

Jury Selection in Adult Victim Sexual Assault Cases

**2019 Partnering for a Future
Without Violence Conference
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Topics Covered

- What research shows about how juries decide adult sexual assault cases
- What actual jurors have said
- Considerations for jury selection
 - Selecting fair jurors
 - Protecting jurors' privacy
 - Minimizing jurors' stress and trauma



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What the Research Shows

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

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

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**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.

LaFree, *Rape and Criminal Justice*

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

Ellison & Munroe Study

- Jurors in a 2015 UK study “invoked personal experiences of sexual assault infrequently, [but] were often quick to voice a range of ‘common sense’ presumptions about the nature of rape and the ‘normal’ or ‘typical’ behaviour of rape victims and rapists...”

Louise Ellison & Vanessa Munro, *Telling tales: exploring narratives of life and law within the (mock) jury room*, Legal Studies, Vol. 35 No. 2, 201, 218 (2015).

Jurors' Beliefs in Rape Myths

- “The more participants endorsed rape myths, the less credible...and more blameworthy...they found the [victim].”
(Schuller, 2002)
- Jurors' beliefs in rape myths “significantly predict [their] evaluation of others who are involved in coercive sexual encounters.”
(Wenger, 2006)

Jurors' Beliefs in Rape Myths

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

- Being male
- Lower income
- Political conservatism

(Makkai, 2009)

Jurors' Beliefs in Rape Myths

Stronger personal beliefs in guilt were significantly associated with:

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

(Makkai, 2009)

Gender Role Stereotypes

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

(Ben-David, 2005)

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

(Viki, 2004)

Gender Role Stereotypes

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

(Gadalla, forthcoming, 2010)

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

(Sheperd, 2002)

Times/CNN Poll (1991)

38% of men
37% of women

said that a raped woman
is partly to blame
if she dresses provocatively

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

49% of men
42% of women

believe women cry rape
when it hasn't really happened

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

48% of men
48% of women

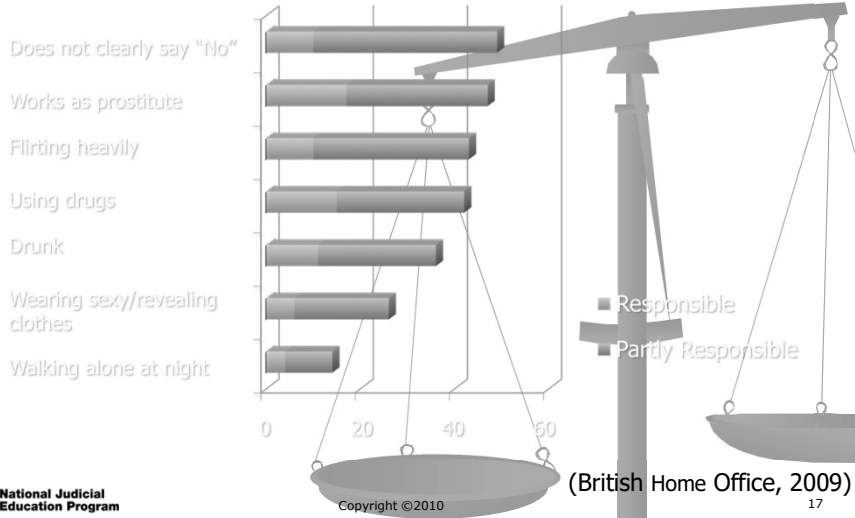
believe sexual assault
necessarily includes
the use of a gun or other weapon

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

20% of men
9% of women

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

Attitudes Towards Rape Responsibility England and Wales (2009)



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

A person on a date has a right to sexual intercourse against the date's consent if they have had intercourse before:

YEAR	% OF BOYS WHO SAID YES	% OF GIRLS WHO SAID YES
1988	70	54
1998	70	53

(Rhode Island, 1998)

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

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

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

(Rhode Island, 1998)

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

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

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

(Rhode Island, 1998)

Australian "Attitudes Toward Sexual Assault and Domestic Violence" Survey 2013

- A survey by the Australian government looked at differences in Australians' attitudes toward sexual assault and domestic violence between 2009 and 2013.
- In 2009, 97% of survey participants agreed that forcing a partner to have sex was a form of violence against women, but in 2013 96% agreed.

Other Key Research

- The closer the acquaintance, the greater the minimization of the severity of the rape and the more responsibility attributed to the victim.
(Ben-David, 2005)
- Prior sexual relationship: victim perceived as less credible, more blameworthy and more likely to have consented.
(Schuller, 2002)
- Higher level of rape myth acceptance for marital rape than for acquaintance rape.
(Cermele, 2008)

Effect of Alcohol Use

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

(Finch, 2005)

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

(Wenger, 2006)

The Effect of Popular Culture

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

(TDCAA, 2007)

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

(Emmers-Sommer, 2006)

The Effect of Popular Culture

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

(Kahlor, 2007)

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

(Kistler, 2009)

Women Jurors in Sexual Assault Cases

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

Women Jurors in Sexual Assault Cases: Possible Explanation

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

(Wenger, 2006)

Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case

What Actual Jurors Have Said

New Mexico Juror

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

Colorado Juror – Comment 1

“She did not show the emotion a victim should show.”

Colorado Juror – Comment 2

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

UK Mock Juror

"I don't think he's guilty... would I allow a man to come in and sit and have wine and coffee and spread it out and kiss him back, like you said? No is no, but she said no later on; she should have said no to the kiss. Don't lead him on and kiss him."

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

Effectiveness of Limiting Instructions

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

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

(Schuller, 2002)

Effectiveness of Limiting Instructions cont'd

- A 2015 U.K. mock jury study found that "...in the majority of cases, participants continued to make very limited use of these instructions, relying instead on their own recollections and (mis)interpretations of pertinent legal tests, as well as on their own evaluations of the evidential weight and credibility of the assertions put before them."
- That study concluded that in the rare instances in which jurors did reference legal tests or judicial directions, "they often continued to exhibit significant substantive misunderstanding."

Selecting Jurors Who Can Be Fair

Key Questions

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

Protecting Jurors' Privacy

Key Questions

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

Jurors' Past Victimization

- "Being summoned for jury duty can cause a lot of anxiety for survivors of rape or sexual abuse."
(Lambert, 2009)
- Must be extremely careful how they ask questions about jurors' prior sexual victimization.
- Should ask behaviorally based questions.
- "While there may be the occasion when a prospective juror explicitly admits to a prejudice, or explicitly admits to an inability to set aside a prejudice, most frequently the prospective juror's subjective bias will [] be revealed [only] through his or her demeanor."

Jurors' Past Victimization: A Cautionary Tale

- 2018 New Hampshire case *State v. Afshar* (171 N.H. 381)
- Defendant appealed his sexual assault conviction after learning post-trial that two jurors failed to disclose that they had been victims of sexual assault
- Trial court overturned conviction and Supreme Court affirmed

Jurors' Past Victimization: Other Examples

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

(*State v. Delgado*)

Jurors' Past Experiences: Other Examples

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

(State v. Watts)

Jurors' Past Experiences: Other Examples

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

(Manrique v. State)

Key Questions

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

Jurors' Past Perpetration

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

(State v. Watts)

Jurors' Past Perpetration

- Important to ask behaviorally based questions because of the misunderstanding of what constitutes "sexual assault" or "sexual abuse."
- Because most sexual assaults are never reported, you need to ask about any claims, allegations or accusations.
- Even then, you may not elicit truthful responses.

Jurors' Past Perpetration: California Example

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

(*State v. Dominquez*)

Jury Questionnaires

- Should you use specially-tailored questionnaires?

Judge William Hughes Hamilton Superior Court, IN

- Initially asked questions in open court, allowing jurors to approach the bench, if they wished
- Change in the rules in Indiana
- Enhanced juror protection
- Questionnaires now confidential
- Change in response rate: 20.3% increase in jurors who disclosed prior victimization

Techniques to Adapt and Adopt

Minimizing Jurors' Stress and Trauma

Providing Support for Jurors

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

Private/Individualized *Voir Dire*

- Is this feasible and how can it be done in a manner that respects juror privacy and protects defendants' rights?

Providing Support for Jurors

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

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