

CAN WOMEN JUDGES HELP MAKE CIVIL SEXUAL ASSAULT TRIALS MORE THERAPEUTIC?

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I. INTRODUCTION

Do women judges make a difference? One particular area in which it is often thought so is in sexual assault cases. If a sexual assault case is before a woman judge, it is reasoned that there is less chance of bias against the woman, less chance that she will be abused by opposing counsel, and a greater chance that she will be heard instead of silenced.¹ While it is beyond the scope of this paper to test this general hypothesis in a scientific or epistemological manner, it will analyze one aspect of this premise: the role that women judges can play in improving the quality of the experience of women victims in civil sexual assault cases.

The primary analytical prism employed for this purpose will be that of therapeutic jurisprudence ("TJ"). Therapeutic jurisprudence is a relatively new doctrine used in social science to study the effect of the judicial system on its participants. This paper will apply TJ to civil sexual assault cases. Specifically, it will ask whether or not, in the context of various trial court decision-making processes (e.g. evidentiary rulings), women judges are more likely to make civil sexual assault cases more therapeutic for female victims. First will be a brief overview of therapeutic justice, its premises, its goals, and a methodology for measuring whether or not a judicial process meets those goals. Second, it will briefly overview the types of decisions that are made at the trial court level and why those decisions in particular can offer key insights into the potential correlation of gender and therapeutic outcomes. Third, the paper will apply the TJ analysis to those decisions in the sexual assault litigation context and analyze the results.

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1. Sean Cooney, *Gender and Judicial Selection: Should There be More Women on the Courts?*, 19 MELB. U. L. REV. 20, 26 (1993); Isabel Grant & Lynn Smith, *Gender Representation in the Canadian Judiciary*, in APPOINTING JUDGES: PHILOSOPHY, POLITICS, AND PRACTICE 66-78 (1991); Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 492 (1984). *But see* Regina Graycar, *The Gender of Judgments: Some Reflections on "Bias"*, 32 U. BRITISH COLUMBIA L. REV. 1, 12 (1998) (pointing out quotes from judges dismissing rape cases as often amounting to false accusations).

II. THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence is a philosophy and a methodology. It is a paradigmatic shift in ways of thinking about the law that began in the late 1980s, drawn from scientific revolutions in the fields of mental health, sociology, psychology, and political science.² TJ's philosophy is fairly simple: legal rules and results can have either a positive or negative impact on the psychological well-being of individuals or groups who become involved in the legal system.³ Its methodology consists of three basic tenets: (1) Study the empirical consequences of laws and legal procedures to ascertain the effect they have had on individuals – in essence, whether law is helping or hurting people; (2) incorporate these social science findings into the law-making process so as to fine-tune the outcomes to the desired therapeutic level; and (3) educate the participants in the legal system about the system and their roles so that they become aware that their performance can have either a therapeutic or anti-therapeutic effect on themselves and on others.⁴

The goals of therapeutic jurisprudence analysis vary by project and protagonist, but generally, most advocates of TJ attempt to evaluate and redesign legal systems so as to provide the participants with the most positive experience possible.⁵ Realistically, however, TJ must accomplish this goal in conjunction with other judicial goals such as constitutionality, individual autonomy, integrity of the fact-finding process, and community safety.⁶ Traditionally, TJ analysis has most often been used to study the effect of judicial processes on defendants, or "participants" as the TJ vernacular refers to them.⁷ However, in recent years, it has expanded to include observations and analysis of both non-defendant episodic participants (e.g. witnesses, victims,

2. Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 442 (1999) (recognizing David Wexler's speech to the National Institute of Mental Health in 1987 as the first time that the term therapeutic jurisprudence had been used).

3. John Q. La Fond, *Can Therapeutic Jurisprudence be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 375 (1999).

4. *Id.* at 375-76.

5. *Id.* at 376 (quoting Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 508 (1998) ("[Therapeutic Jurisprudence] is thus a field of social inquiry designed to produce law reform that will enhance the law's potential as a healing and health-promoting force.")).

6. *Id.* (quoting David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 762 (1993)).

7. *See, e.g.*, David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993); Jeffrey A. Klotz, et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 U. PUGET SOUND L. REV. 579 (1992); Hora, *supra* note 2, at 448.
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etc.) and non-defendant systemic participants, such as judges, prosecutors, and social workers.⁸

Therapeutic analysis begins with an examination of how helpful a particular procedural or substantive rule of law is to those who interact with it. It then proposes a significant change to the law and either hypothesizes or studies the new system, documenting or speculating on whether the new rule results in a more or less therapeutic outcome for those involved. An illustrative example of the implementation of TJ is the Miami Drug Court, an alternative sentencing program that uses TJ as its core philosophy.⁹ The Court offers defendants convicted of drug-related crimes an alternative forum for punishment other than the standard sentencing and imprisonment.¹⁰ Instead, the Court meets with "participants" on an ongoing basis, focusing on working with them to set short-term and long-term goals, such as treatment for addiction and restitution to victims.¹¹ The prosecution and defense lawyers are still part of this Court, yet they abandon their adversarial roles and become assistants to the Court, providing information and support to help the participant meet his or her goals.¹² Participants who consistently fail to meet these goals are remanded to traditional sentencing.¹³

During the first several years of the Drug Court's existence, social scientists studied the difference in recidivism rates between offenders participating in the Drug Court and those who went through the traditional sentencing system. The results of the study showed that offenders diverted to the Drug Court had recidivism rates of 9.7% within twelve months of graduation from the court-administered drug treatment program, 13.2% after eighteen months, and 24% after five years.¹⁴ Drug offenders in Miami who went through the normal court system had an average recidivism rate of close to 60%.¹⁵ If one assumes that both the defendant and society are better off with lower recidivism rates, then the Miami Drug Court can be classified as a therapeutic improvement in the legal system.

8. See, e.g., Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998); Dennis P. Sacuzzo, *How Should The Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765 (1999).

9. See generally Hora, *supra* note 2.

10. *Id.*

11. *Id.* at 476-77.

12. *Id.* at 477-79.

13. *Id.* at 484.

14. *Id.* at 485.

15. *Id.*

III. DECISIONS THAT MAKE A DIFFERENCE: SEEKING OUT THERAPEUTIC POTENTIAL

All judges make decisions every day that affect litigants. However, some decisions are more public than others and some more critical to litigants' perceptions of their experiences in court. The following section briefly explores four variables in judicial decision-making to gauge areas which possess great potential for improved therapeutic results.

A. *Trial Court Versus Appellate Court*

The first variable of decision-making is the level of the court, appellate versus trial. The significant difference between these two levels appears in many forms. For example, trial judges often hear arguments and rule from the bench on the disposition of motions and objections, especially during trial. In comparison, appellate judges generally hear arguments in public but reduce the decision to a written opinion, often months after the issue has been submitted. The public nature of decision-making by the trial judge is much more influential for participants, especially in terms of tone and mannerisms that the judge may use in her delivery of the decision.

Since appellate determinations are done by a majority vote, there is less chance that the public will perceive a single judge as entirely responsible for the outcome of an appeal. The genders of the judges, while often influential in the extreme (e.g. if there are no women on the panel or all women on the panel), have less impact than a single trial judge who makes every decision and thereby represents the entire judicial process for the participant.¹⁶ Thus, the potential for the gender of a judge to influence the therapeutic quality of the judicial process is greater at the trial court level.

B. *Issues of Fact Versus Issues of Law*

Even when focusing exclusively on trial judges, there are other factors to consider in determining potential for improved outcomes. For example, one factor is the type of decision that the trial judge is making in terms of those based on purely legal questions versus those based on factual determinations. At the trial court level, decisions based in law are often either the result of controlling authority (e.g. statutes, administrative rules, or appellate decisions) or situations

16. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1193 (1992) ("[I]n contrast to district judges, who are the real power holders in the federal court system – lords [sic] of their individual fiefdoms from case filing to first instance final judgment – no single court of appeals judge can carry the day in any case. To attract a second vote and establish durable law for the circuit, a judge may find it necessary to moderate her own position, sometimes to be less bold, other times to be less clear.").

where there are no material facts in dispute (e.g. summary judgment).¹⁷

For decisions where there is clear controlling authority, the particular gender of a judge may not prove significant to the impact on the participants. Even if a particular judge may feel that the facts of a particular case cut in favor of one party based on her personal experience, a clear rule of law may force her to decide in favor of the other. This is potentially mitigated, however, by a judge stating her displeasure with the current rule of law and suggesting it be modified or overturned by the legislature or a higher court.

Decisions dealing with fact finding, on the other hand, are prime territory for trial judges to import their personal experience and perspective. For example, when judging the credibility of a witness in a bench trial or the theories of a scientific expert to decide if they are sufficiently reliable to assist the jury. The perspective of the judge is also important in deciding whether or not to grant summary judgment. For a summary judgement, a judge must determine whether there are any material facts in dispute.¹⁸ Whether a fact is "material" depends on whether the judge thinks it is important and potentially dispositive to the outcome of the case. This determination depends, in part, on the judge's internal database of experience. As Regina Graycar writes, "[e]vidence, judicial notice (or knowing by osmosis, as Professor Keeton has called it), and the use of 'common sense' assumptions by judges are all bound up in this epistemological question of how judges know the world they construct (with such authority) in their judgments."¹⁹ The gender of the judge could easily influence such common sense assumptions and knowledge of the world in cases involving gender issues, such as sexual assault.

A directed verdict or judgment as a matter of law (JMOL) is another area where the way in which the trial judge utilizes her decision-making power can prove critical to ensuring a therapeutic outcome. In a JMOL hearing, the judge must determine whether any reasonable jury, viewing all the evidence in the light most favorable to the non-moving party, could find for that party.²⁰ One would be hard pressed to imagine a more demoralizing experience for a female litigant/victim than hearing a judge declare that no reasonable jury could *ever* find in her favor.

C. *Admissibility of Evidence*

A third area in which trial judges have immense opportunity to control the therapeutic effects on litigants is the area of admissibility

17. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921) (recognizing that no judicial system could do society's work if it eyes each issue afresh in every case that raised it); FED. R. CIV. P. 56.

18. FED. R. CIV. P. 56.

19. Graycar, *supra* note 1, at 17.

20. FED. R. CIV. P. 50. HeinOnline -- 16 Wis. Women's L.J. 57 2001

of evidence. A judge always has the power to withhold evidence from the jury as irrelevant or prejudicial.²¹ In addition, the judge can make powerful statements about the value of women's voices when ruling on the reliability of testimony, such as when ruling on a hearsay statement.

For example, under the residual hearsay exception in Federal Rule of Evidence 807, "[a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that . . . the statement [proves a material fact, is more probative than any other evidence reasonably available, and serves the interests of justice.]"²² How does a judge determine whether a person's testimony has circumstantial guarantees of trustworthiness? If a judge values men's voices over those of women, then who is trustworthy and who is not can have a serious impact on what evidence reaches the jury. Regina Graycar writes:

[E]vidence law presumes a reality based on truths and facts. Yet all of the 'facts' found by courts are the outcome of contestation about versions of events which are assembled within the constraints of time, place, culture, politics. Moreover, as those who have written about women's credibility have noted, there are enormous obstacles to women's stories and outsiders' stories occupying the same space and doing so with the same authority as the stock stories that underpin the commonsense of deeply gendered and racialised legal discourses.²³

Thus, how a judge rules on issues of evidence speaks directly to the authority that a woman's voice and story can have in the court of law.

D. *Liability versus Remedy*

Finally, one must consider the differences between liability determinations and remedy determinations. Outside of the categories previously mentioned, a judge's ability to influence participants' experiences in the liability phase of a trial are few and far between. Causes of action have elements, and once the credibility and sufficiency of the evidence has been determined, liability is essentially a matter of law. In addition, in a bench trial, notwithstanding the previous analysis of evidentiary decision-making, judges are expected to judge liability with as objective a perspective as possible.²⁴

21. FED. R. EVID. 401, 403.

22. FED. R. EVID. 807.

23. Graycar, *supra* note 1, at 19.

24. *Blank v. Sullivan & Cromwell*, 418 F.Supp. 1, 2 (S.D.N.Y. 1975) (28 U.S.C. § 144 provides for disqualification of a judge if a submitted affidavit "'give(s) fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.' . . . In order to remove a judge, the bias shown must be a 'personal' prejudice, from an extrajudicial source and resulting in an opinion on the merits not warranted

On the issue of remedies, however, judges have much more flexibility. For example, in sentencing, judges are given extreme deference by appellate courts.²⁵ Even with the Federal Sentencing Guidelines requiring federal district trial judges to state reasons for a sentence and to sentence within a given range,²⁶ the recent *Koon* case²⁷ demonstrates that the Supreme Court has given extreme deference to trial court judges in sentencing under an abuse of discretion standard.²⁸ Thus, the circumstances of the crime can affect the discretion of the judge at sentencing. For example, if a woman kills her husband and is convicted of murder, the judge could take into account the circumstances of the killing (e.g. battered women's syndrome) and depart downward substantially in her sentence, without fear of significant appellate review. Judges can also take into account other characteristics of a gendered experience, such as women's societal experience with sexual harassment, stalking, or the incremental impact of poverty on women.

Equitable relief also presents trial judges with broad choices and options. For example, in deciding a preliminary injunction motion, trial judges must evaluate the likelihood of success on the merits of the case, the balance of burdens on each party, and the "public interest."²⁹ Such determinations, especially regarding the burdens of the parties or what the public interest is in the outcome, require a judge to rely extensively on his or her personal experience. The weight and import given to a party's burden by the judge almost certainly has a substantial impact on the party's perception of the therapeutic nature of the proceeding. When granting an injunction, judges also delineate the scope of the injunction. Again, the extent and severity of the remedy are likely influenced by the values of the judge.

Judicial determinations of damages also substantially influence a litigant's perception of the judicial process. While typically left to the jury, damages can be trebled by the judge for inequitable acts associated with liability.³⁰ If the common saying "Money talks" has any application to the judicial system, it is most apparent to the parties when the court hands down a punitive award.

by the facts or issues presented in the case.") (citing *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968)).

25. *United States v. Jackson*, 835 F.2d 1195, 1197 (7th Cir. 1987) (Easterbrook, J) (Affirming life imprisonment without the possibility of parole for a four-time armed bank robber even though sentence "may be unduly harsh." "The selection of a sentence within the statutory range is essentially free of appellate review.").

26. 18 U.S.C. § 3553 (1994) (Imposition of a sentence under the guidelines).

27. *Koon v. United States*, 518 U.S. 81 (1996).

28. *Id.* at 113.

29. FED. R. CIV. P. 65(a).

30. 35 U.S.C. § 284 (allowing the trial judge to treble patent damages if infringement is willful), *Id.* at § 285 (allowing the trial judge to award attorneys fees in patent cases which are "exceptional").

IV. WOMEN JUDGES: CAN THEY MAKE CIVIL SEXUAL ASSAULT CASES MORE THERAPEUTIC FOR FEMALE VICTIMS?

In 1998, three researchers published a psychological study ("The Des Rosiers Study") based on interviews with sexual assault victims (most of whom were women) regarding their experience with civil suits against their attackers.³¹ The study focused on victims who choose one of two competing judicial mechanisms through which they could receive financial compensation for medical costs (including therapy), pecuniary loss arising from the assault, as well as pain and suffering. The first choice was a hearing by a governmental commission, the second a traditional civil court suit against the assailant.³² The Des Rosiers study did not specifically inquire as to the therapeutic effect of the gender of the judge, but it does provide insight into the qualitative therapeutic factors that a judge might influence. This paper will analyze these results in terms of the previously identified factors in which the gender of the trial judge may impact therapeutic outcomes most.

A. *Findings of the Des Rosiers Study*

1. Time until Decision

The study found that one of the frustrations that sexual assault victims experience in the judicial system is the undue length of time involved in bringing an action or claim to its conclusion.³³ While the study acknowledged that it can often take significant time for survivors to remember and come to grips with their assault, it found that "women want to be heard when they are ready to be heard."³⁴ In addition, one of the factors motivating assault victims to file civil claims is the ability to gain control over some aspect of the assault.³⁵ The study does not articulate exactly why victims wanted to be heard right away once they begin the civil proceedings, but one can surmise that once they reconcile themselves with the fact that they have been assaulted, victims would desire reparations and closure as soon as possible. Thus, the faster the resolution, the more likely the outcome for the victim will be therapeutic.

2. The Environment of the Proceedings

A second finding of the study is that victims generally desire one of two contrasting settings for their case to proceed.³⁶ The group of

31. Nathalie Des Rosiers, Bruce Feldthusen, & Oleana Hankivsky, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433 (1998) [hereinafter Des Rosiers].

32. *Id.* at 434.

33. *Id.* at 436-37.

34. *Id.* at 437.

35. *Id.*

36. *Id.*

survivors who preferred the governmental hearing desired small and intimate rooms “where they could confide a private suffering.”³⁷ The other group preferred a public acknowledgement of the crime against them, such as the public nature of a trial courtroom and the public record of the transcript.³⁸

3. Reactions of the Adjudicator

Overwhelmingly, the study showed that the reactions and attitudes of the adjudicators were extremely important to the victims, potentially more important than the actual decision itself.³⁹ “It is through the words and behavior of the adjudicator that the survivors seem to seek society’s acknowledgement of the harm. . . Their level of satisfaction with the entire process is often correlated to the attitude of the judge or Board member, depending on whether they felt accepted and ‘validated’ or rejected and humiliated.”⁴⁰

For example, one respondent complained specifically about the judge’s lack of empathy and inability to appreciate the pain she had suffered:

They really have to do some work on those judges. . . . They’re taking these sexual abuse cases and treating them as if this man has come up and given you a pinch on the arm. . . . They don’t seem to go any deeper than that. . . . The judge can’t see the damage. If you walked in there missing an arm, they can see this would affect your life forever, but if you walk in and you’ve been sexually abused and you’re a strong person, you don’t seem to be affected much.⁴¹

Some judges, however, even male judges, were able to provide a therapeutic experience for the victims by demonstrating support for their case.⁴² One survey respondent said, “I got the impression that [the judge] was upset about men doing this in our society. . . . He was wonderful . . . I wanted to run up and kiss him in the end. [He] didn’t put up with a lot of nonsense.”⁴³

4. Victim Motivation

The Des Rosiers study also presented interesting insight into what motivates victims to seek restitution through the judicial process.⁴⁴ Perhaps not surprisingly, money was a relatively minor motivational factor in victims’ decisions to go to court.⁴⁵ More common were motivations such as justice, closure, public affirmation of the wrong, deter-

37. *Id.*

38. *Id.*

39. *Id.* at 440.

40. *Id.*

41. *Id.*

42. *See generally id.*

43. *Id.*

44. *Id.* at 442.

45. *Id.*

ring the defendant from harming others, revenge or retribution, or the desire for an apology.⁴⁶

5. The Voice of the Survivor

The study respondents also talked about when they felt silenced as opposed to when they felt heard in the process.⁴⁷ For instance, one woman felt a strong desire to have the judge actually hear her tell her story in her own voice.⁴⁸ An interesting aspect of this problem appeared when the Board or judge would issue a written opinion. In the recitation of facts and/or reasons for the decision, the victims would look for their stories in the words used by the adjudicator. If their story was missing, they often felt silenced; if their story was present, they felt heard.⁴⁹

Expert testimony also played a role in defining the survivor's experience. For example, some experts would situate themselves as the stars of the trial, highlighting their ability to "diagnose" the problems of the victim, often characterizing her as a debilitated member of society after her assault.⁵⁰ This often left the victim feeling less than whole and disempowered.⁵¹

6. Silencing by Lawyers

Finally, victims also reported feeling silenced by the nature of the adversarial system – specifically cross-examination.⁵² Victims occasionally expressed frustration when they were unable to relate other personal or historical experiences in their lives which they felt were related and important, but which the judicial system found legally irrelevant and therefore excluded from the trial or hearing.⁵³

B. *Applying the Des Rosiers Study to Trial Court Judicial Decision-making*

The Des Rosiers study identifies many areas in the judicial process where sexual assault victims experience significant therapeutic or anti-therapeutic outcomes. The following section combines the results of the study with the earlier discussion of trial court decision-making to recommend why having more women trial judges can make the civil sexual assault judicial process more therapeutic for victims.⁵⁴

46. *Id.*

47. *Id.* at 444.

48. *Id.*

49. *Id.* at 444-45.

50. *Id.*

51. *Id.* at 445.

52. *Id.* at 446.

53. *See id.*

54. Not all women bring the same background and experiences to the bench as judges. However, for purposes of this paper I will assume that a majority of women have some background or understanding of how sexual violence impacts the lives of women and possess a heightened level of sensitivity to the needs of victims than most

1. Time Until Decision

On the issue of timing, trial judges have the opportunity to control the courtroom time schedule and environment to increase flexibility in the schedules of sexual assault cases. For example, if a victim cannot remember all the details of the assault immediately after the attack, she runs the risk of exceeding the statute of limitations for her cause of action. In addition, once the claim has been filed, a long drawn out process can easily frustrate the litigant and deter others from filing similar suits, thus making the procedure less therapeutic both individually and systemically. A woman judge who understands these frustrations can modify the litigation schedule to accommodate the victim's recovery process and still provide the necessary relief within a reasonable time period.

2. The Environment of the Proceedings

On the issue of courtroom environment, a female trial judge may be better equipped to relate to the conflicting desires of privacy and public affirmation expressed by victims. More often than not, women are socialized in our society to internalize their expressions of pain and suffering and not to draw public attention to themselves. Yet this must be balanced with the desire expressed by the Des Rosiers respondents to have public recognition of the harm caused in order to accelerate the closure and healing process. A female trial judge who can relate to both these feelings may be able to take steps to balance these needs, such as clearing the courtroom for the victim's testimony or publishing written decisions on sexual assault issues for the public to read.

3. Reactions of the Adjudicator

In terms of the victim's overall reactions to the adjudicator, simply having a woman trial judge is likely to affirm the victim's right to be in court. In addition, women trial judges should be able to measure and maintain the delicate balance between projecting an aura of impartiality with regards to the merits of the case and at the same time reinforcing the message that sexual assault is a serious matter worthy of a court's time.

4. Expert Testimony

The issue of expert testimony also presents a perfect opportunity for women trial judges to increase the satisfaction of victims while amplifying the truth-seeking potential of the judicial process. In a courtroom, a victim's counsel is faced with a critical dilemma on the issue

of their male colleagues. This does not exclude the possibility of male judges on the bench who also have this knowledge or exhibit this sensitivity; however, given the current socialization and selection patterns for male judges, I will assume that women judges offer these advantages more regularly than their male counterparts.

of expert testimony. Victims often want to tell their story in open court, yet the way they want to tell that story may not satisfy the rules of evidence or appear coherent to the fact finder. Expert testimony can potentially solve both these problems but it can also silence or distort the voice of the client and force her to relinquish control over her story.⁵⁵

Lenore Walker, a noted researcher on battered women's syndrome, defends the role of the expert, stating that:

There is a fundamental difference between the way women tell of their battering experiences and what is permitted under the male-identified rules of evidence. Women tend to tell the events in question rooted in their context, by weaving a tale of patterns of events and feelings in the context of how they happened. Rules of evidence call for the recitation of discrete events separated from feelings or opinions. Facts out of context may be acceptable, but they do not convey the battered women's experience. Expert witnesses can tie together what the current evidentiary rules do not allow the [battered woman who is a homicide] defendant to say. Until feminist legal scholars argue for and attain reform in the rules of evidence, a battered woman will be constrained from putting her case in front of the trier of fact.⁵⁶

This dilemma can be resolved if the judge has a better understanding of the context of the victim's story. This will help the judge as either the fact-finder in a bench trial or in guiding the jury through instructions in a jury trial. A woman judge who understands the context of sexual assault and can relate more intuitively to the victim's story should be able to bridge this gap.

5. The Voice of the Survivor

Perhaps most importantly, a female trial judge can work hard to help ensure that the voice of the victim is heard and not silenced. Many women can relate to a time in their life where they were told directly or indirectly to be silent or were simply ignored when they spoke.⁵⁷ This kind of personal experience can provide the understanding and insight for women judges to help make sure that victims do not experience the same kind of treatment in courtrooms.

Cross-examination is a particularly important area in which the judge can provide close supervision to ensure that victims are heard

55. Des Rosiers, *supra* note 31, at 445.

56. *Id.* (quoting Lenore E. Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223-24 (1986)).

57. In our seminar, Justice Kathryn Mickle Werdegar told a story of being the only woman in her division of the California Court of Appeals that made this point. While there, she would make suggestions at the division meetings with other judges and would be regularly ignored, only to hear the same suggestion repeated momentarily by a male colleague and generously accepted by the other men. Seminar, University of California, Berkeley School of Law (Boalt Hall) (Feb. 2, 2000).

and not silenced. While cross-examination is required in American courts both because of our legal history and our constitutional mandate for due process, the trial judge can often exert considerable influence on the scope and tone of cross-examination. For instance, adverse counsel who attempts to delve into the victim's sexual history can be admonished. The judge can also make sure that opposing counsel does not cut off the witness when she is trying to tell her story and can prevent badgering and harassment of the witness on the stand.

Rules of evidence can also help ensure that the victim's voice is heard. By enforcing the liberal nature of Rule 401, the judge can ensure that all relevant aspects of the victim's story are heard. As discussed above, what is relevant may not fit within a traditional "element" of a cause of action, but its import may still be apparent to a woman judge from her own gendered experience.

In addition, as the Des Rosiers study suggests, judges should consider writing to all parties involved in a dispute before her, especially the victim, to explain her decisions, regardless of who wins or loses.⁵⁸ In this process, a careful recitation of the findings of fact can demonstrate to the victim the importance of her story and the benefits of sharing it with the public court. Even if the judge writes an opinion on an issue of law, such as summary judgment or a JMOL opinion, she can point out to the victim what was missing in her case while still validating her right to relief in general and whatever strong evidence was present.

6. Rewarding the Victim

Finally, a woman judge can make a tremendous difference when awarding damages or equitable relief. Besides sending a direct message with monetary relief, a judge who understands a victim's situation can carefully craft other remedies to provide a more holistic and therapeutic result. In order to do this, the judge should keep in mind the non-monetary goals of victims outlined by the Des Rosiers study – justice, closure, apology, public affirmation of the wrong, deterring the defendant from future harm, and being heard.

V. CONCLUSION

The above recommendations are just that – recommendations. There is no hard evidence or statistical data to directly support them as predictions of greater therapeutic outcomes. However, given the overwhelming cultural evidence indicating that many women do share various common experiences with sexism in our society, it does not seem far-fetched to assume that women trial judges possess more knowledge and sensitivity about sexual assault issues and therefore

58. See Des Rosiers, *supra* note 31, at 448.

would be able to provide a more therapeutic courtroom experience for victims, particularly in the decision-making areas identified within this paper.

Thus, women trial judges hold in their hands and minds a great capacity to administer changes that benefit all women who appear before them. In order to implement the above recommendations on a systemic scale, more women trial judges must be appointed and male trial judges must seek to shift their styles toward a more therapeutic perspective. As Regina Graycar suggests (quoting Kim Scheppele) "just putting more people of the relevant social categories on the bench or in the jury box will not fix [the] problem."⁵⁹ Instead, what needs to change, they assert, is "not just the personnel who do the judging but the hegemonic system of thinking about evidence."⁶⁰ Until all trial judges recognize the specific needs of sexual assault victims and adjust their courtroom procedures accordingly, we will not be able to maximize the therapeutic benefits that are available to us and within our reach.

59. Graycar, *supra* note 1, at 20 (quoting Kim Lane Scheppele, *Manners of Imagining the Real*, 19 LAW & SOC. INQUIRY 995, 1011 n.39 (1994) (referring to studies that suggest women jurors in rape cases try to be "objective" by discounting any personal perceptions they feel are not shared by men).

60. *Id.*