

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

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

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

public about victim response to sexual assault so that jurors can rely on their common sense is thus a crucial duty for trauma researchers and educators.

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



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

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

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

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

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

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

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

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

Studies suggest that anywhere from 1/3 of adult rape survivors (Burgess & Holmstrom, 1976) to 1/2 of child sexual abuse survivors (Heidt, Marx, & Forsyth, 2004) display a passive, even frozen, response during the assault. Naturally, people do wonder why and how this passive response occurs,

but it is important to recognize that separate from questions of motivation and mechanism we know from empirical scientific research on sexual victimization that such a passive response is quite common (Marx, Forsyth, & Lexington, 2008; Rizvi, Kaysen, Gutner, Griffin & Resick, 2008). There are research studies attempting to answer the “why” and “how” questions regarding victim passivity. It appears that there are a number of factors (such as power disparity) and pathways that are associated with a passive response ranging from a conscious decision based on the assessment that it is a wise course of action given the dangers of resisting, to involuntary mental processes such as dissociation and involuntary physiological responses of paralysis or freezing. In the scientific literature on sexual assault this constellation of victim passive/freeze responses is sometimes called “rape induced paralysis” and increasingly often called “tonic immobility” although there is also a more technical use of that term (Marx, Forsyth, & Lexington, 2008).

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

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

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

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

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

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

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

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

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

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

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

This list of relevant research findings not generally known by the public is far from exhaustive. There is much more we know about trauma psychology in general and the response of victims to sexual assault in particular. If the public and thus potential jurors were better educated prior to serving on a case, expert testimony such as mine would not be needed. An educated public would lead to a better world

for both the criminal justice system and society more widely. An educated public would make it more likely that eventually the laws themselves would be improved to better reflect the reality of power dynamics and victim response. An educated public would better defend our freedom from assault. The results of our research are often highly relevant to making fair and good decisions about the treatment, prevention, and responsibility for interpersonal violations. Knowledge of that research is also often highly relevant to how helpfully and effectively we interact with each other in society. May our efforts in research and research dissemination intensify and flourish.

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