police.¹⁸⁹ The study of black and white rape victims in Los Angeles cited earlier points out that black women more often live in high crime areas and often drop out of rape crisis therapy because they perceive that the therapeutic plan ignores aspects of their environment that they cannot change.¹⁹⁰ With respect to the response of family, friends, teachers, and colleagues, how destructive others' ignorance about rape can be for the victim is painfully evident in a letter written to Dear Abby that is worth quoting in its entirety for its insight into how even the most educated people think about this issue, and how much damage such incomprehension can do.

Dear Abby: I was raped two years ago, and since then, my husband's parents have subjected me to some mean, thoughtless and outright vicious remarks. ("You must have said something or been dressed in a provocative way; women who get raped are usually asking for it.") As I write this, I am a nervous wreck, as my in-laws will be visiting soon and I am expected to join them for dinner. Abby, I simply cannot do this. I become physically ill at the mere thought of having to face these people.

My husband thinks I am being childish—that just having dinner with them is not a great sacrifice. Abby, I am 31 years old and, normally, a fairly rational person. I have experienced insomnia for almost two weeks worrying about this. I have considered taking a tranquilizer (I've never taken one in my life), or even smoking a marijuana cigarette (it's been years since I've done that), or having a stiff drink, but my in-laws are medical professionals and would know something was wrong.

I have considered running away to visit my brother over that weekend, but he lives 800 miles away.

I would rather shave my head than face these people. My husband is usually very supportive of me. He insists that he loves me and that's all that matters. But if he loves me, how can he ask me to do this?

¹⁸⁹ Presentation by Dr. Carolyn Newberger, Director, Victim Recovery Study, Children's Hospital, to the 1992 All Court Conference on Gender Issues, Syndrome and Profile Evidence Workshop, Boston, Mass. (May 15, 1992).

¹⁹⁰ Wyatt, *supra* note 149, at 86.

—A Nervous Wreck

Dear Wreck: First, you and your husband need more help than I can give you in a letter. There is a rape crisis center in your area, and it offers counseling. Please go there immediately. Both you and your husband should go.

Your in-laws are shockingly ignorant about the realities of rape, especially in view of the fact that they are medical professionals. Tell your husband that you are unable to deal with his parents' lack of compassion and, therefore, he cannot count on you for dinner that evening or any other evening that includes them, until you feel confident enough to be in their company.¹⁹¹

22. Victim's Behavior at Trial

Questions: In your story, did you imagine the trial for which you are a potential juror? Did you write about how the victim would behave on the witness stand? Did you say she was calm and composed or testified in a boring monotone? Did you say she was sobbing? Did you say she was angry and fought with defense counsel during cross-examination? How did her behavior make you feel about her believability?

Comment: In the St. John's University sexual assault case described earlier,¹⁹² one juror said the victim was disbelieved because her demeanor "just didn't coincide with what we felt a victim should behave like."¹⁹³

Judges and juries have definite expectations about the way rape victims should behave on the witness stand, with grave implications for the credibility of those who do not attain the mythical ideal. Yet victims' behavior during trial will vary widely according to their personality, stage of recovery, life situation, and many other factors.

About half of victims demonstrate a "controlled style," which means they hide their feelings and appear calm. The other half demonstrate an "expressive style," which means they display fear, anger, and anxiety by crying, sobbing, smiling, or acting restless or tense.¹⁹⁴

Controlled style victims may be disbelieved when they do not

¹⁹¹ *Dear Abby*, *NEWSDAY*, Nov. 2, 1990, at 47 (reprinted with permission of Universal Press Syndicate).

¹⁹² *Supra* note 104 and accompanying text.

¹⁹³ Varchaver, *supra* note 104, at 17-18.

¹⁹⁴ Ann Burgess and Lynda Holmstrom, *Rape Trauma Syndrome*, in *THE RAPE VICTIM* 122 (Deanna R. Ness ed., 1977).

cry because some tears are what the judge and jury expect.¹⁹⁵ The Florida jurors noted earlier for exonerating a knife wielding stranger rapist because they considered the victim's clothing provocative also disbelieved the victim because they considered her too cool on the witness stand.¹⁹⁶ Attitudes like this punish the victim who has a naturally flat affect, who is psychically numb, or who deliberately controls herself tightly for fear that she will lose control completely if she expresses any emotion at all.

Expressive style witnesses who cry "too much" may be dismissed as hysterical. A Milwaukee judge once told a victim he would dismiss the case if she did not stop crying because, he felt, she was a married woman, accustomed to having sex, and the rape was thus no big deal.¹⁹⁷

Expressive style victims who respond with anger may also be disbelieved. Our culture is extremely uncomfortable with angry women. In the much publicized pool table rape at Big Dan's Tavern in New Bedford, Massachusetts, the victim was criticized by defense attorneys for cursing and using street language to describe her attackers' actions to the man who found her in the street and drove her to the hospital.¹⁹⁸ The St. John's victim was rejected because, instead of appearing pathetic and helpless on the witness stand, she was angry and argumentative during cross-examination.¹⁹⁹

Rape victims being disbelieved when they display anger is particularly disturbing because anger is the beginning of recovery. Professor Barry Burkhart wrote, "At the beginning of [therapy], the client often can feel only the pain of her victimization. . . . As she begins to affirm her victimization, her anger begins to be revealed. Anger provides energy to the work of coping and drives her toward new ways of being in the world."²⁰⁰

¹⁹⁵ See, e.g., Varchaver, *supra* note 104, at 19 (noting juror's observation that victim "tried to cry but couldn't. This girl didn't shed one freaking tear up there.")

¹⁹⁶ James F. McCarthy, *Tactics, Verdict in Rape Case Stir Outrage*, MIAMI HERALD, Oct. 6, 1989, at 38; see also James F. McCarthy, *Broward Jury Blames Woman, Acquits Georgia Drifter in Rape Case*, MIAMI HERALD, Oct. 5, 1989, at A1.

¹⁹⁷ *Judge Scolds Woman for Crying on the Stand*, AP, Mar. 15, 1984, available in LEXIS, Nexis Library, AP File.

¹⁹⁸ Joyce Walter, *Prosecution Begins in '83 Gang-Rape Case*, WASHINGTON POST, Feb. 23, 1984, at A2.

¹⁹⁹ See Varchaver, *supra* note 104, at 18 ("Not only did . . . [the victim] not conform to . . . [the] image of a sex crime victim, she also didn't fit the picture the prosecution painted of a timid, complaisant person . . .").

²⁰⁰ Barry Burkhart, *Conceptual and Practical Analysis of Therapy for Acquaintance*

B. *Summary—Rape is a Critical Factor in the Mental Health of American Women*

All of this information adds up to the fact that *rape is a major determinant of the mental health of American women*. According to *Rape in America*, "3.8 million American women have had Rape-related PTSD [Post-traumatic Stress Disorder] . . . and an estimated 1.3 million American women currently have RR-PTSD."²⁰¹

This study compared rates of depression among women who were victims of sexual assault and those who were not. Rape victims were 3 times more likely than non-victims of crime to have ever had a major depressive episode, 4.1 times more likely to have contemplated suicide, and 13 times more likely to have made a suicide attempt. As the report stated, "The fact that 13% of all rape victims actually attempted suicide confirms the devastating and potentially life-threatening impact of rape."²⁰² There was also substantial evidence that rape victims had higher rates than nonvictims of drug and alcohol consumption and related problems because victims used alcohol and drugs to deal with their emotional pain.²⁰³

Sexual assault is so commonplace and produces such serious psychological trauma that the *Rape in America* study concluded that "it is imperative that rape be classified as a major public health issue in the United States."²⁰⁴

III. HOW JUDGES CAN CONDUCT THE PRETRIAL AND TRIAL PROCESS TO ENHANCE FAIRNESS AND MINIMIZE RETRAUMATIZING THE VICTIM

[I]n the Citizen's Committee's interaction with criminal justice personnel, we have heard many attorneys, prosecutors, and even judges state privately to us that if they or a loved one were sexually assaulted, they would not use the criminal justice system. A system which would not be used by the very people who administer it needs to change its response to the problem it attempts to solve.

Rape Victims, in *ACQUAINTANCE RAPE* 287, *supra* note 101, at 299.

²⁰¹ *RAPE IN AMERICA*, *supra* note 1, at 8.

²⁰² *Id.*

²⁰³ *Id.* at 7-8. Another aspect of this issue is that rape victims' drug abuse is causing high rates of HIV infection among these women. *American Health Quarterly: The Hidden Threat* (PBS television broadcast, Jan. 5, 1993).

²⁰⁴ *RAPE IN AMERICA*, *supra* note 1, at 14.

—*Testimony of Lorraine Koury, Coordinator of the Erie County Citizen's Committee on Rape and Sexual Assault, before the New York Task Force on Women in the Courts.*²⁰⁵

Although rape is the fastest growing category of reported crime in the country,²⁰⁶ it is still the most underreported²⁰⁷ and, as the "Jury Story" exercise demonstrates, the least understood. At the same time that reports of rape are increasing, so is public concern about this crime. Nonstranger rape is garnering even more media attention than stranger rape. During the last few years, newspapers and magazines have focused on this crime repeatedly. For the first time the high incidence of nonstranger rape on college campuses is becoming a matter of public knowledge, and schools that once turned a blind eye to these assaults are being forced to take action.²⁰⁸

The increase in rape reporting and the increase in public expectations that it will be dealt with seriously pose special challenges for the judiciary. Rape and sexual assault trials have always been among the most difficult and sensitive for the courts.²⁰⁹ Often it appears that the complainant rather than the defendant is on trial.²¹⁰ Many victims complain that the trial was another assault. Additionally, judges worry that an insensitive remark will land them in the papers or before a disciplinary committee, as has hap-

²⁰⁵ *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 52 (1986-87).

²⁰⁶ SENATE JUDICIARY COMMITTEE REPORT, *supra* note 50, at 2. According to nationwide police data, reported rapes increased by more than 6% between 1989 and 1990, topping 100,000 for the first time. *Id.* The data gathered from rape crisis centers across the country reveal vastly higher absolute numbers and increases in rape than the police reports. For example, while Louisiana police reported a 0.3% increase in the number of reported rapes, Louisiana's central rape crisis center reported a 39% increase; while Michigan authorities registered a 4.7% increase in the number of reported rapes, Michigan's central rape crisis center reported a 36% increase. *Id.* at 9. It may be that as many as two million women are raped each year when non-reporting is taken into account. *Id.* at 28.

²⁰⁷ *Id.* at 7. As noted earlier, while the reporting rate for robbery, for example, is 53%, the reporting rate for rape is only 7%. *Id.*

²⁰⁸ See, e.g., Helaine Olen & Ronald Ostrow, *Date-Rape Gains Attention After Years as Taboo Topic*, L.A. TIMES, April 23, 1991, at A-1; Le Anne Schreiber, *Campus Rape*, GLAMOUR, Sept. 1990, at 292-95, 360-63; see also Amy Callahan and Suzette Parmley, *College Students Confront Threat of Date Rape*, BOSTON GLOBE, Sept. 2, 1990, at 2H; Daniel Goleman, *When the Rapist is Not a Stranger: Studies Seek New Understanding*, N.Y. TIMES, Aug. 8, 1989, at C1; Ann Rule, *Rape on Campus*, GOOD HOUSEKEEPING, Sept. 1989, at 189, 240-42.

²⁰⁹ Norma Wikler, *On the Judicial Agenda for the '80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202, 206 (1980).

²¹⁰ LaFree et al., *supra* note 90, at 389.

pened in a number of cases.²¹¹ The community watches these trials with particular interest and may be punitive toward the judge, jury, prosecution, defense, complainant, and/or defendant.

Over the last two decades, there have been significant statutory and caselaw reforms respecting rape and sexual assault.²¹² Yet there is substantial evidence that the cultural myths and stereotypes about rape that made these reforms necessary still pervade society, and that judges are no more immune to them than are prosecutors, defense attorneys, or jurors.

A. Findings of the Task Forces on Gender Bias in the Courts

Across the country, state supreme court task forces on gender bias in the courts have investigated the response to rape and sexual assault cases in their own court systems and reported serious deficiencies.²¹³ These task forces report that some judges engage in victim blaming ("Why was she out alone in the evening?"); expect more corroboration in sexual assault cases than in other serious felonies; are insensitive to the tremendous embarrassment experienced by the complaining witness during testimony; and fail, in both the treatment of the victim in the courtroom and at sentencing, to take account of the profound psychological harm of rape and sexual assault. With respect to control of the courtroom, some judges permit more probing into a victim's character in sexual assault cases than in other serious felony cases, allowing defense attorneys to grill complainants about their dress, drinking habits, demeanor, and lifestyle and claim that the victim was at fault because, to cite one striking example, "She should have been at home with her husband."²¹⁴

²¹¹ See, e.g., *In re John J. Fromer*, Determination of N.Y. State Comm'n on Judicial Conduct (Oct. 25, 1984) (judge sanctioned for making public comment on rape case pending before him that trivialized the crime); *Judge Scolds Woman for Crying on Stand*, *supra* note 197 (public outcry over judges remarks from the bench).

²¹² Berger, *supra* note 118, at 12; see Estrich, *supra* note 22, at 1116.

²¹³ Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 28. Among the twenty-one task force reports published to date, the states that addressed rape and sexual assault at length are Colorado, Florida, Georgia, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New York, Utah, Vermont, Wisconsin, Washington State, and the District of Columbia. For information about obtaining these task force reports, contact the author of this Article. See *supra* note *.

²¹⁴ WISCONSIN REPORT, *supra* note 67, at 72.

1. Juror Bias

The gender bias task forces also noted that even when judges are themselves sensitized to rape, there is a high likelihood that juries are not. The task forces' findings are supported by extensive research in this area. Studies of the attitudes of the public, mock jurors, and actual jurors, have revealed significant adherence by men and women to the myths exposed in the "Jury Story" commentary: only "bad girls" are raped; women provoke rape by their appearance and behavior; women enjoy rape; women charge rape out of vindictiveness; black women are more sexually experienced than white women and thus less harmed by an assault; rapists are abnormal men without access to consensual sex.²¹⁶ A striking example of the latter belief was provided by a juror in the William Kennedy Smith trial. After the acquittal, juror Lea Haller told the press, "I think he's too charming and too good looking to have to resort to violence for a night out."²¹⁶

Given that most reported rapes that reach the trial stage are tried to a jury, juror adherence to rape myths and stereotypes presents a major barrier to achieving fairness in these trials. It is therefore essential that judges and prosecutors not only examine their own knowledge about and attitudes toward rape, but also learn about the rape myths to which jurors may subscribe and explore the ways in which voir dire can be used to educate jurors about their biases and help them to listen with an open mind.²¹⁷

2. Nonstranger Rape

As difficult as rape trials have been in the past, the growth in indictments for nonstranger rapes, which can be expected to rise as the public becomes better educated about this issue and increasingly expects prosecutors to take action, presents an even more difficult challenge for the justice system. The gender bias task forces reported that, although there is evidence that courts are treating stranger rape with greater seriousness and sensitivity than in the

²¹⁶ For a review of these studies, see Patricia A. Tetraault, *Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials*, 7 BEHAV. SCI. & THE L. 243 (1989), and Torrey, *supra* note 28, at 1013.

²¹⁶ Amy Pagnozzi, *Juror: Willie 'too good looking' To Be a Rapist*, N.Y. POST, Dec. 13, 1991, at 4.

²¹⁷ Lynn Hecht Schafran, *The Importance of Voir Dire in Rape Trials*, TRIAL, Aug. 1992, at 26.

past, nonstranger rape continues to be minimized and trivialized.²¹⁸ The judgment and credibility of the victims in these cases are even more likely to be questioned than in stranger rape cases.²¹⁹ Defendants are accorded more credibility because, when compared with stranger rapists, they tend to be higher in socioeconomic class and are frequently white.²²⁰

Because nonstranger rape rarely involves weapons and physical injuries, as the law has classically understood injury (for example, broken bones or knife wounds), and because it is mistakenly believed that nonstranger rape produces little psychological trauma, sentences in nonstranger rape cases are often inappropriately low.²²¹ In the words of Minnesota Supreme Court Justice Rosalie Wahl, chair of her state's gender bias task force, "Judicial procedures for handling 'acquaintance rape' promises to be one of the major upcoming issues with which the legal system must learn to deal effectively and with fairness to the victim."²²²

B. Suggestions to Enhance Fairness of Rape Trials and Minimize Victim Retraumatization

Following is a list of actions that judges, prosecutors and others in the criminal justice system can take to enhance the fairness of rape trials and minimize retraumatizing the victim without compromising defendants' rights.

1. Understand that Every Rape is a "Real Rape"

The Massachusetts Supreme Judicial Court Gender Bias Study Commission urged that, "[s]ince so many women are coming to the courts to prosecute sexual assaults by acquaintances, it is crucial that the court system treat these cases fairly."²²³ There are three essential components to treating nonstranger rape cases fairly:

²¹⁸ See, e.g., *Minnesota Report*, *supra* note 8, at 894; FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 37 (1989) [hereinafter MICHIGAN REPORT].

²¹⁹ See ILLINOIS REPORT, *supra* note 155, at 109 (cases involving sexual assault by a nonstranger present particular problems because they are susceptible to dismissal for "lack of corroboration or because the prosecutor or judge fails to believe the victim").

²²⁰ See FEMALE VICTIMS, *supra* note 19, at 8 (69% of nonstranger rapes were committed by whites).

²²¹ ILLINOIS REPORT, *supra* note 155, at 109.

²²² Justice Rosalie Wahl, Presentation to Minnesota Trial Court Judges (September 6, 1989) in GENDER FAIRNESS TASK FORCE REPORTS 5.

²²³ MASSACHUSETTS REPORT, *supra* note 7, at 100.

- Reject the mistaken belief that only blitz rapes by strangers are "real rapes."
 - Become familiar with the literature about victim impact and rape trauma syndrome summarized in this Article.
 - Understand and acknowledge that every rape is a "real rape" and that rape by someone known to the victim is as, if not more, devastating than rape by a stranger.
2. Communicate to Prosecutors, Law Enforcement Personnel, and Probation Officers Your Expectation that They Will Take Nonstranger Rape and Marital Rape as Seriously as You Do

The Florida Supreme Court Gender Bias Study Commission, among others, noted that "a callous attitude by law enforcement and individual prosecuting attorneys can have a substantial impact on the investigation and handling of a rape case from beginning to jury verdict."²²⁴ The tone set by the judge in handling these cases can have an important positive impact on these individuals, as well as on the probation officers writing presentence reports.

3. Encourage Police Departments and Prosecutors to Establish Specialized Sex Crimes Units

Police and prosecutors should have specialized sex crimes units with personnel trained to handle sexual assault cases. Provision should also be made for vertical prosecution of these cases, whereby one prosecutor is assigned to each case throughout the trial process. Reflecting the findings of many of the gender bias task forces, the Illinois Task Force observed that "[v]ertical prosecution fosters a relationship between the prosecutor and victim, helps reduce the number of potentially traumatic interviews, and allows the victim one contact person throughout the case."²²⁵ Specialized units and sensitive handling go a long way to encourage victims to report and proceed and should be encouraged.

4. Pursue an Accelerated Trial Schedule, Avoid Continuances, and Avoid Trial on the Anniversary of the Rape

As the Illinois Task Force observed, "Contact with the crimi-

²²⁴ REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 154 (1990) [hereinafter FLORIDA REPORT].

²²⁵ ILLINOIS REPORT, *supra* note 155, at 120.

nal justice system acts as a reminder of the sexual assault during the recovery process and reliving the event can cause emotional turmoil for the victim. The protracted process and repeated continuances are a primary reason why victims fail to follow through.²²⁶ A speedy trial improves the likelihood that the victim will stay with the process and enhances recovery.²²⁷ If continuances are unavoidable, the prosecutor who conveys the news of the continuance should express concern for the victim and acknowledge her distress.

Many victims have an intensely negative reaction on the anniversary date of the rape, which can effect their ability to present themselves credibly in court. The courts should try to avoid scheduling the trial for the anniversary period,²²⁸ if this is not prejudicial to the defendant.

5. Create A Private Waiting Area for Victims in the Courthouse

Several task forces reported that victims are intimidated if they must remain in the same room with the defendant and his family while waiting to testify.²²⁹ If at all feasible, a private waiting area in the courthouse should be created for victims.

6. Permit Rape Crisis Counselors in the Courtroom

The task forces on gender bias in the courts repeatedly cited the importance to victims of having support from rape crisis counselors and other support persons. However, in some cases these advocates are being barred from the courtroom. Judges not only should permit rape crisis counselors in the courtroom but also should support efforts to expand such programs in underserved counties.²³⁰

Some judges are concerned that victim advocates, through facial expressions and body language, will "coach" the victim behind the prosecutor's back. This type of behavior is not unique to rape

²²⁶ *Id.* at 118-19.

²²⁷ WISCONSIN REPORT, *supra* note 67, at 67.

²²⁸ Letter from Judith Rowland, Esq., Director, California Center for Victimology, to Lynn Hecht Schafran, Director, National Judicial Education Program (Mar. 4, 1992) (on file with author).

²²⁹ See MICHIGAN REPORT, *supra* note 218, at 36; MASSACHUSETTS REPORT, *supra* note 7, at 106.

²³⁰ FLORIDA REPORT, *supra* note 224, at 150, SUPREME COURT OF GEORGIA COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM, GENDER AND JUSTICE IN THE COURTS 104 (1991).

trials or limited to the complaining witnesses' supporters. Defendants in rape cases often have their families, buddies, or fraternity brothers present to glower at the witness or signal their support for the defendant. All of this inappropriate behavior can be eliminated by the judge through appropriate courtroom control. Judges can be alert to such behavior themselves and ask their court personnel to be similarly alert and to bring to the judge's attention any inappropriate behavior of which they become aware.

7. Minimize Use of the Victim's Name

The *Rape in America* study found that victims would be much more likely to report if they could be guaranteed confidentiality.²³¹ When the Illinois Task Force found that the victim's name and identity were revealed in a number of published opinions, it sent a letter to Illinois's Chief Justice requesting the justices of the supreme and appellate courts to refrain from identifying victims of sexual assault in published opinions. The Chief Justice responded with a letter stating the Supreme Court's intention to avoid use of victims' names, and other Illinois courts have followed suit.²³² To the extent possible consistent with constitutional requirements, the complaining witness's name should be kept confidential.²³³

8. Conduct or Permit an Expansive Voir Dire

As noted earlier, extensive empirical research documents jurors' adherence to the myths described in "The Jury Story" exercise.²³⁴ Thus, the necessity for a thorough voir dire in rape cases is patent, yet voir dire is fast disappearing. That voir dire is under attack is hardly news; for more than twenty years commentators have been deploring cut backs in jury examinations.²³⁵ 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.

²³¹ RAPE IN AMERICA, *supra* note 1, at 7.

²³² ILLINOIS REPORT, *supra* note 155, at 122-23.

²³³ See generally Gary Giampetruzzi, Note, *Raped Once, Violated Twice: Constitutional Protection of a Rape Victim's Privacy*, 66 ST. JOHN'S L. REV. 151 (1992) (discussing constitutional implications of suppressing victim's name).

²³⁴ See *supra* note 217-220 and accompanying text.

²³⁵ See Barbara Babcock, *Voir Dire: Preserving 'Its Wonderful Power'*, 27 STAN. L. REV. 545 (1975).

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 at just the time that the kinds of nonstranger rape cases in which it is most needed are beginning to be brought in numbers.

Voir dire must employ open-ended questions to probe prospective jurors for their beliefs in rape myths. Do they believe that:

- 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?"
- a woman cannot be raped if she does not want to be, so only serious physical injury demonstrates nonconsent?
- handsome men or rich men or married men or white men do not commit rape?
- sexual assault cannot be rape if the parties knew one another or were living together or were married or engaged in sexual activity short of intercourse?

When the victim did not immediately report to the police, as is usually the case, jurors must be questioned about their understanding of why a rape victim would not rush to describe her humiliating and frightening ordeal at the station house. Can they appreciate how the trauma of rape, together with fear of retaliation, fear of losing their privacy, and fear of not being believed, prevent rape victims from making a "prompt outcry"?²³⁶ In cases in which 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, and that this is particularly so when the witness has experienced the devastation of rape and must recount details of this extremely personal crime to strangers.

Because there is rarely physical evidence and almost never a witness in rape cases in which consent is the defense, and because there is extreme reluctance to convict a rapist on the word of a woman alone, 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 than for those crimes.

²³⁶ See *supra* notes 147-156 and accompanying text.

Voir dire must educate jurors, especially men, to consider resistance from the female complainant's point of view, not that of the traditional "reasonable man," and to 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 special biases. Many women jurors avoid acknowledging their own vulnerability by blaming the victim. This distancing mechanism operates particularly in nonstranger rape cases, because it is in acknowledging the likelihood of these crimes that women jurors feel most at risk.²³⁷ For some of these women, if they can believe that the victim was raped because she engaged in behavior they think they would not engage in—such as going to a man's home or to a bar—they can convince themselves that they are not at risk. For other women, it is precisely because they engage in these behaviors that they want to believe that these are not circumstances in which rape occurs.

Biased jurors cannot render impartial verdicts. Developing information about juror bias in rape cases takes skill, time, and a thorough knowledge of how these biases operate. Whether the judge conducts the voir dire or turns it over in whole or part to the lawyers, 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 jury panel as a whole. Courts are under tremendous pressure to move cases, and one of the ways they are doing so is by sharply limiting the time for voir dire. But rape and sexual assault cases are unique in the kind of ignorance and bias that many jurors bring to them. These cases require a more expanded voir dire than many other kinds of cases, and it must be provided, even within the strictures of judicial economy. The arguments for efficiency in voir dire are not without foundation, but efficiency should not be bought at the price of rape victims' rights.

²³⁷ Margaret Carlson, *The Trials of Convicting Rapists*, TIME, Oct. 14, 1991, at 11 (interview with Linda Fairstein, Chief, Sex Crimes Bureau, Manhattan, N.Y. County District Attorney's Office); Peg Tyre, *What Experts Say About Rape Jurors*, NEWSDAY, May 19, 1991, at 10 (interview with Barbara Eggenhauser, Assistant District Attorney, Westchester County, N.Y.)

9. Enforce the Rape Shield Statute Consistently and Discourage and Discipline Attempts to Abrogate or Circumvent It

Many gender bias task forces reported that even when the letter of the rape shield statutes is respected, defense attorneys often find ways to introduce prior sexual conduct by indirection.²³⁸ For example, a defense attorney may say to the victim who testifies that she told her boyfriend about the rape, "Did you tell him this before or after you moved in with him?" Other attorneys have gone even further than this, repeatedly calling the victim a slut,²³⁹ for example, or claiming that the victim is a prostitute without a shred of evidence that this is so.²⁴⁰

The Kentucky Task Force described a case in which, despite the requirement that evidence about a woman's character must be presented to the court at least two days before trial for a ruling on relevancy, a defense attorney announced in the midst of trial that he had just learned about some evidence he thought was relevant.²⁴¹ The judge permitted him to interrogate the witness in chambers about matters pertaining to her first divorce and other character issues having no bearing on the rape, which occurred ten years later. The witness emerged shaking. It is incidents like these that make women fear the criminal justice system and refuse to prosecute rape cases. Attorneys for both sides should be instructed before trial—using concrete examples—that behavior of this type will not be tolerated.

10. Do Not Make or Permit Comments that Trivialize Rape and Sexual Assault Cases

The Michigan Task Force wrote:

Failure to treat sexual assaults as the serious crimes they are is reflected in testimony presented to the Task Force that some judges, attorneys and court personnel characterize these cases as 'juicy,' sexually exciting or somehow more interesting than others. This reflects sexism and trivializes the victim's need to have the assault treated seriously.²⁴²

²³⁸ MASSACHUSETTS REPORT, *supra* note 7, at 103.

²³⁹ REPORT OF THE KENTUCKY TASK FORCE ON GENDER FAIRNESS IN THE COURTS 39 (1992) [hereinafter KENTUCKY REPORT].

²⁴⁰ FLORIDA REPORT, *supra* note 224, at 152.

²⁴¹ KENTUCKY REPORT, *supra* note 239, at 37.

²⁴² MICHIGAN REPORT, *supra* note 218, at 35.

The Wisconsin Task Force described a case in which, while a victim was testifying to the embarrassing detailed aspects of being forced to perform oral sex, schoolchildren visiting the courtroom giggled and shuffled in their seats, and the bailiff and court staff snickered.²⁴³ The district attorney had to request that the judge intervene, and although he did so, the snickering and improper behavior did not stop, and the judge apparently took no further action.

The Wisconsin Task Force also reported one case in which the judge described a man who raped his estranged wife as trying to have sex with her in the hope that she would come back to him, and a second case in which the judge said to the victim that, although there was no excuse for the defendant's attempted rape, he might have been "induced" into it because after they met at a tavern the victim went for a drive with him.²⁴⁴

Canon 3 of the American Bar Association Model Code of Judicial Conduct, revised in 1990 and adopted or under review in many states, is particularly pertinent to rape trials, where sex and race bias are so often factors. New Canon 3 requires, in part, that:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.²⁴⁵

²⁴³ WISCONSIN REPORT, *supra* note 67, at 68.

²⁴⁴ *Id.* at 81.

²⁴⁵ MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

11. Do Not Ask Victims to Show on Their Own Bodies How They Were Touched or to Demonstrate the Position in Which They Were Raped

The Wisconsin Task Force related testimony from a victim advocate about a case in which the judge was having difficulty understanding what the victim was describing and "asked her to stand up and show on her own body where and how she was touched."²⁴⁶ The advocate noted that this was extremely embarrassing and urged that a diagram or a doll be used for such an illustration. In another Wisconsin trial, a judge permitted a reenactment in a case in which the male plaintiff alleged that the male defendant fondled him.²⁴⁷ When a New York judge was alleged to have asked a victim to get down on her hands and knees to demonstrate the position in which she was raped, the District Attorney pointed out that this was degrading to the victim, and that if such a demonstration were necessary it should have been provided by a court officer or someone other than the victim.²⁴⁸ Demanding a demonstration from the victim is not only embarrassing and degrading, it violates her private space and sense of control over her own body.

12. Do Not Leave Victims on the Witness Stand During Sidebars in Chambers

At times, after embarrassing and detailed testimony of an assault, the attorneys and judge go into chambers on a sidebar, leaving the victim sitting a few feet from staring jurors. This is unpleasant for the victim and should be avoided.²⁴⁹

13. Permit Expert Witness Testimony to Explain Victims' Reactions to Rape

The criminal justice system wants the victim of any crime to make an immediate report to the police, preserve all evidence, remember everything that happened with crystal clarity, and give repeated statements with no inconsistencies. Although this scenario

²⁴⁶ WISCONSIN REPORT, *supra* note 67, at 68.

²⁴⁷ Kathleen Ostrander, *Sex Case Re-Enactment Draws Criticism*, Wisc. St. J., Aug. 27, 1992, at 1C.

²⁴⁸ Holtzman, in *Letter, Asserts Judge Degraded Woman in a Sex Case*, N.Y. TIMES, Dec. 2, 1987, at B11.

²⁴⁹ WISCONSIN REPORT, *supra* note 67, at 68.

does not happen with any crime victim, the unique trauma of rape means that the victim's behavior is often so far removed from what people expect that law enforcement officers, prosecutors, judges, and juries assume the victim is fabricating. Permitting an expert witness to explain, for example, how rape trauma syndrome affects whether and when victims report, assists the court in understanding behavior that is otherwise inexplicable.²⁵⁰

14. Utilize the Same Standards in Setting Bail and Sentencing Offenders in Stranger and Nonstranger Cases

Many task forces noted that bail is often lower and sentences lighter in cases in which the victim and the defendant knew one another, particularly if they were engaged in a sexual relationship, and even more so if they were married.²⁵¹ This disparity is at odds with the repeated statements to task forces by judges, prosecutors, and defense attorneys that stranger and nonstranger sexual assaults should be treated with equal severity.²⁵² The message to the victim when these cases are treated differently is that the court does not see nonstranger assault as a "real rape."

15. Encourage Victim Impact Statements and Invite Victims to Be Present at Sentencing

Experts in the treatment of rape victims stress the importance of encouraging victims to provide impact statements to the court.²⁵³ Victim impact statements serve two functions. They provide courts with information essential to appropriate sentencing, and provide victims with an opportunity to be heard in their own voices, giving them a sense that the judicial process has served them fairly.

The value to a judge of hearing the victim's words is demonstrated by a New York case in which, at the victim's request, the judge read her letter aloud to the courtroom.²⁵⁴ The rape occurred two years before the sentencing. "My life, no matter what the future may hold, will never be the same again," the victim wrote.

²⁵⁰ See Tetrault, *supra* note 215, at 244; Fischer, *supra* note 133, at 961.

²⁵¹ E.g. FLORIDA REPORT, *supra* note 224, at 144; ILLINOIS REPORT, *supra* note 155, at 114-15.

²⁵² MASSACHUSETTS REPORT, *supra* note 7, at 100, ILLINOIS REPORT, *supra* note 155, at 109.

²⁵³ Interview with Aileen Adams, Esq., *supra* note 49.

²⁵⁴ Ronald Sullivan, *Rapist is Sentenced to 15 Years*, N.Y. TIMES, May 5, 1988, at B8.

"Sometimes I am so scared and tormented, I don't know what to do. Other times I feel like running, running, running—the problem is, where do I run to?" The judge said that the victim's words had "evoked a certain sentiment that I thought in my thirty years of criminal justice I had put behind me. They are truly heart-rending."²⁵⁵

For victims, the impact statement is the one opportunity to present her or his own story directly to the court and to describe the effects of the assault. Because in most cases these effects are profound but invisible, only the victim can truly convey the meaning of what has happened. The Massachusetts Gender Bias Study Commission found that the Massachusetts victim impact law, which allows victims the right to make a statement to the court before disposition as to the impact of the crime and to recommend a sentence, has had a beneficial effect in sexual assault cases in that victims perceive they have been more fairly served.²⁵⁶

Another way to make victims feel fairly served by the judicial process is to schedule sentencing to enable the victim to be present even though she or he is not a party to the case, a factor not always considered.²⁵⁷

16. Acknowledge the Victim and the Impact of the Assault at Sentencing

The Wisconsin Equal Justice Task Force found that although some judges clearly acknowledged the victim at sentencing, others did not mention the victim's experience at all, and some mentioned it negatively to mitigate the sentence, such as referring to her use of alcohol at the time of the crime.²⁵⁸ This task force advised, "In light of concerns addressed by sexual assault victims and their advocates about being disregarded by the legal system, some reference to the victim's experience and/or wishes is important at the time of sentencing. It seems judges do not consistently provide this validation at the time of sentencing and we conclude this should be done."²⁵⁹ The Wisconsin Task Force also recommended that if alcohol or drug abuse were involved, the judge should

²⁵⁵ *Id.*

²⁵⁶ MASSACHUSETTS REPORT, *supra* note 7, at 106.

²⁵⁷ WISCONSIN REPORT, *supra* note 67, at 68.

²⁵⁸ WISCONSIN REPORT, *supra* note 67, at 79.

²⁵⁹ *Id.* at 76.

clearly state that such factors were not the cause of the assault and should hold the defendant responsible for the criminal behavior.²⁶⁰

17. Revise Sentencing Guidelines to Take Account of Psychological Injuries

The Massachusetts Gender Bias Study Commission reported criticism of the state sentencing guidelines for rape on the ground that they fail to take into account the emotional injury factor.²⁶¹ The guidelines formula includes an injury scale that allows the judge to take into account psychological trauma, but the psychological injury must result in temporary or partial disability to trigger more than minimal consideration of emotional injury.

18. Set Sentences Commensurate with the Gravity of the Crime and the Trauma to the Victim

The Michigan Task Force expressed concern about lenient sentencing based on misplaced optimism about the effectiveness of therapy, the belief that the victim is somehow responsible for the crime, or a greater value placed on the needs of the male assailant rather than on those of the female victim.²⁶² The task force cited a case that raised substantial public protest throughout Michigan in which a judge convicted a university student of criminal sexual conduct in the first degree, then improperly sentenced him under the Youthful Trainee Act to avoid giving him a prison sentence. The task force quoted the statement of the Sexual Assault Information Network of Michigan, "The judge acknowledged the pain that the defendant had caused the victim, but apparently weighed that far less heavily than he weighed the defendant's future."²⁶³

The Washington Task Force stated that

[a] particularly sensitive issue for rape victims is the imposition of a sentence that includes only treatment requirements with no accompanying jail sentence. It is [our] position . . . that treatment and punishment are two different sentencing goals and that appropriate punishment should always be imposed in addition to treatment orders.²⁶⁴

²⁶⁰ *Id.* at 84.

²⁶¹ MASSACHUSETTS REPORT, *supra* note 7, at 106.

²⁶² MICHIGAN REPORT, *supra* note 218, at 37.

²⁶³ *Id.*

²⁶⁴ WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, GENDER

According to experts in sex offender treatment, incarceration is an important part of effective treatment for the majority of sex offenders. Outpatient treatment from the start of the sentence is appropriate for only a limited group of rapists: those who are one-time offenders who committed a date rape primed by cultural and peer pressure and alcohol, using no violence extrinsic to the rape itself, and who fully admit what they did, do not lack victim empathy and are not predators. All others should be incarcerated and treated in prison before release to a rigorous outpatient program.²⁶⁵

In assessing the trauma to victims, judges should recognize that the rape survivor who is a victim of a prior sexual assault is even more traumatized than a first-time victim.²⁶⁶ Confusion on this issue has led to inappropriately low sentencing. In one New York case, the defense attorney asserted that the victim had been sexually abused by her father and brother and, therefore, the assault for which his client was going to be sentenced could not have had as much effect on her as if this were her first experience of sexual abuse.²⁶⁷ The judge agreed with this assessment, stating,

AND JUSTICE IN THE COURTS 45 (1989).

²⁶⁵ Telephone Interview with Dr. Anna Salter, Assistant Professor of Clinical Psychology, Dartmouth Medical School (May 6, 1992); Telephone Interview with Prof. Barry Burkhart, Department of Psychology, Auburn Univ. (May 14, 1992). Rigorous outpatient treatment for sex offenders does not mean traditional psychotherapy. Traditional individual, insight-oriented counseling aims to make individuals feel good about themselves. The patient works with a supportive, trusting therapist in a one-on-one confidential relationship. The therapist is used to dealing with people who want to change and is unaware of the capacity for total denial that characterizes sex offenders, who are like drug abusers and alcoholics in their addictive behavior. Traditional psychotherapy focuses on internal emotional conflicts rather than sexual issues, even though the offender committed a sexual offense. The result is that sex offenders treated with traditional psychotherapy by non-specialists emerge even more rooted in denial and other thinking errors than when they began. Nonspecialized treatment does not create victim empathy or teach the offender to understand his own cycle of deviance and how to stop himself when he begins to relapse into that pattern. SALTER, *supra* note 108, at 221-23. The data on sex offenders treated with traditional psychotherapy yields no evidence that this technique is effective. It is therefore essential that judges imposing treatment as a condition of probation require specialized sex offender treatment. There is absolutely no guarantee that this treatment will work either, but data on these newer programs are more promising. Daniel Goleman, *Therapies Offer Hope for Sex Offenders*, N.Y. TIMES, Apr. 14, 1992, at C1.

²⁶⁶ Interview with Dr. Veronica R. Ryback, Director, Beth Israel Hospital Rape Crisis Intervention Center, in New York, N.Y. (June 26, 1992); see also JUDITH HERMAN, *TRAUMA AND RECOVERY* (1992). Revictimized victims are not a rarity. *Rape in America* reported that 39% of rape victims, an estimated 4.7 million women, have been raped more than once, and that 5% of victims, an estimated 6 million women, are unsure how many times they had been raped. RAPE IN AMERICA, *supra* note 1, at 3.

²⁶⁷ Sentencing Transcript at 18, *People v. Garay*, Indictment No. 669/91, N.Y. Sup. Ct.

"The impact . . . on this young woman . . . was considerably less than you might say the first one was or the second one."²⁶⁸ Only a public outcry before the sentence was actually imposed caused a reconsideration and appropriate sentence.²⁶⁹

19. Sentence Adolescent and Young-Adult Rapists with Appropriate Severity

Rapists have long been found disproportionately in the adolescent and young-adult age groups,²⁷⁰ and the number of cases involving adolescent and even younger boys is growing.²⁷¹ Yet, as the case described by the Michigan Task Force demonstrates,²⁷² adolescent and young-adult rapists are often sentenced leniently, in the mistaken assumption that they are just experimenting sexually and will grow out of it. As Dr. Nicholas Groth has written:

[W]e find that the majority of [rape] offenders had attempted or committed their first sexual offense by the age of sixteen, but even when such juvenile offenses were detected, they were misdiagnosed as constituting normative adolescent sexual curiosity and experimentation.²⁷³

Research shows that most sex offenders not only begin their deviant sexual histories as teenagers or earlier, but also that they exhibit all the behaviors of adult rapists, such as planning the rape, engaging the victim's trust, and lack of victim empathy.²⁷⁴ Incarcerative sentences and full-scale sex offender treatment for adolescent rapists is essential to stop these young men while they are young and before their list of victims lengthens, as it inevitably

(Mar. 11, 1992); Schafran, *supra* note 164 (discussing this case and revictimized victims generally).

²⁶⁸ Sentencing Transcript at 18-19, *Garay* (No. 669/91).

²⁶⁹ Emily Sachar, *Was Rapist Violent?*, *Newsday*, Mar. 14, 1992, at 10; Hal Davis, *Prosecutors Blast Judge*, *N.Y. Post*, Mar. 14, 1992, at 10; Salvatore Arena, *Judge Asks Review in Rape Trial Dispute*, *N.Y. Daily News*, Apr. 1, 1992, at 19.

²⁷⁰ See ANNA SALTER, *TREATING CHILD SEX OFFENDERS* 20 (1988) (citing sources). Adolescent girls are the age group at the highest risk for rape. *Id.* *Rape in America* found that 32% of rapes of female victims occurred when the victim was between 11 and 17. *RAPE IN AMERICA*, *supra* note 1, at 4.

²⁷¹ Jessica Collins, *Kids Hurting Kids for Sex*, *INSIGHT*, July 26, 1992, at 12.

²⁷² See MICHIGAN REPORT, *supra* note 218, at 37; *supra* note 263 and accompanying text.

²⁷³ Groth & Hobson, *supra* note 80, at 161.

²⁷⁴ See, e.g., Christina Kelly, *Boys Who Raped, Sassy*, June 1990, at 44. This article is a deeply disturbing series of interviews with three teenage rapists, being treated at a secure facility for adolescents in Oregon, and the program's director.

will unless checked.

20. Recognize that Sexual Assault is a Threat to Public Safety and that Actions that Encourage Reporting and Completed Prosecutions are of Paramount Importance

Most rapists are repeat offenders of a high order. In one highly sophisticated study of 561 nonincarcerated sex offenders, which permitted these offenders to disclose their histories in complete confidence, the 126 offenders who admitted committing rape had committed a total of 907 rapes on 882 different victims. The average number of different victims per rapist was seven.²⁷⁵ As stated in *Rape in America*:

Unreported rapes are a threat to public safety in America. . . . [R]apists cannot be apprehended, indicted, prosecuted, and incarcerated if the criminal justice system does not know that a rape has occurred. Such undetected rapists remain invisible to the criminal justice system. If rape victims are reluctant to report, then rapists will remain free to continue raping America's women, men and children.

Therefore, the dire need for public safety dictates what America's public policy should be: to do everything possible to encourage reporting of *all* alleged rapes to police.²⁷⁶

CONCLUSION

Lack of knowledge about rape is not a private matter. In our personal lives it affects how we respond to those who disclose their victimization to us, which in turn affects their willingness to report to the police and their recovery. In our public lives it affects how we carry out our roles in the criminal justice system as judges, jurors, prosecutors, defense attorneys, police, and probation officers.

The *Rape in America* study cited throughout this Article concludes with a series of recommendations calling for new legislation to protect the privacy of rape victims; education about rape beginning in grade schools with a focus on pre-teen adolescent girls and boys; education for the medical and mental health communities that treat rape victims; and, finally, education for all of us:

²⁷⁵ Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 16-17 (1987).

²⁷⁶ RAPE IN AMERICA, *supra* note 1, at 7.

Many widely held stereotypes about rape, who rape victims are, and how they respond after the assault are not accurate. The American public, our criminal justice system, and jurors in rape trials should be provided with accurate information about these topics to eliminate misconceptions about rape and its victims.²⁷⁷

It is in the spirit of this final recommendation that this "primer" was written. I hope it has increased your knowledge and understanding, and that you will pass it on to others in your law school, your court, your office, and your community.

²⁷⁷ *Id.* at 4.