

APPENDIX S:

POWERPOINT SLIDES AND A SHORT PAPER
ON JUROR'S DECISION MAKING IN SEXUAL
ASSAULT CASES

Prepared by
Lynn Hecht Schafran, Esq.
Director
and

Claudia J. Bayliff, Esq.
Project Attorney
National Judicial Education Program
New York, New York

Jurors' Decision-Making in Sexual Assault Cases

Lynn Hecht Schafran, Esq.
Director
Claudia J. Bayliff, Esq.
Project Attorney
National Judicial Education Program

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

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

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

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

Dallas Times Herald,
Race Tilts the Scales of Justice (1991)

Rape Jurors' Sentences
Devalue Women of Color

Dallas Times Herald (1991)

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

LaFree, *Rape and Criminal Justice*

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

Times/CNN Poll
(1991)

38% of the men and
37% of the women
said that a raped woman
is partly to blame
if she dresses provocatively.

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

49% of the men
and 42% of the women
believe women cry rape
when it hasn't really happened.

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

48% of the men and
48% of the women
believe sexual assault
necessarily includes
the use of a gun or other weapon.

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

20% of the men
and 9% of the women
believe a woman has **no right**
to say "no"
to having sex with her husband.

British Opinion Poll
(2005)
(Random Sample: 1,905 adults 18+)

Results showed a very limited level of awareness of the actualities of rape in the UK.

Only 4% of respondents correctly predicted that there are in excess of 10,000 rapes per year.

People overestimate the percentage of convictions for reported rape (actual is 5.3%).

British Opinion Poll
(2005)
(Random Sample: 1,905 adults 18+)

37% believe a woman is responsible for being raped if she failed to say "no" clearly to the man.

35% believe a woman is responsible for being raped if she behaves in a flirtatious manner.

30% believe a woman is responsible for being raped if she is drunk.

British Opinion Poll
(2005)
(Random Sample: 1,905 adults 18+)

26% believe a woman is responsible for being raped if she is wearing sexy/revealing clothing.

(This was the only item on which there was a significant gender difference in attitude, with more men saying that certain dress can make a woman responsible for being raped.)

British Opinion Poll
(2005)
(Random Sample: 1,905 adults 18+)

22% believe a woman is responsible for being raped if she is known to have had many sexual partners.

22% believe a woman is responsible for being raped if she is alone in a dangerous/deserted area.

Rhode Island Study
of School Children (1988)
(1,700 6th to 9th grade students)

65% of boys and
57% of girls
said it is acceptable
to force a woman to have sex
if the couple has been dating
for more than six months.

Rhode Island Study
of School Children (1988)
(1,700 6th to 9th grade students)

50% of the boys
And 50% of the girls said
a woman walking alone
is **asking** to be raped.

Rhode Island Study
of School Children (1998)
(2,467 6th to 9th grade students)

Of the 9th graders,
62% of boys and
58% of girls
said it is acceptable
to force a date to have intercourse
if the couple has been dating
for "a long time."

Rhode Island Study
of School Children (1998)
(2,467 6th to 9th grade students)

Of the 9th graders,
70% of boys and
53% of girls
said it is acceptable
to force a date to have intercourse
if the couple has had intercourse before.

Rhode Island Study
of School Children (1998)
(2,467 6th to 9th grade students)

Of the 9th graders,
73% of the boys and
78% of the girls
said a man has the right to have sexual
intercourse against the woman's consent
if they are married.

Key Questions

- n How do you get potential jurors to disclose these beliefs?
- n Can potential jurors set aside these beliefs?
- n How do you handle jurors' past victimization and perpetration, and avoid re-traumatizing potential jurors?

Recommendations

- n Give greater leeway to attorneys in sexual assault cases
- n Focus on the defendant, not just the victim
- n Remember that jurors know the "PC" answer to many typical questions

▢ Our next speaker will talk about confidential questionnaires and private *voir dire*.

Thank you.

What the Research About Rape Jurors Tells Us

By Lynn Hecht Schafran, Esq.
Director
National Judicial Education Program
2005

Our belief in the integrity of our jury system rests on the theory that we can select jurors who either do not have – or can put aside – their biases, listen open-mindedly to the evidence, and follow the law as the judge instructs. If we have an area of law where jurors cannot do that, where cases are being decided on extra-legal factors related to myths and psychological needs, then the system is not working and we need to figure out how to fix it. The apt metaphor here is not a level playing field. Criminal cases rightly place an extremely high burden of proof on the prosecution, i.e., beyond a reasonable doubt. Rather, the apt metaphor is: is everyone playing by the rules?

Juries are an endless source of fascination to judges, lawyers and social scientists. The first large-scale jury research was conducted by Harry Kalven and Hans Zeisel in the 1960s.¹ They obtained detailed information about jury deliberations and the judges' agreement or disagreement with jurors' decisions in a large number of cases. From their sample of 3,576 criminal jury trials they focused particularly on the impact of extralegal information in the 25% of cases where there was judge/jury disagreement, and how this extralegal information accounts for the fact that in the vast majority of cases where there was disagreement, the jury was more lenient than the judge would have been.

Within the group of cases of particular interest to Kalven and Zeisel was one group where the judge/jury disagreement was sharpest. These were the 42 cases of what the researchers called "simple rape." That is, one perpetrator, the parties knew each other, no weapon was used, and there was no physical injury extrinsic to the rape. There were 42 of these cases, and only 3 convictions. The researchers found almost 100% disagreement between judge and jury in the half of these cases where there was a rape charge and a lesser included offense. The judge would have convicted of rape; the jury went for the lesser offense.

In cases where the juries had to choose between finding the defendant guilty of rape or acquitting him, juries acquitted where judges would have convicted. Kalven and Zeisel described the actions of all these juries as "the jury chooses to redefine the crime of rape in terms of its notions of assumptions of risk."² In other words, if she went to a bar, went to the defendant's apartment, etc., she assumed the risk.

Now fast forward 20 years to the early 1980s. Has anything changed? In the early 1980s Gary LaFree led a team of social scientists in a major jury study of sexual assault

¹ Harry Kalven Jr. and Hans Zeisel, *THE AMERICAN JURY* (1966).

² *Id.* at 254

cases in Indianapolis.³ The researchers conducted in-depth 90-minute interviews with 331 men and women who had sat on rape case juries.

They found that jurors made their decisions based on the victim's "character" and lifestyle even where there was proof of use of a weapon or victim injury. Jurors were less likely to believe in the defendant's guilt when the victim reportedly drank or used drugs, was acquainted with the defendant, or engaged in sex outside marriage. LaFree wrote that the jurors disregarded the evidence and decided cases on the basis of their personal values. And these values were so rigid with respect to appropriate behavior for women that they even disbelieved women who held non-traditional jobs, for example, a woman who drove a school bus.

Another factor that emerged starkly in the LaFree study is the issue of race.

When we think about rape and race, most of us think about the extreme animus toward black men charged with raping white women. This aspect of the rape and race issue did emerge in the Indiana study. "Taken together, the results indicate that processing decisions in these sexual assault cases were affected by the race composition of the victim-defendant dyad, and the cumulative effect of race composition was substantial."⁴ But what also emerged was a strong devaluation of African-American women as victims of sexual assault: "It is clear from the analysis that black offender-white victim rapes resulted in substantially more serious penalties than other rapes.... Moreover, black *intraracial* assaults consistently resulted in the least serious punishment for offenders."⁵ For example, in one of the cases a juror said of a 13-year-old black victim that she came from a bad neighborhood and probably wasn't a virgin anyway.

This devaluation of women of color in sexual assault cases is vividly demonstrated by a study of sentencing in Dallas, Texas. In Texas, juries impose sentences. When prosecutors make plea bargains, it is, in the words of the Dallas prosecutor at the time, the "juries [who] set the benchmark."⁶ A study of sentencing and pleas by a local newspaper in 1990 found that the median sentence for a black man who raped a white woman was 19 years and the median sentence for a white man who raped a black woman was 10 years. This is a very interesting differential, but even more revealing were the statistics on same-race rape (which, despite the stereotypes, is what the vast majority of rapes are). The median sentence for white on white rapes was 5 years, for Hispanic/Hispanic rape 2.5 years, and for black on black rape 1 year.

The origins of this devaluation of women of color who are victims of sexual assault go back to slavery. White men repeatedly raped black female slaves with total impunity. To avoid acknowledging, even to themselves, the truth of what they were doing, these men invented the victim-blaming myth of the promiscuous black woman who had seduced them.

³ Gary D. LaFree, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* (1989)

⁴ *Id.* at 140

⁵ *Id.* at 145, emphasis supplied

⁶ Herndon, Ray F. "Race Tilts the Scales of Justice," *Dallas Times Herald*, 1990, at A 22.

Rape, Racism, and the Law in 6 Harvard Women's L. J. 103 (1983)⁷ is an article about this aspect of rape and race that I recommend to you because we are clearly living with this attitude still today. The comfort people feel with this attitude is such that some will even express it openly. A few years ago in Westchester County, N.Y., a black woman was raped on the examining table by a white doctor. At first he denied sexual contact. When the DNA came back he claimed that the sex was consensual and he denied it only so his wife would not know what he'd done. After he was acquitted, a white male juror wrote to the prosecutor, "We thought a black female like that would be flattered by the attention of a white doctor."⁸

Other jury research has found jurors preoccupied with the victim's resistance. In the recent past, rape laws in every state called for utmost resistance, but that has been phased out of the law. Yet in the LaFree study of Indiana jurors, 32% believed that a woman's resistance to her attacker is a critical factor in determining the rapist's culpability and 59% believed a woman should do everything she can to repel her attacker.

Given that jurors are screened — that is, they go through a *voir dire* process intended to eliminate those who cannot follow the law — one might think that juror attitudes would look different than those of the general population, but they do not. For example, in 1991 Time/CNN commissioned a national opinion poll on these issues and found that 38% of men and 37% of women said that a raped woman is partly to blame if she dresses provocatively. A 1998 survey among a properly randomized sample of Georgia residents aged 18 to 49 revealed that sexual stereotypes and myths regarding sexual assault and rape persist.⁹ When asked how strongly they agree or disagree with the statement, "Many women cry rape—saying they have been raped when it really hasn't happened," 49% of men and 42% of women polled expressed some degree of agreement with the statement. We know that the vast majority of rapes involve no weapons. But 48% of men and 48% of women in the Georgia study believed that sexual assault necessarily includes the use of a gun or other weapon. We know the particularly devastating effects of marital rape. But in the Georgia study, 20% of men and 9% of women believed a woman has no right to say "no" to her husband.

The most recent opinion poll on these issues was conducted in Britain in 2005.¹⁰ While the UK is not the US, our countries are like enough that we can be informed by the findings. In a random sample of 1,905 adults over 18, the results showed a very limited level of awareness of the actualities of rape in the UK. Few respondents correctly predicted that there are in excess of 10,00 rapes per year and most overestimated the percentage of convictions for reported rape (the actual is 5.3%).

⁷ The author is Jennifer Wiggins.

⁸ Telephone interview with Barbara Eggenhauser, Assistant District Attorney, Westchester County, New York (April 21, 1992).

⁹ Global Strategy Group, Inc., for the Georgia Network to End Sexual Assault (1998).

¹⁰ *Awareness of Sexual Assault in the UK*, conducted by ICM for Amnesty International (October 2005).

With respect to respondents' attitudes toward victims, 37% believe a woman is responsible for being raped if she failed to say "no" clearly to the man; 35% believe a woman is responsible for being raped if she behaves in a flirtatious manner; 30% believe a woman is responsible for being raped if she is drunk; 26% believe a woman is responsible for being raped if she is wearing sexy/revealing clothing; 22% believe a woman is responsible for being raped if she is known to have had many sexual partners; 22% believe a woman is responsible for being raped if she is alone in a dangerous/deserted area. The only item on which there was a significant gender difference in attitude was the question about clothing, with more men than women saying that certain dress can make a woman responsible for being raped.

What about the young people who are our next generation of jurors, will they think differently? Not according to a survey done in 1988 and repeated in 1998 in Rhode Island. In the 1988 survey of 1,700 6th to 9th grade students in Rhode Island, 65% of the boys and 57% of the girls said that in a dating relationship, it was acceptable for a man to force a woman to have sex if the couple had been dating more than six months. Half of the students said that a woman who walks alone is asking to be raped.

In the 1998 survey of 2,467 6th to 9th grade students, 62% of boys and 58% of girls said it is acceptable to force a date to have intercourse if the couple has been dating for "a long time." 70% of boys and 53% of girls said it is acceptable to force a date to have intercourse if the couple has had intercourse before. 73% of the boys and 78% of the girls said a man has a right to have sexual intercourse against the woman's consent in they are married.

You may have been struck by the fact that the percentages of men and women, and boys and girls are so close on many of these questions. Another aspect of juror attitudes that has fascinated researchers and tripped up many a prosecutor is the apparent hostility of many women jurors toward the complaining witness. New prosecutors are frequently surprised by how censorious women jurors are of the complainant's behavior.

The assumption is made that because women are most at risk of rape, they will be most sympathetic to the alleged victim. But for many women, that is exactly why they are hostile. It is a matter of psychological self-protection. *If I can distance myself from you; if I can say that I would never go to a bar or a man's apartment or accept a ride from someone I only knew slightly, then I don't have to acknowledge my own vulnerability.* This is an enormously powerful motivator. As Aristotle put it — "If people claiming pity are too close to oneself, then we feel about them as if we were in danger ourselves" and we do not extend our pity to them.

Now all of this, of course, is going on subconsciously. The question of how to surface it, and get women to set it aside and attend to the evidence and the law, or remove them from the jury if they cannot, is the challenge, as it is with all types of bias in these cases.

A particularly hard case is the male juror who has engaged in conduct that meets the legal definition of rape, but who never viewed his behavior as criminal. Such a juror may come to understand the true nature of his conduct during trial and realize, consciously or subconsciously, that if he votes to convict the defendant he is acknowledging his crime and convicting himself. Or he may identify with the behavior and not think the defendant did anything wrong. In either case, he will vote to acquit, no matter what the evidence.

The research with sexual assault juries and the opinion polls on public attitudes toward victim behavior and forced sex show that empanelling an unbiased jury in a sexual assault trial is a serious challenge. Thorough *voir dire* to address these biases as they relate to the case being tried an essential element to achieve fairness in these trials.