



New York State Coalition  
Against Sexual Assault  
Working for a World Without Violence



Cura Collective



MODEL ALLIANCE



ultraviolet ACTION



May 20, 2024

## Joint Memo of Support

A 4992a / S 9276

We are organizations that represent and serve survivors of sexual assault. **We write to urge you to enact Assembly Bill 4992a / Senate Bill 9276.** This bill would provide that, only in sexual assault trials, the jury may be permitted to hear evidence that a defendant has committed other acts of sexual assault, **if the trial judge weighs the probative value** of the evidence and **determines that it is not outweighed** by any likelihood of prejudice to the defendant.

**This bill would modernize New York law and create consistency with the Federal Rules of Evidence, which permit “similar crimes” evidence to be used in sexual assault cases.** The bill is narrowly tailored to sexual assault cases, and it reflects **the lessons we have learned about the unique nature of sexual assault.** Since most sexual assaults are unreported, **similar crimes evidence is only available in a small number of cases, where multiple survivors have come forward to report the same offender.** For the small percentage of cases where it is available, and the trial judge allows it, permitting this evidence would create **a fairer trial process for survivors without creating unfair prejudice to defendants.**

**Sexual assault is disproportionately targeted at women, LGBTQ people, people of color, disabled people, young people, immigrants, and indigenous people,** though people of every race, class, and gender can be sexually assaulted. In New York, survivors of sexual assault who seek accountability from the criminal justice system are, **in disproportionate numbers, women and girls of color.** Repeat perpetrators of sexual assault benefit from an

existing power dynamic that positions them to target people they believe they can assault with impunity. Changing the law to benefit survivors will help confront these crimes of power.

**Survivors of sexual assault face tremendous obstacles to securing justice against their attackers.** The majority of survivors do not report the crime, fearing that they will not be believed. Of those who do report, most do not see an arrest of their attackers. And even when there is an arrest, most arrests do not lead to a prosecution and conviction. Researchers have called this phenomenon “**the justice gap,**” and as a result of it, **only a tiny minority of sexual assault survivors ever see their attackers held accountable in a court of law.** This not only compounds the harm to survivors; it leaves all of us less safe by leaving serial perpetrators free to re-offend.

**There are multiple reasons for the justice gap.** First, **most perpetrators of sexual assault commit their crimes behind closed doors,** so there are no surveillance cameras or third party eyewitnesses to provide corroboration, as there might readily be for a mugging or a carjacking.

Second, **the accounts of survivors are often discounted.** Rape myths, victim blaming, and excessive skepticism all combine to produce what an Atlantic journalist called “An Epidemic of Disbelief.” Even survivors whose accounts are corroborated often find themselves disbelieved due to biases that victims of other crimes do not face.

Third, **survivors of sexual assault often face forms of cross-examination and character assassination, both in and out of court, that are laced with misogyny, racism, and other biases.** In one case handled by a signatory to this letter, a survivor was asked on cross-examination, “Isn’t it true that your nickname on the street was *puta*?” Another survivor was disparaged with this question: “She’s a married woman; why is she talking to a man she doesn’t know?” **Survivors of sexual assault do not only face the ordinary and appropriate burdens of proof that apply in other kinds of criminal cases; they often find their testimony devalued because of the same biases and inequalities that led them to be targeted for sexual assault in the first place.**

**Information about an offender’s history of similar crimes can therefore shed invaluable light. It can offer relevant corroboration of a survivor’s testimony. It can help counteract the biases survivors face. And it can help protect survivors from a slanted trial process in which the survivor’s credibility, character, and truthfulness are attacked, while a defendant’s history of predatory behavior is concealed from the jury.**

Currently, New York law sharply restricts the admissibility of similar crimes evidence, under the case of *People v. Molineux*, in which the defendant’s conviction was overturned because

similar crimes evidence had been admitted. This case was decided in 1901, at a time when women could not vote and rape was virtually unprosecuted in New York. The judges who decided *People v. Molineux* were not thinking about the kinds of evidence that are probative in rape cases. **It is time to bring the law into the 21<sup>st</sup> century, bring New York into alignment with the Federal Rules of Evidence, and allow this highly relevant evidence to be considered by juries.**

**The bill is modeled after the Federal Rules of Evidence, which have been upheld as constitutional**

Federal Rule of Evidence 413 provides that “(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.” A 4992a / S 9276 closely tracks the language of FRE 413, and adds a provision explicitly requiring a balancing by the trial judge of probative value against prejudice before the evidence may be admitted.

Sixteen other states have followed the federal example. They include California, where Harvey Weinstein’s second criminal trial was held. Though similar crimes evidence was admitted in both Weinstein’s NY and CA trials, the California conviction is not jeopardized by the admission of similar crimes evidence the way the New York conviction was, because California law has been modernized in keeping with federal standards.

**Federal courts have upheld the constitutionality of Federal Rule 413**, which is why our bill tracks its terms closely.

**As advocates for social justice, we care about due process and the rights of the accused. Here are some reasons why this bill does not infringe on fairness to defendants:**

**The bill would not damage due process for defendants.**

A 4992a / S 9276 requires the trial judge to conduct a careful balancing process. The judge must weigh the probative value of the similar crimes evidence against the likelihood that it will create undue prejudice to the defendant. If the potential for prejudice outweighs its probative nature, the evidence will be excluded.

### **The bill would not put a defendant's "character" on trial.**

A 4992a / S 9276 does not permit a wholesale exploration of whether a defendant is a bad person or has a bad disposition. It is narrowly tailored to focus on the specific issue of a pattern of sexual assault. It applies only in sexual assault cases, and it permits only evidence of other sexual assaults committed by the defendant, not other crimes in general, to be introduced.

### **The bill will not contribute to wrongful convictions.**

Evidence of similar crimes is only available in a very small number of sexual assault cases. Because most sexual assaults are unreported, most of them never even come to the attention of law enforcement. Having "similar crimes" evidence is a rare occurrence in sex crime cases, and it occurs only in cases where multiple people have come forward to report victimization by the same defendant. **While false reports of sexual assault do occasionally happen, it is virtually unheard of for a defendant to be falsely reported for sexual assault by more than one person.** Indeed, the existence of multiple complaints has come to be understood as an important indicator of the reliability of the complaints.

### **Admitting evidence about similar crimes does not cause jurors to rush to judgment.**

The fear that has led courts to exclude similar crimes evidence is the fear that it will cause jurors to rush to judgment in a spirit of prejudice, without scrutinizing the evidence. But experience shows that, **when jurors are given information about multiple alleged crimes** (either pursuant to a *Molineux* exception or because multiple crimes are charged), they do not rush to judgment or lump all allegations together. Rather, **they scrutinize each count and each complainant separately, and hold the prosecution to its burden of proof on each individual count.** They readily acquit defendants of counts of which they are not convinced beyond a reasonable doubt, even when they have heard allegations concerning multiple incidents. The trials of Harvey Weinstein, Donald Trump (civil), and Bill Cosby, as well as non-famous defendants like Daniel Holtzclaw and Tyrone Rolle are all examples of jurors' willingness to deliberate carefully, to consider each count separately, and to issue mixed verdicts. **Jurors in sexual assault cases do not assume that a defendant who is guilty of one crime must be guilty of another.** Indeed, the low rates of conviction for sexual assault show that it is survivors, not defendants, who face an uphill battle in court.

## **Conclusion:**

In the past seven years, our culture has seen a widespread reckoning with the prevalence of sexual assault and abuse, and with the profound impact these crimes inflict on their victims. Survivors of serial predators like Harvey Weinstein and Jeffrey Epstein have shown us that a sexual predator can mar countless lives without detection, because each survivor is made to believe that she or he is alone. It is time for NY to tell survivors that they are not alone; that their testimonies need not be heard in isolation where multiple survivors have spoken out.

It is time for New York to adopt a 21<sup>st</sup> Century understanding of the dynamics of sexual assault, the relevance of an offender's pattern of behavior, and the ability of jurors to follow a judge's instructions and hold the prosecution to its burden of proof on each individual count, under a rule that is narrowly tailored to sexual assault cases. It is time to allow this important form of evidence to be used, to help survivors obtain justice and encourage them to place their trust in the court system. We ask that you please enact Assembly Bill 4992a / Senate bill 9276 now.

Respectfully,

Community for a Cause  
Crime Victims Treatment Center  
Cura Collective  
Heruniversity  
Joyful Heart Foundation  
Model Alliance  
National Women's Defense League Action Fund  
National Women's Law Center  
New York City Alliance Against Sexual Assault  
New York State Coalition Against Sexual Assault  
Rape, Abuse, & Incest National Network  
Sanctuary for Families Inc.  
Ultraviolet  
Women's Equal Justice