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# Why the Jury Is, and Should Still be, Out on Rape Deliberation

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## Introduction

For decades, there has been concern across UK jurisdictions about the existence of a ‘justice gap’ in rape cases, evidenced not only by substantial under-reporting of sexual offences by victims but also by significant attrition in the formal complaints which are made across the various stages of the criminal justice process. There have been important innovations in recent decades which have sought to improve the experience of reporting rape for complainants, including specialist training of police and prosecutors,<sup>1</sup> the use of special measures to ameliorate the stresses of testimony-giving<sup>2</sup> and the increased involvement of Independent Sexual Violence Advocates to support complainants at key stages in the justice process.<sup>3</sup> There is some evidence that these developments might have increased victims’ confidence in reporting sexual assault, reflected in part in increased numbers of reports being made to the police.<sup>4</sup> Despite this, conviction rates for rape have languished. In England and Wales, 68.5% of rape cases prosecuted resulted in a conviction in 2019-20.<sup>5</sup> In Scotland the conviction rate in prosecuted rape/attempted rape cases over the same period was 56%.<sup>6</sup>

But the figures on conviction rate at trial do not tell the full story. Data from the Office for National Statistics, for example, documents 57,998 rapes recorded by the police in a single year as compared to 1128 offenders found guilty of rape, implying a conviction rate as a proportion of recorded rapes of only 1.9%.<sup>7</sup> Various explanations have been offered for this, many of which have centred either on the harbouring of misconceptions or cultures of disbelief amongst those who decide about case

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<sup>1</sup> Crown Prosecution Service, [Rape and Serious Sexual Offences Strategy 2025](#) (2020); [Police-CPS Joint National RASSO Action Plan](#) (2021).

<sup>2</sup> In England and Wales, see s.22A of the Youth Justice and Criminal Evidence Act. In Scotland, see s.271(1)(c)(i) of the Criminal Procedure (Scotland) Act 1995.

<sup>3</sup> Ministry of Justice Press Release, [“Extra £40m to help victims during pandemic and beyond”](#), 1 February 2021.

<sup>4</sup> HM Crown Prosecution Service Inspectorate, *2019 Rape Inspection: A Thematic Review of Rape Cases by HM Crown Prosecution Service Inspectorate* (2019) para 1.8.

<sup>5</sup> CPS Annual Publication: *Rape Flagged Pre-Charge and Prosecution Outcomes by Crime Types Management Information* (2020).

<sup>6</sup> Scottish Government, *Criminal Proceedings in Scotland, 2019-20* (2021), 15 (chart 3).

<sup>7</sup> Office for National Statistics, *Sexual Offending: Victimization and the Path through the Criminal Justice System* (2018). Such a calculation is indicative rather than exact as the figures relate to different years and not to a single set of cases. The full figures are: 69901 rape incidents and crimes recorded of which 11913 remained as incidents (year ending March 2018); 1026 offenders found guilty of rape of a female and 102 found guilty of rape of a male (both 2017).

progression through the justice process,<sup>8</sup> or on concerns about the possibility of jurors holding such views, which lead police and prosecutors to doubt the prospects of conviction to such an extent that a decision to proceed to trial cannot be supported.<sup>9</sup>

In respect of those latter concerns, there is a substantial body of research into juror decision-making in rape cases which has suggested that one of the key reasons for the low conviction rates is prejudicial beliefs and attitudes held by jurors towards rape and rape complainants – so-called ‘rape myths’. Quantitative research demonstrates that mock jurors’ scores on ‘rape myth acceptance scales’ are significant predictors of their judgments about responsibility, blame and (most importantly) verdict. Meanwhile, qualitative research indicates that jurors frequently express problematic views about how ‘real’ rape victims would behave and what ‘real’ rape looks like during mock jury deliberations and that even those who score relatively low on abstract rape myth scales can express prejudicial beliefs when deliberating in a particular case.<sup>10</sup> The vast majority of these studies have utilised mock jurors – members of the public recruited to act as jurors in (often highly realistic) case simulations. The impact of juror prejudices and misconceptions on the prospects for justice for rape complainants has been a recognised concern, in Scotland as part of the Dorrian Review,<sup>11</sup> in the Gillen Review in Northern Ireland,<sup>12</sup> and so too in the Ministry of Justice’s End-to-End Rape Review.<sup>13</sup>

In 2020, Cheryl Thomas published much anticipated findings from an unprecedented study in which she was – exceptionally – able to secure access to participants who had taken part in jury deliberations (including but not limited to sexual offences trials) across four crown courts in England and Wales.<sup>14</sup> This research has been seized upon in some quarters to support the conclusion that – contrary to the findings of previous work – we should in fact have far greater confidence in the approach that jurors will take to their deliberative task in rape cases and that anxieties about how misconceptions and stereotypes might influence verdicts are much overblown.<sup>15</sup>

Thomas argues that this research shows that jurors at court “do not hold the same views”<sup>16</sup> as participants in prior research. That would be reassuring if true, but as we set out to show in this

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<sup>8</sup> J. Jordan, “Here We Go Round the Review-Go-Around: Rape Investigation and Prosecution – Are Things Getting Worse Not Better?” (2011) 17 *Journal of Sexual Aggression* 234; J. Brown et al, “Characteristics Associated with Rape Attrition and the Role Played By Scepticism or Legal Rationality By Investigators and Prosecutors” (2007) 13 *Psychology, Crime & Law* 355.

<sup>9</sup> V. Munro and L. Kelly, “A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales” in J. Brown and M. Horvath (eds) *Rape: Challenging Contemporary Thinking* (Cullompton, Devon: Willan, 2009), pp. 281-300.

<sup>10</sup> All of this research is discussed in more detail in the section headed “What do we know about juror decision making in rape cases?” below.

<sup>11</sup> Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice-Clerk’s Review Group* (2021).

<sup>12</sup> Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019).

<sup>13</sup> HM Government, *The End-to-End Rape Review Report on Findings and Actions* (2021).

<sup>14</sup> C. Thomas, “The 21st Century Jury: Contempt, Bias and the Impact of Jury Service” [2020] Crim LR 987 (“The 21<sup>st</sup> Century Jury”).

<sup>15</sup> See e.g. Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, 2020) at para 8.30; J. Rozenberg, [“Belief by juries in rape myths is a myth according to the only researcher who has asked the jurors themselves”](#) A Lawyer Writes, 27 November 2020.

<sup>16</sup> “The 21<sup>st</sup> Century Jury”, at 1004.

article, it is not demonstrated by her research. Thomas's study differed in multiple ways from prior research in this area, making it impossible to know whether reported differences in results were genuinely due to jurors at court being somehow "different", or were instead the result of different research design giving rise to unreliable results. In any event, Thomas's results, even taken at face value, are far less reassuring than has been suggested, for reasons that we discuss below.

Without undermining the importance of this step in opening up the jury to critical scrutiny, we want to reflect in this article on the significant 'known unknowns' that remain in the wake of Thomas's research. Many of those who have been involved in earlier studies as researchers, ourselves included, would be delighted to be proven wrong in our prior conclusions and to be able to say with confidence that complainants and prosecutors have little basis for worrying about the approach that jurors will take in deliberations and the extent to which that approach might be inappropriately influenced by misconceptions about sexual violence, trauma and gender norms. However, we do not believe Thomas's research, important a contribution as it is, overturns the findings of the extensive body of research which already exists in this area. It would be intellectually premature and ethically inappropriate to close off detailed and careful further reflection.

In the following discussion, we first summarise the findings of studies undertaken prior to the Thomas study. We then outline the key aims, methods and findings of Thomas's research. Having done so, we highlight some of the ways in which we believe that her findings are more limited in their reach and robustness than she suggests, and reflect on the implications of this in the context of existing research and policy development. In particular, we will explore missed opportunities in the way the research was framed from the outset, limitations in the methodology used that could have been at least partially redressed and more candidly acknowledged at the analysis stage, and potential slippages or overreach in the conclusions drawn from the data that is presented. In the final analysis, we suggest that the greatest value of Thomas's study lies less in closing the door on debates about juror misunderstanding and misconception in rape cases and more in opening up the potential for further research that reaches into the jury room, to triangulate with studies that use other methodologies, each with their own strengths and limitations, to deepen knowledge and to ensure the best version of criminal justice policy and practice in the sexual offences context.

### **What do we know about juror decision-making in rape cases?**

A substantial body of research indicates that misconceptions regarding what rape looks like, how a victim will react during and after an attack, and the modus operandi and motivations of a rapist, may operate to inhibit open-minded evaluation of the evidence in sexual offences trials. Much of this work has focussed on the existence of so-called 'rape myths' – false and prejudicial beliefs about rape and rape victims – and the impact these might have on jury decision-making.<sup>17</sup> Various 'rape myth acceptance scales'<sup>18</sup> have been developed and refined across decades of work in social psychology and have demonstrated varying degrees of endorsement of such beliefs, with men, older

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<sup>17</sup> On the main categories of rape myth, see F. Leverick, "What Do We Know About Rape Myths and Juror Decision Making?" (2020) 24 *International Journal of Evidence and Proof* 255, 257; O. Smith and T. Skinner, "How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 *Social and Legal Studies* 441, 443.

<sup>18</sup> These scales are discussed further below, in the section headed "Methodology matters".

people and those with lower educational levels the most likely to score highly.<sup>19</sup> Most importantly, there is overwhelming evidence that a person's score on a rape myth acceptance scale affects attitudes and verdict choices in rape cases.<sup>20</sup>

Alongside this, a further body of scholarship has developed, which utilises trial reconstruction methods to explore in more detail the ways in which the sort of abstract attitudes captured in quantitative studies might translate into concrete deliberations. In England and Wales, three Economic and Social Research Council (ESRC) funded studies used this methodology to explore the impact of complainant intoxication, level of injury, delayed reporting, demeanour during testimony and the use of various special measures on jury deliberations.<sup>21</sup> Collectively, the three studies involved 617 jurors, drawn from members of the public eligible for jury service. In each of the studies, trial reconstructions were performed by actors and barristers, with the content and delivery of this stimuli being scripted in conjunction with legal experts and with appropriate legal direction given to participants by the 'judge'.

More recently, in Scotland, a large-scale mock jury study exploring deliberations in rape and assault scenarios, funded by the Scottish Government, has been conducted using a similar methodology.<sup>22</sup> This research involved 431 mock jurors, all of whom were jury-eligible members of the public, viewing and deliberating on a rape trial.<sup>23</sup> While the primary aim of that study was to examine the impact of jury size, majority rules and the availability of the not proven verdict (as distinctive features of the Scottish jury system), the use of a rape trial scenario enabled researchers to generate further insight into how matters such as level of injury, the possibility of a false allegation, delayed

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<sup>19</sup> J.M. Hockett, S.J. Smith, C.D. Klausning and D.A. Saucier, "Rape Myth Consistency and Gender Differences in Perceiving Rape Victims: A Meta-Analysis" (2016) 22 *Violence Against Women* 139; E. Suarez and T.M. Gadalla, "Stop Blaming the Victim: A Meta-Analysis on Rape Myths" (2010) 25 *Journal of Interpersonal Violence* 2010.

<sup>20</sup> F. Leverick, "What Do We Know About Rape Myths and Juror Decision Making?" (2020) 24 *International Journal of Evidence and Proof* 255.

<sup>21</sup> The first was reported in E. Finch and V. Munro, "Breaking Boundaries? Sexual Consent in the Jury Room" (2006) 26 *Legal Studies* 303 ("Breaking Boundaries").

For the second, see L. Ellison and V. Munro, "Reacting to Rape: Exploring Mock Jurors Assessments of Complainant Credibility" (2009) 49 *British Journal of Criminology* 202 ("Reacting to Rape"); L. Ellison and V. Munro, "Getting To (Not) Guilty: Examining Jurors' Deliberative Processes In, and Beyond, the Context of a Mock Rape Trial" (2010) 30 *Legal Studies* 74 ("Getting to Not Guilty"); L. Ellison and V. 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 ("A Stranger in the Bushes"); L. Ellison and V. Munro, "Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation" (2009) 18 *Social and Legal Studies* 291 ("Of Normal Sex").

For the third, see L. Ellison and V. Munro, "Better the Devil You Know: Real Rape Stereotypes and the Relevance of a Previous Relationship In (Mock) Juror Deliberations" (2013) 17 *International Journal of Evidence and Proof* 299 ("Better the Devil You Know"); L. Ellison and V. Munro, "Telling Tales: Exploring Narratives of Life and Law Within the (Mock) Jury Room" (2015) 35 *Legal Studies* 201 ('Telling Tales').

<sup>22</sup> The main study is reported in R. Ormston, J. Chalmers, F. Leverick, V. Munro and L. Murray, *Scottish Jury Research: Findings from a Large-Scale Mock Jury Study* (Scottish Government, 2019). The study's findings in respect of jury deliberations in rape cases are discussed in J. Chalmers, F. Leverick and V. Munro, "The Provenance of What is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials" (2021) 48 *Journal of Law and Society* 226.

<sup>23</sup> The extensive measures taken to maximise the realism of the study are outlined in Chalmers et al (n 22) at 232-234. The full study had 863 participants: 432 of them viewed an assault trial and 431 a rape trial.

reporting and intoxication were approached by participants in their deliberations, and how this interacted with interpretation and application of relevant substantive and evidential legal tests.

All four studies found evidence of jurors expressing false and prejudicial views about rape and rape victims during the deliberations. Space precludes a full discussion here, but the following sections give some examples.

*Lack of physical resistance as evidence of consent:* Jurors often expressed the belief that a genuine victim of rape would have fought back to the extent that she would have suffered substantial defensive injuries, including internal trauma, and/or that an absence of injury to the defendant is evidence of consent.<sup>24</sup> The law on this is clear and juries were directed as such – the offence of rape is made out by a lack of consent on the part of the complainant (coupled with a lack of any reasonable belief in consent on the part of the defendant).<sup>25</sup> Nonetheless, acquittal verdicts were frequently justified by reference to the absence of more extensive injuries to the complainant or the absence of any injuries to the defendant.<sup>26</sup> Jurors often imposed demanding expectations on a complainant to resist an attack, commenting, for example, 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”,<sup>27</sup> “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”,<sup>28</sup> “if you’re being attacked... then to me you would scratch, you would scream, you would try and do anything possible to get him off”<sup>29</sup> and “in spite of being weaker and smaller, she could have tried to defend herself; you can always defend”.<sup>30</sup> This is despite an extensive body of psychological literature indicating that individual reactions to traumatic events vary significantly and that many individuals experience a ‘freezing’ or dissociative response.<sup>31</sup>

*A focus on the behaviour of the complainant before and after the incident:* Jurors often focused on the behaviour of the complainant before and after the incident as a source of evidence that she might have consented. Jurors highlighted behaviours such as offering/accepting a lift, inviting the defendant into her home, remaining in the accused’s company for a prolonged period, paying/receiving compliments, drinking alcohol, and sharing a goodnight kiss as willingness to engage in sexual intercourse.<sup>32</sup> 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 drink.<sup>33</sup> In the Scottish

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<sup>24</sup> Chalmers et al (n 22) at 236; Ellison and Munro, “Getting To (Not) Guilty”, at 207.

<sup>25</sup> Sexual Offences Act 2003 s.1(1); Sexual Offences (Scotland) Act 2009 s.1(1).

<sup>26</sup> Chalmers et al (n 22) at 236-237; Ellison and Munro, “Getting To (Not) Guilty”, at 207.

<sup>27</sup> Ellison and Munro, “Reacting to Rape”, at 207.

<sup>28</sup> Ellison and Munro, “Reacting to Rape”, at 207.

<sup>29</sup> Chalmers et al (n 22) at 236.

<sup>30</sup> Chalmers et al (n 22) at 236.

<sup>31</sup> E.g. M. Schauer and T. Elbert, “Dissociation Following Traumatic Stress: Etiology and Treatment” (2010) 218 *Zeitschrift Für Psychologie/Journal of Psychology* 109; B.P. Marx et al., “Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors” (2008) 15 *Clinical Psychology: Science and Practice* 74.

<sup>32</sup> Ellison and Munro, “Of Normal Sex”, at 295; Chalmers et al (n 22) at 242.

<sup>33</sup> Finch and Munro, “Breaking Boundaries”, at 318.

Jury Study, while it was agreed in evidence that the parties only drank one small glass of wine each, it was not uncommon for jurors to exaggerate the consumption, for example stating that they had “a few glasses of wine” or that the accused had “finished the bottle”, or an insistence that even one glass of wine could have severely impacted both parties’ reasoning processes, either to make it more likely that the complainant would consent to sex or that the accused would struggle to register her resistance.<sup>34</sup>

Even a very short delay in reporting (of 30 minutes in the third ESRC project and 40 minutes in the Scottish Jury Research) was seen by some jurors as suspicious. Jurors in the ESRC project felt it was “strange” that the complainant had delayed phoning the police, and “odd” that she had opted to change her clothes in that intervening period but not go for a shower.<sup>35</sup> In the Scottish Jury Research, jurors received a direction from the trial judge advising that there can be good reasons why a person against whom a sexual offence is committed might delay reporting, and that this does not necessarily indicate that the allegation is false.<sup>36</sup> Notwithstanding, the delay was raised as a concern in 13 of the 32 juries, with, for example, one juror stating that “the time delay factor ... was a bit sketchy” and that this, coupled with the evidence that the complainant called her sister before calling the police, was the factor that led him to favour a not guilty verdict.<sup>37</sup> In the second ESRC project, in which a complainant waited three days before reporting to the police, 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.<sup>38</sup>

*The prevalence of false allegations:* We may not be able to quantify the scale of false allegations of rape, but we do know from research across many decades that it is not likely to be substantial.<sup>39</sup> Across all four studies, however, jurors expressed the view that false allegations of rape are routinely made.<sup>40</sup> In the Scottish Jury Research, for example, the suggestion that false allegations of rape are common arose in 19 of the 32 juries.<sup>41</sup> One juror commented that “there [are] hundreds of cases coming out where women have lied about rape”.<sup>42</sup> Whilst there were jurors who questioned how realistic it was that a woman would put herself through the challenges of a criminal investigation merely due to sexual activity they regretted afterwards or to get revenge on a sexual partner, these comments were often countered by jurors who insisted that “it does happen”, “love makes people do crazy things”,<sup>43</sup> “some women do just use [the criminal courts] as a tool” and “women can be vindictive”.<sup>44</sup> Jurors who sought to bolster the feasibility of a false allegation

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<sup>34</sup> Chalmers et al (n 22) at 242.

<sup>35</sup> Ellison and Munro, “Telling Tales”, at 219.

<sup>36</sup> In line with s.6 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

<sup>37</sup> Chalmers et al (n 22) at 243-244.

<sup>38</sup> Ellison and Munro, “Reacting to Rape”, at 209.

<sup>39</sup> See e.g. L. Kelly, “The (In)credible Words of Women: False Allegations in European Rape Research” (2010) 16 *Violence Against Women* 1345; D. Lisak et al, “False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases” (2010) 16 *Violence Against Women* 1318; P. Rumney, “False Allegations of Rape” (2006) 65 *Cambridge Law Journal* 128.

<sup>40</sup> Chalmers et al (n 22) at 245-246; Ellison and Munro, “A Stranger in the Bushes”, at 795; Ellison and Munro, “Better the Devil You Know”, at 314.

<sup>41</sup> Chalmers et al (n 22) at 245. Bare acknowledgments of the existence of false allegations were excluded from this analysis – only statements that false allegations were e.g. ‘routine’ or ‘common’ were counted.

<sup>42</sup> Chalmers et al (n 22) at 245.

<sup>43</sup> Ellison and Munro, “Better the Devil You Know”, at 314.

<sup>44</sup> Chalmers et al (n 22) at 245.

sometimes suggested that the complainant's injuries could have been self-inflicted. As one juror in the Scottish Jury Research put it, "pressing yourself very hard to make yourself bruised, you can do it", while another suggested it was "fairly easy to scratch yourself if you really want to".<sup>45</sup>

In presenting and evaluating their findings, these simulation-based studies have consistently highlighted the difficulties with uncritical extrapolation from the mock study environment to real courtrooms. However, they have also highlighted the possibility that while jurors might, in the abstract, reject problematic views about rape, these views can still guide decision-making in the concrete context of deliberations towards a verdict in a particular case, where jurors are exposed to different evidential accounts, competing advocacy narratives, and information about *actus reus* and *mens rea* tests, as well as burdens and standards of proof.

Although these studies give rise to concern regarding the processes and perspectives that might frame this vital stage of decision-making in the justice process, researchers have been unable to gain direct insight into the attitudes of, and approaches taken by, jurors in their deliberations in real rape trials. In England and Wales, and in Scotland, disclosing or obtaining "statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations" is prohibited.<sup>46</sup> Whether or not such veiling serves to support or undermine confidence and integrity in the justice process is a wider debate, but there is no question it leaves a substantial gap in our understanding of what goes on behind the closed doors of the jury room.

### **The framing of the research and the missed opportunity to engage with existing literature**

In her article entitled 'The 21<sup>st</sup> Century Jury',<sup>47</sup> Thomas discusses the findings of much anticipated research, conducted under the banner of the UCL Jury Project, which – amongst other things – explored the attitudes in relation to selected 'rape myths' of 771 individuals who had just completed jury service (whether in a sexual offence trial or otherwise) across four court centres in England and Wales. Thomas explains that one of her aims was to provide an evidence base with which to either substantiate or refute claims – which she characterises as having been made in previous research – that "jurors are biased against complainants in rape cases and refuse to convict defendants in rape and sexual assault cases because they believe myths and stereotypes about rape and sexual behaviour".<sup>48</sup> She asserts, moreover, that this work is vital because "previous mock jury studies have simply contended that there are no differences between 'mock' and real jurors".<sup>49</sup> In both these respects, we would argue that this positioning of the project gives rise to a missed opportunity for more meaningful engagement with existing knowledge in the field, and leads to an overreach in relation to the conclusions that can reliably be drawn from her research findings.

Thomas fixes her sights in this discussion on certain high-profile public opinion polls, including the one conducted for the End Violence Against Women Coalition, which reported a substantial level of

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<sup>45</sup> Chalmers et al (n 22) at 245.

<sup>46</sup> Juries Act 1974 s.20D (England and Wales); Contempt of Court Act 1981 s.8 (Scotland).

<sup>47</sup> C. Thomas, "The 21<sup>st</sup> Century Jury: Contempt, Bias and the Impact of Jury Service" [2020] Crim LR 987 ("The 21<sup>st</sup> Century Jury"). The 'rape myth' element of the study is discussed at 998-1004 of the paper.

<sup>48</sup> "The 21<sup>st</sup> Century Jury", at 998.

<sup>49</sup> "The 21<sup>st</sup> Century Jury", at 1006.

rape myth acceptance amongst participants across a variety of attitudinal prompts, and precipitated a petition to Parliament to address the issue as a major barrier to justice in sexual offence cases.<sup>50</sup> However, Thomas pays significantly less attention to the wealth of research (discussed above) in social psychology over previous decades, which has used calibrated and tested rape myth attitude scales to demonstrate that members of the public often do hold such beliefs and that those beliefs are apt to influence their verdict choices. This is unfortunate because it supports an over-simplistic characterisation of the issue as being one about wilful juror bias, when the dynamics at play are more complicated. Indeed, Thomas barely mentions – and certainly does not engage adequately with – any of the mock jury studies discussed above in which participants, rather than being asked to respond to abstract attitudinal prompts, were asked to deliberate collectively towards verdicts having observed a detailed rape trial reconstruction.<sup>51</sup> As we have demonstrated, such studies indicate that the issue requires a more sophisticated framing than jurors’ bias or pointed refusal to convict because of denial of certain facts about the reality of rape. The way in which beliefs affect decision-making is dynamic and multi-faceted. Attitudes that, in the abstract, would be (and often, in fact, were) rejected by participants nonetheless come to be relied upon in deliberations. So, for example, the claim is not that participants in those studies endorsed the view that injuries were needed in order for rape to occur, but that when required to deliberate collectively in a scenario where injuries were equivocal or relatively minor, this factor often became a prominent preoccupation that assisted the group in gravitating towards a narrative that they lacked sufficient certainty to be able to convict.

A failure to engage with this body of research enables Thomas to set up a ‘straw-man’ alternative in the form of public opinion polls. It also precludes the opportunity for more reflective engagement with questions about how the attitudes attested to by jurors in Thomas’s work at the close of their deliberations might, or might not, have translated into views expressed and positions taken in the course of their verdict discussions, in that proportion of cases where they took part in a rape trial. This is also a missed opportunity, then, for researchers who have been involved in conducting such mock jury work who, contrary to Thomas’s claim, have rarely (if ever) argued that extrapolation from the experimental context to the real courtroom is a simple or linear affair.<sup>52</sup> To the contrary, those studies have often highlighted the chasm in knowledge and understanding that remains as a result of restrictions on conducting research with real juries, and the resulting limitations of their findings.<sup>53</sup> Thomas’s unique access to jurors in the courtroom within this study could have created an opportunity for bridging that gap to some extent, but its framing has limited that potential.

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<sup>50</sup> End Violence Against Women, [Attitudes to Sexual Consent](#) (2018).

<sup>51</sup> Willmott’s prior study (D. Willmott, *An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions Within Rape Trials* (2018) Doctoral thesis, University of Huddersfield) is mentioned briefly but dismissed fairly summarily because it involved – in part – student participants and was conducted as part of a PhD project. There is no mention at all, however, of the three ESRC funded studies previously conducted in England or the Scottish Government funded project, discussed above. Such work has been relied upon to inform the development of judicial directions to educate rape jurors in England and Wales, Scotland and internationally. See e.g. New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report 148, 2020) at paras 8.31-8.39.

<sup>52</sup> Thomas states (at 1006) that mock jury studies “have routinely asserted that there are no differences between ‘mock’ and real jurors”, but cites no example of any study that has done this.

<sup>53</sup> See e.g. Ormston et al (n 22) pp. 14-15 and 63-64.

None of this is to say, however, that the findings offered up by Thomas's work are not interesting and potentially important. They certainly provide an additional source of valuable information that can be set in the wider context of existing knowledge. With that in mind, in the next section, we will explore in more detail both how the study was conducted and the data that it generated.

### **Thomas's study and its findings**

The UCL Jury Project research was undertaken in 2018–19. The study's methods are outlined only very briefly in the Criminal Law Review paper,<sup>54</sup> which nonetheless provides the most detailed available discussion, but we know that it involved an anonymous and voluntary survey of people who had served on juries in England and Wales and that it was administered immediately post-verdict. A total of 65 discharged juries (771 jurors) in four different court regions took part and there was a 99% participation rate. The cases the juries tried covered a range of charges: this included both sexual and non-sexual offences, but the balance between the two is not specified.

Participants were asked to indicate whether or not they agreed with a number of statements relating to rape and rape victims. The content of these is considered in more detail below, but they included statements covering some widely discussed rape myths, such as "A rape probably didn't happen if the victim has no bruises or marks", "It is difficult to believe rape allegations that were not reported immediately" and "Many women who claim they were raped agreed to have sex and then regretted it afterwards".<sup>55</sup>

The proportion of participants expressing agreement with the various statements differed according to the statement in question. It ranged from, at one end of the scale, 2% of participants who agreed that "men cannot be raped" and 3% who agreed that "a rape probably didn't happen if the victim has no bruises or marks" to, at the other end of the scale, 43% who agreed that "I would expect anyone that was raped to be very emotional when giving evidence in court about the rape" and 47% who agreed that "some people will make up allegations of sexual offences against a famous person".<sup>56</sup> These findings are discussed in more detail below, but what is clear is that, across the 771 jurors who participated, Thomas reports a significantly lower rate of subscription to myths and misunderstandings about the realities of rape than has been identified in much previous work.

As a result of these findings, Thomas concludes that "previous claims of widespread 'juror bias' in sexual offences cases are not valid".<sup>57</sup> She attributes this difference primarily to the fact that there are "fundamental differences between real jurors and volunteers",<sup>58</sup> with previous studies undermined by the self-selecting nature of participation, which she suggests 'builds in' bias.

It is certainly true that previous studies have relied on voluntary participation,<sup>59</sup> which has been recognised as a factor to be borne in mind in evaluating their findings. It is not that Thomas is wrong

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<sup>54</sup> "The 21<sup>st</sup> Century Jury", at 1001.

<sup>55</sup> "The 21<sup>st</sup> Century Jury", at 1002-1003.

<sup>56</sup> "The 21<sup>st</sup> Century Jury", at 1002-1003.

<sup>57</sup> "The 21<sup>st</sup> Century Jury", at 1004.

<sup>58</sup> "The 21<sup>st</sup> Century Jury", at 1006.

<sup>59</sup> Technically, so too did Thomas's study, but any self-selection effect would be minimal given the exceptionally high participation rate of 99%.

to emphasise the importance of this; but it is difficult to make sense of how this distinction operates in the context of her claims. For one thing, the assumption seems to be that “real jurors” and those who participate in mock jury studies are two entirely different populations. This is highly implausible. Those who participated in the three ESRC studies and the Scottish Jury Research were all eligible for jury service. If summoned, the compulsory nature of jury service means that they could easily end up as real jurors in real cases. If research with voluntary participants demonstrates that a significant number of those participants subscribe to rape myths, those participants do not disappear from the jury pool as a result of compelled service.

Moreover, a considerable body of work has explored the potential effects of self-selection within attitudinal studies, often prompted by the regular use in many studies of student populations as participants. While some of this work is rather dated, and its findings have been inconclusive in respect of verdict outcomes specifically,<sup>60</sup> studies evaluating the impact of voluntary participation in research exploring attitudes to social justice, and sexual behaviour in particular, have indicated that, if anything, this is likely to predispose participants to a less traditional set of views and values.<sup>61</sup> In the present context, then, this might be expected to bias mock jury studies towards the return of more progressive views amongst participants; but somewhat puzzlingly, the suggestion in Thomas’s explanation of her findings is that it works in the opposite direction, with those compelled to jury service being *more* likely than volunteers to reject stereotypical views about sexual violence.

A possible alternative explanation is hinted at by Thomas in the conclusion to her article, which is that the “transformational impact”<sup>62</sup> of jury service on members of the public might account for this change. We are not certain if Thomas does in fact wish to advance this claim, but it is worth considering briefly. To the extent that some previous mock jury research has also identified the potential for educative change as a consequence of measures including extended judicial instructions, there is some support for this hypothesis.<sup>63</sup> However, the difficulty here lies in the fact that Thomas’s conclusions are drawn from the participation of 771 jurors who took part in deliberations across a wide range of trial types. As noted above, her discussion does not state what

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<sup>60</sup> Some studies have indicated that student participants, and wider volunteer cohorts who know their decisions will not have a real impact, tend to be more lenient (R. Simon and L. Mahan, “Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom” (1971) 5 *Law and Society Review* 319; D. Wilson and E. Donnerstein, “Guilty or Not Guilty? A Look at the ‘Simulated’ Jury Paradigm” (1977) 7 *Journal of Applied Social Psychology* 175), others have suggested that mock jurors – including students within higher socio-economic groups – may be more punitive (A. Sealy and W. Cornish, “Jurors and their Verdicts” (1973) 36 *Modern Law Review* 496; H. Zeisel and S. Diamond, “The Effect of Peremptory Challenge on Jury and Verdict: An Experiment in a Federal District Court” (1978) 30 *Stanford Law Review* 491), whilst others detected no impact (N. Kerr et al, “Role Playing and Study of Jury Behaviour” (1979) 7 *Sociological Methods and Research* 337).

<sup>61</sup> J. Anderson and G. Bryjak, “Out of the Tower and into the Street: University Students and Social Justice Issues” (1989) 13 *Educational Research Quarterly* 47–56; D. Strassberg and K. Lowe, “Volunteer Bias in Sexuality Research” (1995) 24 *Archives of Sexual Behaviour* 369; M. Wiederman, “Volunteer Bias in Sexuality Research Using College Student Participants” (1999) 36 *Journal of Sex Research* 59; A. Braunack-Mayer, “The Ethics of Participating in Research” (2002) 117 *Medical Journal Australia* 468.

<sup>62</sup> “The 21<sup>st</sup> Century Jury”, at 1010.

<sup>63</sup> See e.g. N. Brekke and E. Borgida, “Expert Psychological Testimony In Rape Trials: A Social-Cognitive Analysis” (1988) 55 *Journal of Personality and Social Psychology* 372; L. Ellison and V. Munro, “Turning Mirrors Into Windows: Assessing the Impact of (Mock) Juror Education in Rape Trials” (2009) 49 *British Journal of Criminology* 363.

percentage of jurors were involved in sexual offences trials, but it is clear that not all were. In this context, it is hard to understand why participation in, for example, a handling stolen goods trial, would in and of itself bring about changes in attitude towards abstract views on rape. Surveying participants before and after jury service would have assisted in properly assessing any claim about its transformative nature, but unfortunately this was not undertaken.

### **Methodology matters**

It is difficult, then, in the absence of further information, to fully evaluate the possible explanations for why, in Thomas's study, the views of those who have recently completed jury service should appear so significantly at odds with what has been uncovered in previous research. Nonetheless, if it can credibly be supported by the data, it is certainly a welcome finding that her participants evidenced lower levels of rape myth acceptance; a finding which can be used to redress victims' reluctance to report due to a lack of faith in the justice process, as well as concerns from prosecutors regarding the prospects of open-minded juror engagement.

In this section, however, we urge caution. Drawing attention to certain limitations in the methods used in this study, we suggest that it would be markedly premature, on the basis of Thomas's findings, to conclude – as she advocates – that there is a significantly diminished cause for concern. Given the interests at stake in this context, it is crucial carefully to evaluate and reflect on the methods used for any study and the confidence with which the resultant data can be relied upon. The suggestion here is not that there is one perfect research method, but that each has its relative merits and demerits, and that while triangulation can be useful, it is also important to reflect on the 'known unknowns' that are left in the wake of research.

As noted, the data collected by Thomas arose from a survey administered to jurors after the close of deliberations. It is not entirely clear in the published account whether this was administered directly by the researcher (or another person) or whether jurors were provided with a form to complete. Nor is it clear whether a researcher (or other person) was present during completion. What is clear is that the study benefitted from a remarkably high level of participation – 99% of those approached agreed to take part. There is little consideration by Thomas of the extent to which that response rate in itself might reflect a wider issue about the power dynamics surrounding participation. Such uptake suggests participants may have seen the request as coming with the formal endorsement of the court and, as such, may have felt poorly positioned to refuse.

The ways in which that may have influenced their substantive responses also merits further reflection, particularly given that participants were asked to complete the survey immediately after concluding their deliberations. For those participants who did take part in a sexual offence trial, it is likely that they would have been alert to the impulse not to disclose any views that might have cast into doubt the fairness of their deliberations or their resultant verdict.

More generally, there is a substantial body of research literature which highlights the risk of a socially desirable response bias amongst participants in attitudinal studies.<sup>64</sup> The markers of officialdom associated with this particular study (administered in court by a researcher with special authorisation to speak with jurors, etc.) may have rendered this risk all the more acute.<sup>65</sup> Research has established, moreover, that socially desirable responding is most likely to occur where participants are asked questions about attitudes that are socially sensitive – which would of course squarely include attitudes around sexual violence and socio-sexual gender norms.<sup>66</sup> Indeed, existing work in the specific context of criminal justice decision-making on rape has also evidenced this bias.<sup>67</sup>

Steps can be taken, through research design, to mitigate the risk of social desirability bias, for example through the use of robust and sophisticated measurements, and ensuring the researcher is not present whilst the questionnaire is completed.<sup>68</sup> But there is little reflection in Thomas's discussion of whether such steps were undertaken. Moreover, the attitudinal prompts presented to participants were often rather blunt in tone, and not contextualised within the wider framing of established attitudinal scales tested in social psychology research. There are a number of such validated scales, developed to measure the extent to which people hold rape myth supporting attitudes, with the most well-known being the Illinois Rape Myth Acceptance Scale<sup>69</sup> (IRMAS), the Acceptance of Modern Myths About Sexual Aggression Scale<sup>70</sup> (AMMSA) and the Subtle Rape Myth Acceptance Scale<sup>71</sup> (SRMAS). The AMMSA and SRMAS in particular have been rigorously designed and calibrated specifically to minimise the possibility of social desirability bias.<sup>72</sup> They do so by language choice in the phrasing of prompts and by using multiple, differently worded questions to test for the same core attitude, which also assists in testing for consistency of views.

While there is no appendix to accompany the Thomas article which gives an account of the full questionnaire presented to participants, it appears from the tables included in the text that 17

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<sup>64</sup> See e.g. R.J. Fisher and J.E. Katz, "Social-Desirability Bias and the Validity of Self-Reported Values" (2000) 17 *Psychology and Marketing* 105; P. Lietz, "Research into Questionnaire Design: A Summary of the Literature" (2010) 52 *International Journal of Market Research* 249, 252-253; J.E.M. Steenkamp, M.G. DeJong and H. Baumgartner, "Socially Desirable Response Tendencies in Survey Research" (2010) 47 *Journal of Marketing Research* 199; T.F. Van de Mortel, "Faking It: Social Desirability Response Bias in Self-Report Research" (2008) 25 *The Australian Journal of Advanced Nursing* 40.

<sup>65</sup> See e.g. I. Krumpal, "Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review" (2013) 47 *Quality & Quantity* 2025, 2034.

<sup>66</sup> M. King and G. Brunner, "Social Desirability Bias: A Neglected Aspect of Validity Testing" (2000) 17 *Psychology and Marketing* 79, 82; R.B. Larson, "Controlling Social Desirability Bias" (2019) 61 *International Journal of Market Research* 534, 534.

<sup>67</sup> R.M. Venema, "Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias" (2018) 33 *Violence and Victims* 176, 190.

<sup>68</sup> See e.g. Larson (n 66) at 535-538; A.J. Nederhof, "Methods of Coping With Social Desirability Bias: A Review" (1985) 15 *European Journal of Social Psychology* 263.

<sup>69</sup> D.L. Payne, K.A. Lonsway and L.F. Fitzgerald, "Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale" (1999) 33 *Journal of Research in Personality* 27.

<sup>70</sup> H. Gerger, H. Kley, G. Bohner and F. Siebler, "The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English" (2007) 33 *Aggressive Behaviour* 422.

<sup>71</sup> S. McMahon and G.L. Farmer, "An Updated Measure for Assessing Subtle Rape Myths" (2011) 35 *Social Work Research* 71.

<sup>72</sup> See Gerger et al (n 70) at 433; McMahon and Farmer (n 71) at 74.

questions were asked. Thomas reports that these were drawn from “standardised questions on rape myths covered in public opinion polls and research with non-jurors”,<sup>73</sup> “including those based on the Illinois Rape Myth Acceptance Scale (IRMA) as updated [i.e. the SRMAS]”.<sup>74</sup> Nothing is said, however, about the extent to which this modified and abbreviated version of the instrument was piloted or validated prior to its use in the research. In contrast to the SRMAS (and other validated scales), there appears to have been little repetition of themes in the Thomas questionnaire.

The SRMAS includes a total of 22 questions, spread across four key themes [‘she asked for it’, ‘he didn’t mean to’, ‘it wasn’t really rape’ and ‘she lied’], but representation of those themes has been ‘shrunk’ proportionately by around one-third in the Thomas questionnaire. Only one or two prompts attest to these themes. The remainder of the 17 questions introduce new themes. Some of these are important (for example around delayed reporting) but others are tangential to the majority of rape trials (“some people will make up allegations of sexual offences against a famous person”), raise additional and complex issues beyond the scope of the study (“children often make up stories about being sexually abused”) or are phrased so vaguely as to render it difficult to learn a great deal from the results (“it is a hard thing to do to give evidence in court about rape” – for *whom?*). Given that this is the core basis for Thomas’s claims, more reflection on the design and testing of the questionnaire is crucial if conclusions that set it apart so substantially from existing research over many decades in social psychology are to be supported.

Further issues arise, moreover, from the fact that Thomas’s study appears to have utilised a ‘agree/disagree/unsure’ measure for questionnaire responses rather than the more commonly used five or seven-point Likert scales which are designed specifically to generate insight into degrees of respondent confidence.<sup>75</sup> Such a blunt measure is likely to have exacerbated rather than mitigated against the risk of social desirability bias. Take, for example, the question “A woman who goes out alone at night, puts herself in a position to be raped”. This question has such an obviously socially acceptable answer that respondents may have been reluctant to say “yes” to this, even if they believe it.<sup>76</sup> However, if respondents were presented with a scale including the options of “agree somewhat”, “agree” and “strongly agree”, which enables them to qualify a positive response and/or avoid the extreme of “strongly agree”, this may have resulted in a more honest answer.

In addition, an absence of evidence as to degrees of agreement also means it is harder to be confident about how deeply rooted the attitudes of the survey respondents were. This matters greatly in the context of deliberations, where jurors are asked to form views not in the abstract but in relation to a concrete and contested factual scenario, involving competing accounts of events skilfully presented by counsel. Jurors must, based on relevant legal tests, articulate and defend their assessment of liability to peers in pursuit of a collective verdict. This process is apt to put significant strain on views that may be less robustly and assuredly held. As such, the issue here is not only that

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<sup>73</sup> “The 21<sup>st</sup> Century Jury”, at 1001.

<sup>74</sup> “The 21<sup>st</sup> Century Jury”, at 1001 (footnote 47).

<sup>75</sup> R. Likert, “A Technique for the Measurement of Attitudes” (1932) 140 *Archives of Psychology* 1. A considerable body of research suggests that five point or seven-point Likert scales are best practice: see e.g. J.A. Krosnick, “Improving Question Design To Maximise Reliability and Validity”, in D.L. Vannette and J.A. Krosnick (eds), *The Palgrave Handbook of Survey Research* (2018) 95, 99; P. Lietz, “Research into Questionnaire Design: A Summary of the Literature” (2010) 52 *International Journal of Market Research* 249, 260-261.

<sup>76</sup> It is worth noting that 4% of the respondents (31 people) in the Thomas study did agree with this statement.

participants may provide inaccurate responses as a result of power dynamics in the research process, or an appreciation of what would be the more socially desirable response, but also that – even if those responses are an accurate reflection of their view in the abstract – translation and retention of them within the jury room is complicated.

Thomas's study does not ask jurors about their deliberations directly, due to the legislative provisions that prevent this in England and Wales.<sup>77</sup> As we explore in the next section, however, extrapolating abstract attitudinal findings to jury deliberations is in fact a more complicated process than some of the commentary arising from Thomas's study might lead readers to assume.

### **A question of interpretation**

The first point to make about Thomas's findings – and it is an important one – is that, even taking them at face value, they are not as reassuring as her conclusions seem to suggest. 27% of Thomas's participants reported that they either agreed, or were unsure whether they agreed, with the statement "it is difficult to believe rape allegations that were not reported immediately"; 17% either agreed, or were unsure if they agreed, with the statement that "a woman who wears provocative clothing puts herself in a position to be raped"; 15% agreed or were unsure whether "if a person doesn't physically fight back, you can't really say it was rape"; and 13% agreed or were unsure whether "a rape probably didn't happen if the victim has no bruises or marks".<sup>78</sup>

Response rates ranging from 13% to 27% suggest that a significant minority of individual jurors are likely to hold or be open to such views. Given the random composition of juries, such a minority may often be sizeable enough to prevent conviction by majority verdict, but even aside from that point it would be unwise to dismiss lightly the impact that a minority view expressed at individual level can have in the context of collective deliberations. Previous work on group dynamics in general, and on the processes of mock rape jury deliberation in particular, has attested to the ways in which strongly held minority views can influence the tone and trajectory of discussion.<sup>79</sup> This may be particularly so in contexts where that influence pulls a deliberating group towards acquittal.<sup>80</sup>

In addition, as alluded to above, mock jury work has observed a marked tendency for participants who purported to reject problematic attitudes about rape in the abstract nonetheless to proceed to rely upon such views as part of the deliberative process. In one of their ESRC studies, Ellison and Munro, for example, found ample evidence of jurors who had indicated disagreement with rape myths in an abstract questionnaire, but nonetheless expressed those exact prejudices vigorously during the deliberations.<sup>81</sup> There are a number of possible reasons for this – for example, the approach defended in deliberations may give a more honest account of their less socially desirable

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<sup>77</sup> See text attached to n 46 above.

<sup>78</sup> "The 21<sup>st</sup> Century Jury", at 1002-1004.

<sup>79</sup> For discussion, see Ellison and Munro, "Getting to (Not) Guilty", at 82.

<sup>80</sup> See e.g. R. MacCoun and N. Kerr, "Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency" (1988) 54 *Journal of Personality and Social Psychology* 21.

<sup>81</sup> See "A Stranger in the Bushes" at e.g. 790 (the view that a failure to fight back on the part of the complainant is evidence of consent) and 794-795 (the view that false rape accusations are common and often used as a way of 'getting back at' men). See also A.M. Zidenberg et al, "Lost in Translation: A Quantitative and Qualitative Comparison of Rape Myth Acceptance" (2021) *Psychology, Crime and Law*, online first.

responses, or reflect the influence of peers' alternative perspectives and persuasive strategies, or the complexity of the case before them and the challenges of the deliberative enterprise. Whatever the reason, this suggests, as Ellison and Munro argue, a need for caution in assuming that attitudes disavowed in the abstract will not, or in the case of Thomas's study did not, surface in the jury room.

Such caution is further justified, moreover, by recent findings from research in other jurisdictions, which has also involved real jurors. As part of the Trans-Tasman Jury study, researchers in New Zealand and Australia have conducted a series of detailed post-verdict interviews with jurors, triangulated with pre- and post-trial judicial interviews and observation of trial proceedings or access to opening and closing statements, notes of evidence and judicial instructions in those cases. Though the primary aim of that study is to explore jurors' application of judicial directions and question trails, it has yielded important findings regarding the wider content and processes of jury decision-making. Reporting on data from the New Zealand fieldwork, which extended to an analysis of 18 sexual violence trials from which 121 jurors were interviewed, Tinsley et al have recently observed that – while it is difficult to assess the precise extent of its influence upon final verdicts – there was evidence that misconceptions about sexual violence were present in jurors' discussions. In particular, jurors often drew on 'real rape' stereotypes, including the extent of a complainant's physical resistance, in determining credibility. So too, despite judicial warnings stressing there may be good reasons for delayed reporting, some jurors continued to place undue weight on this factor; and in 10 of the 18 cases reviewed, there was at least some evidence of jurors' endorsement of victim-blaming attitudes related to the complainants' clothing, flirtatious behaviour, lifestyle, intoxication or prior sexual history.<sup>82</sup> As a result, the researchers conclude that at least some real jurors *do* use cultural misconceptions about sexual violence to inform their deliberations, and that this may be relied upon – individually and collectively – to support what is clearly illegitimate reasoning in respect of the evidence that is presented at trial.

For all its unprecedented access to jurors at court in England and Wales, the Thomas study did not engage participants directly in discussion about their deliberations in the way that the New Zealand fieldwork has done, and it did not observe the dynamics and content of discussions in the way that mock simulations have done. Both these bodies of work have demonstrated that extrapolation from abstract attitudinal prompts to concrete deliberations is complicated, and that questionnaire findings such as Thomas's should not be taken at face value so as to give rise to complacency about the role of such attitudes in the jury room.

This is all the more the case given that Thomas's research in fact reveals significant juror uncertainty in relation to some of the key rape myths that have been identified as influential on deliberations in previous research. In particular, Thomas reports that 47% of her respondents were unsure whether "many women who claim they were raped agreed to have sex and then regretted it afterwards" (with a further 12% positively agreeing with this statement) and 36% said they were unsure whether "if both people are drunk, it's hard to know if it was really rape" (with a further 25% positively agreeing that it was hard to know).<sup>83</sup> Thomas concludes in respect of these areas that "since there is no agreed factual basis or empirical evidence to say definitely what the correct answer is on these

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<sup>82</sup> Y. Tinsley, C. Baylis and W. Young, "'I Think She's Learnt Her Lesson': Juror Use of Cultural Misconceptions in Sexual Violence Trials" (manuscript in progress, shared with the authors, 2021).

<sup>83</sup> "The 21<sup>st</sup> Century Jury", at 1004.

issues”,<sup>84</sup> it would be unclear how further education or instruction could be given. But that is not an adequate response. These are not mere points of ambivalence to be swept aside so easily, for they speak directly to suspicion regarding the evidential weight of complainants’ accounts and background acceptance of the spectre of false claims shown in previous work with mock jurors, and now also with their real counterparts in New Zealand fieldwork for the Trans-Tasman study, to have a powerful influence. As we noted above, while Thomas is right that we cannot quantify the scale of false allegations of rape, we do know from research across many decades and many jurisdictions that it is not likely to be substantial,<sup>85</sup> and it is certainly not likely to be of a scale that supports more than half of jurors holding frequent false reporting out as a credible possibility. These expectations are not, and cannot be, hermetically sealed in the context of concrete deliberations from jurors’ other views about the level of injury that would corroborate a claim, the relevance of minor inconsistencies or omissions in the complainant’s testimony or the extent to which intoxication – as a social lubricant – has created the scene for sexual miscommunication. It is important in interpreting the findings of this and other studies to resist such efforts at compartmentalising.

## Conclusion

Thomas concludes that her research shows that jurors at court “do not hold the same views” as participants in survey and mock jury research.<sup>86</sup> It does not. Thomas could have tested such a hypothesis by replicating prior attitudinal studies to see if the same results were obtained with her sample, but did not do so. Indeed, from the published account of the study methods, it appears to differ from the existing body of research in at least three important ways: the sample, the questions asked and the responses which participants were able to choose from. To the extent that her research reports different results from prior studies, it is thus impossible to say whether this is due to the different participants, the different questions, or the different response options.

None of this is quibbling. Socially desirable response bias is a serious problem in research of this nature and requires careful attention in research design to ensure that participants are not simply giving the answers they believe the researcher wants to hear. The reported design of Thomas’s research, particularly the apparent use of a blunt “agree/disagree/unsure” scale, barring participants from offering tentative responses such as “somewhat agree”, means that it is impossible safely to conclude that the apparent differences in the data generated are the result of jurors at court being somehow different, as opposed to a consequence of research design which allowed such bias to have greater play.

It would, in any event, be an unsatisfactory answer to concerns about rape myths to claim that jurors at court simply hold views about rape significantly different to those held by the general public as recorded in opinion polls. That would suggest that juries are somehow significantly unrepresentative of the general public, and in defending juries against one charge would open them up to an even greater challenge. As we noted above, Thomas hints at a possible answer to this in the conclusion to her article, referring to the “transformational” nature of jury service. It is certainly true – and important – that US research has suggested that the experience of serving on a jury is

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<sup>84</sup> “The 21<sup>st</sup> Century Jury”, at 1004.

<sup>85</sup> See n 39 above.

<sup>86</sup> “The 21<sup>st</sup> Century Jury”, at 1005.

associated with higher levels of voting and other civic participation thereafter, as Thomas notes.<sup>87</sup> But while civic participation might be “habit forming”, as has been demonstrated elsewhere,<sup>88</sup> there is no obvious or even plausible mechanism why the act of serving as a juror in a trial for handling stolen goods should lead a juror to suddenly change their beliefs about a range of factual issues regarding the reality of sexual assault. Jury service is socially important; it is not social wizardry.

What is more, it should be noted that existing work on, for example, jury service and subsequent voting habits relies on access to prior voting records to demonstrate actual change.<sup>89</sup> Without access to that prior data (which in this case could have been demonstrated by an additional layer of attitudinal research with jurors in the study *prior* to their jury service) there is no basis for any claim of transformation, if indeed that is one that Thomas wishes to make.

Further, as we have argued above, even if Thomas’s research had demonstrated that jurors at court are less likely to subscribe to rape myths than previously supposed, there is little reason to be reassured by data such as 27% of jurors agreeing or being unsure about the statement “it is difficult to believe rape allegations that were not reported immediately” or 15% of jurors agreeing or being unsure about the claim “if a person doesn’t physically fight back, you can’t really say it was rape”. This is particularly so because Thomas’s research does not, and cannot, account for the process of deliberation. Thomas claims that jurors who subscribe to rape myths “amount to less than one person on a jury”.<sup>90</sup> There are at least three problems with this claim. First, it ignores the fact that the distribution of jurors is not in fact even in the fashion suggested: the number in a real case will often be more or less than one. Second, it ignores the jurors who declared themselves “unsure” about the statements in question, thus suggesting that they would at the very least be open to such claims when they are alluded to or relied upon in defence strategies. The number of jurors who believe or are open to such claims in Thomas’s study often equates to an average of more than three persons per jury – enough to prevent conviction even by majority verdict. Thirdly, it says nothing about the process of deliberation, where jurors may express or rely on prejudicial beliefs in the concrete even though they have rejected them in the abstract, and may influence other jurors in doing so.

To be clear, we would be delighted if research with jurors at court demonstrated that fears about jurors subscribing to misconceptions about rape and rape complainants were themselves myths. When subjected to critical scrutiny, it is clear, however, that Thomas’s research cannot demonstrate this. It is a contribution to knowledge on the subject which opens up possibilities for future research, including – potentially – with jurors engaged in real deliberations. It does not close the case.

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<sup>87</sup> J. Gastil, E.P. Deess, P.J. Weiser and C. Simmons, *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation* (2010).

<sup>88</sup> See e.g. A. Coppock and D.P. Green, “Is Voting Habit Forming? New Evidence from Experiments and Regression Discontinuities” (2016) 60 *American Journal of Political Science* 1044.

<sup>89</sup> Gastil et al (n 87).

<sup>90</sup> “The 21<sup>st</sup> Century Jury”, at 1102.