

Hating Girls

An Intersectional Survey of Misogyny

Edited by

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Sexual Assault Prosecutions

Kristi Gray and Dorislee Gilbert

Women and girls are disproportionately affected by sexual assault. One in five women will experience a completed or attempted rape during their lifetime; while one in fourteen men will be made to either attempt or complete penetration of someone else during their lifetime.¹ Nearly 52.2 million women or 43.5% of women in the United States experienced some form of contact sexual violence in their lifetime.² Nearly one fourth (24.8%) of men or 27.6 million men in the United States experienced some form of sexual violence in their lifetime.³

Of course, not all sexual assaults are reported to police. Victims may choose not to report for many reasons, including shame, fear of or retribution from perpetrators, and belief that the justice system will not help them.⁴ In 2018, for example, only 25% of rape or sexual-assault victimizations were reported to police; this was down from 40% in 2017.⁵ This means about three out of every four sexual assaults is not reported. The majority of reported cases involve female victims and male perpetrators. According to RAINN (Rape, Abuse & Incest National Network), the United States' largest anti-sexual violence organization, 955 of every 1000 sexual assault perpetrators will walk free.⁶ Approximately 230 of every 1000 cases are reported to police; 46 of those reports lead to an arrest; 9 of those cases are referred to a prosecutor; 5 of those cases will result in a felony conviction; and less than 5 perpetrators will be

1 Sharon G. Smith, et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2015 Data Brief-Updated Release* (Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2018), 1.

2 Smith, et al., *NISVS: 2015 Data Brief-Updated Release*, 2.

3 Smith, et al., *NISVS: 2015 Data Brief-Updated Release*, 3.

4 Sharon G. Smith, et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010–2012 State Report* (Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2017), 6.

5 Rachel E. Morgan and Barbara A. Oudekerk, *Criminal Victimization, 2018* (Washington D.C.: U.S. Department of Justice, Bureau of Justice Statistics, September 2019), page 8, <https://www.bjs.gov/content/pub/pdf/cv18.pdf>.

6 “The Criminal Justice System: Statistics,” RAINN, accessed August 26, 2020, <https://www.rainn.org/statistics/criminal-justice-system>.

incarcerated for the sexual assault.⁷ With such low accountability through the criminal justice system, it is no wonder that more victims do not report, especially when the specifics of their journeys through the criminal justice system are considered.

But sexual assault is not just a legal system issue, it is also a public health issue. Victims face numerous physical and psychological consequences. Women who have a history of violence victimization, including contact sexual violence, stalking, or physical violence by an intimate partner have a statistically significant increased prevalence of asthma, irritable bowel syndrome, frequent headaches, chronic pain, difficulty sleeping, activity limitations, overall poor physical health, and poor mental health than women who have no history of these types of violence.⁸ A study conducted by the Centers for Disease Control suggests that the estimated lifetime cost of rape is \$122,461 per victim.⁹ The study examined a comprehensive analysis of the costs and includes criminal justice-related expenditures such as investigation, adjudication and incarceration. It also includes the cost of health care and mental health care for the victim, as well as factors such as lost work productivity. The economic cost to society is significant. Deterrence and prevention of sexual assault are vital to halting this public health crisis. Those goals require accountability through a justice system that treats victims with respect and dignity and with willingness to listen, investigate, and judge their claims fairly. They require a system and system-participants who are not eager to blame victims and who are not prone to believe anything besides sexual assault because the idea of real sexual assault is so intrusive, personal, and unpredictable that the thought that it could happen even to “good people” is unfathomable. These goals require retraining our minds to recognize biases, prejudices, and fears we have that prevent the legal system from being a safe place where victims can turn for protection, reparation, and justice.

Many people have preconceived notions about the nature of sexual assaults, both about who is likely to commit such offenses and how they are likely to commit them. If you asked an average citizen to imagine what a rapist looks like, they would likely envision something like what is commonly seen on television. A masked intruder or a man who drives a van with no windows. A stranger to the victim. Someone who “looks creepy” and has an untreated

7 RAINN, “The Criminal Justice System: Statistics.”

8 Smith, et al., *NISVS: 2010–2012 State Report*, 180.

9 Cora Peterson, Sarah DeGue, Curtis Florence, and Colby N. Lokey. “Lifetime Economic Burden of Rape Among U.S. Adults,” *American Journal Preventive Medicine* 55, no. 6 (June 1, 2017): 697. <https://doi.org/10.1016/j.amepre.2016.11.014>.

severe mental illness or, at a minimum, severely compromised social skills. A man who is either unemployed, works varied menial jobs, or is some kind of weird tech-savant. It's unlikely that an average citizen would envision a Stanford University swimmer¹⁰ a beloved television star,¹¹ or a hospital internist.¹² Also unlikely is that the average citizen is aware that perpetrators of sexual violence against women are usually known by their victims prior to the sexual violence and are often current or former intimate partners or acquaintances.¹³

An average citizen might describe the usual sexual assault as occurring in a private, secluded place, where the victim is alone, and vulnerable. People frequently have a hard time imagining that a sexual assault could occur in a residence while other people are home,¹⁴ in close quarters with others,¹⁵ or in a public place.¹⁶

When asked to describe the means of committing a sexual assault, most people would likely suggest a knife or gun. Few would think that threatening words, implicit threats, and intoxicants are widely used means of committing a sexual assault. An offender does not need to use physical force or a weapon when his victim is physically incapacitated by alcohol or drugs. He does not need to wield an actual weapon when his tone of voice and motions are violent and when he threatens to kill the victim, her children, or others she cares about.

These preconceived notions about sexual assault frequently influence the outcome of sexual assault cases in the criminal justice system. These

10 Michael James, "Brock Turner, Ex-Stanford University Swimmer Convicted of Sexual Assault, denied new trial," *USA Today*, August 10, 2018, <https://www.usatoday.com/story/news/2018/08/08/stanford-university-swimmer-convicted-assault-denied-new-trial/943186002/>.

11 Manuel Roig-Franzia, "Bill Cosby Convicted on Three Counts of Sexual Assault," *The Washington Post*, April 26, 2018, https://www.washingtonpost.com/lifestyle/style/bill-cosby-convicted-on-three-counts-of-sexual-assault/2018/04/26/d740ef22-4885-11e8-827e-190efaf1fee_story.html.

12 Kristine Phillips, "Former Texas Doctor Convicted of Raping a Patient at a Hospital—Sentenced to Probation," *Tyler Morning Telegraph*, August 19, 2018, https://tylerpaper.com/news/texas/former-texas-doctor-convicted-of-raping-a-patient-at-a-hospital---sentenced-to/article_e58e8f34-a3f8-11e8-abce-8b9df4a0f71.html.

13 Smith, et al., *NISVS: 2010–2012 State Report*, 23.

14 *State v. Kozlov*, 276 P.3d 1207, 1212–1213 (Utah App. 2012).

15 Bree Burkitt, "Police Report: Behavior of Hacienda Nurse Accused of Raping Patient Changed in Months Before Birth," *Azcentral.com*, June 13, 2019, <https://www.azcentral.com/story/news/local/arizona-health/2019/06/13/behavior-hacienda-nurse-nathan-sutherland-accused-rape-changed-months-before-birth/1447790001/>.

16 Bruce Schreiner, "Woman in McDonald's Strip-Search Hoax Awarded \$6.1 Million," *Chron*, October 6, 2007, <https://www.chron.com/news/nation-world/article/Woman-in-McDonald-s-strip-search-hoax-awarded-1644501.php>.

ill-informed ideas can be held by jurors, police officers, judges, lawyers, and others in the justice system. These notions can lead their holders to do inadequate investigation of cases, jump to conclusions about the veracity of the victim and the perpetrator, and even blame victims for being victimized. Knowledge that jurors likely hold these preconceived notions can cause even the most informed, well-intentioned prosecutors to make charging, plea, and trial-related decisions that seem less than just because of the realistic possibility of acquittal at a jury trial.

In criminal trials decided by juries, the problems caused by these preconceived notions are especially pronounced. The United States Constitution guarantees criminal defendants a jury of peers. This means jurors are not required to have any specialized training or legal experience. In practice, it often means that people with specialized training or legal experience are excluded from jury service. Jurors are selected for service for a particular trial through a process called *voir dire*. During that process, attorneys for the prosecution and the defense are usually permitted the opportunity to exercise peremptory strikes to exclude jurors from the jury on any ground not constitutionally protected. For example, a party may not remove a juror because of the juror's race or sex, but a juror may be removed because they have had certain life experiences, because they hold certain opinions, or because they have certain knowledge. In sexual assault cases, the most effective criminal defense attorneys use the *voir dire* process to ferret out those potential jurors who have knowledge, education, or experience about the realities of sexual assault and then exercise their peremptory challenges to remove those jurors. In any case that does not follow the rare patterns of the preconceived notions described above—that is, in most sexual assault cases—a criminal defendant is best served by juries who hold those misperceptions. When juries hear the evidence that does not match their preconceived notions, they can be quick to acquit, especially in the absence of DNA or video evidence. Even in cases where there is video or DNA evidence, jurors who hold the preconceived notions described above are more likely to believe even an ill-conceived consent defense; a claim that the victim made up the sexual assault allegations for attention, revenge, or to cover up her cheating; or suggestions that the victim might have done something to cause the assault.

These preconceived notions about sexual assault cases frequently lead to victim blaming in cases that don't mirror those circumstances. Jurors frequently develop negative attitudes towards victims, and victims in sexual assault cases often face harsher judgment than witnesses in other cases. Victim blaming creates challenges in the prosecution of every sexual assault case and decreases the likelihood of a conviction at trial. Improved community safety

can only occur when the criminal justice system allows for offenders to be held accountable for their actions, and that occurs far too infrequently in sexual assault cases.

While our jury trial system is one that offers many important constitutional protections to the accused in a criminal case, it is one that works most effectively and best provides for public safety when jurors are unbiased; yet these preconceived notions prevent even the most well-intentioned jurors from being unbiased. Most jurors intend to serve fairly and decide in the way they think the evidence compels them to, but they might not recognize how their preconceived notions about sexual assault, their masked tendencies to blame victims by increasing the scrutiny on them and raising the burden of proof in sexual assault cases, and their desires to believe anything besides the ugly truth of sexual assault prevent them from doing justice in individual cases.

In every criminal trial, the prosecution must prove beyond a reasonable doubt that the defendant committed the offense of which they are accused. For sexual assaults, the elements that must be proven are that the sexual activity occurred and that it was not consensual. A lack of consent exists if the offender used threats or physical force to accomplish the sexual assault or if the victim was legally incapable of consent. While state statutes and definitions vary as to the capacity to consent, typically a person is incapable of consent if she is physically unable to communicate that consent, such as while she is unconscious, or if the victim has a mental illness or intellectual disability that would prevent her from forming the mental capacity to consent. While the age of consent can also vary between states, children under a certain age are also incapable of consent. Beyond a reasonable doubt is a high standard of proof, as it should be when a criminal defendant is facing potential imprisonment. However, it can become an impossible standard if a victim's credibility is unfairly assessed. The testimony of the victim is typically a significant part of any criminal trial, and the jurors are solely responsible for judging the credibility of witnesses.

Sexual assault trials often involve a consent defense, in which a defendant disputes the victim's report and the physical evidence by suggesting that the sexual activity was consensual. While there may be physical evidence to prove that the sexual activity occurred, such as DNA or biological fluids, the lack of consent is often only proven through the testimony of a victim. Many jurors expect physical evidence of the lack of consent, such as injuries to the victim. Many sexual assaults don't result in physical injuries to the victim. In most jury trials, a forensic nurse examiner or medical professional will provide testimony to explain that a lack of injury does not rule out forcible sexual activity. However, the lack of injury is frequently a defining factor in jury decisions. In

cases involving child victims, jurors often acquit if the victim's hymen is intact, despite expert testimony that popular opinions about intact hymens as a sign of virginity are false, that many sexual assaults do not result in visible damage to the hymen, and that even when hymenal injury is present, it heals swiftly. Absent any evidence of physical injury, a conviction in sexual assault cases can occur only when jurors can accept victim testimony as credible.

Victim blaming sometimes makes it impossible to accept victim testimony as credible. It can occur because of moral judgments of the victim's character, behavior, or activities. It can also occur because basic human psychology sometimes makes it difficult for a person to accept that horrible things can happen to a person, sometimes entirely at random. Melvin Lerner explains the Just World Theory, or Belief in a Just World, as such: that in order for an individual to feel secure and to function comfortably in the world, that individual must believe that bad things will not happen to them unless they do something to bring about the negative events.¹⁷ Studies show that people want to believe that a person must be at least partly responsible for any harm that comes to them. Such beliefs create an undeniable challenge in sexual assault trials, in which a defense attorney is specifically asking the jury to focus not on the acts of the offender but on the acts of the victim.

It is important to note that in a criminal trial, the defendant is not required to testify, and he maintains his right to remain silent. If he does not testify, he is never subject to cross examination and the jury never gets to evaluate his credibility as a witness. Instead, they judge him based upon his cleaned-up appearance and his calm and proper demeanor in the courtroom. However, it is rarely possible to conduct a sexual assault jury trial without the testimony of the victim, and the defendant has a constitutional right to confront and cross examine witnesses against him. If a defendant has issues that might affect his credibility, such as a prior felony conviction, he can generally avoid the disclosure of this type of information by electing not to testify. The victim has no such right.

In many sexual assaults, the victim is targeted because she is vulnerable in some way—she has been drinking or is under the influence; she misjudges the risk of a situation and allows herself to be alone with someone that she doesn't know well; or she is living in circumstances that require her to take risks in order to survive, such as not having stable housing. Like any criminal, sex offenders frequently look for circumstances that will make it easier for

17 Melvin J. Lerner and Dale T. Miller, "Just World Research and the Attribution Process: Looking Back and Ahead," *Psychological Bulletin* 85, no. 5 (1978): 1030–1031.

them to commit the offense and escape detection. This is not to suggest that the victim is in any way responsible for what happens to her, because no matter the circumstances, someone only becomes the victim of a sexual assault if they encounter a sex offender. However, these vulnerabilities are the types of circumstances that allow jurors to comfortably separate themselves from the reality that a sexual assault can happen to anyone and allow them to blame the victim in order to avoid acceptance of such a frightening reality. Good defense attorneys are particularly adept at capitalizing on these vulnerabilities and a jury's predisposition to want to blame the victim for what happened to her.

During a criminal trial, neither prosecutors nor defense attorneys can have any direct contact with jurors. However, the parties may speak with jurors after the completion of the trial. Prosecutors frequently do so in order to better understand the way in which jurors assess evidence, whether the trial ends in a conviction or an acquittal. The opinions that jurors express frequently confirm that victim blaming plays a role in their deliberations.

Following a jury trial in 2016, jurors were asked about their impressions of the evidence. The defendant was charged with felony assault, unlawful imprisonment, and sexual abuse. The defendant lived in an apartment building near the victim, and they knew each other. The victim went to his apartment one evening because the defendant had previously borrowed \$17.00 from her and she wanted to ask for the money he owed her. The defendant held the victim in his apartment against her will, assaulted her, strangled her, and touched her vagina and licked her breast. He used duct tape and a torn sheet to bind her wrists and ankles. After she escaped by smashing out a window, he heard her screaming for help, and he ran after her and cut her several times with a knife. He fled when a neighbor heard her screams and turned on a porch light. The victim had extensive injuries from the knife, and she also had injuries that corroborated the assault and strangulation. When officers and medics arrived, she still had duct tape on her and torn strips of sheets on her ankles.

The victim gave a detailed report to officers and detectives. Upon a search of the defendant's apartment, they found some of the victim's clothing, as well as duct tape and torn sheets. During the trial, jurors heard testimony from the victim about the attack. They also heard from first responders, who described her as clearly traumatized. Jurors were able to view numerous photos of the victim's injuries, as well as photos of the crime scene. Detectives and officers testified about their investigation, which corroborated essentially every aspect of her report. Medical experts testified about the nature of her injuries, which were consistent with her report about how the assault occurred. One of her surgeons testified that her demeanor in the hospital was hyper-vigilant, which is consistent with someone who has been the victim of a violent trauma. During

the forensic exam that was performed on the victim, they were able to locate saliva on the victim's breast, and a lab analyst testified that the DNA from that saliva matched the defendant. There was no foreign DNA found in her vaginal swabs, but the lab analyst testified that it is unlikely that DNA would be detected from the act of touching her vagina with his hand.

At the trial, the defense argued that the sexual activity was consensual. The defense suggested that the victim was smoking crack cocaine and because of that, she began behaving erratically and tied herself up in his bedroom. They further claimed that the knife wounds were from the glass that broke when she fled through the window. The medical experts testified that the nature and locations of the wounds were not consistent with being caused by climbing through a broken window. The treating doctors testified that lab tests did not show the presence of cocaine or other drugs or alcohol in her blood when she was tested upon arrival at the hospital.

The jury convicted the defendant for every act except the sexual abuse count for touching her vagina. In speaking with the jurors after the trial, they expressed that because the victim had a history of drug use and had a conviction for a drug offense, they were unwilling to convict based solely on her testimony. Several of them flatly stated that they were unwilling to accept her word as proof. Essentially every other fact that she reported to police officers was corroborated by the investigation, and the jury heard all this evidence. There was no evidence of any specific motive that the victim might have had to fabricate any of her testimony, and the defense was not able to present any direct evidence that she was being untruthful. And yet they still refused to accept her word as to one fact that could not be corroborated, even though there was a scientific explanation for why you would not expect DNA evidence from the act. While prosecutors certainly expect jurors to be discerning, and to require proof beyond a reasonable doubt, it is hard to imagine how that standard would ever be met with such impossibly high expectations from jurors.

Testifying can be a traumatic experience for victims. They are required to tell intimate details about the most humiliating, horrifying, and hurtful experience. They are required to recount the event, often multiple times, in front of a courtroom full of strangers, whose job is to judge whether they are being truthful. The person who did those horrible things to them is present, dressed well, presumed innocent, and protected by the law from having to say anything at all. Meanwhile, victims are asked to describe specific details about parts of their body and the perpetrator's body that few people ever talk about even in the privacy of their own doctor's office. Victims are subjected to cross-examination designed to confuse them, to blame them, or to convince the jury they are liars. They may even be asked to identify photographs of their naked

bodies or the perpetrator's genitalia. And the photographs might be enlarged on a screen in front of everyone! When jurors' preconceived notions and interests in believing in a just world prevent them from listening with an open mind and instead send them immediately looking for a way to believe the charged crime did not occur, the presumption of innocence becomes an irrefutable conclusion of innocence. Justice is not served, reporting of sexual assault is not encouraged, and commission of sexual assault is not deterred.

In another case, a 15-year-old homeless girl was taken in by a nearly 50-year-old man. He essentially demanded sex with her in order for her to have a continued home. She relented. He impregnated her. He was charged with statutory rape—meaning there was no requirement that the sexual acts were committed by force, only that they were committed against a child who was less than 16 years old. At trial, the evidence included DNA testing that established that the man was the father of the girl's child, the girl's own testimony, and evidence that the defendant knew or had reason to know the girl's age. Though she was more than 16 by the time of trial, the girl still looked quite young and a photograph of her at the time of the sexual abuse was admitted into evidence. She appeared to be a youthful teenager in the photograph. The jury acquitted the man. They said the girl's behavior gave the man reason to believe she was at least 21. She drank alcohol and smoked with him. She essentially had sex with him to have a place to live. For these jurors, that was enough to blame her, even though he was more than three times her age.

Her case is not an outlier. If anything could be more difficult to hear about or imagine occurring than sexual assault between adults, it is child sexual abuse. Finding fault with and blaming the victim is much easier than believing that a grown adult would engage in sex acts with a child. As in the previous case example, that sometimes looks like blaming the victim of acting older and appearing to engage in sex consensually. Other times, it looks like accusing the victim of lying and being vengeful. In one case, a jury acquitted despite a straight-A student's detailed testimony about her stepfather's sexual abuse of her because they preferred to believe that she made it all up because she was mad that he did not buy her the prom dress she wanted. In another case, the jury believed the victim was scared because she was caught kissing a boy.

In cases involving younger children, the jury rarely blames the child in the same way. They can be quick to believe that a conniving mother coached a child to get custody in a bitter divorce. They can be eager to accept innocent explanations. A common one offered by perpetrators accused of fondling a child is that they were wrestling with the child and the child misunderstood what was happening. They can be quick to dismiss sexual abuse claims where the physical evidence does not match up with their inaccurate preconceived

notions about intact hymens, physical injuries, or DNA evidence. As in sexual assault cases involving adults, in child sexual abuse cases, many well-intentioned jurors are compelled to believe anything besides that the abuse occurred. Doing otherwise disrupts any just world view.

Extreme level of judgment about victim credibility seems to exist more in sexual assault cases than in other criminal cases. In other types of criminal cases, the jurors rarely describe such doubts about victim testimony. In most criminal trials, the jurors assess all of the evidence as a whole and will assess a witness as credible if the physical evidence supports their testimony. In sexual assault cases, jurors frequently question the motives of the witness more so than in other cases—perhaps because accepting the victim’s account often means acknowledging the type of cruelty and vileness that most people are more comfortable living their lives without knowing about. For this reason, as well, consent defenses and “rough sex” defenses can be appealing to jurors in cases where there is DNA or other physical, video, or photographic evidence. Accepting these defenses allows the jury to accept the scientific or recorded evidence while rejecting the horror that sexual assault is. They allow the jury to find the victim at least as culpable as the defendant for what occurred. While public awareness has softened the language used and the way in which we describe jurors’ reactions, the reality still exists that victim-blaming undermines the effectiveness of the criminal justice system in holding sex offenders accountable for their actions.

During a trial in 2015, jurors heard from a victim of an attempted rape. The offender was someone that she had dated in high school, but the victim had not been involved with him for approximately ten years other than occasional contact on social media or when with mutual acquaintances. The victim described to the jury how the offender showed up at her apartment late one night and was extremely drunk, and he asked her if he could come in and get sober before going home to his wife and children. She did not think she had any reason to be fearful, and she allowed him to come inside. Once inside, he physically forced her into the bedroom, held her down on the bed and tore her clothing. She struggled and managed to get free, and when she told him that she was calling the police, he fled the apartment. The defendant did not testify, but the defense attorney told the jury that while he clearly wasn’t much of a gentleman while he was drinking, the defendant should not be convicted of a crime. The result was a hung jury.

After the trial, jurors expressed concern about the strict penalties that could be imposed on sex offenders and did not believe that the victim was so traumatized that the case deserved such an outcome. The jurors also assumed that because they had dated in high school, they probably had engaged in sexual

activity then, and therefore it was not as serious as if they had been strangers. One juror stated that “boys will be boys.” One juror commented that his behavior was not uncommon when a man had been drinking and was spending time with a pretty girl. The victim had no criminal record, was employed, and had no motive to lie. However, the jurors minimized her experience to such an extent that they couldn’t bring themselves to hold the offender criminally liable. The jurors chalked it up to bad behavior, rather than criminal behavior, despite the use of actual physical force.

Juror nullification is more common in sexual assault cases than in other violent crimes, in part because jurors weigh the potential penalties against what they believe to be the level of suffering that the victim endured. While jurors take an oath to render a verdict based on the evidence presented at trial and whether the elements of the charged offense are proven beyond a reasonable doubt, they admittedly consider factors such as the potential sentences and other consequences that are imposed upon convicted sex offenders. These other consequences often include lengthy sex offender registries with residency restrictions, public notifications, and employment hardships. Sexual assault rarely leaves significant, lasting physical injuries, and victims are rarely permitted to testify in much detail about the psychological and emotional impact rape has had on them when a jury is determining the guilt of the accused. Therefore, jurors can appease themselves that even if the act occurred as described, it lasted for a relatively brief, limited time, and the victim was left functioning—even so much so that she was able to go on with her life, get a job, raise her children, testify at trial, etc. For many jurors, their perceived harm of the sexual assault pales in comparison to consequences like lifetime sex offender registration or a lengthy prison sentence.

When sexual assault occurs in intimate partner relationships, the tendencies increase to blame the victim and to believe any other explanation than sexual assault. Nearly one-fifth of the approximately 43.6 million women in the United States who have experienced intimate partner violence in their lifetimes have experienced contact sexual violence.¹⁸ Yet, there are still people who think that sex between two people who are in an intimate relationship cannot be rape. A 2018 survey of nearly 4,000 people across Great Britain, for example, found that almost one quarter of people think that sex without consent in a long-term relationship usually is not rape.¹⁹ Eleven percent of

18 Smith, et al., *NISVS: 2015 Data Brief-Updated Release*, 8.

19 “YouGov/End Violence Against Women Coalition Survey Results,” End Violence Against Women, September 19, 2018, <https://www.endviolenceagainstwomen.org.uk/campaign/research-public-dont-understand-sexual-violence/>.

respondents thought that a woman who was married to a person who sexually assaulted her would suffer less harm than any other woman.²⁰

Homes are sacred, and fortunately, sexual violence is absent in most homes. As discussed previously, in criminal trials, jurors who have experience with or specialized knowledge about sexual violence or intimate partner violence will often be removed from juries. This leaves people on the jury who end up comparing the dysfunctional, violent relationship they hear evidence about with their own functional relationships. Unwittingly, they can be prone to rationalize, minimize, and even excuse intimate partner violence by saying things like, “we all get mad at our partner sometimes.” They think of that one time their partner made them so angry they wanted to smack/slap/hit them or maybe even did. They then compare the perpetrator to themselves and think how sorry he must have been and how he does not deserve to go to jail or prison for that one-time shortcoming. In sexual assault cases, they might wonder about that one time their partner was not particularly enthusiastic about sex, though willing, or that time their partner woke them, and they groggily, though willingly engaged in sex and suspect that the victim is exaggerating one of these instances and turning it into a claim of sexual assault because of some grudge. Sexual assault, especially committed against someone the perpetrator supposedly loves, is so repugnant that jurors often look for other explanations or are, at least, quick to bite on another explanation dangled by an aggressive defense attorney.

People generally fail to recognize that intimate partner violence is not occasional anger, the rare expression of frustration, or a one-off drunken fight. Most often intimate partner violence is about control and dominance. In the 1980s, Domestic Abuse Intervention Programs, in Duluth, Minnesota, created the widely used power and control wheel to help with visualization of “the pattern of actions that an individual uses to intentionally control or dominate his intimate partner.”²¹ The wheel shows that the overriding motivation for intimate partner abuse is power and control, and that while the most visible means of achieving this is through physical and sexual violence, power and control is also gained through techniques like isolation; minimizing, denying, and blaming; coercion and threats; emotional abuse; economic abuse; and intimidation.²² Unfortunately, juries do not often hear about all the other instances

20 End Violence Against Women, “YouGov/End Violence Against Women Coalition Survey Results.”

21 “Facts About the Wheel,” Domestic Abuse Intervention Programs, accessed August 27, 2020, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/>.

22 “Wheels,” Domestic Abuse Intervention Programs, accessed August 27, 2020, <https://www.theduluthmodel.org/wheels/>.

of physical or sexual abuse or the other behaviors designed to control and overpower victims. Sometimes the victim never describes the non-physical behaviors to police or prosecutors, so they are unaware of it at trial. This can happen because the victim does not see these behaviors as part of the abuse, because she knows that they are not criminal acts and does not think they are important to share, because she is ashamed that she let someone treat her that way, or because it was such a way of life for her that she is unable to conceptualize that there could be anything different. Sadly, sometimes the abuse itself has conditioned her to believe its truth—i.e., that she is stupid, that she deserves to be treated this way, etc. Sometimes, even when police and prosecutors are aware of the uncharged abusive and controlling acts, the rules of court do not allow evidence to be admitted at trial. Sometimes the rules allow it, but judges do not. And sometimes, even when the evidence is permitted, an effective defense attorney preys again on juror stereotypes. For example, if the prior abuse involved physical violence but the victim never reported to police, defense attorneys portray the account as unbelievable and attribute improper motive to the victim's current report. If the prior abuse involves financial abuse like preventing the victim from working and excessively restricting her spending or isolation by preventing the victim from seeing friends and family, a savvy defense attorney paints the victim as a conniving woman who wants more of the defendant's money or is mad at him because he did not like her friends. Unfortunately, these theories of defense can be effective with jurors who are uninformed about intimate partner violence and its denial is more consistent with their world view.

Existing myths about how victims respond to interpersonal violence also create unrealistic expectations among jurors. A person's response to any psychological trauma can be influenced by a myriad of factors. No two individuals cope with trauma in exactly the same manner, and their responses can be affected by past life experiences, current circumstances, and the existence or lack of a support network. For victims of intimate partner violence, their reactions are often colored by those other controlling behaviors that characterize the violence they have experienced. For instance, consistent emotional abuse, blaming, isolation, and threats to harm the children if a victim leaves can make a victim of sexual violence in an intimate partner relationship feel as if she deserves the abuse she has endured or that she is so untrustworthy, unattractive, and unintelligent that no one will ever believe her when she says that she did not want to have sex. It can leave her without friends, colleagues, or family members in whom she can confide. It can leave her fearing the consequences if she reports the abuse, tries to leave, or shows up to testify in court. And when a jury that does not understand intimate partner violence acquits an

offender, it perpetuates the abuse because it affirms exactly what the offender promised the victim—that no one would believe her, that she deserved what happened, and that no one else cared for her besides the offender.

It is not uncommon for jurors or others to think that a woman in an abusive relationship should just leave the abusive relationship and that if she does not do so the continuing abuse is as much her fault as it is the abuser's. This victim-blaming approach is harmful because it fails to lay blame for abusive behavior on the perpetrator of the abuse and fails to account for the complicated situations in which many victims of intimate partner violence find themselves. In her book, *No Visible Bruises*, Rachel Louise Snyder explains that victims of intimate partner violence stay in abusive relationships “because they know that any sudden move will provoke the bear” and “because they have developed tools” like “pleading, begging, cajoling, promising, and public displays of solidarity” as a means of survival against the violent partner who is coming for them.²³ Victims often stay in relationships and sometimes even recant reports of violence to police or in front of juries to stay alive and to keep their children alive.²⁴ This can be incredibly difficult for jurors to understand. It can be nearly impossible for a prosecutor to explain when the victim—who is the only source of the evidence about the nature of the criminal physical or sexual abuse and the other tactics used to control, overpower, and manipulate the victim—is uncooperative because it is the only way she knows how to stay alive.

Delayed reporting is one of the most challenging aspects of a sexual assault prosecution. Many jurors express a reluctance to believe victims when they do not immediately report the offense. This can also be due to jurors preconceived notions about sexual violence or the tendency to compare realities. For example, when one thinks sexual violence is defined by stranger abductions and significant physical injuries, it is easy to believe that reporting sexual assault would be the natural, only response. In reality, many victims do not report immediately, for the same reasons that some victims never report at all—fear, shame, disbelief, the responses of others to prior victimizations, the need to continue to function despite the terrible trauma endured.

Substantial delays in disclosure of sexual assault also make prosecution difficult due to jurors' tendencies to weigh the minimal harm they perceive the victim suffered with the hefty sentences and collateral consequences for sex offenders. Particularly in cases where years or decades have passed before the disclosure, there is a tendency to think that the victim and perpetrator

23 Rachel L. Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* (New York: Bloomsbury Publishing, 2019), 53.

24 Snyder, *No Visible Bruises*, 53.

have moved on and that there was no real, lasting harm. There is a tendency to blame the victim for trying to now ruin someone's life—especially if that someone has gone on to do remarkable things in life. What jurors cannot see is the lifetime of self-esteem problems, mental health issues, relationship dysfunction, and general health problems that many victims experience. These things are not often deemed legally relevant to whether the perpetrator is guilty of the charged offense, and in cases where they are admitted, they are used by skilled defense attorneys to give jurors another version of events that is more palatable than sexual assault—namely, that the victim is “crazy,” “attention-seeking,” or is vengeful because the perpetrator has gone on to be more successful than the victim.

Jurors frequently have unreasonable expectations of how a victim should demonstrate an “appropriate level” of trauma. A juror once commented that since the victim had gotten married after the sexual assault, it seemed that she had gotten over what happened to her. Again, the jurors often seem to weigh the suffering of the victim in reaching their decision about the evidence in a case. However, this can also impact a juror's assessment of a witness' credibility. If a victim does not behave in a certain way following the sexual assault, jurors are reluctant to believe the allegations. Despite that every individual responds to trauma in a different way and shock can lead to very unpredictable behavior, jurors discount any behaviors that do not clearly demonstrate sadness and fear. Jurors are generally less accepting of an angry response or of an unemotional response that may well be the result of disassociation. Particularly in cases involving intimate partner violence but also generally in cases involving female victims, an assertive, confident, or professionally successful woman or a woman who is knowledgeable about abuse can draw a jury's skepticism. Surely, they think, someone who is that assertive, that confident, that knowledgeable, that successful could not be a victim. But just because a woman can conduct a board meeting effortlessly or is articulate and less than timid in presentation does not make a perpetrator of abuse any less capable of sexual assault. In some cases, these very qualities may even be the draw for a perpetrator.

People can display a wide variety of responses after any trauma. Whether someone is involved in a horrific car accident, receives a serious medical diagnosis, loses a loved one, or is the victim of a violent crime, they can demonstrate varied reactions. However, jurors expect victims to behave in certain ways after an attack, and counterintuitive behaviors raise questions about their credibility. A lack of emotion or tears may be nothing more than a common symptom of shock, but jurors struggle with accepting that response to trauma. Some victims respond with fear and hyper-vigilance, while some respond with

extreme risk-taking behaviors. Some victims suffer from noticeable depression and retreat into an isolated existence, while some become overachievers. Some victims never discuss their attack with others, while some become public speakers in order to advocate for crime victims. When jurors assess the “appropriateness” of a victim’s response to trauma, they frequently ignore the reality of differing human experiences.

The criminal justice system is not known for swift and adequate response to sexual assault. It is not known for the precise way it holds perpetrators of sexual assault accountable to their victims and society. The system’s failings are due, in large part, to preconceived notions about what sexual assault looks like and what the appropriate responses to sexual assault are, as well as basic desires to believe that bad things cannot happen to good, undeserving people. Because of the manner in which jury trials are conducted, it is likely that people who hold these beliefs will be on juries in sexual assault cases. The result is that in all but the most documented, scientifically provable cases—and sometimes even in those—juries tend to blame victims and find offenders less than deserving of the dire consequences of a sexual assault conviction. Knowledge of this looming outcome impacts the way sexual assault cases are handled from their initiation. For example, police and prosecutors may opt not to pursue charges where the only evidence is the victim’s testimony—not because they do not believe the victim, but because they know how traumatic testifying can be for a victim, that the chances of a jury believing the victim are almost non-existent, and that an unjust acquittal might make a perpetrator feel affirmed, vindicated, or even emboldened. In recent years, there have been significant improvements in the training and education available to law enforcement agencies and increased knowledge about how trauma affects a victim’s ability to communicate the details of her attack. Investigators are now being trained in the best investigative and interview techniques, and the mental health and medical communities have developed protocols to better address the specific needs of victims of sexual violence. However, a true culture shift must occur before the criminal justice system can provide an adequate response in these types of cases. Education about the real nature of sexual assault can help, but to be effective, it must be large scale. It must reach a sufficient number of learners that when a jury is selected, it is impossible to exclude from service in a sexual assault trial every juror who has any balanced, realistic idea what sexual assault is. When juries become more willing to listen to and accept the realities of sexual assault, prosecutors, police, and judges have better tools to hold offenders accountable and deter future sexual violence.

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