

JUDGING JURIES

*The “common sense” conundrums of prosecuting violence
against women*

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The jury plays a pivotal role within many criminal justice systems. It has often been lauded for its unique ability to ensure the involvement of, and accountability to, members of the public in the application of criminal laws to citizens. At the same time, however, what goes on in the jury room has remained remarkably opaque. We know little about the nature and content of jury deliberations, about how legal tests are understood and applied therein, and about what persuasive strategies are most effective in securing a verdict. Over the past two decades, I — together with colleagues — have conducted several studies, using trial simulations, designed to explore jurors’ approach to decision-making in rape cases. In this article, I reflect on the key findings from that work and situate them in the context of ongoing international dialogue about both how to respond to the “justice gap” in rape cases, and what to do about juries.

I INTRODUCTION

I want to begin by expressing my sincere thanks to the members of the Women in Law Committee for inviting me to give this talk, to the New Zealand Law Foundation and Borrin Foundation for funding my travel to be here, and to Professor Elisabeth McDonald for including me in some fascinating discussions during my visit about the future of sexual offences trials in New Zealand. I am hugely honoured to be giving this year’s Shirley Smith Address. It is a particular treat to do so in the prestigious surrounds of this Parliament Building and in

the company of what I know to be allies and fellow travellers on the journey that Shirley herself trail-blazed towards achieving social justice — both in and through the law. I am grateful to every one of you for making the time to come to the talk tonight and I hope that I will be able to do enough for you to feel that investment of time and attention has been duly rewarded.

In a context in which Lord Devlin, at the outset of his 1956 Hamlyn Lectures, observed that the jury trial was a subject on which it was not possible to “say anything very novel or very profound”,¹ I may well have set myself a rather uphill struggle on this occasion. But as many feminists before me have said in respect of far bigger challenges, nevertheless I shall persist.

In this lecture, I want to reflect on the precarious nature of our contemporary affections towards the jury, focusing particularly — but not exclusively — on its role within sexual offence trials. Drawing on findings across a number of experimental studies that I have conducted with colleagues over the last 15 years, I want to consider the thorny question of whether — in a world in which legal norms and institutions, as well as social interactions, still bear the hallmarks of patriarchal privilege — we can be confident that justice is being done behind the closed doors of the jury room; and if we cannot, where does that leave us in terms of social and legal reforms?

In approaching that question, I will inevitably draw primarily from my own experience of juries and their operation across United Kingdom criminal justice systems. There, as elsewhere, we have engaged in long-standing and still-very-much-live debates about the extent to which, within the broader parameters of an adversarial system, it is possible to reform the procedural and evidential norms of the rape trial in order to respond adequately to the vulnerability of complainants and ensure they are not re-traumatised by the process of holding their attackers legally accountable.

There have also, in past decades, been several legislative and practical

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¹ Patrick Devlin *Trial by Jury* (Steven & Sons, London, 1956) at 3.

innovations that *ought* to have improved the position — including: formal restrictions on the use of certain sexual history and character evidence; special measures to allow complainants to give testimony behind a screen, remotely or via a pre-recorded police statement (and, more recently, pre-recorded cross-examination); provision of detailed training to judges and advocates on reactions to trauma amongst victims of sexual violence; and the introduction of judicial directions designed to challenge certain “rape myths”, for example, in respect of the likelihood of resistance or the significance of a delayed report. But despite this, the rate of attrition of rape cases through the criminal justice process in all jurisdictions of the United Kingdom remains a source of serious concern and the evidence suggests that complainants have experienced little improvement in the process.²

I know, of course, that these are also very live issues in the New Zealand context — that here too there is a sense of frustration that reforms to date have too often been piecemeal and not always lived up to their transformative potential, even when crafted with good intentions.³ In neither hemisphere should that, in my view, cause us to abandon legislative and evidential reform initiatives, but this dawning sense of their limitations has, I think, rightly provoked a turn of attention to other aspects of the justice process that also pose obstacles. As part of that shift, the jury, which had for some considerable time been relatively, and — as I will discuss in a moment — somewhat remarkably, insulated from critique, has attracted increased attention.

Though the Law Commissions in the United Kingdom have not gone so far as their New Zealand counterpart in floating the removal of the jury from sexual

2 Indeed, recent statistics suggest the justice gap in rape cases may be widening rather than retracting. The Crown Prosecution Service in England and Wales recently disclosed that attrition at all stages of the process had increased, with approximately 3.3 per cent of reported rape complaints resulting in a conviction: Crown Prosecution Service *Violence Against Women and Girls Report 2018–19* (2019). In England and Wales, and in Scotland, formal reviews of procedures for, and outcomes of, rape complaints are again underway, reflecting the sense of lack of adequate progress following prior reforms.

3 This is evidenced, for example, by New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015). While the results of the specialist Sexual Violence Pilot Court are promising (see Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Pilot Court* (Gravitas Research and Strategy, June 2019), particularly when combined with intended additional reforms to the process of giving testimony announced by the Government earlier this year, research currently being conducted by Elisabeth McDonald and others, which draws on trial audio recording and transcripts, and which has formed the basis of stakeholder workshops in Wellington and Auckland in August 2019, continues to raise further concerns.

offence cases,⁴ there has certainly been animated debate in recent years over the extent to which jurors can and should be trusted in this context; and of what additional steps might need to be taken to increase confidence in this respect. Current suggestions include, for example, compulsory pre-trial education for jurors, most likely in the form of a DVD. This would be designed to disavow jurors of common but often unfounded and damaging expectations regarding “normal” responses before, during and after a sexual assault.⁵ There have also been calls for an intervention to screen jurors on the basis of their levels of “rape myth acceptance”, as evidenced by responses to attitudinal questionnaires.⁶

These proposals reflect, I suggest, a broader trajectory of what might be termed “falling out of love” with the institution of the jury; and I want to say a little more about that shifting and increasingly precarious relationship before turning to my own findings on how jurors in our mock rape trials approached their task. Those findings will in turn, I hope, help us to consider the merits and demerits of intervening in the jury, including through pre-trial screening and education, for example, and to reflect more broadly on the jury’s future in the criminal process.

II FALLING IN — AND OUT OF — LOVE WITH THE JURY

The liberal state and its legal system’s relationship with the institution of “the jury trial” has certainly had its twists and turns. For prolonged periods of its history, though, it has been marked by a romanticisation of the jury, as much for what it symbolises and enigmatically refuses to reveal, as for its actual role in administering justice or its effectiveness in doing so.

In 1956, Lord Devlin might have purported to have nothing novel or profound to say about the jury, but he certainly had things to say about it that were poetic. It is, he said, “the lamp that shows that freedom lives”.⁷ In

4 Law Commission, above n 3, at [6.34]–[6.49].

5 See, for example, the work of JURIES, a group campaigning for the mandatory briefings in myths and stereotypes about sexual violence for juries in rape, sexual assault and abuse trials. See more at JURIES “JURIES Campaign Brief” (5 November 2014) <www.juriesunderstandingsv.wordpress.com>; and Olivia Smith and Tina Skinner “How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials” (2017) 26(4) S & LS 441.

6 Dominic Willmott “An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials” (Psychology PhD, University of Huddersfield, 2018).

7 Devlin, above n 1, at 164.

other words, its existence reflects a core commitment to public participation in the justice process. It provides an avenue for accountability to the citizenry not only for the substance of the state's laws, but for the way in which that substance is interpreted and applied. As such, when that light cast by the jury is threatened, the citizenry should be alarmed, for it is then, according to Lord Devlin, there is no restraint left to hem in executive power.

The contemporary rejoinder to this, of course, is that, while that may have been true in an era where executive power lay with a singular monarch or undemocratic ruling elite, it no longer applies. Contemporary participatory and representative political systems, coupled with the establishment of an independent judiciary, entail that the jury is not now required to act as a stalwart force against totalitarian power. Its lamp, in other words, can safely be snuffed out.

Yet, as Lady Justice Hallett observed, in a Blackstone Lecture given 50 years after Lord Devlin's, also on the topic of juries:⁸ while it might be right to identify a reduction in the jury's role as a crucial guardian of liberty, it remains important for its enhancement of civil participation in the administration of justice, and for ensuring a more inclusive and diverse engagement with law than could ever be achieved whilst judicial and legislative personnel remain so often drawn from privileged social groups (as they surely do, unfortunately, in many legal jurisdictions).

Juries, Lady Justice Hallett explained:⁹

... provide another form of accountability. They ensure that in each criminal trial it is not just the accused that are on trial. They ensure that the criminal process is itself on trial.

A jury may refuse to convict in spite of the law and the evidence because it concludes that the law is an unjust law. The jury passes its verdict on the law.

That may well be true; and yet it begs as many questions as it answers about the value and legitimacy of the jury. Clearly, there have been cases in which such resistance from the jury has provoked progressive change. Lady Justice Hallett refers, for example, to those involving the historical prosecution of doctors who hastened the death of patients in the process of administering

8 Lady Hallett "Trial by Jury — Past and Present" (Blackstone Lecture, Pembroke College, Oxford, 20 May 2017).

9 At 9.

pain relief, where the jury's refusal to convict notwithstanding a cast iron legal basis prompted the development of the doctrine of "double-effect" to rectify an injustice in the letter of the law.¹⁰ But there are other situations — and sexual offence cases may well be prime amongst them — where jurors' refusal to convict *in spite* of the law and the evidence, and in particular because of a discomfort at the consequences of any such conviction for the accused, takes on a rather different, and I would argue often significantly less progressive, hue.

To properly understand and evaluate this aspect of a jury's functioning requires a stripping away of the romanticised notions in which it has historically been cloaked as a defender of civil freedom, and a candid appraisal of the contemporary role that it does and should play in dispensing justice. But the secrecy that continues to surround jury deliberations makes this difficult. Intrigue over what goes on behind the closed doors of the jury room, and the drama that we presume fills this space as competing perspectives are presented, challenged, and reconciled, may make excellent fodder for Hollywood scripts. But it leaves a substantial gap in our understanding of the operation of justice; a gap that I believe is increasingly hard to reconcile with claims made on behalf of the modern jury to civic responsibility and inclusion.

Lord Devlin himself acknowledged that the jury, in bringing together 12 random strangers with no necessary experience of critical thinking, asking them to listen to and process swathes of information, and then expecting them in a short period of time to form a shared consensus on a verdict regarding the fate of the accused, embodies "a ridiculous and impracticable idea".¹¹ But, nonetheless, he maintained these bizarre and enigmatic qualities were part of its delicate eco-system, and to dig under the surface, or impose restraint or rationality, on the jury would be ill-advised. As he put it:¹²

Since no one really knows how the jury works or indeed can satisfactorily explain to a theorist *why* it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming.

But, it is easy to *presume* that a process which is veiled from scrutiny "works", and Lord Devlin's approach, still effectively supported through our respect for

¹⁰ At 9, citing in particular the case of Dr Arthur: see "R v Arthur" (1981) 283 BMJ 1340.

¹¹ Devlin, above n 1, at 4.

¹² At 57 (emphasis added).

the sanctity of the jury room, has a distinctly self-fulfilling logic.

There are, of course, legitimate reasons to be concerned about tampering with an established system, and maintaining public confidence in the justice process *is* important,¹³ but having a deliberative “black hole” at the heart of our criminal justice system is, I would argue, untenable. At the same time, it is important to be clear that our options here are not limited to blind faith in the fact that the jury works on the one hand, and abandonment of the enterprise of lay participation altogether on the other: on the contrary, even if the jury is shown to be falling short, there may still be compelling reasons to retain it. But we surely need to know where, how and why it is falling short and have an evidence-based approach towards how to improve it.

I make that call for transparency from the perspective of someone who, in England and Wales, has seen restrictions remain on the disclosure of juries’ deliberations,¹⁴ which have foreclosed the potential for large-scale research on the dynamics and content of “real jury” decision-making. Whilst some useful work has been done exploring certain aspects of the “real” juror experience, delving into the substance and dynamics of the deliberation itself has stayed off-limits.¹⁵ I realise that, by contrast, in New Zealand, you have had the benefit of greater insight into real juries as a result of the excellent work done by Yvette Tinsley and colleagues.¹⁶ But even here, I would suggest, there remain broader questions around access to information about juries and the need to develop a sustained, rather than sporadic and largely responsive, evidence base on the jury.

Thus far, I have suggested that there has been a steady decline in the romanticisation of the institution of the jury within our liberal legal process and a growing impetus to subject it to the sort of exposure and scrutiny imposed upon other arms of the criminal justice system. I have noted that this has been particularly pronounced in the context of sexual offence trials, where

13 For further discussion see M Zander “Research Should Not Be Permitted in the Jury Room” (2013) 177 CL & J 215.

14 Juries Act 1974, s 20D (as amended by the Criminal Justice and Courts Act 2015, s 74).

15 Although the Law Commission of England and Wales recommended that, subject to appropriate safeguards, the restriction on disclosure of juries’ deliberations, then contained within s 8 of the Contempt of Court Act 1981, “should be reformed to provide an exception allowing approved academic research into jury deliberations”: Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013) at [4.49].

16 See New Zealand Law Commission *Juries in Criminal Trials* (NZLC R69, 2001).

in many jurisdictions there has been a profound dissatisfaction with the lack of progress achieved through doctrinal and evidential reforms, and a concern that such reforms are being undermined by endorsement in the jury room of problematic socio-sexual norms and what are often referred to as “rape myths”. Jurors in sexual offences trials often have a particularly expansive remit of discretion afforded to them by prevailing legal tests, and matters of credibility are key to their assessments of contradictory evidential accounts regarding the events in question. In this context, there is a concern that misconceptions about rape, and about “normal” socio-sexual behaviour generally, may be applied with impunity by jurors, in pursuance of judicial instructions to apply their “common sense” and “knowledge of human behaviour” to crucial questions about the existence of, belief in, and responsibility for, consent.

With this concern in mind, I want to turn now to give an account of the findings of key studies that I have undertaken in this area. As we will see, while those findings often reinforce the legitimacy of the concerns raised by critics of the jury, they also illustrate the complicated nature of both juror and jury deliberation, and the potential — despite, or perhaps because of, those complications — to do more to ensure that jurors are properly equipped for their task.

III TRIALS AND TRIBULATIONS: JURIES AND SEXUAL OFFENCE ALLEGATIONS

I conducted my first rape jury study about 15 years ago, around the time the Sexual Offences Act 2003 came into force in England and Wales. This Act introduced for the first time in the United Kingdom a statutory definition of consent — a person consents when she agrees by choice and has the freedom and capacity to make that choice. It also set out a list of circumstances in which consent will be presumed (either rebuttably or conclusively) to have been absent, for example where the complainant was asleep or had been given a stupefying substance, or where violence, the threat of violence or deception had been used. Importantly, the Act also shifted English law from a standard of honest belief in consent to one which required the belief held by the defendant to be reasonable, “having regard to all the circumstances” including any steps taken to ascertain consent.¹⁷ The Act was less radical than the initial reform

¹⁷ Sexual Offences Act 2003, s 1(2).

proposals in the Home Office's *Setting the Boundaries' Review*,¹⁸ out of which it developed, but still it was applauded as a substantial step forward. Amongst other things, it was hoped it would provide greater clarity to jurors and move them towards a communicative model of sexual consent.¹⁹

Since completing that first study, I have conducted three further studies on this broad topic with different groups of colleagues, all of which have relied on a similar methodology. In all studies, a scripted trial reconstruction was created in consultation with legal practitioners. In the first three studies, the trial reconstruction was re-enacted live and in real time before an audience of mock jurors, comprised of volunteer members of the public. In the most recent study, participants watched a recorded version of the trial reconstruction filmed in a real courtroom. In the first three studies, the roles of counsel were played by qualified barristers; in the fourth study, while the role of the judge was played by a real judge, counsel were played by actors who received both advance and on-set advice from qualified advocates in respect of tone and delivery. In each study, the trial reconstruction lasted approximately 75 minutes. Having watched the trial, participants were streamed into separate juries and given up to 90 minutes to reach a verdict. Deliberations were audio and video recorded and combined with participants' responses to short pre- and post-deliberation questionnaires. Across these studies, over 1,500 members of the public have taken part, yielding data from 132 different jury groups.

There are, of course, limitations to such mock jury research, not least the fact that participants know the trial is not "real" and as such will not have actual consequences for the parties. On that point, though, it is worth noting that the level of suspension of disbelief apparent across these studies was remarkable, with some jurors discussing at the end how stressful they had found the process and expressing concern about the effect of the decision on the parties. Moreover, while the trial script and periods of deliberation were inevitably curtailed to be feasible within the experimental context, these simulations nonetheless substantially improved — in terms of their realism

18 Home Office *Setting the Boundaries: Reforming the law on sex offences* (July 2000).

19 For further discussion, see, for example Nicola Lacey "Beset by Boundaries: the Home Office Review of Sex Offences" (2001) Crim LR 3; Jennifer Temkin and Andrew Ashworth "The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent" (2004) Crim LR 328; and Sharon Cowan "Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape" in Vanessa E Munro and Carl F Stychin (eds) *Sexuality and the Law: Feminist Engagements* (Routledge, London, 2007) 51.

— on the much more limited written vignette stimuli that was often used in prior research. In addition, these studies were relatively unusual in relying on a non-student volunteer sample, having a substantial group deliberation component and providing detailed and accurate legal tests to jurors to frame that discussion. Importantly, moreover, what this simulation method allowed for — in a way that real trials never can, of course — was isolation of certain variables whilst holding others constant in order to test for specific effects.²⁰

Thus, whilst all four studies explored jurors’ approaches to, and interpretation of, key provisions on consent, freedom, capacity, and reasonable belief,²¹ each also had its own distinctive focus. More specifically, the first looked at the way in which jurors approached rape cases in which the complainant was intoxicated or under the influence of drugs at the time of the attack, whether self or surreptitiously administered.²² The second explored jurors’ subscription to popular misconceptions regarding “normal” or “expected” victim behaviour — namely, her propensity to physically struggle during an attack, to report it immediately afterwards, and to appear emotionally distressed whilst recounting her experience to others.²³ And having identified the prevalence of such views amongst mock jurors, the second phase of this second study also tested for an impact as a result of providing to jurors “myth-busting” information, either through expert testimony during the trial or extended judicial instructions.²⁴

The third study examined the impact of the adult rape complainant’s mode of testimony — in particular, the effect on jurors’ assessments of credibility

20 For a more detailed discussion of the methodological strengths and weaknesses of mock jury research, grounded in the context of one of these substantive studies, see Emily Finch and Vanessa E Munro “Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research” (2008) 35 *J Law & Soc* 30.

21 For discussion on this, see in particular Emily Finch and Vanessa E Munro “Breaking Boundaries? Sexual Consent in the Jury Room” (2006) 26(3) *LS* 303; and Louise Ellison and Vanessa E Munro “Getting to (Not) Guilty: Examining Jurors’ Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial” (2010) 30 *LS* 74.

22 Emily Finch and Vanessa E Munro “The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants” (2007) 16 *Soc & Legal Stud* 591.

23 Louise Ellison and Vanessa E Munro “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49 *Brit J Criminol* 202; and Louise Ellison and Vanessa E Munro “Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation” 18 *Soc & Legal Stud* 291.

24 Louise Ellison and Vanessa E Munro “Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials” 49 *Brit J Criminol* 363.

where she used a screen, live-link or pre-recorded police statement to give her testimony.²⁵ And in the fourth and most recent study, the key findings of which will be outlined in a report published by the Scottish Government in October 2019, my colleagues and I have been looking at both rape and physical assault scenarios; exploring in particular the impact that jury size, number of verdicts and anonymity rules have on deliberations, against the background of Scotland's unique system of having 15 jurors choose by a simple majority between guilty, not guilty and not proven verdicts.²⁶

In this lecture, I obviously do not have the time to go into detail on what we found in relation to each of these variables. What I do want to do, though, is “zoom out” to reflect more broadly on key findings that span across these studies as a collective, and to think about what they can contribute to ongoing debates about reform, or even abandonment, of the jury in rape cases.

That “zooming out” comes with the disclaimer, of course, that it is not possible to draw strict parallels and comparisons across these studies: amongst other things, the scripts that were used varied slightly over time, and while the actors were held constant within each study, we obviously recruited a new group for the next incarnation. In addition, in the Scottish study, jury groups were directed under slightly different substantive definitions of the rape offence, were not necessarily required to even try to reach a unanimous verdict during their deliberations, and — in line with procedural rules — were only able to return a conviction where they were satisfied that the offence elements had been established on the basis of corroborated evidence.

Nonetheless, across these studies, there are still some striking consistencies and resonances that merit reflection. In their different ways, each highlights, I think, the falsity of assuming that a change in substantive legal tests — whether to include a definition of consent, highlight the importance of freedom and capacity to choose, or impose a different standard of responsibility upon the defendant — will automatically result in a change in interpretation and application on the ground. It was relatively rare across all these studies for

25 Louise Ellison and Vanessa E Munro “A ‘Special’ Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials” (2014) 23 Soc & Legal Stud 3. See also Louise Ellison and Vanessa E Munro “‘Telling Tales’: Exploring Narratives of Life and Law within the (Mock) Jury Room” (2015) 35 LS 201 at 212.

26 This research is now published: Rachel Ormston and others *Scottish Jury Research: Findings from a Large-Scale Mock Jury Study* (Scottish Government, October 2019), available at <www.gov.scot>.

jurors to directly employ the language of the legal tests, despite their repeated use by counsel and the judge; and it was even more rare for them to embark on an extended discussion about what those terms might mean exactly in the case at hand. Instead, for the most part, the tests were quickly translated into far more prosaic interpretations — for example, in one jury in the third study, it was maintained by a juror that at its core, “the point we need to decide is whether her removing her knickers or him removing her knickers proves consent”.²⁷ Of course, concepts of freedom and capacity invite complicated philosophical questions, and so it is perhaps not terribly surprising that they do not offer as much useful guidance to jurors as hoped.²⁸ In respect of capacity, for example, it was clear in the first study that jurors adopted a range of divergent tests, which centred variously on the complainant’s level of self-control, her ability to express her sober preferences, her ability to communicate, or level of consciousness during the assault. Whichever approach jurors took had a marked effect on the prospects of a conviction.²⁹

In addition, what a belief that was reasonable “having regard to all the circumstances” entailed exactly was unclear to jurors, who typically levelled this test down to focus simply on what the defendant honestly believed. In the third study, for example, one juror remarked that she did not properly understand the test, prompting peers to paraphrase with inaccurate but rarely challenged alternatives, including “did [the defendant] understand that no meant no or did he actually think that she was coming on to him” and “it is saying that we need to look at it from his point of view, and did he think he was in with a chance”.³⁰ This, of course, undermined the shift in *mens rea* brought about under the 2003 Act, reinforcing the prior position in which the only “objective buffer” was what jurors considered it credible the accused himself believed.

In this context, while many jurors emphasised that it was not an understanding they personally endorsed, they continued to accept that a women’s silence or passivity could “reasonably” be taken as consent by the

27 Ellison and Munro ““Telling Tales””, above n 25, at 212.

28 Temkin and Ashworth, above n 19, at 336; and Vanessa E Munro “Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales” (2017) 26 Soc & Legal Stud 417.

29 Finch and Munro “The Demon Drink and the Demonised Woman”, above n 22; and Emily Finch and Vanessa E Munro “The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited” (2004) Crim LR 789.

30 Ellison and Munro ““Telling Tales””, above n 25, at 212.

accused. As one put it, for example:³¹

If I were to put him in my shoes, I would have said it was not reasonable, but the evidence, and the way he thought, I know he didn't actually hear a yes, but he didn't hear a no, it's just too much to be able to say guilty.

Jurors often accompanied this with the insistence that an expected response to unwanted sexual contact would be to struggle physically (thereby sending a clear and unequivocal signal of rejection to the accused); and they imposed demanding expectations on a complainant to resist an attacker, and indeed inflict defensive injury upon him. Jurors in the second study, for example, asserted that “a woman can be strong when she is being pinned down”, that “the smallest and quietest of people, when you're in a situation you don't want to be in, you find something within you to give him a damn good kicking” and that “no matter how big the guy, even if she's 8 stone and he's 16, at some point she can scratch, she can hit, she can knee”.³²

While some jurors were willing, in principle, to accept that a woman might freeze during an attack, for many the credibility of this only really held in cases where the perpetrator was unknown to the victim. As one juror put it, if it was “someone she didn't know that would be [different], you can believe someone could be paralysed by fear because you don't know what they're capable of”.³³ Such contributions map onto a broader point, which is that, while there is a tendency in some literature in this area to talk in short-hand about a “real rape” stereotype, which weds jurors to a narrow conception of rape as involving only an attack by a stranger, the vast majority of our participants were in fact well aware that most rapes are committed by acquaintances.³⁴ Nonetheless, it was clear that jurors brought to the deliberation certain expectations — including around resistance and freezing — about how a woman would react to an assault by an acquaintance, which were different in kind from those pertaining to a stranger.

³¹ Finch and Munro “Breaking Boundaries?”, above n 21, at 317.

³² Ellison and Munro “Reacting to Rape”, above n 23, at 207.

³³ At 207.

³⁴ See further, Louise Ellison and Vanessa E Munro “A Stranger in the Bushes or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study” (2010) 13 *New Criminal Law Review* 781; and Louise Ellison and Vanessa E Munro “Better the Devil You Know? ‘Real Rape’ Stereotypes and The Relevance of a Previous Relationship in (Mock) Juror Deliberations” (2013) 17 *E&P* 299.

In a context in which critics had rightly criticised the previous law for encouraging a focus on the behaviour of the complainant rather than the defendant, it had been hoped that the legislative shift marked by the Sexual Offences Act 2003 would have provided a counter-balance. But across the studies there was little sign of this within the jury room. Indeed, the behaviour of the complainant before, during and after the attack continued to be a primary focus of discussion. Amongst the behaviours that jurors highlighted as indirectly communicating her willingness to engage in intercourse were: offering/accepting a lift, inviting the accused into her home, remaining in the accused's company for a prolonged period, paying/receiving compliments, drinking alcohol, sharing a goodnight kiss, and using sexual innuendo.³⁵ Talk of "leading the accused on" and "sending mixed signals" were often linked to such behaviours, along with attributions of responsibility for the fact that she was "foolish" or worse for having done so.

And while some jurors did try to distinguish the complainant's previous conduct from the sexual signals that it may or may not have transmitted and the actuality of her sexual consent, many struggled to maintain this separation. This was reflected, for example, in the comment by one female juror in the third study that: "I don't think she gave consent, but I think there was some consent there."³⁶ Similarly, in response to a peer's assertion that there is nothing "wrong" with inviting a colleague back to your home, another female juror responded: "no, there isn't anything wrong with it, but what is behind the thought of inviting somebody back to your house in the evening — a male person?"³⁷ Thus, despite accepting, in principle, that any signalling behaviour cannot supplant the need for consent, many jurors were reluctant to abandon this logic altogether, at least in assessing any belief in consent held by the defendant.

In intoxication scenarios, in particular, complainants who "got themselves" into a drunken state were often seen as partially, if not completely, responsible for any subsequent sexual interaction, and even those to whom intoxicants were administered surreptitiously were often still criticised for not taking adequate care of their host substance. Meanwhile, defendants who

35 Ellison and Munro "Of 'Normal Sex' and 'Real Rape'", above n 23, at 295

36 At 296.

37 At 296.

pressured a complainant to drink, or even gave her additional alcohol without her knowledge, were often approached sympathetically for invoking a well-trodden, if not exactly commendable, strategy of using alcohol to “loosen up inhibitions”.³⁸ As one juror put it, for example:³⁹

... you might think yeah, that is very unreasonable but, from his point of view, you might think it's not as unreasonable and the fact that she is at a party, she does look and appear to be drunk, she hasn't told him no, and from the other person's point of view it might look like he's not being unreasonable.

Across all the studies, then, male sexual initiative was often seen as inevitable and as offering its own justification. An onus was placed on women both to appreciate that men would be monitoring their behaviour for evidence of sexual “signals” and to police their own responses accordingly, forcefully and unequivocally where needed. Indeed, the notion that the defendant might have been “so passionate and into it” or “so transfixed” that he would not be able to “register what she was actually doing” was often put forward.⁴⁰ Amongst the most striking expressions of this came from one juror who asserted: “a woman can stop right up to the last second ... a man cannot, he's just got to keep going, he's like a train, he's just got to keep going”.⁴¹

And these expectations from jurors about how a “credible” victim — that is, one deserving of sympathy and without a taint of contributory responsibility — would act extended not only to the period before and during the attack but also to its aftermath. In the second study in which a complainant waited three days before reporting to the police, for example, this delay presented a significant stumbling block to credibility for many jurors, who were adamant that their instinctive reaction would have been to report immediately.⁴² And even in the third study where the delay before reporting was only around thirty minutes, it continued to be a source of consternation. Some jurors

38 Finch and Munro “The Demon Drink and the Demonised Woman”, above n 22, at 604. For wider discussion of issues around intoxication and consent, see also Finch and Munro “The Sexual Offences Act 2003”, above n 29; and Emily Finch and Vanessa E Munro “Intoxicated Consent and the Boundaries of Drug Assisted Rape” (2003) *Crim L R* 773.

39 Finch and Munro “Breaking Boundaries?”, above n 21, at 318.

40 Ellison and Munro “Of ‘Normal Sex’ and ‘Real Rape’”, above n 23, at 297.

41 At 298.

42 Ellison and Munro “Reacting to Rape”, above n 23, at 209.

felt it was “strange” that she had delayed making the call, and “odd” that she had opted to change her clothes in that intervening period but not go for a shower.⁴³

IV MOVING FORWARD: FUTURE REFORM OR REMOVAL OF THE JURY?

So, on the whole, it is fair to say that these studies do not give cause for much complacency, let alone confidence, regarding the ways in which jurors approach their deliberative task. As Conley and Conley have observed, jurors — particularly in rape trials — “hear fragmentary and often conflicting accounts of highly contested events”⁴⁴ and it is hardly surprising then that they fill gaps, construct stories and make sense of their conclusions through the use of “unofficial” rules and heuristic devices informed by personal, and what is perceived as common, experience.

But this is not an issue that is unique to the rape trial. Many of the unofficial rules, conventions and experiences reflected in participants’ contributions across the four studies tap into wider narratives about the normative dynamics of heterosexual relationships and the capricious nature of women’s agency, whilst endorsing stereotypical conventions of men as active and women as paradoxically passive but also capable enforcers of personal boundaries. These narratives may also play a crucial role in other contexts in which jurors are tasked with dispensing justice in response to allegations of gender-based harms. Thus, while to date, the focus of jury research has overwhelmingly been on rape offences, and not without good reason — it is important that the findings that emerge in that context are not thought to exist in a ghetto.

To give but one contemporary example, in England and Wales and more recently in Scotland, dedicated “coercive control” offences have recently been created. These are intended to respond, through the criminal law, to situations in which, within domestic relationships, an accused relies on non-physical forms of abuse in order to humiliate or intimidate another person, or to make them subordinate and/or dependent by isolating them from sources of support, exploiting their resources for personal gain, depriving them of the means needed for independence, resistance and escape, or regulating the minutiae

43 Ellison and Munro “Telling Tales”, above n 25, at 219.

44 Robin H Conley and John M Conley “Stories from the Jury Room: How Jurors Use Narrative to Process Evidence” (2009) 49 *SLPS* 25 at 31.

of their everyday behaviour.⁴⁵ Prosecutions under these offences are still in their infancy. It is not hard to imagine, however, that jurors might struggle to determine appropriately the point at which certain forms of conduct — which might be read by some as chivalrous and protective, albeit clearly over-zealous — cross over into a form of psychological or emotional abuse that merits criminalisation. It is quite feasible that unofficial rules grounded in the same sort of hetero-normative conventions regarding relationship and communication norms, and expectations of resistance and reporting by victims, will be relied upon here as have been in rape cases. It is important, therefore, to continue to see sexual and family violence, and indeed all violence against women, as related in this way, and to reflect on the challenges posed by, and to, the jury in this patriarchal frame.

All of that said, I do not think it is entirely doom and gloom. As I noted at the outset, there have recently been calls to remove the jury from sexual offence cases or at the very least to screen and bar certain individuals from participation on the basis of attitudinal responses. For me, both these proposals are still premature. It is not often that I find myself agreeing with Lord Devlin, but it is right I think that the importance of having lay participation — in the form of the jury — at the heart of our justice system should not be dismissed lightly; and certainly not until it is clear — based on rigorous and transparent research — that its flaws are too substantial to be overcome. There is still, in my view, a good deal more that we could do to ensure that we have given the jury a fair opportunity to dispense justice in rape cases. Amongst other things, that includes preparing jurors and forepersons more appropriately for the practical and emotional challenges of their role; and equipping prosecutors with the resources to build cases in which they can proactively challenge defence strategies grounded in dubious assumptions about normal victim behaviour and be confident in supporting complainants to contextualise their own responses so that they are intelligible to jurors. It also involves encouraging judges to embrace it as part of their role to manage the tone of a trial and intervene actively when necessary to ensure questioning strategies are appropriate, that jurors do not hear irrelevant information that it will be realistically impossible for them to unremember from the narratives they construct of the case before them, and that the directions that they receive

45 Serious Crime Act 2015, s 76; and Domestic Abuse (Scotland) Act 2018.

are truly useful.

There is no question that, across these studies, there have been several occasions when I have felt frustrated and shocked by how participants have approached their deliberative task and been deeply concerned regarding the assumptions about socio-sexual behaviour that some of them have relied upon. At the same time, however, I have also consistently observed that, even in simulations, jurors are — for the most part — genuinely trying to do their best when tasked with an incredibly difficult challenge. And importantly, there is some evidence which suggests that, to the extent that jurors rely on unfounded stereotypes and myths about sexual violence, these *may* be amenable to at least some level of change. For example, in our second study, in which we explored the impact of giving jurors education regarding the frequency with which, and reasons why, complainants fail to physically resist, delay reporting, or display a calm demeanour at trial, we saw a substantial shift in attitudes and tone in respect of the delay and demeanour variables. This was reflected in a reduction of approximately one half in the number of jurors who said — after being provided with education on these points — that it would have made a difference to them if the complainant had reported sooner or been more visibly upset.⁴⁶

It is true, unfortunately, that we saw no such impact in relation to resistance and injury — some 90 per cent of jurors said it would have made a difference if the complainant had more physical injury, and this remained largely constant regardless of whether they received education.⁴⁷ But it is also worth noting that we did not in that study specifically explain that freezing reactions are common not only in stranger but in acquaintance scenarios; and given that it was this that jurors often struggled to countenance, it is possible that more targeted information could have had a more positive impact. Some support for that optimism comes, though at this stage without full analysis of the data to confirm it, from the most recent study in which — while the position is complicated by the existence in Scotland of corroboration rules and a not proven verdict — there seemed to be a different tone to jurors' discussion of resistance, with references to, and adoption of language used in, a campaign

⁴⁶ Ellison and Munro “Turning Mirrors into Windows?”, above n 24, at 369 and 371.

⁴⁷ At 373.

by Rape Crisis Scotland on freezing responses.⁴⁸

The pre-trial DVD that some campaigners have proposed in England and Wales could certainly have a role to play in this education process. But it cannot be the only response. For one thing, concern over its evidential status inevitably means that it would have to be restricted in its content to substantively uncontroversial claims, for example about the prevalence of acquaintance versus stranger rape, or information about the potential impact of trauma on physical responses and memory recall. Its generic nature also means that it would be likely to cover material of no relevance at all to jurors in respect of the case that comes before them (which may ultimately be confusing or counter-productive). But perhaps most significantly, such pre-trial interventions also risk diverting attention and resource away from broader public education initiatives that disavow citizens of their misconceptions about rape, and about normative sexual behaviour in general, regardless of whether they ever enter the jury room. Though evaluation of such initiatives tends to be small-scale and rarely longitudinal, there is evidence that they can be effective in changing attitudes and so have the potential to not only improve justice outcomes in individual cases of abuse, but to prevent abuse in the first place.⁴⁹

To the extent that the objective is to increase informed discussion within the jury room, another option that has been floated — instead of educating incoming jurors — would be to screen out and exclude the less enlightened.⁵⁰ There is, on the face of it, an appeal of simplicity to this proposal. But that simplicity belies, however, the substantial in-roads that such an intervention would make into the role and function of the jury as a vehicle for democratic participation in the administration of justice, and the wider ramifications that this may have across the system. What is more, it may also significantly overstate the accuracy with which such screening could ever be achieved. Whilst research in social psychology has substantially improved the subtlety and nuance of rape myth acceptance questionnaires, the discursive and deliberative dynamics of the jury room are multi-faceted and the task facing jurors is far more complicated than a simple “yes” or “no” response. Thus, even if a connection could reliably be made to show that scores on rape myth

48 For more information see Rape Crisis Scotland “I Just Froze” <www.rapecrisisscotland.org.uk>.

49 Beth Cameron and Liz Murphy *Campaign Evaluation Report: ‘This is Not an Invitation to Rape Me’* (Rape Crisis Scotland, March 2008).

50 Willmott, above n 6.

acceptance scales predict how participants will approach the evidence and determine their verdict in a rape case, a screening process based upon this will fail to touch the potentially vast number of additional jurors who do not score highly on such scales but who nonetheless also rely on problematic or ill-informed views within the deliberation process.

This is not simply because people are increasingly adept at identifying what is the socially desirable response to attitudinal prompts about sexual behaviour. The reality is that while it is one thing to renounce a problematic view in the abstract, it is quite another to stick to it in a context in which you are being asked to be sure, beyond reasonable doubt, of the guilt of a person, to reach that conclusion on the basis of competing narratives replete with gaps or inconsistencies, and to not only express that perspective to peers but to convince them of its merits. In one of our studies, my colleague and I asked participants to complete an abbreviated rape myth acceptance scale before deliberating and looked at how jurors' responses did or did not correlate to the positions they then defended in discussions.⁵¹ Admittedly, that is only one study and our findings regarding this relationship were ancillary to our main focus. Nonetheless, in it we found the predictive value of attitudinal responses to be potentially limited. Indeed, while — as I have discussed — there was a strong expectation amongst jurors of resistance against a known assailant, only 11 per cent of those sampled agreed with the statement that “if a woman doesn't fight back you can't really say it was rape”. Sixty per cent reported that they strongly disagreed.⁵² Meanwhile, only eight per cent agreed with the statement that “a rape probably didn't happen if the woman has no bruises or marks”, whilst 65 per cent recorded that they strongly disagreed.⁵³ Likewise, whilst comments endorsing the inevitability of male sexual initiative and excess were common in the juries, 58 per cent of the jurors sampled reported that they disagreed with the claim that “rape happens when a man's sex drive gets out of control”; 50 per cent claimed to disagree with the suggestion that “men don't usually intend to force sex on a woman but sometimes they get too sexually carried away”; and 67 per cent said they disagreed that “when a man is very sexually aroused, he may not even realise that the woman is resisting”.⁵⁴ In this

51 Ellison and Munro “A Stranger in the Bushes, or an Elephant in the Room?”, above n 34, at 789–794.

52 At 790.

53 At 790.

54 At 793.

light, to see screening jurors based on abstract attitudinal responses as a reliable solution to any difficulties regarding how juries approach their deliberations in rape cases would, I believe, be overly optimistic.

V CONCLUDING REMARKS

In closing, I should note that, while it has yet to be published, there have been early indications in England and Wales that recent work conducted at the instigation of the Judicial College into reliance on rape myths amongst real jurors will paint a rather different picture. It will suggest that concerns about the approach of the jury have been significantly overblown, with the explanation for this lying primarily in the fact that, whilst previous research has relied on mock jurors, there is something transformative about the process of observing a real trial that ensures jurors in the non-experimental context approach their task more diligently, with greater respect for the legal tests set by the judge and no substantial reliance on myths or misconceptions. Indeed, based on fieldwork conducted at court with approximately 500 jurors, the research appears to have found that “only” three per cent reported being of the view that rape had to result in bruises or marks, and “only” five per cent that it could not be rape unless a person fought back.⁵⁵

It is hard at this stage, without yet having had the benefit of seeing the full report — and being able to properly evaluate its underlying data and methodology — to know what to make of this finding. I will be genuinely delighted if the study can convince that there is in, in fact, nothing to worry about: that would mean we can have significantly more confidence in the justice process, will no longer feel equivocal about encouraging victims of sexual violence to report, and will benefit from police and prosecutors being less risk averse perhaps in the complaints (and complainants) that they are willing to put before the jury. But to the extent that this research seems to rely primarily on post-deliberation interviews with jurors, in which they are asked in the abstract about their subscription to rape myths, it runs into many of the same potential difficulties and shortcomings that were raised above in

55 These figures and the use of the descriptor “only” are taken from Sir Brian Leveson’s Valedictory Lecture: Sir Brian Leveson, President of the Queen’s Bench Division “Criminal Trials: The Human Experience” (University College London, London, 13 June 2019) at 13. He cites these findings, emerging from research by Cheryl Thomas, further discussion of which is featured on BBC Radio 4’s Law In Action: Interview with Professor Cheryl Thomas, Professor in the Faculty of Laws at University College London (Joshua Rozenberg, BBC Radio 4, 27 June 2019) audio record provided by BBC.

respect of other studies that rely too heavily on abstract attitudinal statements as proxies for what went on in the deliberation. Furthermore, in a context in which participants are asked about subscription to such myths and whether they informed their deliberations immediately after having returned their verdict in a case, there is perhaps reason to expect that they might be inclined to emphasise their compliance with legal tests and deny — consciously or otherwise — other heuristic devices.

Thus, while I await its publication with interest, I am not convinced that this research will, or indeed should, quell the concerns that have amassed about jury deliberation in rape cases over many decades — not only across the United Kingdom, but internationally. Rather than closing down debate in this area, if anything, what it may do most compellingly is strengthen the case for relaxation of current legislative restrictions, so that researchers can embark more easily on responsible investigations that — through a diversity of rigorous methods — engage with the mechanics and complexity of the real deliberation process and shed light on the jury room. Doing so has its risks, of course, but it may be the only thing that can rekindle liberal law's love of the jury.