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# Epistemic Injustice in Sexual Assault Trials

Emily Tilton

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# EPISTEMIC INJUSTICE IN SEXUAL ASSAULT TRIALS

by

EMILY TILTON

Under the Direction of Christie Hartley, PhD

## ABSTRACT

Those who commit sexual assault are rarely brought to justice: for every 1000 rapes, only *seven* will result in a felony conviction. There are numerous factors that contribute to the fact that sexual assault goes largely unpunished, and legal reform alone is not a sufficient solution—but it is an important part of the solution. In this paper, I develop an account of the epistemic injustice that rape victims face in criminal trials, and I argue that this, at least in part, helps to explain not only why conviction rates are so low, but why previous feminist legal reform has not helped to improve conviction rates. I then argue that more radical legal reform is necessary, and that we ought to consider lowering the standard of evidence in sexual assault cases.

INDEX WORDS: Rape, Epistemic Injustice, Sexual Assault, Trials, Feminism, Legal Reform

EPISTEMIC INJUSTICE IN SEXUAL ASSAULT TRIALS

by

EMILY TILTON

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2019

EPISTEMIC INJUSTICE IN SEXUAL ASSAULT CASES

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## **DEDICATION**

To my two mothers, my father, and my three sisters, who have all offered their unwavering support from the very beginning.

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## 1 INTRODUCTION

Those who commit sexual assault are rarely brought to justice: for every 1000 rapes, only *five* will result in a felony conviction (“The Criminal Justice System: Statistics”, RAINN).<sup>1</sup> While men are not the only people who sexually assault others, and women are not the only ones who are sexually assaulted, sexual assault is, predominantly, an act done by men to women. This means that sexual assault is a fundamental problem of sex equality, and feminists must be committed to, among other things, ensuring that rapists face justice. There are numerous factors that contribute to the fact that sexual assault goes largely unpunished, including that: sexual assault cases are under-reported; those cases that are reported are unlikely to be investigated by the police; the cases that police *do* investigate are unlikely to be picked up by prosecutors; and, finally, even those cases that are picked up by prosecutors are unlikely to result in a conviction. Legal reform alone will not solve these problems—but it is an important part of the solution. In the last several decades, feminist legal scholars have offered a number of important proposals for legal reform, many of

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<sup>1</sup> What constitutes rape varies by state. The United States Department of Justice defines rape as “the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim” (Department of Justice Office of Public Affairs, 2012) and many state definitions are similar to this definition (although not all are), but conceptions of consent also vary by state. Georgia, for example, does not define consent at all, though it has been interpreted as the permission of someone who is able to give it (Georgia Code § 16-6-1). In California, consent has been defined as *positive cooperation* that is freely given, and requires that that the person consenting have sufficient knowledge of the act to which they are consenting (California Penal Code § 261.6). So, California requires that consent be freely given, while Georgia does not, and California also requires that the person consent *know what they’re consenting to*, while Georgia, again, does not. This means that what constitutes rape in California may not constitute rape in Georgia.

which aim to decrease the role that rape myths—“*widely held false beliefs about rape that work to deny, justify, and tolerate sexual violence against women*” (Lonsway and Fitzgerald 134)—play in the outcome of the criminal trial. A number of these reforms have been implemented.

One such reform was the eradication of three requirements from the Model Penal Code.<sup>2</sup> The three abolished requirements were: (i) the “prompt complaint requirement”, which required sexual assault victims to report the crime within three months of its occurrence; (ii) the “corroboration requirement”, which prevented a man from being convicted unless the woman could provide corroborating evidence “such as bruises or ripped clothing that revealed a struggle”; and (iii) the “cautionary instruction requirement”, which required that jurors be warned about the dangers of wrongly convicting the defendant (Model Penal Code 213.6(4)). These three requirements, implemented to protect “innocent” men from the “lying, inviting, exaggerating complainant” (Tuerkheimer 22), were rape myths written into law, and eradicating them was an important part of the feminist effort to decrease the influence of rape myths in sexual assault trials.

Another type of legal reform, implemented in Canada, forbids the prosecution from making reference to a woman’s sexual history without first submitting an application to show that her past history is relevant. This rule was instituted to prevent the prosecution from using a woman’s irrelevant sexual history and benefitting from the “twin myths”: (i) that women who have sexual experience are more likely to consent, and (ii) that promiscuous women are less credible (Craig 39). Some U.S. states have enacted similar rules, though the guidelines vary by state. Despite these reforms, rape conviction statistics remain grim. More radical legal reform is necessary.

The two legal reforms above both cannot compensate for the fact that rape myths have shaped our shared conception of rape. Since rape myths are pervasively accepted, simply

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<sup>2</sup> While the Model Penal Code is not itself legally binding, many criminal laws are heavily influenced by it. This means that reforms made to the Model Penal Code often result in changes made to state criminal laws.

attempting to remove them from the written law won't be sufficient; instead, we need to correct for the influence that rape myths have on juror-issued verdicts. With this in mind, I argue that radical legal reform is necessary, and that one possible solution is to lower the standard of evidence.<sup>3</sup> To make this argument, I first argue that rape myths function to subject women to three different kinds of epistemic injustice, and that this epistemic injustice is a fundamental impediment to justice in cases that go to trial. I then argue that these kinds of epistemic injustices leave sexual assault victims with a substantial credibility deficit and that they work to explain, at least in part, why so few cases that do go to trial result in a conviction. Finally, I consider different ways to combat this unjust credibility deficit.

## 2 RAPE CULTURE AND RAPE MYTHS

In "Rape Culture and Epistemology", Bianca Crewe and Jonathan Ichikawa define rape culture as "a cultural environment where sexual assault and sexualized violence is a normative or expected type of interaction" (Crewe and Ichikawa 3 (forthcoming)) When sexual violence against women is expected, women are not just affected by sexual violence when it occurs—they also *fear it*. This fear then influences how women lead their lives, making sexual violence against women a potent mechanism for social control. In addition to cultivating an expectation of sexual violence, rape cultures also *accept* this violence against women by letting it go unpunished, which communicates that it is acceptable (Young 62).

Rape culture is created and sustained by a number of social norms and practices, of which one of the most important is rape myths. Rape myths are "*attitudes and generally false beliefs about rape that are widely and persistently held, and that serve to deny and justify male sexual*

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<sup>3</sup> For the purposes of this paper, I limit my analysis to sexual assault cases and do not consider the epistemic injustice that may be present in other kinds of cases. If there are other kinds of cases that feature the kinds of epistemic injustice considered here, I would (likely) conclude that we ought to consider lowering the standard of evidence in those cases as well.

*aggression against women*” (Lonsway and Fitzgerald 134). Rape myths can be sorted into three helpful categories: (i) myths that deny the existence of rape or the scope of the problem, (ii) myths that excuse the behavior of the rapist, and (iii) myths that deny that rape is a serious crime (Hall, Howard, and Boezio 113). While providing an exhaustive list of rape myths is outside the scope of this paper, it is important to consider some concrete examples. Here are some common ones, which I have sorted into the three categories:

- i. Myths that Deny the Existence of Rape
  - a. Women routinely lie about rape.
  - b. Women claim they’ve been raped when they regret the sexual interaction.
  - c. Women could resist rape if they really wanted to.
  - d. Consent cannot be withdrawn after it has been given.
  - e. Consent is automatically present if a sexual act has occurred between the same parties before.
  - f. “Attractive” men don’t rape women, and “unattractive” women are never raped.
- ii. Myths that Justify the Rapist’s Behavior
  - a. Women who were raped were “asking for it”, either by dressing promiscuously or drinking excessively.
  - b. Rape is a crime of passion.
  - c. If he was drunk, he couldn’t help it.<sup>4</sup>
- iii. Myths that Deny the Seriousness of Rape
  - a. Only promiscuous women are raped.
  - b. Most women secretly want to be raped.
  - c. Most rapists only rape once.

These three categories provide a helpful lens through which to view rape myths because they emphasize the role rape myths play in sustaining rape culture. The myths that cast rape as a rare occurrence both obscure the danger women face and trivialize their fear. The myths that stipulate that rape isn’t “that bad” encourage minimal, if any, punishment. Finally, the myths that justify the rapist’s behavior shift the blame to the victim; these myths blame the woman for being the *kind of woman that gets raped*, rather than blaming the man for being the kind of man who

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<sup>4</sup> It is worth noting that if a man is drunk, rape myths exonerate him, but if a woman is drunk, rape myths blame her.

rapes. Together, these rape myths sustain rape culture by denying, trivializing, and justifying violence against women.<sup>5</sup>

### 3 RAPE MYTH ACCEPTANCE AND EPISTEMIC INJUSTICE

Katharine Jenkins has argued that the functioning of rape myths should be considered a form of *hermeneutical injustice*. In this section, I argue that while her analysis is right, she provides an incomplete picture of the epistemic injustice to which rape myths subject women. I then supplement her account by arguing that rape myths not only function as a form of hermeneutical injustice, but they also encourage testimonial injustice and a third kind of epistemic injustice that I call *obfuscatory injustice*. Recognizing that rape myths make women vulnerable to all three of these epistemic injustices provides a much more complete picture of the relationship between rape myths and epistemic injustice.

Hermeneutical injustice is a subspecies of epistemic injustice defined as “the injustice of having some significant area of one’s social experience obscured from collective understanding owing to hermeneutical marginalization” (Fricker 158). When hermeneutical injustice occurs, certain social experiences are *incomprehensible* because people lack the interpretive tools necessary for making sense of those experiences. Jenkins argues that the functioning of rape myths constitutes this kind of epistemic injustice. Consider an example:

**Scenario 1:** A woman thinks that rape is usually committed by strangers, against a woman’s verbal and physical protest. One day, this woman’s husband rapes her—he

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<sup>5</sup> It may be objected that while the rape myths I have considered here work to deny, justify, and trivialize sexual violence against women, there is a set of rape myths that does *not* serve this function (e.g., myths that rape always involves overwhelming physical force, that rape occurs in dark alleys with terrifying strangers, etc.). These rape myths seem to obviously condemn rape by casting it as a horrific, monstrous act—so how can they be said to function to justify, deny, or trivialize sexual violence against women? I contend that these myths really do serve the same function as the rape myths considered above, albeit less directly. These myths work to justify, deny, or trivialize sexual violence against women by constructing an overly narrow concept of ‘rape’ that actually bears very little resemblance to most rapes. This allows us to *superficially* condemn rape by condemning a very small (statistically) subset of rapes, while, at the same time, condoning other kinds of rapes that are significantly more common because we will see them as less bad, more deserved, or more justified rapes in comparison, if we conceive of them as rapes at all (thanks to Chase Halsne for helping me make this point).

pushes her onto the bed and has sex with when she doesn't want to—and she doesn't fight back.

In this scenario, the woman's beliefs leave her with a faulty conception of rape; what she *thinks* constitutes rape is not what *actually* constitutes rape. Jenkins would argue that this woman is unlikely to conceptualize her experience as one of rape because it fails to meet her faulty conception of rape—she thinks rape usually involves both strangers and violence, and because her rape involved neither, she is unlikely to think of it as a rape (Jenkins 3)<sup>6</sup>. Further, Jenkins would argue that her inability to conceptualize her experience constitutes a hermeneutical injustice. The woman's acceptance of rape myths *obscures* her experience; she is not able to accurately understand it because her acceptance of rape myths has left her with a faulty conception of rape (Jenkins 9). The experience that is obscured is also *significant*; it is significant that women be able to accurately conceptualize rapes as rapes if they are to bring their rapists to justice (Jenkins 14). And, finally, the reason this significant experience is obscured is the result of hermeneutical marginalization; it is because of the stigma attached to being a victim of sexual violence that many people lack the conceptual tools necessary to properly conceptualize rape (Jenkins 15). This leads

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<sup>6</sup> Jenkins describes a study that supports her contention that victims will misunderstand their own experiences if they endorse rape myths. In the study, researchers found that women who endorsed the myth that rape usually involves overwhelming physical force and were raped *without* the use of overwhelming physical force were unwilling to apply the term 'rape' to their experience, even though what occurred was in accordance with the legal definition of rape. Similarly, the researchers found that women who endorsed the myth that women who dress promiscuously are *asking* to be raped and who were dressed promiscuously at the time of their assault were also unwilling to apply the term 'rape' to their experience (Jenkins 5, see Zoë D. Peterson and Charlene L. Muehlenhard, 'Was It Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences', *Sex Roles*, 52, 3/4, (2004): 129-144).

Jenkins to conclude that we ought to consider the functioning of rape myths to be a form of hermeneutical injustice.

Jenkins also argues that this hermeneutical injustice is directly tied to rapists going unpunished. Jurors, like some sexual assault victims, also often inaccurately conceptualize rape because they accept rape myths. She argues that juror acceptance of rape myths negatively impacts verdicts in sexual assault trials because jurors “who have a faulty...concept of rape will have an inaccurate understanding of *what it is they are meant to be deciding on*” (Jenkins 25). That is, she thinks jurors who misunderstand rape will be looking to see if the events that occurred satisfy the conditions of their *faulty* conception of rape, rather than the conditions of what rape *actually* is. They will, then, be looking to see if the *wrong thing happened*. If a juror endorses the myth that all rape involves overwhelming physical force, then when presented with a case that does not involve overwhelming physical force, he’ll be asking if *his* conception of rape is satisfied, not whether the *law’s* conception of rape is satisfied. He will, then, be asking the wrong question, and his mistake will negatively impact the rendered verdict.

I agree with Jenkins’ analysis of this function of rape myths. However, her analysis provides an incomplete account of the epistemic injustice sexual assault victims face. If this were the complete account, we would expect that when people hear of cases that fail to conform to their conception of what “real” rape is, they would believe that the events occurred but fail to see the events as constitutive of rape.<sup>7</sup> However, this is not what happens in most sexual assault cases. In most sexual assault cases, it is not *just* that people fail to conceptualize the case as one of rape; they also *doubt* that the series of events occurred as the victim describes them. Consider another example:

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<sup>7</sup> This is the problem in many sexual *harassment* cases (Peterson 141).

**Scenario 2:** A sex worker claims to have been sexually assaulted by a police officer, who she says coerced her into sex by threatening to take her to jail if she did not have sex with him. The case goes to trial, and a juror in the case endorses the myth that rape often involves significant physical force.<sup>8</sup> Upon hearing the woman's account of her assault, the juror not only (mistakenly) believes that the use of threat doesn't constitute rape, he also *suspects that the woman is lying* because the events, as described, seem unlikely to him.

In this scenario, the juror doesn't just fail to conceptualize the coercion as constitutive of rape; he also suspects that the woman isn't telling the truth, and so doubts that the events occurred at all. Some of his doubt is likely the result of *testimonial injustice*. Testimonial injustice is a subspecies of epistemic injustice that occurs when "prejudice on the hearer's part causes him to give the speaker less credibility than he would otherwise have given" (Fricker 4). Not taking an account seriously because it was given by a woman; not taking an account seriously because it was given by someone with an accent; not taking an account seriously because it was given by a Black person; these are all examples of testimonial injustice. Since women are the most likely victims of sexual assault, it seems plausible that this prejudice is responsible for at least some of the suspicion sexual assault victims face.

What is more significant, though, is that people think women are *especially* untrustworthy when they claim to have been sexually assaulted because people believe that women frequently *lie* about sexual assault. The myths that women often lie about sexual assault seem to arise directly out of the prejudiced view that women are less trustworthy than men—people think women lie about rape because they believe women are really *whores* who must obscure their lustful conduct, or because women are *malicious* and want to ruin the lives of innocent men, or because women are just, by nature, more prone to lying than men are, etc. If this is right, then the content of these myths isn't just incorrect, the content is actually prejudicial. Further, these myths

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<sup>8</sup> He would also likely erroneously believe that sex workers can't be raped.



encourage hearers to deflate their credibility assessment of women who report sexual assault because these myths *directly* target the trustworthiness of these women; they say that it is likely that these women are *lying*. This means that rape myths, the content of which is prejudicial, encourage people to unjustly deflate their assessments of rape victims' credibility. In other words, rape myths encourage testimonial injustice.

So, on my account of the relationship between rape myths and epistemic injustice, rape myths both function as a form of hermeneutical injustice and, also, encourage testimonial injustice. This testimonial injustice, like hermeneutical injustice, will negatively impact the result of the trial because it will make jurors less likely to believe the testimony provided by sexual assault victims.

However, while testimonial injustice is another part of the picture, it doesn't seem to adequately capture the causal history of the suspicion cast on the testimony in Scenario 2. In Scenario 2, the juror doesn't just fail to categorize the case as sexual assault while *also* being unjustly suspicious of the offered testimony (although this may be happening). Instead, that the case does not conform to his conception of rape *causes* him to think that the woman is not a trustworthy testifier. He thinks that rape usually involves overwhelming physical force. So, when he hears an allegation that does not involve such force, it seems like an *unusual* allegation. As such, it seems less plausible to him. He then uses his judgment that the allegations are implausible as grounds to discredit the woman; because she is reporting something implausible, he decides that she must be untrustworthy and regards her testimony with more suspicion than he otherwise would have. This suspicion is importantly distinct from suspicion caused by testimonial injustice because this kind of suspicion is *not* the direct result of prejudice. Instead, this suspicion is the result a third kind of epistemic injustice: *obfuscatory injustice*.

This kind of epistemic injustice (though she doesn't call it this) is described by Karen Jones in "The Politics of Credibility". Jones, following Locke, identifies two grounds of credibility: the trustworthiness of the testifier and the plausibility of what is testified to in light of our background knowledge (Jones 155). The trustworthiness of the testifier is determined by considering two factors: "competence with respect to the truth of  $p$  and veracity with respect to [the] exchange" (Jones 156). A testifier's competence with respect to the truth of  $p$  is determined by examining their "counterfactual tendencies"; competent testifiers will tend to endorse some claim  $p$  only if  $p$  is true, and they will not tend to endorse  $p$  if  $p$  is not true.

A testifier's veracity with respect to the exchange is determined by looking at her "local trustworthiness". A testifier is locally trustworthy if, in exchanges relevantly similar to the one occurring, she would be honest (Jones 156). If we have reason to *doubt* that she would be honest in relevantly similar exchanges (if, for example, the testifier would obviously benefit from lying), then she is *not* locally trustworthy and so not a trustworthy testifier.

Trustworthy testifiers are, then, those people who we determine to be locally trustworthy and competent with respect to their claim. *Untrustworthy* testifiers fail to satisfy the first ground of credibility; as such, when they make a claim, they typically need to provide more evidence for the truth of their claim than would a more trustworthy testifier (Jones 156). The second ground of credibility—plausibility in light of background knowledge—works similarly. The more "astonishing" a case is, meaning the less it coheres with our background knowledge, the less credible it is, and so the more evidence is needed to support it (Jones 157). Jones argues that it is crucial that we make *independent* assessments of the trustworthiness of a testifier and the plausibility of their claim (Jones 157). Consider an example:

**Scenario 3:** You are walking through a park and pass people sitting at a booth. As you walk by, the people ask if you're interested in participating in a game. The point of the

game is to convince someone that you went to high school together. You politely decline. Minutes later, someone comes up to you and claims that the two of you went to high school together.

In this example, the testifier is obviously untrustworthy. This assessment of the person's trustworthiness *could* lead you to assume that their claim is implausible. However, if you assume this, Jones would think you've made a mistake. What you *should* do is assess the plausibility of the claim independently. If, for example, you are in your hometown and the person looks rather familiar, then their claim should seem plausible. In this case, your assessment of the testifier's trustworthiness and your assessment of the plausibility of their claim will *compete*, and you should not make any conclusion either way.

When you allow your untrustworthiness assessment to influence your plausibility assessment, you have committed *obfuscatory injustice*; you have obscured the difference between the two grounds of credibility, allowing an assessment of one ground to determine the assessment of the other ground. This is an injustice because a person's untrustworthiness should only count against the credibility of their claim *once*. But, when obfuscatory injustice occurs, their untrustworthiness counts *twice*. This is epistemically bad because both untrustworthy testifiers and trustworthy testifiers who make astonishing reports must provide more evidence than trustworthy testifiers who make plausible reports. So, when an untrustworthiness assessment influences a plausibility assessment, the testifier is required to provide more evidence than she should have to in order to make her claim.

Obfuscatory injustice is more obviously problematic when we recognize that our assessments of trustworthiness are not immune to prejudice, i.e., that we often commit testimonial injustice. If a person thinks (consciously or not) that Black people are untrustworthy and lets this trustworthiness assessment infect her plausibility assessment—meaning she often doubts that what

Black people report is plausible—her prejudice works against Black people *twice*. This means that people who are vulnerable to testimonial injustice are actually vulnerable to a *double disadvantage*; when both testimonial injustice and obfuscatory injustice occur, not only are they deemed untrustworthy, but the plausibility of their claim is diminished. This makes it much more difficult for them to make claims that people will accept.

I argue that rape myths both allow for and also *encourage* this kind of epistemic injustice. Obfuscatory injustice doesn't just occur when trustworthiness assessments influence plausibility assessments; it also occurs when the implausibility of a claim causes us to deem the testifier untrustworthy. This kind of obfuscatory injustice seems to best capture the suspicion present in Scenario 2. The juror, presented with a rape case that does not conform to his conception of rape, doubts the woman's trustworthiness *because* her allegations do not conform to his conception of rape. This is a case of obfuscatory injustice—the man allows his assessment that the claim is implausible to influence his assessment of the trustworthiness of the testifier, which allows his low plausibility rating to count *twice* and doubly disadvantage the sexual assault victim.

Rape myth acceptance allows for this kind of injustice. Rape myth acceptance is responsible for our inaccurate conception of sexual assault, and it is this inaccuracy that causes many instances of rape to seem implausible, or astonishing, to some people. If we accept the myth that rape is something usually done by strangers, then cases in which women are raped by people known to them will seem both surprising and unlikely. This is hermeneutical injustice. This hermeneutical injustice allows for obfuscatory injustice because this implausibility is, at least in many cases, then used to cast doubt on the trustworthiness of a victim.

Further, I argue that rape myths actually *encourage* obfuscatory injustice. Obfuscatory injustice is an understandable mistake, but it is not a mistake that we are always prone to making.

Consider a case in which someone you deemed a very trustworthy testifier (a well-respected teacher, a long-term advisor, etc.) told you something astonishing. In this case, it is unlikely that the implausibility of their claim will lead you to doubt that they are a trustworthy testifier; instead, your assessment of their trustworthiness and your assessment of the plausibility of the claim will pull in opposite directions, and likely leave you uncertain as to what you should believe. This, Jones thinks, is what *should* happen when our trustworthiness and plausibility assessments conflict (Jones 158). But this is not what happens in (many) sexual assault cases.

Many of the rape myths that function to deny the existence of rape do so by contending that women often *lie* about rape. Since this is a common belief, it coheres well with our background knowledge. Thus, when we hear an “astonishing” sexual assault case, e.g., that a woman was raped by her husband, and are searching for a way to make sense of it, it will be easier to accept that the victim is simply lying than it will be to accept that women can be (and often are) raped by people they know. This means that rape myths encourage hearers to, upon hearing an astonishing case, suspect the veracity of the victim rather than seriously consider, on independent grounds, whether or not her claim is plausible. Rape myths therefore encourage obfuscatory injustice.

So, a more complete picture of the epistemic injustice faced by sexual assault victims is this: as most sexual assault victims are women (and many are members of other oppressed groups as well), they are subject to testimonial injustice, which means their testimony is subject to undue doubt. Further, myths that women often lie about sexual assault fuel *more* testimonial injustice. Victims’ experience of rape is also *obscured* from our collective understanding by rape myths, which means we often fail to see their rapes as “real” rapes. This overly narrow conception of rape then works to cast *more* doubt on their testimony, as people are prone to committing obfuscatory injustice in these cases. Thus, the credibility of a victim’s claim is vulnerable to deflation from

three different kinds of epistemic injustice.<sup>9</sup> These epistemic injustices make it unsurprising that few rape cases result in convictions.

#### 4 R V. GHOMESHI

Now consider the case of *R v. Ghomeshi* (2016 ONCJ 155), which demonstrates how these epistemic injustices influence verdicts. Jian Ghomeshi was a Canadian celebrity and the host of a popular radio show on CBC. In November of 2014, Ghomeshi was fired from his position at CBC after his bosses were presented with graphic evidence that he had physically assaulted his girlfriend. After Ghomeshi was fired from his job, more than ten women alleged that he had sexually assaulted them in the past decade (Kingston). Three of these complainants took their allegations to court in 2016, where Ghomeshi was charged with four counts of sexual assault and one count of choking. (2016 ONCJ 155). The defense attacked the credibility of all three women, and the judge, William Horkins, cleared Ghomeshi of all charges because he believed that the defense had cast adequate doubt on the women's credibility. For simplicity's sake, I will focus on only one of the three women, Lucy DeCoutere, but all three women had their credibility attacked in similar ways.

One way the defense discredited DeCoutere was by focusing on the narrative structure of her claim. In his verdict, Horkins claimed that when DeCoutere recounted the assault, the details often shifted: sometimes she said Ghomeshi slapped her first, sometimes she said he choked her first. This, he said, made it hard to trust her account of the events.

Another way the defense discredited DeCoutere was by criticizing her for omitting information. DeCoutere did not initially reveal to the police that she had kissed Ghomeshi before

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<sup>9</sup>It is worth noting that myths about women lying about rape are doing double duty; they not only unjustly cast doubt on her testimony (testimonial injustice)—they also make it so that it easier to believe that a woman is lying about rape than that a rape that does not conform to our expectations occurred, thus prompting obfuscatory injustice.

he began to assault her, that she had kissed him goodbye on the night that he assaulted her, or that she later sent him flowers to thank him for taking her out—this information was all given later (2016 ONCJ 155). DeCoutere claimed that she didn't think it was relevant; when she first talked to the police, she focused on the details of her assault, not on what had happened before or after (2016 ONCJ 155). But Horkins claimed that he could not believe that “someone who was choked as a part of a sexual assault, would consider kissing sessions with the assailant both before and after the assault not worth mentioning when reporting the matter to the police” (2016 ONCJ 155). Further, he speculated that perhaps what motivated DeCoutere's “questionable conduct” was her role as an advocate for sexual assault victims. He admitted that he didn't have conclusive evidence for this, but that it was still a “live question” (2016 ONCJ 155).

In this case, as in any actual court case, it is impossible to know all that is going on. *Many* factors contributed to Horkins' unjust assessment of the women's credibility and his rendered verdict. However, that we cannot identify all the influences on Horkins' assessment does not mean that any analysis of his reasons is futile. Here, I emphasize the ways in which rape myths led Horkins to commit hermeneutical and obfuscatory injustices against DeCoutere, and how these injustices influenced his verdict.

Hermeneutical injustice is plainly visible in (at least) two claims that Horkins made: (i) that the fact that DeCoutere sent flowers to Ghomeshi made her claim seem less plausible, and (ii) that her continued contact with Ghomeshi made her claim seem less plausible. Horkins clearly assumes that there is a *right* way for victims to behave; he endorses the myth that “real” rape victims do not seek continued contact with their rapists. However, this denies the reality of most rapes. Most people are raped not by strangers, but by people that they know, or to whom they are close. This not only makes it difficult for victims to cut off contact with the person because they have some

relationship, but, more significantly, it *also* makes it difficult for the victim to perceive her experience as rape because *she* (often) endorses rape myths as well.<sup>10</sup> This, then, means that many rape victims will stay in contact with their assaulters. That many people do not know this is a hermeneutical injustice caused by the acceptance of rape myths, and this injustice made it difficult for Horkins to categorize the women's experience as a case of "real" rape; he thought it was "astonishing" that a person who was raped would behave that way. Since astonishing cases are generally less credible than cases that are not astonishing, DeCoutere's case was, accordingly, less credible than it would have been otherwise.<sup>11</sup>

Obfuscatory injustice is apparent in Horkins' claim that DeCoutere's role as an advocate for sexual assault victims may explain her "questionable conduct", i.e., her continued contact with Ghomeshi. When Horkins says this, he is saying that DeCoutere may have *ulterior motives*, some reason besides the truth to want Ghomeshi convicted of sexual assault. In other words, he doubts that she is a trustworthy testifier. It is tempting to call this testimonial injustice; his general distrust of women—especially those who report sexual assault—leads him to discredit DeCoutere. However, this characterization seems to miss an important part of *why* Horkins makes this claim.

Horkins believes that "real" sexual assault victims do not seek further contact with their assaulters; as such, when he is presented with a case in which the woman does pursue further contact, he finds that behavior astonishing. He then must find a way to make sense of both his background beliefs about rape and the claims being presented to him. Since rape myths suggest

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<sup>10</sup> In this particular case, that the women were all romantically interested in Ghomeshi likely made it even *more* difficult for them to conceptualize their experience for what it was: rape. Further, there is evidence that each woman really did endorse rape myths, and that the acceptance of those myths is part of why they did not initially think of their experience as one of rape.

<sup>11</sup> An interesting form of hermeneutical injustice applies to this case that I am not able to mention in the paper. Audrey Yap argues that our conception of 'rapist' is too narrow; we think that, when rape occurs, it is necessarily done by someone *monstrous*. But, if we think this, when someone who is not a monster is accused of sexual assault, we are less likely to believe that they are guilty because they don't seem like the kind of person who rapes (Yap). This seems to apply to this case—Ghomeshi was a rich, left leaning celebrity, and so isn't a stereotypical rapist.



that women often lie about sexual assault, it is easier for him to believe that DeCoutere is lying about sexual assault than it is for him to believe that anyone who was actually assaulted would continue to contact their assaulter. As such, rape myths encourage him to believe that DeCoutere is lying, rather than investigate, on independent grounds, the plausibility of her claims. This is obfuscatory injustice: the supposed implausibility of DeCoutere's claim leads Horkins' to suspect DeCoutere's trustworthiness, which allows his misunderstanding of rape to count against DeCoutere twice. Given that DeCoutere—and the other two women as well, although I do not discuss their treatment here—was subjected to these forms of epistemic injustice, it is not at all surprising that she was unable to make her case because rape cases often stand or fall on the victim's credibility. The victim's credibility determines whether or not we will accept her testimony, and her testimony makes up the bulk of the evidence in most sexual assault cases (Tuerkheimer 10). Further, whether we perceive potentially corroborating evidence as corroborating or not *also* depends on the credibility we assign to the victims (Tuerkheimer 12). An example of this can be seen in the Ghomeshi case as well. Normally, all three of the women's claims would have been tried together; however, the defense used text messages and Facebook messages exchanged between the three women as evidence of possible collusion. The possibility of collusion meant that each woman's allegations had to be tried independently (Kingston). This was significant because had the claims been tried together, the similarities between the women's stories would have counted as evidence against Ghomeshi.

Trying the claims independently not only kept the women from accessing this corroborating evidence, but the messages *themselves* were potentially corroborating evidence. In the messages, the women talked about how Ghomeshi had impacted their lives, and, in one, vowed to “sink the prick” because he sexually assaulted them (Kingston). These private messages could,

very plausibly, have been used as evidence that the women were telling the truth. Instead, they were used as evidence that the women were lying. The best explanation of this is that the women were already considered suspicious, and this suspicion then colored the reception of these messages. While the text messages certainly wouldn't have changed the outcome of the trial, it is still significant that the women's perceived credibility led to potentially corroborating evidence being dismissed.

So, a victim's credibility not only impacts whether or not we will accept her testimony, it also impacts whether we will perceive potentially corroborating evidence as corroborating. Rape myth acceptance, as I have shown, is a formidable threat to a victim's credibility because it renders her vulnerable to testimonial, hermeneutical, and obfuscatory injustice. This means that the victim will not be given the credibility that she is due and, as a result, the *evidence* will not be given the weight that it is due either because both the woman's testimony and, also, potentially corroborating evidence will be unjustly discounted.

## 5 POTENTIAL SOLUTIONS

The credibility deficit faced by sexual assault victims is a clear impediment to justice—rape cases that should result in guilty verdicts do not because rape myths encourage jurors to unjustly discredit victims. A successful solution to this problem must recognize that the widespread acceptance of rape myths is, at least in part, responsible for the unjustly low rate at which rape cases result in convictions. Explicitly recognizing this necessity can help to explain why the feminist legal reforms mentioned in the introduction—removing the three problematic requirements from the Model Penal Code and prohibiting irrelevant reference to a woman's past sexual history—have failed to solve the problem. They have written rape myths out of the law, but they have not accounted for the influence of those myths on the application of the law.

Consider first the eradication of three requirements from the Model Penal Code. As before, the three abolished requirements were: (i) the “prompt complaint requirement,” which required sexual assault victims to report the crime within three months of its occurrence; (ii) the “corroboration requirement,” which prevented a man from being convicted unless the woman provided corroborating evidence “such as bruises or ripped clothing that revealed a struggle”; and (iii) the “cautionary instruction requirement,” which required that jurors be warned about the dangers of wrongly convicting the defendant (Model Penal Code 213.6(4)). Deborah Tuerkheimer suggests that these three requirements were implemented to protect “innocent” men from the “lying, inviting, exaggerating complainant” (Tuerkheimer 22).

The prompt complaint requirement, for example, implies that *real* rapes are reported immediately and suggests that, as time passes, it is more likely that the woman’s claim is fictitious (perhaps she regrets the consensual sex she engaged in, or perhaps the man has scorned her in some way). This assumes that women often lie about rape, which is untrue. Further, it assumes that women who have been raped will be able to promptly identify their rape as a rape and come forward with their allegation without hesitation. But this is not true; as I’ve discussed, many rape victims *themselves* endorse rape myths, which leaves them unable to correctly identify their rape as a rape. It may, then, take a woman longer than expected to identify her rape as a rape. Even in cases in which a woman *does* promptly identify her rape as a rape, she may hesitate to come forward because she doubts that she will be believed, or because the person who attacked her is someone close to her (among other possible reasons). Thus, the first requirement relies on the incorrect assumption that, as time passes, it is more likely that women will fabricate rape allegations. This false assumption is the result of widespread rape myth acceptance.

The corroboration requirement more straightforwardly relies on the acceptance of rape

myths. In requiring that the woman provide evidence of a struggle, it is implied that real rapes involve overwhelming physical force, and that the woman will resist that physical force as best she can. These are rape myths.

Finally, there is the cautionary instruction requirement. This requirement also suggests that women are likely to lie about rape—or, at the very least, it suggests that it is *more* likely that a woman would lie about rape than it is that any other victim would lie about any other crime (or else this cautionary instruction would be present in all other criminal trials as well). This, as has been stated, is simply not true. False rape allegations are exceedingly rare.<sup>12</sup>

My aim here is not to suggest that the eradication of these requirements from the Model Penal Code was unnecessary or unimportant; the eradication of these requirements from the Model Penal Code was a crucial part of limiting the influence of rape myths on juror-issued verdicts in sexual assault cases. Instead, my claim is that these reforms weren't *enough* because they failed to take into account the ways in which rape myths influence the application of the law. So, while the law now explicitly recognizes that corroborating evidence such as “bruises or ripped clothing” is not required to prove a sexual assault case, many jurors still believe that most rapes involve significant physical force. Since jurors are likely to believe this, when a jury is presented with a

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<sup>12</sup> Several studies estimate that only 2-8% of rape allegations are false. See Heenan, M., & Murray, S., Study of reported rapes in Victoria 2000-2003: Summary research report, or Krebs, C. P., Lindquist, C., Warner, T., Fisher, B., & Martin, S, The campus sexual assault (CSA) study: Final report, or Lonsway, K. A., Archambault, J., & Lisak, D., False reports: Moving beyond the issue to successfully investigate and prosecute non-stranger sexual assault. *The Voice*, 3(1), 1-11.

sexual assault case that lacks evidence of a physical struggle, the jurors are likely to be suspicious of the allegations because they fail to conform to their expectations. Similarly, while the law no longer explicitly requires that allegations be made within three months or that jurors be warned of the dangers of falsely convicting an innocent man, jurors are still likely to be overly suspicious of rape allegations made long after the events occurred or to be overly worried about falsely convicting an innocent man of rape. As such, the cultural attitudes toward rape responsible for the problematic requirements in the Model Penal Code will continue to affect the outcome of criminal rape trials because rape myths remain highly engrained in our shared conceptual resources.

Similarly, prohibiting reference to a woman's "irrelevant" sexual history fails, at least in part, because whether or not we accept rape myths will impact which parts of her sexual history we consider relevant. While the law *does* (usually) successfully prohibit reference to obviously irrelevant sexual history—like reference to her sexual behavior in college—the law frequently fails to exclude reference to her sexual history with the person she's accusing currently, even though that history is often irrelevant (Craig 45). And, importantly, the law fails to exclude this history because rape myths cause us to believe such history is relevant; if the woman has consented before, this is taken as evidence that she consented during the interaction in question. Again, I am not suggesting that this reform was unnecessary or unhelpful; I am, instead, suggesting that this kind of reform, by itself, cannot eliminate the influence of rape myths from criminal trials.

So, how are we to supplement these legal reforms? One promising solution is to implement a course designed to combat rape myths that jurors must complete before the sexual assault trial begins. If effective, such a course would decrease the degree to which rape myths are accepted and so could keep sexual assault victims from being subjected to the testimonial, hermeneutical, and obfuscatory injustices caused by rape myths. However, while this approach does take into account

the ways in which rape myths affect the application of the law, it will not work either.

Several studies show that, for people who already endorse rape myths, short courses designed to combat rape myths are either not particularly effective or, worse, result in a *rebound* effect (Silver and Hovick (2018); Winkel and DeKleuer (1997); Jaffe, Sudermann, Reitzel, Killip (1992)). This means that when people who endorse rape myths are forced to take a class designed to combat rape myths, they may *double down* on their acceptance of rape myths.

Consider, for example, a study conducted by Nathan Silver and Shelley Hovick on the efficacy of affirmative consent campaigns. Affirmative consent campaigns aim to combat rape myths like: (i) it is only rape if the woman resists, (ii) women who say, “no” often *mean*, “yes”, (iii) that promiscuous clothing entails consent, (iv) that drunkenness entails consent, etc. To combat these myths, affirmative consent campaigns encourage a shift from a “no means no” model of consent to a “yes means yes” model of consent (Silver and Hovick 506). According to a “no means no” model of consent, sex is only nonconsensual *iff* the woman said no; this model places the “burden of establishing nonconsent on the unwilling” (Silver and Hovick 506). Alternatively, according to a “yes means yes” model of consent, sex is only consensual *iff* the woman says yes; this model places the “onus of establishing consent on the instigator of sexual contact (Silver and Hovick 506). Silver and Hovick concluded that rape myth acceptance left people significantly less receptive to the messages of affirmative consent campaigns (Silver and Hovick 511). Silver and Hovick attempt to explain this inefficacy by positing a *schema of denial*.

Recall that one of the primary functions of rape myths is to deny that rape is a common phenomenon, so people who endorse rape myths (often) do not believe that rape is a particularly pervasive problem. Silver and Hovick argue that this is an issue for the success of consent campaigns—studies have shown that “decreased perceived salience...reduce[s] the

effortful processing of information (Silver and Hovick 2). So, rape myths that decrease the perceived salience of sexual violence (as myths that women often lie about rape do) cause people who accept them to be unlikely to devote mental resources to considering the problem of rape seriously. This means that rape myths encourage people to refrain from engaging with courses on rape, and so the courses are likely to be ineffective.

Further, Silver and Hovick point out that people who endorse rape myths have *motivation* to continue to reject rape myths. Many studies show that rape myth acceptance is closely associated with “misogynistic attitudes (Aosved & Long, 2006), rape proclivity (Bohner, Siebler, & Schmelcher, 2006), as well as less intention to seek consent prior to engaging in sexual activity (Hust et al., 2014; Lanier, 2001; Margolin, Miller, & Moran, 1989)” (Silver and Hovick 507). Silver and Hovick conclude that, given the associations between rape myth acceptance and these other problematic attitudes, it is likely that “for people who believe in rape myths, correcting misinformation about the causes of rape would come at the expense of acknowledging significant moral failings in one’s own past...which could be a psychologically difficult undertaking” (Silver and Shelley 507). This explanation can be extended to rape *victims* who endorse rape myths as well—for victims who endorse rape myths, correcting misinformation about rape will come at the expense of acknowledging past significant harm, which will also be a psychologically difficult undertaking.

This explains why people who endorse rape myths typically are either unresponsive to the courses or display a rebound effect; they either don’t devote mental resources towards engaging with the course, or, if they do engage, they double down on their acceptance of rape myths because doing otherwise would require a psychologically difficult assessment of their own sexual histories. While the study by Silver and Hovick is about *campaigns* rather than courses, the problems they

point out extend to short courses as well; engaging with the material presented in short courses will likely seem, at best, uninteresting or unnecessary to people who don't believe that rape is a particularly important problem (and at worst, the courses may seem *politically motivated*, and so suspect), or people will have significant motivation to continue endorsing rape myths. This indicates that implementing a course designed to combat rape myths is not the best solution.

Let's take stock of where we are. Rape myth acceptance, a pervasive problem in the United States, leads to testimonial, hermeneutical, and obfuscatory injustices that prevent the claims of rape victims from being given the credit that they are due. These epistemic injustices are, at least in part, responsible for the abysmally low number of rape cases that result in convictions. Further, eliminating the influence of rape myths seems like it's going to be harder than would be expected, since we seem to be unable to guarantee that jurors will not endorse rape myths. What, then, are we to do about these injustices? I argue that more radical legal reform ought to be considered. One solution that hasn't been seriously considered is lowering the standard of evidence.

## 6 LOWERING THE STANDARD OF EVIDENCE

The standard of evidence is often characterized as being one of three central parts of the structure of the United States' criminal trial, along with the presumption of innocence and burden of proof (Lippke 160).<sup>13</sup> The presumption of innocence requires that jurors presume the *material innocence* of the accused—they are to assume, until it has been proven otherwise, that the defendant did not commit the crime. The standard of evidence dictates what amount of evidence is required to establish the defendant's guilt. In the United States, the standard used in criminal

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<sup>13</sup> While the presumption of innocence, standard of evidence, and burden of proof are not enumerated as rights in the constitution, they are taken to be crucial for protecting a right that *is* enumerated in the constitution: the right to a fair trial



trials is *beyond a reasonable doubt*; the guilt of the defendant is only proven if there is no reasonable doubt that she committed the crime. If there is any reasonable doubt regarding the guilt of the defendant, then jurors must issue a “not guilty” verdict. But, if the only doubt that remains is *unreasonable*, then the guilt of the defendant has been adequately proven. Finally, the burden of proof is on the state. The state must prove that the defendant is guilty beyond a reasonable doubt; the defendant is not obligated to prove his innocence.

These three features of the trial work together to make the trial a “complex moral assurance procedure” (Lippke 160). That is, it justifies our infliction of punishment on those accused of crimes because it provides assurance that we are not punishing innocent people.<sup>14</sup> The trial is meant to be a rigorous test of the evidence against the defendant; if, after the trial, the state has shown that there is no reasonable doubt that the defendant did not commit the crime, then the presumption of innocence is overturned, and it is acceptable to punish the defendant.

There are different accounts of why we should structure the trial this way. One account is that, by structuring the trial in this way, we maximize our *error ratio*: the ratio of innocent people who are punished to guilty people who are not (Lippke 164). Another is that, error ratio aside, state interference as extreme as incarceration must be well justified, and our criminal trial provides this justification (Lippke 164). Taking a side in this debate is both outside the scope of this project and uninteresting to me; both sides agree that we should, to the best of our ability, avoid punishing innocent people. This means that any recommended legal reform that results in an increase in the number of innocent people who are convicted is undesirable.

Crucially, though, both sides must also agree that our obligation to avoid punishing innocent people is not the only relevant consideration for structuring criminal trials—if it were,

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<sup>14</sup> The right against being punished before a fair trial is a legal right guaranteed by the Constitution.

we simply wouldn't have trials and would never punish anyone. Another important consideration is our obligation to punish the guilty.<sup>15</sup> While there are different accounts of the nature of this obligation (e.g., we must punish others because they *deserve* it, or we must punish other people in order to protect other people, etc.), it is clear that we must punish people who break the law. Our obligation to punish the guilty comes with obvious risks; given our epistemic limitations, we cannot always guarantee that the people we are punishing are actually guilty. Sometimes we will make mistakes. So, our two obligations conflict: we must not punish the innocent, but we also must punish the guilty, even though, given our epistemic limitations, we will occasionally make erroneous assessments of who deserves to be punished and who does not. The role of the criminal trial is to strike the best balance of these conflicting obligations; it must still allow us to punish the people who deserve it, but it cannot let it be *so* easy to punish people that we are frequently punishing innocent people. This will inevitably mean that some guilty people will go unpunished—so be it. So long as not *too* many guilty people are going unpunished, the criminal trial is serving its purpose.

In most cases, it seems like the United States' criminal trial is striking the right balance—it provides an investigation of the evidence that is thorough enough that we reasonably believe that the people we punish are guilty, but not *so* thorough that we are never able to punish anybody at all. However, there is reason to think that in sexual assault cases, things are different. Only five rapes out of 1000 will result in a felony conviction (“The Criminal Justice System: Statistics”, RAINN). This statistic is alarming. But it might prompt the following objection:

*Of course* conviction rates for rapes are significantly lower than the conviction rates for other crimes—women are scared to report their rapes, but people are not scared to report other crimes. This is a problem—a problem caused by rape culture—but it is not one that

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<sup>15</sup> There are, of course, other considerations as well. Criminal trials must not take too long, be too expensive, etc.

can be fixed by altering the criminal trial. It is, instead, a *cultural* problem and can be resolved only by fixing the culture around rape.

Consider another statistic: for every 310 rapes reported to police, only five will result in a felony conviction (“The Criminal Justice System: Statistics”, RAINN). This means that the conviction rate for rapes reported to the police is only 1.6%. Comparatively, in assault cases that are not sexual in nature, the conviction rate for cases reported to the police is 6.5% (“The Criminal Justice System: Statistics”, RAINN). This means that assault cases that are reported to police are approximately four times more likely to result in a conviction than rapes that are reported to the police. This indicates that the problem is not just the result of women being scared to report the rapes; the issue lies within the investigation/adjudication realm as well.

This may prompt a further objection: perhaps what is going wrong is not the *trial*, but that the police are not investigating rape allegations seriously enough. Consider another statistic: for every 1000 (non-sexual) assaults that occur, 105 cases are referred to prosecutors, and 41 cases result in felony convictions (“The Criminal Justice System: Statistics”, RAINN). This puts the conviction rate for assault cases referred to prosecutors at around 39%. Comparatively, for every 1000 robberies that occur, 37 cases are referred to prosecutors, and 22 cases result in felony convictions (The Criminal Justice System: Statistics”, RAINN). This puts the conviction rate for robbery cases referred to prosecutors at around 59%. How do sexual assault cases measure up? For every 1000 sexual assaults that occur, *nine* cases are referred to prosecutors, and five cases result in a felony conviction (“The Criminal Justice System: Statistics”, RAINN). This puts the conviction rate for sexual assault cases referred to prosecutors at around 55%. This lends serious support to the thought that what’s going wrong isn’t occurring in the trial, but is occurring with the police instead.

But this is too quick. The rape cases that make it to the criminal trial are, unequivocally, *exceptional* cases; as the above statistics indicate, *very few* rape victims come forward and report their rapes. Then, *very few* rape allegations are taken seriously enough by police, and so very few result in a thorough investigation or arrest. For the cases that do, *very few* are picked up by prosecutors. So, the rape cases that make it to the criminal trial are dramatically unlike most rape cases. They are cases that people are willing to report, that attract the attention of the police and, perhaps most importantly, they are cases that *prosecutors* are willing to pick up because they believe there is a chance that a jury will convict. So, the standards that rape cases must meet to make it to the trial are significantly higher than the standards that other kinds of cases must meet. Despite this, rape cases are not significantly more likely than other cases to result in a conviction. This indicates that there is something going wrong with the trial. The Jian Ghomeshi case considered earlier in the paper lends further support to this thought.

I have provided an account of *why* sexual assault cases go wrong (at least in part); I have argued that rape myths cause various epistemic injustices, and that these epistemic injustices impact the application of the law.<sup>16</sup> According to my account, what's going wrong in sexual assault cases is that women aren't being given the credit they are due, which results in the evidence (both the provided testimony and potentially corroborating evidence) not being given the weight it is due. Since we cannot *eliminate* the influence of rape myths, perhaps we can *correct* for it by lowering the standard of evidence. Lowering the standard of evidence would correct for the unjust influence of rape myths by allowing the presented evidence to have the impact it *would have had* if the jurors didn't endorse rape myths.

There are two feasible replacements for the reasonable doubt standard of evidence: the

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<sup>16</sup> This account of why sexual assault cases go wrong also tells us why other cases *don't* go wrong—it most other cases, there is no 'rape myth' analogue; there are no pervasively accepted false facts.

preponderance of the evidence standard and the clear and convincing standard. Both of these standards are frequently used in non-criminal cases. When the preponderance of the evidence standard is used, the defendant is held liable just in case the jurors determine that it is more likely that the allegations are true than that they are not. If this standard were to be used in a sexual assault trial, then when jurors judge that the evidence is even just *slightly* more in favor of the assault occurring, then they will issue a guilty verdict. The clear and convincing standard is more substantial than the preponderance of the evidence standard, but is still less demanding than the reasonable doubt standard. When this standard is used, the evidence presented during the trial must be highly more probable to be true than not, and jurors must have a strong belief in the factuality of the evidence before holding the defendant liable (Triplett 518).

Which standard is warranted depends on empirical facts about the degree to which rape myths cause jurors to lower their credibility assessments. These are facts that I do not have. I am inclined to think, though, that the preponderance of the evidence standard is simply too low; allowing a guilty verdict to be given in all cases in which the allegations are deemed to be *slightly* more likely to be true than to be false seems to treat the accused's rights too cavalierly. The clear and convincing standard, on the other hand, still requires that the presented evidence make it clear that it is *substantially* more likely that the allegations are true than false. This would still require the state to provide a compelling case, while at the same time taking into account the unjust influence of rape myths on jurors' assessments.

It may be objected that even though lower evidentiary standards are used in noncriminal trials, they *cannot* be used in the criminal trial because the context is different—more is at stake in criminal trials, and it is wrong to implement an evidentiary standard that is used in cases where less is at stake. This is, I think, good reason not to use lower evidentiary standards in cases that are

not sexual assault cases. But this objection misses the point; I have argued that we have two obligations—an obligation to punish the guilty, and an obligation not to punish the innocent—and that the criminal trial must somehow strike the right balance between these two obligations. It is clear that, in sexual assault cases, the right balance is not being struck. Lowering the standard of evidence corrects for this injustice, and helps to strike a better balance between our two obligations.

Here's another way of putting the point: when jurors doubt the veracity of the victim or believe that her claim is implausible, they do not place as much credence in her claims as they would if they thought she were trustworthy or that her claim were plausible. When jurors' low assessments of trustworthiness or plausibility are reasonable, the doubt they cause the juror to have is reasonable as well; however, when the juror's assessments are unreasonable, so is the resulting doubt. As I have argued, rape myth acceptance leads jurors to unjustly assess the trustworthiness of the victim and the plausibility of the victim's claim. This then leads them to be unwilling to accept the victim's testimony, and makes them less likely to perceive potentially corroborating evidence as evidence; in other words, their acceptance of rape myths leads them to believe there is room for reasonable doubt when there, in fact, is only unreasonable doubt. When unreasonable doubt is cast as reasonable, the reasonable doubt standard becomes too difficult to satisfy, since it requires that victims be able to provide evidence that combats doubts that are unreasonable. So, using the reasonable doubt standard in sexual assault cases is *unjust*. If this is right, then replacing the reasonable doubt standard with a lower evidentiary standard isn't the result of failing to acknowledge that more is at stake in criminal trials than noncriminal trials, but the result of acknowledging that it is what must be done if we are to satisfy our obligation to punish the guilty.

Importantly, this solution avoids the pitfalls of other proposed feminist legal reforms. Unlike the removal of the three problematic requirements from the Model Penal Code or the

stipulation that defense attorneys prove that past sexual history is relevant, this solution depends far less on the law being applied correctly and so will have a bigger impact on the outcomes of sexual assault trials. This solution will also have important trickle-down effects. As stated in the introduction, the problem with sexual assault convictions is multi-faceted. Sexual assault cases are unlikely to be reported, unlikely to be investigated, unlikely to be picked up by prosecutors, and, if they make it to trial, fairly unlikely to result in a conviction.

Lowering the standard of evidence will, most immediately, make it more likely that rape victims who take their rapist to trial will see their rapist be convicted. But it will *also* help with some of the other facets of the problem. One of the main reasons that prosecutors do not pick up sexual assault cases is that they (correctly) believe that the case will not result in a conviction (Tuerkheimer 28). By lowering the standard of evidence, we influence the prosecutor's calculus. Lowering the standard of evidence makes it more likely that a sexual assault case will result in conviction, and so makes it more likely that prosecutor's will pick up sexual assault cases. This, then, could also encourage more victims to report their crimes—one of the most common reasons victims cite for not reporting their assault is that they were worried it would be pointless (“The Criminal Justice System: Statistics”, RAINN). Lowering the standard of evidence gives these victims a better opportunity to be heard.

## 7 CONCLUSION

I have argued that the acceptance of rape myths causes three kinds of epistemic injustice—testimonial injustice, hermeneutical injustice, and obfuscatory injustice—and that these injustices are, in part, responsible for rapists going unpunished. I then argued that these injustices warrant a particular kind of legal reform that, so far, has not been implemented; these injustices warrant legal reform that accounts for the impact of rape myths on juror issued

verdicts. A short course designed to combat rape myths is one way to try to account for the influence of rape myths on verdicts. Unfortunately, though, there are good reasons to suspect that these courses will not be effective—such courses are unlikely to register with people who do not believe that rape is a serious problem, or, worse, they may cause people to double down on their acceptance of rape myths so that they do not have to reckon with their own sexual histories. This led me to suggest that we should consider lowering the standard of evidence so that we can *combat* (if we cannot *prevent*) the influence of rape myths on the outcome of the trial. There are, of course, problems with such a suggestion that I have not discussed. Consider, for example, cases that *conform* to the standard narrative of rape constructed by rape myths, e.g., a case in which a white woman alleges that a black man attacked her in an alley. Is it acceptable to lower the standard of evidence in *this* case? If not, is it possible to stake out a position according to which we lower the standard in some cases, but not in others?<sup>17</sup> Further, do we have any reason to believe that lowering the standard of evidence would *actually* make it more likely that rape cases would result in convictions?

These questions are important to consider, and it may turn out that lowering the standard of evidence is not the best solution. But the important take away is this: in a context in which rape

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<sup>17</sup> I suspect that it is, though providing a full argument for this position is outside the scope of this paper.

Here's a quick sketch: some cases, like the one in which a white woman alleges that a black man attacked her in an alley, conform to jurors' expectations of what rapes look like. Such cases are not vulnerable to hermeneutical injustice, and are less likely to result in obfuscatory injustices. So, these cases are not as vulnerable to the epistemic injustices caused by rape myths. Other cases, though, like the case considered in this paper, are extremely vulnerable to the epistemic injustices caused by rape myths. Perhaps, then, we should only lower the standard in cases in which prosecutors can prove that the case is sufficiently vulnerable to the unjust influence of rape myths.



myths are pervasively accepted, sexual assault trials are unlikely to have just results. This injustice requires radical legal reform—we cannot simply wait until the cultural conception of rape shifts, as such a shift will likely take *decades*, and rape victims deserve justice *now*. The kind of legal reform that is required is reform that takes into account the way rape myths influence verdicts, and lowering the standard of evidence is one option. If this turns out not to be a viable solution, other reforms that account for the influence of rape myths must be considered.

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