

UNDERSTANDING SEXUAL VIOLENCE

The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault

The National Judicial Education Program
to Promote Equality for Women and Men in the Courts*

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October 1994
Updated and Revised December 2005



Development of this curriculum was made possible by a grant from the State Justice Institute

*A project of Legal Momentum, formerly NOW Legal Defense and Education Fund,
in cooperation with the National Association of Women Judges

Development of the original *Understanding Sexual Violence* curriculum and this updated and revised Faculty Manual was made possible by a grant from the State Justice Institute to the National Judicial Education Program to Promote Equality for Women and Men in the Courts, a project of Legal Momentum in cooperation with the National Association of Women Judges. Points of view expressed herein are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

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October 1994 and December 2005

***“Justice, though due to the
accused, is due the accuser also.
The concept of fairness must not
be strained till it is a filament.
We are to keep the balance true.”***

**U.S. Supreme Court Justice Benjamin N. Cardozo
1934**



***“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.”***

**Minnesota Supreme Court Justice Rosalie Wahl
1989**

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Acknowledgments

An effort of this magnitude comes to fruition only with the help of many people. We are grateful to the judges, judicial educators, attorneys, law professors, experts, support staff and interns who have worked with us on this curriculum over the years. Their names are listed below.

The *Understanding Sexual Violence* curriculum and its several versions would not exist absent the generous support of the State Justice Institute over nearly fifteen years. SJI's first eighteen-month grant enabled us to develop the curriculum and present two pilot programs in the early 1990s. SJI's second grant enabled us to refine the curriculum and to conduct in 1994 a Faculty Training Institute for judges from eight states to prepare them to teach the curriculum in their own states and regions. A third grant from SJI in partnership with the Department of Justice Office on Violence Against Women (OVW) enabled us to produce a four-hour video version of the curriculum, released in 2000 and subsequently converted to a DVD. SJI's fourth grant in 2004 enabled us to update and revise this faculty manual to reflect our experiences in presenting the *Understanding Sexual Violence* curriculum for judges in more than thirty states and the Tribal Courts. We particularly want to acknowledge our State Justice Institute program officer, subsequently SJI's deputy director, Kathy Schwartz, whose unflagging interest and enthusiasm together with her thoughtful suggestions were so meaningful to us.

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Funding for these interns was provided by the Everett Foundation and the Helena Rubenstein Foundation.

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* In 2004, NOW Legal Defense and Education Fund changed its name to Legal Momentum. These interns worked with us when we were still called NOW Legal Defense and Education Fund.

PREFACE

[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.

Testimony before the New York Task Force on Women in the Courts by the Coordinator of the Erie County Citizen's Committee on Rape and Sexual Assault.¹

Rape is the most underreported and least understood category of crime. Between 1989 and 1990, reported rapes topped 100,000 for the first time.² But, in 1992, the Crime Victims Research and Treatment Center of the Medical University of South Carolina released a major national study, *Rape in America: A Report to the Nation*, which revealed how far removed that figure of 100,000 is from the true dimensions of sexual assault in America. Although this study is over ten years old, it remains the most accurate and highly regarded report on the subject.³

Rape in America determined that in a one-year period between 1989 and 1990, 638,000 adult women over age 18 were victims of rape, defined as forced vaginal, anal, oral or foreign object penetration against the woman's will.⁴

Rape in America also determined that this figure of 638,000 reflected *less than half* the sexual assaults during that year, because in asking these adult women about their first experience of sexual assault, the researchers learned that girls under 18 are assaulted significantly more often than adult women.⁵ *Rape in America* concluded that 12.1 million American women have been sexually assaulted, and that more than 4.7 million of them have been assaulted more than once. This study also found that of all the sexual assaults experienced by survey respondents over their lifetimes, only 16 percent were reported to the police.⁶ Other studies have shown even lower reporting rates.⁷ Moreover, *Rape in America* did not examine male rape, which is even less often reported.

A major reason women do not report rape and sexual assault is that the reality of these crimes does not match the public perception of who commits them, and victims fear they will not be believed. Contrary to the stereotype of rapists as brutal, weapon-wielding strangers, data from rape crisis centers, college campuses and random samples of adult women reveal that the large majority of rapists are someone known to the victim: a family member, friend, co-worker, employer, neighbor, fellow student, acquaintance or date. These nonstranger rapists exploit a relationship of trust and use more subtle methods of coercion, though with the same devastating impact. *Rape in America* found that only 22 percent of sexual assaults were committed by strangers.⁸ Again, other studies have shown even lower percentages.⁹

At the same time that rape reporting is increasing, so is public concern about this crime. When the Florida press reported in 1989 that a jury had exonerated the defendant in a stranger rape because it considered the complainant's clothing provocative, the public was outraged.¹⁰ Nonstranger rape is garnering even more media attention than stranger rape. During the last few years, even before the William Kennedy Smith and Mike Tyson trials, newspapers and magazines focused on this type of rape repeatedly. The high incidence of "date rape" on college campuses has become a matter of public knowledge, and schools which once turned a blind eye to these assaults are being forced to take action.¹¹

The increase in reported rape and the increase in public expectations that it will be dealt with seriously pose special challenges for the judiciary. Rape and sexual assault trials are among the most difficult and sensitive for the courts.¹² Many victims complain that the trial is as traumatizing as the assault. Judges worry that an insensitive remark will result in negative press or disciplinary charges, as has happened in a number of cases. Judges responding to a recent survey reported that compared to other cases, sexual offense trials are "more difficult . . . to preside [over] from a legal and technical standpoint, a personal and emotional viewpoint, and a public scrutiny and public pressure perspective."¹³ 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 three decades there have been significant statutory and caselaw reforms in the area of rape and sexual assault. Yet there is substantial evidence that the cultural myths and stereotypes about rape that made these reforms necessary still pervade society and that the criminal justice system is not immune to them.

Findings of the Supreme Court 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 documented serious deficiencies, particularly in the judicial response to nonstranger rape.¹⁴

Those gender bias task forces which studied rape uniformly recommended judicial education to familiarize judges with the substantial current data about the nature of the crime of rape; the psychology of offenders; the prevalence and seriousness of nonstranger rape; the long-term psychic injury to rape victims; and the effect of the judicial process on victims. The task forces also urged that judicial education programs be designed to develop judicial skills in distinguishing between the presentation of a legitimate consent defense and the improper assertion of a gender-biased defense.

Juror Bias

Extensive research into jury deliberations confirms the gender bias task forces' finding that even when judges are themselves sensitized to rape, there is a high likelihood that juries are not. Studies of the attitudes of the public, mock jurors and actual jurors reveal significant adherence by men and women to such myths as: only "bad girls" are raped; women provoke rape by their appearance and behavior; women enjoy violent sex; women charge rape out of vindictiveness; black women are more sexually experienced than white women and thus less harmed by an assault; and rapists are abnormal men without access to consensual sex.¹⁵

Juror adherence to rape myths and stereotypes presents a major barrier to achieving fairness in rape trials. It is essential that judges not only expand their own knowledge about rape but learn about common misconceptions about rape to which jurors may subscribe and explore ways of minimizing juror bias.

Nonstranger Rape/“Hidden Rape”

Researchers in the area of sexual aggression call nonstranger rapes “hidden rapes” because they are so rarely reported. Professor Barry Burkhart, an expert on date rape, sex offenders and victim impact, and attorney Carol Bohmer have written about the impact of hidden rapes on the courts.

[A]s a result of the ... discovery by social scientists of the dimensions of hidden rape in the population, these hitherto hidden rapes will come to be identified as rapes by victims, if not perpetrators, and the law will then be called to deal with these events in significant numbers. With this occurrence the court will face a difficult situation. These events, by the strict definition of the law, are rapes, but in the eyes of many members of this culture they are not. Thus, once again, the courts will become the crucible wherein the cross-currents produced by conflicts between traditions and social changes will have to be resolved and redirected.

In order for the courts to excel at this task, all involved in this process -- attorneys, witnesses, probation officers, court personnel and jurists -- must be informed, as well as the limits of our knowledge allow, about the nature of hidden rapes.¹⁶

Thus, difficult as rape trials have been in the past, the growth in indictments for nonstranger hidden rapes -- which can be expected to rise as the public becomes better educated about these crimes and expects prosecutors to take action -- will present an even more difficult challenge for the judiciary. The gender bias task forces report that although there is evidence that courts are treating stranger rape with greater seriousness and sensitivity than in the past, nonstranger rape continues to be minimized and trivialized. The judgment and credibility of the victims in these cases are even more likely to be questioned than in stranger rape. Because nonstranger rape rarely involves weapons and physical injuries as the law has classically understood injury (e.g., 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.

Sexual Assault Is a Major Public Health Issue in America

A critical aspect of these hidden rapes is that they are a major determinant of the mental health of American women. It is widely but wrongly believed that only so-called “real rapes” -- i.e., those committed by the weapon-wielding stranger -- leave psychic injuries, and that even these are transient.

But for the victim, every rape is a “real rape,” and every rape leaves profound psychic scars. There is now a significant body of research showing that both stranger and nonstranger rape cause serious, long-term psychological trauma.¹⁷ Moreover, hidden rapes often cause the most long-lasting trauma because they create the most self-blame and destroy the victim’s ability to trust her own judgment or trust others. Victims of both stranger and nonstranger sexual assault have significantly higher rates of

depression and suicide than nonvictims. They are also more likely to abuse alcohol and drugs as a way to self-medicate their psychological pain. The *Rape in America* study found that “3.8 million adult American women have had Rape-Related Post-Traumatic Stress Disorder and an estimated 1.3 million American women currently have RR-PTSD.”¹⁸

Rape in America: A Report to the Nation asserts that it is imperative that rape be classified as a major public health issue in the United States and offers six recommendations, the last of which is directed to the criminal justice system.

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.

Rape education must be systematic from our schools to our judicial system to all citizens of America. For only when we -- as individual citizens and as a nation dedicated to liberty and justice for all -- understand the brutal nature of rape and its devastating aftereffects, will we be able to erase the stigma of rape, guarantee that rape victims are treated with dignity, and offer a concerted, appropriate criminal justice response to crimes of rape and their victims.¹⁹

The Role of the Judge

There are two areas in which judges can have an impact on reducing gender bias in rape trials: the trial process and sentencing. Conducting the pretrial and trial processes in such a way that both the complainant and defendant receive a fair hearing is important not only for the well-being of the individual victim, but to others in the community who will be encouraged to report rapes to the police if they are victimized. Commentators on victims’ rights have observed that “[i]t gives the court a greater appearance of impartiality if it recognizes rights for both the defendant and victim. This will increase the credibility of the courts with victims and the public.”²⁰ Many studies have found that a significant percentage of rape victims do not report the attack because they have heard from other victims that the trial was as devastating as the original assault.

Appropriate sentencing for sex offenders who have pled or been found guilty is of the utmost importance. Sentencing should reflect the profound psychological harm to victims of both stranger and nonstranger rape, even when there is no violence extrinsic to the rape itself. Sentencing should also reflect the dangerousness of nonstranger rapists, even though they employ little physical violence of the traditional kind. The vast majority of sex offenders are repeaters on a major scale who lack any victim empathy. In one study of 561 nonincarcerated sex offenders of whom 126 admitted committing rape, these 126 men had committed 907 rapes involving 882 victims. The average number of victims per rapist was seven.²¹ The harm these men do is incalculable.

Stranger and nonstranger rapists need to be incarcerated and undergo specialized sex offender treatment in prison and then as outpatients. Defendants who must be probated pursuant to plea bargains should be treated as outpatients from the beginning and incarcerated if they fail to follow all the terms of a rigorous sex offender treatment program. To bring judges up to date on these sentencing issues, this curriculum includes an extensive discussion of sex offenders and sex offender treatment. The focus is on what is known about date and acquaintance rapists' characteristics and propensity for repeated assaults, and the critical importance of dealing seriously with adolescent rapists at their first interaction with the criminal justice system. Sex offender treatment programs are not a panacea, but they appear to have some positive impact on reducing recidivism.

The Origin and Testing of this Curriculum

In 1991 the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP), a project of NOW Legal Defense and Education Fund* in cooperation with the National Association of Women Judges, received a grant from the State Justice Institute to develop a model curriculum on the judicial response to stranger and nonstranger rape and sexual assault that could be modified by individual states to reflect their own statutes and caselaw. Developing a comprehensive judicial education curriculum about rape had been a goal of NJEP for more than a decade. NJEP's pilot course, presented at the California Center for Judicial Education and Research in January 1981, included a unit on evidentiary rulings under California's then-new rape shield law, and NJEP continued to explore the issue of rape in its judicial education programs and work with the supreme court task forces in gender bias in the courts for which those judicial education programs were the catalyst.

This curriculum was developed with an Advisory Committee of judges, judicial educators, a prosecutor, a defense attorney and a victim advocate, and in consultation with national experts on the prosecution and defense of sex crimes, rape trauma and sex offender treatment. The curriculum was piloted in Massachusetts in January 1993 and Connecticut in April 1993. Subsequently, the State Justice Institute awarded NJEP a continuation grant for a Faculty Training Institute, held in May 1994, to train judges and judicial educators from eight states to present the curriculum in their own states and regions. The chief justices of twenty-five states and two territories nominated teaching teams. The states selected to attend were Alabama, California, Maine, Minnesota, Missouri, New Mexico, Oklahoma, and Oregon. The final version of this curriculum, published in 1994, reflected the experience of the pilot programs and the Faculty Training Institute.

Initial Presentations of the Curriculum

The judges who attended the Faculty Training Institute were enthusiastic about the curriculum and began presenting it in their own states. The curriculum was presented in Minnesota in September 1994 and was so well received that it was the focus of a criminal justice institute in the fall of 1995. Oregon presented the curriculum in October 1994, and the resulting evaluations were all 4-5 on a 1-5 scale with 5 as the highest rating. One Oregon judge wrote that he had been a judge for twenty-five years and this was the best judicial education program he ever attended. Subsequently, California, Florida, Texas, Maine, Maryland, Missouri, New Hampshire and Vermont presented the *Understanding Sexual Violence* curriculum on their own.

* In 2004, NOW Legal Defense and Education Fund changed its name to Legal Momentum.

Curriculum Presentations by NJEP

In 1996 the Department of Justice Office on Violence Against Women (OVW), utilizing funds appropriated under the Violence Against Women Act, awarded NJEP the first of several grants to enable us to present the curriculum ourselves in states throughout the country and in some more than once. Since then NJEP presented *Understanding Sexual Violence* in Colorado, District of Columbia, Georgia, Indiana, Iowa, Michigan, Mississippi, Montana, Nebraska, Pennsylvania, Utah, Wisconsin and for the National Association for Women Judges and the Tribal Courts. We also provided extensive technical assistance for presentations in California, Georgia, Ohio, Oregon, Pennsylvania, Utah and Wisconsin.

In 2003 and 2004, funding from OVW and SJI enabled NJEP to conduct three Multi-State Team Meetings at which we trained judges and judicial educators from twelve states to present the curriculum on their own. The states attending were California, Colorado, Connecticut, Mississippi, North Carolina, Ohio, Oregon, Georgia, Pennsylvania, Washington State, West Virginia, Wisconsin and representatives from the Tribal Courts. Subsequently, most participating states presented programs of their own with technical assistance from NJEP.

In 2004, NJEP presented *Understanding Sexual Violence* in New Mexico with funding from SJI.

The evaluations from all of these programs have been excellent.

Video and DVD Versions of *Understanding Sexual Violence*

To make the information in the *Understanding Sexual Violence* curriculum more readily available and to enable judges to access it on their own time, NJEP obtained joint funding from SJI and OVW to create a four-hour video version (2000) and then funding from OVW to create a DVD version with an associated website and annotated database, www.njep.org/usvjvd (2005). The DVD is an integral part of the updated and revised curriculum presented in this Faculty Manual.

Endnotes

1. Report of the New York Task Force on Women in the Courts, 15 FORDHAM URB. L.J. 11, 52 (1987).
2. U.S. Senate Judiciary Committee, *Violence Against Women: The Increase of Rape in America 1990*, Mar. 21, 1991 at 2.
3. In 2005 the National Institute of Justice awarded the Medical University of South Carolina a grant to update this study.
4. *Id.* at 3. Sixty-one percent of sexual assault occurred before the victim was 18.
5. National Victim Center and Crime Victim Research and Treatment Center of the Medical University of South Carolina, RAPE IN AMERICA: A REPORT TO THE NATION 2 (1992) [hereinafter RAPE IN AMERICA]. This study was funded by the National Institute on Drug Abuse because so many victims self-medicate their psychological pain with alcohol and drugs. The entire study is at Tab 1 of the curriculum readings.
6. *Id.*
7. E.g., U.S. Senate Judiciary Committee, *supra* note 2, at 2, found a 7% reporting rate for rape compared to 53% for robbery.
8. RAPE IN AMERICA, *supra* note 4, at 4.
9. A 1985-1987 survey by the Massachusetts Department of Public Health indicated that only 18% of sexual assaults reported to rape crisis centers involved assaults by strangers. MASSACHUSETTS SUPREME JUDICIAL COURT GENDER BIAS STUDY COMMITTEE, GENDER BIAS STUDY IN THE COURT SYSTEM IN MASSACHUSETTS 100 (1989). In 1987-1988 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. Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *Final Report*, 15 WM. MITCHELL L. REV. 827, 894-95 (1989).
10. *Jury Blames Woman in Rape Case*, MIAMI HERALD, Oct. 5, 1989; *Tactics, Verdict in Rape Case Stir Outrage*, MIAMI HERALD, Oct. 6, 1989.
11. See, e.g., Helaine Olen and Ronald Ostrow, *Date-Rape Gains Attention After Years as Taboo Topic*, LOS ANGELES TIMES, April 23, 1991; Le Anne Schreiber, *Campus Rape*, GLAMOUR, Sept. 1990; Amy Callahan and Suzette Parmley, *College Students Confront Threat of Date Rape*, BOSTON GLOBE, Sept. 2, 1990; Daniel Goleman, *When the Rapist is Not a Stranger: Studies Seek New Understanding*, N.Y. TIMES, Aug. 8, 1989; Ann Rule, *Rape on Campus*, GOOD HOUSEKEEPING, Sept. 1989.
12. See, e.g., Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Susan Estrich, REAL RAPE (1987).
13. Kurt M. Bumby & Marc C. Maddox, *Judges' Knowledge About Sexual Offenders, Difficulties Presiding Over Sexual Offense Cases, and Opinions on Sentencing, Treatment, and Legislation*, 11 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 305 (1999).
14. See the chapters on rape and sexual assault in the task force reports from Colorado, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New York, Texas, Utah, Vermont, Wisconsin and Washington State. For a list of how to obtain these reports contact the National Judicial Education Program, 395 Hudson Street, 5th Floor, New York, New York 10014; (212) 925-6635 or see our website: www.njep.org and click on Gender Bias Task Forces.
15. For a review of these studies see Patricia A. Tetrault, *Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials*, 7 BEHAVIORAL SCIENCES AND THE LAW 243 (1989) and Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. (1991). Excerpts from the latter article are at Tab 3 of the curriculum readings.
16. Barry Burkhart & Andrea Bohmer, *Hidden Rape and the Legal Crucible: Analysis and Implications of Epidemiological, Social, and Legal Factors*, A JOURNAL FOR THE EXPERT WITNESS, THE TRIAL ATTORNEY AND THE TRIAL JUDGE, Summer 1990 at 3.

17. See Curriculum Unit I, Rape Victims and Victim Impact.

18. RAPE IN AMERICA, *supra* note 4, at 7.

19. *Id.* at 14.

20. John Albrecht, *The Rights and Needs of Victims of Crime: The Judges' Perspectives*, THE JUDGES' JOURNAL, Summer 1994. This article presents suggestions made by participants at two 1993 National Judicial College course for judges on the rights and needs of victims.

21. Gene Abel et al., *Self-Reported Crimes of Nonincarcerated Paraphiliacs* 2 J. OF INTERPERSONAL VIOLENCE 3 (1987).

**Understanding Sexual Violence:
The Judicial Response to Stranger and Nonstranger
Rape and Sexual Assault**

**Faculty Manual, DVD and
Directions for Preparing
the Participant's Binder**

*A Model Judicial Education Curriculum
Developed by the*

*National Judicial Education Program
to Promote Equality for Women and Men in the Courts**

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** A project of Legal Momentum, formerly the NOW Legal Defense and Education Fund,
in cooperation with the National Association of Women Judges*

Faculty Manual, DVD and Directions for Preparing the Participant's Binder

Curriculum Components

This curriculum has three parts:

- Part I.** **Faculty Manual**
- Part II.** *Understanding Sexual Violence DVD*
- Part III.** **Participant's Binder**

Part I, the **Faculty Manual**, explains in detail how to present the curriculum. It provides information about how to plan a presentation of the curriculum; choose and train judicial and non-judicial faculty; adapt the curriculum to reflect your state's statutes and caselaw; develop current national, state and local statistics and other data about stranger and nonstranger rape; locate local experts in these fields to participate in your program; and present each unit. The manual also includes background readings on judicial education to prepare faculty and small group facilitators for their presentations.

Part II is the *Understanding Sexual Violence DVD* which is an integral part of the curriculum. Optimally each participant will be given a copy to use as a resource after the program. Minimally participants should be advised that Supporting Materials for the curriculum (the studies and articles cited by the experts) as well as an annotated database covering a wide range of topics related to sexual assault are on the DVD website, www.njep.org/usvj dvd. It is provided in the pocket inside the front cover of this binder.

The *Understanding Sexual Violence DVD* provides videos and resources. The videos present courtroom scenarios; social science research about rape victims, the neurobiology of trauma, sex offenders and jury decision-making in sexual assault cases; and panel discussions in which judges talk about how they have applied this information in their own courtrooms. The ROM portion of the DVD contains summaries of all the research cited in the videos, suggestions from judges in more than twenty states for applying the information presented, and an Instructor's Guide for trainers. All this information also appears on the website, *supra*, together with the annotated database.

A detailed description of the *Understanding Sexual Violence DVD* is in *Appendix A*.

Part III, the **Participant's Binder**, is to be adapted to the needs of your jurisdiction and provided to each program participant. It contains all the materials necessary for presenting the program including the agenda, faculty biographies, individual and group exercises, the case study, hypotheticals, the experts' slides, local sexual assault statutes and case law, statistics, judges' recommendations and the evaluation instrument.

A detailed description of the Participant's Binder is in *Appendix B*.

Overall Structure

The curriculum as presented here requires two days. The suggested program is at page five. Other options are discussed *infra* at page 7.

Unit I. **Sex Offenders, Sentencing & Treatment** is a plenary session with participants seated at round tables for small-group discussion of sentencing hypotheticals, followed by a report back.

Unit II. **Rape Victims & Victim Impact** is a plenary session with participants seated at round tables for small group discussion of how they would apply the information presented, followed by a report back.

Unit III. **Sexual Assault Law: Evidentiary Issues** is a plenary session with alternate formats. It can have participants seated at round tables for small group discussion with a report back. It can also be a panel of judges commenting on the evidence questions with audience discussion.

Unit IV. **Voir Dire and Jury Questionnaires** is a plenary session with several elements and alternate formats, described below. Participants continue to be seated at their round tables.

Note on the Order of the Units

The curriculum is structured with Sex Offenders first and *Voir Dire* last based on NJEP's experience presenting *Understanding Sexual Violence* across the country since 1993. Many judges believe themselves highly knowledgeable about rape victim impact and think they do not need to hear about this again. Although at the end of the *Understanding Sexual Violence* program they acknowledge that they did have more to learn, putting Sex Offenders, Sentencing & Treatment first engages the judges immediately because they perceive this as being new information.

Putting *Voir Dire* last is necessary because it is only after judges understand their own mistaken beliefs about rape that they grasp how deeply embedded rape myths are in the public mind, and why an especially thorough voir dire is essential in rape and sexual assault cases.

Curriculum Perspective

According to the National Association of State Judicial Educators, the purpose of continuing education is to "maintain and improve the professional competency of all persons performing

judicial functions, thereby enhancing the performance of the judicial system as a whole.”¹ This curriculum falls squarely within this rubric, helping judges develop further their abilities related to decision making, analysis, and awareness of their own values in rape cases.²

Following the educational models provided by Professor Charles Claxton and Patricia Murrell, Director of the Leadership Institute in Judicial Education, there are several principles the authors kept in mind while creating the curriculum: judges need to be able to relate new information to what they already know; judges need opportunities to reflect on the new information; judges need opportunities to apply the new information to real problems they encounter in the courtroom, see *Teaching Techniques for Adult Learners* in Appendix G.

The curriculum is structured so that the major ideas are repeated and reinforced as the curriculum moves from unit to unit, while focusing on the links between the various topics raised.

The focus of the curriculum is on achieving fairness within the judicial process in nonstranger rape cases. It is based on the concept of a "Brandeis Brief," i.e., that judges will be better informed, fairer and more effective in handling rape cases when they have a broad and accurate knowledge base about the crime of rape and its impact. Given the rape myths that permeate our culture and therefore our courts, achieving fairness in the judicial process requires examining these myths. This examination may appear victim oriented. However, as former California Judge Mary Morgan stated at the first *Understanding Sexual Violence* Faculty Training Institute:

“This curriculum is *not* about convictions or acquittals, about judges becoming advocates for rape victims, or about judges becoming prosecutors.

This curriculum *is* about the fact that rape myths impugn the integrity of the truth-finding process. The curriculum addresses the reality that there are multiple myths about rape -- the act, victims and perpetrators. These myths are based on gender bias or sexism, race bias or racism. Judges share these myths, as do attorneys, court staff, jurors and the public at large. When myths come into the courtroom, they result in unfair trials in fact, or at the very least, in the perceptions of the public. Rape myths distort the process.

The job of a judge is not to be a prosecutor, to take care of alleged victims, or to obtain convictions. The judge’s job is to manage a process we call court proceedings in as fair and impartial a fashion as possible - as little tainted by myths and stereotypes as possible.

¹ Anthony Fisser, Chair, Standards Committee, National Association of State Judicial Educators (NASJE), Director of Continuing Education, Connecticut Judicial Branch, *Principles and Standards of Continuing Education* 6 (NASJE 1991).

² Charles Claxton, *Curriculum Development in Judicial Education: A Developmental Model*, paper presented at the Advanced Leadership Training Program, Leadership in Judicial Education, Washington, D.C. (Aug. 26-29, 1993) at 4.

Judges must create a process that is as conducive as possible to finding truth and achieving justice.”

This statement is repeated on the *Understanding Sexual Violence* DVD by Judge Michael Keasler of the Texas Court of Criminal Appeals who conducts the expert interviews. It also appears in the Sample Program Introduction in *Appendix C*.

This is the annotated Suggested Program for the faculty. The agenda for distribution to participants is included at Appendix D.

SUGGESTED TWO-DAY PROGRAM

Day One

- 8:30-9:00 Welcome & Overview (Judicial Faculty)
- Introductions
 - Opening Remarks
 - Participants take Self-Test
 - Refer participants to Self-Test Answers and Commentary
- or**
- defer this review to the close of the program
- 9:00-10:15 Sex Offenders: Myths & Realities (Expert)
- Presentation by expert
- 10:15-10:30 *Break*
- 10:30-11:30 Sex Offenders: Sentencing & Treatment (Judicial Faculty & Expert)
- Presentation by expert
- 11:30-12:15 Local Sex Offender Treatment Options (Local Expert)
- Presentation by local expert on treatment options available in your jurisdiction
- 12:15-1:15 *Lunch*
- 1:15-2:15 Sentencing Sex Offenders (Judicial Faculty—small group exercise and report back)
- Judicial faculty lead small group discussion of sentencing hypotheticals
- 2:15-3:30 Victim Impact—Part I (Judicial Faculty & Expert)
- Introduction to unit and video
 - Video: *Someone You Know*
 - Discussion of video
 - Advise participants of other relevant material available (statistical reports)
- 3:30-3:45 *Break*
- 3:45-4:45 Victim Impact, continued
- Presentation by expert
- 4:45-5:00 Closing for Day One and Preview of Day Two
- Check in exercise

Day Two

- 8:30-9:30 Neurobiology of Trauma (Judicial Faculty & Expert)
- Presentation by expert
- 9:30-10:30 Cultural Issues and Specific Populations (Judicial Faculty & Expert)
- Presentation by Expert
- 10:30-10:45 *Break*
- 10:45-12:00 Implementation Exercise (Judicial Faculty—small group exercise & report back)
- Judicial Faculty lead small group discussion of how to apply the material covered in four areas:
 1. Pre-trial
 2. Trial
 3. Sentencing
 4. Community
 - Have recorder write group ideas legibly
 - Refer to Judicial Ethics material
 - Advise participants to review Judges' Recommendations from Other States
 - Stop small group discussion at 11:30 for report back
- 12:00-1:00 *Lunch*
- 1:00-2:30 Local Sexual Assault Law: Evidentiary Issues (Judicial Faculty—large group discussion)
- Large group discussion of Evidentiary Issues
 - Advise participants of local legal materials in Participant's Binder
 - Detailed list of relevant statutes, Rules of Evidence & Jury Instructions
 - Case law annotations with Table of Cases & Table of Contents
- 2:30-2:45 *Break*
- 2:45-3:45 Jury Panel (Judicial Faculty)
- Give brief case summaries
 - Lead jury panel discussion
 - Questions from participants
 - Escort jurors out
- 3:45-4:15 Juror Decision-Making (Expert)
- Presentation by expert
- 4:15-4:45 *Voir Dire*—The Judge's Role (Judicial Faculty—large group discussion)
- Assign role players
 - Large group discussion of questions raised by role plays
- 4:45-5:00 Closing & Evaluation
- Review the Self-Test Answers and Commentary
 - Closing remarks
 - Participants complete and return evaluation instrument

Curriculum Length

Rape and sexual assault are subjects to which a great deal of time could and should be devoted. To present this curriculum in its entirety requires two days. In developing this curriculum, we presented it once in one day and twice in a day and a half. Neither format allowed enough time to thoroughly present all the material. We found that judges wanted significant time to question the experts, and we encourage you to plan your program with this in mind.

If it is not possible to devote two days to the curriculum in one session, it can be presented as a two or three part program over several months. However the curriculum is divided, it is important that the sentencing hypotheticals not be presented without a discussion of victim impact, sex offenders and sex offender treatment.

Planning the Program

Judges and judicial educators wishing to present the full curriculum or integrate its subject matter into other judicial training programs need to plan carefully. In developing and testing this curriculum, the authors thought it would be possible to present the substantive material with a faculty manual in such a way that it could be readily assimilated and presented. We found that a great deal more time was necessary to prepare for presentation than we anticipated.

Allow time for:

- Determining what components of the curriculum to include as well as the duration of the curriculum;
- Selecting the judicial faculty and small group discussion leaders;
- Selecting the experts on rape victim impact and sex offender treatment;
- Ensuring that all faculty are thoroughly familiar with the parts of the curriculum they will present or the discussions they will lead;
- Conducting faculty training with the experts to ensure that their presentations consistently relate the information they must convey to exactly the way judges can apply that information.
- Adapting the written materials to reflect state statutes and caselaw; and
- Determining what information from the Supporting Materials to include in the Participant's Binder for your training as well as what additional materials are needed and obtaining them. Remember to obtain reprint permission where necessary.

Components That May Be Overlooked

As you review the components of the curriculum, you may initially think that certain units or parts of units can be omitted, for a variety of reasons. However, based on the issues that research shows need to be addressed, we offer the following observations about two issues that are sometimes perceived as unnecessary:

Sex Offender Treatment: Sex offender treatment is an important issue in sexual assault sentencing because of the growth in sentencing consultants who present alternative sentence recommendations that include treatment for defendants, and the growth in private individuals and agencies offering this treatment. For judges to be able to evaluate those recommendations and providers, they need to understand what current state-of-the-art sex offender treatment is and its limitations, as well as how treatment relates to incarceration.

Voir Dire: If the practice in your state is to sharply limit *voir dire*, you may initially think there is no point in including this segment of the curriculum in your program. Please reconsider. Judges may need to rethink the way they conduct *voir dire* because, as noted earlier, the juror biases in this area are so profound and are not being reached under strictly time-limited models.

Again, as noted earlier, we found that the reasons to endorse an expanded *voir dire* in rape trials were the most difficult to communicate and suggest that the *voir dire* discussion be delayed until there has been an opportunity for participants to hear the discussion of rape myths in the units on offenders and victims.

Adapting the Curriculum to Your State

The curriculum is presented as a “generic model” to be adapted to reflect each state's statutes and caselaw. State statutes on rape and sexual assault differ widely on almost every point. Some do not use the word “rape.” Some require consent “freely and voluntarily given.” Many states maintain lesser penalties and more strict reporting requirements for marital rape. Your state statutes and caselaw will affect many issues discussed in this curriculum. *Appendix E* to this Faculty Manual includes an explanation of how to supplement the curriculum with local legal material.

The curriculum also includes several hypotheticals. It may be necessary to alter these in order to raise the issues of most current concern in your state, or to make sense in terms of what can actually be prosecuted in your state. You may want to obtain rape statistics for your state and information about local resources for rape victims and sex offender treatment. *Appendix F* describes how to obtain state statistics and other information, and see “Statistics” *infra* at page 11.

Faculty and Facilitators

The curriculum is premised on two judges serving as lead and teaching-team faculty with as many other judges as necessary serving as small-group facilitators. The small groups should include no more than twelve judges; six to eight is preferable. In addition to the two lead faculty, other judges can be asked to present individual units (e.g., sentencing). The two lead faculty jointly can introduce the program. They can then alternate as faculty for the other units.

Both lead faculty and facilitators should be thoroughly familiar with the curriculum before presenting it. Optimum preparation for the program includes a full-day faculty development workshop at which judicial faculty and facilitators review the curriculum and supporting materials, consider in detail the parts of the curriculum each faculty member will present or team-teach with an expert and practice guiding small group deliberations. *Appendix G* includes guidance on teaching techniques for adult learners and ten role plays for training the judicial faculty to be effective, small group discussion leaders.

Faculty for the Sex Offenders, Rape Victims and Victim Impact and *Voir Dire* units should be experts in these areas with the ability to convey the information and its applicability to judges' responsibilities to a judicial audience. Program planners should involve these experts in the planning process and work with them throughout so that they are aware of what is expected of them and what their role is in the context of the goals of the entire curriculum.

Issues for Non-Judicial Faculty

Whenever non-judicial faculty is invited to speak at a judicial education program, special issues arise. In order for their presentations to be instructive and acceptable to judges, these speakers need assistance in developing their materials and approach for a judicial audience.

Judges experienced in judicial education should work with the non-judicial experts in the preparation of their presentations and materials and should act as “translators” who draw out the implications for the judiciary and the courts of the social science, medical or other information presented. It is essential that the material on rape victim impact and sex offenders be repeatedly linked to how this information relates to *judges'* responsibilities and how it can be applied. It is important that experts not speak in jargon or in abstractions. The victim impact expert should not simply say that rape victims often go into denial after the assault, but rather explain what “denial” means, how it manifests itself and what that means for the court process. For example, a victim in denial will not make a prompt report of the crime.

The judicial faculty will confer credibility on the non-judicial speakers by introducing them in a way that stresses these experts' credentials and legitimizes the importance and relevance of the material to rape trials.

Introducing and Closing the Program and its Units

When presenting this curriculum, it is essential to set the foundation for the program by articulating its purpose and objectives when opening the program, introducing and closing each

unit and closing the program. It is critical to communicate that this curriculum is about *fairness*. At the Faculty Training Institute, Judge Mary Morgan’s language and analysis on this point, quoted above, were well received. They provide a useful framework for developing your introductions and closings. Setting the foundation means articulating the purpose and objectives and relating them to the subject matter and the exercises in the context of participants’ job responsibilities: why this curriculum on stranger and nonstranger rape and sexual assault is necessary for judges and how they can apply what they learn from it.

Without a solid foundation, participants lose their focus, and the educational impact is missed. The judges who introduce the program and the individual units should make clear that the curriculum seeks to enhance understanding of these issues so that judges will take action based on that new understanding. That is, the curriculum is not just about background knowledge, but about using that knowledge to conduct fairer rape trials and impose more informed sentences.

A formal check-in exercise is suggested at the end of Day One. Participants break into dyads and each spend two minutes discussing their reactions to the training while the other listens. After each has had a turn to discuss their reactions the facilitator asks if any participants would like to share with the larger group. The facilitator should give a preview of Day Two after the participants have finished sharing.

Videos

The curriculum includes the video *Someone You Know* and possibly the video *The Mind of a Rapist*. They are described in detail in the units on Rape Victims and Victim Impact and Sex Offender Treatment. These videos are important because they graphically communicate aspects of victim impact and methods of sex offender treatment which cannot be conveyed in the abstract.

Someone You Know was produced by Dystar Television, Inc. and can be borrowed from the National Judicial Education Program (NJEP) for the cost of express mail and handling. NJEP can be reached at 395 Hudson Street, 5th floor, New York, NY; (212) 925-6635, njep@legalmomentum.org. This video can be purchased (\$125) from Coronet/MTI Video & Video, 4350 Equity Place, Columbus, OH 43228, (800) 321-3106 (x918).

The Mind of a Rapist was produced for the ABC-TV show 20/20 and can be included if time permits. It is available only on loan from NJEP for the cost of express mail and handling and under restrictions imposed by ABC for its use (which are, essentially, that the video may be shown only for specified education programs and may not be copied).

Visual Aids

Research into how people learn shows that information presented orally *and* visually is taken in more effectively and retained far longer than information conveyed orally alone. We urge faculty to present information through slides or Power Point—referred to in this curriculum as “visuals”—whenever these are appropriate to the material.

Room Arrangements

The curriculum includes plenary sessions and small group discussions. Thus, you will need a room large enough for all participants to be seated at round tables for groups of no more than 12 participants each. Smaller groups at each table are better, if space permits.

For the plenary sessions, the chairs should be placed at only one half of the table so that participants can comfortably face the speakers. For small group discussions participants can move their chairs around the table into a circle.

Supporting Materials for Faculty and Participants

The Supporting Materials include excerpts, articles and studies from the legal, medical and social science literature about the full range of issues addressed. These materials have two purposes. For the judicial faculty and facilitators they provide grounding and analysis that will enhance their ability to present the program. For participants they serve as a resource to which judges can later turn for information on a particular aspect of this subject matter.

As noted above, the Supporting Materials for this curriculum are on the ROM portion of the *Understanding Sexual Violence DVD* and on its associated website, www.njep.org/usvj dvd, both of which are integral to the curriculum. Optimally each participant will be given a copy of the DVD to use as a post-program resource. Minimally participants should be advised that Supporting Materials for the curriculum as well as an annotated database covering a wide range of topics related to sexual assault are on the DVD website.

It is desirable to include some of these materials in the Participant's Binder, as well. These are described in the description of the Participant's Binder contents in *Appendix B*.

With respect to reprint permission to photocopy and distribute the Supporting Materials, permission has been obtained in advance by the National Judicial Education Program, provided the reprints are used for non-profit educational purposes only.

During the training, faculty should refer to the Supporting Materials in their remarks so that participants will know what is in their resource materials and be encouraged to read these materials on their own and use them as references in the course of their work.

Statistics

Rape and sexual assault statistics are complex and confusing because different studies use different methodologies and definitions, and because the number of reported and unreported rapes is so starkly disparate. The most thorough and rigorous study is *Rape in America: A Report to the Nation* published in April 1992. This study, funded by the National Institute of Drug Abuse (NIDA), was conducted by the Crime Victims Research and Treatment Center of the Medical University of South Carolina. NIDA funded this study because so many rape victims self-medicate their psychological trauma with drugs and alcohol. The complete study is

included in the Supporting Materials and should be included in the Participant's Binder. A copy is in *Appendix H*.

This curriculum utilizes the data from *Rape in America* as its general reference point. The curriculum does not rely on Bureau of Justice Statistics because the National Crime Survey from which these data are drawn has methodological flaws that result in undercounting of sexual assault victims. In 2005 the National Institute of Justice funded the Medical University of South Carolina, to update the *Rape in America* study. The curriculum should utilize the new data once they are published.

Terminology

The curriculum focuses on female victims because they constitute the majority of rape victims. Therefore, victims and complainants are referred to as "she" and defendants as "he". There is reference to male victims and female defendants in the experts' presentations and the Supporting Materials.

For ease of reference, Unit II, Victims and Victim Impact, uses the term "victim" to denote an individual identified through empirical research as a rape victim. The curriculum segments dealing with alleged victims who are complainants within the legal system use the term "complainant". The use of the term "prosecutrix" is not encouraged, as it implies that the complainant instituted the trial, while in fact s/he is a witness for the state. This term plays into the myth of the lying, vindictive woman who is out to harm a man with whom she is angry, and who is prepared to come to court to do so.

Evaluation

The program presentation should conclude with each participant completing and returning an evaluation. A sample evaluation instrument is in *Appendix I*.

Sensitivity of the Subject Matter

Rape is a highly charged subject. This is particularly true of nonstranger rape, which describes rapes occurring in social situations familiar to everyone. All faculty should be prepared for the possibility of intense, emotional and possibly angry responses from participants, as well as a hostile refusal to participate at all. It is therefore particularly important to direct non-judicial faculty to avoid being personal or confrontational with participants.

Given the high incidence of sex crimes against children and adults, it is likely that attendees at the program or members of their families will include survivors of sexual abuse or sexual assault, and that this program may be particularly painful for them. For example, after a program in Western Canada, a judge told the evaluator that his daughter had been raped while on a date two years before and that neither she nor he had yet recovered. It is of the utmost importance that no experience of sexual abuse or assault be minimized or trivialized.

Be extremely careful about asking or permitting guest speakers to ask about the personal experiences of judges in the audience. Done carefully, however, this can be a powerful consciousness-raiser. For example, a professor of criminal law at the University of Kentucky begins teaching about rape by asking each member of the class to state what he or she does on a daily basis to protect him or herself from sexual assault. She begins with the men and gets no response apart from silence and nervous laughter. When she asks the women, every one of them has something to say. The men are always amazed to learn that fear of rape is a daily concern for their female colleagues. If you use such a technique, it should not get more personal than this.

No judicial faculty, facilitator or expert should make jokes about the subject matter. This may seem an obvious precept, but the authors of this curriculum have attended training on sexual assault cases at which this happened. Although these jokes were perhaps a well-meant effort to diffuse nervous tension in the room, they worked to legitimize such jokes and trivialize the issue.

Integrating Segments of this Curriculum into Other Judicial Education Programs

Segments of this curriculum can be usefully integrated into judicial education programs focused on issues other than sexual assault.

Sentencing institutes can include presentations about victim impact, sex offenders and sex offender treatment based on Units I and II of this curriculum, as can programs on **victims' rights** and **law and psychiatry**. As noted earlier it is important that the sentencing hypotheticals not be presented without a discussion of victim impact, sex offenders and sex offender treatment.

The discussion of *voir dire* in Unit IV can be the basis for a unit in a program about **jury selection** *voir dire* specifically or **trial skills** in general.

Programs on **evidence** in criminal law can utilize Unit III on evidentiary issues in rape cases.

Programs on **judicial ethics** can address how judges can engage in community outreach and use their knowledge of rape and rape law to effect improvement in the legal system and the community without violating the Code of Judicial Conduct, as per the implementation exercise in Unit II.

Initial Exercise: Rape Information Self-Test

One suggested beginning to the program is the use of a self-test about rape. This is an interactive activity that can serve as a self-reference throughout the program. Our suggested Rape Information Self-Test and answer sheet is in *Appendix J*. The answers may be distributed at the conclusion of the program and used as the basis for the closing discussion.

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Case Study-*State v. Michael Cates*

The curriculum uses a case study, *State v. Michael Cates*, as a point of reference for the entire program. It is the focal point of several exercises and the experts refer to it at various times. The prosecution and defense statements of this nonstranger rape case are in Appendix K and should be included in the Participant's Binder. Program participants should read the case study after the self-test and before Unit I on Sex Offenders, Sentencing and Treatment so they can use it during that unit.

Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault

Unit I

Sex Offenders, Sentencing and Treatment

*A Model Judicial Education Curriculum
Developed by the*

*National Judicial Education Program
to Promote Equality for Women and Men in the Courts**

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** A project of Legal Momentum, formerly the NOW Legal Defense and Education Fund,
in cooperation with the National Association of Women Judges*

Unit I: Sex Offenders, Sentencing & Treatment

Learning Objectives: As a result of this presentation, participants will be able to:

- 1) Identify the characteristics of adolescent and adult rape-oriented sex offenders and their amenability to treatment.
- 2) Analyze the shared pathologies of stranger rapists and nonstranger rapists.
- 3) Discuss the effectiveness and availability of what is considered state-of-the-art sex offender treatment.
- 4) Identify the kinds of sex offender treatment available in their state and promote the development of methods with greater effectiveness.
- 5) Determine the implications of this information for sentencing decisions.
- 6) Apply the knowledge gained in to sentencing in cases of rape and sexual assault.

Recommended Length: at least three hours

Overview: This unit presents the most current knowledge about rape-oriented sex offenders' characteristics and treatment and a discussion of how this knowledge should be applied to pre-sentence reports and sentencing. Until recently, research into sex offenders' characteristics has been distorted by its focus on incarcerated rapists, a tiny percentage of those who actually commit sexual assaults, skewed sharply towards stranger rapists who use violence extrinsic to the rape itself. This unit presents the emerging research into nonstranger rapists, which demonstrates that both groups share an adherence to rape myths, a tolerance for interpersonal violence, and a perception of relationships between women and men as basically adversarial.

The unit documents that nonstranger rapists such as dates and acquaintances are generally recidivists, serious dangers to the community, and in need of incarceration and treatment on their first encounter with the courts. The unit also presents a discussion of state-of-the-art cognitive-behavioral sex offender treatment programs and their effectiveness in reducing recidivism, and provides an opportunity for judges to practice applying the information from this unit to sentencing hypotheticals.

The Faculty Manual presents this material in two parts:

Part I is an outline for the presentation by the sex offender expert.

Part II is a series of sentencing hypotheticals.

Faculty: Judges: Judicial faculty for two functions:

- for Part I, a judge introduces and facilitates the expert's presentation;
- for Part II, the sentencing hypotheticals, one judge to explain the exercise and lead the report back plus however many others are necessary to lead the small-group discussion at the tables.

Experts:

- An expert on adult and adolescent rape-oriented nonstranger sex offenders and state-of-the-art sex offender treatment.
- An expert on corrections and treatment options available locally.

Depending on the existence and quality of your state sex offender treatment program, the guest speaker may be an expert from your own state who both can discuss sex offender issues and describe the treatment programs in your state. If your state program is not state-of-the art, you will need a speaker who can discuss offenders and an optimal treatment program and a second speaker who can describe what actually exists in your state.

Note: If you are considering a local speaker, choose someone from your Department of Corrections who can discuss both state and private options. Using an expert from a private program may appear to be an endorsement of that program.

With respect to the content of this unit apart from the local information, give the expert the *Understanding Sexual Violence* DVD, the Outline for the Expert's Presentation and Dr. David Lisak's slides on sex offenders. If you are using the video *Mind of a Rapist*, provide that also. All are described below.

Format: A two-part plenary session, possibly including a videotape.

A judge makes a brief introduction about the purpose and objectives of this segment and how they will be achieved, then introduces the speaker(s).

An expert makes a presentation as outlined in the materials following this description of the unit.

A local expert makes a presentation about local sentencing and treatment options.

A small group exercise in which judicial faculty trained as facilitators lead a discussion of sentencing hypotheticals which takes place at the round tables at which participants are seated. The participant to the facilitator's right takes notes and presents the report back.

A judge leads the report back.

Visuals: This segment requires slides or power point. The power point slides, developed by NJEP's sex offender expert, Dr. David Lisak, are in *Appendix L* and are available electronically from NJEP. Your expert should use them as a model.

Supporting Materials: Supporting materials for this unit can be found at www.njep.org/usvj dvd, the website for the *Understanding Sexual Violence* DVD, and on the ROM portion of the DVD. These supporting materials include studies, articles and an annotated database.

Handouts: The sex offender expert's slides, with room for note taking should be included in the Participant's Binder, as well as any materials provided by the local expert.

Video: *The Mind of a Rapist* is a 24-minute video that can be shown if time allows. It can be obtained only by borrowing it from the National Judicial Education Program. This video conveys information about how sex offender treatment is conducted and how different it is from traditional psychotherapy. It makes clear that offenders can fool even mental health professionals about having achieved victim empathy, which means that probation officers and judges must regard sex offenders' expressions of remorse with extreme skepticism. Because this video was made in 1992 it is somewhat dated, but it does communicate essential aspects of sex offender treatment and how difficult it is for the offender and the treatment provider in a way that a verbal presentation cannot.

***The Mind of a Rapist* (24 minutes) – Synopsis**

This is a segment of the ABC-TV show 20/20 shown in January 1992. It is a graphic presentation of state-of-the-art sex offender treatment told through the story of Scott Guy, a man convicted of raping his live-in girlfriend of seven years, who is now an inmate in the sex offender treatment program at the Northwest Correctional Center in St. Albans, Vermont.

The video shows Guy in several different types of treatment sessions and explains three major aspects of sex offender treatment: the penile plethysmograph used to measure arousal to deviant sexual fantasies; boredom tapes, in which rapists tape and retape their violent fantasies for critique by therapists and other inmates for use in such a way that repetition eliminates the power of these fantasies to create sexual arousal; and victim empathization, in which rapists learn to perceive their victims as human beings and feel sympathy for them. The video concludes

with a scene in which Guy breaks down while playing the role of his victim in a group therapy session. But the therapist points out that even though Guy appeared sincere, he, the therapist, is not convinced.

The video includes interviews with Dr. William Pithers, director of the St. Albans sex offender program, and other staff psychologists. They explain that effective sex offender treatment is intensive -- this program includes 20 hours of therapy per week; long -- rapists are in it for at least a year or two; and extremely painful for the offender. The purpose is not to make rapists feel good about themselves or enhance their self-esteem but to make them change their attitudes and behavior.

Post Video Discussion:

Allow 15 minutes for discussion after the video, lead by the sex offender expert.

There are certain key questions that are important to raise. These questions are on the "Cheat Sheet" for this segment which follows this page and which should be given to judicial faculty. If these questions are not raised by participants, judicial faculty should raise them.

“Mind of a Rapist” – Videotape

Cheat Sheet for Discussion

If judges in the audience do not raise the following questions about this video, please ask them of the expert.

Re: Expressions of Remorse

One of the therapists in the video said that even though Scott Guy looked like he had made a breakthrough in the group therapy scene when he broke down while playing his victim’s role, they really could not be sure whether he felt something or had just learned the jargon. This was after a year and a half of treatment.

How then do we assess sex offenders who tell us or probation officers that they are sorry for what they did?

Re: Pleythysmograph

Please tell us more about the pleythysmograph. Does it hurt? Does it give electric shocks? Is it essential?

Re: Duration of Treatment

In the video, one of the therapists says that he told an offender that the only graduation certificate from his treatment program is a death certificate. Does this mean that sex offenders need treatment for life? How are we supposed to factor that in to our sentencing? What about community resources for such treatment?

Outline for Expert's Presentation For Sex Offenders, Sentencing & Treatment Unit

Note: This presentation should focus on *nonstranger* rapists -- those who rape dates, classmates, employees, co-workers, neighbors, relatives, acquaintances and friends. These are the majority of rapists, and they are difficult for judges to assess because they often have no prior records and are different in many respects from the defendants judges usually encounter.

Your presentation should include both empirical data and illustrative individual cases. To make your presentation credible to a judicial audience, participants must be made aware that there has been and continues to be extensive, respected, peer-reviewed research about sex offenders and sex offender treatment. Bringing in your own experiences to illustrate this research is necessary, but anecdotes standing alone without reference to the large existing data base will be less informative and less persuasive. This presentation should be as free of jargon as possible.

This presentation has four parts:

- I. Sex Offenders**
- II. Sex Offender Treatment and Sentencing**
- III. State Resources for Sex Offender Sentencing and Treatment**
- IV. Sentencing Exercise**

Part I is about the characteristics and typology of rapists. Part II is about sex offender treatment and can include the video *The Mind of a Rapist*. Part III is about the sex offender inmate and outpatient treatment programs available in your state. Part IV is about the implications of this information for sentencing and is the lead-in to the consideration of sentencing hypotheticals, which will take place in the plenary session room at the round tables at which participants are seated. Those discussions are led by judge/facilitators.

Judge introduces unit and speaker(s).

I. Sex Offenders

- 1. Begin presentation by telling judges something about your work with sex offenders and, if you do prevention education, potential offenders.**

This is the time for disclaimers about any street language you may use in your presentation and an explanation that you use it to illustrate the underlying misogyny of

these offenders. Judges are removed from this language. Defendants do not generally use such language in courts, but this is evidence of how they *think*.

This is a key opportunity to give judges insight that they may not possess regarding these men.

If applicable to your experience, talk about offenders with whom you have dealt whose self-presentation made it difficult for you, a professional, to perceive them as rapists, even though you knew well the harm they had caused. The point is to make judges aware of how slick and manipulative offenders may be, and how little that is accurate can be gleaned from their court appearances and presentence reports.

2. How we know what we know about sex offenders

Original and continuing research on incarcerated rapists by Nicholas Groth, Robert Prentky, Diana Scully, etc.

More recent research on self-reported nonincarcerated (generally) nonstranger rapists by Eugene Kanin, Gene Abel, Barry Burkhart, Neil Malamuth, David Lisak, etc.

Stress: These are the kinds of rapists who are in your case study, *State v. Cates*. *These are the majority of rapists.*

3. The two populations of rapists studied are basically alike

What Rapists Are *Not*:

- “Violent” in the traditional sense
- Lacking in access to consensual sex
- Mentally Ill
- From any particular racial or ethnic group

Rape is Not “Caused” By:

- Childhood sexual abuse
- Alcohol
- Impulse
- “Poor communication” or merely a misunderstanding
- The victim’s behavior, dress, or “attitude”

What Rapists *Are*:

- Strong believers in rape myths
- Strong believers in stereotypical sex roles
- Believers in acceptance of interpersonal violence
 - § (especially between men and women)

- Hypermasculine in their behavior and thinking
§ (as a result of socialization, not testosterone)
- Extremely manipulative and cunning
- Lacking in empathy
- Serial offenders and recidivists

Rape Myths to which Rapists Subscribe

- No such thing as rape
- Only “bad women” get raped
- Avoid strangers, avoid rape
- Women cry “rape”
- Women provoke rape
- It’s easy to prosecute
- She says no, she means yes
- Men can’t stop after sexplay starts
- At least one of them was too drunk
- If you’ve had sex with him before, you can’t say no
- Rapists are easily identifiable
- Rapists don’t “know” it’s rape

II. Sex Offender Treatment

The type of sex offender treatment now being offered seems extremely bizarre to many learning about it for the first time and must be explained in detail.

Begin with the statement that we are talking about treatment for defendants who have committed crimes and that the punishment of incarceration is essential to making treatment effective.

Sexual assault and rape are felonies.

Offenders should be incarcerated.

Treatment should be provided during incarceration, then during parole.

Developing sex offender treatment that works is important because offenders do get out of prison and they are recidivists. Cite studies showing that they recidivate repeatedly. For example, in a highly sophisticated study by Dr. Gene Abel, 561 nonincarcerated sex offenders were permitted 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.³

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

Traditional psychotherapy is worse than useless for sex offenders. It only confirms them in their good opinion of themselves. Urge the audience not to let offenders fool them with a treatment plan based on traditional psychotherapy.

The model of treatment now in use that shows some promise is based on treating sex offenders as the addicts they are.

As stated by Roger Wolfe of Northwest Treatment Associates in Seattle:

Whatever your relationship to a sex offender, you should keep foremost in mind [that] he is an *addict*. The individual's verbalization, promises, assurances, and contentions should be regarded in the same light as those of alcoholics regarding alcohol or heroin addicts regarding their drug. An approach of healthy skepticism is advised, and behavior should speak to you much louder than words.⁴

This treatment is called **Cognitive-Behavioral Sex Offender Treatment**. Its four primary goals are to:

- 1) Change sexual behavior and associated fantasies
- 2) Increase victim empathy
- 3) Enable the offender to know and intervene in his own deviant cycle
- 4) Reduce cognitive distortions (i.e., belief in rape myths)

Cognitive-behavioral sex offender treatment is highly specialized, rigorous and long.

Methods of Sex Offender Treatment:

Explain each method of sex offender treatment:

- Confrontative group therapy
- Polygraph testing
- Polygraphs
- Masturbatory satiation (boredom tapes)
- Covert sensitization
- Aversive conditioning

Point out that there is an ethical code governing use of aversive techniques.

⁴ Roger Wolfe, Taped site-interview by Fay Honey Knopp, Sept. 30, 1981, *quoted in* F.H. KNOPP, RETRAINING ADULT SEX OFFENDERS: METHODS AND MODELS 17 (1984).

If you are using it, introduce the video: *The Mind of a Rapist*

Explain:

Some of the methods of cognitive-behavioral sex offender treatment are illustrated in a segment of the ABC-TV show 20/20 called *The Mind of a Rapist*. We will see the videotape, discuss it, and talk about other aspects of sex offender treatment not shown in the video.

Show the videotape.

Discussion of Videotape:

Stress:

The duration of treatment. Remind participants of William Pithers' statement in the video that the only graduation certificate from a sex offender treatment program is a death certificate.

The plethysmograph is not a painful horror but a necessary part of treatment.

The great difficulty professionals have in determining whether Scott Guy, the offender who is the focus of the video, is truly remorseful. If they cannot tell after a year and a half whether Guy achieved victim empathy, how can a probation officer or a judge know?

Answer questions from the audience for a limited time, e.g., 15 minutes. The judge who is faculty for this segment should have the "cheat sheet" of questions to be raised about the video if no audience member asks them of the expert.

Again stress that sex offender treatment takes a long time, and that not re-offending requires a lifetime of effort.

There is a need for community programs like AA for sex offenders to utilize after incarceration and parole treatment. Judges should support efforts to develop them.

III. Sentencing

How does the information about sex offenders and sex offender treatment presented in this program relate to sentencing?

1. Recap on Sex Offenders

After the long discussion of sex offender treatment, it will be useful to remind participants of the points to be kept in mind when sentencing nonstranger rapists, e.g.,

Stranger and nonstranger rapists share these attributes:

A lack of victim empathy.

A consistent and persistent lack of understanding of victim cues (belief that “no” means “yes,” disregard of crying, etc.).

A belief in adversarial relationships between the sexes and hostility toward women.

A belief in the use of aggression to achieve goals.

A need for a heightened level of sexual activity, despite a comparatively high level of sexual experience and access to consensual sex. One reason for this may be that the sexual behavior of sexually aggressive males may be “motivationally overdetermined.” “Sexual activity comes to serve not just sexual motives, but needs for power and anger expression.”⁵

Note: It is important to keep shared attributes in mind because they help frame the two factors which are consistently predictive of judicial sentencing but which are not understood in all their complexity in the sex offender context: the seriousness of the offense and prior criminal record. Both of these factors are problematic as currently perceived:

When the rape involves people who know one another, with little overt violence and no weapon or visible physical injuries, it is often perceived as non-serious. But as the rape victim and victim impact unit of the curriculum documents, a rape committed by an acquaintance results in equal or greater trauma to the victim, and the unwanted sexual penetration is itself a violent act.

Sex offenders who have raped acquaintances often have no other criminal record although they are likely to be unreported recidivists of a high order; judges may therefore consider the rape in question an aberration and the defendant deserving of probation or lenient treatment.

⁵ Barry R. Burkhart, *Sexual Aggression in Acquaintance Relationships*, in *VIOLENCE IN INTIMATE RELATIONSHIPS* (W. Russel ed. 1988) 54.

Finally, “lack of ties” to social institutions is a factor encountered in convicted rapists and considered by judges in sentencing decisions. It is important to bear in mind, however, that the presence of ties to rape-supportive institutions such as some fraternity organizations and other traditionally all-male institutions such as the military may also indicate a problem source to consider in sentencing. Research indicates that college fraternities create an environment in which the use of coercion in sexual relationships with women is regarded as normal.⁶

Sex offenders, including even the “golden boys” who are not “violent” and who shine on their school athletic teams, are addicted, predatory, recidivist. They need to be incarcerated and treated while in custody.

How Long? Long enough to incorporate the terror of what they did wrong. If they stay in too long without treatment, their hostility is crystallized and concretized, and they get worse.

Note: Judges will want you to comment on this question: if we do not have a treatment program in our prison, is it wise to send the defendant away for a long time, or will it make him worse?

2. Expressions of Remorse

Urge participants to be extremely skeptical of expressions of remorse to probation officers writing pre-sentence reports to the court. Sex offenders are manipulative.

As seen in the *Mind of a Rapist* videotape, professionals who run sex offender treatment programs cannot themselves tell whether an offender has achieved the goal of remorse and victim empathy. If they cannot tell after nearly two years of treatment, how useful do you think a psychosexual evaluation in a sentencing report can be? Offenders know that if they appear to take responsibility for the crime they will get off more lightly.

3. Use of Community Service

Because of the psychology of sex offenders, community service without specialized treatment cannot in and of itself create victim empathy. If the sentence includes community service, this service should *not* be done at a rape crisis center or domestic violence shelter, as is sometimes suggested or mandated. (Moreover, no crisis center should accept such a defendant as a volunteer.)

4. The Sentence Imposed as the End Point of the Socialization Process

Rape is a learned behavior.

⁶ See Patricia Yaney Martin & Robert A. Hummer, *Fraternities and Rape on Campus*, 3 GENDER & SOCIETY 457 (1984).

If judges do not treat the sentencing of nonstranger rape seriously, there is no reason for these offenders to change their behavior.

Among experts working in preventive training to stop sexual assault, the most successful message to the athletes and other young men is, “The quarterback at your rival school cannot play any more because he is doing 15 years for raping his date.”

When judges do not treat offenders seriously, it undermines the educational and preventive efforts that, according to the National Collegiate Athletic Association, are having a positive impact.

There is a growing trend to put money into preventive efforts. This is pointless if, at the other end, there is sentencing like that in the Glen Ridge, New Jersey, case. There, three high school athletes were convicted of first degree sexual assault for raping a retarded schoolmate with a miniature broom handle. By the time of their conviction, the offenders were in their early 20s. The judge treated them as youthful offenders, sentenced them to time at a campus-like setting and put them on bail until they exhausted their appeals.

This sentence is a message to women that going to trial does not result in punishment for rapists even when the prosecution wins, and a message to young men that sexual assault carries little risk of serious sanction by the courts.

5. Preferred Approach to Sentencing

Optimal:

Incarceration toward the maximum of the guidelines with treatment while in prison and long-term parole conditioned on follow-up treatment.

No In-prison Treatment Program Available:

Incarcerate at maximum with (perhaps) longer term parole linked to treatment.

No Treatment Available In Prison or Community:

If no treatment is available in or out of prison, incarcerate at maximum and try to get a treatment program going.

6. Plea Bargains

Urge participants to try to insist on some incarcerative time. It is critical. Permit probation on condition of specialized, rigorous, sex offender treatment only. Revoke probation if all treatment terms are not met.

7. Expert Witness Testimony in Sentencing Proceedings

It is increasingly common for defendants with economic means to hire sentencing consultants to fashion alternatives to incarceration, which often include individual psychotherapy and community service.

Sex offender experts suggest that prosecutors utilize and judges admit expert witness testimony as to recidivism among sex offenders, the inefficacy of traditional psychotherapy as compared to specialized sex offender treatment, and the inappropriateness of community service to counter these sentencing proposals from defendants.

IV. State Resources for Sex Offender Sentencing & Treatment

Presentation by in-state expert from the Department of Corrections who addresses the following questions:

- How does the state corrections department handle sex offenders?
- Are there any treatment programs for incarcerated offenders?
- When during their sentence do they have access to them?
- Does the state run any programs for sex offenders on parole?
- Does the state run any programs for sex offenders on probation?
- Does the state certify private treatment providers?
- How does the state monitor sex offenders in the community?

Sentencing Exercise

Learning Objective: To apply the knowledge gained in the sex offender unit to sentencing in rape and sexual assault cases.

Overview: This part of Unit I presents several diverse sentencing hypotheticals, including the case study, *State v. Cates*, which participants are asked to read at the opening of the program. Participants are asked what information they would seek from the victim and a presentence report, and what sentences and conditions they would impose.

Faculty: Trained judge facilitators for round-table discussions.

Handouts: Sentencing hypotheticals adapted to reflect your state statutes and sentencing guidelines.

Format: This exercise is done at the tables in the plenary presentation room using the case study and hypotheticals in the Participant's Binder. It can include a role play. Facilitators lead a discussion about the appropriate sentences and appoint the judge to their right to take notes and present the report back. A judge leads a report back from each table.

Sentencing Exercises

Following are the sentencing determination for the *States v. Cates* case study and eight sentencing hypotheticals to use as time permits.

Sentencing Case Study—*State v. Cates*

Start with the case study, *State v. Cates*, on which this curriculum is based. It can be presented in one of two ways:

- Participants can read the textual presentation and discuss it in their small groups. The text is in *Appendix M* and should be included in the Participant's Binder if you choose that option.
- The sentencing proposals can be presented as a role play, followed by small group discussion. The role play script is in the following pages.

In either case there should be a report back. There is a discussion guide for the *State v. Cates* sentencing following the *State v. Cates* role play script.

Sentencing Hypotheticals

These hypotheticals are in *Appendix M*. Include all you intent to discuss in the Participant's Binder. Points to stress in connection with all hypotheticals are on the page following the discussion guide for the *State v. Cates* sentencing.

Hypothetical I involves a divorced couple and asks how the reader would respond in light of various recommendations (e.g., sex offender-specific evaluation, parole department recommendation, plea agreement, probation department recommendation in light of the plea agreement and victim impact statement).

Hypothetical II is a Florida case, which involved multiple defendants.

Note: Hypothetical I and II are followed by a detailed set of questions about pre-sentence reports, victim impact statements and the sentence to be imposed. This is one type of format you may want to use. Hypotheticals III through VIII are short case scenarios without detailed questions, which is a format you may prefer.

Hypothetical III involves rape by a neighbor.

Hypothetical IV involves rape by the regular attendant at the victim's office parking lot.

Hypothetical V involves the stranger rape of a woman who works as a bartender.

Hypothetical VI involves college students of different races and a date rape.

Hypothetical VII involves high school students and rape with a beer bottle.

Hypothetical VIII involves a drug-facilitated sexual assault with young professionals.

Sentencing Role-Play—*State v. Cates*

The sentencing proposals can also be presented as a role play with either judicial faculty or willing participants playing the prosecutor and defense attorney. Give the following pages to the “performers.”

Sentencing Role-Play—*State v. Cates*

Prosecutor

Your honor, the people are asking for a period of incarceration in a state prison facility. Any treatment should be within the prison system and as a component of any probation period. Incarceration in a state facility is appropriate because of the nature of the violent crime and impact on the victim.

Rape is a violent act, which causes severe, long-lasting harm. That is why it is charged as a major felony even if there was not other overt violence, such as a beating.

The defense attorney claimed at trial that the victim was not terrorized. You have read her victim impact statement. She wrote that she thought that the defendant was going to kill her.

Now perhaps this seems an extreme statement because there was no weapon and she wasn't beaten up, but we know that many, many rape victims fear for their lives even when, as in this case, there was no violence or injury apart from the rape itself.

The defense attorney also argued that the victim was not injured. This is wrong. He argued to the jury that she had no broken bones or even bruises. That is true. But he also said she has no scars -- which is false. The victim has suffered a deep emotional and psychological injury. She wrote in her victim impact statement that she still has nightmares and flashbacks even though a year has passed, and, worst of all, she feels she can no longer trust anyone. She used to be a lively, out-going young woman leading a normal life. Now she is afraid to leave her parents' home. She wrote in her victim impact statement that she is afraid to go out on any dates and is afraid of men in general. She has lost her sense of trust as a result of this crime, and has enrolled in a less demanding school so as to remain at home.

Defense Attorney

Your honor, the prosecutor has asked for a long period of incarceration. We are asking for the minimum period of incarceration possible under the guidelines.

My client is very sorry that things got out of hand during his date with Ms. Larsen. He understands that she is upset and he regrets the incident.

We ask you to take account of the many factors in this case that show why a long period of incarceration is not appropriate:

This is my client's first offense. He has never had any trouble with the law before.

We have met with the college, and the officials have agreed to his continuing enrollment while he is on probation.

Your honor, you have to consider what happened in this case. This was a case where things just got out of hand. They were both drinking and necking and petting.

Sentencing Role-Play—*State v. Cates (cont.)*

There were no weapons; he wasn't violent; he didn't threaten her. He did not hurt her. She wasn't beaten or even bruised. We therefore believe that in this case the appropriate sentence is minimum incarceration followed by treatment and community service.

As a result of this case, my client is already seeing a fine therapist. He meets with the therapist once a week and has been going steadily. His parents made him move back home, away from campus influence. He is not living in his fraternity house anymore. His parents are very supportive; they are paying for his therapy.

My client is also ready to do community service. We suggest that he be directed to work with a rape crisis center or a domestic violence shelter to sensitize him to issues of violence against women. This would give him an opportunity to understand the kinds of harm women suffer and develop empathy for women.

Rebuttal—Prosecution

Your honor, may I be heard again. Private one-on-one therapy is not appropriate for sex offenders. Furthermore, as to community service, absolutely no assignment to a rape crisis center or domestic violence shelter should be made. This is the worst possible assignment for someone who has a demonstrated problem with violence against women.

I take strong exception to defense counsel's characterization of this case. The jury has convicted the defendant of a felony, a violent crime. Your honor, we are here to talk about a sentence for the defendant, but the victim in this case has already been sentenced, and while the defendant will only serve a term of years, the victim has been sentenced for life. She will never forget this rape, never forget the feeling of total helplessness and betrayal, panic and fear that she felt that night.

Your honor, the defense attorney has urged you to take into account the fact that the defendant is a young man with his whole life ahead of him. I ask you to remember that before the rape the victim in this case was a young woman looking forward to the life ahead of her. The defense attorney has asked for minimum incarceration and community service. Such a sentence is not commensurate with this crime and will not deter the defendant from committing similar crimes in the future.

Note: Facilitators may also decide to address the issue of plea bargains. Although the case study deals with a trial and a conviction, a sentencing discussion could extend to what the appropriate sentence would be should the defendant plead to a lesser crime entailing no mandatory prison time.

FACILITATOR'S DISCUSSION GUIDE FOR *State v. Cates*

Participants were asked to read the case study *State v. Cates* at the start of the program. At the outset of this exercise, be certain that the judges in your group recall the basic facts of this case study. Give them a couple of minutes to look it over.

See if there is consensus as to whether this case is a definite “in” (incarceration), a probable “in,” a probable “out” (probation), or a definite “out.” (Assume for the moment that the mandatory minimum does **not** apply). Particularly if there are judges in one or the other “probable” categories, probe them about what sort of information they would like to have added to help them make a decision and how they would get it.

How will victim attitude affect the result? Ask the judges to assume that the victim sends a letter describing numerous personal difficulties she has experienced since the assault. In the alternative, assume that the victim sends a different letter in which she expresses outrage, but hopes that Mr. Cates life will not be ruined and that he will be given a chance to rehabilitate himself and will not go to jail.

If any judge is considering probation and treatment for this defendant, refer to the presentation made by the sex offender treatment expert and discuss any positive and negative indicators of success that can be gleaned from the materials. Ask what kinds of additional information participants would like to have to make a valid assessment of amenability to treatment.

Suppose, at the victim's request, an attorney representing her interests seeks to present the court with scientific data, such as the Gene Abel study tending to show that most sexual assault “first offenders” are in fact (in his words) recidivists “of a high order,” to support a request for lengthy incarceration for incapacitative purposes. Do you let the attorney introduce this material?

The defendant comes to sentencing seeking probation on the ground that he has voluntarily enrolled in individual counseling with a therapist with experience treating criminal offenders. He has an evaluation from a therapist indicating that he has been actively participating in treatment and that he is a low risk to repeat this offense because he does not fit the profile of a rapist and this was his first encounter with the law. Furthermore, the doctor has recommended that the court direct the defendant to perform community service at a domestic violence shelter or rape crisis center in order to develop victim empathy.

Suppose the prosecutor seeks to present expert witness testimony about recidivism and the need for treatment to be conducted in conjunction with incarceration. Would you admit this testimony?

Suppose the case comes to you for pretrial, and the defense attorney indicates that (despite the defense outlined in the materials) his client is interested in pleading guilty. He feels terrible about what happened, and he proposes a probationary sentence along the lines of the one outlined. Do you approach the case any differently from the way you would after a trial?

Other issues to keep in mind: Should the fact that Ms. Larsen went to Mr. Cates' room voluntarily have any impact on the sentence? What about the fact that Ms. Larsen accepted drinks from Mr. Cates? That Mr. Cates had been drinking at the charity fundraiser? Should the fact that she consented to his kissing her mitigate the sentence? What about his status as a good college student and a volunteer in the Big Brother program?

Sentencing Recommendations

Cheat Sheet

If these ideas do not emerge in the discussion, please raise them.

- Set sentences related to the gravity of the crime and the trauma to the victim.
- Recognize that nonstranger, “nonviolent” rapists, including adolescents, are a danger to the community, and sentence them accordingly.
- Require that any treatment that is part of the sentence be a vigorous program designed especially for sex offenders.
- Encourage victim impact statements.
- Acknowledge the victim and the impact of the assault at sentencing.
- Work within your state to revise sentencing guidelines to take account of psychological injuries.
- Wherever possible within the guidelines (where there is no extrinsic physical injury, use of weapon, etc.), utilize the same standards in setting bail and sentencing offenders in stranger and nonstranger cases.

Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault

Unit II

Rape Victims and Victim Impact

*A Model Judicial Education Curriculum
Developed by the*

*National Judicial Education Program
to Promote Equality for Women and Men in the Courts**

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** A project of Legal Momentum, formerly the NOW Legal Defense and Education Fund,
in cooperation with the National Association of Women Judges*

Unit II. Rape Victims & Victim Impact

Learning Objectives: As a result of this presentation, participants will be able to:

- 1) Identify the immediate, short- and long-term psychological, physiological and social impacts of stranger and nonstranger rape on female and male victims, including how victims react during the assault and the implications for the criminal justice system
- 2) Understand the neurobiology of trauma as it relates to sexual assault and the criminal justice system.
- 3) Recognize the cultural issues related to sexual assault relevant to the demographics of your jurisdiction.
- 4) Analyze the impact of the criminal justice system generally on adult victims of sexual assault.
- 5) Minimize retraumatization of the victim during the pretrial, trial and sentencing processes without compromising defendants' rights.
- 6) Apply their knowledge of rape impact to sentencing defendants convicted of rape and sexual assault.
- 7) Provide leadership in the criminal justice system and the community by promoting the sensitive, informed handling of rape cases and engaging in community outreach approved under your Code of Judicial Conduct.

Overview: This unit provides a summary of the vast research about rape victims and rape impact and the implications for the criminal justice system. It presents basic facts such as: the incidence of stranger and nonstranger rape; the percentage of rape victims who sustain physical injuries apart from the rape itself; victim response during the assault relating to the legal questions of force, consent, and resistance; the incidence and timing of rape reporting; and the symptoms and duration of Rape-Related Posttraumatic Stress Disorder and their implications for the pretrial and trial processes and sentencing.

The unit concludes with a discussion of how judges can conduct the pretrial, trial, and sentencing processes so as to minimize retraumatizing the victim without undermining defendants' rights, and how judges can utilize the information in this unit in their roles as decision makers in the courtroom, leaders in the criminal justice system, and leaders in the community.

Recommended Length: Five and one-half hours for Victim Impact, Neurobiology of Trauma and Specific Populations.

Five and one-half hours is warranted because this unit encompasses a large amount of essential material. The rape expert needs time to illustrate the psychological concepts with examples from specific cases and thus make the discussion concrete. This is particularly important when the expert(s) describes rape-related Posttraumatic Stress Disorder and the neurobiology of trauma, which are the most technical segments of the unit. Five and one-half hours allows sufficient time for the expert to show and discuss the video (see *infra*), make a didactic presentation, and answer all questions raised. This time allocation also allows for a full discussion by participants about the ways judges can use this information in their courtrooms and beyond.

Faculty: Judges:

- One or two judges familiar with the issues in this segment, who can introduce the subject and the experts, support the discussion of the video and lead the exercise on the ways judges can apply the information presented by the expert.
- Judges to facilitate the small group discussion of the exercise.

Experts:

- An expert on rape victims and rape victim impact.
- An expert on the neurobiology of trauma.
- An expert on the cultural issues relevant to the specific populations in your state (e.g., Native American, Hmong).

With respect to the content of this unit, give the expert the *Understanding Sexual Violence* DVD, the Outline for the Expert's Presentation, Dr. Janine D'Annibale's slides on rape victim impact, the description of the video *Someone You Know* and the section of this manual titled "Keys to Presenting the Expert's Part of this Unit." All are described below.

The planning committee must also read these sections to determine the unit format and what local experts and/or victim presentations to include.

Possible Additional Local Experts:

If time permits you can include presentations by other types of experts.

Forensic Sexual Assault Examiner:

Many jurisdictions across the country have instituted programs in which medical personnel, usually nurses, receive special training in how to provide health care for sexual assault victims, conduct sexual assault forensic examinations and testify about their findings. These specially trained personnel are called Sexual Assault Nurse Examiners (SANE) and Sexual Assault Forensic Examiners (SAFE). These examiners are beginning to testify in courtrooms throughout the country as both fact and expert witnesses.

Some of the *Understanding Sexual Violence* programs have included a short presentation by the director of the local SANE program. For example, Mississippi had just instituted a SANE program when NJEP presented the live curriculum presentation there. The Director of the Mississippi SANE program made a short presentation to Mississippi judges to explain how the program works and what the judges could expect when the SANE personnel begin to testify. This was of such interest to the judges that they invited her to present at the annual judicial college.

The Sample Two-Day Program does not include a presentation on Sexual Assault Forensic Examiners because these programs are not available in all jurisdictions.

State Coalition Against Sexual Assault Presenter:

Every state has a state coalition against sexual assault. These organizations usually provide resources to local rape crisis centers, act as an information clearinghouse and conduct training programs throughout the state for those involved in providing services to sexual assault victims, as well as for criminal justice personnel who deal with victims of sexual assault. These state coalitions do not usually provide direct services to victims or their families.

At some states, the *Understanding Sexual Violence* program judicial faculty has invited a member of the state coalition to observe, but not participate, in the program. In other states, someone from the state coalition has given a very brief presentation about the resources available through their organization and provided the judges with sample materials. One state invited the directors of their state coalition to attend the faculty planning meeting to share resources. Some judicial faculties, on the other hand, have not been comfortable with having a representative of the state coalition present at all. They are concerned about the appearance of bias.

It is important for judges to know what resources are available to victims in two contexts: providing support to potential jurors who disclose a history of victimization (see Unit III. *Voir Dire and Jury Questionnaires*) and participation in community outreach and multidisciplinary commissions.

It is important for state coalitions to know about sexual assault training programs conducted in their states so they can coordinate their training efforts. For that reason, NJEP notifies the state coalition about each training program and provides the coalition with a complete set of all training materials. We suggest that, at a minimum, you notify the state coalition and provide the coalition with a copy of all training materials.

Have the planning committee for your program discuss what role, if any, they would like the state coalition to play. NJEP has worked with numerous state coalitions in planning live curriculum programs throughout the country. We have found that the state coalition leaders are respectful of any boundaries set and are quite grateful for the opportunity to observe the program and receive the materials. If you decide to have the coalition director make a presentation, just give clear instructions that the presentation is to be informational only and not advocacy.

The Sample Two-Day Program does not include a presentation from the state coalitions. However, if you decide to include one, you can include a short presentation on Day Two just prior to the morning Implementation Exercise and shorten the time allowed for the exercise. In those jurisdictions where the state coalition director has presented, fifteen minutes has usually been allocated.

Rape Victims:

You may also want to invite one or more rape victim(s) who have gone through the trial process to speak. Victims can describe how going through the criminal justice process affected them. Optimally, the victim will have been the victim of a nonstranger rape so that the gravity of these kinds of assaults can be made real to the participants. If a victim is going to speak, she should be prepared for the program by both the victim impact expert and a judge on the faculty so that her presentation will focus on the areas for which judges have responsibility. For example, how well or badly she was treated by police should be less prominent than how she felt about the sentence imposed and how it related to the impact the assault had on her life.

Format: A four-part plenary session that ends with a small group exercise done at the tables and a report back.

A judge introduces the topic and explains why the information about rape victims and rape impact is important for the judiciary to know. The judge explains that the expert's presentation will enable participants to recognize rape myths and determine when an expert's testimony might be valuable. This presentation will also help judges think about steps they might take to make the criminal justice system more accessible to victims without undermining defendants' rights.

A judge should introduce each of the expert presenters.

Part I: Expert introduces and shows *Someone You Know* videotape (see Video, *infra*) and leads discussion about it, with judicial faculty input.

Expert makes presentation about rape victims and rape impact.

Additional local experts present as planners decide.

Part II: Expert makes presentation about the neurobiology of trauma.

Part III: Expert makes presentation about the cultural issues relevant to the jurisdiction.

Part IV: At their tables participants discuss how they can apply this information in their roles as judges and leaders in the criminal justice system and the community. The participant to the facilitator's left takes notes for the report back. (See Implementation Exercise, *infra*.)

Judge(s) lead a "report back" and discussion in which the ideas generated by participants at their tables are shared and critiqued.

Supporting Materials: Supporting materials are in the *Understanding Sexual Violence DVD*, on its website, www.njep.org/usvjdvd, and in the Participant's Binder as explained below.

Handouts: Include in the Participant's Binder:

- The slides/materials provided by the Victim Impact Expert
- The slides/materials provided by the Neurobiology of Trauma Expert
- The slides/materials provided by the Specific Populations Expert
- Any slides/materials provided by the local experts

The sheets for developing a list of actions judges can fairly take to minimize retraumatizing victims during the judicial process. (See Implementation Exercise, *infra*.)

During the report back for the Implementation Exercise create a sheet on which the ideas generated during this exercise are listed. This is distributed at the end of the training. In case time does not permit, a prepared handout is at the end of the directions for this unit. (See Implementation Exercise, *infra*.)

Visuals: This segment requires slides or power point.

- The power point slides developed by NJEP's victim impact expert Dr. Janine D'Annibale are in *Appendix N* and are available electronically from NJEP.
- The power point slides developed by NJEP's neurobiology of trauma expert, Dr. David Lisak are in *Appendix O* and are available electronically from NJEP.

- The power point slides developed by NJEP's Native American victims expert, Sarah Deer, are in *Appendix P* and available electronically from NJEP. Your experts should use these as a model.

Video:

Someone You Know. This video is an integral part of the program. As noted earlier, studies indicate that what is learned visually is remembered far longer. Moreover, "expert" statements by faculty or guest speakers about the trauma of rape cannot convey the reality as the women in the video do in their own words. Even if you have a rape victim as a speaker, we strongly encourage you to show this video. The victim/speaker you invite may not cover all the points in the video and, as only one person, will not be able to convey how universal the trauma of nonstranger rape is.

Someone You Know is a powerful video that graphically conveys the incidence and trauma of rape by acquaintances, dates and intimates. The 30 minute videotape has two parts. Part I (21 minutes) is about the prevalence and impact of nonstranger rape. Part II is about how women and men can stop rape. This section can be omitted from the program because the way it is presented is not immediately relevant to the course content. Note, however, that its point -- that it is men who commit rape and who must stop rape -- is important.

The rape victim expert should see and take notes on the video before the program in order to develop questions and a presentation that builds on the video and the opening exercise. A synopsis of the video appears below.

***Someone You Know* (21 minutes) - Synopsis**

The video begins with a voice-over reenactment and printout of the transcript of an actual call to 911. It opens with the female victim screaming that someone is trying to break into her home and continues with her on the line to the police as the man breaks into her home and rapes her. The male narrator of the video points out that most women fear stranger rape, but that *Someone You Know* poses a greater threat, as revealed in the 1985 statistics on reported and unreported stranger and nonstranger rape which he recites.

This is followed by interviews with 7 women -- 5 in their 20s, one about 30, one 50; 6 white, 1 black -- who were raped by nonstrangers: a long term ex-boyfriend, dates, a friend's brother, and a gang of college students. The women describe the horror of the experience and its indelible impact on their lives. These rapes happened between one and ten years before the video was made, and the women are still traumatized. They have nightmares, flashbacks, great difficulty in trusting any man, constant fears of rape and other symptoms of Rape-Related Posttraumatic Stress Disorder, once called, in this context, rape trauma syndrome.

The scenes with the rape victims are interspersed with commentary by the director of the Santa Monica Rape Crisis Center and a leading academic researcher on campus rape. These experts explain that contrary to common misperceptions, rape by someone you know is not simply "bad sex," but rather a horrible violation in which women feel totally powerless and often fear for their lives.

Someone You Know is an intense video that has a strong effect on viewers. After Part I ends, leave a moment or two of silence to allow the video to sink in and let participants collect their thoughts before turning on the lights and beginning the discussion.

It is important to allow time for discussion after the video presentation. We have presented this video with and without discussion and found that a discussion much improved the understanding of the issues. For example, the first victim in the video married a year and a half after the rape. She still reports flashbacks, difficulty with her sexual relationship with her husband, and suicidal thoughts and actions. Nevertheless, several judges in a program which did not allow time for discussion said at lunch that they felt the fact that she was able to marry lessened the impact of the trauma. By airing this in discussion, the judges understood more clearly that the marriage was a desperate attempt at normalcy.

In case certain key questions are not asked during the discussion, provide the judicial faculty with the "Cheat Sheet" that follows this page so they will be reminded to ask these questions.

Note: *Someone You Know* invariably leads participants to think about their families and ask what they should tell their daughters. The victim impact expert and the judge facilitating this unit should be sure to comment also on what judges should be telling their sons, and should bring the discussion back to the judges' role in these cases. Do not let the personal element derail the focus on the court system and the judicial process.

Stopping the Video: Part I of the video does not have a formal end, but the themes clearly switch at this point. Stop the video after approximately 21 minutes (after Gail Abarbanel, Director of the Santa Monica Rape Crisis Center, talks about how striking it is that every rape victim she has seen believed she was confronting death).

Someone You Know - Videotape

Cheat Sheet for Discussion

If judges in the audience do not raise the following questions about this video, please ask them of the expert.

Victim Who Married:

The first woman in the video got married a year and a half after the rape. If she was so traumatized, how could she get married? Does that mean she wasn't really so upset?

Duration of Posttraumatic Stress Disorder:

One of the women in the video said the rape had happened ten years ago and she is still terrified. Is such a long duration of Posttraumatic Stress Disorder unusual?

Level of Violence/Use of Weapons:

You said before the video began that the stories in the video were atypical in that they involved a lot more violence and weapons than is usual. Is the reason these women are so traumatized the fact that they were beaten up and threatened with guns or other weapons?

Current Statistics:

Participants may note that this is an old video that cites statistics from 1985 and ask whether they match current data. The expert should say that they do and that she/he will say more about this shortly.

Keys to Presenting the Expert's Part of this Unit:

Experts' Presentation Style

The rape victim experts who present this material should avoid jargon and abstractions. The presentation should be as concrete as possible so that participants understand:

- 1) What the terminology means, e.g., emotional liability means bursting into tears for no apparent reason; and
- 2) How this information relates to the aspects of the criminal justice process for which a judge has responsibility.

For example, the expert should not simply say that rape victims often deny what has happened to them in an effort to maintain control of their lives. The important point is that there are ways in which denial affects the victim's behavior and that explain why she did things that may not make sense to either the judge or the jury, such as waiting weeks to report, or returning to the high-risk scene of the crime, such as a bar.

The expert should explain that denial can prevent a woman from reporting the attack or from reporting the full details of what happened, using examples from her or his own crisis center to convey just how powerful denial can be in these cases. For example, the Chief of the Sex Crimes Unit in the Queens, New York, District Attorney's Office received a 6 A.M. telephone call from an Assistant District Attorney reporting that she had been attacked, but that there was no penetration. The unit chief insisted on meeting the ADA at the hospital with the police and found out that there had been digital, vaginal and anal penetration. This is also a perfect example of what could be characterized later as an inconsistent story.

Explaining and Reinforcing the Reasons Judges Need to Know This Material

Some judges who attend presentations about rape victim impact report that the material is interesting but they do not see why they should know it. It is essential for the rape victim expert and the judicial faculty to repeatedly make the links between this material and its relevance to what judges do.

Judges need an in depth understanding of rape victim impact for several reasons:

Assessing Credibility: How a victim behaves during and after the rape and at trial may affect a judge's and jury's sense of her credibility. If judges or jurors have expectations about how she should have resisted or reported or whether she should cry or be calm or show anger at trial, how well she meets those expectations will effect their assessment of her credibility. Research from Stanford Law School shows that judges "leak" their assessments of witness credibility to juries through verbal and nonverbal language. Thus, if judges have erroneous expectations about how "true" victims of rape behave, and the complainant does not meet those expectations, judges may communicate their faultily-premised skepticism to the jury, as well as act on it themselves.

Therefore, judges need to understand how individual victims behave and why in order to assess credibility fairly.

***Voir Dire* and Jury Instructions:** Knowledge about rape victim impact can effect the questions judges ask or permit during *voir dire*, the use and content of preliminary jury instructions and the content of final jury instructions. For example, the curriculum explains that despite the lack of “violence” or extrinsic injury that would convey to the ordinary observer the basis for a “reasonable” fear, many women experience fear of death during an otherwise “nonviolent” rape. The curriculum describes the phenomena of “frozen fright” and “dissociation” as explaining what some people inaccurately refer to as “passive cooperation or acquiescence” or “reluctant consent.”

Admitting Expert Witness Testimony: In many situations rape victims behave in anomalous ways that are counterintuitive to what most people expect, such as not resisting and not making a prompt complaint. Understanding these phenomena will assist judges in making decisions about the admission of expert witness testimony to explain these behaviors to the jury.

Plea Bargains and Sentencing - Understanding Psychological Injury: Victim impact should be an essential element in decisions about plea bargains and sentencing. Judges need to understand the way psychological injury operates in rape cases in order to make decisions about accepting pleas and setting sentences commensurate with the injury. There have been many complaints that rape sentencing guidelines fail to take into account psychological injury. Judges need to understand how that injury operates in order to know when they have valid grounds to enhance sentences above the guidelines.

It is particularly important that judges understand that nonstranger rape is usually even more traumatizing over the long run than stranger rape because victims experience more shame and guilt and their ability to trust is destroyed. This level of victim trauma should be reflected in sentencing decisions.

Minimizing Retraumatization of the Victim: Rape is a vastly underreported crime. An important reason is victims’ fear that a trial would be a second assault. Judges want crime victims to believe that they can find a fair hearing in the courts. Thus, judges need to learn about ways they can conduct the pretrial and trial processes to minimize retraumatizing the victim without undermining defendants’ rights.

Part I. Outline for Expert's Presentation on Rape Victim Impact

Use of the Term "Victim": At the beginning of your presentation explain that as someone who works within the therapeutic community treating individuals who seek counseling for sexual assault, you will use the term "victim." Acknowledge your awareness that in the criminal justice system, an individual alleging rape is called a "complainant." She or he does not become a "victim" until there is a plea bargain or a conviction. The individual accused is the "defendant." Judges are extremely concerned about appropriate terminology because to call a complainant a victim before conviction presupposes the defendant's guilt and violates due process.

Your presentation should include both empirical data and illustrative individual cases. To make your presentation credible to a judicial audience, participants must be made aware that there has been and continues to be extensive, respected, peer-reviewed research about rape victims and victim impact. Bringing in your own experiences to illustrate this research is necessary, but anecdotes standing alone without reference to the large existing data base will be less informative and less persuasive.

Video: *Someone You Know*

The victim impact expert introduces the video. Following is a suggested introduction.

We will begin with a video in which you will meet women who were victims of rape by men they knew -- principally boyfriends and dates -- and hear about the impact on these women over time.

Based on my ___ years as Director of the Rape Crisis Intervention Center and the ___ thousands of women to whom we have provided short- and long-term care, I can tell you that the strong and diverse reactions of the women in this video are in no way unusual or atypical.

What is atypical about the victims in this video is the amount of violence and the weapons used in their rapes. As we will discuss again, few nonstranger rapes do involve weapons or significant force, but the impact on the victims is just as profound.

As you watch this video, think about your response to each of the women. For example, did any of their responses seem to you extreme? Are you surprised or skeptical about the duration of their responses?

Make a quick note of anything that raises questions for you. We will discuss the video after we watch it.

Note: In addition to the questions raised in the cheat sheet for the video, an issue to point out is that the video opens with a 911 call from someone being attacked by a stranger. This communicates the horror of the moment. Subsequently we hear victim/survivors talk about their experiences. For some listeners, this may not have same power: The point needs to be made that the event itself was just as terrifying for the victims of nonstranger rape who describe the aftermath for us in the video.

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Part II. Presentation

The following presentation was developed by NJEP in consultation with Veronica Reed Ryback, Director of the Beth Israel Hospital Rape Crisis Intervention Center in Boston, who was the victim impact expert for the early presentations of this curriculum. Subsequent presenters on victim impact have utilized their own formats to present this material and update it with new knowledge on the neurobiology of trauma. The slides from Dr. Janine D'Anniballe, Executive Director, Moving to End Sexual Assault (MESA), who has presented on victim impact at recent *Understanding Sexual Violence* programs are in Appendix N.

Statistics. The curriculum and its video and DVD versions utilize statistics from the National Women's Study conducted by the Medical University of South Carolina and published in 1992 as part of *Rape in America*. Explain that because of the way the study was conducted it is still considered the gold standard, and that subsequent studies show the same high, and often higher, rates of nonstranger rape.

For example, *The Sexual Victimization of College Women* study, funded by the National Institute of Justice and published in 2000, found that in 96% of completed rapes and 92% of attempted rapes, the offenders were classmates, friends, boyfriends or ex-boyfriends or acquaintances.⁷

In 2005 the National Institute of Justice funded the Medical University of South Carolina to update the National Women's Study. These data should be used in the curriculum when that study is published.

I. Rape is a Profound Injury In and Of Itself

Although relatively few rapes involve weapons or result in serious physical injury, the psychological consequences are profound.

II. Brutality of the Attack Does Not Determine Level of Fear or Reaction During the Crime or Afterward

Rape in America study, 1992:

70%	Reported no physical injuries
24%	Reported minor physical injuries
4%	Reported serious physical injuries

⁷ Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, *The Sexual Victimization of College Women*, U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, Research Report (Dec. 2000).

Yet. . .

49% **Feared death or serious injury during attack**

and, as will be discussed later,

Victims of nonstranger rape with no violence extrinsic to the rape itself usually suffer even greater lasting psychological trauma than victims of stranger rape.

III. The Vast Majority of Rapes are Committed by Someone Known to the Victim

Rape in America study, 1992:

22% Stranger rape
75% Nonstranger
3% Not sure/Refused to state

Relationship between Victim and Perpetrator

9% Husband/Ex-Husband
11% Father/Step-Father
10% Boyfriend/Ex-Boyfriend
16% Other Relatives
29% Other Non-Relatives
22% Stranger
3% Not Sure/Refused to Say

IV. Few Rapes Are Reported To The Police

Rape in America Study, 1992:

Only 16% of acknowledged sexual assaults were ever reported to the police.

Stranger rape is far more likely to be reported than nonstranger rape.

Delayed reporting to hospitals and/or police is much greater in nonstranger rape than stranger rape.

V. Post-Rape Medical Examination Is Traumatic

Note to Expert: This material is optional. Include it only after discussion with planning committee and if time permits because it may generate extensive, time-consuming questions.

Describe the elements of a post-rape medical examination and how evidence collection is conducted to complete a Sexual Assault Evidence Collection Kit:

The medical examination includes:

Examination and treatment for cuts and bruises
Preventative treatment for sexually transmitted infections and pregnancy
Complete gynecological exam, including pelvic and rectal exam for internal damages
Referral for appropriate HIV testing (it is illegal for hospitals to test for HIV without the patient's permission)

Types of evidence collected :

- Clothing worn during the assault
- Debris on victim body (dirt, leaves, fibers, hairs)
- Fingernail scrapings
- Foreign materials and swabs from the surface of the body (blood, semen, saliva, sweat, etc)
- Pubic and head hair combings
- Oral, anal and vaginal/cervical or penile swabs and smears
- Known blood or saliva sample or buccal swab for DNA analysis and comparison⁸

Explain how traumatic it is for a victim to undergo an internal examination and evidence collection procedure, especially if she has no privacy or encounters insensitive practitioners or law enforcement.

VI. Reasons For Failing To Make A Prompt Complaint

Not knowing the assault was legally rape

Denial and suppression of emotions related to the rape

Psychogenic amnesia - unable to remember some or all details of the assault

Fear of retaliation

Fear of being disbelieved or blamed

⁸ OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS: ADULT/ADOLESCENT 93 (2004).

Fear of loss of privacy

Fear of the criminal justice system

Embarrassment and shame when recounting details of rape

VII. Stages of Response to Rape

NOTE: The expert should be sure to emphasize that this section addresses symptoms that sexual assault victims report experiencing and that professionals have observed. Victims may experience a range of symptoms that include many or none of those discussed and these symptoms range in duration and severity.

Impact (rape to three months)

Outward adjustment (three months to one year)

Resolution (one to two years or longer)

Integration (two years to lifetime)

Note to Expert: In your presentation, use examples from actual cases to make this material understandable and memorable. Wherever possible, tie the presentation to a specific assault or trial that illustrates the symptoms. Except as noted, the quotations in this section are drawn from the case records of Professor Veronica Reed Ryback, Director, Beth Israel Hospital Rape Crisis Intervention Center, and Clinical Instructor in Psychiatry, Harvard Medical School. You may use these in your presentation.

A. Stage I: Victim Response During The Assault

Dissociation and Frozen Fright During the Assault: Implications for Force and Consent

Note to planning committee: Because dissociation and frozen fright are responses to rape that occur **during** the assault, it is important for the expert to discuss why traditional ways of defining nonconsent do not match the way women actually react at the moment of an assault. Judges appear to be particularly interested in this aspect of victims' response to rape.

The goals are:

1. To explode myths that work against the credibility of sexual assault victims.
2. To explain the implications for the criminal justice system of the way women really react to rape.
3. To demonstrate the application of expert testimony about this reality in the courtroom.

VII. Cont'd.**Dissociation:**

In *Trauma and Recovery*, Dr. Judith Herman describes how some trauma victims go into an altered state of consciousness when they perceive themselves to be helpless in these situations. This occurs for victims of both stranger and nonstranger rape. About this dreamlike detachment called "dissociation" Dr. Herman writes:

Sometimes situations of inescapable danger may evoke not only terror and rage but also, paradoxically, a state of detached calm...The person may feel as though the event is not happening to her, as though she is observing from outside her body, or *as though the whole experience is a bad dream* from which she will shortly awaken.⁹

As one rape survivor told Dr. Herman:

I left my body at that point. I was over next to the bed, watching this happen...I dissociated from the helplessness. I was standing next to me and there was just this shell on the bed...When I repicture the room, I don't picture it from the bed. I picture it from the side of the bed. That's where I was watching from.¹⁰

As another rape survivor related to researcher Diana Russell:

I felt that I was outside my body, watching this whole thing, that it wasn't happening 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.¹¹

Dissociating has critical consequences for a victim's ability to respond in any way, much less to resist. In Dr. Herman's words, dissociation produces "*profound passivity in which the person relinquishes all initiative and struggle.*"¹²

⁹ DR. JUDITH HERMAN, *TRAUMA AND RECOVERY* 42-43 (1992) (emphasis added).

¹⁰ *Id.* at 43.

¹¹ DIANE E.H. RUSSELL, *THE POLITICS OF RAPE* 19 (1974).

¹² Herman, *supra* note 9, at 43 (emphasis added).

VII. Cont'd.

Frozen Fright

Frozen fright is a feeling of complete paralysis. The victim's fear is so intense that she is immobilized, like a deer in the headlights, and cannot offer any resistance.

Some rape victims do not resist because they are literally frozen with fright. As Dr. Judith Herman of Harvard Medical School writes:

When a person is completely powerless, and any form of resistance is futile, she may go into a state of surrender. The system of self-defense shuts down entirely. The helpless person escapes from her situation not by action in the real world but rather by altering her state of consciousness. Analogous states are observed in animals, who sometimes "freeze" when they are attacked. These are the responses of captured prey to predator or of a defeated contestant in battle. A rape survivor describes her experience of this state of surrender: "Did you ever see a rabbit stuck in the glare of your headlights when you were going down a road at night. Transfixed--like it knew it was going to get it--that's what happened." In the words of another rape survivor, "I couldn't scream. I couldn't move. I was paralyzed. . .like a rag doll."¹³

Loss of Consciousness

Victims may black out entirely. This was the response of one woman 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 absolutely no recollection of being dragged 40 feet and would deny that she ever screamed had she not heard the tape made by the rest of the stakeout team.¹⁴

¹³ Herman, *supra*, note 9, at 42

¹⁴ JUDITH ROWLAND, THE ULTIMATE VIOLATION 45 (1985).

Fear of Death

Even when no force is used beyond the intimidation factor of the man's size and/or greater 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.

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.

Strategic Decisions Not to Resist

Apart from being psychologically immobilized, some victims make a strategic decision not to resist because they fear that resisting will result in severe physical injury apart from the rape or even death.

B. Rape to Three Months: Common Symptoms Following the Assault**Disorientation - Psychogenic Amnesia - Dissociation**

"I can't believe this happened to me. It still doesn't seem real. It's taken me a week to report it to the police -- I can't remember the exact details of what happened. I guess I'm afraid that people won't believe me."

Maria, high school senior, raped by classmate with whom she was studying for final exams

Psychological Disorganization - Nightmares, Flashbacks, Sleep and Appetite Disturbances, Difficulty Concentrating

"I haven't slept for days. As soon as I fall asleep I have a nightmare of someone trying to rape me. Every time I look at food I get nauseous and can't eat. I can't concentrate and don't see how I'm going to return to school."

Emily, college sophomore, raped by classmate at fraternity party

Constant Reliving of the Rape

“Every time I walk into my bedroom I see him standing over me and telling me to take off my clothes and not to say a word. I can’t get it out of my head. It’s as if it’s happening right now.”

Jennifer, 28-year-old business executive, raped by a former boyfriend

Re-enactment of Experience

Sometimes victims reenact the traumatic moment with a fantasy of changing the outcome of the encounter. In their reenactments, victims may even put themselves at risk of further harm. Some reenactments are consciously chosen.

“I had to prove they weren’t going to get me down. The guys who raped me told me, ‘If we ever find you out here alone again we’re going to get you’. And I believed them. So it’s always a bit of a terror walking up that lane, because I’m always afraid I’ll see them. In fact, no one I know would walk up that lane at night alone, because it’s just not safe. People have been mugged, and there’s no question that it’s dangerous. Yet part of me feels that if I don’t walk there, then they’ll have gotten me. And so, even more than other people, I *will walk up that lane.*”

Sohaila, 17-years-old, gang-raped in her neighborhood quoted in Judith Lewis Herman, M.D., Trauma and Recovery 39-40 (1992).

Shock, Disbelief, Helplessness, Powerlessness, Loss of Control

“I can’t believe this happened. People keep asking me if I screamed or tried to talk the guy out of it, but I was so scared at the time. I was afraid he was going to kill me so I just lay there.”

Allison, college senior, raped by a man she had dated several times

VII. Cont'd.**Guilt And Self-Blame - Loss Of Self-Esteem**

“I was so stupid. I should have known better than to let him drive me home from the party. He seemed so nice and trustworthy -- maybe I’m a bad judge of people. I keep thinking that if only I had tried to struggle with him I could have avoided what happened. I feel like such a fool.”

Wendy, 24-year-old nurse, raped by a man who was a guest at her best friend’s engagement party

Emotional Lability and Constriction

“Yesterday I was walking across campus. It was a beautiful day, and all of a sudden I burst into tears and couldn’t stop crying.”

“I can’t seem to feel anything even though I know something terrible has happened.”

Deborah, graduate student, raped by her college professor

Extreme Fear And Hypervigilance

“I jump at every noise. I’m afraid to be in my apartment or to walk the streets alone. I’m convinced he’s out there, waiting to hurt me again.”

Melissa, 32-year-old school teacher, raped in an alley by a man she had talked with at a bar in her neighborhood

Extreme Calm And Denial - Psychic Numbing

“It’s like it happened to someone else. Sometimes I just think it was a bad dream and I’ll wake up to find it didn’t happen -- I feel completely numb.”

Valerie, high school sophomore, raped by her brother’s best friend

Irritability And Outbursts Of Anger

“I’ve been feeling so angry at everyone. Here is this guy still roaming the city scott-free while I’m going through hell. Nobody knows how awful this is.”

Susan, 32-year-old secretary, raped by a man who came to her apartment to raise money for animal rights

Depression - Suicidal Thoughts And Actions

“Sometimes I wish he had killed me rather than having to endure this pain. Sometimes I feel so down I think about going to sleep and never waking up. Last night I found myself with a handful of sleeping pills- if my husband hadn’t been there I might have taken them.”

Laura, 40-year-old college professor, raped by a colleague at an academic conference

Physical Symptoms - Fatigue

“I am so physically run down and exhausted that I can’t function. Since the rape, my stomach is upset all the time.”

Molly, high school junior, raped by a friend of the family

Shame - Internalized Sense Of Damage

“I’m wondering if I’ll ever be the same again. I want to tell my boyfriend but I don’t know how he’ll react. I’m afraid he’ll be repulsed by me. I feel so dirty I can’t stop taking showers.”

Laurie, college junior, gang-raped at a fraternity party

VII. Cont'd.**Changes In Sexual And Social Functioning**

“I could never tell my family about this -- it would kill them. They’d worry and try to keep me home more. I’m not even sure if I want my friends to know or if I want to burden them with this.”

“I just don’t want my boyfriend to touch me -- I get nervous when he does now. Even when I see men on the street I get upset. I just don’t feel the same since this happened.”

Paulette, high school senior, raped by a fellow member of the high school yearbook committee

B. Three Months to One Year: Outward Adjustment**Efforts To Deny The Rape Happened**

“It seems like something bad happened a long time ago. I don’t want to think about it or even go on talking about it.”

Carla, divorced mother of teenage son and daughter, raped by a man she met through a dating service

Minimize The Impact Of The Rape

“Everybody says it happened months ago -- you should be over it by now. Maybe they are right – I’ve got to get on with my life.”

Lisa, worked the night shift at a convenience store, raped by co-worker who offered a ride home from work

Rationalize The Reasons It Happened

“I guess it was just bound to happen -- especially since I was the one who broke up with him. He couldn’t control his temper.”

Alexis, airline attendant, raped by a pilot who was her boyfriend for one year

VII. Cont'd.

Avoid Thoughts And Actions That Remind Her Of The Rape

“I’ve moved into another dorm and dropped all the classes we were in together. I’ve never gone back to the fraternity house even though I had many friends there. At least I don’t have to be constantly reminded of what happened.”

Tonya, college freshman, raped at fraternity party by captain of the football team

Depression, Anxiety, And Fear Remain But Are Experienced As Less Distressing

“I still feel low and scared at times but it’s better than how I felt a few months ago when I couldn’t live a normal life at all.”

Judy, 51-year-old widow, raped by her brother-in-law

Fewer Episodes Of Reliving The Rape

“Some days I don’t think about the rape at all -- it is such a relief. Maybe I can finally forget about it.”

Karen, 35-year-old lawyer, raped by the head of her law firm after a meeting

C. One to Two Years or Longer: Resolution

Return Of Original Symptoms

“Even though it’s a year since the rape, I’ve been feeling upset again. I’m really confused about this. I’ve been having flashbacks and nightmares like I did just after it happened. Will I ever get over this?”

Eve, graduate student, raped while on vacation by a man who had offered to give her a guided tour of the island she was visiting

VII. Cont'd.**Victim Able To Express Full Range Of Emotions About Rape**

“I’m just beginning to feel the anger and the sadness – it’s as if I’ve been keeping my feelings in a vault waiting until it feels safe enough to let them out.”

Anne, young mother, raped by a co-worker on a political campaign committee

Develops Ways Of Coping With Rape Trauma

“I’ve gone to counseling and taken a self-defense course. I’m learning to trust myself again in social situations, although I still get nervous when I’m with people I don’t know well.”

Judith, 21-year-old music conservatory student, raped by her teacher and mentor during a practice session

D. Two Years to Lifetime: Integration**Acceptance And Understanding Of The Rape Relative To The Victim’s Future Life**

“I’ve learned that bad things can happen to good people. I’ll never forget the rape but I know that I can return to life with my wound healed and my spirit unbroken.”

Agatha, marathon runner, raped in high school by her boyfriend after the senior prom

Reorganization Of Life So She Can Resume Relationships, Work, And Regain A Personal Sense Of Safety And Well-Being

“I am beginning to believe that I can rebuild my life in a way that I feel safe and strong. I’ll never forget what has happened to me, but I’m ready to use what I have learned to help myself and other victims.”

Karen, college senior, raped by a friend’s boyfriend when she was a freshman

VIII. Each victim responds differently during the attack and after, depending on her age, ethnic and cultural background, economic class, life situation, the circumstances of the rape, her specific personality style, and the responses of those from whom she seeks support.

IX. Controlled And Expressive Self-Presentation Styles

About half of victims present themselves in a “controlled style,” which means they hide their emotions and appear calm, even flat, in their affect. The other half present themselves in an “expressive style,” which means they display fear, anger and anxiety. How complainants present themselves in court is not indicative of whether they were raped.

X. Special Issues For Male Victims

Sense of loss of manhood

Fear of homosexuality

Confusion over gender identity, roles, and sexual orientation

Aggressive assertion of masculinity

Sexual dysfunction with consensual partners

Higher likelihood of sustaining physical injury

XI. Marital Rape

Some people do not believe that a man can rape his wife. Others assume that since the couple is accustomed to having sexual intercourse, the rape is just “bad sex.”

In reality, men do rape their wives, independently and in conjunction with wife-battering.

The psychological trauma of marital rape is especially profound because trust is shattered in the individual whom the woman normally has the most reason to trust, her experience of rape will rarely be validated, and she sees her rapist daily.

XII. Response of the Revictimized Victim

Many women have been raped more than once or experienced sexual abuse as children. According to *Rape in America* over 43% of victims – more than 5 million women – were revictimized victims. Contrary to some lawyers’ and judges’ misconceptions, having been raped before does not make a subsequent rape less traumatic. Indeed, victims of prior rapes and sexual abuse are almost always **more** traumatized by a subsequent assault.

When victims report to hospital emergency rooms and rape crisis centers with well-trained personnel, they are quickly asked if they have ever been the victim of a previous sexual assault. This is not done to see if they have a penchant for alleging rape, but because knowledgeable professionals know that the revictimized victim will have the most difficult recovery.

XIII. How The Trauma Of Stranger And Nonstranger Rape Compare

“Blitz rape” and “confidence rape” are terms developed by the clinician/researchers who first described rape trauma syndrome. These terms describe stranger and nonstranger sexual assault. Blitz rape is a sudden attack by a stranger. Confidence rape involves “some nonviolent interaction between the rapist and the victim before the attacker’s intention to commit rape emerges.”¹⁵

Clinical experience indicates both overlap and differences in the issues, concerns, and symptoms of blitz and confidence rape victims. **The surprising finding is that women raped by someone they know often have a harder time recovering than women raped by strangers.** These victims are more likely to keep their rape secret because of guilt and shame, be blamed by themselves and others, and be less likely to believe themselves deserving of sympathy and professional help.¹⁶

Nonstranger rape also has a unique effect on the victim’s ability to form relationships. According to Dr. Veronica Reed Ryback, Director of the Beth Israel Hospital (Boston) Rape Crisis Intervention Center, “Another 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.”¹⁷

The *State v. Cates* case study illustrates this kind of case, where the defendant betrayed the victim’s confidence by manipulating her into coming to his room where they would be alone and she would be vulnerable. People find it hard to understand how much

¹⁵ Sally I. Bowie et. al., *Blitz Rape and Confidence Rape: Implications for Clinical Intervention*, 64 AM. J. - PSYCHOTHERAPY 180 (1970).

¹⁶ *Id.* at 184-85.

¹⁷ Allison Bass, *A Date Rape@ Victims Bear Scars Longer, Study Finds*, BOSTON GLOBE, Sept. 30, 1991, at 1.

psychological damage was done in a case like this because there was no violence in the sense of stab wounds or bones broken, and the victim admits that she had a bit of a crush on the defendant. So the mistaken attitude is, even if she wasn't totally willing, it was just bad sex. But the information we are given in this case study about how the victim's life fell apart is the norm in these confidence rape cases.

XIV. Duration Of Rape-Related Posttraumatic Stress Disorder

Studies of rape victims at different points in time post-rape have shown the long lasting psychological consequences of sexual assault. In one study, 94% of female rape victims exhibited symptoms two weeks after the rape, decreasing to 47% at three months post-rape. In another study, 41% of victims exhibited Rape-Related Posttraumatic Stress Disorder at 1 - 2 1/2 years. In a third very long-range study of victims who had been raped on average 15 years before the inquiry, 16.5% had current RR-PTSD symptoms.

XV. Rape Is A Critical Factor In The Mental Health Of American Women

Rape in America study, 1992:

3.8 million American women have had Rape-Related Posttraumatic Stress Disorder.

Compared to women who have never been raped, a rape victim is:

3 times more likely to have a major depression

4.1 times more likely to contemplate suicide

13 times more likely to attempt suicide

(13% of all rape victims attempt suicide)

More likely to use and abuse drugs and alcohol as a way to self-medicate

More likely to fear contracting AIDS

XVI. Victim Fears About The Court Process

Influenced by reports of other victims' experiences in the courts

Response of police, lawyers, legal advocates, judges

Fear that she will be put on trial: "second victimization"

Likelihood of conviction

Trial delays

Fear of confronting assailant

Fear of reliving rape

Fear of reprisal from assailant

Fear of inability to emotionally withstand trial process

XVII. Conclusion

Every rape is a “real rape,” whether the offender is a stranger or someone the victim knows or is married to.

Rape by someone the victim knows is vastly more prevalent than stranger rape and often has even more severe long-term consequences.

Although rape rarely causes physical injury, it is a profound injury in and of itself and causes long-term psychological trauma.

The trauma often causes victims to delay reporting, suppress or totally forget aspects of the crime, and make inconsistent statements. This behavior should be evaluated in the context of the trauma of rape and not be assumed as evidence of fabrication.

How judges conduct the judicial process has a major impact on the recovery of rape victims and the willingness of other victims of sexual assault to report and prosecute.

XVIII. Sentencing Recommendations Related To Victim Impact

Encourage victim impact statements.

Wherever possible within the guidelines (where there is no extrinsic physical injury, use of weapon, etc.), utilize the same standards in setting bail and sentencing offenders in stranger and nonstranger cases.

Set sentences related to the gravity of the crime and the trauma to the victim.

Acknowledge the victim and the impact of the assault at sentencing.

Work within your state to revise sentencing guidelines to take account of psychological injuries.

Part II. Neurobiology of Trauma

Recent brain research on the physical effects of a traumatic event, such as a sexual assault, on a victim's brain reveals that traumatic memories are actually created, stored and retrieved differently than non-traumatic memories. The difference is that it is harder to access these memories, and that at times victims remember different aspects of the traumatic event. This has profound implications for the criminal justice system, which expects crime victims to have perfect recall of the crime and consistently give an identical account to police, prosecutors and in the courtroom.

The power-point presentation and a short paper on the neurobiology of trauma by NJEP's expert, Dr. David Lisak are in *Appendix O*.

Your expert should use these as a model for his or her slides, which should be placed in the Participant's Binder. Dr. Lisak's paper can be reprinted and distributed in the Participant's Binder as well.

Part III. Sexual Assault and Specific Populations

As noted in the presentation on victim impact, each victim responds differently during the attack and after, depending on her age, ethnic and cultural background, economic class, life situation, the circumstances of the rape, her specific personality style and the responses of those from whom she seeks support. Thus, it is important to be aware of a victim's cultural background and its implications for the case.

If you are in a jurisdiction with a significant Native American or Alaska Native population, you should present the text and slides developed by Sarah Deer of the Tribal Law and Policy Institute and include them in the Participant's Binder. Both are in *Appendix P* and are available electronically from NJEP.

This presentation also provides a model for whatever Specific Populations – e.g., Hmong, Hispanic, Muslim – are a presence in your jurisdiction. Note that Specific Populations are not just those from particular ethnic or religious backgrounds. The National Judicial Education Program can provide additional information on sexual assault and the following Specific Populations:

- African American Victims
- Asian and Pacific Islander Victims
- Latina Victims
- Adolescent Victims
- Mentally Disabled Victims
- Physically Disabled Victims
- Immigrant Victims
- Male Victims
- Sex Worker Victims
- Regionally Oriented Victims
- Lesbian, Gay, Bisexual and Transgendered Victims
- Mentally Ill Victims

IMMIGRANT WOMEN: SPECIAL CONCERNS

There are many barriers to immigrant women's seeking protection from violence. Some are a function of cultural norms that make it taboo to disclose sexual assault or problems within the family or community. Others relate to immigration status and language difficulties. Your program should address these issues in the context of sexual assault cases

- **Fear of Deportation Because of Immigrant Status**

- **Fear of Justice System**

Many immigrants fear the justice system. Based on their experiences in their native countries, they believe that court systems are partial and favor men and the economically powerful. Since immigrant women are often totally economically dependent on their husbands, they see themselves as doubly disadvantaged in trying to deal with the courts.

- **Unfamiliarity with U.S. law**

Many immigrant women come from civil law countries where cases are decided based on written affidavits. They are not aware that their verbal testimony about what has happened has value.

- **Cultural Norms**

In some cultures any public acknowledgement of rape is taboo. It makes an unmarried woman damaged goods whom no one will marry and causes husbands to repudiate and punish their wives.

- **Abuse by Interpreter Issues**

For any non-English speaking person, a well-trained interpreter competent in that individual's language and dialect and pledged to impartiality is an essential component of access to justice. For immigrant women, interpreters pose special problems in rape cases.

Sakhi is a New York City organization that works to end violence against women within the Asian Indian, Pakistani, Bangladeshi, Nepali and Sri Lankan communities in the New York metropolitan area. Sakhi reports numerous complaints about untrained interpreters who come from the defendant's community and openly side with him. For example, before a hearing the interpreter is in the waiting room chatting with the defendant about the case.

A Philadelphia judge tried a case in which two Korean men were charged with raping a Korean woman. The men claimed not to speak English. Although the judge disbelieved them, she was obliged to appoint an interpreter. This interpreter sat at the defense counsel table between the two defendants. During the direct examination of the alleged victim, the judge looked up from taking notes to find that the interpreter and both defendants were all making threatening faces and gestures at the witness.

- ú Need for interpreter fluent in the complainant's language and dialect as she speaks it.

Having an interpreter who truly speaks the same language and dialect as the witness is crucial. In one case a Cuban battered woman tried to tell the judge she had been “stabbed” with a knife. The interpreter who was from Uruguay and spoke a different form of Spanish said that she had been “scratched” with a knife.

- ú Do not use the complainant's companion or child as an interpreter.

The companion may be the rapist, or a friend or family member with his or her own biases, and may filter what the woman says. For example, the companion may be the victim's aunt who believes it is shameful for women to complain publicly about their husbands' actions and who therefore edits some of her niece's answers.

The victim may edit herself because she feels ashamed and concerned that the friend or family member will repeat the story to others in the community.

Never allow the victim's children to act as interpreters. This is a tempting option because minor children often accompany their mothers to court and are frequently the most fluent, or only, bilingual persons present. Succumbing to this temptation disserves both the child and the victim. The child is surviving the trauma of learning about the violence done to his or her mother. The mother may edit her story so as not to put her child in the position of having to retell the mother's account of sexual abuse. Without the full story, the judge may perceive the violence as less serious than it is.

- ú Do not use volunteer interpreters.

Volunteers are usually tied to the community and highly subject to retaliation by the defendant and his family. Volunteers' fear may lead them to edit the victim's testimony.

Part IV. Implementation Exercise: How Judges Can Fairly Apply the Experts' Presentations in Their Roles as Judges in the Courtroom and Leaders in the Criminal Justice System and the Community

Introduction

A judicial faculty member introduces and explains the exercise and asks the trained facilitators at each table to indicate who they are. The judge to the facilitator's immediate left is designated as the reporter to take notes and give a report back.

Table Discussion (45 minutes)

At each table the facilitator directs participants to the sheets in the Participant's Binder on which participants list how they can apply the information presented by the experts in their roles as decision makers in the courtroom, leaders in the criminal justice system and leaders in the community, "How Can Judges Conduct the Pre-Trial, Trial and Post-Trial Processes to Enhance Fairness and Minimize Retraumatizing the Alleged Victims Without Undermining the Defendant's Rights?" These four sheets are in *Appendix Q*. Instruct participants to spend ten minutes writing down their suggestions. The discussion which follows will be richer because each judge was allowed time to reflect on the material.

Then the judges at each table discuss among themselves for 30 minutes the actions they will take in the three contexts. Have everyone give their suggestions for sheet one, Pre-Trial, before moving on to sheet two and so on. Ask the judges, in the interest of time, not to repeat colleagues' suggestions but only to add new ones. The goal is for the group to generate a comprehensive list of actions each participant can take. The judge second to the facilitator's right designated as reporter to take notes and give the report back.

Alternate: If time is tight, this exercise can be done in a slightly different way. As NJEP presented the *Understanding Sexual Violence* curriculum across the country we incorporated the suggestions judges made during this Implementation Exercise into a list titled "Participating Judges' Recommendations" to which we added after each program. Usually we distribute the list at the end of the exercise, after the participants have developed their own suggestions. However, to save time, the list can be given to participants at the start of the exercise, with the instruction that they review the recommendations, discuss what they would and would not do themselves, and add to the list if they wish. The list of "Participating Judges Recommendations" follows the exercise sheets in *Appendix Q*.

Community Outreach

The last sheet of the Victim Impact Implementation Exercise asks judges to respond to the statement "Actions I can take outside the courtroom as a leader in the criminal justice system and the community."

State coalitions against sexual assault and other community and court-related groups are eager to have judges participate in multidisciplinary commissions focused on improving the way courts

and the criminal justice system handle rape and sexual assault cases, and in community outreach programs to help the public understand the legal aspects of these crimes.

As NJEP has conducted this exercise across the country, we found judges responding to the issue of community outreach in three different ways. Some embrace it, some do not want to be involved with anything outside their courtrooms, and some are interested and willing but concerned that participating in this kind of activity would violate the Code of Judicial Conduct. Therefore, for this exercise to work well, the faculty and facilitators must be familiar with their state code of judicial conduct and able to discuss with their colleagues how they can engage in community outreach without violating the code.

Judicial involvement in community outreach has become much more accepted in recent years, and in many states is actively supported by the chief justice. The American Judicature Society has issued a monograph about the kinds of commissions and task forces on which judges may properly serve, Cynthia Gray, *Ethics and Judges' Evolving Roles Off the Bench: Serving on Governmental Commissions*. Judges have used NJEP materials in a variety of programs, such as prevention programs at colleges and programs on the legal system for large-scale victim services conferences.

NJEP can provide more detailed guidance on how to approach the question of judicial ethics and the judge's role *outside* the courtroom. It is helpful to include in the Participant's Binder the relevant sections of your state Code of Judicial Conduct and any relevant decisions from your supreme court or ethics advisory committee.

Report Back (30 minutes)

A report-back for this segment is essential because it makes all participants aware of the rich range of ideas that were generated and the opinions surrounding these ideas. Participants also utilize this time to air any discomfort with changing any part of the judicial process that takes place before conviction, lest it appear to be advocacy or too victim oriented. This gives the faculty opportunity to respond in full.

The report back should follow the model of the small group discussion, in that each table's reporter should air the recommendations for sheet one before moving to sheet two and so on. Direct the reporters who follow the first speaker to add only suggestions not already made. While one judge faculty member leads this report back, another notes the ideas on a flip chart. Then both judges lead a discussion of the suggestions from the tables and raise any ideas from the "Participating Judges' Recommendations" sheets that are not raised in the discussion. The victim impact expert comments as appropriate. If at all possible, the ideas generated by the group should be converted into a handout and distributed at the end of the program with the prepared list of suggestions.

Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault

Unit III

Sexual Assault Law: Evidentiary Issues

*A Model Judicial Education Curriculum
Developed by the*

*National Judicial Education Program
to Promote Equality for Women and Men in the Courts**

*Lynn Hecht Schafran, Esq.
Director*

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Project Attorney*

** A project of Legal Momentum, formerly the NOW Legal Defense and Education Fund,
in cooperation with the National Association of Women Judges*

Unit III. Sexual Assault Law: Evidentiary Issues

Learning Objectives: As a result of this unit, participants will be able to:

- 1) Rule appropriately on evidentiary issues such as the Rape Shield Law, prior bad acts and the confidentiality of victims' records.
- 2) Rule appropriately on admission of expert witness testimony in rape/sexual assault cases.
- 3) Enhance the fairness of jury deliberations through rulings on evidentiary issues.

Recommended Length: One and one-half hours

Format: A plenary session with panel of judges providing commentary
or
A small-group discussion with a report back.

The alternate formats are explained in detail below.

Faculty: Judges: Depending on format, a moderator and panelists *or* a moderator and facilitators.

Handouts:

- 1) The case study *State v. Cates*. Give participants a few minutes to read this case study again.
- 2) Ten evidence questions. These are in *Appendix R* and should be included in the Participant's Binder.
- 3) A hypothetical that raises *Crawford v. Washington* testimonial issues. A sample is in *Appendix R*. Your version should also be included in the Participant's Binder.
- 4) The local law compendium if one is prepared, see *Appendix E*.

Evidence Exercise Formats:

Panel/Plenary Session Format:

The judge(s) moderating the program and the facilitators constitute a panel to respond to the evidence questions in *Appendix M*. Each judge is assigned specific questions and asked to research them and be able to discuss them with citations to the specific statutes and caselaw that govern in your state.

After the panelist comments on a question, the moderator invites participants to ask questions and offer comments.

Small Group Exercise Format:

Table Discussion:

- At their tables, participants discuss the evidentiary questions, led by a facilitator.
- The judge sitting second to the left of the facilitator is designated the reporter to take notes and present the report back.

Report Back:

- For each question one table gives a report back, describing the ruling(s) at that table and the reasoning.
- The moderator invites questions and comments from the full group. This format is repeated until all the evidence questions have been discussed

Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault

Unit IV

***Voir Dire* and Jury Questionnaires**

*A Model Judicial Education Curriculum
Developed by the*

*National Judicial Education Program
to Promote Equality for Women and Men in the Courts**

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Director

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Project Attorney

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Unit IV. *Voir Dire* and Jury Questionnaires

Learning Objectives: As a result of this unit, participants will be able to:

- 1) Understand how myths about rape affect juror attitudes.
- 2) Conduct a *voir dire* that elicits and minimizes misconceptions about rape that could interfere with fairness in jury deliberations.
- 3) Conduct a *voir dire* sensitive to the survivors of child and adult sexual assault in the juror pool.

Background on the Need for a *Voir Dire* Unit

Different states and the federal system, as well as individual judges, have sharply differing approaches to *voir dire*. In some courts, lawyers conduct a virtually unlimited *voir dire*. In others, the lawyers' time is limited to, for example, an hour, and in still others, the judge imposes a rule of 15 minutes for the first panel, 10 minutes for the second, 5 minutes for the third, and 1 minute thereafter. In the federal system and some state courts, jury selection is conducted by the judge based on questions submitted by the attorneys and is often notably brief.

If your state utilizes a system of brief questioning by the judge or sharply limits lawyers' time, many judges may be reluctant to examine the question of *voir dire*, insisting that it is unnecessary because it is not an issue in their courts. An exploration of this issue will perhaps demonstrate that rape trials without adequate *voir dire* cannot be fair trials. The moderator and the facilitators must invite the participants to keep an open mind as they work through this issue.

If your initial response to the *voir dire* material was that it is unnecessary, it is likely that at least some of the participants will have the same reaction. Therefore, it is important that whoever opens the unit and the facilitators for the small-group exercise acknowledge this attitude as an issue while stating that they think addressing *voir dire* is important. During the development of this curriculum, there were several instances in which judges who at first dismissed the need to discuss *voir dire* reversed themselves after reviewing the material.

Whether it is lawyers who conduct the *voir dire* in your state or judges using questions lawyers submit, the *voir dire* unit should center on the relevancy of the questions, as judges need to understand the myths in order to understand that a particular question is relevant. In those states where lawyers conduct *voir dire*, the facilitator could also query the participants as to when and whether it would be appropriate for the judge to ask additional questions if s/he is dissatisfied with the *voir dire* that is being conducted.

Overview: This unit is intended to make judges aware of how ill-informed and biased the jury pool may be about rape and sexual assault and the consequences of this stereotyped thinking for fairness in the judicial process. Myths about rape interfere with jurors' and judges' proper application of the law. Biases impose extra-legal proof requirements on the state and result in inappropriate plea bargains, acquittals, and sentences.

The unit provides an opportunity for judges to practice countering these biases by developing *voir dire* questions that they would permit or ask themselves.

Additionally, the high incidence of child sexual abuse and adult sexual assault makes it almost certain that there will be survivors in the jury pool, and possibly perpetrators as well. This unit shows judges how to use jury questionnaires to conduct a *voir dire* sensitive to these realities.

Recommended Length: Two hours

Jury Panel—1 hour.

Expert on Jury Research on Sexual Assault Jurors—20 minutes

Expert on Jury Questionnaires in Sexual Assault Cases—20 minutes

Voir Dire Questions Exercise—20 minutes

Faculty: Judges:

- for Part I, a judge to moderate the jury panel
- for Part II, a judge to introduce the expert on jury research and moderate discussion
- for Part III, a judge to present on jury questionnaires
- for Part IV, a judge to explain the exercise and lead the report back, plus however many other judges are necessary to lead small-group discussions at the tables.

Experts:

- for Part II, an expert on jury studies regarding rape trials. This could be a lawyer, a law professor, a psychologist or a jury consultant.

- Format:** This unit has four parts.
- Part I is a panel composed of jurors who sat in recent nonstranger rape/sexual assault trials in the jurisdiction presenting the curriculum.
 - Part II is an expert on jury research.
 - Part III is an judge on juror questionnaires.
 - Part IV is a small group exercise on *voir dire* questions for the *State v. Cates* case study.

Note: Parts II and III can be combined and the expert can cover both the research and the use of jury questionnaires.

Visuals: The jury research and jury questionnaire segments of this unit require slides or a powerpoint. The slides developed by NJEP Director Lynn Hecht Schafran and Project Attorney Claudia Bayliff on jury research are in *Appendix S*. The slides developed by Judge William Hughes on jury questionnaires are in *Appendix T*. Slides combining these topics are in *Appendix U*. Your experts should use these as a model.

Supporting Materials: Supporting materials are on the *Understanding Sexual Violence* DVD and its website, www.njep.org/usvdvd.

- Handouts:** The Participant's Binder should include:
- The slides on jury research and juror questionnaires, with room for note taking. (See *Appendices S-U*)
 - The short paper on sexual assault jury research by Lynn Hecht Schafran in *Appendix S*.
 - A juror questionnaire for sexual assault cases. (See *Appendix T*)
 - The exercise sheet for developing *voir dire* questions. (See *Appendix V*)

Part I. The Jury Panel

Including a Panel of Jurors who have Served on Sexual Assault Cases

One of the most exciting innovations with this curriculum has been the inclusion of the jury panel as part of the program. When NJEP has presented its live curriculum, the judicial educators and judicial faculty in every state except one have included a panel of jurors who deliberated in local sexual assault cases. In each jurisdiction, the judicial faculty tries to find jurors who served on nonstranger sexual assault cases in which the complainant was an adult, since that is the focus of this curriculum. The goal is to get four or five jurors, some of whom served on a case in which there was an acquittal and some who served on a jury that voted to convict. One of the judicial faculty members questions the jurors about their experience and their decision-making process. After the jurors respond to the faculty member's questions, the participants can then ask questions of the jurors. The judges have been very respectful of the jurors and have found the panel discussions fascinating.

The easiest way to find jurors is to enlist the help of judges in the district closest to where the program will take place. Ask the local judges about recent nonstranger sexual assault cases in which the complainant was an adult. Have the local judge obtain the jury list and either have the local judge or one of the faculty judges contact the jurors and ask them to participate. Jurors have been much more willing to participate when they have been called by a judge.

When the judge contacts the jurors, the judge should explain about the program and what is expected of the jurors. The jurors who have participated in these panels are very nervous and intimidated about speaking to judges. It is important for the judge who calls the jurors to reassure them that the judges will not be second-guessing or attacking them, but that the judges rarely get the opportunity to talk to jurors and are very eager to learn from what the jurors say. The judge also needs to give the jurors clear instructions about where to go and the exact time requirements. In previous panels, there was usually one juror who did not appear after promising to do so. Therefore, we suggest that you plan for this possibility by scheduling one more juror than you actually need.

Once the jurors have been selected, it is important for the judge who will be questioning them to talk to them ahead of time to reassure them and give them a sense of the type of questions they will be asked. Jurors often give the judges valuable information in these informal discussions that helps the judge tailor the questions and elicit interesting information from the jurors during the panel discussion.

The judge who will be moderating the panel should also get background information about the two cases, so that he or she can give a short explanation about the case to the participants before the jurors begin answering questions. The moderator should give a brief synopsis of each case to be discussed at the beginning of the panel.

The questions asked obviously depend on the circumstances of each particular case, but the following is a list of issues or topics the judicial moderators have asked jurors about in other

panels. The judge questioning the jurors can tailor the specific questions using these topics as a guide:

- Jurors' general background:
 - Prior jury experience;
 - Reaction to serving on this jury;
- Factual disputes:
 - Dispute about whether intercourse had occurred;
 - Dispute about consent;
 - Dispute about force;
- The complainant:
 - The complainant's appearance and demeanor on the witness stand;
 - Role the complainant's demeanor played in the deliberations;
 - Role the complainant's credibility played in the process;
- Reporting the crime:
 - When and how the crime was reported;
 - Delayed reporting, if applicable;
 - Role the delayed reporting played in deliberations;
- Physical injuries present or absent:
 - If no physical injuries, role that played in deliberations;
 - Torn or damaged clothing;
 - Medical examination or medical evidence;
- The defendant:
 - Mental image of a rapist;
 - Whether the defendant fit that image;
 - The defendant's appearance and demeanor at the defense table;
 - Role the defendant's demeanor played in the deliberations;
 - Whether the defendant testified;
 - If the defendant testified, the role the defendant's credibility played in the deliberations;
- Use of drugs or alcohol on the part of the complainant or the defendant:
 - Role drugs or alcohol played in the deliberations;
- Deliberations:
 - Crucial point in deliberations;
 - Which elements were not proven (for the acquittal case);
 - Additional information that was missing;
 - Deliberation process;
 - Length of time deliberations took;
- The jury:
 - Jury composition by race/ethnicity and by sex;
 - Were certain jurors more forceful than others;
 - Whether everyone participated;
 - Whether men and women participated equally;
- Whether there were holdout jurors:
 - What happened to change the holdout juror(s)' mind;
 - Whether the holdout juror was comfortable with the decision;

- Jury instructions:
 - Helpfulness of the instructions;
 - Whether the instructions were given to the jury during deliberation;
 - Whether the jury referred to the instructions during deliberation; and,
- How judges can improve the process.

Obviously, this list contains many more topics than can be covered in an hour, so the judicial moderator for the panel will have to tailor the questions to the specific panel.

It is critically important for the moderator to keep the questioning of the jurors focused on issues related to sexual assault. Do not let the discussion turn to general areas, such as what the jurors understood “reasonable doubt” meant.

Be sure to have someone available to meet the jurors when they arrive. We also suggest that you arrange a head table with microphones for each juror. They often speak softly and need the microphone to be heard by all of the participants.

After the juror panel, someone escorts the jurors from the room and thanks them for their participation. The participants take a quick stretch break and then the group reconvenes for a group discussion and juror panel.

Part II. Jury Research on Sexual Assault Jurors

The need for a thorough *voir dire* to expose juror biases is born out by the substantial research on sexual assault jurors. This research documents their reliance on extra-legal factors, their propensity to victim blame, and their difficulty in moving beyond the stereotyped mental picture of a “real rape” and “worthy victims” to grapple fairly with the way sexual assault really happens. The jury panel in Part I of this unit make these attitudes vividly alive for the judges.

The presentation on the research on sexual assault jurors shows how the responses of the jury panel relate to juror attitudes in other jurisdictions. The information about public opinion polls and the attitudes of young people shows how widespread and ingrained these attitudes are, and that time alone is not changing them. An expert on sexual assault jurors and public opinion about sexual assault presents this information and takes questions.

With respect to the content of Part II, give the expert the text by NJEP Director Lynn Hecht Schafran and the slides developed by Schafran and in *Sexual Assault Cases* by NJEP Project Attorney Claudia Bayliff in *Appendix S*.

Part III. Jury Questionnaires

The jury pool will almost certainly include survivors of child and adult sexual assault and possibly perpetrators as well. *Voir dire* on victimization and perpetration should be conducted sensitively and with as much privacy as possible to avoid retraumatizing victims. Judges should know what the resources for victims are in their community and be able to direct jurors to them. Remember that some jurors will be disclosing adult sexual assault or childhood sexual abuse for the first time and this will be profoundly upsetting for them.

For the content for Part III, give the expert the slides and jury questionnaire developed by Judge William Hughes in *Appendix T*. Note in Judge Hughes’ slides the slide that says 20.3%. When Judge Hughes began using a questionnaire in rape and sexual assault cases and keeping records of members of the jury pool who asked to be excused because of personal victimization, he found a 20.3% increase in the number of pool members asking to be excused.

Note: The following questions concentrate on biases encountered by the prosecution because the issues and biases facing the defense in rape cases are generally the same as those facing the defense in other cases. These issues include: (1) exploration of the fact that the prosecution bears the burden of proof, particularly important in acquaintance and “date” rape cases if both the defendant and the victim take the stand and appear fairly credible; (2) exploration of the fact that no negative inference can be drawn from a defendant’s decision not to take the stand; (3) exploration of the issue of prior bad acts if the court has ruled this evidence admissible; (4) exploration of race/sexuality issues in an interracial rape case; and (5) exploration of the possibility of mistakes with scientific evidence such as DNA.

Part IV. Developing *Voir Dire* Questions for *State v. Cates* Case Study

In this exercise, participants are referred again to the curriculum case study, *State v. Cates*. They are asked to formulate key *voir dire* questions necessary for this fact pattern if a relatively unbiased jury is to be empanelled.

Although open-ended questions take more court time, they allow the attorney or judge to elicit answers in narrative form, creating a more comprehensive picture of the juror and his/her biases. Open-ended questions both educate the juror and provide the attorneys and judges with a better sense of whom to exclude. Closed questions that require only a “yes” or “no” answer may not elicit the genuine feelings of the jurors and so may not elicit existing biases, particularly in rape cases where the subject matter is often embarrassing or otherwise difficult.

The purpose of having participants develop a *voir dire* for *State v. Cates* is to give them practice in figuring out where juror biases lie in rape cases.

Note that a consistent discussion point is that overt evidence of disagreement with the law as written is not necessarily “corrected” by the standard admonition to the juror to “set aside your personal feelings.” The promise to apply the law fairly cannot be kept when the juror holds certain beliefs about the proper mode of social and sexual behavior between men and women, but does not realize that these are biases. In such cases, there may be times in the *voir dire* process when elimination of the juror for cause is appropriate *before* the judge explains the law and asks the juror whether she or he can put aside personal feelings and apply the law fairly.

***Voir Dire* Exercise**

An effective way to begin this exercise and stimulate conversation is with the *voir dire* vignette from the *Understanding Sexual Violence* DVD or a role play. In either case, the judge second to the facilitator's left should be designated the reporter to take notes and give the report back. During the report back, ask each table to give three questions they developed and not to repeat one another on the subject matter.

DVD Vignette:

The *voir dire* vignette at the start of the *Voir Dire* unit in the DVD is just a few minutes long. After viewing the vignette, the facilitators should ask the judges at their tables whether they would permit, or themselves ask, the questions at issue, and what specific questions they would ask to empanel a fair jury. Facilitators should also ask participants whether, if the attorneys did not ask, or ask them to ask, these questions, they would ask them themselves.

Role-Play:

Below is the script for a live role-play of a *voir dire* vignette in *State v. Cates*. After each point the facilitators should lead a discussion at their tables using the questions in the text boxes and the teaching points headed "Areas of Possible Bias in the *State v. Cates* Case Study" at pages 19-20.

In addition to the questions in the text boxes, facilitators should elicit from the group what specific questions they would craft to empanel a fair jury in *State v. Cates* and whether, if the attorneys did not ask, or ask them to ask, these questions, they would ask them themselves.

On the page after the script with text boxes is the script to give the players. The role-play cast is:

- Judge
- Prosecutor
- Defense Counsel
- 4 Jurors

If you decide to use the role-play, have seven copies of the script ready and give them to participants to play these roles.

Role Play Script for *State v. Cates***Point 1: Expectations About Rapists' Characteristics**

Prosecutor: Juror A, good morning. Do you think that you could pick a rapist out of a group of men?

Juror A: I doubt it.

Prosecutor: Well, do you have a mental image of what a rapist looks like?

Juror A: I don't know what you are getting at.

Prosecutor: Well, let's suppose you have a good-looking, well-spoken college student. Would someone like that be part of your mental image of a rapist?

Defense: Your Honor, I object to that question.

Judge: Juror, just hold off your answer. Counselor, that question is unnecessary. Move on.

Prosecutor: May I approach the bench?

Judge: All right.

Prosecutor: Your Honor, I really need to explore this. Nobody likes to convict good-looking well-educated young men. In rape cases juries don't believe such men can be rapists. In the William Kennedy Smith trial, one juror told the press that she knew Smith was innocent because he was too good-looking to need to use violence for a night out.

Recently a Washington Post journalist wrote about a rape trial in which she was a juror. She said that for some of the jurors, the defendant's good looks were a deciding factor for acquittal. Good looks in rape cases means "this guy doesn't have to rape to get sex, he's too good-looking..." Jurors equate good looks with access to sex and no need to rape. So they can't adequately evaluate the credibility of the witnesses.

Defense: Judge, you know that jurors are *always* more prone to believe a defendant with good looks who is well spoken. It's no different in rape cases, and the prosecution doesn't get to explore this issue during *voir dire* in other cases.

Questions for facilitators to put to participants:

Would you give the prosecutor time for this line of questioning?

Would you permit a challenge for cause if the juror says he or she would have difficulty believing that a good looking man [or a man with an active consensual sex life] would commit rape?

Note: For purposes of eliciting discussion, more latitude was given this prosecutor than would probably occur in most courts.

Point 2: Is It Rape if Parties Know Each Other?

Prosecutor: Juror B: Do you think that a sexual encounter could be rape even if the woman and the man know each other?

Juror B: Well, that would depend on the circumstances.

Prosecutor: Well, suppose the individuals I'm talking about had a few dates. On the evening of the alleged assault, they were out on a date. What do you think now?

Juror B: I think it depends on the kind of date.

Prosecutor: Let's say they kissed and necked and both had a few drinks.

Juror B: I'd have problems with that.

Prosecutor: Don't you think she has the right to say no even if she's been drinking with or dating the guy?

Juror B: But it wasn't just drinking. I think if they knew each other, they were on a date, they were kissing and so on, this is different from the guy in an alley.

Prosecutor: Juror C, what about you? If the parties know each other and are out on a date, and the people prove that the defendant forced sex on the complainant without her consent, would you agree that it was rape?

Juror C: If they knew each other well, and were busy kissing and necking like you described, I probably wouldn't think it was rape, unless he really beat her up.

Prosecutor: But if I said to you that the judge is going to charge that the law of rape does not differentiate between these kinds of situations and the kinds of stranger rapes that you feel are valid, would you be able to follow the law?

Juror C: Yes, I'd be able to do that, but you'd have to show me a lot to prove to me that someone could be raped without being beaten up in a situation like the date you described.

Prosecutor: Well, Juror D, what do you think about the scenario I described?

Juror D: I think it doesn't matter whether they know each other or even what their relationship is.

Prosecutor: Judge, may we have a sidebar? I would like to challenge jurors A and B for cause.

(Sidebar)

Judge: I don't see why this should be a challenge for cause. I am going to instruct the jurors that there is no difference under the law between a situation in which a woman is sexually assaulted by a stranger and one in which a woman is sexually assaulted by someone she knows. I also ask each juror whether he or she can put aside their biases and follow the law. That should be enough. If you have a problem with that, you can always use your peremptory challenges.

Prosecutor: Your Honor, I disagree. Research shows that jurors are very respectful of judges, and many will say yes just to please you. Therefore, if jurors indicate bias in their initial responses, we should treat that very seriously, and to be fair and have jurors who can assess credibility of all the witnesses, they should be struck.

Defense: I disagree, Your Honor. I don't think they should be struck for cause. I think they can be fair, and if the state disagrees, that's what peremptory challenges are for. This is an attempt by the state to start prosecuting the case.

Judge: I don't think this is sufficient bias for a challenge for cause. Please continue the *voir dire*.

Prosecutor: Juror X, suppose you have a friend to whom you have lent money several times. Each time the friend has come to you for money, you have given him small amounts. One day the friend comes to you for a much bigger loan, and you don't want to give him the money. But he pins you against the wall and doesn't listen to your protests, so you give him the amount he asks for. Is that illegal? **[Juror nods head and says "yes."]** You've given him money before: why should it be a crime that he forced you this time? Is your analysis any different for sex?

Judge: Counselor, we don't have all day here. This line of questioning is out of line.

Prosecutor: May I approach the bench to explain?

Judge: Yes, briefly.

Prosecutor: Judge, I know there are limits on the amount of time we can use for *voir dire*. But this isn't about any misconceptions people have about the law of rape: your instructions will hopefully cure that. What the legal instructions will not cure is these jurors' inability to put aside their biases about sex and the nature of sexual assault and their attitudes toward women. That's why I need to relate rape to another crime.

Your Honor, people don't think of this as being biased. When sex is in question, they think, "That's just the way it is." Those jurors won't really listen to the complainant because in their minds she isn't a victim. Even if they believe her account, they won't consider what happened to be rape -- maybe the penetration was without her consent, but she had it coming.

Defense: Your Honor, this is supposed to be jury selection, not an opportunity for the prosecution to give a course on rape.

Questions for facilitators to put to participants:

What are the limits you would allow for the questioning?
Which if any jurors would you strike for cause?

Areas of Possible Jury Bias in the *State v. Cates* Case Study:

The couple engaged in consensual kissing just prior to the rape.
Only minimal force was used and Ms. Larsen was not injured.
If allowed, Mr. Cates will testify that Ms. Larsen flirted with most if not all of the men at the party at which they met.
There was no "violence" as it is commonly understood.
Ms. Larson went to Mr. Cates' apartment late at night.
Both Ms. Larsen and Mr. Cates were drinking.
Mr. Cates is a good-looking, middle class, articulate college student.
Ms. Larsen did not make a prompt complaint.
Lifestyle of complainant, e.g. extensive partying.
Ms. Larsen called Mr. Cates the day after the alleged rape.

***Voir Dire* Questions Must Therefore Reach:**

What constitutes consent.
What constitutes resistance.
What constitutes force.
Whether a woman can be raped by someone she is dating.
Intent (because Mr. Cates is raising a mistake of fact defense).
Whether women who behave in certain ways (e.g. drink, go to a man's apartment) "deserve to be raped," or alternatively "cannot be raped."

“Assumption of Risk;” “Victim Precipitation;” and “Women as Limit Setters.”

Biases as to what rapists look like.

Inferences raised by lack of prompt complaint.

The fact that the only two witnesses to the event are the complainant (a woman) and the defendant (a man).

In addition, any rape *voir dire* should try to discern possible biases by jurors who are unidentified victims of rape or sexual assault. See note, *infra* at 21.

Voir Dire for State v. Cates

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