

RAPE AND SEXUAL ASSAULT

A Research Handbook

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CHAPTER 19

PSYCHOLEGAL RESEARCH ON RAPE TRIALS

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All too often for crime victims, the initial criminal event marks only the beginning of the experience of being a victim. Insensitive treatment by police and prosecutors, court delays, and numerous inconveniences encountered in the justice system can produce what psychiatrists who treat crime victims refer to as the "second wound," a wound that may have even longer lasting effects than the initial victimization. As recently publicized reports on victims of crime and violence have documented, however, many state and local governments since the 1970s have taken steps to make the law enforcement and justice systems more responsive to the needs of victims (U.S. President's Task Force Final Report 1982). Various reforms, for example, have incorporated victim rights into the plea-bargaining process, bail hearings, trial scheduling, the trial itself, sentencing, and parole. Perhaps the most dramatic reforms have been introduced to reduce the likelihood that rape victims will be "on trial" along with their accused assailants (Berger 1977; Borgida 1980; Tanford and Bocchino 1980).

The focus of this chapter is on perceived victim credibility which is crucial to an understanding of how these evidentiary reforms affect the prosecution of rape cases. Perceptions of credibility, for example, may affect whether an assailant initially decides to victimize someone and, in turn, whether the police decide to unfound or prosecute the case. Perceptions of credibility affect the reactions of significant others to the victim and perhaps even the extent of self-blame later experienced by the victim. Perceptions of credibility also play a key role in how the victim is treated throughout the justice system and especially (should she get there) in courtroom proceedings.

Some scholars who study courtroom dynamics, in fact, have argued that testing witness credibility is at the heart of conceptualizing the trial process (Miller and Boster 1977; Miller and Burgoon 1982). Jurors' understanding of case facts, in this view, revolve around their assessments of witness credibility. Perceptions of credibility, in turn, are related to witness and juror characteristics and mediate juror verdicts (Borgida 1981; Whobrey et al. 1981). This certainly characterizes rape trials where eyewitnesses are rare and physical evidence is often minimal or legally tainted. In most rape cases, moreover, the basic issue is consent. Jurors therefore must determine whether the victim or the defendant is more credible. Ironically, social psychologists interested in the social perception of rape

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and psychologists of the law interested in the trial process, with few exceptions, have neglected to study perceptions of credibility (Elwork et al. 1981; Whobrey et al. 1981).

The purpose of this chapter, therefore, is to pursue the question of victim credibility in rape trials in greater depth than previous treatments of the topic. First, we examine social psychological research on the social perception of rape victims. While most of these experimental studies were not designed to address legal questions about rape in an externally valid manner, they nevertheless suggest some of the factors that might impinge on perceptions of victim credibility in court. Once those factors and processes that may attenuate victim credibility in social and quasi-legal settings have been identified, the chapter reviews two approaches to preserving victim rights that seem to affect victim credibility in the courtroom: statutory reform and countering rape myths through the use of expert testimony. The chapter concludes with a discussion of the controversial legal status of expert testimony on rape trauma syndrome.

SOCIAL PERCEPTION OF RAPE VICTIMS

Studies on the social perception of rape victims have typically attempted to identify the determinants of victim evaluations, particularly attributions of responsibility. Because the focus of such research has been the development and testing of social psychological theories rather than legal questions, legally relevant outcomes have either been neglected or included as attributional correlates. In addition, few studies have attempted to simulate the adversarial nature of rape trials, and instead have presented brief narrative descriptions of hypothetical rape incidents. Consequently, victim credibility has been of less interest to researchers in this domain and has not, with few exceptions, been investigated directly.

In a trial setting, however, perceptions of victim credibility take on considerable importance (Elwork et al. 1981), and most probably causally mediate both social perception and legal judgments. In order to determine the extent of victim responsibility, for example, a juror must first decide whether to believe her account of the incident. Hence, research which examines those factors affecting social perception of rape victims may contribute to the identification of those factors that affect perceptions of victim credibility in court. In the following sections, therefore, research that deals with the impact of victim, defendant, subject, and contextual characteristics on the social perception of rape victims will be reviewed.

Victim Characteristics

One of the first experimental investigations of the impact of victim characteristics on judgments about rape was conducted by Jones and Aronson (1973), which then became the prototype for much subsequent research in the area. They hypothesized that a socially respectable victim would be seen as more at fault for a rape than would a socially unrespectable victim. Although this prediction might seem counterintuitive, it followed from Lerner's (1970) just world hypothesis. According to Lerner, people tend to believe in a world in which individuals get what they deserve and deserve what they get. If a woman is raped (or some other negative event befalls her), then she is seen as deserving it either because she is an evil person or because her behavior precipitated the event. When a socially unrespectable woman is raped, according to this line of reasoning, it is

easy to reason that "women like her deserve to be raped," thereby maintaining one's belief in a just world. The rape of a respectable woman, however, may be somewhat threatening. It is difficult to view such a rape as just, unless one can blame the victim for provoking the incident. Thus, the respectable woman may be seen as more directly at fault for a rape than an unrespectable woman.

On the other hand, Jones and Aronson (1973) expected that a man who raped a respectable woman would be punished more severely than a man who raped an unrespectable woman. Presumably, raping a respectable woman (e.g., a virgin) causes more "damage" than raping an unrespectable woman (e.g., a divorcee) and thus requires harsher punishment.

In order to test these hypotheses, the researchers had college students read a very short narrative account of a sexual assault, followed by brief "police descriptions" of the victim and the defendant. The victim was described as either a divorcee (low respectability), a married woman, or a virgin prior to the incident (high respectability). After reading the case account, subjects rated the extent to which the rape was the victim's fault, and indicated the length of the prison sentence they thought the defendant should receive.

In accordance with predictions, the virgin and the married victim were rated as significantly more at fault for the rape than the divorcee, yet a harsher sentence was recommended for the rape of a married woman than the rape of a divorcee. This suggests that although respectable victims may be held more responsible for their rapes, the presumed severity of victim suffering, rather than the extent to which she is blamed, may determine judgments regarding punishment for the crime.

Unfortunately, these findings have not been replicated. A number of studies (Kahn et al. 1977; Kanekar and Kolsawalla 1977; Kerr and Kurtz 1977) have failed to find any significant effects of victim respectability on attributions of responsibility and recommended sentence, despite the fact that they used stimulus materials that were identical or virtually identical to those used by Jones and Aronson (1973).

Other investigators have obtained evidence which appears to contradict directly the Jones and Aronson findings. Feldman-Summers and Lindner (1976), for example, found that as the respectability of the victim decreased, attributed responsibility to the victim increased, rather than decreased. Moreover, although their subjects believed that rape had less psychological impact on less respectable victims (as Jones and Aronson had suggested), recommendations regarding punishment of the rapist did not vary with the respectability of the victim.

Still other studies suggest that the impact of victim respectability may be far more complex than was previously assumed. Smith and colleagues (1976), for example, found that a less respectable victim was held more responsible than a more respectable victim only when the victim and her assailant were acquainted prior to the incident. Kanekar and Kolsawalla (1980), on the other hand, found that the effect of victim respectability on attributions of responsibility depended on how provocatively the victim was dressed and whether the person judging the victim was male or female.

Why have investigations of the impact of victim respectability on judgments about rape victims yielded such variable and inconsistent results? A number of explanations have been advanced. One possibility is that attitudes toward rape and rape victims have somehow changed. With the rise of the women's movement over the past decade, rape has become a major political and social issue, and there is evidence that perceptions of rape have been changing (Nagao and Davis 1980). It seems unlikely, however, that such trends could fully account for this body of discrepant findings. Most studies were conducted within a period of only a few years, using very similar subject populations (i.e., college students). More important, no trends are evident in the data which might reflect such attitudinal changes; there appear to be no systematic relationships between the time at which a study was conducted and the nature of the results that were obtained.

Luginbuhl and Mullin (1981) hypothesized that respectability, rather than influencing the amount of responsibility attributed to a victim, would influence the type of blame attributed to her. One might expect people to blame the unrespectable victim's character, while attributing more responsibility to behavior and to chance in the case of a respectable victim. The failure to distinguish between various types of blame may account for some of the negative and ambiguous results in this domain, but Luginbuhl and Mullin's hypothesis was not even completely successful in accounting for their own findings. The effects of respectability on attributions of blame to chance and the victim's character were as predicted, but attributions to the victim's behavior were not. Although the pattern was more pronounced for respectable victims, subjects always assigned the least blame to a victim's character, more to her behavior, and the most blame to chance.

Kahn et al. (1977) have suggested that the original Jones and Aronson findings were actually statistical artifacts, owing to capitalization on chance through the use of numerous selected *t*-tests, rather than the more appropriate analysis of variance. If so, then the failure of others to replicate is not surprising; perceived victim respectability may be irrelevant to attributions of responsibility for rape. But what about other studies that have obtained evidence for the impact of victim respectability? Upon close examination, studies which obtained significant victim respectability effects and those which did not may not actually be contradictory. Feldman-Summers and Lindner (1976), for example, found that a low respectability victim was held more responsible than a high respectability victim. It must be noted, however, that these investigators expanded the range of respectability in their study to include a non-virgin and a prostitute, as well as the married woman, virgin, and divorcee considered in most other research. Feldman-Summers and Lindner actually found no differences in attributions of responsibility to the married woman, virgin, and divorcee. The significant victim respectability effect that they obtained was entirely due to the fact that the prostitute was judged to be more responsible for the rape than were any of the other victims. Such a finding does not really contradict the null results obtained by others who investigated a more limited range of victim respectability. Instead, it suggests that victim respectability may have little impact on judgments except in very extreme cases, such as the rape of a prostitute.

In a similar vein, it is readily apparent that research which demonstrated that the effects of victim respectability were moderated

by other variables is not necessarily inconsistent with research that failed to obtain respectability effects without including these moderator variables in their experimental designs. Of course, the existence of such interaction effects and the absence of main effects implies that the impact of victim respectability on attributions may be quite complex and difficult to determine for any individual case. Victim respectability may interact with a nearly infinite array of variables, including characteristics of the victim and her assailant, contextual variables, and characteristics of the person making the judgments.

Also problematic is the fact that manipulations of respectability involve varying an entire constellation of characteristics simultaneously, thereby confounding a number of factors that may exert very different effects on people's judgments. By operationalizing victim respectability as marital status, for example, researchers have confounded the effects of the perceived severity of the consequences of rape for the victim, the victim's prior sexual experience, and perhaps the victim's presumed physical appearance. In expanding the range of victims to include prostitutes or topless dancers and nuns (e.g., Luginbuhl and Mullin 1981; Smith et al. 1976), researchers have further confounded occupational status, religiosity, social class, and characteristics of dress, at the very least. To the extent that any of these variables are differentially related to judgments about rape, such confounding can only serve to increase the variability of subjects' responses and decrease the interpretability of any consistent findings that do emerge.

The impact of a few of the characteristics that may underlie victim respectability has been investigated empirically. It has been argued, for example, that providing information about a victim's prior sexual history has detrimental effects on perceptions of the victim (Borgida and White 1978). Indeed, L'Armand and Pepitone (1982) found that the more sexually experienced a victim was, the more she was blamed for the rape, the less the rape was viewed as serious and damaging to her, and the less the defendant was blamed for the assault. Similarly, Burt and Albin (1981) found that a victim with the reputation of being "easy" was evaluated more negatively and considered more likely to have precipitated the rape than a victim who had been a virgin prior to the incident.

It has also been hypothesized that there might be a strong bias associated with the physical attractiveness of the victim. Empirical evidence suggests, however, that the impact of physical attractiveness on perceptions of the victim is quite limited. Perhaps because rape is commonly believed to be a crime of passion, attractive women are seen as more likely targets of rape and unattractive victims are rated as more likely to have done something to provoke the rape (Seligman et al. 1977). Nevertheless, attractive and unattractive victims are held equally responsible for rapes (Kanekar and Kolsawalla 1980; Seligman et al. 1977; Thornton 1977) and are seen as equally credible (Thornton 1977). Evidence regarding the impact of the victim's attractiveness on punitiveness toward the assailant is inconsistent. Seligman et al. (1977) and Kanekar and Kolsawalla (1980) obtained no significant relationship between the attractiveness of the victim and the sentence assigned to the assailant. Thornton (1977), however, found that while verdicts were unaffected by a victim's attractiveness, a man who raped an attractive woman was generally assigned a harsher sentence, especially by male subjects.

Research on the impact of victim provocativeness has been inconclusive. Although provocatively dressed rape victims may be seen as more at fault than unprovocatively dressed victims (Kanekar and Kolsawalla 1980), the effects of this variable on attributed victim blame seem to be moderated by other factors, including victim respectability (Kanekar and Kolsawalla 1980), victim status (Kanekar et al. 1981), and sex of subject (Kanekar and Kolsawalla 1980; Kanekar et al. 1981). Moreover, the provocativeness of a victim's dress does not appear to influence the severity of the sentence assigned to her assailant (Kanekar and Kolsawalla 1980; Scroggs 1976).

Investigation of the effects of other victim characteristics has been minimal and generalizations based on single studies are not very fruitful (Vidmar 1979). So far, then, it appears that subjects do consider at least some of the victim's characteristics relevant to their judgments and attributions of responsibility for rape. To what extent do comparable defendant characteristics influence subjects' evaluations of rape victims? This question constitutes the focus of the next section.

Defendant Characteristics

Not surprisingly, little research has addressed the impact of defendant characteristics in rape cases and that which has been conducted has yielded conflicting results. Kahn et al. (1977), for example, operationalized defendant respectability in terms of occupational status and found no differences in the sentence recommended for the defendant or the amount of fault attributed to the victim, regardless of whether the defendant was described as respectable or somewhat unrespectable. Deitz and Byrnes (1981), by contrast, found that both the defendant's occupation and his physical attractiveness were predictive of subjects' perceptions of the victim and the defendant. Similarly, Ugwuegbu (1979) found that white subjects treated a black defendant more harshly than a white one, yet Oros and Elman (1979) used the same trial summary and obtained no significant effects associated with the defendant's race.

In light of the inconsistency of these findings, no conclusions about the role of defendant characteristics should be drawn at this time. Instead, the next section will consider those characteristics of experimental subjects which may influence perceptions of rape victims.

Subject Characteristics

One of the more intensely researched hypotheses involving subject characteristics is that women and men will differ in their perceptions of rape victims. Legal lore has it that female jurors are *a priori* biased against male defendants in rape trials, readily believing the victim and advocating severe punishment for her alleged assailant. On the other hand, it has been suggested that because women find rape threatening, they may try to increase the psychological distance between themselves and the rape victim in order to assure themselves that it could never happen to them. This would result in a tendency for women to cast blame and doubt on the victim rather than on the defendant. Such reasoning, it should be noted, often underlies defense attorney tactics during *voir dire* in rape cases.

Research confirms the existence of widespread sex differences in this domain. Men and women exposed to the same information regarding a sexual assault often interpret and evaluate it quite differently.

For example, both sexes tend to identify most strongly with the rape victim, yet females identify more with the victim than do males, and males identify more with the defendant than do females (Kahn et al. 1977; Krulewitz and Nash 1979). Consistent with this pattern, men are more likely than women to attribute responsibility for a rape to the victim's character (Calhoun et al. 1976), to view the rape victim as the kind of person who gets herself into those situations (Calhoun et al. 1976; Cann et al. 1979), and even to believe that the victim had an unconscious desire to be raped (Cann et al. 1979). Men are also more likely to believe that the woman's behavior contributed to her rape (Calhoun et al. 1976; Cann et al. 1979; Selby et al. 1977), that perhaps she was being careless (Smith et al. 1976), or was behaving in a suggestive manner (Cann et al. 1979).

Women, by contrast, tend to view a rape as more due to chance (Luginbuhl and Mullin 1981) and attribute more responsibility to the rapist than do men (Krulewitz and Nash 1979; L'Armand and Pepitone 1982). Not surprisingly, the sexes also seem to view the consequences of rape somewhat differently; women tend to rate the crime as more serious (Feldman-Summers and Lindner 1976; L'Armand and Pepitone 1982), more damaging (L'Armand and Pepitone 1982), and as having more psychological impact on the victim (Feldman-Summers and Lindner 1976) than do men.

Underlying some of these sex of subject effects may be differences in male and female beliefs about the dynamics of rape. There is some evidence that rape stereotypes are gender-specific, varying, for example, in the extent to which rape is seen as sexually versus aggressively motivated (Heitbrun 1980). Furthermore, men and women maintain opposing beliefs regarding the most appropriate way to respond to an assault. Whereas men believe that rape is most likely if a victim does not physically resist an attack, women believe that rape is most likely if a victim does resist (Krulewitz 1981). In fact, the more a victim resists, the more intelligent and less at fault she is likely to be considered by men. Women, by contrast, attribute more fault and less intelligence to a victim the more she resists (Krulewitz and Nash 1979).

It thus appears that men and women indeed maintain different perspectives on rape, each of which is associated with some fairly consistent beliefs about its causes and consequences, the most effective means of coping during an assault, and the extent to which an assailant is responsible for a rape. The nature of sex differences on some of the more legally pertinent dimensions is less clear, however. Some studies have found no differences between male and female ratings of defendant guilt (Kaplan and Miller 1978; Lenehan and O'Neill 1981). Others have found that women are more likely to believe that the defendant is guilty (Thornton 1977) and others have found that the subject's gender interacts with factors such as victim respectability (Feldman-Summers and Lindner 1976) to produce these judgments. Sex differences in sentencing are equivocal as well. In at least one study, males delivered harsher sentences than females (Thornton 1977), yet other researchers have found either that females are more punitive than males (Feldman-Summers and Lindner 1976; Kanekar and Kolsawalla 1980; L'Armand and Pepitone 1982; Smith et al. 1976), that there are no sex differences (Jones and Aronson 1973; Kahn et al. 1977; Kaplan and Miller 1978; Oros and Elman 1979), or that there are interactions between the subject's gender and characteristics of the victim (Lugin-

buhl and Mullin 1981) or the case under consideration (Richardson and Campbell 1982).

Finally, attempts to determine whether men and woman differ in the tendency to hold the victim responsible for her rape have produced completely inconsistent results. Empirical evidence has supported all possible conclusions; that men blame the victim more, that women blame the victim more, that there are no sex differences, and that the effects of a subject's sex depend on a whole host of other variables.

The existence of such inconsistencies is both disturbing and puzzling. It is disturbing because the inconsistencies tend to emerge on the most common dependent measures, such as recommended sentence and victim blame, rather than the more idiosyncratic measures used by only a few investigators. It is also puzzling because the most immediately available explanations for these inconsistencies are clearly inadequate. It is plausible, for example, that as mass media attention to the phenomenon of rape raises men's general level of awareness to the problem, many sex differences in reactions to rape and its victims will begin to disappear. There are no evident temporal trends across studies, however. Studies published in 1982 are no less likely to exhibit sex differences than those published in 1973. It is equally plausible that task differences across studies might account for the obtained differences on outcome measures. It should be noted, however, that many studies in this domain were intended to be literal replications of Jones and Aronson (1973), and thus utilized virtually identical stimulus materials, dependent measures, and experimental procedures. Any task differences, then, must have been very subtle, no doubt too subtle to be ascertained from standard published reports of the research.

A more promising explanation for the inconsistencies in this research area may lie in the failure of most researchers to control for other subject characteristics which may be less than perfectly correlated with gender and differentially distributed across subject populations.

Numerous attitudinal, personality, and experiential variables have been investigated and there is evidence that some of them are significantly related to evaluations and judgments regarding rape. Kaplan and Miller (1978), for example, hypothesized that identification with a rape victim would lead to an anti-defendant bias. They reasoned that parents of females, aware that their daughters are potential victims, would identify more strongly with a rape victim and deliver harsher sentences than would parents of males. Consistent with predictions, parents of females delivered stronger guilt ratings and harsher sentences, but only when the rape occurred in a setting which they believed their daughters were likely to encounter. When the rape occurred under somewhat unusual and risky circumstances, the responses of all parents were the same. Similarly, Deitz et al. (1982) have presented evidence that the tendency to empathize with a rape victim, as measured by the Rape Empathy Scale, is a significant predictor of harsher sentencing, greater certainty of defendant guilt, and attributions of responsibility to the defendant rather than the victim.

Others have hypothesized that attitudes toward women and endorsement of sex-role stereotypes play an important role in subjects' judgments and evaluations regarding rape (Weidner and Griffitt 1983).

Evidence on this point is mixed. Thornton et al. (1982) found that attitudes toward women were significantly related to attributions of responsibility to the victim. Deitz et al. (1982), however, replicated this effect in a sample of college students, but found no such relationship in a random sample of adults from a local jury roster. Burt (1980) obtained evidence that sex role stereotyping, along with distrust of the opposite sex and acceptance of interpersonal violence, are strongly related to the acceptance of stereotyped, false beliefs about rape, rapists, and rape victims. Acceptance of these rape myths leads to more restrictive definitions of rape, a tendency to believe a victim provoked her rape, and a tendency to evaluate the defendant more positively (Burt and Albin 1981). This suggests, then, that the effect of attitudes toward women and sex roles on rape evaluation is indirect, operating through its impact on acceptance of prejudiced attitudes toward rape.

Personality variables, on the other hand, appear to be largely unrelated to rape evaluations and attributions. Although subject dogmatism may predict attributions of victim responsibility (Thornton et al. 1982), the tendency to believe in a just world (Kerr and Kurtz 1977; Thornton et al. 1982), and locus of control (Thornton et al. 1982) do not, and evidence for the impact of personal versus environmental attributional style is equivocal (Thornton et al. 1981; Thornton et al. 1982).

In sum, the data suggest that subject characteristics are important determinants of evaluations and attributions regarding rape. Of those subject characteristics investigated, the effects of attitudinal variables appear to be the most consistent and important. To the extent that subjects maintain biased and stereotyped beliefs about what constitutes rape, one might expect evaluations to be sensitive to the context in which the rape occurred. The focus of the next section is on the impact of such contextual variables.

Contextual Characteristics

Research on the impact of contextual factors suggests that stereotypic beliefs about rape affect evaluations and interpretations of particular rape cases. Evaluations of rapes may differ according to the degree of correspondence between features of a particular rape and subjects' notions of the "prototypical" rape. Most subjects, for example, are more certain that a rape has actually been committed, the more physical force the rapist uses (Krulowitz and Payne 1978) and the more the victim resists (Krulowitz and Nash 1979). For feminist women, however, extreme physical force is not a defining characteristic of rape, as they are equally certain that a rape has occurred at all levels of force (Krulowitz and Payne 1978).

If one believes, as do many, that "true" rape involves strangers, information about the prior relationship of the victim and the defendant may also significantly influence judgments. There is evidence that rape by an acquaintance is judged as less serious and damaging (L'Armand and Pepitone 1982), and more due to provocation by the victim (Smith et al. 1976). On the other hand, women raped by strangers may be seen as more careless (Smith et al. 1976). Depending on the circumstances of the rape and, perhaps, the plausibility of carelessness versus provocation explanations, the victim of rape by a stranger may be seen as either more responsible (Smith et al. 1976), or less responsible (L'Armand and Pepitone 1982) than the victim of rape by an acquaintance. More generally, the impact of prior relationship

may often depend on other fairly specific features of the rape under consideration, such as the time and place of the assault (Bolt and Caswell 1981), and the number of previous rapes in the area (Calhoun et al. 1976).

Implications

Social psychological research on the social perception of rape victims suggests that the process of evaluating victims is complex. Subjects do not process the facts of a particular case in a logical and detached fashion. Instead, they seem to integrate information from a variety of sources in light of their own biases and attitudes about rape. This may lead them to weigh heavily certain data that are of questionable legal relevance, such as the attractiveness or prior sexual history of the victim or the race of the defendant. The research reviewed thus far in the chapter highlights some of the variables that subjects seem to view as pertinent to their experimental tasks and provides evidence on the impact of these variables on attributions of responsibility for rape. These research findings, however, must be interpreted with caution. Although most studies have focused on only a few variables at a time, there are numerous signs that the effects of most factors are actually interactive; the impact of a particular victim characteristic may depend on characteristics of the defendant, contextual details, and most important, the subject's own attitudes and beliefs about rape. Because few studies have investigated these interactions explicitly, what is known about the operation of various victim, defendant, case, and subject variables may be quite context-specific or crime-specific (Myers and LaFree 1982).

Moreover, what this research suggests about how jurors in court actually assess evidence in a rape trial is questionable. Very few of the social perception studies have considered judgments and evaluations about rape in a legal context. Instead, the rape case has typically been used as a convenient context within which to study person perception and attributional processes by researchers who often have only a peripheral interest in legal questions. Although such research may yield results which are quite informative with respect to basic social psychological theory, problems arise when such researchers claim that their findings are policy relevant (Weiten and Diamond 1979).

The courtroom setting may constitute a unique attributional and judgmental context (Penrod and Borgida 1983). Very little is currently known about the extent to which attributions are constrained by the contexts in which they are made, but the little evidence that does exist suggests that these concerns about context are warranted. Using records of actual juror verdicts, for example, Myers (1980) found support for only a subset of hypotheses about attributions of responsibility derived from the experimental literature. She argues that her analysis "raises the possibility that qualitatively different attribution processes occur and, within empirically specifiable limits, reflect the operation of contextual constraints that shape attributions in complex and unanticipated ways" (p. 415).

No research better illustrates this interactive, contextual complexity than the study conducted by Feild and Bienen (1980) who examined the impact of various juror, victim, defendant, and case characteristics on reactions to a hypothetical rape case. A number of features distinguish this work from most other research in this area.

First, the investigators were sensitive to the legal issues underlying their inquiry, and concerned with both the practical and legal implications of their findings. Accordingly, subjects were asked to examine a more extensive case summary than other researchers have typically used, including synopses of the prosecuting and defense attorneys' cases and photos of the victim and the defendant, as well as a general description of the rape. After reading the summary, subjects were asked to render a verdict, to indicate their degree of confidence in that verdict, and to recommend a sentence for the defendant. Thus, an attempt was made to simulate the adversarial nature of a rape trial, and to include legally relevant dependent measures.

Second, Feild and Bienen acknowledged the wide array of factors that potentially contribute to juror verdicts, and incorporated as many of them as possible into a single research design. Six factors were varied systematically through modifications in the case summary and litigant photographs: (1) victim race; (2) physical attractiveness of the victim; (3) moral character of the victim (sexually experienced versus sexually inexperienced); (4) defendant race; (5) type of rape (non-precipitatory versus precipitatory); and (6) strength of the evidence. The resulting sixty-four versions of the case enabled examination of the effects of every factor independently and in combination. Furthermore, subjects completed a number of individual difference measures assessing attitudes toward rape, attitudes toward women's roles and women's rights, knowledge regarding the phenomenon of rape, and various background characteristics. This facilitated the search for interactions among juror, victim, defendant, and case characteristics.

Finally, unlike previous research which relied almost exclusively on college student subjects, Feild and Bienen utilized a large sample of non-student adults drawn from four subgroups: citizens, patrol police officers, rape crisis counselors, and convicted rapists. In addition to enhancing the external validity of their findings, this permitted examination of subgroup differences in levels of knowledge and attitudes toward rape.

What did Feild and Bienen find? Comprehensive treatment of the plethora of results generated in the course of this research is beyond the scope of this chapter, so discussion of the Feild and Bienen data will be confined to findings of direct relevance to juror decision-making in rape cases. One of the most striking features of Feild and Bienen's data set is the prominence of interaction effects. For example, on the average, black defendants were given harsher sentences than white defendants, but this was because black men who raped white women were given especially long prison terms. When the rape was of a black woman, the defendant's race had no impact on sentencing. This effect was further moderated, however, by the attractiveness of the victim. This relationship obtained for attractive victims, but only the defendant's race affected sentencing for unattractive victims.

Similarly, the defendant's race had no impact on sentencing when the victim was sexually experienced. When the victim was both sexually inexperienced and unattractive, on the other hand, jurors were more punitive toward black defendants.

In total, there were seven significant interaction effects, and each independent variable was involved in at least two of them. Without examining interactions, one might have come to very different con-

clusions. Considered independently, for example, the victim's physical attractiveness and her moral character appeared unrelated to sentencing, yet they were clearly influencing jurors' decisions in combination with other factors; the effects of physical attractiveness depended on the defendant's and victim's race and the victim's moral character, while the victim's moral character interacted with all five of the other independent variables under investigation.

Juror characteristics were also significantly related to sentencing. Higher educational attainment and a belief in severe punishment for the crime of rape predicted harsher sentencing, while increasing age and beliefs that women are responsible for preventing rape, that victims tend to precipitate rapes, and that rapists are normal, predicted leniency. Interestingly, the attitudinal variables were by far the most predictive juror characteristics; adding background variables accounted for little additional variance in sentencing.

Not surprisingly, juror characteristics interacted with characteristics of the defendant, the victim, and the case. For example, jurors who believed that women precipitate rape gave shorter sentences to men who raped sexually experienced women than jurors who did not believe that women cause rapes. Jurors who believed in severe punishment for rape were more punitive toward black defendants than white ones. And, in general, jurors tended to treat a defendant of their own race more leniently than a defendant of the opposite race.

Taken together, Feild and Bienen's findings highlight the complexity of people's reactions to, and evaluations of, rape victims, and the drawbacks associated with investigating the impact of only one or two variables in isolation. It also provides us with a basis for making some generalizations which may prove to be valid in a legal setting. Markedly absent from the entire program of research, however, is any consideration of victim credibility, thus severely limiting the kinds of generalizations that can be made. This omission was intentional. Although they acknowledged its probable impact on juror judgments, and its importance for attorney decisions regarding how to present a case in court, Feild and Bienen avoided measuring perceptions of victim credibility.

Similarly, virtually none of the social perception studies discussed thus far have directly addressed the question of victim credibility. A number of researchers have assumed that perceptions of credibility mediate attributions of responsibility for rape, but this hypothesis has not been tested directly. Within the general attribution research area, in fact, the role of cognitive mediators also is often assumed but rarely investigated (Taylor and Fiske 1981). To be fair, given the goals of some attribution researchers, the role of victim credibility may have been of limited theoretical interest. Perceptions of victim credibility, however, are so central to juror decision-making in rape cases that determining its status as a mediator may constitute the most important line of investigation for psycholegal research on rape trials. An understanding of victim credibility is critical in order to increase the proportion of rape cases that go to trial, to increase conviction rates once they get there, and to improve the treatment on rape victims throughout the justice system. In the next section of this chapter, therefore, a program of research that increases our understanding of victim credibility in rape trials will be discussed.

VICTIM CREDIBILITY IN THE COURTROOM

Statutory reform

At the outset of this chapter, it was noted that various evidentiary reforms have been legislated over the past decade to protect rape victims in court. In fact, over forty jurisdictions have enacted such statutory "rape shield" laws since the passage of Michigan's Criminal Sexual Conduct law in 1974. In most instances, these new laws shifted the burden of proof to the defense by prohibiting the admission of third party prior sexual history evidence and eliminating resistance and consent standards. In so doing, these new laws assumed that more victims would be willing to pursue their cases to court and that prosecutors' chances for achieving convictions would increase. But recent legal impact studies of the law reforms in Michigan (Marsh 1981; Marsh et al. 1982) and in the state of Washington (Loh 1980, 1981) provide mixed empirical support for the validity of these assumptions. Whereas Marsh and colleagues (1982), using a combination of interrupted time series analysis and interviews, report an increased conviction rate for original charges of rape since law reform was introduced in Michigan, Loh (1980) found that in King County, Washington, the increase in convictions since law reform in 1975 was entirely attributable to changes in the labelling of rape convictions.

However, conclusions about the impact of law reform as measured by legal impact data (e.g., arrests, convictions, pleas, and sentencing) must be tempered by the fact that different states have adopted different types of law reforms, with different standards of rape. Loh (1980, 1981), for example, classified the different law reforms along a continuum of "victim-actor orientation." He placed common law statutes at the victim end of the continuum because they require some degree of victim resistance to prove the crime of rape. Law reforms like Michigan's anchor the other end of the continuum because they define rape in terms of the defendant's conduct. Washington's law reform, which Loh systematically evaluated, would be located in the ambiguous middle of this continuum because it considers the conduct of both victim and defendant. Therefore, Washington and Michigan clearly have different types of law reforms according to Loh's scheme. In fact, the Marsh et al. (1982) Michigan study suggests that the impact of one type of law reform (e.g., one that emphasizes defendant conduct) should not be expected to (and apparently does not) predict the impact of other types of law reform.

Borgida's (1980) classification of the various law reforms in terms of the extent to which they restrict the admission of third party prior sexual history evidence explicitly suggests that it is crucial to consider type of law reform in determining legal impact. His "Common Law" category included those jurisdictions without an exclusionary rule and assumes the comparatively unlimited admissibility of third party prior sexual history testimony. In contrast, his two categories of reform statutes reflect the arguments put forth by critics of traditional rape laws. The critical difference between the reform statutes rests in the amount of discretion which is left to the trial judge in determining the admissibility of third party prior sexual history evidence. In those jurisdictions governed by a "Moderate Reform" exclusionary rule (e.g., Washington), such evidence is generally excluded unless the court determines the evidence to be material

to a fact at issue. Laws of this type allow the trial judge considerable discretion in weighing the probative and prejudicial aspects of the evidence in question. As a result, the impact of law reform in Moderate Reform jurisdictions may be no greater practically than in Common Law jurisdictions (although the intent of such law reforms is clearly to screen the admissibility of prior sexual history evidence as compared to the Common Law). Finally, a number of jurisdictions (e.g., Michigan) have adopted more restrictive "Radical Reform" statutes that require the exclusion of third party prior sexual history evidence. The view in these jurisdictions is that such evidence is more prejudicial than probative when offered to prove consent and therefore should be excluded.

This reformist assumption that evidence of prior sexual history is inflammatory and prejudicial, and that the admission of such evidence in rape trials would bias juries to acquit the defendant on issues not directly relevant to his guilt, was tested in a jury simulation study by Borgida (1981; Borgida and White 1978). Qualified adult jurors sampled randomly from the Twin Cities metropolitan area viewed and then deliberated one of six different versions of a videotaped trial (*State v. McNamara*) which presented a consent defense (for procedural details, see Borgida 1981). In each version of the trial the complainant maintained that she had been forcibly raped and the defendant claimed that the complainant had voluntarily consented to sexual intercourse.

Particularly in rape cases such as *State v. McNamara*, certain features of a fact pattern (e.g., location of the assault, prior relationship between the complainant and defendant) may combine to suggest to jurors complainant consent or contributory behavior. The presence of such features in any given case, therefore, could reduce the likelihood of conviction, whether or not evidence of prior sexual history had been admitted. Consequently, one-half of the *State v. McNamara* trials embodied an "Improbable Likelihood of Consent" fact pattern and the other half embodied a "Probable Likelihood of Consent" fact pattern. The same core scenario was included in both fact patterns, but certain critical features were varied between fact patterns. Whereas the complainant and defendant "hardly knew each other" in Improbable Likelihood of Consent, for example, they were "very close friends" and had been physically affectionate with one another in Probable Likelihood of Consent. Testimony by the defendant about the complainant's failure to resist was emphasized in Probable Likelihood of Consent. Furthermore, the complainant and defendant had met earlier on the evening in question at a bar-disco in Probable Likelihood of Consent, whereas in Improbable Likelihood of Consent they both just happened to visit the trailer home of a mutual friend earlier in the evening.

The type of exclusionary rule applied to evidence of the victim's prior sexual history was the second factor which was varied in *State v. McNamara*. In accordance with Borgida's (1980) classification of the evidentiary reforms, the defense testimony of a prior sexual history witness whose testimony would have been admissible was included in the Moderate Reform versions of both Probable and Improbable fact patterns. In the Common Law versions of both fact patterns, the defense also presented the testimony of a second prior sexual history witness whose testimony would only have been admissible under the Common Law rule. No prior sexual history evidence was added to either

fact pattern in the radical reform versions.

Thus, the simulation experiment examined the extent to which the types of legal rules (and, by implication, types of law reform) affect not only juror perceptions of the complainant, but also the conviction rate in *State v. McNamara*. In addition, the study examined the extent to which the varying degrees of implied victim consent moderate the efficacy of the different exclusionary rules. An interaction between type of exclusionary rule and likelihood of consent was expected. Since Improbable Consent fact patterns are less suggestive about the complainant's moral character and propensities than Probable Consent fact patterns, juror verdicts were expected to show the highest likelihood of conviction when the restrictive Radical Reform rule governed the Improbable Likelihood of Consent fact pattern.

In *State v. McNamara*, jurors were indeed reluctant to convict the defendant when any testimony about the complainant's third party prior sexual history was introduced by the defense in support of the consent defense. Only the Radical Reform rule, when applied to an Improbable Consent fact pattern, increased the likelihood of conviction. By contrast, the admission of third party prior sexual history testimony under the Moderate Reform or Common Law, in an otherwise conviction-biased case, was clearly detrimental to the prosecution's case. Neither type of legal reform enhanced the conviction rate when the trial fact pattern conveyed probable consent.

In general, when third party prior sexual history evidence was introduced in *State v. McNamara*, jurors readily inferred complainant consent, more carefully and unfavorably scrutinized the complainant's character than the defendant's character, attributed more responsibility to the complainant, and even denigrated the skill and competence of her attorney. Rather than weigh the facts in this particular case, jurors seemed to use the complainant's prior sexual history with men other than the accused to impeach her credibility as a prosecution witness and by inference to impugn her veracity.

In order to examine further this notion that "prior promiscuity imports dishonesty"--that jurors perceive a direct causal link between complainant credibility and culpability in *State v. McNamara*--Borgida (1981) conducted a path analysis. The direct causal effects of complainant credibility and various personality, attitudinal, experiential, and demographic predictors on individual juror verdicts, as well as the direct causal effects of these predictor variables on complainant credibility, were examined. The best predictor of verdicts in *State v. McNamara* was not any juror socioeconomic characteristic, or whether they had prior jury experience or acquaintance with a rape victim or, for that matter, their authoritarianism or sex role identification. The strongest predictor of verdicts was jurors' perceptions of the complainant's credibility. In fact, 64 percent of the verdict variance was accounted for by the complainant credibility predictor.

In addition to the central importance of complainant credibility, jurors' attitudes toward women and rape also reliably predicted verdicts in *State v. McNamara*, accounting for 12 percent of the verdict variance. Jurors whose belief systems incorporated a high number of stereotypical beliefs and cultural myths about rape (e.g., "In the majority of rapes, the victim is promiscuous or has had a bad reputation") were much less likely to find the defendant in *State v. McNamara* guilty of sexual assault. Such jurors apparently maintain rather restrictive intuitive definitions of what constitutes rape (Burt and

Albin 1981) and therefore were more likely to acquit the defendant in *State v. McNamara*.

Implications

To the extent that statutory reforms alter juror perceptions of victim credibility, as the simulation data strongly suggest, noticeable improvement in the conviction rate for a consent defense rape case like *State v. McNamara* can be expected. Interestingly, criminal justice officials who were interviewed by Marsh et al. (1982) in their impact study of the Michigan law reform largely attributed the documented increase in the rate of original rape convictions and the reduced courtroom harassment of rape victims to the new law's evidentiary prohibition on the admission of the victim's prior sexual history. Such corroborative field data, it should be noted, can only enhance the external validity of the jury simulation approach (Borgida 1981).

Several legal scholars, however, have raised cogent arguments against the "presumptive inadmissibility" of Radical Reform as well as the Moderate Reform statutes because, in certain cases, exclusion of the complainant's prior sexual history may violate the due process clause of the Fourteenth Amendment and the confrontation and compulsory process clauses of the Sixth Amendment. Some have acknowledged that there may be prejudicial effects associated with prior sexual history evidence, but question whether such evidence is any more harmful than similar types of evidence like prior record of the accused or the prior criminal record of any prosecuting witness which traditionally have been admissible (Tanford and Bocchino 1980).

But thus far, the rape shield laws have fared remarkably well in the appellate courts. Both Moderate and Radical Reform statutes have been upheld. Moderate Reform statutes have been examined by appellate courts in New York, Washington, New Jersey, and Kansas. In each case the court recognized the state's legitimate interest in protecting the privacy of the rape complainant and concluded that the exclusion of prior sexual history evidence did not deprive the defendant of any constitutionally protected right. It is no doubt more significant that the Radical Reform statutes have been able to withstand constitutional challenge. Decisions in California, Oklahoma, Louisiana, and Michigan have refused to set aside Radical Reform statutes as unconstitutional. The opinions uniformly express the view that evidence of a complainant's prior sexual history is not probative of her credibility or her tendency to consent, and that such evidence, as the results of the simulation study suggest, is highly prejudicial.

Although these appellate decisions thus far have upheld the constitutionality of the new rape shield laws, legal scholars continue to argue that the absolute prohibition of even third party prior sexual history in some cases may deprive the defendant of his constitutional rights (Tanford and Bocchino 1980). Defenders of the law reforms continue to respond that evidence of a complainant's prior sexual history is not probative of consent nor is it relevant to any other issue. A defendant has no constitutional right, in this view, to present evidence that is arguably probative and highly prejudicial. "The problem," therefore, as Berger (1977) has observed, "is to chart a course between inflexible legislative rules and wholly untrammelled judicial discretion: the former threatens the rights of defendants; the latter may ignore the needs of complainants" (p. 69). A non-sta-

tutory approach that bears on the charting of this course is discussed in the concluding two sections of the chapter.

Countering Rape Myths Through Expert Testimony

Despite the statutory reforms designed to increase conviction rates and protect the interests of victims, the general public maintains numerous myths (Burt 1980), stereotypes (Heilbrun 1980), and misconceptions (Feild and Bienen 1980) about rape that may adversely affect perceptions of the rape victim's credibility in court. For example, although research indicates that in about 40 percent of all rapes, the victim is at least casually acquainted with her assailant (Amir 1971; National Commission on the Causes and Prevention of Violence 1969; National Institute of Law Enforcement and Criminal Justice 1978) it is commonly believed that "true" rape involves strangers. Similarly, people often view a woman's reluctance to go to the police as indicative of a fabricated rape report, despite the fact that only an estimated 10 to 30 percent of all rapes are ever reported to the police (Amir 1971; National Criminal Justice Information and Statistics Service 1979).

Stereotypes and misconceptions such as these contribute to juror bias against the victim by providing grounds for questioning her credibility and by restricting the range of incidents that are defined as rape (Burt and Albin 1981). In fact, the research by Borgida and his colleagues (1978, 1980, 1981) on statutory reform, as well as the previously reviewed research on social perception of rape victims, indicates that a very good predictor of juror verdicts is the extent to which jurors endorse these rape myths.

Aware of these biases, prosecutors have shied away from bringing to trial all but the strongest rape cases (Loh 1980). In response to this trend, rape researchers (Feild 1979; Luginbuhl and Mullin 1981) and prosecutors (Rowland 1979) have advocated the introduction of expert scientific testimony on behalf of the prosecution in rape trials. The intent behind such a strategy is, in effect, to reeducate jurors by directly confronting their erroneous beliefs with scientific evidence. It is assumed that informing jurors that their preconceived notions about rape have little scientific basis will be sufficient to keep them from using their stereotypes when evaluating a particular case, which should, in turn, increase conviction rates.

Is such an assumption warranted? Does expert scientific testimony function as an effective means for counteracting jurors' rape myths and inferential biases? What is the impact of expert testimony on victim credibility? Rowland (1979), former Deputy District Attorney of San Diego County, California, has introduced expert scientific testimony in four rape trials. She obtained three convictions and one hung jury, with eleven of twelve jurors voting guilty in the latter case. Post-trial interviews with jurors conducted informally by Rowland suggested that the expert witness had a decisive influence, but only one controlled study to date has been conducted to examine the impact of expert testimony in rape trials.

In a jury simulation experiment designed to assess the influence of expert testimony on juror judgments in rape trials, Brekke and colleagues (1983) randomly assigned college students to juries of balanced sex composition. Juries listened to an abbreviated, audiotaped version of the *State v. McNamara* case used by Borgida and his colleagues (1981; Borgida and White 1978). The basic fact pattern was exemplary of a "casual acquaintance rape" with a consent defense.

Both parties knew each other prior to the incident and both agreed that intercourse had taken place. The major point of dispute was over the issue of consent. The complainant claimed that she had been raped; the defendant contended that the complainant had been a willing participant. The basic trial stimulus lasted slightly over an hour and contained all the structural features of an actual rape trial. This version was presented to jurors in the control condition.

Four additional versions of *State v. McNamara* were constructed which included testimony by an expert witness. The expert was identified as a male university psychiatrist who had conducted extensive research in the area of rape, counseled rapists and rape victims, and taught courses on human sexuality. In his testimony, the expert addressed the low level of public awareness regarding sexual assault and attempted to debunk a number of widely held misconceptions about rape. For example, using empirical evidence to support his claims, he testified (a) that few women falsely accuse men of rape; (b) that, in fact, rape is one of the most under-reported of all crimes; (c) that many rapes involve acquaintances rather than strangers; (d) that rape is a crime of violence rather than a crime of passion; and (e) that it may be better for a woman to submit to her attacker than to risk the additional violence that may result from ineffective attempts to fight back. The expert also described common behavior patterns exhibited by rape victims during and following their sexual assaults. On cross-examination, the expert admitted that he was being paid for testifying by the county and that he had discussed the facts of the case with the prosecuting attorney prior to his court appearance.

The four versions varied according to the type of expert testimony employed and the timing of presentation of that testimony during the trial. In the "general information" condition, the prosecuting attorney asked a series of leading questions that enabled the expert to dispense his testimony in essentially a lecture format. In the "specific-hypothetical" condition, jurors listened to the general information, followed by an explicit attempt to point out the connection between the expert testimony and the case under consideration. Specifically, the prosecuting attorney posed a hypothetical example to the expert, incorporating in it the essential facts of *State v. McNamara*. The expert was then asked to comment on the reasonableness of the hypothetical victim's behavior, given the situation she was in. The expert highlighted features of the example that were typical of casual acquaintance rapes and argued that the hypothetical victim's behavior was quite predictable and reasonable, when viewed in light of scientific knowledge of typical behavior in such circumstances. It should be noted that inclusion of the hypothetical example provided no additional information beyond that already given to jurors; it merely enabled the expert to comment more directly on the case at hand.

Each type of expert testimony was presented half of the time early in the trial (i.e., as first prosecution witness), and half of the time late in the trial (i.e., as last prosecution witness).

Thus, type of expert testimony was crossed with timing of presentation in a 2x2 factorial design with an independent no-expert testimony control group. Six juries listened to each version of the trial. Following the case, jurors deliberated to unanimous verdicts or for thirty minutes, whichever came first. Jurors then completed questionnaires assessing verdict, recommended sentence, and evaluations of various trial characters and pieces of evidence.

Brekke et al. (1983) hypothesized that the expert testimony would be most effective when it was linked directly to the trial by means of a hypothetical example, especially when it was presented early in the trial. The rationale behind this hypothesis was twofold. First, given the inferential tendency to underutilize abstract, statistical information in favor of more vivid case-specific information (Nisbett and Ross 1980), it seemed likely that jurors would tend to disregard the general information expert testimony and base their judgments on the more vivid information available to them (e.g., testimony by the litigants and jurors' own personal experience). Brekke et al. reasoned, however, that using this lecture format to educate the jury followed by a hypothetical example to highlight key points in the actual trial, would allow maximum dissemination of information and would provide some assurance that jurors would understand how to apply their newly-acquired knowledge to the case at hand. The danger, of course, was that this type of expert testimony would be viewed as too directive and explicit, and that psychological reactance would set in, leading jurors to rely even more strongly on their own erroneous preconceptions.

Second, Brekke et al. expected early presentation to be most effective because it provided an opportunity to reeducate jurors before their preconceptions and biases had had a chance to influence their perceptions of the complainant and her behavior. Once jurors had formed negative impressions of the complainant, expert testimony should have relatively little impact on judgments.

Results of the Brekke et al. study were generally in accordance with predictions. Including expert testimony clearly influenced the percentage of jurors who rendered guilty verdicts. Without expert testimony, only 11 percent of jurors voted guilty. When general information expert testimony was included, conviction rates jumped to 38 percent, a statistically significant increase. Even more effective, however, was the specific-hypothetical expert testimony; 65 percent of jurors who listened to that version of the trial rendered guilty verdicts (again, a highly significant increase).

Results on other dependent measures pointed to the importance of considering the type of expert testimony employed. Compared to jurors who received general information expert testimony, specific-hypothetical jurors recommended harsher sentences for the defendant, considered it less likely that the complainant consented to have sex, saw her as more credible and moral, and attributed less responsibility to her for the events on the night in question. Post hoc comparisons with the no expert testimony control group revealed that except on the verdict measure, general information expert testimony means did not differ significantly from no expert testimony control means. In other words, expert testimony appears to have affected perceptions of the litigants only when it included a hypothetical example relating the information directly to the case.

Timing of presentation tended to moderate the effects of type of expert testimony. The timing by type interaction reached statistical significance only on measures of recommended sentence, attributions of responsibility to the complainant, and likelihood of complainant consent, but a clear pattern emerged on all those dependent measures with type of testimony main effects. The expert testimony always yielded the strongest effects when it was linked to the case via the hypothetical example and presented early in the trial.

The introduction of expert testimony thus appears to be an effective means of counteracting the otherwise pervasive effects of rape myths and inferential biases on juror judgments. It is crucial, however, that the testimony be linked explicitly to the case at hand, rather than presented as generally relevant to an understanding of rape. Without this link, jurors seem unable or unwilling to apply the information to the facts of the case they are considering. In addition, it seems advisable to present the testimony early in the trial, before jurors' biases have affected their interpretations of the evidence and influenced their impressions of the litigants.

The admission of expert scientific testimony in rape trials, however, has recently become the subject of considerable controversy. A particular type of expert testimony, rape trauma syndrome evidence (Burgess and Holmstrom 1974), seems to be at the heart of this controversy. The scientific reliability of such testimony has been questioned, and there has been some concern expressed that its use by the prosecution may be prejudicial to the defendant. In the concluding section of this chapter, the current legal status of expert testimony on rape trauma syndrome is discussed.

Rape Trauma Syndrome Evidence in Court

Broadly defined, "syndrome evidence" consists of a description of particular physical or emotional conditions which manifest themselves in certain situations (Coleman 1982). Such evidence has been introduced by the prosecution in cases involving battered women, battered children, family incest, and rape. Rape trauma syndrome, in particular, represents a predictable sequential pattern of emotional reactions typically experienced by a rape victim as she attempts to cope with the post-traumatic stress associated with rape (Burgess and Holmstrom 1974; see also Chapter 4 in this volume). In order to improve the conviction rate in rape cases, prosecutors across the country have begun to introduce expert testimony on rape trauma syndrome in court. Rowland's (1979) use of expert testimony was essentially prompted by a judicial instruction (CALJIC 10.23) that emphasizes the defendant's state of mind at the time of the assault. Jurors are to decide the case on the basis of the defendant's "reasonable and good faith belief" about victim consent. The rationale behind expert testimony, then, is to direct jurors' attention toward the rape victim's perception of the situation, and to explain how the victim's behavior in the situation constituted a normal coping response as defined in part by rape trauma syndrome. As discussed in previous sections of the chapter, jurors bring to trial numerous misconceptions about a rape victim's perceptions and behavior; expert testimony could serve to corroborate the victim's testimony in a consent defense rape case and, in turn, increase the likelihood of conviction.

The admission of expert testimony on rape trauma syndrome, however, has proven controversial (Frazier and Borgida 1983). Thus far, there are published appellate court opinions in five criminal sexual conduct cases that were appealed on the basis that expert testimony on rape trauma syndrome was improperly admitted at the trial court level. The first decisions on this issue were made by the Minnesota Supreme Court in August, 1982 (*State v. Saldana*; *State v. McGee*). The Minnesota Court's opinion was that the expert testimony on rape trauma syndrome was inadmissible and constituted reversible error (the *Saldana* case has since been re-tried and the defendant was acquitted). A Kansas court (*State v. Marks* 1982) decided, however, that

rape trauma syndrome evidence is relevant and proper testimony (*People v. Biedsoe* 1983; *Delia S. v. Torres* 1982). Because the courts are divided at this time over the admissibility of rape trauma syndrome evidence, it is instructive to examine each of these cases more closely in order to evaluate the current status of rape trauma syndrome evidence in court.

State v. Saldana provides the most detailed discussion of the admissibility of rape trauma syndrome evidence. The appellant in *Saldana* had been charged with first degree criminal sexual conduct and alleged at trial that intercourse had been consensual. The state called a rape victim counselor as an expert witness to rebut his claim. The witness (a) described the typical behavior of rape victims, (b) stated that she definitely believed that the complainant had been raped, and (c) stated that she did not believe the rape had been fantasized. On appeal, the Court evaluated each aspect of this testimony according to the criteria for admitting expert scientific testimony.

Briefly, under the Federal Rules of Evidence, there are several criteria that govern the admissibility of expert testimony. First, the trial judge must determine that the proffered evidence is relevant and that its probative value is not outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Rule 403). Second, under Rule 702, the expert must be qualified on the basis of "knowledge, skill, experience, training or education..." Additionally, Rule 702 requires that the expert evidence must assist the trier of fact in determining the truth (the helpfulness requirement), which has been conservatively interpreted in one leading opinion (*Byas v. United States* 1977) to mean that the expert must provide knowledge that is "beyond the ken of the average layperson." Finally, the courts have traditionally required that the expert's testimony be scientifically reliable and generally accepted in the scientific community (Giannelli 1980; Imwinkelried 1981; McCormick 1982).

In regard to the scientific reliability of rape trauma syndrome testimony, the Court in *Saldana* held that the evidence was not sufficiently established in either the medical or psychiatric community. However, the thrust of the Court's argument seems to be that even if such evidence were reliable, it would not be helpful to the jury because it is not the kind of evidence that "accurately and reliably determines whether a rape occurred." The Court also stated that the post-traumatic stress symptoms associated with rape could follow any psychologically traumatic event and that not every case of rape will result in the symptoms described in the syndrome. Thus, the Court held that evidence concerning how some, or even most, people react to rape is not helpful to the jury; rather, the jury must decide each case on the basis of the facts at hand. Although rape trauma syndrome may be a useful counseling tool, the Court reasoned, it is prejudicial in the courtroom.

The expert witness in *Saldana* also testified that, in her opinion, the complainant had been raped. As to whether an expert may offer an opinion of this kind, the Court held that although the expert may testify in the form of an opinion, a majority of the courts ruling on this issue have decided that admission of a physician's opinion that a rape had occurred was in error because it involved a legal conclusion. The Court did note three cases in which physicians had been

allowed to give an opinion (based on their physical examination of the complainant) that intercourse had not been voluntary. But the Court rules that the *Saldana* expert's testimony would have been erroneous in any case because the witness was not a physician, had not physically examined the complainant, and had not in fact met the complainant until ten days after the incident.

The third aspect of the expert's testimony examined by the Court in *Saldana* was an assertion by the expert that she did not believe that the complainant had fantasized the rape. Generally, such credibility judgments are regarded as in the province of the jury. Expert testimony on this issue is only allowed in unusual cases (e.g., a mentally retarded witness). The Court saw no special circumstances warranting the testimony in this case, ruling also that the witness was not qualified to testify whether the complainant could distinguish fantasy from reality.

The Minnesota Court also reversed a criminal sexual conduct conviction in the companion case to *Saldana*. In *State v. McGee*, a physician had been allowed to testify that in his opinion the complainant's behavior after the incident was consistent with the symptomatology of rape trauma syndrome. The Court ruled that admission of this testimony constituted reversible error for the reasons outlined in the *Saldana* case.

However, a noteworthy dissenting opinion was submitted in the *McGee* case. Justice Wahl maintained that there is indeed a substantial data base in support of rape trauma syndrome, thus making it sufficiently reliable within the scientific community. Arguing that the physician was an expert and that the subject matter of the testimony was not within jurors' common knowledge, Justice Wahl argued that the crucial question was whether the evidence was helpful to the jury. As distinguished from the expert in *Saldana*, the physician in *McGee* did not give his opinion as to whether a rape had occurred. He described the complainant's symptoms after the incident and stated that he found these to be consistent with rape trauma syndrome. Justice Wahl found this testimony to be probative on the issue of consent and thus helpful to the jury in resolving the conflicting facts of the case.

Probative value, as mentioned earlier in this section, must be weighed against the danger of unfair prejudice. In this regard, Justice Wahl compared rape trauma syndrome evidence to other kinds of syndrome evidence; notably, battering parent syndrome (*State v. Loebach* 1981) and battered child syndrome (*State v. Loss* 1973; *State v. Goblirsch* 1976). Battering parent syndrome was proscribed in *Loebach* because it directly attacked the character of the defendant. Rape trauma syndrome evidence, however, is more closely akin to battered child syndrome evidence (which was upheld in *Loss* and *Goblirsch*) because it is victim-oriented and non-prejudicial to the character of the defendant. Thus, according to Justice Wahl, the prejudicial effect of the evidence does not outweigh its probative value.

The decision of the Kansas Court in *State v. Marks* (1982) reflected the same thinking as the dissenting opinion in *McGee* in its judgment that the admission of rape trauma syndrome evidence was not reversible error. In *Marks*, a psychiatrist testified on the basis of his evaluation of the complainant that she had been the victim of an attack and was suffering from rape trauma syndrome. The appellant did not challenge the expertise of the witness. Rather it was argued

that rape trauma syndrome evidence, whether reliable or not, is inadmissible where consent is a defense because it invades the province of the jury. The Court, however, argued that if rape trauma syndrome is detectable and reliable as evidence that an assault took place, then it is relevant when a defendant alleges consent. The expert opinion does not invade the province of the jury but is offered as any other evidence with the expert open to cross-examination and the jury left to determine its weight. In regard to reliability, the Court concluded that rape trauma syndrome evidence is generally accepted within the scientific community and therefore admissible when the defense is consent.

In *People v. Bledsoe* (1983), the defendant argued that the testimony of the complainant's rape counselor was irrelevant, based on previous decisions in *People v. Clark* (1980) and *People v. Guthreau* (1980). However, the inadmissible evidence in *Clark* and *Guthreau* concerned the reasonableness of the victim's resistance rather than rape trauma syndrome evidence. The *Bledsoe* decision distinguished between these two types of evidence and concluded that rape trauma syndrome evidence was relevant to whether a rape occurred.

Justice Wiener dissented from this ruling, asserting that the testimony in this case could not be distinguished from that in *Clark* and *Guthreau*. His opinion maintained that the expert merely corroborated the subjective state of mind of the victim and provided circumstantial evidence to support the inference that the complainant had been raped. Justice Wiener also criticized the Court for its failure to address the issue of the reliability of the evidence. Citing *Saldana*, *McGee*, and *Marks*, Wiener concluded that the question of scientific reliability was still highly debatable. Without an answer to this question and a definition of the scientific body of knowledge, Justice Wiener stated that it would be impossible to determine if an expert had the requisite qualifications. This opinion concluded, in line with *Saldana*, that the testimony was not beyond the common knowledge of the jury and that the danger of unfair prejudice outweighed any probative value.

In another California case (*De-la S. v. Torres* 1982), the expert testified concerning the reactions of rape victims and the characteristics of rapists. The defendant argued that this testimony improperly validated the complainant's testimony, thereby constituting prejudicial error. But the Court (a) held that the testimony was proper because the subject matter was not within the common knowledge of the jury; (b) affirmed the qualifications of the expert, who was a clinical social worker with considerable experience in rape crisis centers; (c) affirmed the relevance of the testimony concerning common reactions of rape victims on the basis that the defendant sought to show that the complainant's behavior was inconsistent with that of most rape victims (adding that the expert in this case only provided general information on rape victims and did not give an opinion that the complainant was psychologically motivated to act in a certain way); and (d) recognized the potential danger of testimony regarding the characteristics of rapists, yet concluded that its admission was warranted due to the defendant's claim that he was not likely to be a rapist because of his status in the community. The expert did not express an opinion as to whether the defendant fit the profile of a rapist. Thus, the testimony did not attack his character, but provided a means by which the jury could determine the probative weight

to be given to the fact that he had status in the community. Thus, prejudice was not outweighed by probative value and there was no abuse of discretion, according to the decision. The Court, however, did not discuss the issue of the scientific reliability of the evidence.

Implications

Courts recently faced with expert testimony on rape trauma syndrome have been divided over the admissibility of such testimony. This is rather clear from the five appellate opinions on rape trauma syndrome reviewed in the previous section. Three key issues have been and no doubt will continue to be central to determining the legal status of expert testimony on rape trauma syndrome: (1) whether its probative value outweighs any prejudicial effect; (2) whether such testimony is beyond the ken of the average juror; and (3) the scientific status of rape trauma syndrome. This chapter concludes with a brief assessment of each issue.

Prejudice vs. Probity. Particular case facts may render the expert testimony more prejudicial than probative and it is the trial judge who has discretion over the admissibility decision. With respect to expert testimony on rape trauma syndrome, the problem of prejudice is most likely to arise when the testimony is seen as pointing an "accusatory finger" at the defendant. This point was made by Justice Wahl in her dissenting opinion in *McGee* and is further discussed by Coleman (1982). Like battered child syndrome, rape trauma syndrome should address victim behavior rather than the defendant's character. Furthermore, in comparison to battering parent syndrome, no opinion need be expressed as to who inflicted the injury. In fact, rape trauma syndrome testimony will be challenged less often if the expert does not offer a legal opinion on whether the victim had been raped. Thus, expert testimony on rape trauma syndrome may be admissible when its focus is limited to victim characteristics. To the extent that the expert testimony has such a focus, the danger of undue prejudice to the defendant is minimized considerably.

The "Helpfulness" Requirement. To what extent is expert testimony on rape trauma syndrome beyond the ken of the average juror? Does the expert testimony "assist the trier of fact" in understanding the evidence in a consent defense rape case, or is rape trauma syndrome commonly understood? *Saldana* and *McGee* both ruled that the evidence was within jurors' common knowledge. In *Torres*, which upheld the admissibility of the testimony, it was argued that while jurors indeed may have opinions about the common reactions of rape victims, these opinions are often quite erroneous; hence, *Torres* ruled that expert testimony on rape trauma syndrome did not invade the province of the jury.

Other arguments regarding the helpfulness requirement also relate to whether the evidence on rape trauma syndrome is misleading or invades the province of the jury. In *Saldana*, for example, it was argued that inclusion of such testimony may lead to a time-consuming "battle of the experts" which could distract the jury from its task. A more common argument is that rape trauma syndrome evidence, rather than corroborating complainant credibility, improperly bolsters complainant credibility (Cade and Imwinkelried 1983). Corroborating evidence is routinely admissible because it is relevant to the case facts and only indirectly addresses, in this context, victim credibility. The argument against admission of testimony on rape trauma syn-

drome, however, is that such evidence functionally bolsters victim credibility. Because it is originally based on the complainant's self-reports, to admit such testimony would de facto bolster the credibility of the victim's perspective. Evidence that bolsters complainant credibility, according to this argument, invades the province of the jury. Proponents, however, have plausibly argued that rape trauma syndrome evidence is introduced only to corroborate the victim's testimony about case facts, i.e., that she did not consent. The expert should not testify that the complainant was a truthful person; only that the complainant exhibited symptoms common to other rape victims.

Scientific Status. As is the case for expert testimony on battered woman syndrome (Walter 1982), the courts have disagreed over the "state of the art" standard required for admitting expert testimony in rape cases. In *Saldana*, the Court argued that such syndrome evidence has not been reliably established in the psychiatric community, but the Court in *Marks* argued that rape trauma syndrome was a well-documented example of a post traumatic stress disorder. Cade and Imwinkelried (1983), writing for the National Association of Criminal Defense Lawyers, have argued that expert testimony on rape trauma syndrome should, like any other scientific evidence, meet the controversial *Frye* test (*Frye v. United States* 1923). Under the *Frye* test, scientific evidence must be "generally accepted" within the scientific community. But the *Frye* test has been criticized for a variety of reasons, including the extent to which it is an ambiguous standard (what, for example, constitutes "general acceptance" in the scientific community?). And, in many jurisdictions, the *Frye* test has been superceded by the relevancy approach embodied in the Federal Rules of Evidence (Giannelli 1980).

Cade and Imwinkelried (1983) also argued that although the diagnosis of post traumatic stress disorder is generally recognized in the psychiatric literature, the specific application of that disorder to rape trauma is not yet altogether accepted. However, it has been suggested that the admissibility of rape trauma syndrome evidence need not be determined by this general acceptance criterion (Coleman 1982; Frazier and Borgida 1983). The court in *Ibn-Tamas v. United States* (1979), for example, has emphasized that admissibility should only be based on general acceptance of an expert's methodology. That is, scientific evidence could be evaluated by the court in terms of the methodology used in a particular study or the scientific soundness of the studies on which the expert bases his or her testimony (Imwinkelried 1981). "The accessibility of the conclusions and theories ordinarily is the function of the jury, i.e., a determination of which side to believe. Requiring the conclusions to be generally acceptable ignores the adversarial nature of our system ... and the jury's ability to make a proper ascertainment of the truth" (Walter 1982, p. 293). As the research base on rape trauma syndrome continues to expand, questions about its scientific status should begin to abate, leaving juries to determine the weight of expert testimony in the context of all the facts at trial.

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