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Blaming the Victim

A Look at Sexual Assault Adjudication in the Milwaukee County Courthouse

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July 31, 2013

This study compared the cultural narratives used by defense attorneys to blame adult and child sexual assault victims in the courtroom. The study sample consisted of 18 sexual assault cases (5 adults and 13 children) in three branches of the Milwaukee county courthouse in Milwaukee Wisconsin. Ethnographic observational data, archival research, and secondary data analysis was used to compare victim blaming strategies at trial and during sentencing hearings. Results show that the narratives utilized work to hold adult and child victims as unbelievable across a variety of themes relating to consent, reliability, and corroboration. A narrative of rebelliousness was also invoked particularly as it pertained to child victims. The importance of these findings is elaborate in the discussion.

Introduction

In the United States alone, one in three women will experience sexual assault during their lifetime (Allison and Wrightsman 1993: 8). The majority of these assaults will go unreported as the assailants who commit these crimes walk away and potentially harm other victims (Matoesian 1993: 6; Grubb and Harrower 2009: 64). Sexual assault often produces several psychological effects on women victims including “posttraumatic stress, depression, anxiety, substance abuse, relationship problems, and sexual problems” (Bradley, Miller, and Ruskino 2010: 357). Child sexual assault female victims face several emotional and psychological consequences as well. Lowenstein (2011: 296) notes that while younger child sexual assault victims may experience anxiety, nightmares, bedwetting, and PTSD, older child victims may endure depression, hyperactivity, educational problems, and/or suicidal thoughts. Adult female victims of sexual assault often fear reporting their abuse to law enforcement because they think no one will find their story credible. Such attitudes are even more common among victims who are assaulted by someone they know (Day, Hackett, and Mohr 2008: 323). Similarly, child female sexual assault victims fear disclosing their abuse due to feelings of guilt, shame, and helplessness. In addition, many child victims are reluctant to report because they continue to maintain a strong bond with the assailant (Lowenstein 2011: 296), thus making it even more difficult to contact the criminal justice system.

If sexual assault victims report their abuse and proceed to the jury trial phase of the adjudication process, prosecutors, defense attorneys and jurors often place blame on adult victims by using rape myths to develop an image of “real rapes” versus “simple rapes” (Ehrlich 2001: 19). Victim blaming refers to the, “negative attitudes towards crime victims” that propose survivors of sexual assault were somehow responsible for their victimization (Allison and

Wrightsmann 1993: 105-106). Victims of sexual assault, whose experiences fail to meet the “real rape” criteria, are often disregarded by members of the criminal justice system (Ehrlich 2001: 19). While several studies discuss victim blaming by defense attorneys amongst adult females (Ehrlich 2001; Matoesian 1993; and Estrich 1987), very few have addressed how defense attorneys engage in victim blaming in child sexual assault cases. The lack of attention on child victims of sexual assault is problematic because the majority of female sexual assault victims are children (Bartollas and Wormer 2011: 200). Therefore, this project aims to investigate the cultural narratives developed by defense attorneys to blame child sexual assault victims. Furthermore, this study seeks to compare how these narratives agree and differ from sexual assault cases pertaining to adult victims. Common themes found in both adult and child sexual assault cases include narratives of consent, the question of credibility, and the role of corroborating evidence. In child sexual assault cases, the rebellious kid narrative solely pertains to child cases of sexual assault. By investigating victim blaming themes amongst adult and child sexual abuse victims, this study elucidates issues surrounding sexual assault victims as they attempt to maneuver the criminal justice system. In my research, I answer several questions. How do defense attorneys use victim-blaming strategies in sexual assault cases? What types of cultural narratives are involved? Do these narratives differ based on whether the victim is an adult or child?

In this study, I examined two key stages of the sexual assault adjudication process, jury trials and sentencing hearings. Key sections of the jury trial that were analyzed for victim blaming include opening statements, closing arguments, and cross-examination. The defense attorney’s recommendations for sentencing were analyzed in the sentencing hearings. The research design for this project consists of qualitative, ethnographic observational research at the

Milwaukee County Courthouse in Milwaukee, Wisconsin, secondary data analysis of court monitoring documents and archival data.

Literature Review

Rape Mythology

While society perceives sexual assault as a heinous act deserving of punishment from the criminal justice system, there are conflicting viewpoints of whether certain instances constitute as “real rapes.” According to Beichner and Spohn (2012: 6) “real rapes,” commonly known as stranger rapes, adopt society’s view of an innocent woman attacked by a mentally disturbed male who jumps out of bushes and forces himself upon her. Despite this common perception, the stranger rape myth fails to describe the overwhelming majority of sexual assaults. In fact, Bradley Miller, and Ruskin (2010: 358) note the vast majority of victims are sexually assaulted by someone they know. Most rapes fall under what scholars consider “simple rapes,” meaning the victim, “is forced to engage in sex with a date, an acquaintance, her boss or a man she met at a bar, when no weapon is involved and when there is no overt evidence of physical injury” (Ehrlich 2001: 19). In other words, a female has a higher chance of being sexually assaulted by a boyfriend or husband than a stranger. While scholars separate “real rapes” and “simple rapes” to describe how society perceives sexual assault, we must recognize that in reality “simple rape is real rape” (Estrich 1987: 104).

The distinction between “real rapes” and “simple rapes” creates an image of “good victims” and “bad victims.” “Good victims” are perceived as undeserving of the sexual assault and are thereby certified to receive legal protection from the criminal justice system. On the contrary, “bad victims” are those women whose lives, backgrounds, and characteristics depart from the narrow confines of “ideal victims” (Randall 2010: 408-409). Misconceptions also arise

in defining assailants. Rape mythology suggests, “Legitimate [assailants] never encounter their victims prior to attacking them, always use a weapon, and leave behind a trail of evidence including physical abuse” (Ehrlich 2001: 20). Women who are in relationships with their assailants or work as prostitutes, are often disqualified from being perceived as authentic victims because the men engaging in sex with them believe that consent is already implied (Randall 2010: 409). This assumption places many sexual assault victims in a difficult situation because they feel as though they cannot be in the “promiscuous category” but they cannot be in the “wife category” either (Randall 2010: 415).

Even though Wisconsin law creates no distinction between real and simple rapes (State of Wisconsin Legislative Reference Bureau 2001), the criminal justice system treats these typologies as unequal. It is very hard for the legal system to accept there are multiple ways a victim may respond to sexual assault (Randall 2010: 427). In cases of real rape, such extralegal factors as moral behavior are not needed in order to receive a conviction. On the other hand, in simple rape cases, extralegal factors are used in order to present the victim as credible or non-credible to the jurors (Beichner and Spohn 2012: 6).

Other common misconceptions in regards to sexual assaults include the beliefs that men cannot control themselves, men should not be blamed for being under the influence, women say “no” when they really mean “yes,” and women should not dress in a way that provokes men to rape them (Bartollas and Wormer 2011: 202). Individuals may blame the victim for placing herself at the scene – where she is expected to be raped – rather than blaming the assailant for the abuse (Bradley, Miller, and Ruskino 2010: 360). In addition, there is an expectation that sexual assault victims will verbally and physically resist their perpetrators, and that evidence of their unwillingness to engage in sex must be present to support their claim (Randall 2010: 415).

Prosecutors' perceptions

Prosecutors, who represent the state during a rape trial, partake in blaming sexual assault victims by adopting rape myths to determine whether to prosecute the assailant. Prosecutors often do not charge assailants solely based upon legally relevant factors as the severity of the crime or the amount of evidence. Prosecutors, too, search for legally irrelevant clues to the victim's past, such as her perceived moral character and her actions leading up to sexual assault (Beichner and Spohn 2012: 3).

Prosecutors are more likely to prosecute an assailant if the victim fits society's perception of how a credible woman should appear (Beichner and Spohn 2012: 5). For example, many prosecutors feel skeptical when charging assailants whose victims were intoxicated during the time of the assault because they know her credibility is likely to face scrutiny by defense attorneys (Beichner and Spohn 2012: 18). In their research, Day, Hackett, and Mohr (2008: 324) show that victims who seem to be distressed on the witness stand are more credible in the minds of jurors than a woman who appears emotionless. If jurors do not see a victim who is, "hysterical, crying and shaking," they are perceived as less credible (Day, Hackett, and Mohr 2008: 324). Sometimes victims may overly express themselves to conform to the "ideal" victim image and receive sympathy from the jury (Konradi 2007: 73).

Child sexual assault cases face similar challenges during prosecution. First, very few child sexual assault cases even reach prosecution (Wiley 2009: 278). When they do, the defendant often pleads to a lesser offense not involving sexual abuse (Faller and Staller 2010: 7). Second, prosecutors will generally refrain from pursuing legal action against an assailant if the child witness is unwilling or unable to take the stand (Wiley 2009: 279). A reluctant child witness becomes problematic because – more often than not – the only two witnesses to the

crime are the victim and the assailant. Therefore, the child's testimony is an essential piece of evidence in the State's case against the defendant (Baker and Regan 1998: 187-188). Even when a child witness elects to take the stand, prosecutors are in a difficult position. On one hand they want to prepare the victim, but on the other hand, they know that by doing so, the child witness will likely appear less emotional on the stand, thus contradicting many jurors' perceptions of how a child victim should behave (Baker and Regan 1998: 188-189). For example, one study indicated that the more calm a child's demeanor before taking the stand, the less credibility the child had amongst adult observers (Baker and Regan 1998: 189). Moreover, while children are perceived as more honest and less capable of fabricating sexual assault allegations, they tend to have difficulty recounting their abuse and are more susceptible to other people's influence (Connell and Kuehnle 2009: 502). Accordingly,

“The prosecutor must construct a believable legal narrative on behalf of a child victim, however, that child may not tell the story in a way that jurors can readily understand or may not act in accordance with adult expectations about truthful storytelling, thereby casting potential doubt” (Faller and Staller 2010: 3).

Furthermore, child sexual assault cases are difficult to prosecute because there is often a lack of physical evidence and visible injury (Faller and Staller 2010: 3).

Additional factors affect sexual assault cases involving victims of marginalized backgrounds. They are more likely to experience further victimization from prosecutors. For example, prosecutors are more likely to charge if the suspect is male, unemployed, and a minority with a Caucasian victim (Beichner and Spohn 2012: 5). Wiley (2009: 278) also found that prosecutors are more likely to proceed in prosecution when the female is older and the abuse is more severe. In LaFree's (1989: 107) study, he concluded that while many prosecutors believed the defendant to be “technically guilty,” they still faced the problem of proving the

assailant's culpability to the jury or judge. By sifting through the pool of victims and choosing the ones that are likely to result in conviction, prosecutors participate in blaming the victim. In doing so, prosecutors risk sending the message that certain rape experiences are illegitimate if they fail to meet society's criteria.

Defense Attorneys' strategy

Sexual assault victims are often not prepared to navigate the legal system. Victims frequently feel as though they are outsiders (Konradi 2007: 64). During the cross-examination stage, victims must encounter the defense attorney, who is chosen to represent the defendant (Konradi 2007: 98). In order to undermine the prosecutor's case, a defense attorney seeks to do one of three things: show that the victim has wrongfully identified the assailant, prove that the sexual encounter was consensual, or prove that no sexual encounter occurred in the first place (Konradi 2007: 99). Konradi (2007: 99) also notes that defense attorneys find ulterior motives for the victim to lie about the assault. Defense attorneys purposely speak too fast, interrupt the victim, refuse to answer questions, and many other subtle tactics to reinforce their power, thus making the victim appear to be less credible (Konradi 2007: 103). Over the course of a trial, defense attorneys discuss issues of credibility, sexual history, and moral character, despite the fact these factors are irrelevant in determining whether the crime took place (Matoesian 1993: 20). Defense attorneys examine other matters regarding the victim, including the victim's alcohol consumption, style of clothing, and personal information from medical and counseling records (Bartollas and Wormer 2011: 216) – something they regularly request (Randall 2010: 405). In order to convince the jury of their client's innocence, defense attorneys try to taint the victim's actions post-assault as peculiar and strange (Ellison and Munro 2009: 363).

Defense attorneys use these issues to blame the victim. “Victim blaming refers to a fundamental tendency in American culture to hold the downtrodden or underdogs of society responsible for creating their own distress” (Bartollas and Wormer 2011: 205). In other words, defense attorneys employ various methods to suggest the victim is responsible for her own sexual assault. Defense attorneys attempt to damage the victim’s image during cross-examination (Ehrlich 2001: 69). Despite modifications to rape laws (i.e. rape shield laws) introduced to rid the legal system of false conceptions of rape, these regulations have done very little to increase convictions or deter defense attorneys from using certain rape blaming tactics (Matoesian 1993: 17). The only guidance victims receive during cross-examination are the prosecutor’s objections; otherwise, they are essentially alone (Konradi 1996: 415).

Defense attorneys do not limit victim-blaming strategies to adults; child sexual assault victims are also included. Considering the various professionals who work with child sexual assault victims, defense attorneys are the most likely to find child witnesses less credible and incompetent (Connell and Kuehnle: 524). Often times, testifying in court becomes intimidating for many child victims because they do not fully grasp the reason they are taking the stand (Wiley 2009: 279). Also, the courtroom – in and of itself – can be intimidating to child witnesses (Faller and Staller 2010: 167). The Sixth Amendment, of the U.S. Constitution provides defendants with the right to confront their accusers in court, regardless of the age of the accuser (Baker and Regan 1998: 191). Cross-examination involves a, “face-to-face confrontation between the child and the defendant” (Faller and Staller 2010: 4). The defense attorneys try to cast doubt on the child’s statement, memory, and/or intentions during this time (Faller and Staller 2010:4). In addition, defense attorneys continue to manipulate language (Perry, McAuliff, Tam, Claycomb, Dostal and Flanagan 2009: 502). One study suggested that – similar to adult victims –

defense attorneys try to deceive child witnesses by utilizing age inappropriate words, complex terminology and general ambiguity during questioning (Perry, McAuliff, Tam, Claycomb, Dostal and Flanagan 2009: 612). Children under the age of ten-years-old are even less likely to interpret or understand courtroom terminology (Perry, McAuliff, Tam, Claycomb, Dostal and Flanagan 2009: 609). Subsequently, a child witness becomes less accurate when defense lawyers utilize inappropriate questioning during cross-examination (Perry, McAuliff, Tam, Claycomb, Dostal and Flanagan 2009:625).

Jurors' perceptions

A juror's role consists of examining the evidence presented during the trial and using that evidence to determine the innocence or guilt of the defendant. Estrich (1987: 19) notes that juries tend to side with the defendant if there was any indication the victim contributed to her own assault. Thus, they are often involved in the victim-blaming process along with other members of the criminal justice system. Rape myths influence jurors' perceptions. For example, many jurors believe that a "real" sexual assault victim will be emotional during her testimony; any lack of emotion contradicts the idea of a "real" rape victim and the woman becomes non-credible in the jury's eyes (Day, Hackett, and Mohr 2008: 324). In fact, Day, Hackett, and Mohr (2008: 324) note that previous studies conclude victims who seem to be upset or distressed on the stand are more credible in the minds of jurors than a woman who appears emotionless.

Even though jurors tend to view younger children as more credible than older children and adults (Baker and Regan 1998: 188; Wiley 2009: 279), they continue to rely on similar misconceptions. For instance, one study indicates that potential male and female jurors found a child victim who was emotionally upset more credible and believable than a child victim who demonstrated a calm demeanor upon confronting the defendant in court (Baker and Regan 1998:

192). Another study suggests that potential jurors believed corroborating physical evidence is present in sexual assault cases, even though this assumption is incorrect (Connell and Kuehnle 2009: 509).

The Expectancy Violation Theory may be used in order to explain why jurors participate in victim blaming. This theory suggests, “[a person’s] perceptions of others will be influenced by [his/her] expectations of their behavior” (Day, Hackett, and Mohr 2008: 326). In other words, jurors may become confused if a victim’s actions do not conform to their expectations. Grubb and Harrower (2009: 65) noted a similar theory called Defensive Attribution, holding that people are more likely to blame the victim if they cannot relate to them or if they cannot see themselves as future victims (Grubb and Harrower 2009: 65). For example, one study found that the more potential female jurors related to victims, the less they blamed them (Bradley, Miller, and Ruskin 2010: 359). Also, previous victims of sexual assault were less likely to assign blame to victims of sexual assault (Bradley, Miller, and Ruskin 2010: 360). Jurors tend to place more blame on the victim if they did not physically resist their assailants. Many jurors may then perceive accusers as a willing participant; however, most women are unable to resist due to fear, coercion, intoxication or another unknown reason (Bradley, Miller, and Ruskin 2010: 359). Fortunately, another study found that mock jurors with educational guidance were more likely to accept the victim’s responses (i.e. delayed reporting and lack of emotion) as normal behavior for a victim (Ellison 2009: 374).

Juries are extremely vital in the victim blaming process because they ultimately make the decision to convict or acquit the defendant. Since they are the final decision-makers in sexual assault trials, juries are the individuals who decide what specific actions constitute as sexual assault; essentially, “[sexual assault] is whatever a jury says it is” (LaFree 1989: 153).

The Study

Data and Methodology

This study utilizes a mixed methods approach, employing ethnographic observational research, secondary data from court monitoring forms, and archival data from Consolidated Court Automation Programs (CCAP). Utilizing a mixed methods approach expands the data collection sample and provides additional case information.

The ethnographic observational research took place in Milwaukee, Wisconsin at the Milwaukee County Courthouse between May and June 2013. Observations occurred in three branches of the courthouse. Felony sexual assault cases are open to the public, making the Milwaukee County Courthouse an ideal setting for observational research. I spent approximately seventy hours over a seven-week period, examining two phases of the sexual assault adjudication process: jury trials and plea/sentencing hearings. These distinct stages suit the purpose of this study because defense attorneys have the opportunity to use themes that serve to blame and discredit sexual assault victims.

All branches administering sexual assault cases have designated courtrooms. I witnessed hearings and trials from each branch. During observations, I sat in the gallery, or public seating area, which remained separated from the front of the courtroom by a glass frame. Only judges, attorneys, deputies, and witnesses were permitted to enter when court was in session. While sitting in the gallery I collected jotted notes, or “little phrases, quotes, and key words” (Lofland 1971: 103) and then transformed them into full field notes. Descriptive notes focused on the courtroom actors (i.e. judge, attorneys, victim, defendant, deputies) and their demeanor, as well as the individuals sitting in the gallery. In addition, I recorded direct quotes from the courtroom actors and the people sitting in the gallery. Documenting quotes – especially from defense attorneys – was a vital part in this study because they captured the language utilized to blame the

victim. Furthermore, my notes consisted of interpretive and analytical accounts in order to comprehend the events and behaviors I witnessed (Liamputtong and Ezzy 2009: 159).

The jury trial consists of seven stages: *voire dire*, jury instructions, opening statements, evidence, closing statements, jury instructions, and deliberation. While I wrote fieldnotes during each stage, I focused primarily on opening statements, cross-examination, and closing arguments. Opening statements include a brief synopsis of the evidence attorneys will present during trial (Lafree 1989: 159). Cross-examination provides the defense the opportunity to question the victim, witnesses, and experts on the stand. Closing arguments is the last time the defense has the chance to speak to the jury. Thus, closing arguments involve, “the most carefully worded and eloquently delivered parts of the trial” (Lafree 1989: 162). Consequently, the defense must ensure that they present all of the legal and extralegal factors as evidence for jury deliberation. Sentencing hearings, on the other hand, have a different structure and purpose. Since the defendant has been found guilty, the purpose is no longer to convict, but rather to minimize the defendant’s punishment. Defense counsels often blame the victim in order to do so.

Secondary data came from court monitoring documents collected by student monitors between September 2011 and May 2012. Monitoring forms included case data on sexual assault trials and plea/sentencing hearings including case number, defendant and attorney names, and case characteristics such as types of offense, review of case details, state and defense recommendations, and judge ruling and associated explanations. Archival data came from CCAP online tracking system, which provides records of cases in the Wisconsin Circuit Courts. Archival information includes case number, defendant demographic information, charges, and

case history. CCAP is open to the public and used extensively by courtroom personnel and citizens.

The sample included eighteen sexual assault cases: five of these cases involved adult sexual assault victims and thirteen cases involved child sexual assault victims. These cases were collected from ethnographic observation and secondary data. This study was reviewed and approved by Marquette University Institutional Review Board (IRB) #HR-2224. To assure confidentiality, victim/witness names were excluded. Defendants' names are provided with case numbers, as they are publically available via CCAP.

Coding and Analysis

I analyzed my findings using an inductive analysis approach. I explored the sensitizing concepts set forth related to inductive themes as they emerge in the data (Patton 1990: 392). The overall theme I investigated was victim blaming within sexual assault trials. For this study, I utilize Allison and Wrightsman's (1993: 106) definition of victim blaming: "[The] degree of suspicion and doubt that the rape victim must face. Such suspicion and doubt may ultimately result in attributions of responsibility, or... blame." Before finalizing which categories would be used to describe the victim blaming phenomena, I engaged in open coding. Open coding occurs when, "the ethnographer reads fieldnotes line-by-line to identify and all ideas, themes, or issues they suggest, no matter how varied and disparate" (Emerson, Fretz, and Shaw 2011: 172). After reading through dozens of cases, I developed fourteen categories. Then, I narrowed these categories by combining similar themes. I looked for key comparisons in categories between adult and child sexual assault cases. In the end, I developed three categories pertaining to child and adult victims – including consent, credibility, and corroborating evidence – and one category, the rebellious kid narrative that involved only child sexual assault cases. In the

following section, I use the term “victim” to describe the adult and child females who testified that they were sexually assaulted. In some paragraphs, “alleged victim” may be used when referring to how the defense attorneys perceive and/or describe the victim. The persons being accused of sexual assault are referred to as “defendants.”

Findings

A number of themes emerged from the data. In the 18 cases observed, defense attorneys utilized victim-blaming narratives that were categorized as follows: narratives of consent, the question of credibility, the role of forensic evidence and the rebellious kid narrative. Consent signifies that a person has given another person permission to partake in sexual activity. The absence of consent during sexual activity indicates a sexual assault. However, sexual assault is one of the only crimes where victims are expected to prove non-consent through physical resistance (Estrich 1987: 29; Allison and Wrightsman 1993: 173). Credibility refers to the actions and/or lifestyle of the victim that indicates the victim is or is not telling the truth. Corroborating evidence includes anything that suggests a sexual assault occurred. Since victims are often disbelieved by the criminal justice system, corroborating evidence ensures that the victim was actually raped (Estrich 1987: 43). While the rebellious kid narrative incorporates aspects from other themes, it is uniquely placed in its own narrative and used by defense attorneys to blame and discredit the victim.

Narratives of Consent

In cases of adult victims, defense attorneys discursively worked to transform the alleged assault into a consensual encounter (Matoesian 1993). Defense attorneys commonly pointed out that the victim and the defendant know each other or had a prior relationship involving consensual activity. Consent was established by questioning the victim’s lack of resistance using

accusatory language (Matoesian 1993: 104). The *State v. Carpenter* (2013) jury trial involved a couple in their early thirties with an extensive history of domestic violence. The girlfriend, or victim, testified that her boyfriend, the defendant, repeatedly struck her with his fists. After collapsing to the ground, the defendant continued to kick the victim as she lay on his garage floor trying to protect her head. Once the defendant finished verbally and physically abusing the victim, the defendant raped her vaginally and anally as she held her broken ribs. During the entire incident, the defendant refused to let the victim leave the house. However, during cross-examination, defense counsel contested the victim's allegation of sexual abuse by asking the jury, "Did [the victim] do anything physical that indicated she didn't want to have sex?" The defense continued saying, "She did not resist. She didn't say no." In addition to questioning the victim's lack of resistance during cross-examination, defense counsel argued the defendant misunderstood the victim's wishes because the victim and the defendant maintained a prior sexual relationship. The defense attorney suggested couples often fight, apologize and then have sex: "How was he to know? You have to intend to sexually assault someone." Since the victim failed to make her refusal clear – according to defense counsel – the defendant believed he and the victim were engaging in "make-up-sex." The prosecuting attorney contested the defense's closing arguments, telling the jury what the defense attorney just did is called, "blaming the victim." She emphasized that, "It's not about what [the victim] did; it's about what the defendant did to her!" The jury reached a Guilty verdict in this case.

Defense counsel in the *State v. Triplett* (2013) sentencing hearing, made similar claims while questioning the victim's consent. The defendant was being charged with twenty charges including pimping/pandering, human trafficking, and 3rd degree sexual assault involving three victims, all of whom worked for the defendant as prostitutes. During the trial, one of the three

victims testified the defendant forced her, and the other women, to continue working for him by threatening them with a firearm. Yet, during the sentencing hearing, defense counsel argued that if the defendant truly assaulted and threatened the victims, they should have tried to leave the house where the defendant was holding them: “[The victims] weren’t chained up or locked in.” In fact, defense counsel added, the victims were taking trips to the store and going on vacations paid for by the defendant. Therefore, the defendant did not force them to participate in any activity they did not want.

State v Hardaway (2012) jury trial provides yet another example of how defense attorneys question the victim’s consent. The defendant was being charged with 2nd degree sexual assault of a woman whom he was dating. The victim, a 44 year-old mother of two and active choir member, testified that the defendant proceeded to have sexual intercourse with her in her living room one morning, even after she told him, “Stop, I don’t want this.” The victim eventually complied with the defendant’s commands for fear of further injury. However, during direct examination of the defendant, the defense counsel claimed the victim initiated the sexual contact with the defendant by placing her leg on his, flirting with him, and wearing a bra. According to the defense, all of the sudden, “[the victim’s] pants dropped” as she pushed the defendant’s penis into her vagina. Defense counsel claimed the victim never told the defendant she wanted to stop. The jury reached a Not Guilty verdict in this case. It is important to note that a lack of resistance does not signify the victim was a willing participant. In fact, Estrich (1987: 22) notes that victims often do not resist their assailant for fear of further injury.

Similar to adult sexual assault cases, in State v. Wilkins (2013) jury trial the defense attorneys used the victim’s lack of resistance to question her consent or to say the encounter never occurred at all. The defendant, a 33-year-old male, was charged with the 2nd degree sexual

assault of a 13-year-old girl after a party at her parents' house. After partaking in various drugs and drinking alcohol, the defendant fell asleep on a couch near to the living room where the victim and younger sisters slept. According to the victim, who was 15-years-old at the time of her testimony, the defendant woke up to the defendant performing oral sex on her. Later, he forced her to engage in sexual intercourse with him in the living room while her sisters lay asleep on the floor nearby. After the assault, the victim described feeling "weirded out" and "shocked." During cross-examination, using accusatory language, defense attorney asked the victim why she did not call out to her parents in the next room or wake up her sisters who were sleeping beside her if the defendant sexually assaulted her. Defense counsel attempted to show that by not doing so, the victim acted outside of what a "real rape victim" should do.

Even though the judges and prosecuting attorneys reiterated that a child cannot legally consent to sexual activity with an adult under Wisconsin State law, defense attorneys continued to make the argument that the victim wanted the encounter to occur. In *State v. Kaho* (2013), the defendant was convicted of 2nd degree sexual assault of a child and was prepared for sentencing. The defendant, a 55-year-old male pursued a third party who introduced him to the 15-year-old victim to pay for sexual activity. Even though the victim initially told the defendant she was 19-years-old, the defendant continued to have sex with her when he should have known she was under the age of 18-years-old. While the defense attorney and defendant claimed the defendant accepted responsibility for his actions, defense counsel still emphasized that, "The victim was seeking [the defendant] out" through text messages so receive \$50 for sexual favors. After saying this, defense counsel claimed she was not blaming the victim but rather "stating the facts."

In *State v. Meir* (2013) sentencing hearing, defense counsel made similar arguments. The defendant, a young man in his early twenties, sexually assaulted a 15-year-old even though the

sexual intercourse was cooperative. As mentioned, a person under the age of 18 years old cannot legally consent to partaking in sexual activity with an adult. While the victim initially told the defendant she was 18 years old, the defendant continued to have sex with her even after discovering she was not an adult. During the defense' recommendations to the judge, one of the defendant's defense attorneys claimed that while his client should not have been sexually active with the victim, he never forced her to do anything she did not want. In fact, the victim continued to send the defendant text messages saying, "I love you" even after the defendant stopped contacting her. Defense attorneys sought to establish consensual sexual activity by questioning the victim's lack of resistance and by arguing the defendant was unable to understand her refusal to partake in sexual activity. Defense counsels reiterated this while questioning the victim's consent in order to show jurors that the victim does not meet the standards of what scholars refer to as a "real rape victim."

The Question of Credibility

Defense attorneys also blame the victim through the question of credibility. This oftentimes discounts the victim's memory and/or "lifestyle." According to Randall (2010: 398), "credibility assessments...remain deeply influenced by myths and stereotypes surrounding 'ideal,' 'real,' or 'genuine' victims of sexual assault". My findings show that, many of the adult victims failed to meet these stereotypical standards of the "ideal" victim. In *State v. Bell* (2013), the victim, a 62-year-old mother, accused the defendant, an acquaintance in his early forties, of striking her in the face and raping her during a friend's party. While the defendant admitted to punching the victim in her face, he denied ever forcing her to have sexual intercourse. The defendant testified that the victim offered to perform oral sex if he provided her with some of his crack cocaine. Since the victim partook in both alcohol and drugs during the time of the assault,

the defense counsel used these behaviors to hinder her credibility. The defense attorney told the jury, “Someone who uses a lot of substances, you can’t believe everything they say.” He then described his own narrative of what occurred during the party between the victim and the defendant. Due to the fact the victim was a 62-year-old woman, she was embarrassed and ashamed of her ongoing alcohol and drug addiction, things she desperately tried to hide from her son and daughter-in-law. She did not want to tell her son she performed oral sex on the defendant in exchange for crack cocaine; therefore, she lied and told law enforcement she was raped. The defense attorney reiterated that people facing addiction often lie about it; furthermore, they invent the worse kinds of lies because they almost believe those lies. Defense counsel never emphasized that the defendant was less credible due to his own cocaine addiction and intoxication level at the time of the alleged assault. He only focused on the actions of the victim. Ultimately, the jury found the defendant not guilty of sexual assault. Research shows that many prosecuting attorneys are skeptical to proceed with cases involving intoxicated victims because they know the victim’s credibility will be questioned by defense counsel (Beichner and Spohn 2010: 18). Lafree (1989: 217) also noted that jurors are less likely to find a defendant culpable if drugs and alcohol are involved.

Beyond intoxication, the victim’s criminal record was also an issue in several cases involving adult victims of sexual assault. The defense attorney in *State v. Carpenter* (2013) told the jury during closing statements that the victim had been convicted of three prior crimes, though he did provide the jury with specific details. Furthermore, defense counsel explicitly told the jury that they should use that information to assess the victim’s credibility. Similarly, in *State v. Triplett* (2013), defense counsel listed all of one of the victim’s prior convictions, including drug possession, disorderly conduct, and retail theft among other crimes. He even

described one of the other victims as a prostitute and heroin addict who admitted to having “regular customers” who paid her for sexual favors. The defense attorney claimed, “All of the [victims]...committed felonies, very serious crimes” and yet, “[his] client is going to be the only one doing the time even though [the victims] committed [past crimes].” The prosecuting attorney contested the defense arguments by stating,

“There’s a tendency to dislike heroin addicts and prostitutes, ‘Oh it’s just some heroin addicts trying to get a fix.’ [However] just because the victims aren’t perfect doesn’t mean the defendant’s behavior isn’t any less egregious!”

Defense counsels also used delayed disclosure of the abuse to question the victim’s credibility. In *State v. Hardaway* (2013) involving the 44-year-old victim, during opening statements the defense attorney emphasized that the victim waited over a 48-hour period to go to the hospital. According to the defense, delaying the disclosure contradicts the actions of someone who was truly raped.

While defense attorneys in the adult cases often focused on intoxication, prior criminal record, and delayed disclosure to discredit the victim, defense attorneys in child sexual assault cases largely focused on the child’s memory. In *State v. Lewis* (2013), the defendant was charged with four counts of 1st degree sexual assault of a 6-year-old girl. Through the victim’s testimony, both during the forensic interview and on the stand, the victim testified that the defendant raped her on multiple occasions, penetrating her vaginally and orally. While the victim was unable to articulate the abuse in legal terminology, she used hand motions and toy dolls to describe the assault. Using a child’s vocabulary, the victim said the defendant’s penis “looked like a microphone” and felt “harmful [and] hard.” The defense attorney focused on the victim’s loss of memory. During closing arguments, defense counsel claimed, “[The victim] has never been consistent from day one until now!” He emphasized that the victim continually changed

certain aspects of her “story,” for instance, claiming the defendant’s clothes were off and later saying they were on saying it was cold outside when the alleged incident occurred in the summer and fall. The defense told the jury, “We could never get to the specifics with this little girl.” However, Wiley (2009: 278-279) states that despite the fact that a child witness is inconsistent with his/her story the inconsistency does not indicate the child was inaccurate about the abuse. Children simply have a more difficult time in recalling the specific details concerning their assault (Faller and Staller 2010: 176). Defense attorneys in other cases also emphasized the victim’s memory loss. For example, in *State v Reynosa* (2012), the defense attorney asked the victim if anyone told her what to say during her testimony in cross-examination. He continued to ask the victim whether people had to remind her a lot. The defense counsels in *State v Jackson* (2012), *State v Feltz* (2013), and *State v Akinshemoyin* (2012) reiterated these notions by emphasizing the victims’ inconsistencies in their testimony. However, Zajac and Cannan (2009: S47) note that it is quite common for child sexual assault victims to change their testimony on the stand from their previous forensic interviews because they often become confused by the defense attorney’s questions.

In addition to questioning children’s memory, defense attorneys attempt to hinder a child victim’s credibility by questioning the length of time between the alleged abuse and the disclosure, similar to adult sexual assault victims. In *State v. Feltz* (2013), the 16-year-old victim in the case accused the 23-year-old defendant of sexually assaulting her as a child, almost ten years prior to the actual trial. The abuse occurred between 2004 and 2006; however, the victim did not disclose the incident to her guardian until five years later. Even after telling her guardian, the victim and her family waited several months before contacting law enforcement. The defense attorney reiterated the length of time between the alleged abuse and the disclosure. He told the

jury, “A child that age who needs help asks for it... [She could have told her aunt] but she didn’t!” According to Lowenstein (2011), the defense attorney this is not always the case. Children often delay disclosing their abuse due to feelings of guilt, shame and helplessness, something the victim in this case testified to during direct examination. Moreover, the child may have a strong bond with their assailant and feel as though their parents would not believe them (Lowenstein 2011: 296).

Another way some defense attorneys attempted to undermine a child victim’s credibility was by questioning the child’s demeanor on the stand. In *State v Akinshemoyin* (2012), the defendant was charged with 1st degree sexual assault of a person under the age of thirteen. The victim in this case was the 3-year-old niece of the defendant’s girlfriend. Due to her age, the judge allowed the victim to sit on his lap during her testimony. However, the victim was unable to testify because she was too scared to answer questions concerning her abuse. After she began to cry, she was excused from testifying further. During cross-examination, defense counsel questioned the victim’s demeanor on the stand to damage her credibility. The defense attorney questioned how a victim could maintain a “happy-go-lucky” disposition during the forensic interview and then break down while providing her testimony. Defense counsel suggested that the victim did not cry because of the thought of the abuse but rather due to the fact she was unable to answer the prosecution’s questions. However, child sexual assault victims do not have a uniform way of behaving; all victims react differently (Connell and Kuehnle 2009: 509). At the same time, Allison and Wrightsman (1993: 183) show that jurors use victims’ behavior during testimony is used to assess their credibility.

In addition, defense counsels appeared to use the victims’ ages to indicate they could not have possibly known about things involving sexual abuse. In *State v Akinshemoyin* (2012), for

example, the defense attorney indicated that the 3-year-old victim in the case could not be trusted because children that young do not have knowledge of sexual intercourse or sex organs.

Therefore, defense counsel suggested the victim's mother and a social worker helped her to fabricate the sexual assault allegations. Similarly, in *State v Jackson* (2012), defense counsel attempted to argue that the 10-year-old victim knew how to fabricate allegations of sexual abuse because she viewed pornographic images. Furthermore, they suggested that her bipolar mother, who wanted to hurt the defendant's father, manipulated the victim. These findings are not surprising considering defense both directly and indirectly propose the child victim is not telling the truth (Zajac and Cannan 2009: S37).

The Role of Corroborating Evidence

In an effort to prove the sexual assault did not take place, defense attorneys emphasize the lack of corroborating evidence during the investigation. This becomes problematic for prosecuting attorneys because the majority of sexual assaults do not include very little, if any corroborative evidence (Estrich 1987:21). Moreover, while some studies indicate forensic evidence has a big impact on the adjudication process, other studies have found that it has virtually no influence (Sommers and Baskin 2011: 316). In fact, only a few of the adult cases included any corroborating evidence at all. If present, evidence usually came in the form of wounds and bruises. For example, during the closing arguments the defense attorney in *State v Carpenter* (2013) showed an array of photos of the victim who testified to being brutally raped and beaten repeatedly by the defendant. As he pointed to the images, the defense attorney stated, "You can barely see bruises!" signifying that although the victim may have been injured, it was not substantial injury. However, bruises and other wounds are usually not found on victims of sexual assault (Taslitz 1999: 6). Sommers and Baskin (2011: 330) found that a victim of sexual

assault is more likely to be believed if serious injury is found because it supports her story. Thus, without the corroborative evidence to support her claim, the victim fails to appear as authentic.

Other cases emphasized the DNA, or lack thereof, found on the victim's body during the investigation. In *State v Martin* (2011), the defendant was charged with 2nd degree sexual assault with the use of force of a 42-year-old woman. The victim, who had been in a relationship with the defendant for three months, testified that he raped her on multiple occasions after spitting on her, beating her, and forcing her to drink his urine. In addition, the defendant made the victim view two videos of him engaging in sexual intercourse with two other women, one of which was their next-door neighbor. The victim did not report her abuse to law enforcement because, "[she] thought he was going to kill [her]." Although the victim's DNA was found on the defendant's penis, defense counsel pointed out that the defendant's DNA was not found on the victim's face, contesting the allegation that the defendant urinated on her. Furthermore, the defense attorney said the victim had no injuries on her hands to prove she had been beaten. The jury returned with a Not Guilty verdict on 2nd degree sexual assault. In a similar case, *State v Bell* (2013), the leading detective did not take the 62-year-old victim to the sexual assault treatment center to be examined for injuries related to sexual assault. Therefore, the defense effectively argued that those injuries did not exist. The jury also reached a Not Guilty verdict in regards to the 2nd degree sexual assault with the use of force. However, if forensic evidence had been found, most of the adult victims in the study were dating or in a relationship with the defendant; therefore, DNA – in and of itself – may have done very little to improve the prosecution's case. In cases of acquaintance rape, the value of DNA evidence depreciates (Sommers and Baskin 2011: 331).

For prosecutors, child sexual abuse cases are also difficult to prosecute due to the lack of physical evidence and/or visible injury (Faller and Staller 2010: 3). Consequently, child victims

face a huge “narrative burden” because CSA cases often lack physical evidence and/or witnesses (Faller and Staller 2010: 168). Even though a few of the child cases included forensic evidence, it was often quite difficult for prosecutors to prove that evidence indicated a sexual assault. For instance, in *State v Lewis* (2012), the SANE who examined the 6-year-old victim testified that there was redness to the young girl’s hymen. However, when questioned by the defense attorney, the SANE admitted that redness to the hymen could have been caused by poor hygiene, bubble baths, or wiping too much. In his closing arguments, the defense attorney proposed the redness came from wiping too much. He pointed out that the victim constantly wiped her nose during the forensic interview – using approximately four or five pieces of tissue – so, the victim probably wiped in the same way she would blow her nose. In *State v Akinshemoyin* (2012), defense counsel made similar arguments in order to account for the forensic evidence that was found. Investigators noted redness to the victim’s genitals but the defense attorney reiterated the SANE’s testimony during closing arguments, saying that the redness may have come from common body products like detergent and soap. Furthermore, while investigators discovered DNA on the victim’s vagina, the DNA sample was so small they were unable to conclude the DNA belonged to the defendant. Consequently, the jury reached a Not Guilty verdict in this case.

In other cases, there was no corroborating evidence, which made it even harder for the prosecution to prove their case. The defense argued that the DNA probably came from another person the victim saw earlier in the week. In *State v Johnson* (2013), the defense attorney described the case as a “he said, she said” case because there was no DNA present and the medical reports showed no injuries caused by sexual assault. In these types of cases, physical and medical evidence is important because it has proven to be one of the most essential factors in jurors finding a defendant culpable (Wiley 2009: 279). Furthermore, jurors expect most child

sexual assault cases to have some forensic evidence, yet this assumption is simply incorrect (Connell and Kuehnle 2009: 509).

The Rebellious Kid Narrative

While defense attorneys in adult cases created narratives that focused on aspects of the victim's lifestyle (i.e. shared sexual history, drugs, alcohol, etc.), defense attorneys in child cases emphasized the child's lack of moral character by portraying them as "rebellious." The "rebellious" child victim fabricates allegations of sexual abuse for personal gain. By deeming the victim as "rebellious", the defense attorney seeks to establish a lack of credibility – and in some cases, consent – in the jurors' minds. In *State v. Wilkins* (2013), the defense attorney continuously questioned the 16-year-old victim concerning her parents' household rules. The defense attempted to show that the victim contrived the false allegations because she was upset with her parents for not providing her with her own room. In order to do so, the defense told the victim, "[You were] angry at mom and dad for that, weren't you?" Even though the victim responded "no," the defense continued to suggest she lied about the sexual abuse to rebel against her parents. Once again the defense attorney asked, "[Were you] angry your mom was putting rules on you?" The defense attorney even suggested that the victim was infatuated with his client because her family would tease her about having a crush on the defendant.

During *State v Petri* (2013), the defendant plead guilty to partaking in sex with the victim who was 16-years-old at the time of the incident. According to the prosecuting attorney the victim claimed the sexual intercourse was non-consensual, even though the victim's boyfriend and the defendant believed the incident to be consensual. The defense outlined the victim's past by saying this was not the first time she had accused someone of sexual assault. Defense counsel also told the court the victim is a troubled girl who continues to make bad decisions. For

example, she ran away from home with her boyfriend the night before the incident. Throughout the sentencing hearing, the defense attorney reiterated, “The victim has been acting out sexually.” He also mentioned that as a teenage girl, she went to the bridge where the defendant lived to have sex with him. Before concluding, defense counsel emphasizes that he is not trying to blame the victim. In this case, the defense attorney not only attempts to establish consent but also to undermine the victim’s credibility because of her “rebellious” actions.

In *State v Garcia Reyes* (2012), the defendant was charged with five counts of 1st degree sexual assault of a child and two counts of repeated sexual assault of the same child. Although she later recanted her statement on the witness stand, the 14-year-old victim initially provided police with seven detailed accounts of sexual activity with the defendant, her mother’s boyfriend at the time of the assault. Although the victim had to wear uniforms to school, there were days when she was permitted to wear jeans. During cross-examination, the defense attorney asked the victim if the defendant prohibited her from wearing jeans to school. The victim indicated that was the truth. In addition, the defense attorney questioned the victim if it were true that she wanted the defendant out of her home for a few years so that he would not disturb her social life. Furthermore, he emphasized that the victim told the detective her mother’s boyfriend was a nice person but he was very strict with her. The victim indicated that was true. Therefore, by making it appear as though the victims wanted to rebel against their guardians, defense attorneys create reason for the victim to lie about the sexual assault in the minds of the jurors.

It is important to note that this narrative was not limited to teenagers, but young children as well. In *State v Feltz* (2013) the defense attorney referred to the victim, who was 6-years-old at the time of the abuse, as a “precocious child” because she entered the defendant’s residence without an invitation on two separate occasions. In another case, *State v Lewis* (2012), the

defense attorney attempted to use the words of the victim's mother to propose the victim was lying. For example, during closing arguments defense counsel reiterated that the victim's mother did not believe her allegations of sexual abuse. He quoted the victim's mother, saying, "[The victim] is a smart girl who tries to fit in," suggesting that the victim fabricated the abuse in order to be "cool." Defense counsel in *State v Akinshemoyin* (2012) implied a similar reason for the victim to lie about being sexually abused. According to the defense attorney, "[the victim] was naughty that day."

Discussion

The aim of this study is to investigate how defense attorneys produce different narratives based on common rape myths involving consent, credibility, corroborating evidence to blame adult and child victims of sexual assault. While several studies have examined themes essential to blaming adult victims of sexual assault, very few have addressed if and how these same themes are applied in child sexual assault cases and how they differ from adults. Furthermore, other studies do not discuss other narratives, such as the "rebellious kid," that may pertain solely to child victims and not to adult victims. In addition, this study utilizes cases from sentencing hearings as well as jury trials. Since the number of cases and time period for data collection were limited, more cases will be needed to build upon the existing results.

A few points were revealed that described some of the differences between victim blaming amongst adult victims and victim blaming amongst child victims. Even though defense attorneys for both adult and child cases emphasized how the victims wanted the sexual contact because they did not resist, for child cases of sexual assault this argument is irrelevant because they are not allowed to consent by law. Regardless, defense attorneys did not refrain from arguing such points. More differences may be seen in narratives surrounding credibility. While

drugs, alcohol, and prior criminal records were utilized in damaging the victim's credibility, the focus for child victims relied on her memory, delayed disclosure, and young age. Defense attorneys for both types of cases reiterated the lack of corroborative evidence – in particular forensic evidence, to indicate the sexual assault was consensual or never occurred. However, the lack of corroborating evidence in child cases appeared to be more crucial in determining the defendant's culpability because, unlike adult cases, DNA cannot be explained by a consensual encounter. For example, in adult sexual assault cases forensic evidence may explain penetration but cannot necessarily prove non-consensual penetration (Estrich 1987: 21). Lastly, the rebellious narrative shows how the above themes all function to create a narrative that solely blames child victims.

Since every adult is a potential jury member, it is vital they become aware of the rape mythologies that continue to harm society and the court system. The criminal justice system should serve as a protector of the sexual assault victims of all ages, not as a system formed to reiterate traditional gender roles and male domination. If the system continues to place blame on victims, they may lose the desire to report their attack and seek justice (Bartollas and Wormer 2011: 215). As Konradi (2007: 1) explains, sexual assault victims should report their attacks in order to “activate the justice process to protect others from harm” and to punish offenders in the hopes of deterring potential assailants from committing sexual assaults. However, as the Defensive Attribution Theory suggest, society looks to an individual's behavior to assess whether to believe an alleged victim. Therefore, if society has certain expectations of an alleged victim and the woman or child does not meet their standards, they will be less likely to perceive that person as a victim of sexual assault (Grubb and Harrower 2009: 65). Thus, I hope to change the conversation of sexual assaults. Instead of focusing on the rape myths and stereotypes

centered around the victim's behavior before, during, and after the assault as well as her lifestyle, the legal system should work to discredit the perpetrator and his actions during the attack. By changing the conversation, female victims – young and old – obtain a voice in sexual adjudication process.

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