VICTIM, RECONSTRUCTED: SEX CRIMES EXPERTS AND THE NEW RAPE PARADIGM

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The "perfect victim" embodies enduring misconceptions about how victims behave during and in the wake of sexual violence. However misguided, these myths are sufficiently pervasive to pass for common sense—the same common sense that jurors in sex crimes trials are instructed to deploy when judging the credibility of accusers. One obvious corrective is expert testimony. But expertise in rape cases has mostly been anchored to an odd syndrome—the "rape trauma syndrome," which, quite apart from its questionable scientific underpinnings, suffers from two conceptual defects: the syndrome individualizes the structural, and it pathologizes the normal. As #MeToo has brought into sharp focus, sexual violence is not aberrant; nor is it possible to abstract rape and its aftermath from a social context defined by steep social hierarchies. Expert testimony should account for these realities, reconstructing the victim accordingly. This move can reverberate beyond rape trials to other parts of the criminal justice system and—most urgently—to the cultural realm, where quotidian credibility judgments dictate the path forward for countless survivors. The paradigm that emerges promises to upend entrenched understandings of who counts as a victim and what constitutes rape.

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TABLE OF CONTENTS

I. INTRODUCTION

In February 2020, as jurors in the case against Harvey Weinstein prepared to begin their deliberations, the trial judge offered a set of legal instructions that included this guidance: "The bottom line is that you should apply the same

common sense in the jury room that you are called on to use in the rest of your lives."[1] The directive was not at all unusual—to the contrary, it is standard fare in courtrooms across the country.[2] But common sense routinely fails when it comes to sexual violence.

Even today, when judging the credibility of an accuser, many individuals—legal actors and lay people alike—draw upon a cluster of key misconceptions about sexual misconduct,[3] its victims,[4] and its perpetrators.[5] These misconceptions prime people—jurors included—to readily dismiss allegations of abuse.[6] I call this *credibility discounting.*[7]

As intractable as the credibility discount may seem, a better approach to sex crimes experts has the potential to upend it.[8] This approach was deployed in

1. *See* Patrick Ryan & Maria Puente, *Harvey Weinstein Trial Jury Begins Deliberating, Told to Use 'Common Sense,'* USA TODAY (Feb. 18, 2020, 4:51 PM), https://www.usatoday.com/story/entertainment/celebrities/2020/02/18/harvey-weinstein-trial-jury-instructions-before-deliberating-verdict/4786306002/ [https://perma.cc/ZH2U-QQ66].

2. ADMIN. OFF. OF THE U. S. COURTS, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 11 (2012), https://www.uscourts.gov/sites/default/files/trial-handbook.pdf [https://perma.cc/C8BZ-ALJQ].

3. The term "sexual misconduct," which can also be described as sexual abuse, includes sexual harassment and sexual assault. Sexual assault and rape definitions vary considerably from jurisdiction to jurisdiction; unless otherwise noted, I use the terms interchangeably throughout the discussion.

4. Most sexual abuse victims are girls and women, and most abusers are men. MICHELE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18–19, 24 (2011). Transgender people are also victims of sexual assault, as are boys and men. *See infra* note 252; *see also* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1266–72 (2011) (discussing the prevalence of male-on-male rape both within and outside the prison setting). Like sexual abuse itself, the aftermath of abuse is gendered. DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 10 (2021) ("When a woman comes forward with an allegation of abuse, . . . gender, power, sexual entitlement, cultural mythology, and legal protections collide."); *see also id.* at 15 (there is one notable exception: "When white women allege sexual assault by a Black man, whites in power have a long and tragic history of too readily crediting the accusation."). Given these realities, at times I employ gendered pronouns when describing rape and patterned responses to it.

5. *See* TUERKHEIMER, *supra* note 4, at 50–54 (describing the myth of the "monster abuser"); Karen Jones, *The Politics of Credibility*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 154, 155 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002) (noting generally that our assessments of credibility draw on an "understanding of how the world works").

6. In the main, this discussion focuses on one dimension of credibility—that involving the truth of an allegation. But in order for an allegation to be deemed credible, a listener must *also* believe that the conduct it describes is blameworthy *and* that it is worthy of our care. Identifying this trio of claims is crucial to understanding the dynamics of credibility discounting. TUERKHEIMER, *supra* note 4, at 10–11.

7. *See* TUERKHEIMER, *supra* note 4, at 9, 15. As a rule, people are "prone to credibility judgments that work to the detriment of people who lack social power." In general, this means that:

> credibility is meted out too sparingly to women, whether cis or trans, whatever their race or socioeconomic status, their sexual orientation or immigration status. At the same time, the intersections are critical—just as there is no female prototype, there is no singular experience of . . . the *credibility discount* . . . . When women belong to groups that are marginalized, subordinated, or otherwise vulnerable, their assertions are even less likely to be credited. *Id.*

8. While this discussion centers on the treatment of sexual violence allegations, I should emphasize that credibility discounting also operates in many other settings. *See id.* at 9–10:

> Once you have a name for it, you see credibility discounting everywhere. It's not isolated or idiosyncratic—it's patterned and predictable. It happens in the workplace, when your contributions are treated with disrespect. In medical settings, when your description of symptoms is cast aside as untrue or unimportant. In the course of salary negotiations, when your requests are dismissed as unseemly posturing. In the classroom,

the Weinstein case; notwithstanding the judge's standard instruction on common sense, the jury did not have to rely on common sense to evaluate the testimony of the accusers. Instead, jurors were able to harness the insights of an expert, whose trial testimony represented a meaningful break from old ways of approaching expertise in sex crimes trials.[9]

Reconceiving the function of expert testimony in sex crimes trials is a reform that promises to reverberate well beyond the courtroom. Improving the evidentiary treatment of sex crimes expertise, however, requires a fundamental break from the past—in particular, from reliance on a suspect diagnosis known as the "rape trauma syndrome" ("RTS").[10]

The legal trajectory of RTS involves a rather peculiar rise and an equally remarkable endurance. By way of brief illustration, consider the syndrome's jurisprudential genesis in one state—New York.[11] Arriving home late on a summer night in 1984, a nineteen-year-old woman woke her mother and reported having just been raped on a nearby deserted beach in Long Island.[12] After her mother called the police, the young woman first told officers that her attacker was a stranger, but when she was alone with her mother, and again to the police, she identified her rapist as a man she had known for years.[13] She later identified the man, John Taylor, in lineups.[14] Taylor was indicted by a grand jury on multiple sex crimes charges, including rape in the first degree.[15]

At Taylor's retrial after the first jury failed to reach a verdict, the prosecution introduced testimony about RTS.[16] This testimony was provided by a City University of New York instructor with experience counseling sexual assault survivors.[17] As the state's high court would later describe, the expert's testimony served two purposes. First, it "explained why the complainant might have been unwilling during the first few hours after the attack to name the defendant as her attacker where she had known the defendant prior to the incident."[18] And second, testimony that it was "common for a rape victim to appear quiet and controlled following an attack, responded to evidence that the complainant had appeared calm after the attack and tended to rebut the inference that because she was not excited and upset after the attack, it had not been a rape."[19] After being convicted, Taylor appealed in part based on the introduction of this expert testimony.[20]

when the value of your insights is minimized. In intimate relationships, when you're somehow held responsible for the conduct of others. And on and on.

9. Much of this discussion of sex crimes has wider applicability to other legal settings in which sexual abuse allegations arise, including defamation suits and civil claims.

10. For a discussion of RTS, see *infra* Section II.B.

11. For a fuller discussion, see *infra* Section II.B.

12. People v. Taylor, 552 N.E.2d 131, 132 (N.Y. 1990).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 131–32.

Taylor's appeal was consolidated with the appeal of Ronnie Banks, who was convicted of sexually assaulting an eleven-year-old Rochester girl.[21] The girl described playing on the street with her friends when Banks, a stranger, pulled her into a garage and raped her.[22] The next morning, the girl reported to her grandmother, who called the police.[23] At trial, the prosecution presented testimony about RTS from an obstetrician-gynecologist who specialized in treating sexual assault victims.[24] After describing the syndrome in general terms, the doctor opined "hypothetically that the kind of *symptoms* demonstrated by the complainant"—a constellation that included nightmares, fear of school, and running away from home—"were consistent with a diagnosis of rape trauma syndrome."[25] The implication of the expert's testimony, as the court understood it, was that because of the girl's *symptoms*, it was "more likely than not that she had been forcibly raped."[26]

When *Taylor* and *Banks* eventually reached New York's high court, its analysis began with a summary of the 1974 study that spawned RTS.[27] Recognizing the syndrome as a "therapeutic and not a legal concept," the court nevertheless determined that the "therapeutic origin of the syndrome" does not "render[] it unreliable for trial purposes,"[28] and, further, that evidence of the syndrome was generally accepted within the scientific community.[29] The court then moved on to consider whether such testimony would assist the trier of fact—put differently, whether expertise of this sort was "beyond the ken of the typical juror."[30] Analogizing to the use of expert testimony in child abuse cases, the court noted that rape is "permeated by misconceptions," including that victims promptly report sexual assault, that victims bring about their abuse, and that consent can be inferred from certain past behaviors.[31] Because "cultural myths still affect common understanding of rape and rape victims," the court explained, expert testimony about RTS could assist the jury deciding a rape case—but only under limited circumstances.[32]

In the case against Taylor, evidence of RTS was seen as helpful to the jurors' understanding of why a victim might be afraid to disclose a known assailant's name to the police and why someone acquainted with her rapist is "less likely to report the rape at all."[33] Because this evidence provided "a possible

21. *Id.* at 133. Banks was acquitted of all forcible rape counts but convicted of multiple counts of statutory rape. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* (emphasis added).
26. *Id.*
27. *Id.* at 133–34. *See infra* Subsection II.B.1 (describing the origins of RTS).
28. *Taylor*, 552 N.E.2d at 135.
29. New York is a *Frye* jurisdiction. *See infra* note 164.
30. *Taylor*, 552 N.E.2d at 135 (quoting De Long v. County of Erie, 457 N.E.2d 717, 722 (N.Y. 1983)).
31. *Id.* at 135–36.
32. Surveying the judicial treatment of RTS, the court found considerable variation in approach. *Id.* at 136–38.
33. *Id.* at 138.

explanation for the complainant's behavior that is consistent with her claim that she was raped," it was relevant.[34] And because this type of behavior was outside the ordinary juror's notion of how rape victims behave, the expert testimony was properly admitted.[35] In a similar vein, the complainant's apparent lack of emotionality in the wake of her rape ran counter to commonplace misconceptions, and was, therefore, the appropriate subject of expert testimony on RTS.[36]

The court reached the opposite conclusion in *Banks*. There, because the expert's testimony was "not offered to explain behavior that might appear unusual to a lay juror" but, rather, as the court suggested, to "prove[] that a rape occurred," the testimony should have been excluded.[37] In short, after *Taylor*, while evidence of RTS *is* permissible to "dispel misconceptions that jurors might possess" about "patterns of response exhibited by rape victims," it is inadmissible "when it inescapably bears solely on proving that a rape occurred."[38]

Setting aside its analysis of the scientific validity of RTS,[39] the court's holding left unresolved several points of tension that have impacted the subsequent judicial treatment of sex crimes expertise. In particular—why is expert testimony about common victim behaviors properly tethered to a "syndrome?" And when exactly can testimony contextualizing an alleged victim's testimony—which invariably implicates the defendant—be said to bear "solely" on proving guilt? Notwithstanding these pressure points, in the three decades since *Taylor* was decided, it has not been revisited.[40] Other state courts have similarly struggled to articulate a coherent approach to RTS.[41] Across the board, judicial treatment of syndromic testimony, both its acceptance *and* its rejection, rests on flimsy grounds.

These weaknesses continue to surface—most recently in Harvey Weinstein's appeal of his conviction for multiple sex crimes.[42] Chief among Weinstein's claims was that expert testimony on RTS[43] should not have been allowed to "bolster the credibility of the witnesses and to prove the crimes occurred."[44] Citing *Taylor*, Weinstein argued as a general proposition that any need to dispel myths about rape has subsided with the passage of time and that in "2020 America," expertise in service of this end is no longer warranted.[45] Specifically,

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* The court determined that the erroneous introduction of rape syndrome evidence was not harmless and reversed Banks's conviction. *Id.* at 138–39.

38. *Id.* at 138.

39. *Id.* at 133–34; *see also infra* notes 157–59 and accompanying text (noting methodological critiques).

40. *See generally Taylor*, 552 N.E.2d at 131.

41. The courts are "sharply divided" on the issue. State v. Black, 745 P.2d 12, 17 (Wash. 1987); *see also infra* notes 165–84 and accompanying text (discussing the divergent judicial treatment of RTS).

42. *See* Brief for Defendant-Appellant at 95–112, People v. Weinstein, 170 N.Y.S.3d 33 (2022) (No. 2020-00590) (on file with author). The appeal is currently pending.

43. Prior to trial, Weinstein moved for a hearing focused in part on whether the subject of expert testimony is generally accepted within the relevant scientific community. This motion was denied. *Id.* at 96.

44. *Id.* at 95.

45. *Id.* at 103–04 n.28. The full passage reads as follows:

Weinstein urged that the prosecution's expert trial testimony impermissibly "bore on the ultimate question of whether defendant was guilty"[46]—a line of attack opened by the court's resolution of *Banks*. Last, and more universally damning of the prosecutorial use of syndrome evidence, Weinstein questioned the use of the "pathologizing testimony of an expert" to explain commonplace victim behaviors.[47]

Sex crimes expertise remains legally yoked to a dubious syndrome.[48] But this linkage is hardly necessary. Indeed, we find ourselves on the cusp of an important decoupling—a decoupling not yet theorized, but critical if nonstranger rape is ever to supplant the stranger rape paradigm.[49] For evidence of this innovation, one need look no further than Weinstein's trial. In a twist that seems even more curious when considering his argument on appeal,[50] the expert whose testimony is being challenged on appeal never once mentioned a *syndrome*.[51]

The remaining discussion proceeds as follows. Part II shows how victims are socially and legally (mis)constructed.[52] It begins by explaining how "common sense" about rape victims relies on faulty understandings of resistance,[53] memory,[54] emotionality,[55] and subsequent contact.[56] These persistent

> [T]he past ten years have seen significant transformations in due process on American college campuses, in courts of law, and the broader culture that shift the burden of proof to those accused of sexual assault to prove their innocence. What American today has not heard of date rape or believes that women cannot be raped by an acquaintance or their intimate partner or even their spouse? Despite the fact that the admissibility of such testimony is culturally dependent and that American culture has changed quite drastically since *Taylor*, culminating with the hashtags, *#MeToo*, *#Believeallwomen*, and the routine public shaming of public figures on the mere accusation of sexual improprieties, the trial court permitted this testimony without any evaluation of whether and to what extent it was still warranted.

Id. Future sex crimes defendants are likely to mount similar challenges to the admissibility of expert testimony despite the persistence of familiar modes of cross-examining alleged rape victims and commonplace defense arguments about why accusers should not be believed.

46. *Id.* at 118; *see also id.* at 109–10 (challenging the admissibility of expert testimony that rape victims often engage in self-harm and perceive themselves as "damaged goods." Indeed, some cite *Banks* to mean that "expert opinion that a person exhibited symptoms associated with rape trauma syndrome would be inadmissible because it bore solely on proving that a rape had occurred."). *Id.*

47. *Id.* at 111. In the ruling currently under review, the intermediate appellate court held that "rape trauma syndrome has been widely accepted by courts as a proper subject of expert testimony." People v. Weinstein, 170 N.Y.S.3d 33, 56–57 (App. Div. 2022).

48. *See infra* Subsection II.B.3 (identifying RTS's conceptual defects).

49. *See infra* note 368 and accompanying text (describing the stranger rape paradigm and its distorting effects). #MeToo has generated a spate of high-profile sex crimes prosecutions that deviate from the stranger rape paradigm. Along with these prosecutions comes greater reliance on properly framed expertise.

50. *See supra* notes 42–47 and accompanying text.

51. In a pretrial filing, the prosecution offered notice of its intent to introduce "expert testimony on sexual assault *and rape trauma syndrome*," which indicates the tenaciousness of the syndrome's legal hold. Brief for Defendant-Appellant, *supra* note 42, at 97 (emphasis added). For an account of how the expert actually testified at trial, see *infra* Section III.B.

52. CREDIBLE chronicles how law reflects and reifies the "perfect victim" archetype in ways that closely mirror the social construction while imbuing it with additional staying power. *See* TUERKHEIMER, *supra* note 4, at 41–50. The legal construction that I discuss in this Article is differently faulty—pathological, not perfect—but it too is essentially incompatible with the realities of abuse.

53. *See infra* Subsection II.A.1.

54. *See infra* Subsection II.A.2.

55. *See infra* Subsection II.A.3.

56. *See infra* Subsection II.A.4.

misconceptions create the perfect victim archetype against which all victims are judged, to their extreme disadvantage[57]—a disadvantage that redounds throughout the criminal system.

Even so, a prevailing legal solution to failed common sense is itself problematic. Expert testimony in rape prosecutions *also* (mis)constructs the victim—in this case, as deviant and severed from social context.[58] RTS, the dominant template for expertise in sex crimes trials,[59] has two central defects which, not coincidentally, correspond to a general orientation toward gender violence that is endemic to the criminal law. First, the structural is individualized.[60] This negates the lived experiences of victims, particularly those most vulnerable to rape and its differential aftermath[61]—primarily marginalized women of color.[62] Syndromic testimony has a second, related flaw: it pathologizes the normal, rendering social structures of inequality invisible and thereby immune from critique.[63]

Part III offers a framework for rethinking sex crimes expertise. Standard legal instructions on credibility make "common sense" the fulcrum upon which jurors hinge their evaluations of fact witnesses, including rape accusers.[64] Common sense requires a corrective, one that comports with the evidentiary rules governing expert testimony.[65] The solution is nonsyndromic expertise, which promises to improve credibility determinations at trial and beyond.[66] This move to legally reconstruct the victim is already underway, as manifested by expert testimony in the highest-profile rape trial of our time.[67]

Part IV contends that—notwithstanding reasons to think otherwise—this move is significant. #MeToo has foregrounded the criminal justice system's abysmal response to sexual violence.[68] In ways that are less obvious but also worthy of attention, the movement also poses a deep theoretical challenge to reliance on criminal prosecution.[69] The cultural revelation that sexual violation is ubiquitous has generated newfound scrutiny of the systems and cultures that enable abuse—this in place of a singular preoccupation with individual perpetrators.[70] Criminalization sits uneasily with the move to locate a wide spectrum of

57. *See infra* notes 76–81 and accompanying text.
58. *See infra* Subsection II.B.3.
59. *See infra* notes 143–79 and accompanying text.
60. *See infra* Subsection II.B.3.a.
61. *See infra* Subsection II.B.3.a.
62. *See infra* notes 197–230 and accompanying text.
63. *See infra* Subsection II.B.3.b.
64. *See infra* Subsection III.A.1.
65. *See infra* Subsection III.A.2.
66. *See infra* notes 294–334 and accompanying text.
67. *See infra* notes 294–362 and accompanying text.
68. *See, e.g.*, Deborah Tuerkheimer, *Sexual Violence Without Law*, 76 N.Y.U. ANN. SURV. AM. L. 609, 611 (2021) (analyzing #MeToo era evidence that the spectrum of sexual violation remains mostly untouched by criminal law).
69. A robust feminist critique of the criminal justice system long pre-dated the #MeToo movement, although the term "anti-carceral feminism" was coined more recently. *See* Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES 128, 143 (2007).
70. *See infra* Section IV.C. For further discussion of the systems and cultures that enable abuse, see Bernstein, *supra* note 69.

sexual abuse as a core structural feature, rather than a problem of deviance. These insights from the #MeToo movement raise the question: why should we care about sex crimes prosecutions and trials themselves? Part IV offers answers to this question, considering the effects of rape trials on prosecutors,[71] police officers,[72] survivors,[73] and the general public.[74]

A conclusion underscores that proper sex crimes expertise can destabilize the stranger rape paradigm while helping to end the credibility discount.[75]

II. MISCONCEIVED VICTIMS

Our legal system depends on lay people to judge credibility in the criminal setting and beyond. Yet when it comes to sexual violence, those without expertise tend to make patterned and predictable errors.[76] Without realizing it, people often reason by reference to an imaginary victim, whose behavior comports with misunderstandings that are widespread still today.[77] The socially constructed victim satisfies benchmarks for perfection that are both descriptive and normative.[78]

By way of contrast, the legally constructed victim is derived from a particular notion of pathology—one rooted in RTS. Unmoored from social context and suffering from a constellation of symptoms that mark her as deviant, the victim—and the abuse itself—can only be understood as aberrational.[79] The syndromic victim belies the realities of sexual misconduct while obscuring the systemic and cultural supports that sustain practices of abuse.

Whether the standard is perfection or pathology, these (mis)constructions drive the credibility discount and perpetuate an archaic rape paradigm. To see how this works, we turn first to common sense, and then to dominant evidentiary conceptions.

A. The Failure of Common Sense

The plausibility of an abuse claim hinges on whether the accuser behaved like the victim in our mind—a "perfect victim." The perfect victim is an amalgam of how we think victims do, in fact, respond to abuse and how we think they should respond to abuse.[80] If an accuser fails to meet these benchmarks, however unfettered from reality, she doesn't *seem* like a victim, and her allegation is

71. *See infra* Subsection IV.A.1.
72. *See infra* Subsection IV.A.2.
73. *See infra* Subsection IV.A.3.
74. *See infra* Section IV.C.
75. *See infra* Part V.
76. *See* TUERKHEIMER, *supra* note 4, at 37.
77. *Id.* at 41.
78. *See* discussion *infra* Section II.A.
79. *See* discussion *infra* Section II.B.
80. Often a victim's behavior *preceding* the assault is also held against her—for instance, if she was consuming alcohol or dressing in ways deemed overly sexual. *See* TUERKHEIMER, *supra* note 4, at 108–12.

dismissed.[81] When it comes to resistance, memory, emotionality, and continued contact with the abuser, few victims can satisfy the prevailing standard.

1. Resistance

The expectation that victims fight back is deeply entrenched throughout both cultural and legal systems.[82] A formal resistance requirement—once physical, now mostly verbal—has long been baked into our criminal statutes.[83] The law of resistance reflects and reifies a longstanding insistence that victims fight to end the assault or escape it.[84] For several reasons, the imposition of such a burden runs counter to the experience of most victims.[85]

First, girls and women are often socialized to be acquiescent and physically docile.[86] Still today, traditional notions of femininity retain their influence by dictating a gendered set of appropriate attributes and qualities—like sweetness and gentleness.[87] This antiquated standard continues to constrain how many girls and women behave, especially in scenarios involving the potential for confrontation with a more powerful man.[88]

A separate reason for apparent passivity is self-preservation.[89] Because some victims may fear that resistance may increase the chance of more serious injury or future harm, these victims may make a conscious decision not to fight.[90] A marked power imbalance between perpetrator and victim—including, but not limited to, cases involving domestic violence—can intensify the disincentive to mount resistance.[91]

Other victims have developed a coping mechanism, often originating from childhood sexual trauma or other past sexual exploitation, that entails remaining

81. Compared to the perfect victim, an accuser will likely be seen as untrustworthy, blameworthy, *and* unworthy of care. *See supra* note 6 and accompanying text (describing three dimensions of an abuse allegation).

82. TUERKHEIMER, *supra* note 4, at 44–47.

83. *Id.*

84. *Id.*

85. *See infra* notes 86–91 and accompanying text; *see also infra* note 295 and accompanying text.

86. For an overview of gender socialization processes, see Elham Hoominfar, *Gender Socialization*, *in* GENDER EQUALITY, ENCYCLOPEDIA OF THE UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS 645, 647 (Walter Leal Filho, Anabela Marisa Azul, Luciana Brandli, Amanda Lange Salvia & Tony Wall eds., 2021).

87. *See* Nicole L. Johnson & Dawn M. Johnson, *An Empirical Exploration into the Measurement of Rape Culture*, 36 J. INTERPERSONAL VIOLENCE 70, 82–85 (2021) (finding continued effects of "traditional gender roles," which include stereotypical views of women as "passive," "sweet," and "nice").

88. *See, e.g.*, Ajah Hales, *'Fight or Flight' Are Not the Only Ways People Respond to Sexual Assault*, VICE (Jan. 13, 2020, 10:37 AM), https://www.vice.com/amp/en/article/v74eqj/fight-or-flight-and-harvey-weinstein-sexual-assault-trial-defense [https://perma.cc/48MV-4UZ9]. For instance, Mira Sorvino described "'scrambl[ing] for ways to ward off' [Harvey] Weinstein without offending him as he groped her and '[chased] her around,' including telling him she didn't date married men for religious reasons." *Id.*

89. *See* TUERKHEIMER, *supra* note 4, at 43.

90. *Id*.

91. As one therapist observes, "[w]hen a sexual perpetrator is a man of status and power . . . the fight response can feel futile." Hales, *supra* note 88.

still during abuse.[92] Psychologists have learned that this coping mechanism can be activated, almost automatically, when a threat looms.[93]

Mounting evidence is also revolutionizing our understandings of how victims may respond to trauma. As neurobiologists discover more about the brain, they have been able to identify the circuitry responsible for various states of immobility that can occur when we're under attack.[94] Scientists now understand that some victims freeze as a reflexive response to trauma.[95]

Yet despite these empirical realities, the perfect victim resists her violation.

2. Memory

The perfect victim is able to provide a detailed, comprehensive, linear recounting of her abuse and the timeframe surrounding it.[96] But this demand for an exhaustive narrative is misguided. Commonplace intuitions about what victims should recall about their abuse are mostly contradicted by neuroscience.[97]

When we remember an experience, our encoding of that experience is partial—whether it's traumatic or not.[98] A key concept in memory research is the distinction between central details and peripheral details. Even under ordinary circumstances, we pay most attention to central details, which are more likely than others to be encoded—the first step in creating a memory—and stored once encoded.[99] Details that we don't notice or find significant may not be converted to a storable memory.[100]

Threatening situations can be even more challenging for the brain. One leading expert on the physiological effects of trauma, Bessel van der Kolk, has found just that.[101] His seminal book, *The Body Keeps the Score*, shows how trauma is imprinted on both the body and the brain.[102] One important finding is that traumatic memories are disorganized. A systematic study by van der Kolk and his colleagues showed that victims of terrifying experiences

92. *See, e.g.*, Jennifer M. Heidt, Brian P. Marx & John P. Forsyth, *Tonic Immobility and Childhood Sexual Abuse: A Preliminary Report Evaluating the Sequela of Rape-Induced Paralysis*, 43 BEHAV. RSCH. & THERAPY 1157, 1166–67 (2005).

93. *Id.* at 1169.

94. *See, e.g.*, Norman B. Schmidt, J. Anthony Richey, Michael J. Zvolensky & Jon K. Maner, *Exploring Human Freeze Responses to a Threat Stressor*, 39 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 292, 293 (2008) (citing studies finding "a rape-induced paralysis that appears to share many of the features of tonic immobility"); Jim Hopper, *Freezing During Sexual Assault and Harassment*, PSYCH. TODAY (Apr. 3, 2018), https://www.psychologytoday.com/us/blog/sexual-assault-and-the-brain/201804/freezing-during-sexual-assault-and-harassment [https://perma.cc/LN6Y-P4VA].

95. Hopper, *supra* note 94.

96. *See* TUERKHEIMER, *supra* note 4, at 75.

97. *See infra* notes 101–09, 262–67 and accompanying text.

98. *See* TUERKHEIMER, *supra* note 4, at 76.

99. *See infra* notes 262–67 and accompanying text.

100. *See infra* notes 262–67 and accompanying text.

101. *See* TUERKHEIMER, *supra* note 4, at 76.

102. *See generally* BESSEL A. VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2014).

> remembered some details all too clearly (the smell of the rapist, the gash in the forehead of a dead child) but could not recall the sequence of events or other vital details (the first person who arrived to help, whether an ambulance or a police car took them to the hospital).[103]

Clinical psychologist Jim Hopper explains:

> In situations of stress and trauma, there tends to be a narrowing or focusing on parts of the experience that the brain is appraising as really essential to survival and coping. That zeroing in of attention, the collapsing in on central details and the ignoring or non-processing of peripheral details—that is accentuated.[104]

As a result, memories of traumatic experiences are more fragmented than others.[105]

Trauma experts understand that many rape victims are unable to remember the details of what happened just before or just after the assault.[106] Victims can also find it difficult to provide a neat chronological account.[107] Because incomplete memories of this sort are a common byproduct of trauma, people err in the wrong direction when they hold imperfections in an accuser's account against her.

While a partial narrative about abuse may have any number of explanations—some trauma related, others not[108]—most lay people become doubtful when an accuser's account is missing details, or when it is not linear, or when it includes facts that seem less important than those that are excluded.[109] Common sense turns partial stories, however true, into fodder for disbelief.

3. Emotionality

When an accuser's emotional response defies expectations, her story seems suspicious. Both "suppressed" and "intensified" emotions—or "under-emotional" and "over-emotional" responses—are familiar to psychologists who work with sexual assault victims.[110] Yet lay people often have preset ideas about how survivors react to their abuse—ideas that distort credibility judgments.[111]

103. *Id.* at 193.

104. TUERKHEIMER, *supra* note 4, at 76–77.

105. *See infra* notes 263–95 and accompanying text.

106. *See infra* notes 263–95 and accompanying text.

107. *See infra* note 305 and accompanying text.

108. For instance, victims may not feel safe or comfortable recounting certain details, or they may not view particular facts as salient.

109. Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, AM. PROSECUTORS RSCH. INST. 1, 5–11 (2007).

110. KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, VICTIM IMPACT: HOW VICTIMS ARE AFFECTED BY SEXUAL ASSAULT AND HOW LAW ENFORCEMENT CAN RESPOND, END VIOLENCE AGAINST WOMEN INT'L 18 (2020), https://evawintl.org/wp-content/uploads/Module-2_Victim-Impact.pdf [https://perma.cc/33VF-6HLE].

111. *See* Mary R. Rose, Janice Nadler & Jim Clark, *Appropriately Upset? Emotion Norms and Perceptions of Crime Victims*, 30 LAW & HUM. BEHAV. 203, 217 (2006).

Victims who don't display obvious signs of emotional distress are frequently discredited.[112] Consider the case of a young woman called Marie, whose story was told in the acclaimed 2019 television miniseries *Unbelievable*.[113] Marie was charged with lying about her rape and later vindicated when police caught her attacker, who turned out to be a serial rapist.[114] Skepticism of Marie's account began not with the police but with those closest to her. Her foster mother, Peggy, suggested that something was strange about the way Marie recounted her rape. "She was detached. . . . Emotionally detached from what she was saying," Peggy told the investigating police officer.[115] Shannon, Marie's former foster mother, was suspicious for the same reason.[116] "I remember exactly," she told journalists.[117] "I was standing on my balcony and she called and said, 'I've been raped.' It was very flat, no emotion."[118] When Shannon and Peggy spoke, each confirmed the other's doubts.[119] And when those doubts were shared with the police, Marie became the suspect, derailing any meaningful investigation into her rapist.[120]

These reactions are not unusual. A meta-analysis finds that accusers "who present with controlled affect" are perceived as less credible than accusers who are visibly upset.[121] This is a burden placed uniquely on rape survivors, who are expected to "experience negative emotions that are much stronger than those experienced by other victims of crime."[122] Because "emotional demeanor is not diagnostic of witness honesty," as the meta-analysis concluded, people are downgrading the believability of certain victims for no good reason.[123]

But the acceptable emotional range for survivors is exceedingly narrow, creating a troubling bind for all but the perfect victim. Just like their *too calm* counterparts, women who appear *too agitated* may be perceived as unbelievable.[124] Especially when their allegations depart from the stranger rape template,[125] "hysterical" accusers are suspect.[126] As one long-serving police

112. *Id.* Research suggests that rape victims who "fail to muster enough emotion to an event are seen as less credible, even if the content of their testimony is exactly the same as a victim who displays more emotion."; *see also infra* notes 121–23 and accompanying text.

113. The miniseries is based on reporting originally published by ProPublica and The Marshall Project, which later became a book. T. CHRISTIAN MILLER & KEN ARMSTRONG, A FALSE REPORT: A TRUE STORY OF RAPE IN AMERICA 1 (2018).

114. *Id.* at 205, 210.

115. *Id.* at 105.

116. *Id.* at 106.

117. *Id.*

118. *Id.*

119. *Id.* at 106–07.

120. *Id.* at 108–19.

121. Faye T. Nitschke, Blake M. McKimmie & Eric J. Vanman, *A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complainants*, 145 PSYCH. BULL. 953, 970 (2019).

122. *Id.* at 955.

123. *Id.* at 973.

124. TUERKHEIMER, *supra* note 4, at 48.

125. *See infra* note 368 and accompanying text.

126. It was once believed that "the womb, or uterus, was a free-floating entity which could leave its moorings when a woman was dissatisfied, to travel around the body and disrupt everything in its passage," resulting

detective described this dynamic, "patrol officers often think, 'this person wasn't injured, there weren't any weapons, I don't understand why they're acting like this.'"[127] Once the label of hysteria has been attached, the accusation is even less likely to be pursued.[128] "Hysterical" women are deemed unreliable reporters, as they have been for centuries.[129]

4. Contact

Perfect victims immediately cut all ties with their abuser. If a woman and her abuser maintain any kind of relationship, the victim's story is apt to be dismissed as if the abuse didn't happen, or as her responsibility, or as unworthy of concern.[130] In fact, victims of sexual assault and harassment often remain cordial or intimate with their abuser.[131] Many are fearful of the repercussions that might ensue from severing connection, and this concern is augmented by asymmetries in social status or authority.[132] Preserving the relationship may also feel to the survivor like a way to show—both herself and her abuser—that he did not defeat her.[133] By moving forward as if the violation never occurred, she endeavors to diminish his power.

Regardless of these well-grounded rationales, and despite its typicality, continued contact is held against accusers who deviate from the perfect victim archetype.[134]

All told, the socially constructed victim fails to reflect the realities of sexual violence. As we will now see, the legally constructed victim fares little better.

B. Flawed Expertise: The "Rape Trauma Syndrome"

Since the late 1970s, courts have struggled with the question of whether and when to admit expert testimony regarding rape victims.[135] Over the decades, to the extent such expertise has been allowed, the dominant paradigm for

in "hysterical" symptoms. LISA APPIGNANESI, MAD, BAD AND SAD: WOMEN AND THE MIND DOCTORS 142 (2008).

127. *See* TUERKHEIMER, *supra* note 4, at 48.

128. *Id*.

129. *See* APPIGNANESI, *supra* note 126, at 142.

130. More precisely, her story will fall short along any of the three dimensions I have identified. *See supra* note 6 (describing the trio of claims nested in an abuse allegation).

131. *See infra* notes 258, 308, 342–47 and accompanying text.

132. *See* Trial Transcript at 1365, People v. Weinstein, 170 N.Y.S.3d 33 (App. Div. 1st Dept. 2022) (No. 2020-00590) (on file with author).

133. *See infra* note 346 and accompanying text.

134. *See, e.g.*, Ella Torres, *Why Assault Victims Stay in Touch with Attackers, in Light of Weinstein Defense*, ABC NEWS (Jan. 23, 2020, 4:04 AM) https://abcnews.go.com/US/sexual-assault-victims-continue-relationships-assailants/story?id=68460398 [https://perma.cc/R6SW-HVUG].

135. Forensic evidence collected in a sexual assault examination (often referred to as a "rape kit") is the subject of a different type of expert testimony, which lies outside the scope of this discussion. Also outside the purview is expert testimony regarding the behavior of a typical abuser to which the defendant can be compared, sometimes referred to as "offender profile evidence."

testimony has been RTS.[136] Although the scientific validity of the diagnosis has been attacked,[137] most courts allow its admission.[138]

Separate from the scientific criticism of RTS, its construction of the rape victim has escaped sustained critique[139]—perhaps because this construction is harder to discern since it closely aligns with the criminal law's overall approach to gender violence as both decontextualized and aberrational.[140] Before elaborating on these problems, I describe the origins of RTS along with its subsequent use in court.[141] I later describe how the #MeToo movement has cast new light on the limits of RTS in assisting the jury with the task of credibility evaluation.[142]

1. Origins

Beginning in 1972, Ann Burgess, a psychiatric nurse, and Lynda Holmstrom, a sociologist, spent a year interviewing patients who entered the emergency department of a Boston hospital with "the complaint of having been raped."[143] These 146 patients were divided into three categories: victims of "forcible rape," including attempts;[144] victims "in situations to which they were an accessory due to their inability to consent";[145] and victims of "sexual encounters to which they had initially consented but that went beyond their expectations and ability to control."[146] Only the first category of patients, comprised of ninety-two women,[147] was included in the paper that analyzed these women and their "symptoms," as the authors referred to the observed conditions.[148] The remainder

136. *See infra* notes 139–56 and accompanying text.

137. *See, e.g.*, William O'Donohue, Gwendolyn C. Carlson, Lorraine T. Benuto & Natalie M. Bennett, *Examining the Scientific Validity of Rape Trauma Syndrome*, 21 PSYCHIATRY, PSYCH. & L. 858, 859 (2014); *see also infra* notes 157–59 and accompanying text.

138. *See infra* notes 162–74 and accompanying text.

139. A notable exception is Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271 (1994).

140. *See infra* notes 244–45 and accompanying text.

141. *See infra* notes 143–84 and accompanying text.

142. *See infra* notes Subsection II.B.3.b.

143. Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 981 (1974).

144. *Id*.

145. *Id.* This category seems to be comprised largely of women who the authors perceived as mentally or cognitively impaired. Stefan, *supra* note 139, at 1291.

146. Burgess & Holmstrom, *supra* note 143, at 981. This category "included prostitutes and cases in which the woman consented to sex but was treated with violence or brutality or 'perversion' to which she did not consent. The authors never explain why this is not rape." Stefan, *supra* note 139, at 1292–93.

147. Burgess & Holmstrom, *supra* note 143, at 981.

148. *Id*.

of the sample—and of course, the far larger portion of rape victims who never report to an ER[149]—was not considered in formulation of the diagnosis.[150]

At its inception, RTS was described as a "syndrome of behavioral, somatic, and psychological reactions" to forcible rape.[151] The syndrome—typically understood as a "group of symptoms that collectively indicate or characterize a disease, psychological disorder, or other abnormal condition"[152]—was defined by a "two-phase reaction."[153] In the first "acute" phase of "disorganization," women were said to experience a range of bodily responses, including physical trauma from the attack, nausea, "just thinking of the rape," and fear of death.[154] The second phase, a long-term process of "reorganization," was characterized by women moving homes, changing phone numbers, nightmares, and "traumatophobia"—fear of indoors, fear of outdoors, fear of being alone, fear of people behind them, and "sexual fears."[155] Underscoring that RTS was a clinical diagnosis, the authors pointed to "crisis counseling" as the therapeutic model of choice for the "management of Rape Trauma Syndrome."[156]

Since publication, the paper has been heavily criticized on methodological grounds,[157] and its findings have not been replicated.[158] Yet RTS has endured.[159] Research continues to document certain common reactions to rape (which are

149. In the study, the phenomenon of nonreporting is simply defined in relation to RTS. According to the authors:

> Since a significant proportion of women still do not report a rape, clinicians should be alert to a syndrome that we call the silent reaction to rape. This reaction occurs in the victim who has not told anyone of the rape, who has not settled her feelings and reactions on the issue, and who is carrying a tremendous psychological burden. Evidence of such a syndrome became apparent to us as a result of life history data. A number of women in our sample stated that they had been raped or molested at a previous time, often when they were children or adolescents. Often these women had not told anyone of the rape and had just kept the burden within themselves. The current rape reactivated their reaction to the prior experience. It became clear that because they had not talked about the previous rape, the syndrome had continued to develop, and these women had carried unresolved issues with them for years.

Id. at 985.

150. *Id*. at 981.

151. *Id.* at 982. Although the authors included a "heterogeneous sample of victims," the effects of victims' identities on their "symptoms" were not separately discussed or (except age) analyzed. *Id.* at 981, 983. The sample was not described in terms of victims' knowledge of the perpetrator. *See* O'Donohue et al., *supra* note 137, at 862 (noting this defect).

152. O'Donohue et al., *supra* note 137, at 861; *see also* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 467 (1996) (noting that the term "syndrome" is "elastic" when used in the social sciences, and citing the dictionary definition: "a group of symptoms or signs *typical* of a disease, disturbance, condition, or lesion in animals or plants.").

153. Burgess & Holmstrom, *supra* note 143, at 982.

154. *Id.* at 982–83.

155. *Id.* at 983–84.

156. *Id.* at 984. In a possible nod to the inadequacy of a syndromic framework, the authors conclude their study by noting: "[T]his is not a private syndrome. It should be a societal concern, and its treatment should be a public charge." *Id.* at 985.

157. *See* O'Donohue et al., *supra* note 137; *see also* Stefan, *supra* note 139, at 1297 (describing methodological criticisms, including that "sampling procedures were not described, potential sample bias was not addressed, control or comparison groups were not used, standardized psychometric testing devices were not used, and the reliability of measuring devices was not documented" (citations omitted)).

158. O'Donohue et al., *supra* note 137, at 866.

159. However, the diagnosis has never been included in the DSM. *See infra* note 161.

often but not always placed within the "syndrome" rubric),[160] and the inclusion of post-traumatic stress disorder ("PTSD") in the Diagnostic and Statistical Manual in 1980 legitimized the idea that a psychologically traumatic event can generate a constellation of characteristic symptoms.[161]

Notwithstanding questions surrounding its scientific reliability, courts quickly began allowing expert testimony on RTS.[162] In the four decades since, while judicial acceptance of such testimony has not been universal,[163] courts across numerous jurisdictions have affirmed its admission.[164]

2. Judicial Treatment

Typically, the expert who testifies about RTS is a psychiatrist, psychologist, or even a therapist who has treated or examined the victim.[165] Where courts

160. *See* Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 427 (1985) (citing a "sampling of writings on rape victims that support the RTS description of victim reaction to rape").

161. *See* David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C. L. REV. 1143, 1151–53 (1985) (discussing the impact of PTSD recognition on RTS legitimacy); *see also* O'Donohue et al., *supra* note 137, at 868 (noting that "RTS is not nor has it ever been included in the DSM").

162. *See* McCord, *supra* note 161, at 1159, 1177–78 (describing early civil cases); Massaro, *supra* note 160, at 436–39 (discussing early civil and criminal court treatments). In one early and influential adoption of RTS, the Kansas Supreme Court concluded that "[a]n examination of the literature clearly demonstrates that the so-called 'rape trauma syndrome' is generally accepted to be a common reaction to sexual assault" and, as such, is "relevant and admissible in a case . . . where the defense is consent." State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982).

163. Those courts to reject testimony about RTS have often expressed concern about its use to prove the occurrence of a rape. *See, e.g.*, People v. Bledsoe, 681 P.2d 291, 301 (Cal. 1984) (explaining "expert testimony that a complaining witness suffers from rape trauma syndrome is not admissible to prove that the witness was raped," while emphasizing that the decision "is not intended to suggest that rape trauma syndrome is not generally recognized or used in the general scientific community from which it arose, but only that it is not relied on in that community for the purpose for which the prosecution sought to use it in this case, namely, to prove that a rape in fact occurred"); *see also* State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982) (en banc) (concluding that "[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred"); State v. Taylor, 663 S.W.2d 235, 236–42 (Mo. 1984) (explaining the notion that "the prosecutrix suffered from rape trauma syndrome and that she had been raped are not sufficiently based on a scientific technique, which is either parochially accepted or rationally sound, to overcome the inherent danger of prejudice created by his status as an expert"); People v. Pullins, 378 N.W.2d 502, 504–05 (Mich. Ct. App. 1985) (holding RTS testimony inadmissible to prove that victim's symptoms were consistent with those of a person who had been raped). For one court excluding testimony based on the expert's qualifications, see State v. Willis, 888 P.2d 839, 847 (Kan. 1995) (requiring expert testimony on RTS to come from a person who possesses special training in the field of psychiatry, and excluding the testimony of a social worker who diagnosed the victim with RTS).

164. *See, e.g.*, Commonwealth v. Mamay, 553 N.E.2d 945, 951 (Mass. 1990) (concluding that "the medical community has generally recognized the existence of rape trauma syndrome," and citing cases upholding its admission). Courts have affirmed the admissibility of expert testimony on RTS in states applying *Frye*, which focuses on general acceptance within the scientific community, and in the majority of states that have adopted a *Daubert* model that centers on reliability. *Compare, e.g.*, Marks, 647 P.2d 1292 (applying *Frye* standard), *and* People v. Taylor, 552 N.E.2d 131, 137 (N.Y. 1990) (concluding that "evidence of rape trauma syndrome is generally accepted within the relevant scientific community"), *with* People v. Hampton, 746 P.2d 947, 951–52 (Colo. 1987) (applying *Daubert* standard) (abrogated on other grounds), *and* State v. Kinney, 762 A.2d 833, 842 (Vt. 2000) (applying *Daubert* standard).

165. *See, e.g.*, People v. Wheeler, 602 N.E.2d 826, 829 (Ill. 1992). In *Wheeler*, Pamela Klein, a therapist, interviewed the victim at the request of the State's Attorney and determined that the victim "had symptoms consistent with rape trauma syndrome." *Id.* Although this testimony was not otherwise objectionable, the court

expressly articulate a theory of relevance for this type of testimony,[166] they have affirmed its admission as probative of a lack of consent[167] and suggestive of the occurrence of a rape.[168] Courts also allow experts who have not examined the victim to testify about the symptoms of RTS and to explain that the victim's behaviors were consistent with this diagnosis.[169]

Some courts permit testimony on RTS while precluding the expert from expressing a view about the occurrence of a rape.[170] For instance, according to one court, an expert was allowed to explain that the victim "exhibits behavior consistent with" RTS, but could not opine "as to whether or not the alleged victim was raped."[171] The witness, a rape counselor, went beyond the permissible bounds when she testified that the victim "was 'still traumatized by this experience,'" since this testimony "amounted to a statement that [the counselor]

reversed the conviction because the defense was not permitted to examine the victim. *Id.* at 833–34. In rape cases involving prosecution experts, courts have recognized a range of qualifications. *See, e.g.*, State v. McCoy, 366 S.E.2d 731, 733 (W.Va. 1988) (affirming the qualifications of a co-founder and coordinator of a rape crisis team based on "a bachelor's degree in sociology and a master's degree in community agency counseling . . . training in rape crisis counseling," previous work experience dealing with sexual assault victims, conference attendance, and knowledge of current literature). For an overview of the kinds of witnesses qualified to testify on the behaviors of sexual assault victims, see KIMBERLY A. LONSWAY, THE USE OF EXPERT WITNESSES IN CASES INVOLVING SEXUAL ASSAULT 3 (2005) https://evawintl.org/wp-content/uploads/VAWORPAPER.pdf [https://perma.cc/4Q3P-RPVX]:

> [M]ost expert witnesses called to testify are medical professionals such as physicians, physicians' assistants, or Sexual Assault Forensic Examiners (SAFE). Psychologists, psychiatrists, clinical social workers, psychiatric nurses, and other mental health professionals also commonly serve as expert witnesses. Less common are victim advocates, law enforcement professionals, counselors, researchers, and college professors with expertise in the dynamics of sexual assault crimes and the impact of sexual assault victimization.

See also infra note 314 and accompanying text (discussing requirements of FRE 702). With a move away from RTS toward expertise on victim behavior, expert witnesses may include sexual assault victim advocates, rape crisis counselors, law enforcement officers, emergency room physicians, and sexual assault nurse examiners; therapists who have worked with the victim are generally avoided pursuant to best prosecutorial practice. Email from Jennifer Long, Chief Executive Officer, AEquitas (May 26, 2023) (on file with author).

166. Courts do not always address the issue of relevance. *See, e.g.*, *Wheeler*, 602 N.E.2d at 831.

167. *See, e.g.*, State v. Huey, 699 P.2d 1290, 1294 (Ariz. 1985); State v. Liddell, 685 P.2d 918 (Mont. 1984); United States v. Halford, 50 M.J. 402, 404 (C.A.A.F. 1999); State v. White, 605 S.E.2d 540, 544 (S.C. 2004); *see also* State v. Allewalt, 517 A.2d 741, 751 (Md. 1986) (describing testimony that referred to "posttraumatic stress disorder" rather than "rape trauma syndrome").

168. *See, e.g.*, Goodwin v. State, 573 N.E.2d 895, 898 (Ind. Ct. App. 1991) ("It is permissible to introduce expert testimony that a victim's behavior is consistent with post-traumatic stress disorder (or 'Rape Trauma Syndrome') as bearing upon whether or not a rape has occurred."); *White*, 605 S.E.2d at 544 (S.C. 2004) ("[The expert's] testimony is consistent with the probative purpose of admitting rape trauma evidence, i.e., to refute the defendant's contention that the sex was consensual and to prove that a sexual offense occurred.").

169. *See, e.g.*, Simmons v. State, 504 N.E.2d 575, 579 (Ind. 1987) (emphasis added) (citations omitted):

> The witnesses here were properly qualified psychiatric social workers, specifically trained in treatment of rape victims. Their testimony tended to show the victim's behavior after the rape was consistent with the clinically observed behavior pattern known among professionals as 'rape trauma syndrome.' The witnesses did not give an opinion as to the credibility of the victim. They described the victim's behavior as consistent with the behavior pattern often seen, much as the police officer in *[a previous case]* testified as to the behavior of burglars under certain circumstances. The decision to allow the opinion of an expert is left to the discretion of the trial judge and will be reviewed by this Court only if the trial court exceeds his discretion. In view of the facts and circumstances here, we cannot say the trial court committed reversible error in allowing the testimony of these two state witnesses.

170. *See, e.g.*, State v. McCoy, 366 S.E.2d 731, 737 (W. Va. 1988).

171. *Id.* at 737.

believed the alleged victim, and by virtue of her expert status she was in a position to help the jury determine the credibility of the most important witness in a rape prosecution."[172] The only permissible use of the diagnosis, in the court's view, would have been to place the victim in the category of those who suffer from RTS,[173] but without "bolster[ing] the credibility of the alleged victim by indicating that she was indeed raped."[174]

The arbitrariness of this distinction[175] evinces a deeper problem with the court's reasoning and with the body of case law surrounding RTS.[176] Even assuming some utility in a therapeutic setting,[177] the diagnosis has no place in a courtroom. This is not, as courts often suggest, because RTS helps the jury evaluate a victim's credibility,[178] but because it does not—at least, not nearly as effectively as expert testimony unyoked from a syndromic model.[179]

Why, then, has RTS maintained a quasi-monopoly on admissible expertise?[180] Two main features of the diagnosis help to explain its staying power: RTS individualizes the structural,[181] and it pathologizes the normal.[182] Each of these functions corresponds to the criminal law's extant approach to gender violence.[183] While this approach was always incompatible with social realities, #MeToo has crystallized the disconnect.[184]

172. *Id.*

173. Although the testifying expert did not use this term, the court employs it repeatedly. *Id.* at 734–37.

174. *Id.* at 737.

175. As the court noted:

> Even when the expert stops short of expressing an opinion on the ultimate issue of whether the complaining witness was raped and, as here, states simply that the witness is suffering from "rape trauma syndrome," the use of this terminology is likely to mislead the jury into inferring that such a classification reflects a scientific judgment that the witness was, in fact, raped.

Id. at 735 n.7 (citation omitted).

176. The cases allowing RTS to prove consent or the occurrence of a rape rest on similarly weak conceptual footing. *See, e.g.*, *supra* notes 11–41 and accompanying text (discussing New York Court of Appeals treatment of RTS in *People v. Taylor*, 552 N.E.2d 131, 132 (N.Y. 1990)).

177. On this score, it may be worth emphasizing that the diagnosis is not recognized in the DSM. *See* O'Donohue et al., *supra* note 137, at 860.

178. Even when adhering to the RTS template, courts have repeatedly gestured toward a permissible use for expert testimony in helping the jury evaluate victim credibility. *See, e.g.*, *Taylor*, 552 N.E.2d at 138 (holding expert testimony on RTS admissible to explain the victim's reactions after the incident); State v. Martens, 629 N.E.2d 462, 467 (Ohio Ct. App. 1993) (allowing expert testimony on RTS to "explain the [victim's] unusual behavior after the incident"); State v. Kinney, 762 A.2d 833, 842 (Vt. 2000) (finding RTS testimony was permissible "to assist the jury in evaluating the evidence, and frequently to respond to defense claims that the victim's behavior after the alleged rape was inconsistent with the claim that the rape occurred"); People v. Hampton, 746 P.2d 947, 951–52 (Colo. 1987) ("The rape trauma syndrome evidence put in context this explanation of delayed reporting.").

179. *See infra* notes 292–326 and accompanying text.

180. The monopoly is not complete—indeed, for decades, some prosecutors have managed with little fanfare (or resulting case law) to introduce nonsyndromic expert testimony in order to explain victim behavior. I thank Jennifer Long for sharing this insight.

181. *See infra* Subsection II.B.3.a.

182. *See infra* Subsection II.B.3.b.

183. *See infra* notes 238–42, 272–73 and accompanying text.

184. *See infra* notes 246–58 and accompanying text.

3. Conceptual Defects

The judicial treatment of RTS does more than influence how sex crimes are prosecuted; it forges a legal conception of the rape victim and, by implication, sexual violence itself.[185] The resulting construction is belied by the realities of abuse.[186] This same critique applies to a more encompassing failing—that is, the defects I identify also underpin the criminalization of gender violence.[187]

a. Individualizing the Structural

The syndromization of victims' responses to rape positions the individual as a singular focal point, wholly abstracted from social context. Once the diagnosis attaches, the "symptoms" identified with it are understood in isolation, concealing the manifold ways that victims' reactions to an assault are shaped by an interlocking set of systems and the hierarchies that sustain them.[188]

Fixation on a syndrome to describe the aftermath of rape pretends away key structural barriers facing survivors. Chief among these barriers are impediments to reporting the violence and, more globally, a range of cultural supports that protect abusers at the expense of those who are more marginalized.[189] Put differently, victims of rape are deeply embedded in structures of power.[190] Power imbalances inform who is most vulnerable to rape,[191] how victims respond to an assault,[192] and what happens (or does not happen) in its wake.[193] None of this is legible when an individual is plucked from context. Gender disappears, along

185. *See infra* notes 292–95, 366–73 and accompanying text.

186. This observation has important parallels in an adjacent domain—the evidentiary use of "battered woman syndrome" in cases involving domestic violence. *See infra* notes 243, 290 and accompanying text. In cases involving gender violence, where victims confront unique barriers to belief, the imprimatur of "science," however faulty, may be especially alluring to prosecutors and courts alike.

187. *See infra* notes 238–42, 272–73 and accompanying text.

188. *See infra* notes 246–58 and accompanying text.

189. *See supra* note 7; *infra* notes 243–45, 298–308 and accompanying text.

190. The lives of domestic violence victims are also shaped by marked power imbalances. *See generally* RACHEL LOUISE SNYDER, NO VISIBLE BRUISES: WHAT WE DON'T KNOW ABOUT DOMESTIC VIOLENCE CAN KILL US (2019); EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE (2009).

191. *See, e.g.*, *Victims of Sexual Violence: Statistics*, RAINN, https://rainn.org/statistics/victims-sexual-violence (last visited Sept. 28, 2023) [https://perma.cc/98NP-H73U] (noting particular vulnerabilities of young women and girls, trans women, prisoners, and Native women); *see also infra* notes 196–205, 300 and accompanying text.

192. *See supra* notes 82–91, 131–32 and accompanying text; *infra* notes 343–45 and accompanying text.

193. *See supra* note 7 (tracking credibility along lines of power). A structural analysis of credibility locates its patterned distribution along axes of inequality and observes that the contours of the credibility discount (as opposed to just its size) are themselves rooted in social subordination. *See* Swethaa S. Ballakrishnen & Sarah B. Lawsky, *Law, Legal Socializations, and Epistemic Injustice*, 47 LAW & SOC. INQUIRY 1026, 1034 (2022) (in discussion of the credibility discount, stressing the importance of "a move beyond the idea of a single value growing or shrinking or even a more rapid progression of discrimination or disbelief," and toward an intersectional view of discounting as encompassing "more than two dimensions" (citing Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 285–317 (2001))).

with its centrality to sexual violence.[194] So too do race, socioeconomic class, and other social identities that map onto identifiable axes of social power.[195]

The individualistic, decontextualized framing of syndromic evidence—and of criminal law itself[196]—cannot begin to capture the truly intersectional nature of gender violence. Consider that women of color are routinely perceived as less credible—and less important—than their abuser.[197] A syndromic understanding of victimization utterly fails to account for this fundamental feature of sexual violence and its structural supports. While seemingly race-neutral, a diagnosis blind to these complexities enshrines whiteness as the tacit default.

For instance, ignoring overlapping identities when describing the aftermath of abuse negates the experiences of Native survivors of gender violence, who Sarah Deer has described as "not only the most victimized, but also the original victims, the first victims of political and politicized sexual violence."[198] Native women suffer sexual violence at staggering rates—according to government estimates, more than half are victimized in their lifetime.[199] In some communities, especially remote villages, the incidence of sexual assault is even higher.[200] "It's more expected than unexpected," says one women's health advocate on the Yankton Sioux Reservation in South Dakota.[201]

Officials discount the credibility of Native survivors so steeply that reporting can seem useless.[202] When Native women are assaulted, they are well aware of the near inevitability that their allegation will be dismissed.[203] "You may have seen your mother report, or your sister report, or your aunties report, or you heard

194. *See* TUERKHEIMER, *supra* note 4, at 10–21 and accompanying text (citing statistics on the gendered nature of sexual violence and its aftermath).

195. *See supra* note 7; *infra* notes 198–230 and accompanying text (advancing an intersectional understanding of the credibility discount).

196. *See infra* notes 238–42, 272–73 and accompanying text.

197. As Kimberlé Crenshaw writes, "[w]omen of color are differently situated in the economic, social, and political worlds." Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1250 (1991).

198. TUERKHEIMER, *supra* note 4, at 21.

199. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 NAT'L INST. JUST. J. 39, 39 (2016).

200. *See, e.g.*, Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), https://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html [https://perma.cc/Y6CP-SDVB] ("[N]o place, women's advocates say, is more dangerous than Alaska's isolated villages, where there are no roads in or out, and where people are further cut off by undependable telephone, electrical and Internet service.").

201. *Id.*

202. *See, e.g.*, *id.* ("[Though] distressingly common for generations, [Native women] say tribal officials and the federal and state authorities have done little to help halt [rape], leading to its being significantly underreported. . . . Women's advocates on the [Navajo] reservation say only about 10 percent of sexual assaults are reported."); *infra* notes 389–98 and accompanying text (discussing the consequences of credibility discounting by police officers).

203. Non-Native offenders are responsible for the vast majority of sexual assault against Native victims. *See* Rosay, *supra* note 199, at 42.

of them reporting," Deer says.[204] "And nobody did a damn thing. So why would you think your case would be any different?"[205]

In Alaska, several police departments are notorious for failing to investigate sexual assault complaints from Native women.[206] The observations of one former officer are telling. Gretchen Small served as a Nome police officer in the mid-2000s.[207] Soon after she joined the force, she says, she realized the department was regularly dismissing Native women's allegations.[208] Small remembers an Alaska Native woman who reported that she was drinking at a bar and woke up in a hotel room with several men, one of whom described how five others had repeatedly raped her while she was unconscious.[209] After hearing this victim's account, Small returned to the police station to pursue leads, only to be instructed by two fellow officers that the episode was "not rape" because the accuser was drunk.[210] When Small reminded them that sex with an unconscious victim was indeed a crime, the officers "laughed and pointed to a stack of case files," explaining that "[w]hen a victim has a history of drinking or promiscuity," the case would "never be acted upon."[211] In Nome, as elsewhere, the belief that the abuse occurred is not enough to prompt action.[212] One local victim's advocate observed a lingering "mindset—not just within law enforcement but within community members—that when things like this happen . . . it's an individual's fault."[213]

Apart from shifting blame to the victim, many police officers show an utter indifference to the plight of Native women.[214] Small says she was once ordered to halt an investigation into a white man suspected of raping an Alaska Native fourteen-year-old.[215] "He doesn't do girls," Small recollects the sergeant saying.[216] "He only gets women at the bar drunk and takes them out in the tundra for sex. . . . He's a good guy."[217] From this case and others, Small was forced to conclude, "Native women don't count."[218]

The treatment of Black women also defies an atomistic notion of (white) victimhood removed from a profoundly hierarchical social context.[219] Black

204. TUERKHEIMER, *supra* note 4, at 21.

205. *See* Rosay, *supra* note 199, at 42.

206. Victoria McKenzie & Wong Maye-E, *In Nome, Alaska, Review of Rape 'Cold Cases' Hits a Wall*, ASSOCIATED PRESS (Dec. 20, 2019, 11:10 PM), https://apnews.com/b6d9f5f6fd71d2b75e3b77ad9a5c0e76 [https://perma.cc/WGW8-AGU7].

207. *Id.*

208. *Id.*

209. *Id*.

210. *Id*.

211. *Id.*

212. *Id.*; *see also supra* note 6 (observing that "it matters" is a component of a credible claim of abuse).

213. McKenzie & Maye-E, *supra* note 206.

214. *Id*.

215. *Id*.

216. *Id*.

217. *Id.*

218. *Id.*

219. *See, e.g.*, TUERKHEIMER, *supra* note 4, at 17–18 ("The credibility of Black women is discounted in ways that are distinct from how white women's credibility is discounted. Black women are not simply subordinated to a greater degree than white women; they are also differently subordinated.").

women are not simply subordinated to a greater degree than white women; they are also differently subordinated.[220] Distrust, blame, and disregard are each "brought to bear with special vengeance on Black women."[221] One study found that survivors who reported sexual assault to family members were met with three common responses: denying the assault occurred, faulting the victim, or ignoring the allegation altogether.[222] Those at greater risk for sexual violence are most likely to be dismissed, diminishing the odds they will pursue a formal complaint.[223]

Psychologists who study barriers to disclosure have also identified a "cultural mandate to protect African American male perpetrators from actual and perceived unfair treatment in the criminal justice system."[224] For Black women, coming forward may be cast as an act of disloyalty. Salamishah Tillet, a feminist activist and scholar of African American studies, writes that "the stereotype of the black male rapist has . . . intimidated black women who were assaulted by African-American men into silence out of fear of being labeled race traitors or, worse yet, of being seen as complicit with a criminal justice system that disproportionately incarcerated black men."[225] The imposition of this code of silence on Black women results in "a form of self-denial that contributes further to the degradation," as Anita Hill once described it.[226] The particular vulnerabilities of Black women and girls led Tarana Burke to found the MeToo movement,[227] and she continues to center her work on victims who are far more marginalized than celebrities.[228] For the stories of these survivors to matter, Burke insists that their suffering be regarded as important.[229]

220. *See* Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995). As legal scholar Angela P. Harris has observed, "Black women are not 'white women only more so.'" TUERKHEIMER, *supra* note 4, at 18.

221. TUERKHEIMER, *supra* note 4, at 19; *see also id.* at 16–20, 110–12, 169–70; Shaquita Tillman, Thema Bryant-Davis, Kimberly Smith & Alison Marks, *Shattering Silence: Exploring Barriers to Disclosure for African American Sexual Assault Survivors*, 11 TRAUMA, VIOLENCE, & ABUSE 59, 65 (2010).

222. *See* Tillman et al., *supra* note 221, at 62.

223. *See id*. at 63, 67.

224. *Id.* at 64–65. Other than sexual assaults against Native women, which are overwhelmingly interracial, the vast majority of sexual assaults involve a victim and perpetrator who share the same race. Rosay, *supra* note 199, at 42; RACHEL E. MORGAN, BUREAU JUST. STATS., RACE AND HISPANIC ORIGIN OF VICTIMS AND OFFENDERS, 2012-2015 1 (2017).

225. Salamishah Tillet, *Why Harvey Weinstein's Guilt Matters to Black Women*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/opinion/harvey-weinstein-black-women.html?action=click&module=Opinion&pgtype=Homepage [https://perma.cc/SW4C-AVVP].

226. ANITA HILL, SPEAKING TRUTH TO POWER 277 (1st ed. 1998).

227. The "#Me Too" campaign originated in 2007, when activist Tarana Burke began a nonprofit to assist victims of sexual harassment and assault. *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/JQN8-24HF]. For a reflection on when a protest campaign like #MeToo becomes a movement, see Beverly Gage, *When Does a Moment Turn into a 'Movement'?*, N.Y. TIMES MAG. (May 15, 2018), https://www.nytimes.com/2018/05/15/magazine/when-does-a-moment-turn-into-a-movement.html [https://perma.cc/HMM4-JWFF].

228. *See* Garcia, *supra* note 227.

229. *Id*.

In short, Black women must navigate a host of added pressures to stay silent at their own expense. *This* is the meaningful burden—not a cluster of "symptoms" that mark a socially abstracted, ostensibly raceless (read, white) individual as suffering from a syndrome. It is a burden carried differently by victims who are differently or multiply marginalized.[230] And it is a burden erased by a syndrome that converts structural constraints into personal pathologies.

The substitution of syndrome for structures elides victims' reasons not to report, and much else. Systems of inequality contribute to vulnerability to rape.[231] To apparent passivity during an assault.[232] To continued contact with an abuser.[233] To interactions with law enforcement officials and others in the wake of an assault.[234] To ways of communicating about what happened.[235] Even to changed behaviors in the aftermath of abuse.[236] Separately and—even more—collectively, systems of inequality compound rape's harm.[237]

Just as a syndromic model of victimization overlooks these realities, so too does the criminal law. With few exceptions, the criminalization of gender violence rests on the faulty premise that context does not matter.[238] At issue are select incidents, not patterns.[239] Non-physical manifestations of power or control aren't considered.[240] Those complicit in abuse lie outside the bounds of

230. *See, e.g.*, TUERKHEIMER, *supra* note 4, at 23 (quoting Sarah McBride, *Why I'm Not Staying Silent About Being a Trans Woman Who Was Sexually Assaulted*, BUZZFEED (Oct. 20, 2017), https://www.buzzfeed.com/sarahemcbride/why-its-so-hard-for-trans-women-to-talk-about-sexual-assault [https://perma.cc/P3BE-PX6Q]):

> As one trans woman who did not report her assault wrote, "I stayed silent because I knew that while many survivors are met with disbelief and doubt when they share their stories, trans survivors often also face a different kind of disbelief—one rooted in the perception that trans people are 'too disgusting' to be assaulted."

231. *See supra* notes 188–90 and accompanying text.

232. *See supra* notes 83–87 and accompanying text; *infra* notes 343–45 and accompanying text.

233. *See supra* notes 131–33 and accompanying text.

234. *See* TUERKHEIMER, *supra* note 4, at 80 (explaining that when an accuser faces a skeptical or hostile questioner, her ability to retrieve information may be compromised).

235. *See id.* (noting that an accuser "might not feel secure enough to share [her account] with a listener bent on disbelieving").

236. *See id.* at 101 (describing a survivor who, after being blamed for her rape, explained that she "kind of went off the deep end," drinking heavily and putting herself in "really dangerous situations," partly because she was "willing something else to happen . . . that could actually be credible and be perceived as a bad thing.").

237. *See id.* at 175:

> Accusers who come forward only to be dismissed . . . often describe fallout that is every bit as bad as—or worse than—the abuse itself. I've heard this from women who were distrusted, women who were blamed, *and* women who were disregarded. Regardless of why their report was cast aside, the credibility discount exacts an enormous toll.

238. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 949, 966 (2004).

239. *See id.* at 971–72 (describing criminal law's transaction-bound, incident-focused, "narrow temporal lens," which "places patterns of abuse outside of criminal law's reach;" "the law does not touch the pattern of conduct, for it cannot be captured by a moment in time").

240. *Id.* (critiquing the criminal law's "limited conception of harm" and its connection to a pervasive physical injury requirement).

accountability.[241] Victims must stand alone.[242] These ways of circumscribing a case are not without exception—nor are they without justification, however contestable. But notice how the foundational tenets of criminalization fail to comport with the lived experiences of gender violence. Regardless of where one lands on the merits of reform, to contextualize abuse would be to enact a dramatic reworking of criminal law. For now, the structures underlying abuse remain outside legal reach.

b. Pathologizing the Normal

Victims respond to sexual violence in ways that are reasonable and commonplace.[243] In stark contrast, the syndromic model pathologizes victims, ignoring the background conditions of widespread violation that yield a set of rational and comprehensible responses.[244] RTS works to the detriment of victims by casting their reactions as deviant rather than ordinary, and their suffering as aberrational rather than horrifically typical.[245]

Never before has the ubiquity of sexual violence been more apparent. The viral #MeToo moment began in early October 2017, when accusations of sexual assault and harassment against Harvey Weinstein were first published by *The New York Times* and *The New Yorker*.[246] As allegations against Weinstein multiplied in the coming weeks and months,[247] the media intensified its focus on sexual misconduct by other powerful men.[248] Soon, the coverage of misconduct

241. *See* Deborah Tuerkheimer, *Ghislaine Maxwell is Guilty. What Happens Next is Critical.*, N.Y. TIMES (Dec. 29. 2021), https://www.nytimes.com/2021/12/29/opinion/maxwell-epstein-sexual-abuse.html [https://perma.cc/KPL8-EWN7] ("In the world of wealth and privilege, most enablers are beyond the reach of criminal law.").

242. *See infra* note 370 and accompanying text.

243. In the context of battered women who kill in self-defense, feminist legal theorists have argued that syndrome evidence is in tension with an understanding of the victim's fear as reasonable, which the doctrine requires. *See, e.g.*, ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 123–33 (2000).

244. This failure is not unrelated to problems associated with individualizing the structural, although each critique is worthy of separate analysis.

245. According to government estimates, more than one in five women (21.3%) have been the victim of rape—defined as forced penetration, attempted forced penetration, or alcohol/drug-induced forced penetration—in her lifetime. SHARON G. SMITH ET AL., NAT'L CTR. FOR INJURY PREVENTION AND CONTROL: DIV. VIOLENCE PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF, 1–2 (2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf [https://perma.cc/T767-NW44]; *see also infra* notes 249–50 and accompanying text (surveying #MeToo revelations).

246. *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/24JZ-Y2KK]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/5AZD-YQWB]; *see also supra* note 227 and accompanying text (describing origins of the #MeToo movement).

247. *See* Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (June 1, 2018, 4:51 PM), https://www.usatoday.com/story/life/people/ 2017/10/27/weinstein-scandal-complete-list-accusers/804663001 [https://perma.cc/A8YY-6D5P].

248. *See* Swetha Kannan & Priya Krishnakumar, *A Powerful Person Has Been Accused of Misconduct at a Rate of Nearly Once Every 20 Hours Since Weinstein*, L.A. TIMES (Dec. 29, 2017),

ranging from boorish to criminal expanded to disparate industries and institutions, including publishing, fashion, music, sports, entertainment, architecture, advertising, comedy, philanthropy, hospitality, retail, farm, factory, academia, technology, media, church, and politics.[249] By the close of 2017, #MeToo had

https://www.latimes.com/projects/la-na-sexual-harassment-fallout [https://perma.cc/94SE-SJ89]. In the several years preceding the Weinstein story, clusters of high-profile sexual misconduct accusations surfaced against Bill Cosby, Roger Ailes, and Donald Trump, among others, likely seeding the ground for #MeToo. For one pre-Weinstein perspective, see Lani Seelinger, *Trump, Cosby, and Why Being a Woman in 2017 Feels Harder than Ever*, BUSTLE (June 17, 2017), https://www.bustle.com/p/trump-cosby-why-being-a-woman-in-2017-feels-harder-than-ever-65066 [https://perma.cc/F3AR-96P3].

249. *See, e.g.*, Patricia Cohen & Tiffany Hsu, *Children's Book Industry Has Its #MeToo Moment*, N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/business/childrens-publishing-sexual-harassment.html [https://perma.cc/M9JB-A5BC]; Emilia Petrarca, *Fashion's #MeToo Movement Is Loudest on Instagram*, CUT (Apr. 5, 2018), https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment.html [https://perma.cc/VR33-J5N5]; Marlow Stern, *'Russell Simmons Is Just the Beginning': Music Industry Braces for #MeToo Impact*, DAILY BEAST (Dec. 15, 2017, 4:35 PM), https://www.thedailybeast.com/russell-simmons-is-just-the-beginning-music-industry-braces-for-metoo-impact [https://perma.cc/Q73A-ABAM]; Juliet Macur, *The 'Me Too' Movement Inevitably Spills into Sports*, N.Y. TIMES (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/sports/olympics/mckayla-maroney-me-too.html [https://perma.cc/R45T-V3XX]; *Notable Entertainment Figures Accused of Sexual Misconduct in Wake of Harvey Weinstein*, HOLLYWOOD REP. (Nov. 30, 2017, 2:23 PM), https://www.hollywoodreporter.com/lists/hollywood-media-men-accused-of-sexual-misconduct-and-harassment-post-weinstein-1057193 [https://perma.cc/HM3L-AZ7D]; Stassa Edwards, *Women in Architecture Have Their Own Shitty Men List*, JEZEBEL (Mar. 16, 2018), https://jezebel.com/women-in-architecture-have-their-own-shitty-men-list-1823844222 [https://perma.cc/KL72-W5RN]; Amelia Harnish, *Advertising's #MeToo Movement Picks Up Speed*, REFINERY29 (Mar. 13, 2018, 4:35 PM), https://www.refinery29.com/en-us/2018/03/193440/times-up-advertising-female-advertising-executives-sexual-harassment [https://perma.cc/XYA7-339L]; David Sims, *Louis C.K. and Abuse of Power in the Comedy World*, ATLANTIC (Nov. 9, 2017), https://www.theatlantic.com/entertainment/archive/2017/11/louis-ck-sexual-misconduct-allegations/545489 [https://perma.cc/LN99-7QWY]; *#MeToo Hits the Nonprofit World*, CHRON. PHILANTHROPY (Apr. 5, 2018), https://www.philanthropy.com/specialreport/metoo-hits-the-nonprofit-worl/167 [https://perma.cc/72YF-45QH]; Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why Is the Restaurant Industry So Terrible for Women?*, WASH. POST (Nov. 17, 2017, 9:00 AM), https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html [https://perma.cc/77VA-EEXM]; Yuki Noguchi, *Low-Wage Workers Say #MeToo Movement Is Chance for Change*, NPR (Feb. 6, 2018, 4:59 AM), https://www.npr.org/2018/02/06/583428098/low-wage-workers-say-metoo-movement-is-a-chance-for-change [https://perma.cc/ZWJ6-67LK]; Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html [https://perma.cc/R78Z-9REL]; Nick Anderson, *Academia's #MeToo Moment: Women Accuse Professors of Sexual Misconduct*, WASH. POST (May 10, 2018, 6:00 AM), https://www.washingtonpost.com/local/education/academias-metoo-moment-women-accuse-professors-of-sexual-misconduct/2018/05/10/474102de-2631-11e8-874b-d517e912f125_story.html [https://perma.cc/MX69-966Z]; Alyssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017, 7:30 PM), https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271 [https://perma.cc/X3TA-MUTJ]; Jill Disis, *The Media Men Who Have Been Accused of Sexual Misconduct*, CNN BUS. (Nov. 30, 2017, 10:21 AM), https://money.cnn.com/2017/11/29/media/media-men-accused-of-sexual-misconduct/index.html [https://perma.cc/AL86-HRNG]; Harry Bruinius, *Churches Struggle with Their #MeToo Moment*, CHRISTIAN SCI. MONITOR (Apr. 20, 2018), https://www.csmonitor.com/USA/Politics/2018/0420/Churches-struggle-with-their-MeToo-moment [https://perma.cc/AT4L-J3F9]; Dan Corey, *Here's a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 16, 2017, 10:08 PM), https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821 [https://perma.cc/83DY-7FT6].

sparked a collective reckoning with a vast continuum of sexual abuse—a partial and imperfect reckoning that continues.[250]

Amidst and beyond the headlines lies the suffering of countless women, which cannot accurately be characterized by a syndrome.[251] Rape is not an extraordinary occurrence, meaning that victims are not rare in relation to the general population.[252] Nor are the responses of rape victims or their so-called symptoms exceptional. Quite the opposite: these responses are as commonplace as the violence that prompts them and, at least in the short term, they can be adaptive.[253]

Take the behaviors that surround the decision not to report the assault—a decision made by *most* rape victims.[254] Likewise, as we have seen, most victims do not mount physical resistance.[255] Most victims cannot provide a perfectly linear, detailed narrative of their rape.[256] Self-blame is sadly normal.[257] Continued contact with the perpetrator is more the rule than the exception.[258] In sum, RTS "symptoms" are familiar, customary responses to sexual assault, and they can be optimal ways of negotiating drastically unequal terrain.

This is not to overlook the neuroscience of trauma or deny its impact.[259] But here too, whether a rape victim can be said to suffer from a psychiatric disorder seems rather beside the point in a criminal justice setting. The legal construction of victims as pathological may be so ingrained as to seem unremarkable, but the law is not a clinical setting, and diagnosis in the courtroom is not meant to serve therapeutic ends.[260] Rather than frame the effects of trauma as syndromic, the insights of neuroscience illuminate how—as a matter of course—traumatic events impact victims both during and after a sexual assault.[261]

250. *See* Deborah Tuerkheimer, *The Importance of E. Jean Carroll's Lawsuit Against Donald Trump*, N.Y. TIMES (Apr. 25, 2023), https://www.nytimes.com/2023/04/25/opinion/trump-metoo-sexual-assault-lawsuit.html [https://perma.cc/ZUC3-6AJF].

251. *See supra* note 243 and *infra* note 290 (noting critiques of "battered woman syndrome").

252. *See* TUERKHEIMER, *supra* note 4, at 10–21 (citing statistics on the gendered nature of rape); *supra* note 245 (citing statistics on rape prevalence). The incidence of sexual assault is even higher among transgender populations. *See Responding to Transgender Victims of Sexual Assault*, OFF. FOR JUST. PROGRAMS, OFF. FOR VICTIMS OF CRIME (June 2014), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/sexual_numbers.html [https://perma.cc/25ZT-7TT7] (reporting that "[o]ne in two transgender individuals are sexually abused or assaulted at some point in their lives" and that "[s]exual violence has been found to be even higher in some subpopulations within the transgender community, including transgender youth, transgender people of color, individuals living with disabilities, homeless individuals, and those who are involved in the sex trade" (citations omitted)).

253. *See infra* note 300 and accompanying text (describing the kinds of power often wielded by perpetrators and how this prospect disincentivizes the reporting of abuse); *see also* TUERKHEIMER, *supra* note 4399, at 107 (discussing how self-blame can, in the short term, seem psychologically protective).

254. *See infra* notes 419–26 and accompanying text (citing statistics on underreporting).

255. *See supra* notes 83–94 and accompanying text.

256. *See supra* notes 96–109 and accompanying text.

257. *See also* TUERKHEIMER, *supra* note 4, at 105–08 (discussing self-blame and shame).

258. *See infra* note 308 and accompanying text (describing expert testimony in the Cosby trial).

259. *See supra* notes 105–06, *infra* notes 263–95 and accompanying text.

260. *See supra* note 177 (cautioning against assuming diagnostic utility in the therapeutic setting).

261. *See infra* notes 294–328 and accompanying text.

For instance, as mentioned earlier,[262] individuals have only a limited amount of time to create memories when under stress.[263] When our brain detects a threat, the hippocampus, which plays a critical role in encoding information into short-term memory and storing it as long-term memory, operates in an unusual manner.[264] After five to twenty minutes in "super-encoding mode," when central details are strongly encoded, the hippocampus enters a "minimal-encoding" phase, in which "the *storage* of details—even central ones—[is] severely limited or not happening at all."[265] The biology of superencoding means that it cannot be sustained for long without permanently damaging the cells.[266] Our bodies have adapted, burning into memory the information most likely to be needed for future survival, while at the same time protecting our hippocampus.[267] All this means that incomplete memories of traumatic events are both explicable and far from aberrational—which is to say, the workings of trauma are at odds with an evidentiary conception of victims as disordered and exceptional.

Even so, the syndromic conception resonates with how rape is criminalized. The pervasiveness of assault,[268] which has been placed on more copious display since #MeToo,[269] is in deep tension with the traditional conception of crime as deviant and atypical.[270] A similar critique flows from recognizing the myriad ways that male sexual entitlement pervades contemporary gender relations even when exercises of this entitlement fall short of criminal prohibition. These fissures reveal that, like syndromization, the criminalization of gender violence constructs victims in ways irreconcilable with core features of abuse.

* * *

The connection between sex crimes expertise and RTS may seem durable, but it can be severed. In the wake of #MeToo, this very unraveling is underway.

III. THE NEW EXPERTISE

Released from syndromic constraints, expert testimony in sex crimes trials can squarely situate victims in social context, normalizing rather than pathologizing, contextualizing rather than abstracting. Recent high-profile prosecutions have featured this very type of expertise.[271] To explain why, I begin by describing the law governing jury evaluations of accusers' credibility.

262. *See supra* notes 102–05 and accompanying text.

263. *See, e.g.*, Jim Hopper, *Why Can't Christine Blasey Ford Remember How She Got Home*?, SCI. AM. (Oct. 5, 2018), https://blogs.scientificamerican.com/observations/why-cant-christine-blasey-ford-remember-how-she-got-home/ [https://perma.cc/Z4MR-GR6V].

264. *Id.*

265. *Id.*

266. *Id*.

267. *Id.*

268. *See supra* note 245 (citing statistics on rape prevalence).

269. *See supra* notes 248–52 and accompanying text.

270. *See supra* notes 245–52 and accompanying text.

271. For an overview of the testimony in Cosby's trial, see *infra* notes 296–308 and accompanying text. For a detailed account of the testimony in Weinstein's trial, see *infra* Section III.B. Expert testimony was also introduced in the prosecution of Ghislaine Maxwell, see *infra* notes 310–26 and accompanying text, and of R. Kelly.

A. Law of Credibility

1. Jury Instructions

For much of our nation's history, sex crimes trials included a unique "cautionary instruction," which warned jurors to evaluate an accuser's testimony with extra suspicion.[272] Cautionary instructions were meant to ensure that, in every sexual assault case, jurors would remain especially distrustful of the version of events offered by a woman alleging rape.[273] In the parlance of one representative warning from California, since a rape charge "is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. . . . [T]he law requires that you examine the testimony of the female person named in the information with caution."[274] To protect innocent men from false rape allegations in particular,[275] jurors were ordered to be uber vigilant when judging the testimony of accusers. Throughout the 1980s, about half the states instructed rape juries accordingly,[276] and a handful continue to do so.[277]

Even where this skepticism is no longer formally embedded, standard judicial guidance on judging witness credibility, while neutral on its face, continues to disadvantage rape accusers. By default, credibility judgments depend on common sense[278]—a dynamic made explicit by instructions provided in courtrooms

See Emily Palmer, *R. Kelly Trial: Key Moments from Week 5*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/article/r-kelly-trial-explained.html [https://perma.cc/6P53-V76D] (describing expert testimony that a power dynamic can keep victims "captive" to their abuser).

272. *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 948 (2004). Cautionary instructions in U.S. courts were based on the seventeenth-century musings of Lord Hale, who warned that if a rape accuser

> [C]oncealed the injury for any considerable time after she had opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.

SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 633 (1847). Hale further emphasized that a woman's failure to promptly report the rape "always carries a presumption of a malicious prosecution." *Id.*

273. *See, e.g.*, Anderson, *supra* note 272, at 949.

274. People v. Rincon-Pineda, 538 P.2d 247, 252 (Cal. 1975). This echoes the 1962 Model Penal Code (MPC) formulation, which states:

> No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

MODEL PENAL CODE § 213.6(5) (AM. L. INST. 1962). Revised MPC provisions on sexual assault will be published in 2024; these provisions do not contain a cautionary instruction. I was one of many consultants on the project.

275. *See, e.g.*, A. Thomas Morris, Note, *The Empirical, Historical, and Legal Case Against the Cautionary Instruction*, 1988 DUKE L.J. 154, 160 (1988).

276. *See id.* at 156.

277. *See, e.g.*, Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 652 (2010).

278. On the definition of "common sense," see Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RSRV. L. REV. 165, 176 (1989–1990). Friedland writes:

across the states.[279] But we have seen how common sense fails when people evaluate the credibility of rape victims.[280] Set against our stores of misconceptions about the workings of abuse, a victim's behavior—and thus her allegations—seem strange and inexplicable.[281]

"In deciding whether testimony is true and accurate, use your common sense and experience," reads one typical instruction.[282] This is the counsel jurors are given—to determine what to believe, we must depend on common sense. But when common sense is skewed, so are common credibility assessments.[283]

Expert testimony decoupled from the syndromic template can mitigate this skewing effect.

> Attempts to define common sense with precision have proven futile. The continued survival of the notion of common sense may be due to the fact that a precise definition is neither needed nor available. If common sense is used to assess credibility because jurors are responsible for determining guilt and innocence on behalf of the community, the concept of common sense is synonymous with the 'average community viewpoint.' Common sense embraces, therefore, the broad disparity of experiences and approaches to credibility that may exist in a representative cross-section of the community.

Id. at 176 n.50 (citing 3 OXFORD ENGLISH DICTIONARY 573 (2d ed. 1989) ("common sense" is defined as "[t]he endowment of natural intelligence possessed by rational beings; ordinary, normal or average understanding; the plain wisdom which is everyone's inheritance.")).

279. *See, e.g.*, CAL. CRIM. JURY INSTRUCTIONS No. 105 (May 2023), https://www.justia.com/criminal/docs/calcrim/100/105/ [https://perma.cc/P54K-6P9L]; ILL. GEN. JURY INSTRUCTIONS Nos. 1.01(A), (C), https://www.illinoiscourts.gov/Resources/d28c859b-ce8c-4ff2-81bb-00bb0934e6d2/1.00.pdf (last visited Sept. 28, 2023) [https://perma.cc/4SGN-HUUQ]; MASS. JURY INSTRUCTIONS 1–4 (Sept. 2022), https://www.mass.gov/doc/2120-function-of-the-jury-what-is-evidence-credibility-of-witnesses/download [https://perma.cc/ZW76-BRB8]; MICH. MODEL CRIM. JURY INSTRUCTIONS 1-10 to 3-11 (June 28, 2023), https://www.courts.michigan.gov/4acdaf/siteassets/rules-instructions-administrative-orders/jury-instructions/criminal/current/criminal-jury-instructions.pdf [https://perma.cc/X4GF-7JGP]; VA. MODEL JURY INSTRUCTIONS—CRIMINAL Nos. 2.050, 2.500, 2.800 (Sept. 2022), https://www.vacourts.gov/courts/circuit/resources/model_jury_instructions_criminal.pdf [https://perma.cc/AX6U-XGT2]; UTAH PATTERN JURY INSTRUCTIONS CR 207, http://edwinwall.com/Federal__State_Forms/Utah%20MUJI.pdf (last visited Sept. 28, 2023) [https://perma.cc/QT7C-L4YV]; REVISED ARIZ. JURY INSTRUCTIONS (CRIMINAL) 5 (Sept. 2019), https://www.azbar.org/media/jl5lzdpl/2019-raji-criminal-5th-ed.pdf [https://perma.cc/67MC-5XJX]; *see also supra* notes 1–5 and accompanying text (describing Weinstein trial instruction on common sense).

280. *See supra* notes 76–134 and accompanying text.

281. *See supra* notes 79–81 and accompanying text (the "perfect victim" is "an amalgam of how we think victims do in fact respond to abuse, and how we think they should respond to abuse.").

282. *See* CAL. CRIM. JURY INSTRUCTIONS, *supra* note 279, at 14.

283. Along these lines, rather than offer a "common sense" jury charge in a sex crimes case, a judge might even warn jurors of the *unreliability* of common sense. This would run directly counter to the traditional cautionary instruction. *See supra* notes 272–77 and accompanying text.

2. Expert Testimony

Expert testimony that bears on a witness's credibility has long been admissible.[284] Experts can address credibility in several permissible ways.[285] One is to assist the jury in understanding a witness's conduct, which might otherwise suggest a lack of credibility.[286] For decades, expert testimony of this sort has been allowed to explain the behaviors of domestic violence and child abuse victims.[287] Rather than opine directly on whether a particular witness is credible,[288] the expert can offer general insight into the behaviors of a relevant group, thus contextualizing conduct that might—without the benefit of expertise—cast unwarranted doubt on the witness's account.[289]

For instance, courts regularly allow the use of testimony on battering and its effects, untethered from what once was known as "battered women's syndrome."[290] Similarly, in cases involving the sexual abuse of children, courts have

284. This general rule of admissibility has evolved in spite of what Anne Bowen Poulin has described as "the residual strength of the common-law maxim that witnesses—particularly expert witnesses—must not invade the jury's province by vouching for or bolstering a witness's credibility," or even by explaining perceived weaknesses in credibility. *See* Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 993 (2007). Poulin adds:

> The admissibility of expert testimony addressing credibility must be considered in the context of the modern rules of evidence as embodied in the Federal Rules of Evidence [and a majority of states whose rules are modeled on the federal rules]. The Rules marked a change in the law, and the Rules establish a clear bias in favor of admissibility. In addition, the Rules specifically abandon some common-law restrictions on admissible evidence. Three sets of rules, each expanding the range of admissible evidence, bear on this discussion: the general rules governing the admissibility of relevant evidence; the rules governing character evidence; and the rules governing expert testimony. Each of these sets of rules favors the admissibility of expert testimony addressing credibility.

Id. at 995–96 (citations omitted).

285. *Id.* at 995–96.

286. As Poulin articulates this function, "an expert witness may help the jury understand the way in which a witness's conduct reflects on the witness's credibility. When a witness's conduct may suggest a lack of credibility to the jury, expert insight into that conduct may bolster the witness's credibility." *Id.* at 995.

287. *Id.* at 1040–44 (also noting cases in which expert testimony was admitted on behalf of a defendant challenging the credibility of his confession). For a discussion of how the evidence rules apply to admission of expert testimony explaining victim behavior, see *infra* notes 309–25 and accompanying text.

288. *See, e.g.*, United States v. Johnson, 860 F.3d 1133, 1140–41 (8th Cir. 2017) (allowing testimony "[s]o long as the expert does not impermissibly 'vouch' for the victim by, for example, diagnosing the victim with sexual abuse or expressing an opinion that sexual abuse has in fact occurred . . . ." (citation omitted)); United States v. Ray, No. 20-cr-110, 2022 WL 101911, at *12 (S.D.N.Y. Jan. 11, 2022) ("[T]here is nothing wrong with testimony that corroborates the testimony of a party's fact witnesses and thereby makes that testimony more credible or believable to the jury.").

289. *See* Friedland, *supra* note 278, at 201 (citations and footnotes omitted):

> The most commonly admitted form of expert testimony on credibility concerns the common or general characteristics of a group of people. Courts have found this form of testimony to have the least prejudicial impact. The testimony usually instructs jurors on how to assess properly the credibility of a certain type of witness or explains that certain behavior is relatively normal.

See also Mosteller, *supra* note 152, at 472 (advocating limited use of expert social science testimony to "describe general reactions to known or assumed causes"). For an early guide to prosecutorial practices around the introduction of expert testimony in gender violence cases, see generally Long, *supra* note 109.

290. *See* SCHNEIDER, *supra* note 243, at 80–81, 127–28, 132–42 (exploring how expert testimony on what once was styled as "battered woman syndrome" "reflected ongoing tensions and paradoxes within women's self-defense work" and, more broadly, for feminist legal theory). For recent judicial treatment that typifies the move away from syndromic evidence toward the more modern approach to expert testimony on battering and its effects,

long permitted experts to testify about the "general characteristics" exhibited by child victims, including the "emotional and psychological traits of abuse victims that often account for behavior such as delay in reporting the abuse or failure to 'escape' the abusive situation."[291]

Although for decades RTS has dominated the evidentiary framework governing expert testimony on adult rape victims,[292] the syndromic model's supremacy may be on the wane.[293] In recent years—coinciding, not coincidentally, with the rise of #MeToo—prosecutors in a series of high-profile cases have successfully pursued a distinct approach to expert testimony.[294] Liberated from the confines of the diagnostic frame, experts are permitted to describe and explain a wide range of behaviors exhibited by rape victims.[295]

A prime example comes from the 2018 retrial of Bill Cosby.[296] The prosecution opened its case with a forensic psychiatrist whose testimony was meant

see People v. Cooper, 496 P.3d 430, 443 (Colo. 2021) (allowing expert to "educate the jury" where "certain behaviors by a domestic violence victim," including remaining in an abusive relationship and refusing medical attention, "are in conflict with what an ordinary juror might intuitively expect, generalized expert testimony is helpful to educate the jury on what social science teaches about those behaviors."); *see also Ray*, 2022 WL 101911, at *10–11 (citing federal cases holding admissible expert testimony to "help a jury understand a common set of conduct experience [sic] by victims," and allowing expert testimony on the effects of "coercive control"). For a helpful overview, see generally U.S. JUST. DEPT., NAT'L INST. JUST., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS (1996), https://www.ojp.gov/pdffiles/batter.pdf [https://perma.cc/8SE3-N2WW].

291. *See, e.g.*, *Johnson*, 860 F.3d at 1140 (citing cases involving child sexual abuse).

292. *See supra* notes 165–74 and accompanying text.

293. Even apart from recent high-profile cases, the longtime linkage of allowable expertise to RTS is not without exception. *See, e.g.*, People v. Glasser, 293 P.3d 68, 77–78 (Colo. App. 2011) (upholding admissibility of expert testimony about "sexual assault victim trauma issues and dynamics," including "the reactions of sexual assault victims, [and] the science behind victims' delayed reporting or faulty memories"); State v. Obeta, 796 N.W.2d 282, 290–91 (Minn. 2011) ("[C]ommon behaviors and mental reactions social scientists repeatedly observe in rape victims, such as delayed reporting, lack of physical injuries, or the failure to fight aggressively against the attacker, that are contrary to society's expectations of how a person who was sexually assaulted would behave." Further, the court allowed expert testimony on "typical rape-victim behaviors to dispel commonly-held rape myths that the jury might rely on in evaluating the evidence in the case."). For a state-by-state compilation of cases treating expert testimony on victim behavior, including testimony focused on child victims, domestic violence victims, and sexual assault victims, see generally AEQUITAS, CASE LAW DIGEST: EXPERT TESTIMONY ON VICTIM BEHAVIOR (2011) (on file with author).

294. *See supra* note 271.

295. *See* Trial Transcript, Testimony of Barbara Ziv, at 18, 51–53, Commonwealth v. Cosby (Pa. Commw. Ct. Apr. 10, 2018) (No. 3932-16) (on file with author) [hereinafter Ziv Testimony]. The Cosby prosecution sought qualification of the forensic psychiatrist as "an expert in understanding the dynamics of sexual violence, victim responses to sexual violence, and the impact of sexual violence on victims during and after being assaulted." *Id.* at 18. The court allowed the expert to testify in order to "assist the trier in [sic] fact in understanding the dynamics of sexual violence . . . ." *Id.* at 31.

296. *See* Ailsa Chang, *Why Prosecutors in Bill Cosby's Case Focused on Addressing Misconceptions About Rape*, NPR: ALL THINGS CONSIDERED (Apr. 27, 2018, 4:22 PM), https://www.npr.org/2018/04/27/606580169/why-prosecutors-in-bill-cosbys-case-focused-on-addressing-misconceptions-about-r [https://perma.cc/R8W8-VMCW]:

> The guilty verdict in the retrial of Bill Cosby has many people wondering what changed this time around. Well, we're going to talk about one big difference. In the first trial, the prosecution waited until almost the end of their case to put forward an expert on sexual assault, a person who could explain how victims of assault typically respond—what they do, what they don't do. In the second trial, the prosecution called as its very first witness forensic psychiatrist Barbara Ziv.

to debunk the clump of misunderstandings likely to be shared by at least some members of the jury.[297] The expert explained:[298] many rape victims describe themselves "in a state of being frozen" during the assault, and they do not mount resistance;[299] victims do not usually confront their rapist after the fact;[300] the vast majority of victims never report sexual assault,[301] and the "small minority who do report" often wait before coming forward;[302] a victim's consumption of alcohol or drugs is often an additional barrier to reporting;[303] many victims "show little emotion or even inappropriate emotion" after being assaulted;[304] victims rarely provide a comprehensive, linear account of the violence;[305] police questioning seldom generates the conditions conducive to thorough reporting;[306]

297. *See supra* notes 76–134 and accompanying text.

298. In order to admit Ziv's testimony, the court determined that it was appropriately based in science and helpful to the jury. *See infra* notes 309–26 and accompanying text (describing applicable evidentiary framework); *see also* Ziv Testimony, *supra* note 295, at 42, 77 (testifying that "most of what people believe, most common knowledge about sexual assault is wrong;" and her opinions were given "within a reasonable degree of scientific certainty within the field of forensic psychiatry"). With regard to "scientific certainty," government experts in federal prosecutions no longer use this once-typical formulation. *See* Danielle Weiss & Gerald LaPorte, *Uncertainty Ahead: A Shift in How Federal Scientific Experts Can Testify*, NAT'L INST. JUST. J. (Jan. 17, 2018), https://nij.ojp.gov/topics/articles/uncertainty-ahead-shift-how-federal-scientific-experts-can-testify [https://perma.cc/7GK2-8SE2].

299. *See* Ziv Testimony, *supra* note 295, at 53 ("[D]uring a sexual assault, most people do not fight back. Most of the time they don't even verbally fight back. They almost never physically fight back.").

300. *See id.* at 108:

> People . . . blame themselves to a certain extent. They want to believe that somebody that they trusted is trustworthy because they're . . . afraid of damage to their reputation, perhaps damage to their career, because there is a hierarchy in the relationship. Women are often sexually assaulted by individuals who are in a more powerful role than they, and they may be wary of the consequences. And they don't want to be told that it didn't happen, and they don't want to be told that it was their fault.

301. *See id.* at 44–45:

> The vast majority of victims do not report sexual assault to police. Or other authorities, actually. They don't report to clergy. They don't report to doctors. They don't report to mandatory reporters. They don't report to their HR department. The vast majority of victims of sexual assault do not report to any authority.

302. *See id.* at 45 ("A delayed reporting is the norm, not the exception. Delayed reporting can go from days to weeks to months to years. There are lots of reasons behind that . . . ."); *see also id.* at 68:

> I would challenge you to find one victim of sexual assault, one—I've been doing this for a long time. I don't know that I can name one victim of sexual assault who is not humiliated by the fact that they have been sexually assaulted, who doesn't blame themselves in some way, and who is not deeply ashamed of it.

303. *Id.* at 51:

> Alcohol is probably more commonly involved in sexual assaults than is known. If it is involved, a victim is much less likely to bring it to the attention of authorities, or if drugs are involved, for two reasons. Number one, it increases someone's sense of responsibility, the victim's sense of responsibility. And number two, it impacts your memory.

304. *See id.* at 63:

> [Y]ou can have a wide range. You can have people shut down and shut down completely. You can have people behaving inappropriately. You can have people that just become really angry. Not toward the perpetrator, but toward family member or colleagues or other people. You have a whole range of responses . . . .

305. *See id.* at 52 (refuting conventional wisdom that a rape victim will provide "a nice chronological, consistent, coherent timeline of what happened," and emphasizing that even without the involvement of drugs or alcohol, memories are normally "not precise").

306. *See id.* at 71–72 ("Most often information is provided incrementally," in part because presenting allegations to police can feel like "a trial" that leads victims to withhold sensitive information).

victims may engage in a range of self-destructive behaviors in the wake of an assault;[307] and subsequent contact with the abuser is, in fact, the norm.[308]

The shift to expertise that normalizes rather than pathologizes victim behavior accords well with the law governing the admissibility of expert testimony.[309] Consider the district court's analysis of a defense motion to exclude the government's expert in the case against Ghislaine Maxwell, who assisted in Jeffrey Epstein's scheme to sexually abuse girls.[310] The court's decision to allow the expert evidence[311] followed an "extensive" *Daubert* hearing[312] examining the proffered testimony of Lisa Rocchio, a clinical psychologist with decades of experience treating victims of sexual abuse.[313] Without objecting to Rocchio's qualifications,[314] Maxwell argued that her testimony was not relevant

307. *See id.* at 64:

> It can range from anything to—some people try to carry on and act normally and go back to their jobs and their families and, you know, go forth. And some people shut down completely, tune out, retreat into themselves, turn off. Some people go to drugs and alcohol. Some people engage in self-injurious behavior; they cut themselves, they burn themselves, they may become suicidal.

308. *See id.* at 90 ("[I]n the 20 years that I have been doing this and in the thousands of victims of sexual abuse, it is rare for somebody, except for a stranger rape, to not have any subsequent contact with the offender."); *see also id.* at 92–93 (in response to being asked on cross-examination, "[y]ou wouldn't doubt that a very logical and rational response to being sexually assaulted would be one of revulsion, never wanting to have any contact with that person whatsoever?" responding, "That's the whole point of the rape myth. You just articulated it," and adding, "No, it isn't normal. What you just said is wrong. That's not a natural response. The natural response is to be frightened. A natural response is to feel confused. A natural response is to feel ashamed. Those are the natural responses. That's why there is all this literature about sexual assault victims").

309. Nearly all states have adopted the Daubert standard that applies in federal court. *See* PRACTICAL LAW LITIGATION, STANDARD FOR EXCLUDING EXPERT TESTIMONY: 50 STATE SURVEY (2023).

310. *See* United States v. Maxwell, No. 20-CR-330, 2021 WL 5283951, at *2 (S.D.N.Y. Nov. 11, 2021); Weiser et al., *infra* note 463 (noting Maxwell's conviction after trial).

311. *Maxwell*, 2021 WL 5283951, at *5. The court allowed the proffered testimony except with regard to Rocchio's opinion that the presence of a third party can facilitate grooming—a dynamic referred to as "grooming-by-proxy." *See id.* at *5:

> [T]he Court understands this opinion to be an extrapolation of the broader principle of how grooming functions through the development of trust. That extrapolation may be logical and follow common sense, but it is for the jury to make on the facts of this case. The Court therefore excludes Dr. Rocchio's opinion that the presence of a third party can facilitate grooming. Dr. Rocchio's core opinions about grooming, however, remain admissible under the Rule 702 and *Daubert* standard and remain relevant pursuant to Rule 401 and not unduly prejudicial.

312. *Id.* at *2, *1 (citations omitted):

> The Court exercises a "gatekeeper function" in assessing the admissibility of expert testimony. To determine whether an expert's method is reliable, the Court considers the non-exhaustive list provided by the Supreme Court in *Daubert*, including whether the expert's method has been tested, whether it has been subjected to peer review, the rate of error, standards controlling the method's operation, and whether the method is accepted by the expert community . . . . [N]ot every expert admissible under *Daubert* need rely on a method that conforms with "the exactness of hard science methodologies."

313. *Id.* at *2. In addition to teaching, she has published peer-reviewed articles and given talks in the area. *Id*.

314. *Id.* at *2. *See supra* note 271 (discussing types of witnesses commonly qualified as experts); *see also* FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

(questioning both "fit"[315] and helpfulness[316]), and that its probative value was substantially outweighed by its prejudicial effect.[317] The defendant further argued that Rocchio's method was unreliable because she based her conclusions on personal clinical experience which did not allow for a determination of client truthfulness, rather than on studies with known error rates.[318]

The court disagreed, noting that a "strictly quantitative mode of inquiry is not realistic or even ethical" when it comes to sexual abuse,[319] and that "absolute certainty" about the client's report is neither practicable nor necessary for the expert's method to be considered reliable.[320] On the question of relevance, the court observed that the expert's opinion must not comment "directly" on the credibility of a fact witness, nor can the opinion be "one that the jury could reach with their own 'common knowledge and common sense.'"[321] With these principles in mind, the court found that the proffered testimony would "assist the jury in understanding concepts that require expert knowledge"[322] without directing the jury to reach any conclusion as to a witness's credibility.[323] Because Rocchio's testimony would "speak only to concepts and [would] not (and indeed may not) suggest that the jury find any alleged victim witness to be credible,"

315. *Maxwell*, 2021 WL 5283951, at *5 (emphasis added) (citations omitted):

> *Fit* is satisfied if the expert's opinion would assist the jury's decision on a relevant question of fact without "usurp[ing] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it."

See Alto v. Sun Pharm. Indus., Inc., No. 1:19-cv-09758, 2021 WL 4803582, at *3 (S.D.N.Y. Oct. 13, 2021) (characterizing Daubert's "fit" requirement as a specialized relevance inquiry that asks "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute" (quoting Daubert v. Merrel Dow Pharms. Inc., 509 U.S. 579, 591 (1993))).

316. *See infra* note 322 and accompanying text (noting "outside the ken" language).

317. *Maxwell*, 2021 WL 5283951, at *2, *5.

318. *Id.* at *3.

319. *Id.* ("[T]he Court finds that the error-rate factor listed by *Daubert* is not determinative as to the reliability of Dr. Rocchio's method.").

320. *See id.* (citations omitted):

> Given the realities of studying sensitive criminal acts like sexual abuse, a researcher can only rarely verify reports with absolute certainty. Yet that does not mean a clinical or forensic psychologist accepts all statements at face value. Rather, . . . part of Dr. Rocchio's profession is to examine and diagnose her patients consistent with her significant training and specialized knowledge. Further, on the forensic side of her practice, Dr. Rocchio regularly investigates and verifies sexual abuse. She reports 'remarkable consistency' between the reports of her clinical patients and her forensic findings. That said, the Defense is of course free to cross-examine Dr. Rocchio about how she evaluates her patients.

321. *See id.* at *4 (citations omitted):

> [E]xpert testimony cannot "constitute evaluations of witness credibility"—that is, expert testimony is inadmissible if it "comment[s] directly, under the guise of expert opinion, on the credibility of trial testimony from" specific fact witnesses. Additionally, if the expert's "opinion is one that the jury could reach with their own 'common knowledge and common sense,' no expert testimony is warranted."

322. *See id.* ("[B]oth Dr. Rocchio's opinion about sexual abuse's connection to substance abuse and her opinion about delayed disclosure are 'are outside the ken of the average person,' and so appropriate for expert testimony." (quoting United States v. Felder, 993 F.3d 57, 72 (2d Cir. 2021)).

323. *See id.* at *5 (citations omitted):

> The Defense argues that Dr. Rocchio's testimony is not relevant because the Government represents that she will testify only to general principles and not offer "testimony regarding any specific victim." The Defense has the law backwards on this point. . . . [A]n expert may not testify as to a specific witness's credibility. And as other courts have explained in admitting similar testimony, Dr. Rocchio's testimony is appropriate because she does *not* testify as to any specific witness's credibility.

her testimony was not unduly prejudicial,[324] and it remained the jury's task to "determine whether and how" the expert's opinion applied to the credibility of the accusers.[325]

The court's admissibility decision hinges on what it repeatedly describes as the "general" nature of Rocchio's testimony.[326] The idea is to provide the jury with information about victim behavior at a relatively high level of abstraction; this information functions as a corrective to the "common sense" misconceptions that would otherwise impede fair and accurate credibility evaluation.

The admissibility of this kind of expertise does not push evidentiary boundaries—quite the contrary. But the resulting testimony is far different from what typically came before. What follows is a granular look at how a jury learns from expert testimony rooted in context rather than syndrome, and how this testimony constructs a victim who is neither perfect nor pathological.

B. Case Study: People v. Weinstein

The trial of Harvey Weinstein began in a Manhattan courtroom in January 2020.[327] This was *the* trial of the era, a stand-in for the #MeToo movement itself.[328] Weinstein's power and fame made the prosecution extraordinary. But just as unusual was that the case ever reached a courtroom—even apart from Weinstein's stature. Rarely do sex crimes allegations make it to trial,[329] particularly when they present so many "bad facts" (as most rape cases do).[330] Prosecutors could point to no physical injury or weapon; the victims delayed reporting and

324. *See id.* (citations omitted):

> The Court finds that Dr. Rocchio's testimony would not unduly '"simplify' an otherwise complex case" or mislead jurors by a supposedly infallible expert. Dr. Rocchio's opinions speak only to concepts and will not (and indeed may not) suggest that the jury find any alleged victim witness to be credible or to find Ms. Maxwell guilty. The more general nature of Dr. Rocchio's opinions, which the Court heard in detail at the *Daubert* hearing, therefore mitigates its prejudicial effect.

325. *Id.*

326. *See id.* (referring variously to "general principles," "general characteristics," and the "general nature" of the testimony).

327. *See* Corey Kilgannon, *Harvey Weinstein On Trial: What's Happened So Far*, N.Y. TIMES (Jan. 27, 2020), https://www.nytimes.com/2020/01/27/nyregion/weinstein-trial-recap.html [https://perma.cc/NF6L-WGNS] (previewing "one of the most anticipated criminal proceedings in recent memory").

328. *See, e.g.*, Jan Ransom, *These Are the 6 Women Who Are Testifying Against Harvey Weinstein*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/01/26/nyregion/harvey-weinstein-trial-accusers-testimony.html [https://perma.cc/FH4E-K6LU] (referring to the "most anticipated case in recent history"); David Remnick, *Ronan Farrow on What the Harvey Weinstein Trial Could Mean for the #MeToo Movement*, NEW YORKER (Jan. 13, 2020), https://www.newyorker.com/news/q-and-a/ronan-farrow-on-what-the-harvey-weinstein-trial-could-mean-for-the-metoo-movement [https://perma.cc/7XGZ-SZ6X] (the trial was "a test of a lot of systems that have failed a lot of people for a long time . . . . Any outcome will be revealing about these kinds of cases and our ability to hold powerful people to account in the criminal-justice system.").

329. *See infra* note 452 and accompanying text (noting rape case attrition).

330. *See* Deborah Tuerkheimer, *What Weinstein's Defense Team Will Unleash*, CNN (Jan. 14, 2020, 8:21 AM), https://www.cnn.com/2020/01/14/opinions/harvey-weinstein-trial-defense-misconceptions-tuerkheimer/index.html [https://perma.cc/3X3S-C6YC]:

> Most sexual assaults are not reported to the police, and those that are rarely lead to criminal charges. Even when charges are filed, the barriers to conviction are steep. In the coming weeks, these barriers will be placed in stark relief. Although the Weinstein case is in many ways extraordinary, attacks on his accusers will sound all too familiar.

maintained contact after the assaults; and their accounts varied over time.[331] All this predictably[332] gave rise to familiar credibility attacks on the accusers—six in total, two whose allegations gave rise to the main charges.[333] To rebut these attacks, prosecutors presented an expert witness who never once used the word "syndrome."[334]

The expert's testimony in *People v. Weinstein* exemplifies an important innovation in sex crimes prosecutions.[335] This is how an expansive notion of expertise can correct for the deficiencies of common sense while reconstructing the victim.

1. Qualification

Barbara Ziv, a forensic psychiatrist, has been qualified as an expert on "sexual assault victim behavior" in state and federal courts around the country.[336] Ziv did not interview any of the witnesses or listen to their trial testimony.[337] Rather, Ziv was offered as a "blind expert"—as she described her role to the jury, "I'm not opining about any one individual . . . I've been hired to provide information and education about sexual assault, victim behavior in sexual assault, rape trauma in sexual assault."[338] Ziv's testimony was based on both her clinical experience and the relevant bodies of empirical research.[339]

2. Resistance

Ziv testified that a "common rape myth is that victims of sexual assault resist their assailants."[340] Even in the more unusual circumstance of stranger rape—where much of the research on sexual assault is focused—relatively few victims run, scream, yell, hit, punch, or bite.[341]

331. *See* Remnick, *supra* note 328:

> As is so often true in cases like this, there's going to be little, if any, forensic evidence. These are crimes people are reluctant to talk about, so often you're dealing with witnesses who didn't disclose their claim immediately, and perhaps only disclosed part of it when they first began to describe it to people. Weinstein is going to present evidence of ongoing, friendly contact with accusers after their alleged assaults.

332. *See* Tuerkheimer, *supra* note 330.

333. *See* Ransom, *supra* note 328.

334. A similar move away from RTS has characterized the expert testimony in other high-profile #MeToo trials. *See supra* note 271 and accompanying text.

335. *See infra* notes 374–77 and accompanying text (quoting DA Vance on the significance of Weinstein's conviction).

336. Trial Transcript at 1350, People v. Weinstein, 170 N.Y.S.3d 33 (App. Div. 1st Dept. 2022) (No. 2020-00590) (on file with author). Ziv was also the testifying expert in the case against Bill Cosby, *see supra* notes 296–308 and accompanying text, and in a second prosecution of Harvey Weinstein in Los Angeles. *See* Craig Clough, *'Rape Myths' Prof Tells Weinstein Jury Fighting Back Is Rare*, LAW360 (Nov. 1, 2022, 10:37 PM), https://www.law360.com/articles/1545651/-rape-myths-prof-tells-weinstein-jury-fighting-back-is-rare [https://perma.cc/4G8X-FDMJ].

337. Trial Transcript, *supra* note 336, at 1357.

338. *Id.* at 1358, 1382 (describing testimony as based upon general knowledge and explaining that she would not "talk at all about the facts of the case").

339. *See id.* at 1382–84.

340. *See id.* at 1362 ("This is not true.").

341. *See id.* at 1362–63.

3. Contact

Contrary to the "very common misconception [that] victim[s] of sexual assaults don't have contact with the perpetrator following the sexual assault," Ziv explained that such contact is "extremely common"—"[i]n fact, it is the norm."[342] Victims often engage in text and email exchanges, maintain a relationship, or even begin a relationship with their abuser.[343] The explanations for continued contact are "complex."[344] Many victims are fearful of the perpetrator's ongoing power. As Ziv characterized this reasoning, "I don't want it to get worse, I don't want this individual . . . to ruin my reputation, ruin my friendships, put my job in jeopardy. I can handle this physical trauma, but . . . God forbid they ruin the rest of my life . . . ."[345]

Victims often maintain contact as a way of "moving on" from the assault.[346] While this may seem counter-intuitive, Ziv explained that many women want to:

> hold on to this relationship or image they had of this person that they knew, and they are hoping this is just an aberration, you hear [this] all the time, that they go back thinking[,] I can just bring this back to baseline, I can just pretend this whole thing never happened, and I can continue to have a relationship with this person and we can move on.[347]

4. Reporting

Ziv stressed that "it is not uncommon for individuals to . . . tell a friend or a family member or somebody they are close to. Often that does not occur in real time either but it can occur within days of the sexual assault," once the victim has begun to process what happened.[348] Ziv added that it is also "not uncommon" for individuals *not* to report to friends or family.[349] Indeed, a "sizeable subset" of victims never report to anybody.[350] "[I]t is the only crime where the victim blames themselves and people are [ashamed] that they are a victim of sexual assault and they do not want to be [branded] as a victim of sexual assault, they do not want anybody to know."[351]

Ziv also made clear that it is "very rare in fact for individuals who have been sexually assaulted by somebody they know to go to the police."[352]

342. *Id.* at 1363–64.
343. *See id.* at 1364.
344. *See id.*
345. *Id.* at 1365.
346. *See id.* at 1366.
347. *Id.*; *see also id.* at 1367 (noting women "almost always" have further contact with the perpetrator, believing "we can go back to square one").
348. *Id.* at 1367–68.
349. *Id.* at 1368.
350. *Id.*
351. *Id.*
352. *Id.*

5. Memory

After offering the jury a brief primer on how the brain responds to trauma,[353] Ziv elaborated on the kinds of memories that are usually stored and those that are not. As she explained:

> [I]n a situation where you are being sexually assaulted, you are not looking around the room seeing what people are wearing. You are not focusing on irrelevant data because your job is to preserve yourself in that [moment]. It is to focus on what is salient to that situation. So people have very clear . . . memories of the traumatic experience. They will remember.[354]

Ziv noted that law enforcement officers seldom employ the kinds of practices likely to elicit these memories.[355] Rather than ask open-ended questions that prompt victims to share the salient information most apt to have been encoded, police officers often pose directed inquiries into peripheral details ("what were they wearing, what did you eat").[356] Victims may be unable to answer this kind of question, or they may answer incorrectly. But, as Ziv suggested, these responses may say more about the officer's faulty interviewing style than the veracity of the allegation itself.[357]

6. Variability

Throughout her testimony, Ziv underscored that there is no monolithic response to rape. Behavior in the aftermath of sexual assault is enormously "variable."[358] Some victims meet the criteria for a PTSD diagnosis, while others do not.[359] Without in any way minimizing the impact of rape, which can be devastating and lasting,[360] Ziv oriented the jury away from a singular understanding of victim behavior and toward recognition of the full spectrum of possibilities.[361]

353. *See id.* at 1371–73.

354. *Id.* at 1373–74; *see also id.* at 1374 (offering more detail on the workings of traumatic memory); *id.* at 1377 ("[P]eople tend to remember . . . the core elements of the trauma pretty clearly.").

355. *Id.* at 1378 (explaining that trauma informed interviewing techniques incorporate neuroscientific knowledge about the workings of memory).

356. *See id.*

357. *See id.* For one set of guidance on trauma-informed interviewing practices for law enforcement officers, see *Successful Trauma Informed Victim Interviewing*, INT'L ASS'N OF CHIEFS OF POLICE (June 5, 2020), https://www.theiacp.org/sites/default/files/2020-06/Final%20Design%20Successful%20Trauma%20Informed%20Victim%20Interviewing.pdf [https://perma.cc/YV6K-F4WT].

358. *See* Trial Transcript, *supra* note 336, at 1369 ("The aftermath of the sexual assault behavior is also variable, there are over a hundred behaviors of individual [sic] who have been raped by strangers that have been identified . . . .").

359. *See* Emily R. Dworkin, Anna E. Jaffe, Michele Bedard-Gilligan & Skye Fitzpatrick, *PTSD In the Year Following Sexual Assault: A Meta-Analysis of Prospective Studies*, 24 TRAUMA, VIOLENCE & ABUSE 497, 497 (2021). A recent meta-analysis found that one week after the assault, 81% of sexual assault survivors had significant PTSD symptoms. *Id.* at 502. One month later, when the disorder can first be diagnosed, 75% of sexual assault survivors satisfied the diagnostic criteria. *Id.* After three months, the figure dropped to 54% and after one year, it dropped to 41%. *Id.*

360. *See* Trial Transcript, *supra* note 336, at 1369.

361. *See id.* at 1376 ("[P]eople really struggle valiantly to not let it affect them emotionally but most of the time they are unsuccessful, especially in the short-term.").

A central theme of the testimony was that most lay people are ill-equipped to evaluate the credibility of rape accusers. "[P]eople come to assess sexual assault with preconceived notions that are usually wrong," as Ziv put it.[362] Where common sense fails, nonsyndromic expertise functions as a needed corrective.

Still, one might wonder whether this correction is meaningful. Yes, the right kind of expertise can mitigate credibility discounting by jurors—but why do sex crimes trials matter?

IV. BEYOND TRIALS

Sex crimes trials featuring accurate understandings of abuse will improve decisions made throughout the criminal justice system.[363] Sex crimes trials can empower survivors.[364] And they can dispel popular misconceptions.[365] Together, all this holds the promise of dislodging the stranger rape paradigm while driving needed cultural change.

A. Systemic Effects

In recent years, prosecutors have demonstrated an unprecedented willingness to pursue high-profile sex crimes charges in traditionally overlooked cases.[366] This novel approach[367] has the potential to cascade throughout the criminal system. Its greatest impact will be felt, not only when cases generate widespread attention, but when they subvert conventional narratives about sexual violence.[368] Over time, *these* are the prosecutions most likely to be culturally transformative: cases involving nonstranger assault; cases involving nonconsensual penetration without extra physical violence; cases involving victims whose behavior or marginalized identity makes them vulnerable to especially steep credibility discounts;[369] and cases involving a lone victim.[370]

362. *See id.* at 1359.

363. *See infra* Section IV.A.

364. *See infra* Section IV.B.

365. *See infra* Section IV.C.

366. *See infra* notes 453–55 and accompanying text.

367. *See infra* notes 374–77 and accompanying text.

368. *See* TUERKHEIMER, *supra* note 4, at 37–39:

> [The rape paradigm is] rape perpetrated, not by someone known to the victim, but by a stranger. It's committed by someone of low socioeconomic status. It entails a great deal of physical violence that leaves obvious signs of physical injury. It involves a weapon. It takes place at night, in a dark alley or a rough neighborhood . . . . Although this paradigm defies reality, it has remarkable durability. It is embraced by wide swaths of society.

See also id. at 37–50 (connecting the stranger rape paradigm to creation and maintenance of the "perfect victim" archetype; *infra* notes 423–26 and accompanying text (detailing how the stranger rape paradigm is undermined by empirical realities)).

369. *See supra* note 7 (tracking credibility along axes of power).

370. Most high-profile #MeToo-era cases have featured multiple accusers—a telling reminder that one woman's word is rarely enough to satisfy common thresholds for belief (quite apart from the criminal law's high standard of proof beyond a reasonable doubt). I have referred to this dynamic as "credibility in numbers." Deborah Tuerkheimer, *What If Only One Woman Had Accused Harvey Weinstein?*, GUARDIAN (Oct. 22, 2017, 6:00 PM), https://www.theguardian.com/commentisfree/2017/oct/22/harvey-weinstein-bill-cosby-allegations

When they fall into one or more of these categories, sex crimes trials can have an appreciable impact on the future decisions of prosecutors,[371] police officers,[372] and survivors.[373]

1. Prosecutors

When a Manhattan jury found Harvey Weinstein guilty of sexually assaulting two women, District Attorney Cyrus Vance proclaimed that the conviction "changed the course of history in the fight against sexual violence."[374] The Weinstein accusers and prosecutors "declar[ed] that rape is rape, and sexual assault is sexual assault, no matter what."[375] The justice system had finally been "pulled . . . into the 21st century."[376] As Vance underscored, "[t]his is the new landscape of survivors of sexual assault in America. . . . This is a new day."[377]

While Vance's optimistic portrayal undoubtedly magnified the seismic nature of the shift, since early 2020, prosecutors have successfully pursued several high-profile sex crimes cases rarely charged, much less tried, in an earlier era.[378] These convictions can erode a perennial reluctance on the part of prosecutors to move forward on cases seen as unlikely to result in conviction. Prosecutorial charging in sexual assault cases, especially those involving acquaintances,[379] is inexorably linked to concerns that jurors will downgrade the accuser's credibility. As one prosecutor put it, "[t]he bottom line is whether the jury will believe the victim. Rape cases rarely involve witnesses and don't always involve physical evidence, so it all comes down to the victim and her credibility."[380] Another prosecutor acknowledged that her office "does consider jury bias when determining whether to prosecute," adding that, "[a] lot of the cultural attitudes about sexual assault come into play in a jury trial and are part of the consideration about whether or not we would be able to prove it beyond a reasonable doubt."[381]

[https://perma.cc/MJS3-P6ND]. For a discussion of the criminal law implications, see Kimberly Kessler Ferzan, *#WeToo*, 49 FLA. ST. U. L. REV. 693, 693 (2022).

371. *See infra* Subsection IV.A.1.

372. *See infra* Subsection IV.A.2.

373. *See infra* Subsection IV.A.3.

374. *Full Coverage: Harvey Weinstein is Found Guilty of Rape*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html [https://perma.cc/EZ5R-XK7T].

375. *Id.*

376. *Id.*

377. Jan Ransom, *Weinstein Was Convicted. Can DA Vance Now Win Over His Critics?*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/nyregion/cyrus-vance-harvey-weinstein-verdict.html [https://perma.cc/A2NQ-Z9CP].

378. *See infra* notes 460–63 and accompanying text.

379. *See supra* note 368 and accompanying text (describing the stranger rape paradigm).

380. *See, e.g.*, Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justification for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206, 229 (2001); *see also id.* at 213 (finding that prosecutors in the studied jurisdiction rejected over 40% of cases at the initial screening stage; in just over 11% of cases, charges were filed but later dismissed, meaning that less than half of the cases received by the office were fully prosecuted).

381. *See* Sofia Resnick, *Why Do D.C. Prosecutors Decline Cases So Frequently? Rape Survivors Seek Answers*, REWIRE (Mar. 11, 2016, 11:02 AM), https://rewirenewsgroup.com/article/2016/03/11/d-c-prosecutors-decline-cases-frequently-rape-survivors-seek-answers/ [https://perma.cc/2FRL-MZFF] (describing survivors'

Quantitative and qualitative research on prosecutorial charging practices is consistent with these observations. Studies have demonstrated that "convictability is the organizational standard on which prosecutors file cases."[382] Prosecutors perceive a range of demographic characteristics as relevant to the likelihood of juror belief.[383] This calculus draws on a stock of narratives that "incorporate[ ] stereotypes of real crimes and credible victims."[384] Framed by an inquiry into how the archetypical juror would assess the accuser's account, prosecutorial decision-making transposes widespread misconceptions about rape victims into a legitimate rationale for declining to pursue charges.[385]

By contrast, sex crimes trials that defy received wisdom about how juries respond to accusers push the boundaries of the convictability standard. Trials and convictions can thus yield a set of prosecutorial practices that correspond more closely to the realities of abuse.

2. Police

Sex crimes trials and convictions have a tangible effect on law enforcement officers, whose unwarranted "gatekeeping" in rape cases has been well documented.[386] This beneficial effect encompasses two components: improving officers' credibility assessments[387] and changing their calculus regarding the odds of eventual conviction.[388]

Police officers routinely discount the credibility of rape accusers.[389] Victims with marginalized racial identities,[390] victims acquainted with their

perceptions that prosecutors "seemed to disbelieve their stories or blame them for the alleged assault," and that they questioned "to what degree the available evidence in their cases was carefully scrutinized [by prosecutors]"); *see also infra* notes 415–16 and accompanying text (discussing "downstream orientation").

382. *See, e.g.*, Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 533 (1997). Drawing on an ethnographic study of prosecutorial decision-making, Frohmann writes, "prosecutors orient particularly toward 'the jury'"; they assess convictability based on their "previous trial experience, discussions with other prosecutors, and prosecutors' general cultural knowledge about the norms and mores around sexuality, heterosexual relationships and violence," and then decide whether a credible narrative can be told. *Id.* at 535–36.

383. *See id.* at 537 (arguing that the prosecutorial categorization of jurors "reveals how prosecutors maintain and reproduce cultural stereotypes about race, class, and gender through their decisionmaking practices").

384. Spohn et al., *supra* note 380, at 208.

385. *See infra* note 415 (noting that downstream theorizing was originally developed to explain prosecutorial decision-making). For a proposal to replace the convictability standard with a "merits-based approach" to rape prosecution, see Michelle Madden Dempsey, *Prosecuting Violence Against Women: Towards a "Merits-Based" Approach to Evidential Sufficiency*, 14 U. PALERMO L. REV. 241, 242–44 (2015).

386. *See, e.g.*, Corey Raeburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 206 (2017).

387. *See infra* notes 389–413 and accompanying text.

388. *See infra* notes 414–17 and accompanying text.

389. *See infra* notes 390–413 and accompanying text.

390. *See* Yung, *supra* note 386, at 229 (describing "a pattern wherein black victims in majority-minority neighborhoods are least likely to be believed by police," and pointing to "substantial evidence that police simply take the rape reports of whites more seriously"); *see also supra* notes 196–230 and accompanying text (discussing credibility discounting of Native women and Black women).

perpetrator,[391] adolescents,[392] and women believed to be sex workers,[393] among others,[394] face even steeper credibility discounts.[395] Early credibility discounting forestalls adequate investigation;[396] as a matter of course, officers rely on misconceptions about victims to quickly conclude that a case lacks merit.[397] This is a recurring pattern in police departments of all sizes, as is the consequent dismissal of rape allegations at disproportionately high rates.[398]

One mechanism police use for closing an investigation is to classify the complaint as "unfounded," which deems it baseless or false. Law enforcement agencies often utilize the unfounded designation to "clear" sexual assault reports without making an arrest.[399] In this manner, high clearance numbers, which are used as a measure of how effectively police are solving crime, can instead camouflage low arrest rates.[400] For example, in Pittsburgh, over 30% of rape cases were unfounded in 2017.[401] In Prince William County, Virginia, that figure was nearly 40% in 2016.[402] And an earlier analysis found similarly high rates: between 2009 and 2014, 34% of rape reports were unfounded in Baltimore County, 46% were unfounded in Scottsdale, Arizona, and more than half were unfounded in Oxnard, California.[403] These numbers starkly contrast with the actual incidence of false sexual assault reports, which is estimated at a rate of about 5%.[404]

391. *See* Rebecca Campbell & Giannina Fehler-Cabral, *Why Police "Couldn't or Wouldn't" Submit Sexual Assault Kits for DNA Testing: A Focal Concerns Theory Analysis of Untested Rape Kits*, 52 LAW & SOC'Y REV. 73, 78 (2018) ("[I]n interview studies, police directly state that they find victims less credible if they knew the perpetrator and had prior social/sexual contact, which, to their thinking, may mean that rape allegations could be fabricated because women regret having sex and/or want to seek revenge on their partners." (citations omitted)).

392. *See id.* ("Adolescents are often singled-out by police as being particularly less credible, as law enforcement believe that their claims of rape are fabricated to cover up for 'bad behavior' (being out late, drinking) and to try to avoid getting into trouble with their parents for those behaviors.").

393. Police often dismiss rape allegations by "women they believe[] [are] involved in sex work as 'economic crimes,' meaning that they alleged rape when they were not paid." *Id.*

394. *See* TUERKHEIMER, *supra* note 4, at 15 ("Class matters. Line of work matters. Immigration status matters. Drug and alcohol use matters. Sexual history matters. Sexual orientation matters. Nowhere are the particulars more important than when it comes to race . . . .").

395. *See supra* note 193 (observing that credibility discounts vary along both quantitative and qualitative dimensions).

396. *See* TUERKHEIMER, *supra* note 4, at 81.

397. *Id*.

398. *See infra* notes 400–08 and accompanying text.

399. *See infra* notes 400–08 and accompanying text.

400. *See* Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1247 (2014).

401. *See* Lucy Perkins, *Pittsburgh Police Dismiss Nearly One-Third of Rape Cases as 'Unfounded,'* WESA (May 15, 2019, 7:06 AM), https://www.wesa.fm/post/pittsburgh-police-dismiss-nearly-one-third-rape-cases-unfounded#stream/0 [https://perma.cc/SF67-9MCH].

402. *See* Bernice Yeung, Mark Greenblatt, Mark Fahey & Emily Harris, *When It Comes to Rape, Just Because a Case Is Cleared Doesn't Mean It's Solved*, PROPUBLICA (Nov. 15, 2018, 10:00 AM), https://www.propublica.org/article/when-it-comes-to-rape-just-because-a-case-is-cleared-does-not-mean-solved [https://perma.cc/4K9W-4NTA].

403. *See* Alex Campbell & Katie J.M. Baker, *This Police Department Tosses Aside Rape Reports When a Victim Doesn't Resist 'To The Best Of Her Ability,'* BUZZFEED NEWS (Sept. 8, 2016, 6:11 AM), https://www.buzzfeednews.com/article/alexcampbell/unfounded [https://perma.cc/MV8L-TLWB].

404. *See, e.g.*, Claire E. Ferguson & John M. Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES SEXUAL BEHAV. 1185, 1192 (2016).

A ProPublica investigation of sixty-four law enforcement agencies found that fifty-four made arrests in fewer than a third of their cases.[405] Fourteen police departments—including Chicago, Seattle, San Diego, Phoenix, Portland, Tucson, Nashville, and Sacramento—reported figures in the single digits.[406] (Salt Lake City's was the lowest rate, with arrests in only 3% of its cases.[407]) "No matter the jurisdiction," found a recent study of law enforcement agencies across the nation, "sexual violence seldom results in an arrest."[408]

When officers dismiss accusers from the get-go, they fail to gather corroborative evidence that might include texts, voice mails, photographs, social media posts, forensic reports, witnesses to the lead-up or aftermath, and, on occasion, eyewitnesses.[409] The passage of time makes older allegations more difficult to corroborate, but a thorough investigation may still turn up important evidence to bolster a prosecution.[410] In many cases, if officers curtail the impulse to distrust, blame, and disregard women who report abuse, the notorious "he said, she said" (or somewhat less derisive "word on word") contest[411] can be entirely avoided.

This suspension of disbelief becomes more likely if police see prosecutors moving forward in cases with similar allegations.[412] Over time, successful sex crimes prosecutions can prompt law enforcement officers to update their understandings of how rape victims behave, and in this manner to improve their judgments about when an accuser is credible.[413]

Sex crimes trials and convictions affect police decision-making in another way that is more mediated. Irrespective of an investigating officer's own credibility determination, it matters how other criminal justice actors are likely to evaluate the case.[414] This "downstream orientation," as criminologists describe it, means that police officers partly base their processing decisions on predictions about what prosecutors (and even jurors) would decide.[415] Cases that will probably be dropped at later stages of the process are considered unworthy of

405. Lena V. Groeger, Mark Fahey & Mark Greenblatt, *Could Your Police Department Be Inflating Rape Clearance Rates?*, PROPUBLICA (Nov. 15, 2018), https://projects.propublica.org/graphics/rape_clearance [https://perma.cc/VQZ2-W92R].

406. *Id.*

407. *Id.*

408. MELISSA S. MORABITO, LINDA M. WILLIAMS & APRIL PATTAVINA, NAT'L CRIM. JUST. REFERENCE SERV., DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. 20 (2019), https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf [https://perma.cc/LJ6E-GMRC].

409. *See* TUERKHEIMER, *supra* note 4, at 82.

410. *Id.*

411. *Id.* at 68–69.

412. *See, e.g.*, Eryn Nicole O'Neal & Brittany E. Hayes, *"A Rape Is a Rape, Regardless of What the Victim Was Doing at the Time": Detective Views on How "Problematic" Victims Affect Sexual Assault Case Processing*, 45 CRIM. JUST. REV. 26, 30 (2020).

413. *See id.* at 29–30.

414. *Id.* at 30.

415. *See, e.g.*, *id.* at 30 (citing empirical support for the idea that police decision-making can be shaped by consideration of later-stage outcomes, observing that downstream orientation "was originally developed to explain prosecutorial decision-making" and further that "since its inception, scholars have also applied downstream theorizing to law enforcement decision-making"); *see also supra* notes 379–85 and accompanying text (discussing convictability standard applied by prosecutors).

pursuit.[416] This dynamic is exacerbated by a scarcity of resources available for investigations and arrests.[417]

Trials have cascading effects throughout the criminal system, including upstream to police officers—the system gatekeepers. Officers are watching, incorporating prosecutorial outcomes into crucial judgments about when and how to investigate the rape allegations that come their way.

3. Accusers

Even farther upstream from police officers are survivors, who make choices about whether to pursue a criminal complaint in a world of pervasive nonenforcement. These background conditions are largely responsible for the extant problem of underreporting.[418] Successful sex crimes prosecutions like the kind we are beginning to see can transform these conditions.

For now, most sexual assault is not reported through official channels. Among the population most vulnerable to rape and sexual assault (young women ages eighteen to twenty-four), conservative estimates suggest that less than a third complain to police.[419] Women in college report at lower rates—20%, according to one study and fewer than 5%, according to another.[420] Reporting rates for women of color, both on and off campus, are even lower.[421] Government researchers estimate that for every Black woman who reports her rape, at least fifteen Black women do not report theirs.[422]

Although college sexual assault survivors rarely turn to police, they are more likely to complain if the incident will seem "believable"—that is, if their assault involved the kind of physical evidence associated with violent rape by a stranger.[423] But the vast majority of sexual assault does not conform to the stranger rape paradigm:[424] more than three quarters of victims know their

416. *See* O'Neal & Hayes, *supra* note 412, at 31.

417. *See* MORABITO ET AL., *supra* note 408, at 8.

418. *See* O'Neal & Hayes, *supra* note 412, at 39.

419. *See* SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUST. STAT., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 1 (2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf [https://perma.cc/F5W9-5Z46].

420. *See id.*; BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, NAT'L INST. JUST., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf [https://perma.cc/UE6H-H5VP].

421. *See* Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It*, CHRON. HIGHER EDUC. (June 18, 2015), https://www.chronicle.com/article/another-challenge-on-campus-sexual-assault-getting-minority-students-to-report-it/ [https://perma.cc/KH8Z-B6K3]; JENNIFER C. NASH, BLACK WOMEN AND RAPE: A REVIEW OF THE LITERATURE 4–5 (2009), https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/nash2009.pdf [https://perma.cc/3MZV-KSTV].

422. *See* NAT'L CTR. ON VIOLENCE AGAINST WOMEN IN THE BLACK CMTY., BLACK WOMEN AND SEXUAL ASSAULT 1 (2018), https://ujimacommunity.org/wp-content/uploads/2018/12/Ujima-Womens-Violence-Stats-v7.4-1.pdf [https://perma.cc/986H-SQ88].

423. *See* FISHER ET AL., *supra* note 420, at 23–25.

424. *See supra* note 368 and accompanying text.

perpetrator;[425] nine of ten victims say that no weapon was used.[426] Sexual assault usually lacks conventional hallmarks of believability, which leads most survivors to anticipate, rightly, that their allegations will be dismissed as untrue.

Over time, sex crimes trials and convictions can reshape the context that drives this perception, making reporting the rule rather than the exception.

B. Survivor Empowerment

Victims who opt not to seek justice through the criminal justice system possess a range of concerns. Some are deterred by the likelihood that their credibility will be discounted.[427] Others seek a different kind of accountability altogether—one, like restorative justice, that rejects incarceration or its threat.[428] And survivors—especially survivors of color—may be unwilling to participate in a system that disproportionately penalizes men of color.[429]

At the same time, many victims *do* wish to pursue criminal justice, or would in the absence of anticipated barriers to justice, chief among them the credibility discount.[430] To these victims, the system's capacity to deliver, on behalf of the state, fair prosecutions and trials matters a great deal.

Holding the abuser to account is almost universally important to survivors.[431] But suffering by the abuser is not the point, nor is punishment for its own sake a high priority. Rather than being moved by a desire to see the abuser deprived of liberty, victims often want him stripped of what psychiatrist Judith Herman calls "undeserved honor and status."[432] In Herman's research, most victims who turned to the legal system were motivated by a wish to publicly expose the offender—not to cause needless humiliation, but to divest him of "undeserved respect and privilege."[433] Victims hoped their own "standing in their families and communities" would then be elevated relative to the abuser.[434] As Herman writes, "[t]he main purpose of exposure was not to get even by inflicting pain. Rather, they sought vindication from the community as a rebuke to the offenders' display of contempt for their rights and dignity."[435]

425. *See* MICHAEL PLANTY, LYNN LANGTON, CHRISTOPHER KREBS, MARCUS BERZOFSKY & HOPE SMILEY-MCDONALD, BUREAU JUST. STAT., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 4 (2016), https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf [https://perma.cc/VU6A-TKKJ].

426. *See id.* at 5.

427. *See* TUERKHEIMER, *supra* note 4, at 28–31 (discussing the anticipated "credibility discount").

428. For a helpful account, see Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (2019); *see also* TUERKHEIMER, *supra* note 4, at 207–15 (discussing the promise and pitfalls of restorative justice).

429. *See supra* notes 224–28 and accompanying text.

430. *See* TUERKHEIMER, *supra* note 4, at 28–31 (discussing the anticipated "credibility discount").

431. In more than two decades of conversations with more survivors than I can count, this has been a constant theme.

432. Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 593 (2005).

433. *Id.* at 594.

434. *Id*.

435. *Id.* at 597.

Among legal scholars who have theorized the expressive function of punishment,[436] Jean Hampton has suggested that punishing an offender can equalize the social standing of the victim.[437] When a person is violated, her status is diminished; the abuser has treated her as less valuable than he, which is not what she deserves. Punishment of the abuser communicates that this devaluing is wrong and affirms the opposite message: the victim is no less important than he. On the contrary, she is valued, respected, and worthy of protection. "The crime represents the victim as demeaned relative to the wrongdoer; the punishment 'takes back' the demeaning message," Hampton explains.[438]

A set of experiments designed by Kenworthey Bilz to test the effects of punishment on social standing affirms the expressive value of punishment.[439] Study participants were shown edited clips of the movie *The Accused*, which is loosely based on a rape that took place in 1983 in a tavern in New Bedford, Massachusetts.[440] After viewing the film, participants were presented with one of two outcomes. In the punishment version, the offenders—characterized in the study as one "college boy" and two "townies"—were convicted of rape.[441] The no-punishment version featured the men pleading guilty before trial to a lesser non-sexual offense.[442] In order to measure the effects of these outcomes on social standing, participants were then asked to consider how members of the community would rate the victim and the offenders along various dimensions, including the extent to which each was "admired," "valuable," and "respected."[443]

Bilz found that when the offenders were punished, they lost social standing and the victim gained social standing.[444] At the same time, a failure to punish the offenders for rape had the opposite effect: the victim lost social standing and the offenders gained it.[445] This increase in social standing was even greater for the unpunished "college boy" (as compared to the "townie" offender), whose perceived social status was higher from the outset.[446] Bilz concluded that punishment is a communication device that "expresses, and perhaps even alters, the social standing of victims and offenders."[447]

436. *See, e.g.*, Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60, 60 (2017); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 948 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 341 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996); *see also infra* notes 437–38 and accompanying text.

437. Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1, 13 (Wesley Cragg ed., 1992).

438. *Id.*

439. Kenworthey Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358, 358 (2016).

440. *Id.* at 365.

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* at 366–67.

445. *Id.*

446. *Id.* at 367.

447. *Id.* at 385.

Consistent with this finding about the perceptions of members of the community, victims often express the significance of holding their abuser to account.[448] But even among those who turn to the criminal justice system for redress,[449] the nature of the desired consequence varies—from a formal charge, a sentence of incarceration, however brief, or considerable prison time, which some see as reflective of the victim's injury and whether it matters.[450]

Across wide variation in perceptions of meaningful accountability, this much holds true: sex crimes prosecutions and trials—when they are fair—can empower a victim, helping to right the power imbalance created or compounded by the initial violation. At the close of R. Kelly's criminal sex trafficking trial, the prosecutor reminded the jury of what was at stake as it weighed a verdict in the case: "The defendant's victims aren't groupies or gold diggers. They're human beings. Daughters, sisters, some are now mothers. And their lives matter."[451]

C. Cultural Understanding

Against a landscape of pervasive sexual violation, sex crimes trials are exceedingly rare.[452] But when they attract widespread attention, as often happens when the person accused occupies a position of status or privilege, trials have the potential to shape popular understandings of abuse. In many ways, high-profile cases tend to be unrepresentative—the lives of Harvey Weinstein, Bill Cosby, R. Kelly, and Ghislaine Maxwell are hardly typical.[453] Even so, the dynamics of abuse detailed in these cases are, in important respects, ordinary, as are certain familiar behaviors on the part of the victims. The same is true of cases that captivate the public despite no one involved being famous—take, for instance, the trial of Brock Turner, the Stanford swimmer convicted of sexually assaulting a woman while she was unconscious.[454] To be sure, the trials that draw public

448. TUERKHEIMER, *supra* note 4, at 203–06.

449. *See supra* note 428 and accompanying text (noting that many survivors seek restorative justice and other nonpunitive models of justice).

450. TUERKHEIMER, *supra* note 4, at 220–24; *see also* RACHAEL DENHOLLANDER, WHAT IS A GIRL WORTH? MY STORY OF BREAKING THE SILENCE AND EXPOSING THE TRUTH ABOUT LARRY NASSAR AND USA GYMNASTICS 291–92 (2019). A survivor of Larry Nassar's abuse, Rachel Denhollander wrote the following in her letter to the sentencing judge: "I am writing to urge you today to impose the maximum available sentence." *Id.* at 291. Noting the shocking number of Nassar's victims, Denhollander asked, "[h]ow much is a little girl worth?" *Id.* She added: "[d]oes the destruction of these precious children matter enough to provide every measure of justice the law can offer? The sentence you hand down will answer these questions." *Id.* at 292.

451. Troy Closson, *R. Kelly's 30-Year Sentence Was the End of a Long Downfall for the Former Superstar*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/nyregion/r-kelly-the-disgraced-rb-superstar-is-sentenced-to-30-years.html [https://perma.cc/XY4Q-CSX4].

452. It is estimated that, of every thousand sexual assaults, twenty-eight will end in a felony conviction. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Sept. 29, 2023) [https://perma.cc/8Q67-26HM] (aggregating government data).

453. *See infra* notes 460–63 and accompanying text.

454. *See* Tara Golshan, *Why the Stanford Sexual Assault Case Has Become a National Flashpoint, Explained*, VOX (Dec. 19, 2016, 3:39 PM), https://www.vox.com/2016/6/7/11866390/brock-turner-stanford-sexual-assault-explained [https://perma.cc/X6PF-L89Q]; *see also* TUERKHEIMER, *supra* note 4, at 165–67, 189–90.

notice tend to feature particulars marked by privilege.[455] But for those watching, plenty can be learned about the obstacles that also confront victims of everyday, unexceptional abuse.

In the #MeToo era, sex crimes trials take on huge symbolic importance (Weinstein's criminal trial was a "milestone,"[456] the defamation trial involving Johnny Depp and Amber Heard was "the death of Me Too,"[457] and so forth). But my focus here is on offshoots that are more mundane, if no less vital. Trials provide critical public education.[458] By tuning into a sex crimes trial, the public can become better versed in the oft-misunderstood workings of abuse.[459] Consider the teachings of recent high-profile criminal trials—Bill Cosby,[460] Harvey Weinstein,[461] R. Kelly,[462] Ghislaine Maxwell.[463] In each one of these cases, victims stayed in touch, or even in a relationship, with the perpetrator.[464] They waited a good while to report to authorities.[465] Their memories were imperfect.[466] Their

455. The defendants in high-profile cases of the #MeToo era have been privileged men (except Ghislaine Maxwell, a privileged woman), while their victims have been far less powerful. In some cases, the victims have been especially vulnerable or marginalized.

456. *See* Laura Newberry, *Weinstein Trial Is a Milestone for #MeToo and a Moment of Wrenching Truth for Survivors*, L.A. TIMES (Jan. 19, 2020, 6:00 AM), https://www.latimes.com/california/story/2020-01-19/weinstein-trial-is-a-milestone-for-metoo-and-a-moment-of-wrenching-truth-for-survivors [https://perma.cc/39HX-WDJ4].

457. *See* Moira Donegan, *The Amber Heard-Johnny Depp Trial Was an Orgy of Misogyny*, GUARDIAN (June 1, 2022, 4:33 PM), https://www.theguardian.com/commentisfree/2022/jun/01/amber-heard-johnny-depp-trial-metoo-backlash [https://perma.cc/S3DN-47NM].

458. *See* Mary Jo White, The Importance of Trials to the Law and Public Accountability, 5th Annual Judge Thomas A. Flannery Lecture (Nov. 14, 2013), https://www.sec.gov/news/speech/2013-spch111413mjw [https://perma.cc/HQ4L-LJQ9] (observing that trials are "an irreplaceable public forum" and "important source of knowledge about ourselves and key issues of public concern" (quoting Professor Robert Burns)).

459. Expert testimony, properly framed, can significantly enhance public education. *See supra* notes 294–326 and accompanying text (describing an expanded framework for expert testimony).

460. *See* Graham Bowley & Jon Hurdle, *Bill Cosby is Found Guilty of Sexual Assault*, N.Y. TIMES (Apr. 26, 2018), https://www.nytimes.com/2018/04/26/arts/television/bill-cosby-guilty-retrial.html [https://perma.cc/DK8X-QL9R]. Cosby's conviction was later overturned by the Pennsylvania Supreme Court. *See* Charlie Savage, *Bill Cosby's Release from Prison, Explained*, N.Y. TIMES (Oct. 14, 2021), https://www.nytimes.com/2021/07/01/arts/television/bill-cosby-conviction-overturned-why.html [https://perma.cc/23LD-8TUY].

461. *See* Jan Ransom, *Harvey Weinstein Is Found Guilty of Sex Crimes in #MeToo Watershed*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-trial-rape-verdict.html [https://perma.cc/V9XH-LWJX].

462. *See* Troy Closson, *R. Kelly Is Found Guilty of All Counts and Faces Life in Prison*, N.Y. TIMES (Sept. 27, 2021, 7:00 PM), https://www.nytimes.com/live/2021/09/27/nyregion/r-kelly-trial-news#r-kelly-is-going-to-prison-why-did-it-take-so-long [https://perma.cc/WH9F-6PH2].

463. *See* Benjamin Weiser, Rebecca Davis O'Brien & Colin Moynihan, *Ghislaine Maxwell Is Found Guilty of Aiding in Epstein's Sex Abuse*, N.Y. TIMES (Dec. 29, 2021), https://www.nytimes.com/2021/12/29/nyregion/ghislaine-maxwell-guilty-verdict.html [https://perma.cc/C8DH-SDLD].

464. *See* Bowley & Hurdle, *supra* note 460; Farrow, *supra* note 246; Closson, *supra* note 451; Weiser et al., *supra* note 463.

465. *See* Bowley & Hurdle, *supra* note 460; Farrow, *supra* note 246; Closson, *supra* note 451; Weiser et al., *supra* note 463.

466. *See* Bowley & Hurdle, *supra* note 460; Farrow, *supra* note 246; Closson, *supra* note 451; Weiser et al., *supra* note 463.

nonconsent was not always translated into physical fight or resistance.[467] When these victims testified about their experiences of abuse and its aftermath—and when this testimony was placed into larger context by an expert[468]—those watching were able to piece together a more accurate picture of the world.

Verdicts matter too, of course, and not just to testifying victims. This is true whether the jury convicts or acquits. First, consider acquittals. If the factfinder dismisses an allegation (even if verdict might be best be explained by the governing law, or by the high burden of proof beyond a reasonable doubt), it reinforces a dominant view of accusers as untrustworthy, blameworthy, and unworthy of care.[469] These views are sticky, in part because of the confirmation bias, which leads people to "seek out and attend to information that already confirms their beliefs," as psychologist Jennifer Eberhardt writes.[470] When a case ends in acquittal, doubtful onlookers are likely to become even more skeptical of future allegations. An accuser who is perceived as discredited buttresses the impression that she, and others like her, shouldn't be believed.[471]

This feedback loop is not confined to the criminal setting. We are conditioned by the reactions of those around us when we judge credibility. We watch to see how accusers we know are treated, how high-profile accusers fare in the court of public opinion, and what happens when accusers turn to campus tribunals and workplace disciplinary processes. Whenever an allegation is deemed false, the mythology surrounding accusers is reinforced, increasing the odds that the next allegation will also be considered false. Disbelief begets disbelief.

A guilty verdict, by validating the victim's account, also has the power to influence how those watching will evaluate future allegations. Public understandings are forged by criminal convictions that declare, in essence, that the victim is credible—the abuse happened, it was wrong, *and* it mattered.[472] Convictions can thus make inroads on commonplace misconceptions about abuse. Because defense arguments in sex crimes cases closely track the ways that victim credibility is discounted outside the courtroom, many of these misconceptions will have been on copious display throughout the trial.[473] When jurors reject

467. *See* Bowley & Hurdle, *supra* note 460; Farrow, *supra* note 246; Closson, *supra* note 451; Weiser et al., *supra* note 463.

468. *See supra* notes 294–321 and accompanying text.

469. *See supra* note 6.

470. JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 33 (2019). "Once we develop theories about how things operate," Eberhardt continues, "that framework is hard to dislodge." *Id.*

471. *See* TUERKHEIMER, *supra* note 4, at 72 (citations omitted):

> This effect is magnified when a false allegation is well publicized. Duke Lacrosse. *Rolling Stone*. These cases captivate the popular imagination in large part because they resonate with entrenched beliefs about lying accusers and the misogyny that animates these beliefs. The "lying accuser" cases have come to represent a false reality—an inverted world where sexual assault accusations are normally false.

472. *See supra* note 6.

473. *See, e.g.*, Katy Butler, *Op-Ed: Harvey Weinstein's Latest Trial and the Ritual of Degrading Women in Court*, L.A. TIMES (Dec. 19, 2022, 4:30 PM), https://www.latimes.com/opinion/story/2022-12-19/harvey-weinstein-rape-trial-accusers-women [https://perma.cc/RL3U-8LMU] (describing defense tactics amounting to a "dragging-through-the-mud" of accusers at Weinstein's L.A. trial, which ended in a mixed verdict).

well-trodden credibility attacks, their strength is undermined, however incrementally.

In short, whenever a verdict breaks free of enduring myths about abuse, it fosters improved—nondiscounted—credibility judgments, both in future litigation and outside the courtroom.

V. CONCLUSION

MeToo was founded on the recognition that sexual misconduct is systemic.[474] What has become increasingly visible in recent years is not simply the prevalence of sexual violence, but also the inadequacies of existing legal and social responses to it. Connecting these structural failures is the credibility discount: as a rule, victims are too readily dismissed. This is the case within the courtroom and, even more incessantly, outside it. Yet the cultural transformation needed to end the credibility discount seems elusive at best and, during times of backlash, wholly out of reach.

One way to make inroads on the credibility discount is to rethink the function of expert testimony in sex crimes trials. Properly framed, expertise newly configures the constructed victim, who continues to disadvantage real victims at trial and beyond. The reconstructed victim resonates with the insights of #MeToo: survivors' behaviors are normalized, set against a backdrop of steep social inequalities. Expertise cannot eliminate these inequalities, but it can bring them into sharper focus. This clarity is essential if we are to end the credibility discount and topple its supports.

474. *See supra* note 227 and accompanying text (noting movement's origins).