City Research Online

City St George's, University of London

Citation: Temkin, J. (2010). "And always keep a-hold of nurse, for fear of finding something worse": Challenging rape myths in the courtroom. New Criminal Law Review, 13(4), pp. 710-734. doi: 10.1525/nclr.2010.13.4.710

This is the unspecified version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/2527/

Link to published version: https://doi.org/10.1525/nclr.2010.13.4.710

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to City Research Online policy.

City Research Online: http://openaccess.city.ac.uk/ publications@citystgeorges.ac.uk

"AND ALWAYS KEEP A-HOLD OF NURSE, FOR FEAR OF FINDING SOMETHING WORSE"[1]: CHALLENGING RAPE MYTHS IN THE COURTROOM

*Jennifer Temkin**

Radical reform of the law of rape and the evidential rules surrounding it, changes in police procedures, the setting up of Sexual Assault Referral Centres and many other initiatives to assist victims in England and Wales, whilst entirely worthwhile in themselves, have achieved disappointing results in terms of boosting conviction rates. It is now acknowledged that more needs to be done to tackle the attitudinal problem that exists in society at large as well as in the courtroom with respect to rape cases. This article considers the value of judicial directions as one strategy for achieving this goal.

Since the 1970s, England and Wales have experienced a golden age of law reform in relation to sexual offenses. However, this worthy endeavor has by no means resulted in higher conviction rates in rape cases. To the contrary, conviction rates, in terms of the proportion of offenses recorded by the police that result in convictions, have dropped markedly over the same period.[2] There is now growing recognition that one reason for this is the power and destructive force of rape myths. The difficulty is to settle upon

*The author is indebted for their assistance to Professor Barbara Krahé and His Honour Judge Rook QC.

1. Hilaire Belloc, "Jim," in Cautionary Tales for Children (1907).

2. In 1979, convictions for rape offenses in the Crown Court were 32 percent of reported cases in the same year. In 2008, the percentage dropped to 6.9. See Home Office, Ministry of Justice (MOJ), Annual Criminal Statistics Supplementary Tables, vol. 2, Table S2.1 (A). For further discussion, see below and Jennifer Temkin, Rape and the Legal Process, ch. 1 (2002).

New Criminal Law Review, Vol. 13, Number 4, pps 710–734. ISSN 1933-4192, electronic ISSN 1933-4206. © 2010 by the Regents of the University of California. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, http://www.ucpressjournals.com/reprintInfo.asp. DOI: 10.1525/nclr.2010.13.4.710.

methods of dealing with the problem. This article will consider how rape myths have come to be seen as an issue that the criminal justice system must tackle and will seek to evaluate whether judicial directions can assist in fulfilling this goal.

I. THE ACHIEVEMENTS OF REFORM IN ENGLAND AND WALES

Reform of the law of rape in England and Wales in modern times begins with the efforts of the Heilbron Committee in 1975[3] and the Criminal Law Revision Committee in the 1980s.[4] But the judges must be given credit for beginning the process over a century earlier when they first articulated the principle that the essence of rape is the nonconsent of the victim, which need not be manifested by any display of resistance on her part.[5] The Heilbron Committee's recommendations resulted in the Sexual Offences (Amendment) Act 1976, and after that legislation proceeded incrementally to dispense with the worst excesses of existing law (e.g., the marital rape exemption[6] and the requirement of a corroboration warning[7]), and eventually, with the Sexual Offences Act 2003, to put in place a new and enlightened regime of substantive law. Of cardinal importance is that the law now spells out certain principles that, in the case of adults, give primacy to the idea of personal autonomy in the sexual sphere so that consent is the touchstone by which all sexual encounters are judged. Moreover, rules of evidence have been changed to support rather than undermine such principles. The use of sexual history evidence has been controlled,[8] cross-examination of the complainant by the accused himself has been stopped,[9] and the complainant may be assisted

3. The Heilbron Committee, Report of the Advisory Group on the Law of Rape Cmnd. 6352 (1975).

4. Criminal Law Revision Committee (CLRC), Working Paper on Sexual Offences (1980); CLRC, Fifteenth Report, Sexual Offences, Cmnd. 9213 (1984).

5. See, e.g., Camplin 1 Cox CC 220 (1845).

6. The exemption was first abolished by the judiciary in the landmark judgements of the Court of Appeal and the House of Lords in R v. R, see 2 All E.R. 257 [1991]; 4 All E.R. 481, HL [1991].This was subsequently ratified by the legislature in the Criminal Justice and Public Order Act 1994, § 142.

7. Criminal Justice and Public Order Act 1994, § 32.

8. See Youth Justice and Criminal Evidence Act (YJCEA) 1999, § 41.

9. See YJCEA 1999, § 34.

in giving evidence through the use of a series of special measures.[10] At the same time, the Criminal Justice Act 2003, which is of general application in criminal cases, has ushered in law reform capable of providing considerable assistance in the prosecution of sex offenses by permitting the more liberal use of evidence of the defendant's bad character[11] and by softening the law on recent complaint and hearsay evidence.[12]

To complement these changes, there have been widespread improvements in the handling of rape cases by the criminal justice system. For example, there is now special training for judges trying serious sexual assault cases; since the 1980s police practices have altered substantially to take account of victims' needs[13]; and more recently, sexual assault referral centers (SARCs) have been established throughout the country to assist victims and increase the chances of the collection of useful forensic evidence.[14]

Yet, despite all these successes, it has been demonstrated time and again that reform has not yielded results in terms of higher conviction rates, and there remains the perception that men are still "getting away with rape."[15] Likewise, findings from the British Crime Survey suggest that sexual victimization remains a widespread problem in England and Wales.[16]

---

10. See YJCEA 1999, §§ 19–30.

11. Part 11, ch. 1. See Morgan Harris Burrows, Research into the Impact of Bad Character Provisions on the Courts, MOJ Research Series 5/09, March 2009.

12. Part 11, ch. 2. See also R v. Openshaw EWCA (Crim) 556 [2006]; 2 Cr. App. Rep. 405 [2006].

13. See Jennifer Temkin & Barbara Krahé, Sexual Assault and the Justice Gap: A Question of Attitude 191–93 (2008); John Yates, Rape Investigation: A Policing Perspective, 77 Medico-Legal Journal 70, 74 (2009).

14. See http://rds.homeoffice.gov.uk/rds/sexoffend1.html. For further improvements in the way that the criminal justice system deals with rape cases, see The Stern Review, A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales 49–50 (2010), http://www.equalities.gov.uk/pdf/Stern_Review_of_Rape_Reporting_1FINAL.pdf.

15. See Still Getting Away with Rape, Channel Four Television, Dispatches, Mar. 16, 2000, http://www.broadcaster.org.uk/section1/rapecampaign/date_rape_trans.htm.

16. Among adults aged 16–59, 19.5 percent of women had suffered some form of sexual assault since the age of 16. Sexual assaults against females, which are the main focus of this article, far exceeded sexual assaults against males. See Home Office, Crime in England and Wales, British Crime Survey 2008–09, vol. 1, ch. 3, Table 3.11, 67 (2008–09) http://www.homeoffice.gov.uk/rds/pdfs09/hosb1109vol1.pdf.

II. RAPE AND THE JUSTICE GAP

In 2007–2008, 11,648 offenses of rape of a female were recorded by the police.[17] In 2007, 1,725 cases of rape of a female went for trial, of which thirty were not tried and 783 resulted in conviction.[18] Hence, the vast majority of recorded offenses never reached the trial stage, and of those that did, under half resulted in conviction. In 2007, for every other violent or sexual offense, convictions exceeded acquittals at trial. Only in the case of rape of a female did acquittals exceed convictions: 54 percent of cases of rape of a female resulted in an acquittal.[19] The number of convictions for rape of a female in 2007 was 6.7 percent of the offenses recorded by the police in 2007–2008. The figures for 2008 show a slight improvement: 12,165 rapes of a female were recorded by the police in England and Wales in 2008–2009.[20] The total number of defendants sent for trial in 2008 was 1,714, of whom 1691 were actually tried. Of these, 848 were convicted.[21] Thus just over 50 percent of those tried were convicted. This figure is 6.9 percent of the number of recorded offenses in 2008–2009.[22] Low conviction rates tend to discourage prosecutions, thus creating a vicious circle. More disappointing still is that negative accounts of the experience of rape complainants within the criminal justice system persist.[23]

A. The Continuing Quest for Improvement

On the part of women's organizations and government, there has been no relaxation in the drive for improvement to ensure that victims of rape are

17. Id. at Table 2.04.

18. Ministry of Justice, Criminal Statistics England and Wales 2007, Supplementary Tables, vol. 2, Part 1, Table S2.1A, http://www.justice.gov.uk/publications/criminalannualarchive.htm.

19. Id.

20. Home Office, Crime in England and Wales 2008–09, 32, Table 2.04, http://www.homeoffice.gov.uk/rds/pdfs09/hosb1109vol1.pdf.

21. Ministry of Justice, Criminal Statistics Annual Report 2008, Supplementary Tables, Vol. 2, Part 1, Table S2.1A, http://www.justice.gov.uk/publications/criminalannual.htm.

22. For a different view of rape statistics based on an eighteen-month study, see Cheryl Thomas, Are Juries Fair?, Ministry of Justice Research Series 1/10 (2010), http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf.

23. See, e.g., Jacqueline Wheatcroft, Graham Wagstaff & Annmarie Moran, Revictimising the Victim? How Rape Victims Experience the UK Legal System, 4 Victims and Offenders 265 (2009).

properly treated by the criminal justice system. For example, in 2006, the Office for Criminal Justice Reform, in a bid to increase conviction rates, issued a Consultation Paper[24] that considered a variety of options, and a small committee was then set up to explore them. In November 2009, Sara Payne, the Victims' Champion, issued a report on rape with recommendations for immediate action.[25] In the same year the Home Office published a strategy for ending violence against women and girls.[26] More recently, a review led by Baroness Stern into the handling of rape complaints has moved away from the emphasis on conviction rates whilst making a host of recommendations geared toward assisting victims.[27]

B. False Beliefs About Rape

One of the major problems currently identified as being at the heart of the failure to make progress both with conviction rates and the fair treatment of victims is the problem of attitude.[28] Not without justification, rape myths and stereotypes are perceived to be holding back advances in this area. There is a growing recognition that judgments and decisions made by police officers, crown prosecutors, forensic medical examiners (FMEs), juries, and judges are not always entirely evidence-based but rather are influenced by erroneous assumptions about rape. Rape myths were first defined by Martha Burt as "prejudicial, stereotyped and false beliefs about rape, rape victims and rapists."[29] Gerger and colleagues have further usefully defined them as "descriptive or prescriptive beliefs about sexual aggression (i.e., about its scope, causes, context, and consequences) that serve

---

24. Office for Criminal Justice Reform, Convicting Rapists and Protecting Victims—Justice for Victims of Rape: Consultation Paper (2006).

25. Sara Payne, Rape: The Victim Experience Review, Home Office (2009). See also Fawcett Society, Final Report of the Commission on Women and the Criminal Justice System, Engendering Justice: From Policy to Practice (2009), http://www.fawcettsociety.org.uk/documents/Commission%20report%20May%2009.pdf.

26. Home Office, Together We Can End Violence against Women and Girls: A Strategy (2009).

27. Stern Review, supra note 14.

28. See, e.g., Temkin and Krahé, supra note 13. Sara Payne's report highlights the problem: supra note 25, at 10.

29. Martha R. Burt, Cultural Myths and Support for Rape, 38 J. Personality & Soc. Psychol. 217, 217 (1980).

to deny, downplay, or justify sexually aggressive behavior that men commit against women."[30]

Examples of false beliefs about rape are so many and various that they defy the space constraints of this article. However, some of the most damaging include the following:

1. True rape is rape by a stranger. Other rapes are not "real rapes" but more often than not involve misunderstandings or situations where both sides are equally blameworthy or where the complainant has consented and regretted it afterwards.
2. True rape mostly takes place in an outdoor location and involves physical violence against a victim who does all she can to resist. She is consequently bruised, particularly in the genital area. At the very least threats of violence are used.
3. A woman can always prevent rape by fighting off her assailant. It therefore follows that, save in very rare circumstances, there is no such thing as rape.[31]
4. A woman can always withhold consent to sex no matter how drunk she is.[32]
5. Only stranger rape is really traumatic.
6. Women have only themselves to blame for rape because of their clothes, drinking habits, previous sexual relationships, and risky behavior.
7. Consent to sex can be assumed from mode of dress or certain types of behavior, such as flirting or kissing.
8. True victims have not reported rape more than once. A person who reports rape to the police more than once should be treated with suspicion.
9. Genuine victims report rape immediately.
10. Genuine victims display great emotion when recounting the events in question.
11. Genuine victims will always give a thoroughly consistent account.

---

30. Heike Gerger, Hanna Kley, Gerd Bohner, & Frank Siebler, The Acceptance of Modern Myths about Sexual Aggression (AMMSA) Scale: Development and Validation in German and English, 33 Aggressive Behavior 422 (2007).

31. This is the most extreme of all the myths and conflicts with other myths.

32. See Emily Finch & Vanessa Munro, Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants, 45 Brit. J. Criminology 25 (2005).

12. False allegations of rape are very common and constitute a large proportion of rapes reported to the police.[33]

The myths of rape may be challenged on at least four different grounds. First, many of the beliefs cited here are not merely false but have no bearing on criminal liability in England and Wales. Thus, it matters not as far as the law is concerned whether the assailant was a stranger or where the rape took place. There is no legal requirement that violence or threats be used or that the complainant should suffer injury, and even if her own behavior could be regarded as foolish, this is entirely irrelevant to the criminal liability of the accused.[34] Hence, any acquittal based purely on myths 1, 2, or 6 would be blatantly in contravention of the law.

Secondly, some beliefs about rape are self-evidently false. Given the obvious disparities in strength between most men and most women, it is clear that women cannot always prevent rape by fighting off the assailant. Similarly, a person who is so drunk as to be "blotto" or "legless" may well be unable to express lack of consent by words or actions.[35] Myths, 3, 4 and 7 arguably defy common sense and can be discounted on that ground alone.

Thirdly, certain beliefs about rape are well known to be false. In *R v. Doody*[36] it was stated that it is well known that the feelings of shame and guilt that may accompany a rape might inhibit a woman from making a complaint immediately (myth 9). This was held to justify a judicial direction on the matter.

Fourthly, research reveals the falsity of many other common beliefs about rape. For example, extensive psychological and psychiatric research into the impact of rape has conclusively demonstrated that many victims suffer from rape trauma syndrome[37] or posttraumatic stress disorder (PTSD)[38]

---

33. See, e.g., Opinion Matters, Report prepared for the Havens (Sexual Assault Referral Centres), Wake Up to Rape, Research Summary Report 8 (2010), http://www.thehavens.co.uk/docs/Havens_Wake_Up_To_Rape_Report_Summary.pdf.

34. See the Sexual Offences Act 2003, § 1.

35. See R v. Malone, 2 Cr. App. R. 447 [1998].

36. EWCA (Crim) 2557 [2008]; Crim. L. Rev. 591 [2009].

37. See, e.g., Ann W. Burgess & Linda L. Holmstrom, Rape Trauma Syndrome and Post-Traumatic Stress Response, in Ann. W. Burgess ed., Rape and Sexual Assault: A Research Handbook, Vol. 1, 46 (1985).

38. See, e.g., Lance P. Kelley, Frank W. Weathers, Meghan E. McDevitt-Murphy, David E. Eakin, & Amanda M. Flood, Comparison of PTSD Symptom Patterns in Three Types of Civilian Trauma, 22 J. Traumatic Stress 227 (2009).

This is by no means confined to victims of stranger rape. Intimate partner violence involving rape or physical or sexual abuse has been found to be related to high levels of posttraumatic stress.[39] Indeed, owing to the breach of trust frequently involved, nonstranger rape may have highly adverse consequences for victims (myth 5).[40] Similarly, research into rape trauma syndrome has revealed that many victims have a controlled response when recounting what has happened to them. They mask their feelings and appear calm and composed rather than hysterical and tearful (myth 10).[41] That memory is affected by trauma is also well documented, so that a victim who has, for example, during rape dissociated from the experience, will have difficulty at first in recalling what happened or the order of events, but these may be recalled at a later stage.[42] Inconsistency is thus not a sure indication of mendacity (myth 11). Numerous studies further demonstrate that victims of rape and sexual abuse have frequently been victimized more than once,[43] so that myth 8 is clearly false.

Many myths are challengeable on more than one of the above grounds. For example, in terms of myth 1, not merely does the law of rape not require the perpetrator to be a stranger, but research shows that the overwhelming majority of rapes reported to the police and classified and recorded by them as rape do not involve strangers.[44] It cannot be supposed that the many thousands of men and women who report nonstranger rape are either

---

39. Ann L. Coker, Rebecca Weston, Daniel Creson, Blair Justice & Patricia Blakeney, PTSD Symptoms Among Men and Women Survivors of Intimate Partner Violence: The Role of Risk and Protective Factors, 20 Violence & Victims 625 (2005).

40. See, e.g., Alan Clarke, Jo Moran-Ellis & Judith Sleney, Sentencing Advisory Panel Research Report 2, Attitudes To Date Rape and Relationship Rape: A Qualitative Study (2002).

41. See Burgess & Holmstrom, supra note 37; Liat Sayfan, Emilie B.Mitchell, Gail S.Goodman, Mitchell S. Eisen & Jianjian Qin, Children's Expressed Emotions When Disclosing Maltreatment, 32 Child Abuse & Neglect 1026 (2008).

42. See, e.g., Bessel A. van der Kolk & Rita Fisler, Dissociation and The Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study, 8 J. Traumatic Stress 505 (2006); Shannon Tromp, Mary P. Koss, Aurelio Jose Figueredo & Melinda Tharan, Are Rape Memories Different?: A Comparison of Rape, Other Unpleasant and Pleasant Memories among Employed Women, 8 J. Traumatic Stress, 607 (2006).

43. See, e.g., Catherine C.Classen, Oxana G. Palesh & R. Aggarwal, Sexual Revictimization: A Review of the Empirical Literature, 6 Trauma, Violence & Abuse 103 (2005).

44. See, e.g., Andy Feist, Jane Ash, Jane Lawrence, Duncan McPhee & Rachel Wilson, Investigating and Detecting Recorded Offences of Rape, Home Office Online Report, 12 (2007), http://www.homeoffice.gov.uk/rds/pdfs07/rdsolr1807.pdf.

mistaken or have simply lied about their experiences. By the same token, quite apart from the fact that proof of injury is not a legal requirement of rape, most rapes do not in fact involve injuries to the victim.[45]

C. The Prevalence of Rape Myths and Their Impact on Decision-Making

Numerous studies now demonstrate that, despite the falsity of many beliefs about rape, such beliefs are widely held.[46] Victim-blaming attitudes (see myth 6) were recently incorporated into official decision-making by the Criminal Injuries Compensation Scheme, which ruled that awards to rape victims who had drunk alcohol at some stage prior to being raped should be reduced.[47] This decision was subsequently revoked after media attention and government intervention, but it was not without its supporters.[48] Moreover, according to the Stern Review, awards are still being reduced on this ground as well as on the ground of a delay before making the complaint.[49] Sara Payne has noted, on the basis of her discussions with the police and the Crown Prosecution Service, the influence of stereotypes on decision making by both agencies. She mentioned in particular what might be described as the "not you again" problem—where officers fail to deal with rapes effectively because the complainant has complained before (myth 8).[50] John Yates, Assistant Commissioner of the Metropolitan Police, acting on behalf of the Association of Chief Police Officers (ACPO), commissioned a team to look into the policing of rape in all 43 police forces in England and Wales with the result that "there has never been a better

45. Id. at 21. See also United States Department of Justice, Full Report of the Prevalence, Incidence and Consequences of Violence against Women, Research Report iv (2000), http://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

46. See, e.g., Temkin & Krahé, supra note 13, at ch. 2; Wake Up to Rape, supra note 33; Mary White Stewart, Shirley A. Dobbin & Sophia I. Gatowski, "Real Rapes" and "Real Victims": The Shared Reliance on Common Cultural Definitions of Rape, IV Feminist L. Stud. 159 (1996).

47. See Dozens More Rape Compensation Payouts Cut Because Victims Had Been Drinking, The London Times, Aug. 13, 2008.

48. See Compensation for Drunk Rape Victims, The London Times, Aug. 17, 2008.

49. See Stern Review, supra note 14, at 17.

50. Payne, supra note 25, at 13.

picture of what is going on than we have now."[51] He concluded from this review that "cultural issues (myths and stereotyping) remain incredibly significant," particularly the view that "stranger rapes are serious, relationship/acquaintance rapes are not."[52] In the courtroom the deployment of rape myths has been frequently noted.[53] However, there has been no systematic mapping of their invocation at trial, and resulting no doubt from constraints on jury research, their precise impact on jury decision making is unclear. But studies with participants eligible for jury service suggest that those who score high on rape myth acceptance tend to bring these attitudes to bear when asked to make judgements about rape scenarios despite the facts of the case.[54]

III. THE SEARCH FOR SOLUTIONS IN ENGLAND AND WALES

In a Consultation Paper published in 2006, the Office for Criminal Justice Reform outlined a proposal to amend the law to permit the prosecution to call general expert evidence to expose some of the false beliefs about rape.[55] It was envisaged that the expert would not comment on the complainant's behavior or evidence and would not have examined her beforehand.[56] The defense would be able to challenge this expert evidence through cross-examination or by calling experts as well.[57] The proposal attracted a mixed response,[58] and the government concluded that it should be approached with caution, undertaking to continue to look into ways of allowing "myth busting" material to be presented in court.[59]

Accordingly, a small committee headed by the Solicitor General was formed to take the matter further. This Committee looked at various options

51. Yates, supra note 13, at 74.

52. Id.

53. See, e.g., Sue Lees, Carnal Knowledge: Rape on Trial (1996).

54. See, e.g., Temkin and Krahé, supra note 13, at part 2.

55. See Office for Criminal Justice Reform, supra note 24, at ch. 4.

56. Id. at 19.

57. Id. at 20.

58. Office for Criminal Justice Reform, Convicting Rapists and Protecting Victims—Justice for Victims of Rape: Response to Consultation, 14–18 (2007).

59. Id. at 20–21.

including expert evidence, providing the jury with a video or leaflet, and judicial directions. The latter has emerged for the time being as the firm favorite.[60] The idea here is that in the summing-up to the jury at the end of the trial before it retires to consider its verdict, the judge should comment on certain false beliefs about rape that are relevant to that particular trial. In an interview with *The Times*, the Solicitor General revealed her decision to promote the idea of judicial directions to challenge some of the many rape myths listed above.[61] The myths to be targeted were that genuine victims report at once (myth 9), that false allegations are common (myth 12),[62] that most rapes are committed by strangers (myth 1), that stranger rape is more traumatic than rape by a known person (myth 5), that genuine victims put up a fight, show signs of struggle and sustain genital injuries (myth 2), and that consent to sex can be assumed from dress, flirting, or drink (myth 7). Some trial judges had already begun commenting in their summing-up about certain rape stereotypes, and a body of directions on rape stereotypes were subsequently formulated and incorporated in a set of materials by His Honour Judge Rook QC and the Judicial Studies Board (JSB) for those judges participating in the Serious Sexual Offences Seminar.[63] The decision of the Court of Appeal in *Doody*[64] provided a boost to this strategy by approving a direction that explained why victims do not always report immediately.

Lord Justice Pitchford was also commissioned, as part of his task of reviewing all judicial directions in criminal cases, to consider directions on rape myths, building upon the work of the JSB. The culmination of his work in this area is Chapter 17 of the new Crown Court Benchbook,[65] which provides unequivocal and welcome recognition of the malign impact

60. In England and Wales, at the end of a jury trial, the judge will give a detailed summing-up to the jury in which the law will be set out, the evidence in the case examined, and specific directions given.

61. Beware Rape Myths, Judges to Tell Jurors, The London Times, June 15, 2009.

62. The idea of a judicial direction on false allegations has now been rejected.

63. Peter Rook, Sexual Offences (Non-Consensual Cases and Offences against Children): Examples of Directions to the Jury, Judicial Studies Board, September 2009. Unpublished materials kindly supplied to the author by His Honour Judge Rook QC.

64. See supra note 36 (both sources). For an exemplary direction on late reporting by victims of child sexual abuse upheld but not emphatically endorsed by the Court of Appeal, see MM, EWCA (Crim) 1558 [2007]. See also Breeze EWCA (Crim) 255 [2009], where the judge's direction on late complaining led to a successful appeal.

65. Judicial Studies Board, Crown Court Benchbook (2010).

that stereotypes and myths can have in this area of the law.[66] The chapter sets out a series of "Illustrations," which he has developed and adapted from the directions already in use. Their purpose is to illustrate how a direction might be given: "It is there to provide the reader with ideas, including ideas as to how it can be improved."[67] The "Illustrations" are available for judges to use *if they so wish*. They are aimed at cautioning juries against making certain unwarranted assumptions based on myths and stereotypes. Those covered relate to the stranger rape myth, the impact of trauma on demeanor when giving evidence, late reporting, the absence of force or the threat of force, lack of resistance, complainant behavior including dress and alcohol consumption, inconsistency in the complainant's account, and the idea that rape is about sexual attraction. But judges remain free to word directions as they see fit, so long as they keep to the main principles, which are to ensure that they do not implant in the jury's mind any contrary assumption or stray from the commonplace to the controversial and thus appear to be endorsing argument for one side at the expense of the other.[68] Judges may therefore in practice continue to draw upon the previous JSB materials. Any direction should be a matter for consultation having received the views of both advocates beforehand.[69] It is equally open to the judge to give no direction at all.

IV. JUDICIAL INSTRUCTIONS: COMPREHENSIBILITY

The move toward judicial instructions as the preferred option for addressing the problem of rape myths and stereotypes raises the question of whether this is likely to be effective. There is a substantial body of research on jury instructions in criminal trials in general. In an extensive review of the literature on jury research up to 2001, Darbyshire, Maughan, and Stewart state, "if there is one point upon which nearly every commentator agrees it is that juries have a great deal of difficulty understanding and applying judicial instructions."[70]

66. Id. ch. 17, at ¶ 4.

67. Id. introduction at viii.

68. Id. ch. 17, at ¶¶ 13, 14.

69. Id. at ¶ 14.

70. Penny Darbyshire, Andy Maughan & Angus Stewart, What Can the English Legal System Learn from Jury Research Published up to 2001? 25 (2001), http://sixthformlaw.info/06_misc/pdf_files/penny_darbyshire.pdf.

Indeed, several authors have concluded that juror comprehension of judicial instructions is "abysmally low."[71] It has been pointed out that Americans have an average reading level of sixth to eighth grade,[72] whilst Darbyshire and her colleagues note that the state of adult literacy in Great Britain cannot be regarded as much better.[73] Steele and Thornburg concluded from their research that "jurors conscientiously try to follow their instructions but that most of those instructions cannot be understood by most jurors."[74] Darbyshire and colleagues consider that the reason for this is that instructions "are written only with an eye on the letter of the law and with little consideration of their comprehensibility."[75] They criticize some judicial instructions for their complex syntax, noting that they may contain three or more paragraphs with sentences of five or more lengthy clauses.[76] This stands in stark contrast to the leaflet that accompanies the summons to jury trial and the video that is also shown to jurors, which have been described by Robert Howe QC, a juror in a rape case,[77] as "very simplistic" with "Postman Pat-style explanations." He also commented after this experience:

> In modern criminal cases the directions are often very complex. Yet the theory is that the jury is supposed to remember and understand these convoluted directions and then apply them to the facts. In most cases, this is probably a polite fiction![78]

Research using psycholinguistics has demonstrated that comprehensibility can be enhanced by reorganizing judicial instructions, minimizing sentence length and complexity, using the active voice, avoiding jargon and

---

71. See V. Gordon Rose & James R.P. Ogloff, Evaluating the Comprehensibility of Jury Instructions: A Method and an Example, 25 (4) Law & Hum. Behav. 409, 411 (2001).

72. Bethany Dumas, Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues, 67 (3) Tenn. L. Rev. 701 (2000).

73. Darbyshire et al., supra note 70, at 26.

74. Walter W. Steele & Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure To Communicate, 67 N.C. L. Rev. 77 (1988) at 77.

75. Darbyshire et al., supra note 70, at 25.

76. Id. at 26.

77. Lawyers are now allowed to sit on juries in England and Wales: Criminal Justice Act 2003, Schedule 33.

78. Robert Howe, Too Much Legal Experience Can Subvert Jury Trial, The London Times, Dec. 3, 2009.

uncommon words, and using concrete rather than abstract words.[79] One study found that, without such reorganization, standard instructions were no better than no instructions.[80] Most recently, in a study involving 797 jurors who saw a simulated trial, it was found that only 31 percent actually fully understood the judge's legal directions; with written instructions, this figure rose to 48 percent.[81]

Hence, unless great care is taken to ensure that jury instructions are drafted simply and clearly, there is a good chance that juries will miss the points being made. Indeed Darbyshire and colleagues state, "As a matter of common sense it seems obvious that when faced with a largely incomprehensible direction, the jury will tend to fall back on their prior knowledge of the law, which we know is largely incorrect."[82] It is equally likely that a less than clear instruction on rape myths will ensure that members of the jury will fall back on their existing assumptions.

The "Illustrations" in the new Crown Court Benchbook cannot be faulted as pieces of English prose. Indeed, they are models of elegance, sophistication, and literary style. However, whether a jury would be able to follow some of them is open to question. For example, the following direction is aimed at addressing the myths relating to inconsistency:

> Every person who is a victim of rape suffers trauma to a greater or lesser degree. The quality of our memory is affected by the ability of the mind to take in the details of the experience, register them and to recall them afterwards. Trauma can interfere with these processes. Experience tells us that the way in which trauma affects memory varies considerably. *It may affect a person's ability accurately to lay down in the memory, in the correct sequence, each of the constituent parts of the ordeal.* If the trauma did have such an effect, the ability of the witness to recall events consistently is also likely to be affected in this way. *After the event some people ruminate constantly on what happened and by that process reconstruct accurately or perhaps inaccurately the events which occurred*; *others hate to confront their memories and do their best to avoid thinking about them. The result is that recall is not always consistent*.[83]

---

79. See, e.g., Laurence J. Severance & Elizabeth F. Loftus, Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions, 17 Law & Soc'y Rev. 153 (1982).

80. Amiram Elwork, Bruce D. Sales & James J. Alfini, Making Jury Instructions Understandable (1982).

81. Thomas, supra note 22, at 35–38.

82. Darbyshire et al., supra note 70, at 27.

83. Supra note 65, ch. 17 at 362 (italics added).

Trial judges may want to adapt this "Illustration" since many jurors would find some of this vocabulary beyond them (e.g., "ruminate", "reconstruct," "correct sequence") and the direction as a whole, particularly the italicized sentences, too complex. However, judicial instructions contained in the JSB Materials suggest that trial judges too still struggle with comprehensibility. The following example is a well-intentioned instruction about the dangers of stereotyping:

> [1] Sitting on a jury requires you to put your emotions to one side and keep a cool head in judging the evidence *dispassionately.* [2] *You may think that much of what I am about to say is simple common sense but it needs to be said so that every member of the jury has the same approach as a starting point because it is sometimes difficult for a jury to understand the way people act if there has indeed been a rape.* [3] Forget *generalisations or stereotypes* you may have heard or read about in the media; the circumstances of the commission of serious sexual offences and the reactions of victims to them are extremely varied.[84]

Some jurors would have difficulty with the words "dispassionately", "stereotypes," and "generalizations," as well as with the rather long second sentence that contains a series of different ideas. Moreover, the use of the phrase "if there has indeed been a rape," intended to be fair to the defendant, will immediately cast doubt on the complainant's story.

V. JUDICIAL INSTRUCTIONS: DISLODGING FALSE BELIEFS

In seeking to use judicial directions to dislodge false beliefs about rape, comprehensibility is merely one of the hurdles to be overcome. It might be thought—and this would appear to be the underlying rationale of deploying judicial instructions to counter rape myths—that "if people only thought enough about the issues at hand, considered all the relevant information and employed proper reasoning strategies, their decision-making would surely improve"[85] and their biases would fade away. Moreover,

---

84. Supra note 63, 5 (numbering and italics added).

85. Norbert Schwarz, Lawrence J. Sanna, Ian Skurnik & Carolyn Yoon, Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and

"models of rational choice assume that people will expend more time and effort on getting it right when the stakes are high."[86] However, the task of myth-busting is psychologically highly complex and fraught with danger. There is a considerable risk that a direction will have the opposite effect to that intended and serve to entrench rather than overcome stereotypes and myths in the minds of the jury. There is the risk of *assimilation*—that the judge's instruction will be distorted by jurors to conform with their own existing attitudes. It is possible that those who adhere strongly to rape myths, who are most in need of being educated, will see their stereotypes reinforced rather than questioned by the direction.[87]

Again, setting out a false belief and then proceeding to challenge it might be considered an effective way of dispelling myths. However, it has long been established that acceptance of erroneous beliefs often increases soon afterward where this method is used. As Schwarz and colleagues point out, this is because this "educational strategy focuses solely on information content, ignoring the metacognitive experiences that are part and parcel of the reasoning process."[88] In other words, reasoning processes are not solely determined by giving people the correct information but rely on factors such as how easy it is for a person to process both the wrong and the right information and bring either to mind subsequently. Schwarz and colleagues have demonstrated that "false information is better left alone. Any attempt to explicitly discredit false information necessarily involves a repetition of the false information which may contribute to its later familiarity and acceptance."[89] By providing people with false information and then attempting to discredit it, the false information has been inserted in a person's memory bank and may be recalled later on—particularly if by its nature it is easy to recall—and may be used in preference to the information given to discredit it. By the same token, if myths are repeated, they are rendered familiar when they are encountered again not long afterward. Familiar statements are more likely to be accepted as true than rejected as false. Research by Skurnik, Yoon, and Schwarz has demonstrated that the attempt to debunk myths by setting out erroneous beliefs and then

---

Public Information Campaigns, 39 Advances in Experimental Soc. Psychol. 127, 127 (2007).

86. Id. at 128.

87. See Temkin and Krahé, supra 13, at 205.

88. Schwarz et al., supra note 85, at 128.

89. Id. at 146.

confronting them with facts facilitates the acceptance of the myths after a delay of only thirty minutes.[90] This is particularly likely to be a problem with older adults whose memory has declined and who rely increasingly on familiarity. Thus "repeating false information . . . may put older adults at a particular risk essentially turning warnings into recommendations."[91] Moreover, attempts made by a highly credible source to inform people that a given claim is false may also have the unintended effect that the false claim is eventually associated with the highly credible source and thus becomes more influential.[92]

When applying this research to sincere attempts by the judiciary to counter rape myths, one particular pitfall becomes clear: there is a danger that where a judicial direction focuses on the beliefs about rape that are false, this may have the opposite effect to that which is intended. Moreover, since a judge is a highly credible source, this may increase acceptance of the false belief. Hence, judicial instructions that do not apply these research insights may inadvertently carry with them considerable dangers. The following included in the JSB materials on the impact of nonstranger rape provides an illustration:

> [1] *A woman (or a man) who has been subjected to a sexual assault obviously undergoes a traumatic experience, irrespective of whether they know or have had previous consensual sex with their assailant.* [2] *On first thought, you might think that the stranger rape would be far more traumatic, violent and frightening, but this may not be the case.* [3] The trauma experienced by a victim of rape may affect *the manner or demeanour of their evidence,* which may be different to the way you would expect them to give evidence. [4] *They may display visible signs of having experienced a trauma or they may not.* You must, therefore, put to one side how you may expect [the complainant] to appear when she/he is giving evidence, and consider that people react in very different ways if they have indeed been raped.[93]

In this direction, sentence 2 invokes the myth directly, bringing it to the mind of the jury just before it begins its deliberations. It not merely sets out the false idea about rape, but highlights it by placing it at the start of the sentence and by elaborating and reinforcing it with the words "far more

90. Cited in Schwarz et al. supra note 85, at 147.
91. Id. at 151.
92. Id.
93. Supra note 63, 6 (numbering and italics added).

traumatic, violent and frightening." All that is said to counter the myth is contained in the laconic final subclause, "this may not be the case." These six words can do little to displace the bold statement contained in the main body of the sentence. Quite unintentionally, the direction would appear to be ideally formulated to ensure that the false claim it highlights becomes more rather than less influential and to assist *assimilation*.[94] Again, sentence 4 is likely to have a similar effect. The false belief that a complainant will necessarily show visible signs of trauma is highlighted at the beginning of the sentence and is only countered with the four words at the end of the sentence, "or they may not."[95]

A. R v. *Doody*[96]

The decision of the Court of Appeal in *Doody* in 2008 was hailed as giving the green light to the use of judicial directions to counter rape myths. The direction on late complaining approved by the Court of Appeal and praised by the Stern Review was as follows:

> [1] Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response. [2] The defence say that the reason that the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. [3] That is a matter for you. [4] *You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time.* [5] *A late complaint does not necessarily mean it is a false complaint*. That is a matter for you.[97]

Before *Doody*, trial judges had for some time been cautiously addressing the issue of late complaining[98] but always in the shadow of the Court of Appeal. The above direction was thus understandably tentative. The difficulty for the judge is to safeguard the defendant's position whilst attempting to counter the myth. In this direction, sentence 2 gives prominence to the idea that the allegation may well be false, and sentence 5 also tends to reinforce the myth by suggesting that a late complaint may very well be

94. See text at supra note 87.

95. Jurors may also be unfamiliar with words such as "demeanor" and "assailant."

96. See supra note 36.

97. Supra note 36, [2009] Crim. L. Rev. 591 at 593 (numbering and italics added); Stern Review, supra note 14, at 93.

98. See, e.g., Temkin and Krahé, supra note 13, at 164.

false, although this is not invariably the case. It is only in sentence 4 that the myth of late complaining is broached and then only very gingerly, so that its myth-busting potential is strictly limited. The point is not that some people "may" complain immediately and some "may" feel shame and shock, but that some people *do* complain immediately, whilst others *do* feel shame and shock and *do not* complain immediately. These are matters of fact. However, what is also true is that a late complaint may be a false complaint. It is up to the jury to decide which it is.

Some judges henceforth may adopt the *Doody* formula, whilst others may prefer the rather more elaborate "Illustration" set out in the new Benchbook:

> It has been said on behalf of the defendant that the fact that the complainant did not report what had happened to her as soon as possible makes it less likely that the complaint she eventually made was true. Whether that is so in this particular case is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress, or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. *A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in the case of this particular complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it.* You need to consider what the complainant herself said about her experience and her reaction to it.[99]

Once again the prose is flawless and elegant. However, the sheer sophistication with which the ideas are expressed and the elaborate sentence structure in the italicized sentences arguably render it unsuitable for jury consumption. The same ideas could perhaps be set out more simply as follows:

> Experience shows that people react in different ways to the trauma of a serious sexual assault. Some people do not complain immediately to anyone. This may be for a variety of reasons. They may feel shame or guilt.

---

99. Supra note 65, ch. 17 at 358 (italics added).

> They may be too shocked or upset to tell anyone. They may fear upsetting their family. But other people feel differently and will complain to the police straight away. It will just depend on the person and her particular situation and the circumstances of the case. The defence says that the reason that the complainant did not report immediately after the incident is because she has made up a false story. This may be the case but there may be other reasons why she delayed reporting. It is for you to decide.

B. Judicial Directions: Further Problems and Limitations

A further problem with judicial directions on rape myths is that there is no guarantee that they will be delivered effectively or at all. Experience in New South Wales testifies to this.[100] Chapter 17 of the new Crown Court Benchbook is undoubtedly a laudable development, but it leaves judges to make their own decisions on whether to use directions and, if so, how to express them. Clearly judicial education is central here, and there is every indication that the Judicial Studies Board in England and Wales is keen to promote this.

Even assuming that judicial directions were worded to maximize their impact as myth-busting tools and that judges were uniformly enthusiastic about applying them, it must be recognized that what can be achieved by this approach is likely to be limited. The use of heuristics or shortcuts, of which stereotyping is a manifestation, is a very fundamental way in which people reach decisions. People tend to rely on the information that comes most readily to mind, and for many people, rape stereotypes fall into that category. But it is not only myths and stereotypes that are included in heuristics. People also use *scripts* to describe how the world is and how it works. Recent research by Ellison and Munro vividly illustrates the application of these scripts in sexual cases.[101] Scripts include both descriptive elements and normative elements specifying expected behaviors in a given situation.[102] Thus, there are scripts for rape and scripts for normal sex that involve

---

100. For further discussion of the New South Wales experience of judicial instructions in rape cases, see J. Temkin, Rape and the Legal Process 193–94 (2002).

101. Louise Ellison & Vanessa Munro, Of "Normal Sex" and "Real Rape": Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation, 18 Soc. & Legal Stud. 291 (2009).

102. Barbara Krahé, Steffen Bieneck & Renate Scheinberger-Olwig, The Role of Sexual Scripts in Sexual Aggression and Victimisation, 36 Archives Sexual Behav. 687, 687 (2007).

expectations of what happens in both situations. These may involve entirely false ideas about rape. Another widely used heuristic is *counterfactual thinking*, which describes the process of mentally undoing events by imagining conditions under which an outcome opposite to the one observed could have been brought about.[103] In rape cases this can lead to the attribution of blame to the complainant for what happened. The *hindsight bias* can have a similar effect.[104] Thus there is an array of different biases that may come into play in a rape case, many of which cannot suitably be tackled in judicial directions. Of those that can be, it would be optimistic indeed to think that they are likely to be fully dislodged by a couple of sentences in the judge's summing up at the very end of the trial.

C. Empirical Research on Judicial Directions in Rape Cases

Empirical research can offer insights into the possible effects of judicial directions. Recently, Ellison and Munro have attempted to assess the impact of jury education in a mock jury study involving nine mini-trial scenarios.[105] Each mini-trial lasted 75 minutes and was observed by 24–26 participants divided into three mock juries (27 juries in total). The mini-trials were played out by actors and barristers in three sets of three trials. In one set, the complainant's demeanor when giving her evidence was flat and unemotional, in another set she complained late, and in the third set, she failed to resist her assailant. In each set of three, jury education was attempted in two trials but not in the third. Jury education took the shape of an expert in one trial and a judicial instruction designed to counter the myth in the second trial. Thus, a judicial instruction was given in three trials involving nine juries. The authors do not set out the precise wording of the instructions given, and it may therefore be possible that they could have been worded more effectively,[106] but attempts were made to ensure they were clearly expressed and, following the guidance in *Doody*, that the defense case was properly represented.[107]

---

103. See Temkin and Krahé, supra note 13, at 49–50.

104. Id.

105. Louise Ellison & Vanessa E. Munro, Turning Mirrors into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials, 49 Brit. J. Criminol. 363 (2009).

106. See preceding text, at "Judicial Instructions: Dislodging False Beliefs."

107. Supra note 105, at 366–67.

The methodology used in this study was far removed from an actual trial, but this is in many ways its strength. Mock jurors were asked simply to concentrate for 75 minutes. The judge's summing-up was brief compared to a normal summing-up, consisting simply of judicial directions on the law and the relevant myth, so that these were given far greater salience than in a normal trial. Hence, with an uncluttered summing-up, the research was well placed to ascertain whether a judicial direction is capable of having any impact. The results disclosed that the majority of jurors who had received the judicial direction were less inclined to be influenced adversely by a complainant who had given an emotionally flat performance or one who had reported late than jurors who had received no such instruction, although the number of jurors in each category was small. For example, where no judicial instruction was given, 15 jurors (58 percent) adhered to the myths about late reporting, but this number declined to 6 (23 percent) in the group where jurors received instruction. However, the myth that rape victims will fight back and incur injuries in doing so proved impossible to shift, and the mock jurors were uninfluenced by the judicial direction.[108]

The authors draw positive conclusions from the research as far as juror education is concerned on the basis that post-trial deliberations showed greater awareness of the issues surrounding rape where this took place. It is difficult however to share this optimism. Given that the format of the study created an environment that was more conducive than a real trial to jurors engaging with judicial instructions, it is disappointing that the directions had no impact in one out of three scenarios. It is also of interest that, for the most part, juries did not discuss the legal tests, and when they did, there was "ample evidence of misunderstanding."[109] "Participants often candidly acknowledged, during the deliberations, that they had not understood the legal directions provided," with one juror noting that he had not been listening since "the content 'was going over the top of my head.'"[110] Since one way of combating some of the myths of rape is to emphasize the requirements and the nonrequirements of the legal definition, this is hardly encouraging. Moreover, the researchers found that in the vast

108. Id. at 371.

109. Louise Ellison & Vanessa E. Munro, Getting to Not Guilty: Examining Jurors Deliberative Processes in and Beyond the Context of a Rape Trial, 30 Legal Stud. 74, 94 (2010).

110. Id. at 95.

majority of trials in the study, there was a shift away from conviction by the time deliberations had concluded. "A sizeable minority of jurors who indicated a guilty verdict at the start of deliberations ultimately voted not guilty . . . only one juror shifted from a preliminary not guilty position to one of guilty at the close of the deliberation process. In addition, those jurors who were initially undecided as to verdict were significantly more likely to vote not guilty in the final poll."[111] Hence, in the final analysis, it would appear that whatever the quality of jury deliberations, juror education was yielding little in terms of conviction rates.

The Ellison and Munro research does not make the case for judicial directions as a means of myth-busting that will lead to improved conviction rates. Indeed, it may confidently be predicted that, in the context of real trials, their impact would be very much less than it was in the study. In real life, a simple trial involving a single defendant is likely to take around 5 days or more. Trials involving more than one defendant or complainant will take much longer, and are likely to last for a fortnight or more. The judge's summing-up is given after the jury has heard all the evidence and been given ample opportunity over the course of days to harden its views. In the summing-up, which is likely to take from one and half to two hours or more in longer trials, the judge will mainly be concerned with examining all the evidence in the trial and explaining the law. No more than a paragraph will be devoted to myths. Thus, the adage "too little, too late" might be thought to apply.

D. Judicial Directions: The Way Forward

It seems unlikely that judicial directions relating to rape myths will have much impact on conviction rates. There is however something to be said for them. They do involve a public recognition from an authoritative source that some commonly held beliefs about rape are false. They would thus take their place as one in a number of different strategies that can be deployed to dismantle the structure of damaging untruths about rape that exists in our society. Furthermore, they are important in terms of the complainant's experience in court. As Sara Payne has pointed out, the women interviewed for her review felt let down in some way by the system "not

111. Id. at 83. Out of 27 trials, 18 of which had involved some form of jury education, only 5 resulted in a conviction, but the authors do not specify which trials these were.

because they had expected a conviction in every case but because they had been made to feel ashamed and responsible."[112]

To be useful, it is suggested that judicial directions need to follow several basic principles. First, they must be clear and simple. Language is all important. Long or elaborate sentences and difficult words should all be avoided. Secondly, it is obvious that different myths need to be challenged in different ways.[113] Some beliefs about rape are always false, and some have no bearing on criminal liability. For example, the crime of rape does not require proof of force, injury, or violence. The false assumption that it does can clearly be challenged in an unequivocal voice, and there would seem to be no objection to such directions being handed over in written form to the jury. Likewise, it can be made very clear that the complainant's "contributory negligence" has no bearing on the issue of consent, as in the following suggested direction, which covers a variety of different situations:

> You cannot assume that a woman is consenting to sex just because of the way she is dressed. You cannot assume that a woman is consenting to sex with a person just because she went to that person's home. You cannot assume that a woman is consenting to sex just because she was flirting or kissing. You cannot assume that a woman is consenting to sex just because she had sex with the same man on some other occasion.[114]

On the other hand, some myths involve beliefs that may or may not be true given the circumstances. For example, it is a false belief that inconsistency necessarily means that the complainant is lying, and this needs to be pointed out; but an inconsistent complainant may be lying, and her inconsistency may be an indication of this. Clearly, a different approach is required here, and in such cases a written instruction is possibly, though not necessarily, less appropriate.

Thirdly, judicial instructions need to avoid the pitfalls revealed by the science of attitude change.[115] Thus, for example, it may be counterproductive to draw too much attention to false beliefs in an attempt to displace

---

112. Payne, supra note 25, at 8.

113. See preceding text, at "False Beliefs about Rape."

114. Only the relevant behavior would need to be mentioned. It is suggested that the new "Illustration" on complainant behavior is too weak to have much impact; supra note 65, ch. 17 at 361.

115. The advertising campaign by the Association of Chief Police Officers in December 2009 heeds many of the lessons learned from research into media campaigns: see The London

them. Finally, there are some myths that research has exploded but the findings of which are counterintuitive and insufficiently familiar in the public domain. These include those relating to memory, consistency, and multiple abuse experiences. In such cases expert evidence that affords the opportunity for greater explanation would be a useful adjunct to a judicial instruction. Indeed, whatever its limitations, expert evidence, coming as it does within the body of the trial, also has a greater chance of being attended to before the jury has made up its mind than a judicial instruction.[116]

CONCLUSION

The justice gap will not be breached solely by tackling the myths of rape. The power of the myths is but one of many outstanding problems in the processing of rape cases by the criminal justice system.[117] However myth-busting is an essential activity that needs to be undertaken within society at large, particularly in schools, as well as in the context of education of the police, barristers, and judges. The advantage of such educational programs is that they can be carried out at a pace that allows for discussion and debate. The courtroom context is plainly very different. Judicial instructions to juries on rape myths is a well-meant and worthwhile development but one that must be approached cautiously for fear of making things worse rather than better for complainants.

Times, Nov. 30, 2009. See also, Police Launch National Rape Awareness Campaign, http://inform.glam.ac.uk/news/2009/12/03/police-launch-national-rape-awareness-campaign/.

116. Research suggests that jurors form views about the verdict early on in the trial: see, e.g., Valerie P. Hans, U.S. Jury Reform: The Active Jury and the Adversarial Ideal, 21 St. Louis U. Pub. L. Rev. 85 (2002).

117. See, e.g., Yates, supra note 13, and Stern Review, supra note 14.