Importance of Voir Dire in Rape Trials

Lynn Hecht Schafran

In March 1992 police in Queens, New York, arrested a man in the act of raping a 61-year-old homeless woman. The grand jury wanted to know why she was outdoors at two in the morning.[1]

A little-known fact about the Mike Tyson rape trial is that it took place in the same city as the most extensive study of rape trial jurors ever conducted. From 1978 to 1980 a team of sociologists watched all 38 Indianapolis jury trials for forcible sexual assault and then conducted 90-minute interviews with 331 of the 456 jurors who sat in those cases.[2]

The jurors were deeply influenced by stereotypes about appropriate roles and behavior for women and frequently cited the complainant's reputation as the basis for their verdict. Women who violated traditional norms of "womanly" behavior—by being sexually active outside of marriage, drinking, taking drugs, being away from home at the time of the attack, even holding a blue-collar job such as school bus driver—were less likely to be believed.

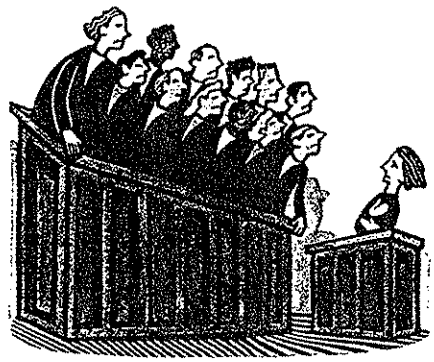
If the complainant knew the defendant, the jurors were extremely unwilling to convict. And if the complainant was black, no matter what the race of the rapist, she was met with particular skepticism. The jurors in the survey were apparently influenced by stereotypes about black women as more likely to consent to sex or less likely to be harmed by forced sex.

How did people with these attitudes get to sit on rape juries? Obviously there was a failure of voir dire. The necessity for a thorough voir dire in rape cases is patent, yet voir dire is disappearing before our eyes.

That it is under attack is hardly news. For more than 20 years commentators have been deploring cutbacks in jury examinations.[3] Today the country is a patchwork of voir dire practices. Although a few states still permit lawyers great latitude, an increasing number of states follow the federal practice of having the judge conduct the entire voir dire and keeping it very brief.

The pressure to minimize voir dire in this period of vanishing court resources is enormous and understandable. But it is particularly disturbing that voir dire is disappearing when the kinds of rape cases in which it is most needed are beginning to be brought in larger numbers. Despite the Tyson verdict, recent cases across the country show that the attitudes of the jurors in the Indianapolis study continue to be widely held and that inadequate voir dire continues to be a major factor in rape trial verdicts.

In Fort Lauderdale in 1989, a jury exonerated a rapist who kidnapped his victim from a parking lot at knife point on the ground that her clothing was provocative.[4] The prosecutor, when questioned about the jury's attitude, claimed



that he was legally barred from questioning jurors about their attitudes toward women in sexy clothing.[5]

New York City was stunned in 1991 by the acquittal of three male St. John's University students who orally sodomized a female student after stupefying her with liquor. The administrative prosecutor failed to question the prospective jurors about their biases. He explained, "We didn't realize that people's attitudes about sex were so ingrained and crossed a wider cross-section of the population than we anticipated."[6] This case also illustrated how ingrained is the racism toward black victims documented in the Indianapolis study. The victim was the black daughter of immigrants; her six assailants were sons of the white middle class.[7]

A juror's comment about the 1991 Palm Beach trial of William Kennedy Smith illustrates that in addition to the victim's reputation, jurors' decisions turn on stereotypes about who is and is not a rapist. After the verdict, juror Lea Haller told the media, "I think he's too charming and too good-looking to have to resort to violence for a night out."[8]

The myth that rapists are subhuman-looking men with no access to consensual sex is tenacious. Yet according to Dr. Nicholas Groth, a pioneer in sex-offender treatment, "All the offenders we have seen were sexually active males involved in consenting sexual relationships at the time of their offense."[9] When sociologist Diana Scully interviewed 114 incarcerated rapists, 89 percent estimated that before entering prison they had engaged in consensual sex at least twice a week; 42 percent of the prisoners said they had consensual sex at least once a day.[10]

With respect to unincarcerated, undetected date rapists, Professor Eugene Kanin of Purdue University, who has been working in the area of sexual aggression for decades, studied 71 self-disclosed date rapists—all white, middle-class, undergraduate college students. He found the rapists to be "dramatically more [sexually] active than the controls." Kanin concluded, "The evidence does not lend to stereotyping these men as the sexually deprived. . . . In fact, comparatively speaking, these men very successfully pursued a lively and positive interest in women, dating, and sexual activity."[11]

Voir dire is also essential to deal with potential female jurors' need to distance themselves from the victim's situation. Linda Fairstein, chief of the Manhattan district attorney's Sex Crimes Unit, has observed that women are often not good jurors in acquaintance-rape cases. For many women, the need to shield themselves from their own vulnerability to sexual assault is paramount. If they can insist that the victim engaged in behavior that they would never engage in, such as visiting a bar or going to a man's apartment, they can convince themselves that they are not at risk.[12]

'Friendly Fire'

Contrary to the stereotype of rapists as brutal strangers, data from rape crisis centers, police, and studies reveal that the overwhelming majority of rapes are committed by someone known to the victim: a family member, friend, coworker, employer, neighbor, fellow student, acquaintance, or date. A national study released in April indicated that only 22 percent of rapes are committed by strangers.[13] Yet, as the Indianapolis study demonstrated, jurors are particularly unwilling to believe that a man could be guilty of rape if the victim knew him.

Prosecutors have historically been reluctant to bring nonstranger-rape cases because of their own biases about rape and their belief that a jury would not

convict the defendant.[14] Now, in a period of public education and change, more and more prosecutors are willing to pursue these cases. But acquaintance-, date-, or marital-rape trials cannot be fair if jurors subscribe to the myriad myths and stereotypes with which rape is uniquely burdened. As Judith Rowland, director of the California Center on Victimology and the first prosecutor to introduce rape-trauma syndrome, has written—

> There is so much "baggage" . . . to jettison before a good jury is selected. Judges need to allow greater latitude to prosecutors . . . in separating those jurors who cannot overcome their biases from those who can. In states which require judges to do the bulk of the questioning, it is critical that they know why, and understand how, jury selection often decides the case—before the first witness takes the stand or a single jury instruction is read.[15]

Voir dire must employ open-ended questions to probe for beliefs such as these: a woman loses her right to say no to sexual activity when she goes to a bar or a man's apartment or gets into his car; when a woman says "no," she means "yes"; only serious physical injury demonstrates nonconsent; handsome men or rich men or married men don't commit rape; sexual assault cannot be rape if the parties knew one another, were living together or married, or had engaged in sexual activity that fell short of intercourse.

When the victim did not immediately report to the police, as is often the case,[16] jurors must be questioned about their understanding of why a rape victim would not rush to the station house to describe her humiliating and frightening ordeal to strangers. Can they appreciate how the trauma of rape can—together with fear of retaliation, fear of losing privacy, and fear of not being believed—prevent rape victims from making a "prompt outcry"?

In cases where there are inconsistencies in the written reports from the hospital, police, and prosecutors, jurors need to be reminded that additions or omissions of detail are commonplace when anyone recounts the same incidents repeatedly over time. They need to know that this is particularly so when the witness has experienced the devastation of rape and must recount this extremely personal crime to strangers.

In cases where consent is the defense, there is rarely physical evidence and almost never a witness. Jurors are extremely reluctant to convict a rapist on the word of a woman alone. Therefore, jurors must be reminded that most muggings and robberies are one-on-one crimes with no witnesses and that the standards for conviction in a rape case are no different.

Voir dire must educate jurors, especially men, to consider resistance from the complainant's point of view, not that of the traditional "reasonable man." They should understand why men's larger size and strength is usually enough of a threat to force women to capitulate. Voir dire must also make potential women jurors aware of their own possible biases. As noted above, many women jurors avoid acknowledging their own vulnerability by blaming the victim.

Developing information about juror bias in rape cases takes skill, time, and a thorough knowledge of how these biases operate. The kind of voir dire essential to a rape trial cannot be accomplished with a questionnaire and a few closed-ended questions addressed to the whole jury panel. The arguments for efficiency in voir dire are not without foundation, but efficiency should not be bought at the price of rape victims' rights. □

Notes

1 Interview with Marjory Fisher, Bureau Chief, Special Victims Bureau, Queens County District Attorney's Office, in New York, N.Y. (Apr. 23, 1992).

2 Lafree, Reskin & Visher, *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985).

Hulk Hogan, She's Not

*In 1955, Jerry Hunter was charged in Clackamas County, Oregon, with the crime of "unlawfully and wilfully participat[ing] in a wrestling competition and wrestling exhibition." Hunter—"being a person not of the male sex, to wit: of the female sex"—had violated a state law limiting participation in the sport to men. Arguing that the statute was unconstitutional, Hunter appealed to the Oregon Supreme Court, whose defense of the law is reproduced here in part (*Oregon v. Hunter, *300 P.2d 282 (Or. 1956)):*

In addition to the protection of the public health, morals, safety, and welfare, what other considerations might have entered the legislative mind in enacting the statute in question? We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal.

It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled.

In the business and industrial fields as an employee or as an executive, in the profession, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere men, and, we are frank to concede, in many instances had outdone him. In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges?

Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not. . . .

The judgment is affirmed.