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And Still We Must Talk About “Real Rape”

SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE. By Jennifer Temkin & Barbara Krahe. Oxford & Portland, Oregon: Hart Publishing. 2008. Pp. ix, 257. \$63.00.

*Reviewed by Elisabeth McDonald**

Over twenty years ago, Susan Estrich, in a 1986 article that provided the basis for her influential book,¹ made the following observations about non-traditional rapes, or those rapes that are not “real”:

Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight . . . the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman.²

In a 2008 echo of these words, Jennifer Temkin³ and Barbara Krahe⁴ report, in *Sexual Assault and the Justice Gap: A Question of Attitude*, that:

An extensive body of research from social psychology and criminology demonstrates the influence of stereotypes and myths on judgments about rape. It reveals widespread endorsement of the real rape stere-

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1. SUSAN ESTRICH, *REAL RAPE* (1987).
2. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1092 (1986).
3. Professor of Law, University of Sussex, United Kingdom.
4. Professor of Psychology, University of Potsdam, Germany.

otype which sets restrictive criteria for the definition of rape in terms of strangers using force on victims behaving in accordance with normative expectations about female role behaviour. Since only a small proportion of rapes actually meet these defining features, the real rape stereotype effectively bars many women from being acknowledged as victims of rape. . . .

The real rape stereotype is embedded in the wider context of generalised beliefs about rape that stress the victim's responsibility for being assaulted, minimise the seriousness of sexual assault and exonerate the perpetrator.⁵

As Temkin and Krahe establish, the less a sexual assault looks like a "real rape"—because the complainant was previously in a sexual relationship with the defendant, had been drinking, or willingly went home with the defendant—the more likely the defendant will be acquitted.⁶ This much is not new. Both before and after Estrich's observations about "real rape," a significant amount of research and academic commentary, across many jurisdictions, has come to the same conclusion.⁷ Further, it seems likely that the low conviction rates for rape and the fact that victims of acquaintance rape have a very difficult time as complainants within the criminal justice system may well contribute to the low reporting rate for sexual offenses

5. JENNIFER TEMKIN & BARBARA KRAHE, *SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE* 50 (2008).

6. *Id.* at 45-46, 48.

7. *See, e.g.*, N.S.W. DEP'T FOR WOMEN, *HEROINES OF FORTITUDE: THE EXPERIENCE OF WOMEN AS VICTIMS OF SEXUAL ASSAULT* (1996), available at <http://www.women.nsw.gov.au/Publications/Publications.htm>; SCOTTISH LAW COMM'N, *DISCUSSION PAPER ON RAPE AND OTHER SEXUAL OFFENCES* (2006), available at http://www.scotlawcom.gov.uk/downloads/dp131_rape.pdf; NATALIE TAYLOR & JACQUELINE JOUDO, AUSTRALIAN INST. OF CRIMINOLOGY, *THE IMPACT OF PRE-RECORDED VIDEO AND CCTV TESTIMONY BY ADULT SEXUAL ASSAULT COMPLAINANTS ON JURY DECISION MAKING: AN EXPERIMENTAL STUDY, RESEARCH AND PUBLIC POLICY SERIES*, No. 68 (2005), available at <http://www.aic.gov.au/publications/rpp/68/RPP68.pdf>; VICTORIAN LAW REFORM COMM'N, *FINAL REPORT ON SEXUAL OFFENCES* (2004), available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb23784ec2a3402/B5FinalMergedReport.pdf>; Elisabeth McDonald, "Real Rape" in *New Zealand: Women Complainants' Experience of the Court Process*, *Y.B.N.Z. JURIS.*, 1997, at 59 [hereinafter McDonald, "Real Rape"]; DUBLIN RAPE CRISIS CTR., SCH. OF LAW, TRINITY COLL., *THE LEGAL PROCESS AND VICTIMS OF RAPE* (1998), available at <http://www.drcc.ie/report/rapevic.pdf>.

against adult women.⁸ Temkin and Krahe refer to the discrepancy between reports of sexual victimization and convictions, despite significant law reform measures over the last thirty years, as the “justice gap.”⁹

Although the connection between rape myths and conviction rates has long been demonstrated, the need for a contemporary, scholarly study that compellingly reiterates this connection is, perhaps aptly, provided by those legal practitioners interviewed as part of the authors’ UK-based research.¹⁰ When asked about the existence of the justice gap, only one of the twenty-four interviewed (seventeen judges and seven barristers) “was prepared to concede that there was in fact a justice gap.”¹¹ “Other interviewees denied or showed resistance to this idea, and some were plainly annoyed at the suggestion.”¹² The authors importantly go on to identify the contradiction between this rejection of the notion of a justice gap—which a number of interviewees described as a “concoction” of women’s groups¹³—and the observations of the participants about the difficulties of conviction when there is no “real rape”:

Many interviewees considered that the idea of a justice gap was based on fundamental misunderstandings about the nature of rape cases in which so frequently it was one person’s word against another so that the burden of proof would necessarily be very difficult for the prosecution to discharge. *Yet they themselves had pointed to the problems in processing rape caused by failures in evidence-gathering, weak prosecuting and reliance on stereotypical thinking, all of which have a bearing on whether the burden of proof is regarded by juries as having been satisfied.*¹⁴

The authors’ research makes the case for the need to continue to talk about “real rape” and how the dissonance between reports and convictions can be explained, not by lack of evi-

8. Mary Heath, *Lack of Conviction: A Proposal to Make Rape Illegal in South Australia*, 27 *AUST. FEM. L.J.* 175, 177 (2007).

9. TEMKIN & KRAHE, *supra* note 5, at 1.

10. *See id.* at 125-58.

11. *Id.* at 139.

12. *Id.*

13. *Id.* at 140.

14. *Id.* at 141 (emphasis added).

dence, but by preconceived notions of what rape looks like and how a “real victim” will act. Rather than explaining the justice gap as a result of the difficulties of proof when credibility is the main issue, Temkin and Krahe argue that “[p]erceptions of rape are influenced by stereotypes, bias and gender prejudice. . . . [I]t is this attitude problem that needs to be addressed if the justice gap is to be reduced.”¹⁵ Judgments about sexual assault, the authors say, are “skewed in the direction of low conviction rates partly because of the widely held attitudes about rape which undermine the position of the complainant and benefit the defendant.”¹⁶

Again, there can be no real argument about the validity of these claims from those working with victims or those involved in researching the impact of rape law reforms. The original contribution this book makes to the literature in this area is that it analyzes the existing research in order to reveal the impacts of attitudinal bias, presents previously unpublished research which is consistent with previous work, and suggests how attitudes may be changed so that law reforms will no longer be undermined by the actual practice.¹⁷ Instead of claiming the law can provide the answers, although some further law reform is proposed,¹⁸ the authors demonstrate that the attitudinal biases—the wide-spread subscription to rape mythology—can only be effectively addressed by identifying and challenging these biases. Law reform, alone, has clearly proven to be of little use in addressing the justice gap.

Having established the current need for such a publication, this review will proceed with selective comment on the three parts of the book. Part I, *The Background*, deals with the existing research on the justice gap, the role of rape stereotypes, and the process of jury decision making.¹⁹ Part II, *New Evidence*, presents a series of empirical studies undertaken by the authors, “which investigate the attitudinal problems underlying the justice gap.”²⁰ Part III, *Some Possible Solutions*, sets out

15. *Id.* at 1.

16. *Id.* at 2.

17. *See id.* at 3-5.

18. *See id.* at 161-76.

19. *Id.* at 9-71.

20. *Id.* at 4. *See also id.* at 75-158.

reform options, covering education initiatives, as well as substantive and procedural reforms.²¹ Given the amount of information contained in this book, my comments will focus mainly on the relevance of the work to developing proposals for change in other jurisdictions, particularly that of the jurisdiction with which I am most familiar, New Zealand. I conclude that *Sexual Assault and the Justice Gap: A Question of Attitude* is required reading for all policy and lawmakers currently grappling with how to address the “justice gap.”

I. The Background: Research on the Impact of Rape Myths and Jury Decision Making on the Justice Gap

A. *Reporting and Conviction Rates: The Problem of Attrition*

The first chapter sets out statistical information from various jurisdictions—England and Wales, Germany, and the United States—to demonstrate the extent of the problem of attrition, that is, the gap or “chasm”²² between offenses reported to the police and the number of actual convictions.²³ However, as the authors point out, although the rate of reporting appears to be rising, sexual offenses are still under-reported, and, as some of those actually reported are classified as “no crime” by the police,²⁴ the number of convictions as compared to the actual number of offenses is even more concerning than the official statistics expose.²⁵

The reasons that victims choose not to report sexual offenses include their own views about whether what happened to them was a “real rape.”²⁶ Even if an alleged victim believes she was raped, she may conclude, however, that the police may not agree.²⁷ Research in the United States supports this analysis, finding that the chances of a rape being reported increased where there had been physical injury or the use of a weapon.²⁸ Victims may also not report rape in order to avoid what they

21. *Id.* at 161-207.

22. *Id.* at 10.

23. *See id.* at 11-21.

24. *Id.* at 17.

25. *See id.* at 10-14, 19-22.

26. *Id.* at 13-14.

27. *Id.* at 13.

28. *Id.* at 13-14.

know will be a difficult journey through the criminal justice system.²⁹ High profile acquaintance rape cases, which have disclosed evidence of the complainant's behavior and resulted in acquittals, remind victims to be wary.³⁰ Judges and lawyers acknowledge the trauma of being a complainant in a sexual assault case, some even stating publicly that they would advise a family member not to report such an incident.³¹ Further research on the reasons for non-reporting is currently being undertaken in New Zealand, with a focus on addressing the rate of attrition and increasing the rate of reporting.³²

The low conviction rate for rape may also be a factor influencing low reporting rates. Temkin and Krahe examine the unfavorable conviction rate in England and Wales in 2004 for rape (43% of those actually prosecuted) as compared with other violent offenses (71% for "other wounding" offenses, for example).³³ In the United States, "conviction rates [for rape] measured in terms of convictions as a proportion of reported offenses have been shown to be well below that of other violent crimes."³⁴ These figures are almost identical to those in New Zealand for 2004 through 2006: 46% conviction rate for sexual offenses compared to 70% for total crime.³⁵ Mary Heath found that in South Australia in 2003, there was a 19% conviction rate for rape and attempted rape, compared to a 41.4% conviction rate for a major

29. See N.Z. LAW COMM'N, DISCLOSURE TO COURT OF DEFENDANTS' PREVIOUS CONVICTIONS, SIMILAR OFFENDING, AND BAD CHARACTER, REP. 103, at v (2008), available at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_136_405_Disclosure_of_Previous_Convictions_Report_103_WEB.pdf [hereinafter N.Z. LAW COMM'N, DISCLOSURE].

30. See *id.* at iv-vi.

31. See Elisabeth McDonald, *Sexual Violence on Trial: Assisting Women Complainants in the Courtroom*, WOMEN'S STUD. J., 2005, at 113 [hereinafter McDonald, *Sexual Violence*].

32. Ministry of Women's Affairs, Sexual Violence Research Project, <http://www.mwa.govt.nz/our-work/svrproject> (last visited Apr. 21, 2009).

33. TEMKIN & KRAHE, *supra* note 5, at 21.

34. *Id.* at 23.

35. N.Z. MINISTRY OF JUSTICE, PUBLIC DISCUSSION DOCUMENT: IMPROVEMENTS TO SEXUAL VIOLENCE LEGISLATION IN NEW ZEALAND 2 n.5 (2008), available at <http://www.justice.govt.nz/discussion/sexual-violence-legislation/6064-2%20MOJ%20SV%20discussion%20document-ff-WEB.pdf>.

assault.³⁶ Conviction rates in Germany have been higher,³⁷ but this may not be the case for all European countries.³⁸

Of course, the comparatively low conviction rate for rape offenses only discloses part of the problem, which Temkin and Krahe make apparent.³⁹ The official statistics do not differentiate between conviction rates for "real rape" and conviction rates for non-traditional or acquaintance rape. Research that does differentiate between these two types of rape, whether it is based on mock jury studies or qualitative work, indicates that the conviction rate for "real rape" is significantly higher than that for other forms.⁴⁰ Therefore, the figure that would be most alarming, if quantified, is the conviction rate for acquaintance rape—either as a percentage of those prosecuted or as a percentage of the number actually reported. This is yet another reason why it remains important to talk about what is and what is not "real rape." Temkin and Krahe go on to convincingly argue that women who have been victims of such non-traditional rape will be less likely to report rapes in jurisdictions where the conviction rate is low.⁴¹ Because of this trend, some writers have questioned the wisdom of publicizing low conviction rates "if it will make already low reporting rates fall lower still."⁴²

Over time, there have been law reform measures aimed at addressing the low conviction and reporting rate. In Chapter 1, and Appendix 1, the authors examine some of the legal modifications in England and Wales that have not delivered on their promise and may need revision.⁴³ These efforts include the revised definition of consent (in particular, the effect of complainant intoxication on consent and belief in consent),⁴⁴ the admissibility of sexual history evidence,⁴⁵ the need for corroboration,⁴⁶ and the rules relating to third party disclosure.⁴⁷

36. Heath, *supra* note 8, at 187.

37. TEMKIN & KRAHE, *supra* note 5, at 23.

38. *Id.*

39. *See id.*

40. *See* McDonald, "Real Rape," *supra* note 7, at 60, 79.

41. TEMKIN & KRAHE, *supra* note 5, at 32.

42. Heath, *supra* note 8, at 177.

43. *See* TEMKIN & KRAHE, *supra* note 5, at 24-29, 235-44.

44. *Id.* at 27.

45. *Id.* at 236-42.

46. *Id.* at 235-36.

47. *Id.* at 243-44.

These areas remain significant for most, if not all, common law jurisdictions, and the need for on-going law reform will be discussed further in the consideration of Part III.

B. *Rape Myths and Jury Decision-Making*

The “real rape” stereotype involves “an attack by a stranger on an unsuspecting victim in an outdoor location, involving the use or threat of force by the assailant and active physical resistance by the victim.”⁴⁸ Women violated in this way are expected to make a “hue and cry”—an immediate complaint—and to be distraught.⁴⁹ They are not judged to be at fault in encouraging or facilitating the offense.⁵⁰ However, those victims whose experience deviates from the “real rape” stereotype—because they knew the offender, it occurred in their own home, or they were voluntarily under the influence of drugs or alcohol at the time—“are more likely to be blamed for the assault and less likely to receive sympathetic treatment from others.”⁵¹ It is also not the case, contrary to the myths related to the “real rape” stereotype, that all victims will complain immediately or show “visible signs of emotional agitation after the assault.”⁵² There also remains a firmly entrenched view in most jurisdictions that women are prone to falsely allege rape.⁵³

Law reform measures, including the rules dealing with “recent complaint” evidence,⁵⁴ control of the admission of sexual history evidence, and revisions of the corroboration requirement were aimed in part at addressing and challenging the myths concerning “real rape” and the behavior of “real victims.”⁵⁵ Rape myths are defined as “descriptive or prescriptive beliefs about sexual aggression (i.e., about its scope, causes, context, and consequences) that serve to deny, downplay or justify sexu-

48. *Id.* at 31.

49. See Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 75 (1987) (now HARV. J. L. & GENDER).

50. See Estrich, *supra* note 2, at 1092.

51. TEMKIN & KRAHÉ, *supra* note 5, at 32.

52. *Id.* at 33.

53. See *id.* at 138-39.

54. RICHARD MAHONEY, ELISABETH McDONALD, SCOTT OPTICAN & YVETTE TINSLEY, *THE EVIDENCE ACT 2006*, at 134 (2007).

55. See TEMKIN & KRAHÉ, *supra* note 5, at 145.

ally aggressive behavior that men commit against women.”⁵⁶ In Chapters 2 and 3, and further in Part II, the authors demonstrate how prevalent the belief in rape myth is and how adherence to these myths impacts the rate of reporting, the exercise of prosecutorial discretion, the admissibility rulings of the judiciary, the performance of the prosecution and defense counsel, the judges’ summation of the law and facts for the jury, the decision-making process, and jury verdicts.⁵⁷ In other words, rape myth acceptance has an insidious influence on every stage of the criminal justice process with regard to the prosecution of sexual offending.⁵⁸ Therefore, in the authors’ view, it is the “attitude problem which needs to be addressed if the justice gap is to be reduced.”⁵⁹

In Chapter 2, the authors examine the research concerning the police response to victims of sexual assault and the attribution of blame to either the victim or the offender, depending on their respective behavior.⁶⁰ The exhaustive synthesis of this research produces nothing new. However, the overwhelming consistency of the evidence certainly is disturbing. It is clear that the closer the facts conform to the “real rape” stereotype, the more likely police will categorize complaints as true.⁶¹ Complaints are more likely to be categorized as false or unlikely to be true if the victim had delayed reporting, had previous consensual sex with the offender, or had been drunk at the time.⁶² Jurors are more likely to view the complainant as less credible, and more to blame, if they know she previously had consensual sex with the accused.⁶³ Therefore, Temkin and Krahé conclude that it is time to explore ways “in which people can be made to engage in a proper assessment of the data available rather than falling back on easy stereotypical answers”⁶⁴ In order to supplement the existing research with contemporary studies,

56. *Id.* at 34 (quoting Heike Gerger et al., *The Acceptance of Modern Myths About Sexual Aggression (AMMSA) Scale: Development and Validation in German and English*, 33 *AGGRESSIVE BEHAVIOR* 422, 425 (2007)).

57. *See id.* at 31-71, 125-58.

58. *See id.* at 50-51, 141-42, 158.

59. *Id.* at 1.

60. *See id.* at 38-48.

61. *See id.* at 38-40.

62. *See id.*

63. *Id.* at 45.

64. *Id.* at 50.

the authors present their own recent research in Part II that for the most part re-confirms the results of the previous work discussed in Part I and provides additional information about those who are or will be involved in the criminal justice system.⁶⁵

II. New Evidence: Talking to Students, the Public and the Professionals

In Part II, Temkin and Krahe present the findings of three separate studies, as well as material from interviews with judges and barristers.⁶⁶ The authors appropriately claim that the three studies are a new contribution to the research because they provide “a systematic analysis of the single and joint contributions of case characteristics on the one hand, and the preconceived attitudes of participants on the other.”⁶⁷ The studies also make an original contribution, as they focus on “markedly under-researched groups with potential involvement in the processing of rape cases within the criminal justice system”⁶⁸ These groups are “undergraduate law students (Study 1), graduate students training to be lawyers (Study 2), and members of the general public who are eligible for jury service (Study 3)”⁶⁹ “The aim of the studies was to obtain a picture of the extent to which judgments about rape cases are influenced by attitudes that lead individuals to be responsive to extra-legal factors and to pay less attention to case-based information.”⁷⁰

The explanation, analysis, and presentation of the three studies are handled very effectively. The authors set out their hypotheses, provide examples of the scenarios given to the participants, and clearly present the results.⁷¹ Temkin and Krahe also do an excellent job of self-reflection and analysis of the studies—identifying where and why problems with the method-

65. *See id.* at 75-158.

66. *See id.*

67. *Id.* at 75.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See id.* at 76-123.

ology might be present and how the results might be explained in different ways.⁷²

In Study 1, the participants, when dealing with the acquaintance rape scenario, “saw the defendant as less blameworthy, attributed more blame to the complainant and were less certain that the incident was rape than in the classic stranger rape.”⁷³ However, all the scenarios presented “involved the use of force by the defendant as well as active physical resistance and a clear verbal statement of non-consent by the complainant.”⁷⁴ The research also considered the influence of the participants’ “female precipitation beliefs” on their judgments of the scenarios.⁷⁵ The study found that “[w]hile participants’ female precipitation beliefs did not play much of a role when they were asked to judge the stranger rape . . . they were particularly influential in the [judgment of] the ex-partner rapes.”⁷⁶

In Study 2, the rape scenarios were extended to “include situations where the complainant was affected by alcohol and unable to resist.”⁷⁷ This variation was important, because previous studies had shown “that when the complainant is intoxicated at the time of the assault, the case is considered less credible and is less likely to lead to a guilty verdict than when the complainant is sober at the time of the attack,”⁷⁸ and concern had been expressed about the absence of clarity in the UK legislation as to how intoxication should be taken into account.⁷⁹ Thus, research on how juries will treat a complainant’s intoxication is helpful in exploring reform options. Study 2 also sought to examine whether rating the participants’ endorsement of female precipitation beliefs before, as compared to after

72. *Id.* at 84-85, 122, 123.

73. *Id.* at 84.

74. *Id.*

75. *Id.* at 79. “Participants’ endorsement of female precipitation as a cause of rape” was measured by the degree that they believed that rape is caused by each of six propositions: “(1) women who tease men; (2) women who allow men to intimately touch them; (3) women’s use of drugs or alcohol; (4) women who dress sexy; (5) women allowing the situation to get out of control; and (6) women who do unsafe things (such as being out alone, hitch-hiking).” *Id.*

76. *Id.* at 84.

77. *Id.* at 86.

78. *Id.*

79. Philip N.S. Rumney & Rachel Anne Fenton, *Intoxicated Consent in Rape: Bree and Juror Decision-Making*, 71 *MOD. L. REV.* 279, 286 (2008).

their review of the scenarios, was statistically significant.⁸⁰ In other words, will the impact of rape myths on decisions be more pronounced when they have been brought to the attention of the participants immediately before the decision-making process?⁸¹

In this study “[t]he defendant was seen as significantly less likely to be liable in the ex-partner scenarios than in the stranger cases”⁸² Recommended sentences were lower in the ex-partner cases, and the complainant received significantly more blame.⁸³ “[T]he acquaintance scenarios fell in between.”⁸⁴ However, contrary to the authors’ hypothesis, “[n]either ratings of defendant’s liability nor perceptions of complainant blame were affected by” the use of force or by the complainant’s intoxication.⁸⁵ Moreover, the participants with the highest acceptance of female precipitation beliefs “were the only group whose perceptions of defendant liability were dependent on the defendant’s prior relationship with the complainant.”⁸⁶ Complainant blame also increased with this group, “regardless of whether the defendant was alleged to have used force or exploited the complainant’s incapacitated state.”⁸⁷ Additionally, the authors note that the findings of this study were “highly consistent with those derived from a similar study conducted in Germany.”⁸⁸

In Study 3, 2,176 members of the general public in the United Kingdom participated in an online survey using the rape scenarios from Study 2.⁸⁹ The type of relationship between the complainant and the defendant also influenced decisions about defendant liability and complainant blame in this study.⁹⁰ Defendants were held more accountable, and the complainants held less to blame, when the defendants used force, as opposed to when they exploited the complainant’s intoxicated state.⁹¹ When the two variables were combined, however, the study

80. See TEMKIN & KRAHE, *supra* note 5, at 86-87.

81. *See id.*

82. *Id.* at 91.

83. *Id.*

84. *Id.*

85. *Id.* at 92.

86. *Id.*

87. *Id.* at 93.

88. *Id.* at 97.

89. *Id.* at 101.

90. *Id.* at 103, 105.

91. *Id.*

found that defendant liability did not change in the alcohol-related cases, regardless of the type of relationship.⁹² And only in the force scenarios did “perceptions of defendant liability decrease[] the closer the relationship between defendant and complainant.”⁹³

However, somewhat surprisingly, although complainant blame in the force scenarios was related to the type of relationship—with “complainant blame . . . particularly high when the defendant was an ex-partner”⁹⁴—“in the alcohol-related cases the complainant was blamed *less* where the defendant was an ex-partner than when he was a stranger or an acquaintance.”⁹⁵ The authors hypothesize that the “[p]articipants may have felt the complainant should not have needed to be on her guard and aware of the risk of sexual assault when interacting [and drinking] with a former partner”⁹⁶ However, it is not clear why that same consideration would not also have increased the liability of the defendant. Should he not be held more accountable when taking advantage of a vulnerable ex-partner?

The final part of Study 3 dealt with the impact of a Home Office educational poster campaign, which was aimed at raising young men’s “awareness of the importance of consent”⁹⁷ Some participants in the study were shown a poster with a written paragraph about consent and the legal definition of rape, others were shown the same poster without the paragraph, and others were shown just the paragraph.⁹⁸ However, the study was “unable to demonstrate the effectiveness of the posters”:⁹⁹

Whether or not the participants were shown the posters while judging the rape scenarios made practically no difference to the way they perceived the liability of a defendant who blatantly ignored the women’s expression of non-consent, and it had no effect on the sentences they recommended if he was found guilty. The consent paragraph also failed to have an impact,

92. *Id.* at 103.

93. *Id.*

94. *Id.* at 105.

95. *Id.*

96. *Id.* at 117.

97. *Id.* at 109.

98. *Id.* at 113.

99. *Id.* at 119.

either on its own or in combination with the posters. *The only effect that did emerge was contrary to the campaign's objectives. The prison poster actually reduced ratings of defendant liability.*¹⁰⁰

The “prison poster” used in Study 3 displayed a cell containing a set of bunks with the top bunk occupied by a middle-aged man looking out of the poster at the person who may well occupy the bottom bunk and contained the caption: “If you don’t get a ‘yes’ before sex, who’ll be your next sleeping partner?”¹⁰¹ The authors suggest that the reduced ratings of defendant liability by those viewing this poster occurred because “[p]articipants may have asked themselves whether they would want the defendant in the scenario to end up as shown on the poster and may have tuned down their liability ratings in order to protect him from such a fate.”¹⁰² The wording on the poster may have even suggested that a defendant himself could be subject to sexual assault in prison—in fact, five percent of the interviewees in the Home Office’s own evaluation of the poster campaign thought that the “message was if you rape you will get raped in prison.”¹⁰³

Temkin and Krahé’s evaluation of the effectiveness of the this poster campaign is, therefore, a critical and timely reminder of the need to carefully design and test information intended to educate and address the justice gap¹⁰⁴ and ties into their proposals for educative strategies in Part III.

A. *The Role of Gender: Implications for Policy Makers*

At the conclusion of the discussion of the three studies, the authors reflect on the difference that gender makes in decisions about defendant liability, complainant blame, and acceptance of rape myths (or female precipitation beliefs).¹⁰⁵ In the earlier presentation of the existing research, Temkin and Krahé note that research has consistently shown that “rape myths are more

100. *Id.* (emphasis added).

101. *Id.* at 110.

102. *Id.* at 119.

103. *Id.*

104. *See id.* at 122-23.

105. *See id.* at 121-22.

widely accepted among men than among women.”¹⁰⁶ Further, female police officers “tended to hold more positive attitudes towards victims than male officers,”¹⁰⁷ and “men are more disposed than women to blame the victim.”¹⁰⁸ However, as the authors argue, “one of the reasons for the greater willingness of men to blame the victim and exonerate the perpetrator might be their greater acceptance of rape myths, including the belief that women precipitate rape through the way they behave.”¹⁰⁹ And it is seemingly the case that men are more lenient generally, not just when assessing defendant liability in the case of heterosexual rape.¹¹⁰

When considering the effect of gender, Temkin and Krahé conclude “that the crucial determinant of judgments about rape cases is the extent to which people subscribe to rape myths. Thus it tends to be attitudes rather than an unbiased evaluation of the facts which determine judgments in these cases.”¹¹¹ This conclusion again validates the authors’ focus on identifying and changing attitudes. However, it is also the case “that men subscribe to rape myths to a greater extent than women”—which two of the authors’ studies also found.¹¹² From this perspective, gender may have an indirect effect on perceptions of rape cases. But because women also subscribe to rape myths, the focus for change should be on altering attitudes, not on addressing gender balance within the criminal justice system.¹¹³ This conclusion has important implications for policy decisions and law reform options and is one that should be noted by lobbyists and legislators in all jurisdictions.

B. *Views from the Bench and Bar: The Lack of Self-Reflection*

In Chapters 6 and 7, which I consider to be two of the most compelling and concerning portions of their book, Temkin and Krahé present the results of a qualitative interview study with

106. *Id.* at 36.

107. *Id.* at 39.

108. *Id.* at 43.

109. *Id.* at 43-44.

110. *Id.* at 44.

111. *Id.* at 121.

112. *Id.*

113. *See id.* at 122.

a group of seventeen judges and seven barristers.¹¹⁴ A summary of the interview schedule is included in Appendix 2 of the book,¹¹⁵ although the interviewees were encouraged “to go beyond those questions to address issues they considered important in the way rape was dealt with by the courts.”¹¹⁶ The excerpts from these interviews are presented in a clear and well-structured manner. The quotes from the interviewees are grouped together under topic headings that are familiar to the reader—for example, “The Influence of Rape Stereotypes”¹¹⁷ and “Attributing Blame to the Victim”¹¹⁸—as well as those topics of particular relevance to the expertise of the interviewees—“Incompetent Prosecuting Counsel”¹¹⁹ and “Judges’ Attitudes towards Complainants.”¹²⁰

These chapters are essential reading for policy makers, especially those proposing change within common law jurisdictions. In my view, research investigating the attitudes of legal practitioners working in the criminal justice system, especially in the areas of sexual and domestic violence, should be undertaken in a more frequent and rigorous manner, even though working with judges in such circumstances is difficult.¹²¹ Although the chapters contain much useful information that provides insight into judicial decision making, the overall message is that the interviewees are often apt to find fault with persons other than themselves.¹²²

Specifically, fault was found with the police, who were considered to be poor at gathering evidence, taking statements, and challenging a complainant’s story at an early stage in the

114. *See id.* at 126-42, 143-58.

115. *See id.* at 245-46.

116. *Id.* at 126.

117. *Id.* at 132.

118. *Id.* at 133.

119. *Id.* at 130.

120. *Id.* at 131.

121. The recent government-funded research conducted in New Zealand initially intended to include interviews with members of the judiciary as part of the work ascertaining the views of legal professionals working within the criminal justice system. *See* Ministry of Women’s Affairs, *supra* note 32. However, access to the judiciary for this purpose was denied following an application to the Judicial Research Committee.

122. *See* TEMKIN & KRAHÉ, *supra* note 5, at 142.

case.¹²³ Defense counsel were viewed as “behaving badly” because of the tactics used, in some cases, to discredit the complainant.¹²⁴ Concern was expressed over the “inexperience and incompetence of prosecuting counsel.”¹²⁵ Juries were described as having “totally unrealistic expectations of how genuine victims should behave,”¹²⁶ willing to decide cases not on the facts but “in the light of their own experience,”¹²⁷ and having “difficulty drawing inferences from the facts and the evidence.”¹²⁸

Although the interviewees were reluctant to be self-critical, the study does reveal some of their attitudes—including some that concern the authors. While some of the interviewees’ observations were consistent with social science research—for example, identifying cases as “sure-fire losers”¹²⁹ when they involve “estranged couples, date rapes where some consensual intimacy had taken place, or cases where the girl was drunk and found a man having sex with her”¹³⁰—the interviewees’ beliefs about the influence of female jurors in the decision-making process did “not accord with psychological research which . . . demonstrate[s] that women are *more* inclined to hold defendants liable”¹³¹ Further, interviewees “commonly distinguished between ‘serious’ rapes and others,”¹³² with one barrister (identified as “B4”) expressing the view that “non-stranger rape was not necessarily that serious and that if the public thought it was, there would be more of an uproar about the poor conviction rate.”¹³³

Some of us, in fact, might believe that we are in the middle of an uproar. This is certainly the case in New Zealand as a result of a series of high-profile cases involving alleged historical gang rapes by serving police officers.¹³⁴ While B4 expressed

123. *Id.* at 127-29.

124. *Id.* at 129-30.

125. *Id.* at 130.

126. *Id.* at 132.

127. *Id.* at 133.

128. *Id.* at 135.

129. *Id.* at 134.

130. *Id.*

131. *Id.* at 137.

132. *Id.* at 138.

133. *Id.*

134. See N.Z. LAW COMM’N, DISCLOSURE, *supra* note 29, at iv. See also LOUISE NICHOLAS & PHILIP KITCHIN, LOUISE NICHOLAS: MY STORY (2007).

the view that the public is not sufficiently concerned about the low conviction rates, the other interviewees stated that the “justice gap” is a “concoction of ‘pressure groups,’ i.e., women’s groups, or . . . outside influences.”¹³⁵ Thus, the public is presented both as not sufficiently concerned about the low conviction rate and as inappropriately representing the low conviction rate problem. As Temkin and Krahe note, “[i]t is not at all surprising that interviewees demonstrated firm resistance to the idea of a ‘justice gap’ since this could easily be interpreted as an attack on the legal profession as well as the criminal justice system as a whole.”¹³⁶ Therefore—and the significant contribution of this book is to make this very point—the attitudes that need altering for the justice gap to be successfully addressed must include the attitudes of those in the legal profession.¹³⁷

The authors conclude Chapter 6 by observing that “[t]he judges failed to mention that they too, as a group, might be implicated in the problems surrounding rape trials through their own attitudes which affect the way they apply the law.”¹³⁸ To expose the attitudes behind judicial application of the law, Temkin and Krahe present, in Chapter 7, the interviewees’ views on some of the relevant law reform—that relating to the corroboration requirement, third party disclosure, and sexual history evidence.¹³⁹

C. *Admissibility of Sexual History Evidence: The “Law in Action”*

One of the earlier law reforms, with regard to evidence in sexual offense trials, concerned the limitation on the admissibility of the complainant’s sexual history with people other than the defendant.¹⁴⁰ This reform was aimed at preventing juries from using such evidence when assessing the complainant’s credibility, as well as reducing the unpleasantness that com-

135. TEMKIN & KRAHE, *supra* note 5, at 140.

136. *Id.* at 141.

137. *See id.*

138. *Id.* at 142.

139. *See id.* at 143-58.

140. *See id.* at 236. The United Kingdom put forth this reform in 1976. *Id.* New Zealand, however, established this reform in 1977. *See Evidence Act, 1908, § 23A (N.Z.).*

plainants reported feeling when testifying about previous intimate relationships.¹⁴¹

To admit sexual history evidence, according to most "rape shield statutes," the evidence must meet a heightened relevance standard.¹⁴² In section 41 of the Youth Justice and Criminal Evidence Act,¹⁴³ after it is established that the evidence is relevant to a limited number of issues,¹⁴⁴ the ultimate admissibility test is that "a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case."¹⁴⁵ The New Zealand equivalent of this law requires that the evidence be "of such relevance to a fact in issue that to exclude it would be contrary to the interests of justice."¹⁴⁶ Despite these seemingly strict standards for admissibility,¹⁴⁷ academic analysis of the decisions made in accordance with discretionary rules demonstrates the fundamental problem with law reform that is enacted in order to prevent decision makers from placing undue weight on a complainant's sexual experience.¹⁴⁸ A law that is aimed at changing attitudes will not be effective if it is to be implemented by those who subscribe to those same attitudes.¹⁴⁹ It is even more problematic that most members of the judiciary do not believe that they bring their own biases to the bench.¹⁵⁰

Although section 41 of the Youth Justice and Criminal Evidence Act replaced an earlier, less structured law,¹⁵¹ Temkin and Krahe report that the new section is also the "object of criti-

141. See N.Z. DEP'T OF JUSTICE, *RAPE STUDY: DISCUSSION OF LAW AND PRACTICE* (1983); E.W. Thomas, *Was Eve Merely Framed or Was She Forsaken?*, N.Z.L.J., October 1994, at 368.

142. MAHONEY ET AL., *supra* note 54, at 184.

143. 1999, c. 23, § 41 (Eng. & Wales).

144. *Id.* §§ 3, 5.

145. *Id.* § 41.

146. Evidence Act, 2006, § 44 (N.Z.).

147. R. v. McClintock, [1986] 2 N.Z.L.R. 99, 103 (C.A.).

148. See TEMKIN & KRAHE, *supra* note 5, at 148-50, 236-37.

149. See *id.* at 237 ("[T]he principal structural flaw of such legislative schemes is their failure to define the key concepts for determining admissibility leaving the judges free rein to apply their 'common sense' assumptions." (quoting Terese Henning & Simon Bronitt, *Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence*, in *BALANCING THE SCALES* 76, 85 (Patricia Eastal ed., 1998))).

150. See *id.* at 143, 158.

151. Sexual Offences (Amendment) Act, 1976, c. 82, §§ 1-7 (Eng. & Wales).

cism and controversy.”¹⁵² The interviewees in the authors’ study believed that the new section is too restrictive and has the potential to exclude relevant evidence.¹⁵³ Six of the judges interviewed also determined that it preserved their discretion to admit evidence—although the aim of the reform was to remove discretion.¹⁵⁴ One judge stated: “I’m not one for being unduly fettered. I’ve been appointed to do a job on the basis that I have a certain amount of judgment, and to be fettered or shackled by statutory constraints, I don’t think helps anybody.”¹⁵⁵

The inability or unwillingness of some of the judges participating in this research to apply the new law, which was enacted in order to effectively control admission of sexual history evidence, is a real concern and demonstrates the limitations of law reform. Nearly half of the judges in this study were also unaware of, or ignored, the procedural requirements of the reform—“that defense applications to bring in evidence of the complainant’s sexual history [be] made in writing before trial. . . . [i]n order that only properly considered applications are made and that the prosecution has time to challenge them.”¹⁵⁶ A proposal that would have required parties to file their applications before trial and judges to provide their reasons for admitting such evidence in writing was considered but rejected by the New Zealand Law Commission on the basis that the notice requirement would be ignored and that the judges should not be compelled to record their rulings.¹⁵⁷ Although this was a disappointing decision, in light of the attitude toward the English provision, it may have been a realistic and pragmatic one.

In conclusion, the authors offer a critical assessment of the impact judges’ attitudes have on the justice gap:

Thus, the interviews with judges and barristers raise issues about the extent to which the law laid down by Parliament and the higher courts for rape

152. TEMKIN & KRAHÉ, *supra* note 5, at 240.

153. *See id.* at 146-47.

154. *Id.* at 148.

155. *Id.* at 149.

156. *Id.* at 146.

157. This information is based on my discussions with the Commissioner in charge of the Evidence Project, Judge Margaret Lee, during my time working at the Law Commission.

and sexual assault cases is being judicially observed. It is the gap between the law and the law in action which is an essential component of the justice chasm in sex cases. It seems that law itself, which must ultimately be interpreted and applied by the judges, cannot entirely withstand an attitude problem which, in some cases, is too entrenched to budge.¹⁵⁸

Having made the case that something more than law reform is required in order to address the justice gap, the authors consider options for change in Part III.

III. Some Possible Solutions

A. *Law Reform: Expert Evidence, Evidence of Good Character, Sexual History, Consent and Intoxication*

Chapter 8 deals with law reform proposals.¹⁵⁹ This includes consideration of the increased use of expert evidence in cases of sexual offenses in order to address the common misconceptions concerning victims.¹⁶⁰ Temkin and Krahe examine the reform possibilities excellently, while also discussing the arguments for and against the use of expert evidence.¹⁶¹ This discussion supplements the earlier consideration of the issue in Chapter 3.¹⁶²

The authors conclude that the prosecution should be allowed "to import expert evidence into rape trials on those occasions when it considers that this would be useful."¹⁶³ Expert evidence could potentially be admitted under the new admissibility rule in New Zealand, which requires that the fact-finder be "likely to obtain *substantial help* from the [expert] opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding."¹⁶⁴ Although Temkin and Krahe mention that the prosecution can offer expert evidence when that evidence would

158. TEMKIN & KRAHE, *supra* note 5, at 158.

159. *See id.* at 161-76.

160. *Id.* at 162.

161. *See id.* 161-67.

162. *Id.* at 57-63.

163. *Id.* at 167.

164. Evidence Act, 2006, § 25 (N.Z.) (emphasis added).

be useful for the prosecution's case,¹⁶⁵ it is the judge who rules on the admissibility and may not be easily convinced that there is real need for such evidence. Thus, changes to law or procedure that require the favorable exercise of judicial discretion may well be defeated in practice if not implemented in the context of attitudinal change.

The authors consider the case for allowing the complainant to offer "good character" evidence about herself in order to "obtain some parity with the accused,"¹⁶⁶ who has historically been permitted to present "good character" evidence to assess both his credibility, if the defendant testifies, and his guilt.¹⁶⁷ The New Zealand Evidence Act of 2006¹⁶⁸ provides that any party, including the complainant in a sexual assault case, may offer evidence in support of his or her veracity (credibility) when that evidence is "substantially helpful" in assessing that person's veracity¹⁶⁹ and may also offer propensity (character) evidence when it is relevant.¹⁷⁰ Although there are no reported decisions on the use of these provisions, the mechanism is in place for such "parity" to occur, provided, of course, that the prosecution is willing to use such evidence, and the judge is willing to admit it.¹⁷¹

The authors' recommendations concerning sexual history evidence relate mainly to the non-compliance with the procedural requirements.¹⁷² However, it will presumably be important in England and Wales, as elsewhere, to keep monitoring the decisions made under the relevant rape shield statutes. The New Zealand Evidence Act significantly changed this rule by barring any evidence of the complainant's *reputation* in sexual matters.¹⁷³ As I have argued elsewhere, this is a welcome change

165. See TEMKIN & KRAHÉ, *supra* note 5, at 167.

166. *Id.* at 168.

167. MAHONEY ET AL., *supra* note 54, at 157.

168. Evidence Act, 2006 (N.Z.).

169. *Id.* § 37.

170. *Id.* § 40.

171. However, note the effect of offering biographical information about the parties. See TEMKIN & KRAHÉ, *supra* note 5, at 49 ("By having more detailed information about a person, he or she becomes more prominent in the perceiver's awareness and is therefore a more likely candidate to be selected as responsible for the events in question.")

172. *Id.* at 168-69.

173. MAHONEY ET AL., *supra* note 54, at 184.

but one that may well be defeated in practice.¹⁷⁴ It is worth noting that the New Zealand Law Commission recommended extending the section's control over the evidence of the complainant's sexual experience with a particular defendant;¹⁷⁵ however, during the legislative process, this recommendation was rejected.¹⁷⁶

The final law reform measure discussed is that concerning the connection between consent and intoxication.¹⁷⁷ The authors recall their earlier observations in Chapter 8, that "if the complainant is portrayed as drunk, she is perceived as less credible and the perpetrator is seen as less likely to be culpable. . . . The findings suggest that the issue of victim intoxication is closely related to the perception of victim culpability."¹⁷⁸ This connection clearly needs to be challenged and addressed, and the reform required may well be jurisdiction-specific, as it will relate to what the law or practice already provides. Temkin and Krahe propose that the United Kingdom's Sexual Offences Act of 2003¹⁷⁹ "should be amended to make it plain that there can be no consent when the complainant was or becomes unconscious, or where she is mistaken as to the nature of the proposed act."¹⁸⁰ The latter recommendation is important in light of the England and Wales Court of Appeal's recent decision in *R. v. Bree*.¹⁸¹

174. Elisabeth McDonald, *Complainant's Reputation in Sexual Matters*, N.Z.L.J., Aug. 2007, at 251.

175. N.Z. MINISTRY OF JUSTICE, *supra* note 35, at 25.

176. MAHONEY ET AL., *supra* note 54, at 185.

177. See TEMKIN & KRAHE, *supra* note 5, at 174-75.

178. *Id.* at 169-70.

179. Sexual Offences Act, 2003, c. 42 (Eng. & Wales).

180. TEMKIN & KRAHE, *supra* note 5, at 175.

181. [2007] EWCA (Crim) 256 (Eng. & Wales). See also Sharon Cowan, *The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex*, 41 AKRON L. REV. 899, 908-09 (2008) ("Sir Judge stated in *Bree* that it is the role of the court to decide whether or not the woman's capacity has been diminished to the degree that consent is not possible, and that this is not an issue that can be appropriately decided by a statutory tariff system."); Rumney & Fenton, *supra* note 79, at 283.

B. *Improving Rape Trials: Assisting the Jury and Educating Legal Professionals*

Temkin and Krahé also consider the possibility of abolishing the jury in sexual assault cases.¹⁸² While acknowledging that such a proposal would meet fierce opposition, they make a strong case for having conviction decisions made by a judge alone.¹⁸³ “Rape-ticketed judges,”¹⁸⁴ they argue, are far less likely to be led astray by defense counsel, as they are “familiar with patterns of sexual aggression and are more likely to be able to draw the inferences which can and should be drawn from the evidence.”¹⁸⁵

The authors also express the view that, although judges may also subscribe to rape myths, and training judges is not without problems, “structures are now in place and can be built on whereas no such opportunities to educate juries could ever be built into the system.”¹⁸⁶ Those who believe that the jury is best suited to make decisions about guilt in cases of serious offenses express faith in the number of jurors: “Somehow the common sense and judgment that you get out of twelve people, is, I think, amazing and amazingly valuable.”¹⁸⁷

The authors do not, however, consider other options that may provide a compromise, such as having more than one judge on the bench in sexual assault cases or adopting other variations found in the civil law model. More generally, I expected the authors to provide a fuller consideration of relevant aspects of an inquisitorial model, given the comparative work that has been done with regard to sexual assault already¹⁸⁸ and the authors’ expertise.

Assuming that the current jury system is likely to remain, at least in the short term, Temkin and Krahé consider ways that the jury might be assisted in making decisions without re-

182. See TEMKIN & KRAHÉ, *supra* note 5, at 177-80.

183. See *id.* at 178-80.

184. “Rape-ticketed” judges are judges “specifically licensed to try rape cases” in the English court system. *Id.* at 126.

185. *Id.* at 178.

186. *Id.* at 178-79.

187. *Id.* at 179. See also N.Z. LAW COMM’N, JURIES IN CRIMINAL TRIALS, REP. 69, at 48-49 (2001), available at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_76_161_R69.pdf.

188. See, e.g., DUBLIN RAPE CRISIS CTR., *supra* note 7.

lying on stereotypical thinking and, instead, by focusing on the facts of the case.¹⁸⁹ The authors briefly mention the possibility of adopting a *voir dire* process of jury selection¹⁹⁰—as used in the United States—before discussing what help the jury may be given in terms of flow charts, notebooks, access to witness statements, the judge’s summation of the law and facts for the jury, and the like.¹⁹¹ The authors note that, although “jurors in England and Wales are permitted to ask questions . . . research studies show a distinct inhibition about doing so.”¹⁹² Section 101 of the New Zealand Evidence Act codifies a process by which a jury may put a question to a witness.¹⁹³ This section caused some disquiet among New Zealand judges, who worried about a dramatic increase in jury questions.¹⁹⁴ Nonetheless, even though some judges do inform their juries of the right to ask questions, as advised by the Law Commission,¹⁹⁵ this practice does not seem to have had any negative impact on the trial process in terms of length or complication.

The final part of Chapter 9 deals with the education of legal professionals and consideration of the value of appointing more women judges.¹⁹⁶ Temkin and Krahe note that although increased education is desirable, judges are “notoriously difficult to educate.”¹⁹⁷ The United States is viewed as leading the way in terms of “developing an understanding of judicial gender bias.”¹⁹⁸ However, it is not just an unwillingness to acknowledge gender bias in decision making that may prevent effective judicial education. Two myths also need to be overcome: “‘First, that ‘only judges can teach judges,’ second, that judges should not take into account social science data’”¹⁹⁹

189. See TEMKIN & KRAHE, *supra* note 5, at 181-88.

190. *Id.* at 180-81.

191. *Id.* at 181-86.

192. *Id.* at 185.

193. Evidence Act, 2006, § 101 (N.Z.)

194. See N.Z. LAW COMM’N, EVIDENCE: REFORM OF THE LAW, REP. 55, at 115 (1999), available at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_55_155_R55%20Vol%201.pdf.

195. MAHONEY ET AL., *supra* note 54, at 366.

196. See TEMKIN & KRAHE, *supra* note 5, at 188-96.

197. *Id.* at 188.

198. *Id.* at 189.

199. *Id.* at 188 (quoting LYNN HECHT SCHAFFRAN & NORMA J. WIKLER, STATE JUSTICE INST., NAT’L JUDICIAL EDUC. PROGRAM, GENDER FAIRNESS IN THE COURTS:

“In Canada, judicial training has included [consideration of] ‘social context,’”²⁰⁰ which is designed to assist judges in “‘explor[ing] their own assumptions, biases and views of the world with a view to reflecting on how these may interact with judicial process.’”²⁰¹ However, despite Temkin and Krahe’s claim that New Zealand has followed the United States’ lead by introducing gender bias training, this statement seems based on only an article about India that cites a 1994 report authored by a woman judge from New Zealand.²⁰² Unfortunately, any training that is offered to address gender bias seems only to account for a small portion of the introductory training curriculum for new judges.²⁰³ Moreover, judges did not unanimously agree with the recent suggestion that “social context” materials be included as part of the judicial education on New Zealand’s evidence and procedure rules.²⁰⁴

It is clear that effective training of legal professionals, in order to “tackle” the attitude problem,²⁰⁵ is essential and long overdue, especially in common law jurisdictions outside North America. As Temkin and Krahe argue, based on the results of the social science research they discuss, the answer is not appointing more women judges but rather “judicial education aimed at dispelling rape myths held by *both* female and male judges”²⁰⁶

The authors note that the training of “rape-ticketed” judges and crown prosecutors who deal with sexual assault is laudable, although such training is not extended to defense counsel.²⁰⁷ Temkin and Krahe do not, however, consider the possibility of specialist sexual assault courts, which are used elsewhere in

ACTION IN THE NEW MILLENNIUM 30 (2001), available at <http://womenlaw.stanford.edu/genderfairness-strategiesproject.pdf>.

200. *Id.* at 190.

201. *Id.* (quoting T.B. Dawson, The Social Context Education Project (2004) (unpublished report on file with the National Judicial Institute Canada)).

202. *Id.*

203. This information is the result of an informal conversation I had with the Director of the Institute of Judicial Studies.

204. This opinion is based on my interactions with judges that I worked with in this training program.

205. TEMKIN & KRAHE, *supra* note 5, at 196.

206. *Id.* (emphasis added).

207. *See id.* at 126, 130-31.

the world.²⁰⁸ New Zealand has also introduced specialist family violence courts with some success.²⁰⁹ Despite the drawbacks of specialized courts,²¹⁰ such a model addresses the issues concerning education and attitudinal change and seems worthy of investigation.

C. *Changing Public Attitudes*

Chapter 10 “reviews existing approaches designed to challenge rape myths and outlines directions for future efforts towards this goal.”²¹¹ Public education is, of course, relevant not only to the prevention of sexual assault but also to the jury decision-making process and the perception of harm for victims themselves. As Temkin and Krahe note, rape prevention programs need to be provided early, and any use of the media for education or raising awareness must be thoughtfully considered and evaluated.²¹² Changing public attitudes is critical for effective challenge to the justice gap, and this is recognized in many jurisdictions, including New Zealand.²¹³ The work that clearly remains is how to actually accomplish this, and Chapter 10 proves a helpful starting point for answering this question.

IV. Conclusion

In *Sexual Assault and the Justice Gap: A Question of Attitude*, Temkin and Krahe conclude that stereotypical beliefs about what “real rape” is affect “the judgments made by individuals dealing with rape cases . . . and thereby shape the understanding of rape as it is represented and dealt with in the criminal justice system.”²¹⁴ The authors’ original research and consideration of existing research convinces the reader that the difference between reports and convictions can be explained, not by a lack of evidence, but by preconceived notions of what rape looks like and how a “real” victim will act. Rather than the

208. See McDonald, *Sexual Violence*, *supra* note 31, at 123.

209. See New Zealand Ministry of Justice, Family Violence Courts—Information for Victims, <http://www.justice.govt.nz/pubs/courts-publications/family-violence-courts/301.html> (last visited Apr. 21, 2008).

210. McDonald, *Sexual Violence*, *supra* note 31, at 124.

211. TEMKIN & KRAHE, *supra* note 5, at 199.

212. *Id.* at 207.

213. See Ministry of Women’s Affairs, *supra* note 32.

214. TEMKIN & KRAHE, *supra* note 5, at 209.

justice gap being a result of the difficulties of proof in rape cases, Temkin and Krahé argue that “[p]erceptions of rape are influenced by stereotypes, bias and gender prejudice. . . . [I]t is this attitude problem which needs to be addressed if the justice gap is to be reduced.”²¹⁵

The book presents particularly compelling evidence about the attitudes of members of the judiciary—those charged with applying the laws crafted to address the justice gap—demonstrating that they are also not without bias and have a tendency to subscribe to rape myths.²¹⁶ Instead of claiming that the law can provide the answers, since legal reform has been of limited use, the authors demonstrate that the widespread attitudinal biases can only be effectively addressed by identifying and challenging these biases.

As jurisdictions throughout the world continue to struggle to address the problem of low conviction rates in cases which do not involve a “real rape,” it is time to take a different approach in order to provide justice for victims, while not simultaneously undermining a defendant’s right to a fair trial. *Sexual Assault and the Justice Gap: A Question of Attitude* provides a timely and well-crafted argument for the different approach that is needed. It should be required reading for all policy and lawmakers, especially those working within adversarial criminal justice systems, and I have commended the work to New Zealand’s Ministry of Justice.²¹⁷

215. *Id.* at 1.

216. *See supra* notes 126-38, 153-58 and accompanying text.

217. Elisabeth McDonald, Public Discussion Document: Submission on Improvements to Sexual Violence Legislation in New Zealand (Oct. 10, 2008) (unpublished comment, on file with the author).