

# CHAPTER 10

## LGBTQ Minorities and Sexual Offenses

By

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### I. Introduction

#### A. Topics Covered

1. Evidence that sexual minorities are frequently targeted for sexual offenses compared to heterosexuals.
2. Theories explaining high sexual offense victimization rate of the LGBTQ<sup>1</sup> population.
3. Gender and sexuality-related myths relevant to sexual offenses against sexual minorities.
4. Suggestions for how judges can help increase sensitivity toward and improve outcomes for LGBTQ sexual offense survivors within their courtrooms.
5. LGBTQ-friendly community resources in Washington for sexual offense survivors and references for judges.

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<sup>1</sup> References throughout this chapter refer to “LGBTQ” people, the letters of which refer to *lesbian* (meaning female persons primarily attracted to females), *gay* (meaning male persons primarily attracted to males), *bisexual* or *bi* (meaning persons attracted more or less equally to both males and females), *transgender* or *trans* (meaning persons whose gender assigned at birth is not the gender with which they identify) and *genderqueer*, or *questioning* (meaning persons who do not identify with or are exploring current sexual orientation or gender identity descriptions; those who do not identify with being solely male or solely female)

## B. Overview

[O]nce we started working into the case, and actually speaking to the people that were gay and finding out what their underlying fears were, well, then it sort of hit home. This is America. You don't have the right to feel that fear. And we're still going to have people who hold with the old ideals, and I was probably one of them fourteen months ago. I'm not gonna put up with it, and I'm not going to listen to it. And if they don't like my views on it, fine... I already lost a couple of buddies. I don't care. I feel more comfortable and I can sleep at night.

– Moisés Kaufman, *The Laramie Project*<sup>2</sup> (2001)

Why should judges be concerned about sexual offenses committed against the relatively small number of lesbian, gay, bisexual, transgender, and genderqueer or questioning (LGBTQ) people in the United States? One reason is that researchers have repeatedly found rates of lifetime sexual assault victimization to be higher among LGBTQ individuals than in the overall population. Several studies have found that LGBTQ individuals are overrepresented among sexual assault survivors,<sup>3</sup> although LGBTQ people make up a relatively small part of the overall population.<sup>4</sup> Additionally,

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<sup>2</sup>The Laramie Project, <http://www.laramieproject.org/> (last visited 3/31/13) (*The Laramie Project*, a play written by Moisés Kaufman and later adapted to film for HBO, focuses on the community of Laramie, Wyoming, following the brutal beating of a young man named Matthew Shepard. Shepard was targeted for his homosexuality and died in the hospital six days after his attack. *The Laramie Project* arose from interviews between members of the Tectonic Theater Project and more than 200 residents of Laramie, conducted five weeks after Shepard's death)

<sup>3</sup> Compare Emily Rothman, Deiner Exner & Allyson Baughman, "The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review," 12*Trauma, Violence, & Abuse* (2), 55-66 (Sage, 2011) (meta-analysis of all population-based studies estimating rates of sexual-assault prevalence between 1989 and 2009 suggests lifetime sexual assault rates of 20-30.4% for gay men and 15.6-55% for lesbians and a rate for all U.S. men of 2-3% ) (citation omitted) with Kathryn Moracco, Carol Runyan, J. Michael Bowling & Jo Anne Earp, "Women's Experiences with Violence: A National Study," 17*Women's Health Issues* (1), 3-12 (2007) (in a random sample of 1,800 adult U.S. women in households with a telephone, self-identified lesbian or bi women were 3.89 times as likely as other women to report sexual assault by a stranger, 4.19 times as likely to report sexual assault by a known person, and 9.12 times as likely to report sexual assault by a known person within the last year); and see Rebecca Stotzer, "Violence Against Transgender People: A Review of United States Data," 14*Aggression and Violent Behavior* (3), 170-79 (Elsevier, 2009) (in a meta-analysis of all known self-report surveys on transgender sexual assault, 10-86% of transgender respondents reported sexual assault motivated by transgender identity; in meta-analysis of needs assessment and academic surveys, 14-66% of transgender subjects had been sexually assaulted; the article notes, at 171, that "the most common finding across surveys and needs assessments is that about 50% of transgendered persons report unwanted sexual activity")

<sup>4</sup> See Patricia Tjaden, Nancy Thoennes & Christine Allison, "Comparing Violence over the Life Span in Samples of Same-Sex and Opposite-Sex Cohabitants," 14*Violence and Victims* (4), 413-25 (Springer, 1999) (review of literature suggests "between 4.1% and 10% of men and 2.6% and 4.1% of women have had at least one same-sex sexual experience in their lifetime;" sample of 8,000 U.S. men and 8,000 U.S. women selected via random-digit dialing)

the LGBTQ population can face prejudice or hostility as a result of unexamined stereotypes—a phenomenon particularly dangerous in the context of legal proceedings relating to sexual offenses. While many questions about sexual orientation or gender identity and sexual offenses remain unanswered, this chapter explains that judges may contribute to a more balanced and sensitive legal process in all sexual offense cases by examining commonly held stereotypes about sexual offenses and sexual minorities.

In keeping with Washington law, this chapter focuses on the social context of sexual offenses against sexual minorities, rather than considering whether unique legal doctrines might apply to sexual offense cases involving the LGBTQ population. In Washington, key components of sex offenses—sexual intercourse and sexual contact—are defined in a gender neutral manner. Washington’s statutes incorporate an expansive definition of sexual intercourse, including not only vaginal sexual intercourse but also “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another *whether such persons are of the same or opposite sex*”<sup>5</sup> (*emphasis added*). Sexual contact is also defined without reference to gender as “any touching of the sexual or other intimate parts of a *person* done for the purpose of gratifying sexual desire of *either party or a third party*”<sup>6</sup> (*emphasis added*). Although traditional sexual offense statutes can raise nuanced doctrinal questions about how such laws apply to same-sex or transgender victims, such questions are not considered in this chapter due to Washington’s gender-neutral statutes.

Additionally, this chapter will look to the relationship between victims’ sexual orientation or gender identity and the risks associated with sexual offense victimization in order to explore how victim identity is relevant to sexual offenses. LGBTQ sexual offense survivors face unique challenges as they navigate the legal system and seek to live offense-free, healthy lives. As sexual minorities, LGBTQ survivors can be misunderstood or humiliated by the authorities as a result of stereotypes when they seek to report sexual offenses. Victims may also face discriminatory assumptions relating to sexual offenses while their reports are investigated and litigated. Survivors can face prejudicial attitudes of homophobia and transphobia on the part of government and other service-providing organizations, as well as psychological or medical difficulties responding to their own traumatic experiences. The relative social isolation of some LGBTQ individuals, which may raise the risk of victimization in the first place, can

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of residential telephone numbers revealed .8% of men and 1% of women had cohabited with a same-sex partner “as a couple” at some point in their lifetime); Gary J. Gates and Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT: Inaugural Gallup findings based on more than 120,000 interviews* (Oct. 18, 2012),

<http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx> (citing that 3.4% of the U.S. population identifies as LGBT; women are 0.3% more likely to report as LGBT than men, and 53% of the LGBT population consists of women; younger Americans are more likely to report as LGBT than those older, with 6.4% of the 18-29 year old population identifying, as opposed to 3.2% of the 30-49 year old population, 2.6% of the 50-69 population, and 1.9% of the 65+ population)

<sup>5</sup> RCW 9A.44.010(1)(c) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.010>

<sup>6</sup> RCW 9A.44.010(2)

create additional challenges following victimization.<sup>7</sup> Isolated LGBTQ survivors may not know what resources are available to them or may be averse to contacting public agencies or service providers for assistance, given their perception that society considers them less worthy of compassion or respect because they are lesbian, gay, bisexual, transgender, genderqueer or questioning.

This chapter seeks to build upon existing sexual offense resources available in Washington by examining problems in the legal response to sexual offenses against LGBTQ people with an eye toward relevant issues identified in scholarly research and commentary on the topic. Judges are uniquely positioned to improve society's response to sexual offenses against LGBTQ people by familiarizing themselves with common gender and sexuality-related sexual offense myths that may arise in legal proceedings. Judges who address these issues model behavior which may in turn influence attorneys and public servants who handle sexual offense investigations and litigation.

Section II of this chapter reviews research suggesting LGBTQ individuals experience high rates of childhood sexual abuse, adult sexual offenses, and, to some extent, intimate partner sexual offenses relative to the overall population. Section III describes a number of common gender and sexuality-related myths which may arise in proceedings surrounding sexual offenses against LGBTQ victims. Section IV discusses how, in light of these myths, judges should view their role as working to educate and dispel common gender-based assumptions in working alongside court staff, attorneys, and jurors. Judges should also maintain a critical perspective throughout the trial to improve the investigation and litigation of sexual assault cases involving LGBTQ victims or survivors. Finally, Section V's conclusion seeks to briefly summarize the contents of this chapter. It is followed by Appendix A, which provides a list of community resources that may be helpful to professionals working with LGBTQ sexual assault survivors, and by Appendix B, which provides a list of reference materials.

## **II. Contextualizing the Problem: What Does Research Reveal About Sexual Offenses Against LGBTQ People?**

Medical and social science research suggests that LGBTQ people experience high rates of sexual offenses relative to the overall population. Studies have repeatedly suggested that, over their lifespan, LGBTQ people are more likely to experience sexual offense victimization than are heterosexual people.<sup>8</sup> Moreover, researchers have observed

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<sup>7</sup> See Lisa Waldner-Haugrud & Linda Vanden Gratch, "Sexual Coercion in Gay/Lesbian Relationships: Descriptives and Gender Differences," 12 *Violence and Victims* (1), 87-98 (Springer, 1997) (citing both gay men and lesbians as examples of "a community limited in visibility and relationship resources")

<sup>8</sup> See, e.g., Rothman, Exner & Baughman, "The Prevalence of Sexual Assault Against People..." supra at 59-60, (concluding that "currently available literature suggests that *GLB people are likely at elevated risk for lifetime sexual violence victimization.*") (emphasis added); Sari Gold, Benjamin Dickstein, Brian Marx & Jennifer Lexington, "Psychological Outcomes Among Lesbian Sexual Assault Survivors: An Examination of the Roles of Internalized Homophobia and Experiential Avoidance,"

evidence of pronounced rates of sexual offense victimization of LGBTQ people both during childhood and adolescence<sup>9</sup> and during adulthood.<sup>10</sup> The high number of sexual assaults against LGBTQ youth may be a sign that sexually or gender-nonconforming children and adolescents are targets for violence, including violence perpetrated by family members and close friends, even before recognizing or “coming out” to others about their own LGBTQ status.<sup>11</sup> While previous research suggested a disparity between

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33*Psychol. of Women Q.* (1), 54-66 (2009) (studies suggest 18% to 22% of lesbians report childhood sexual assault [CSA] and 21% to 40% report adult sexual assault [ASA]; 11% to 32% of heterosexual women self-report CSA, and 12% to 22% report ASA) (citations omitted); Sari Gold, Brian Marx & Jennifer Lexington, “Gay Male Sexual Assault Survivors: The Relations Among Internalized Homophobia, Experiential Avoidance, and Psychological Symptom Severity,” 45 *Behaviour Research and Therapy* (3), 549-62 (2007) (noting studies “have suggested that at least 30% of gay men experience childhood, adolescent, and/or adult sexual assault,” which rate of prevalence is “somewhat comparable to [that] of heterosexual women, [whose own] rates range from 14% to 59%”) (citations omitted); Elizabeth Saewyc, Carol Skay, Sandra Pettingell, Elizabeth Reis, Linda Bearinger, Michael Resnick, Aileen Murphy & Leigh Combs, “Hazards of Stigma: The Sexual and Physical Abuse of Gay, Lesbian, and Bisexual Adolescents in the United States and Canada,” 85 *Child Welfare* (2), 195-213 (2006) (among studies specifically measuring bisexual survivor prevalence rates, “bisexual adolescents or those with both gender attractions appeared to be at higher risk for victimization ... than gay and lesbian peers.”) (emphasis added) (citations omitted); Stotzer, “Violence Against Transgender People...” supra at 178, (“What is beginning to emerge from [existing] sources of data [is] the increased risks of [a] variety of types of violence, ... in particular sexual violence, faced by transgender people. This risk starts early in life and continues throughout the lifetime.”)

<sup>9</sup> Saewyc, Skay, Pettingell, Ries, Bearinger, Resnick, Murphy & Combs, “Hazards of Stigma...” supra at 203, (in surveys asking U.S. and Canadian teenaged subjects to self-report sexual abuse and either a predominantly gay, lesbian, or bisexual orientation, “lesbian or bisexual girls self-reported the highest prevalence of sexual abuse [of all girls], with 1 in 4 to nearly half reporting a history of sexual abuse,” while rates for predominantly heterosexual girls “ranged from just under 10% to just over 25%,” “[f]or most surveys, more than 1 in 4 bisexual boys and 1 in 5 gay boys reported sexual abuse,” while rates for predominantly heterosexual boys were “well under 10%.”); see Shannon Wyss, “‘This was my hell’: the violence experienced by gender non-conforming youth in US high schools,” 17 *International Journal of Qualitative Studies in Education* (5), 709-30 (2004) (in qualitative study including mostly white, transgender subjects recruited through internet in U.S., six of 27 subjects “reported surviving sexual assault or rape in high school”)

<sup>10</sup> Gold, Marx & Lexington, “Gay Male Sexual Assault Survivors...” supra, (studies suggest 21-40% of U.S. lesbians report ASA histories, compared with 12-22% of heterosexual women) (citations omitted); compare Rothman, Exner & Baughman, “The Prevalence of Sexual Assault Against People...” supra at 62, (analysis of all population-based U.S. studies on sexual assault prevalence from 1989 to 2009 suggests 22.2-47.1% of lesbian and bisexual women report ASA) with id. at 55 (11-17% of U.S. women overall experience LSA) (citations omitted); (10.8-15% of gay/bi men report ASA) (2-3% of all U.S. men report LSA) (citations omitted); see Stotzer, “Violence Against Transgender People...” supra at 173 (14-66% of trans people have experienced sexual assault according to needs assessment and academic surveys)

<sup>11</sup> See Saewyc, Pettingell, Ries, Bearinger, Resnick, Murphy & Combs, “Hazards of Stigma...” supra at 198-199, “[S]tigma from gender atypicality or some as-yet unmeasured trait of emerging gay or bisexual orientation may decrease family protection and support for LGB teenagers even before they recognize and self-identify and, thus, may help explain higher risk for maltreatment during childhood and adolescence.”) (citation omitted) (emphasis added); see also id. at 208 (noting that, while many surveys fail to “disentangle the complexity of timing and determine causality, such as a teen being abused because of her lesbian or bisexual status.... [s]exual and physical abuse ... clearly are not the cause of

rates of sexual violence in gay or lesbian versus heterosexual intimate partner relationships,<sup>12</sup> more recent studies have shown that incidents of violence occur as frequently in LGBTQ intimate partner relationships, with relatively equal rates of self-reported violence in gay versus lesbian relationships.<sup>13</sup> Although studies have suggested varying rates of sexual offense prevalence, and the evidence is not yet statistically robust enough to be conclusive regarding the exact rates (particularly those for transgender people),<sup>14</sup> repeated findings of heightened sexual violence at least suggest that sexual orientation and gender identity are highly relevant when considering individuals' risk of sexual assault.<sup>15</sup> As with sexual offenses in general, evidence surrounding sexual offenses against sexual minorities suggests sexual offenses across the board are primarily committed by men.<sup>16</sup>

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developing a gay, lesbian, or bisexual orientation... [T]he majority of adolescents who identify as gay, lesbian, or bisexual do not report any abuse, and the overwhelming majority of adolescents who report sexual or physical abuse identify as heterosexual.”)

<sup>12</sup> See Waldner-Haugrud & Gratch, “Sexual Coercion in Gay/Lesbian Relationships...” supra at 88, (existing research in 1997 suggested that “gays and lesbians have higher rates of sexual coercion than what is experienced by their heterosexual counterparts.”); Tjaden, Thoennes & Allison, “Comparing Violence over the Life Span...” supra at 421 (study using population-based sample found “same-sex cohabitants reported significantly more intimate partner violence [although at the hands of both same-sex and opposite-sex current or former partners] than did opposite-sex cohabitants; for example, 23.1% of same-sex cohabiting men said they were raped and/or physically assaulted by a spouse or cohabiting partner at some time in their lives, compared with 7.7% of opposite-sex cohabiting men, and 39.2% of same-sex cohabiting women said they experienced such violence, compared with 20.3% of opposite-sex cohabiting women”); id. at 413 (“The study ... confirms previous reports that intimate partner violence is more prevalent among gay male couples than heterosexual couples.”); but see id. at 421 (11.4% of women cohabiting with female partners reported sexual and/or physical assault by a female intimate partner at any point in their lives, while 20.3% of opposite-sex cohabiting women reported such violence by a male intimate partner); Waldner-Haugrud & Gratch, “Sexual Coercion in Gay/Lesbian Relationships...” supra at 87, (“[T]he results of this study suggest lesbians are not more likely than gay men to be classified as victims of sexual coercion.”)

<sup>13</sup> Joanna Bunker Rorhbaugh, “Domestic Violence in Same-Gender Relationships,” 44 *Fam. Ct. Rev.* 287, 287-88, 290, 297 (April 2006); see id. at 295 (where characteristics of “severe abusers in same-gender relationships are like the severe abusers in cross-gender relationships in that they often have severe mental illnesses or were themselves abused as children”); but see id. at 293 (“types of abuse in same-gender relationships are the same as for cross-gender relationships, except for... threat of ‘outing,’ or exposing partner’s sexual orientation... [and] extreme isolation due to being ‘in the closet,’ lack of civil rights protections, and lack of access to the legal system”)

<sup>14</sup> See Stotzer, “Violence Against Transgender People...” supra at 171, (noting common use of convenience sampling and snowball selection procedures in transgender subject research)

<sup>15</sup> See Moracco, Runyan, Bowling & Earp, “Women’s Experiences with Violence...” supra at 10, (in national population-based sample of 1,800 female U.S. telephone users, lesbian or bisexual orientation correlated more closely with sexual assault by a known perpetrator than did young age, nonwhite race, residence in a “city,” receiving public assistance, or educational attainment of less than high school diploma/GED)

<sup>16</sup> Tjaden, Thoennes & Allison, “Comparing Violence over the Life Span...” supra at 419-420, (“The study also found that the vast majority of rape victims—regardless of gender or cohabitation history—were raped by men.”); Waldner-Haugrud, & Gratch, “Sexual Coercion in Gay/Lesbian Relationships...” supra at 89, (review of literature suggests “lesbians often are the victims of rape or attempted rape by male dates”) (citation omitted); Leslie Moran & Andrew Sharpe, “Policing the Transgender/Violence Relation”, 13 *Current Issues in Criminal*

While quantitative studies serve to provide a sense of the number of LGBTQ people who experience sexual offenses, these studies face common limitations. Studies of sexual offenses against sexual minorities may tempt readers to draw misguided conclusions. This is particularly due to the tendency of such studies to categorize people exclusively by sexual orientation or gender identity rather than provide readers with a more robust understanding of LGBTQ victims and their abusers. Observations of starkly contrasting sexual assault victimization rates in the LGBTQ population as compared with the heterosexual population, or the overall U.S. population, may actually obscure more subtle correlations (for example, between sexual assault victimhood and socioeconomic status). Although some researchers confront this problem by testing for correlations between various aspects of survivors' identities and sexual offense histories,<sup>17</sup> lurking variables can at times be overlooked in overbroad conclusions about subjects defined by sexual orientation or gender identity categories.

At its most extreme, hyper-focusing on sexual minority status as the sole variable of interest can lead to fallacious reasoning that, due to the strong correlation between membership in a sexual minority group and a history of sexual offenses, being LGBTQ "causes" sexual offenses. But the evidence of such a correlation does not explain what causes the higher rates of sexual offenses. Research using familiar sexual identity categories, when combined with stark statistical disparities, may also tempt readers to draw other simplistic conclusions (e.g. "all transgender people must be at a[n equally] high risk of sexual offenses"). Sexuality is likely one among many variables relevant to individuals' risk of lifetime sexual offense victimization.

Studies suggesting a high rate of sexual offenses among sexual minorities can also face methodological limitations relevant to understanding their conclusions.<sup>18</sup>

Three distinct themes emerge from existing research on sexual minorities and sexual offenses. One is a consistent picture of high rates of sexual violence against LGBTQ people. This violence may be considered especially noteworthy because it appears to be yet higher than the level of sexual violence occurring in comparison populations—for example, the U.S. population overall—and because some evidence suggests LGBTQ

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*Justice* (3), 269-85 (2002) (in the U.S. GenderPAC survey, 68% of reported incidents of violence against transgender people in the U.S. were committed by white people and 84.1% were committed by men) (citation omitted)

<sup>17</sup> See footnote 13, *supra*

<sup>18</sup> For example, it is difficult to tell how reliable self-reporting of sexual assault history is as a method for measuring prevalence, as subjects may not draw a connection between their own experiences and the definition of "sexual assault" that researchers have in mind. Additionally, the relevant experience of victimization may take place decades before research begins, which may affect reporting accuracy. Furthermore, researchers often face an uphill battle in recruiting LGBT, and especially transgender, subjects for studies. As a result, researchers sometimes resort to convenience samples based upon word-of-mouth recruitment starting from a community center or other obvious gathering place. Due to the nonrandom selection procedure, these methods may provide skewed samples from which to draw any inferences regarding the larger LGBT population. Population-based samples, which can support valid statistical inferences, have been used in a number of sexual assault studies cited in this chapter.

identity correlates more closely than other possible risk factors with reports of sexual offense history.<sup>19</sup>

A second key theme is that the high rate of sexual offense victimization among sexual minorities is not attributable to a single source of abuse—for example, most lesbian and gay survivors’ experiences of sexual offenses do not take place at the hands of same-sex intimate partners.<sup>20</sup> Rather, the high rate of lifetime sexual offenses is a product of a range of forms of sexual offenses, including sexual abuse in childhood and adolescence, sexual offenses as an adult, in intimate partner relationships, and by family members, acquaintances, and strangers.

A third key theme is explored below: LGBTQ sexual offense victims often face responses that treat their victimization as more trivial than that of heterosexual victims.

### **III. Myths and Realities Surrounding Sexual Offenses Against LGBTQ People**

A set of commonly encountered myths compounds the problems facing LGBTQ sexual offense survivors. Some of these myths arise from common, gender related stereotypes about male and female roles relating to sexual offenses. Other myths are more closely related to widely held stereotypes that can deprive LGBTQ people of compassion or respect as a result of their sexual orientation or gender identity. Some notable myths relating to sexual offenses against sexual minorities are considered briefly below in the context of observations from relevant research on sexual offenses. These myths are worth exploring because, as the quotations below indicate, survivors themselves, law enforcement, and perpetrators—indeed, just about anyone—may have similar thoughts at times without pausing to consider their deeper implications.

#### **A. How Gender-Related Stereotypes Trivialize LGBTQ Sexual Assault Victims**

Gender-related stereotypes about the dynamics of sexual offenses are particularly harmful to sexual minority victims, although these assumptions can also have detrimental effects in sexual offense proceedings in general. One set of myths arises from the belief that men are generally in a better position than women to protect themselves from sexual offenses.

Transgender male and female experiences raise major questions about this commonly held notion. In one study of the relationship between transgender people in Sydney, Australia, and the local police, Kirk, a female-to-male transgender focus group subject, described his house being vandalized, with words like “fag” spray-painted across its front. When Kirk went to the authorities to address his fear of a physical or sexual assault

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<sup>19</sup> See footnote 13, *supra*

<sup>20</sup> Tjaden, Thoennes & Allison, “Comparing Violence over the Life Span...”*supra* at 421; see footnote 11, *supra*

subsequent to the vandalism, “they said to me, ‘but you’re a bloke. What would you be scared for?’”<sup>21</sup> Transgender survivors’ perceptions that police are unfamiliar with and unsympathetic to transgender people may discourage survivors from reporting sexual offenses or cooperating in investigations and the legal process. As Steven, a focus group member in the Sydney study, said, “there’s no way I would walk into that [police] station and say I’ve been raped as a man, as a transgender man’.” He continued:

Number one, why should I have to walk in there and educate them? I’ve just been raped or bashed or stabbed. Why should I have to as a trans man walk in there and ... educate the policeman or ... the police woman that I am transgender when I’m suffering all these ... other pains? ....[B]eing transgender and walking in there with a beard ... they’d just think I was a freak. I mean, look at this guy he’s got a vagina you know.... [I]t’s none of their ... business whether I’ve got a vagina or a penis anyway.<sup>22</sup>

As the above quotes suggest, trans-men’s ability to “pass,” or present to others as a man, may actually render their transgender status invisible. Appearing male may force some victims to come out as trans in order to be taken seriously when describing sexual offense experiences or fears. For these transgender survivors, gendered stereotypes and assumptions relating to sexual assault may translate into an offensive fixation on the survivors’ anatomy which distracts from the complainant’s assault. For other transgender survivors, the fear of negative responses to the victim’s transgender status may deter the victim from reporting an assault.

Such gendered assumptions relating to sexual offenses cut against transwomen as well, although perhaps in different ways than how such expectations affect transmen. As one outreach worker in the Sydney study opined, “many transgender women ‘... approach the world with the same sense of safety that the average man would.’”<sup>23</sup> The heightened sense of security in public which certain transwomen instinctively feel based upon their socialization as males “may make M to F trans people particularly vulnerable to violence as they transgress gendered expectations of spatially specific behaviour.”<sup>24</sup> And, in contrast to transmen, transwomen are at a higher risk of encountering unsympathetic reactions to sexual assault complaints or fears to the extent that they *do not* “pass,” or present as females.

Transgender people are not, of course, the only ones affected by gendered stereotypes relating to sexual offenses. Gay and lesbian sexual offense survivors may have their experiences trivialized or overlooked by many professionals, who are accustomed to

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<sup>21</sup> Leslie Moran & Andrew Sharpe, “Violence, identity and policing: The case of violence against transgender people,” 4 *Criminology & Criminal Justice* (4), 395-417 (2004)

<sup>22</sup> Moran & Sharpe, “Violence, identity and policing...” supra

<sup>23</sup> Moran & Sharpe, “Violence, identity and policing...” supra at 408

<sup>24</sup> Id.

seeing gendered patterns of abuse among heterosexual couples and may assume that sexual offenses are always crimes committed by males against females.<sup>25</sup>

In the absence of the familiar relationship between a controlling male partner and a controlled female partner, professionals working in the field of domestic violence and sexual assault may fail to recognize cues of abusive behavior or adequately address abusive situations. One study found that crisis-line workers “tended to rate same-sex [domestic violence] abuse as less serious, less likely to recur, and less likely to get worse over time than opposite-sex abuse. They also believed that it was easier for victims in same-sex relationships to leave their partners.”<sup>26</sup> Corollary to the observation above is that law enforcement have been considered less likely to intervene in same-sex abusive relationships. Furthermore, largely “heterosexist beliefs” held by many mental health service providers can impact the assistance same-sex sexual abuse victims receive.<sup>27</sup> Even where the authorities do not themselves hold such beliefs, sexual minority victims’ fears of an unsympathetic or uncomfortable response to the victim’s LGBTQ status can deter sexual offense reporting.<sup>28</sup>

## B. How Widely Held Myths May Deprive LGBTQ People of Compassion and Respect

Two distinct myths regarding sexuality markedly affect the LGBTQ community: first, the myth that rape can “correct” sexually nonconforming people by causing them to change their behavior and become heterosexual; and second, the belief that sexual minorities either deserve victimization or bring assaults upon themselves. As one female-to-male transgender focus group member in the Sydney study related, “I got raped at 18 because they wanted to send me straight. I went to the police and the police said to me, ‘he who lays with dogs should expect to get fleas’, that’s what I got.”<sup>29</sup> This comment speaks directly to the “desire to correct” and “deserved victimization” attitudes.

The first of these myths is “corrective rape,” which takes place when a perpetrator selects and sexually assaults a victim out of the belief that doing so will either “cure” the victim of LGBTQ status, or discourage the victim from acting on same-sex attractions or expressing their gender in nonconforming ways. Corrective rape against LGBTQ people,

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<sup>25</sup> Mika Albright & DeAnn Alcantara-Thompson, “Contextualizing Domestic Violence from an LGBTQ Perspective,” Northwest Network of Bisexual, Trans, Lesbian and Gay Survivors of Abuse (retrieved on 11/29/2012 from <http://nwnetwork.org/wp-content/uploads/2011/06/2011-Intersections-in-Practice-Article.pdf>); (Sexual violence among heterosexual couples often takes place against the background of a dynamic of domestic violence in which, approximately 90% of the time, a male partner seeks to assert power and control over a female partner.)

<sup>26</sup> Michael Brown & Jennifer Groscup, Perceptions of Same-Sex Domestic Violence Among Crisis Center Staff,” 24 *Journal of Family Violence* (2), 87-93 (2009)

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Moran & Sharpe, “Violence, identity and policing...”, supra

and women in particular, has been observed internationally as rates of those identifying as LGBTQ have risen.<sup>30</sup>

The second myth is that of “blaming the victim”, a fallacy recognized in many sexual offense contexts.<sup>31</sup> Blaming the victim takes place when a victim’s conduct or lack of precautions is cited in order to explain his or her victimization. In the context of LGBTQ sexual offenses, victim blaming is used to justify or to dismiss reports of abuse. This myth is reflected in the following three examples: First, some perpetrators may rationalize their own sexual offenses as what the victims “deserve,” which ties back in with the other myth of “corrective” rape.<sup>32</sup> Second, some teachers hearing reports of sexual offenses from LGBTQ students may choose not to respond, due to a belief that “queer teens bring this harassment on themselves.”<sup>33</sup> Third, police officers may fail to investigate violence against transgender people who deal drugs or engage in other criminalized conduct (e.g. sex workers) because the complainant’s criminal conduct is assumed to explain (and perhaps justify) the assault.<sup>34</sup>

Sexual offenses can also take place in the context of a more pervasive experience of homophobic or transphobic harassment. For instance, “out” gender-nonconforming high school students may receive frequent and invasive sexual touching and comments from other students at school, with their sexuality cited as an “excuse” for provoking such behavior.<sup>35</sup>

Victim-blaming is not solely the work of non-victims. After being sexually assaulted in high school, one survivor describes feeling

like i (sic) deserved all of it because i wasn’t normal, like i was sick, bad, wrong, diseased ... and also, ... it made me feel like i was somehow a perpetrator—because i knew that the nature of what was ‘wrong’ with me was sexual/about my sex, i felt like i was criminal in some way, or i was perpetrating unwholesomeness on all of the normal people around me, just by being there.<sup>36</sup>

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<sup>30</sup> See generally, “Violated Hopes: A nation confronts a tide of sexual violence,” *The New Yorker*, May 28, 2012 (describing corrective rape in South Africa)

<sup>31</sup> For a further discussion of blaming the victim, see Section V., Chapter 1: Understanding Sexual Violence, of this bench guide

<sup>32</sup> See footnote 27, supra

<sup>33</sup> Wyss, “This was my hell...” supra

<sup>34</sup> See Moran & Sharpe, “Violence, identity and policing...” supra (police end investigation of assault against transgender victim when they discover that victim deals drugs).

<sup>35</sup> See generally Wyss, “This was my hell...” supra

<sup>36</sup> Id.; see also Gold, Marx & Lexington, “Gay Male Sexual Assault Survivors...” supra at 559 ( mere awareness of myths relating to sexual assault can “cause individuals to react to their sexual assault histories with shame, self-blame, and guilt”)

As this quotation displays, survivors can experience profound feelings of guilt and shame surrounding not only their victimization, but also the sexual minority identity that they sense motivated their abuse.

Myths relating to sexual offenses can harm LGBTQ sexual offense survivors from the moment they choose to bring their complaints to the legal system. Although many who experience sexual offenses choose not to report them to the authorities, those who do report can face an insensitive or traumatically intrusive investigative and litigation process. A court process sensitive to gender and sexuality-related sexual offense myths will be of benefit to a significant number of survivors who struggle to overcome the rationalizations for their own abuse.

#### **IV. What Judges Can Do: Confronting Myths in the Courtroom and Beyond**

Under Washington law, the essential elements of sexual assault crimes are gender neutral, and there is little in the way of unique legal doctrine relating to sexual assault against sexual minorities in Washington.<sup>37</sup> Because of the legislature’s conscious decision to remain gender-neutral in its statutes, judges should employ the same best practices relevant in any sexual offense case: whether a victim or defendant is lesbian, gay, bisexual, transgender, or genderqueer does not require additional statutory guidance. This does not mean the court should not consider such cases carefully and with heightened sensitivity.

For many LGBTQ sex offense survivors, the prospect of revisiting experiences of victimization during the litigation process remains deeply traumatic. The act of reporting an offense may subject survivors to ridicule, or may force the survivor to confront hostile or stereotype-driven questions and assumptions during the investigation and/or litigation processes.

Through sensitive courtroom management, the judiciary can make significant contributions towards how sexual offenses against sexual minorities are investigated and, especially, how they are litigated. As one researcher has recently concluded, “[l]egal efforts . . . must be augmented with advocacy and interventions to increase respect for diversity and reduce community acceptance of violence toward those marginalized.”<sup>38</sup>

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<sup>37</sup> See RCW 9A.44.010(1)(c) (gender neutral definition of sexual intercourse) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.010>, RCW 9A.44.010(2) (gender neutral definition of sexual contact); for a unique analysis applying the gender-neutral sexual assault definitions, see generally *State v. A.M.*, 163 Wn. App. 414, 260 P.3d 229 (2011) (rejecting government’s argument that, since the labia are considered part of the vagina, the buttocks should be considered part of the anus under RCW 9A.44.010(1)(a), and holding that sexual penetration of the buttocks but not the anus does not constitute sexual intercourse under that section)

<sup>38</sup> Saewyc, Pettingell, Ries, Bearinger, Resnick, Murphy & Combs, “Hazards of Stigma...” supra at 210-211

The legal system—and the judiciary in particular—is itself uniquely situated to contribute to increased respect for diversity and diminished community acceptance of sexual violence against marginalized people, including the LGBTQ population.

Gender or sexuality-related myths like those discussed in Section III may be especially hurtful or distracting to jurors, or prejudicial to both victim and defendant. They should therefore be dispelled to the extent possible by the court, through rules and procedures of each court, general information and instructions to lawyers and litigants, and specific jury instructions where necessary.

Consistent with the sexual myths explored in Section III, jurors' own societal perceptions may lead them to be more sympathetic to female victims than males.<sup>39</sup> In a 2000 study, mock jurors were found to assign less “blame” to females assaulted by a male, than to males assaulted by a female.<sup>40</sup> This may have dire consequences in how jurors address cases regarding transgender individuals, where gender-based assumptions are at play.

Where female victims may find a more sympathetic audience, so too may female abusers; a “general pattern” of leniency towards female defendants has been identified.<sup>41</sup> However, in dealing with same-sex sexual assaults, heterosexual men are reportedly more negative in their perceptions of victim or abuser than are heterosexual women.<sup>42</sup> This may provide insight as to the “differences in men and women jurors’ decisions in same-gender assault cases and that direct associations should exist between homophobic attitudes and case judgments.”<sup>43</sup>

Because much of what jurors believe is based upon societal perceptions and judgments, it would not be surprising for such beliefs to potentially be present among court staff, judges, and attorneys. It is particularly pertinent that judges and lawyers as well, are aware of such assumptions and myths.

Judges and lawyers should not only be cognizant of these assumptions, but should strive to work with jurors in dispelling harmful stereotypes and dismantling common myths. During voir dire, narrowly tailored questions addressing sexual offense myths may help identify juror biases relevant to a sexual offense trial involving an LGBTQ survivor (judges should also be mindful that members of the jury pool, witnesses, or others in the courtroom may identify as LGBTQ). Furthermore, a thoughtfully constructed voir dire may serve to educate not only those harboring gender-based

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<sup>39</sup> Jodi A. Quas, Bette L. Bottoms, Tamara M. Haegerich, & Kari L. Nysse-Carris, “Effects of Victim, Defendant, and Juror Gender on Decisions in Child Sexual Assault Cases,” 32 *J. Applied Soc. Psychol.* 1993, 1995 (2002)

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1996, ( where “the combination of a general leniency toward women sexual abuse perpetrators, a bias against same-gender sexual abuse... leads to the hypothesis that there will be fewer guilty verdicts when jurors are presented with an abuse allegation that involves a woman defendant.”)

<sup>42</sup> *Id.* at 1998

<sup>43</sup> *Id.*

stereotypes, but also those who are largely apathetic. Being mindful of language used and references made is essential to communicating in a neutral and impartial manner.

It is important for judges to be mindful of a LGBTQ victim's fear of isolation. Due to only a small percentage of the American population identifying as LGBTQ, many LGBTQ people can feel marginalized by society. LGBTQ victims may be much more invested in their communities or networks of peers, and may be reluctant to cease those interactions despite a strong possibility of coming in to contact with their abusers.<sup>44</sup> Understanding this dynamic within the LGBTQ community may be helpful when ordering SAPOs or confronting violations of such protection orders.

Finally, courts should at least be aware of a number of community resources that either specifically aid, or are friendly to, the LGBTQ community. Information regarding these resources may be passed along to others appearing in a judge's court, as the judge sees fit. Appendix A to this chapter lists some of those resources.

## V. Conclusion

Sexual offenses against lesbian, gay, bisexual, transgender, and genderqueer, or questioning people remain a problem of great proportion, both because sexual offenses against LGBTQ people occur frequently, and because social norms and assumptions about sexual offenses tend to marginalize sexual minorities. Gender and sexuality-related sexual offense myths are likely to compound the difficulties facing LGBTQ survivors within the courts.

Section I provided the framework for understanding Washington law in how it relates to LGBTQ victims in the context of sexual assault, and broadly introduces the reader to the contents of the following sections.

Section II provided the backdrop and context for the pervasiveness of sexual assault in our society. Three themes emerged from this: (1) the high rates of sexual violence against sexual minorities; (2) that the high rate of sexual offense victimization among sexual minorities is not attributable to a single source of abuse; and (3) that LGBTQ sexual offense victims often have their experiences trivialized.

Section III discussed in what ways gender-based assumptions play down the abuse of same-sex assault. It then explained that two common myths are primarily responsible for the trivialization of LGBTQ victimization. The first of these is "corrective rape," where the abuser seeks to "cure" the victim of LGBTQ status, or discourage the victim from acting on same-sex attractions. The second myth is in "blaming the victim," operating under the notion that the victim merely got what he/she deserved.

Section IV explored how judges can pave the way for more fair and respectful treatment of litigants in sexual offense investigations and litigation. By understanding

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<sup>44</sup> Albright & Alcantara-Thompson, "Contextualizing Domestic Violence..." supra

common myths and juror perceptions based on societal influence, judges can effectively address a jury pool, conduct a sensitive voir dire, execute unbiased jury instructions, and be mindful in ordering conditions or resolving violations of SAPOs.

It is important to remember that gender and sexuality-related sexual offense myths are also likely to influence juries in cases involving no sexual minorities at all, meaning that working to minimize their effect on juries could reduce the risk of prejudice across the board. Maintaining an awareness of and respect for diversity within the courtroom can significantly improve LGBTQ survivors' experiences on the witness stand and in the jury box, and could even promote better reporting of, and responses to, sexual assault crimes in the future. Moreover, such mindfulness also promotes the fair administration of justice as well as a bench that more accurately reflects the diversity of the community that it serves.

A list of resources for the LGBTQ community has been supplied in Appendix A, along with a brief description of the services each provides. These may be helpful in supplying further information for judges looking to broaden their knowledge and understanding of LGBTQ issues and to offer to others who may benefit from the information. Appendix B provides reference materials utilized in the preparation of this chapter that are also helpful sources of additional information.