

SHAMED

*Maybell Romero**

Victims of rape, sexual assault, and sexual abuse have long had to contend with victim blaming and victim shaming. While legal scholars have had fruitful and theoretically engaging debates regarding the validity and merits of shaming sanctions and shaming criminal defendants, there has been precious little written about the shame that victims face, let alone a recognition that their interaction with shame as both a social force and an emotion is multidimensional. In a previous piece titled “Ruined,” I examined the language judges use during sentencing hearings in sexual assault cases to describe victims, such as pronouncing them “broken,” “ruined,” or “destroyed.” This Article serves as a continuation of the inquiry I started in “Ruined” by expanding in focus. It seeks to differentiate between the related concepts of shame and stigma and explain why shaming of rape victims is so common. I propose a novel typology with which to examine a rape victim’s experience and separate the shame that victims are made to feel by the criminal adjudicative process, the shame victims are supposed to perform, and the shame victims are supposed to feel into discrete components, revealing that shame in relation to such victims is multilayered and much more complex than legal scholarship has made it out to be. Even outside of the law of rape and sexual assault, this typology has potential broader applicability in criminal law and other fields of legal practice.

I share my own experiences with each of these manifestations of shame to demonstrate the usefulness of my new typology. I also relate how I have felt ashamed to come forward with my story as a practicing

* McGlinchey Stafford Associate Professor of Law, Tulane Law School. U.C. Berkeley School of Law, J.D. 2006; Cornell University, A.B. 2003. I would like to thank the faculties of The Ohio State University Moritz College of Law, Tulane Law School, Southwestern Law School, the University of Maryland Carey School of Law, and Cornell Law School for allowing me to workshop this paper in one form or another. I got very helpful comments from audience members after presenting at the “Critical Views of the Criminal System” panel at CrimFest 2023 for which I am grateful. I would also like to especially thank Ann Lipton, Valena Beety, Cynthia Godsoe, Bennett Capers, Janice Nadler, Leigh Goodmark, Sarah Lorr, Maneka Sinha, Kristen Underhill, Sandra Babcock, and Brian Frye for their incisive feedback that they each offered at different stages of the evolution of this piece.

attorney as well as my experiences of being shamed in the legal academy. I conclude, however, with a note of optimism, reflecting on the positive things to have come with my very public self-disclosure of being a rape and sexual abuse victim and hoping to encourage others to employ personal narrative and auto-ethnographic methods in their own scholarship, as well.

INTRODUCTION	327
I. DEFINING, PERCEIVING, AND FEELING SHAME.....	333
A. “Shame” Versus “Stigma”	334
B. Why People Shame	336
1. A (Brief) Introduction to Just World Theory	338
2. Just World Theory, Victim Blaming, and Rape Culture	339
3. The Meaning of “Justice” for Victims	342
4. Experiencing the Just World Belief	344
C. Examples of the Shaming and Minimization of Sexual Assault Victims in Media	346
1. In Art	346
2. In Music	349
3. In Television, Movies, and News Media	350
II. SHAMING VICTIMS IN THE CRIMINAL ADJUDICATIVE CONTEXT	351
A. Shamed by Investigations and Proceedings	353
1. Shaming by Police	354
2. Shaming in the Criminal Adjudicative Process	359
B. The Shame Victims Are Supposed to Perform	362
1. Performing Shame for Police	362
2. Performing Shame for Prosecutors	364
3. Performing Shame for Juries	367
C. The Shame Victims Are Supposed to Feel	368
III. PROFESSIONAL SHAMING, RESPECTABILITY, AND PERSONAL NARRATIVE	369
A. Shaming and Respectability in the Legal Profession	369
B. My Experience with Shaming in Legal Academia	372
C. Why I Continue to Write Myself	374
D. Points of Optimism	376
CONCLUSION.....	377

INTRODUCTION

In the Getty Center in the Brentwood neighborhood of Los Angeles hangs a depiction of Lucretia painted by Italian Baroque painter Artemisia Gentileschi sometime around 1627.¹ As depicted by Gentileschi, Lucretia is obviously a noblewoman of some sort. She wears pearls not just as earrings but strung throughout her hair. Her shoulders are draped in a diaphanous, light white fabric that appears to be tulle. She gazes to the upper right corner of the frame with a plaintive look on her face. In her right hand, she holds a dagger with a silver blade. The end of the dagger's hilt appears to be gold, ending in the small figure of an animal, maybe a rabbit. She points the dagger to her chest. According to legend, Lucretia, the faithful wife of Lucius Tarquinius Collatinus, was raped by Sextus Tarquinius, the son of the King of Rome.² Before stabbing herself to death, she “called on her father and her husband [to exact] vengeance” for this wrong.³ The legend goes that anger over Lucretia's death led to the fall of the Roman monarchy and the establishment of the Roman Republic.⁴

¹ Artemisia Gentileschi, *Lucretia*, c. 1627, oil on canvas, 92.9 × 72.7 cm, Getty Center, <https://www.getty.edu/art/collection/object/109Q8G> [<https://perma.cc/BT2Q-VJQR>].

² *Lucretia*, Getty, <https://www.getty.edu/art/collection/object/109Q8G> [<https://perma.cc/BT2Q-VJQR>] (last visited Nov. 11, 2024).

³ *Id.*

⁴ Virginia Gorlinski, *Lucretia*, *Encyc. Britannica*, <https://www.britannica.com/topic/Lucretia-a-ancient-Roman-heroine> [<https://perma.cc/TJE9-VXGN>] (last visited Nov. 11, 2024).

Artemisia Gentileschi, *Lucretia* (c. 1627)

There have been many depictions of Lucretia over many hundreds of years.⁵ Yet this depiction of her by Gentileschi is the one that I, as a rape victim, have always found most relatable. It focuses exclusively on Lucretia and her anguish rather than on the political ramifications of her death. Perhaps this empathy with Lucretia's plight makes sense on the part of the artist, given that Gentileschi was raped by the artist Agostino Tassi when she was seventeen.⁶ While Tassi initially promised to marry Gentileschi, he later refused, leading Gentileschi to report what happened to her father, Orazio.⁷ At the time, "rape was viewed more as a crime against a family's honor than as a violation of a woman," and it was Orazio, rather than Gentileschi herself, who pressed charges against

⁵ See Natasha H. Arora, *Lucretia's Many Bodies Through the Ages*, *Art & Object* (Dec. 15, 2022), <https://www.artandobject.com/news/lucretias-many-bodies-through-ages> [<https://perma.cc/BS2X-LKTW>] (discussing various artistic depictions of Lucretia).

⁶ Mary O'Neill, *Artemisia's Moment*, *Smithsonian Mag.* (May 2002), <https://www.smithsonianmag.com/arts-culture/artemisias-moment-62150147/> [<https://perma.cc/H6B8-GQRV>].

⁷ Joseph Wm. Slap, *Artemisia Gentileschi: Further Notes*, 42 *Am. Imago* 335, 337 (1985).

Tassi.⁸ The trial took more than half a year.⁹ Gentileschi testified at the trial while tortured, purportedly to assure the truthfulness of her testimony.¹⁰ As she was put to thumbscrews, she exclaimed to Tassi, “This is the ring you give me, and these are your promises[.]”¹¹

Perhaps to today’s reader, both stories—Lucretia’s and Gentileschi’s—sound remote and archaic. There is, however, a long association between those attempting suicide and those reporting histories of sexual assault.¹² By one estimate, rape victims are 4.1 times more likely to contemplate suicide and are 13 times more likely to attempt suicide compared to non-victims.¹³ Moreover, while victims no longer face physical torture at trial, they may still be tormented in other ways. For example, if victims do not want to testify, they can be threatened with jail time until they do.¹⁴ Those that do testify risk being discredited or degraded and may have their experiences essentialized.¹⁵

Victims of sexual assault continue to be shamed in a multitude of ways today. This Article introduces a typology of shame to consider when thinking about how victims are treated by the legal system and subjected to shaming through those mechanisms: the shame that victims feel or are made to feel by both investigations and proceedings in court, the shame that victims are supposed to perform for others, and the shame that victims are supposed to feel.

⁸ O’Neill, *supra* note 6.

⁹ Elizabeth S. Cohen, *The Trials of Artemisia Gentileschi: A Rape as History*, 31 *Sixteenth Century J.* 47, 49 (2000). This does not mean, however, that it was a trial in the sense with which we would be familiar today. Rather, “[t]he trial dragged on through seven months of intermittent interrogations and legal maneuvers. During at least the first six weeks, there continued private negotiations toward a settlement ending in marriage.” *Id.*

¹⁰ O’Neill, *supra* note 6.

¹¹ *Slap*, *supra* note 7, at 337 (quoting Rudolf Wittkower & Margot Wittkower, *Born Under Saturn: The Character and Conduct of Artists* 162 (1963)).

¹² Jonathan R.T. Davidson, Dana C. Hughes, Linda K. George & Dan G. Blazer, *The Association of Sexual Assault and Attempted Suicide Within the Community*, 53 *Archives Gen. Psychiatry* 550, 550 (1996).

¹³ Dean G. Kilpatrick, Christine N. Edmunds & Anne Seymour, *Nat’l Victim Ctr. & Crime Victims Rsch. & Treatment Ctr., Rape in America: A Report to the Nation* 7 (1992).

¹⁴ See Sexual Assault Kit Initiative & RTI Int’l, “Next-Level” Compulsion of Victim Testimony in Crimes of Sexual Violence Against Adults: Prosecutorial Considerations Before Using Bench Warrants/Body Attachments and Material Witness Warrants 2–3 (2022), <https://sakitta.org/toolkit/docs/14451SAKINextLevelComplsnVctmTstmny.pdf> [<https://perm.a.cc/T5ZT-Z8JR>] (discussing the challenges victims of sexual assault may face if held in contempt for not complying with an order to testify).

¹⁵ See *infra* Part II.

The title of my previous article addressing the language used by judges during sentencing in sexual assault cases is “*Ruined*.”¹⁶ The reason there are quotation marks around that title is the basis for the argument of the paper itself; while judges may wish to pronounce rape victims “ruined,” it is the victims themselves who should be allowed to determine and pronounce their own fate.¹⁷ But with the title of this paper, *Shamed*, I dispense with those quotation marks, not because victims should be ashamed of the harm that has been done to them, but because attempts to shame victims are real. They are pervasive. And they are harmful, even when such attempts are not immediately apparent. Shaming of sexual assault victims exists in police investigations, courtrooms, interpersonal relationships, and even within written laws. Not only have I been shamed, but I have shamed others in the course of prosecuting sexual assault cases. As Robert Cover has explained, “interpretive act[s]” on the part of judges are themselves “violent deed[s]” that both “authorize[] and legitim[ize]” acts of violence.¹⁸ Legal interpretation “depends upon the social practice of violence” to be effective.¹⁹

This Article considers the existence of shame and its operationalization in the law in relation to rape and sexual assault. Shame itself is its own social sanction, and shaming is its own social practice. While judges and perhaps prosecutors attempt to use shame against sexual offenders as a legal sanction, shame is, primarily, a social sanction. Shame itself is about enforcing social norms, and so many of those norms enshrined in the law and larger culture are harmful and regressive when it comes to sexual assault.

I intend to consider shame—the concept and its operation—more closely in this Article at different junctures in the law and in society than I considered in “*Ruined*.” While other scholarship has also examined shame as well as shaming sanctions, this Article is unique in relating many of my own experiences of being shamed and wielding shame as a child, as a young female prosecutor, and especially, as a law professor and legal scholar. From this perspective, I also examine different forms of sexual assault shaming in legal professional spheres.

¹⁶ Maybell Romero, “Ruined,” 111 *Geo. L.J.* 237 (2022).

¹⁷ See generally *id.* (arguing that a judge’s pronouncement of a victim as “ruined” is stigmatizing and perpetuates myths about victimhood).

¹⁸ See Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1614 (1986).

¹⁹ *Id.* at 1613.

At multiple prosecution trainings early in my career, I and everyone else in the audience were informed that people (usually, specifically women) who have gone through sexual assault should never work on sexual assault cases because they would be too “biased” and would lack the objectivity to do the job well—that somehow victims of sexual assault would be overtaken by their emotions to the point of rendering them ineffective.²⁰ In an environment like that one, I certainly did not feel free to come forward with my story for fear that colleagues, law enforcement officers with whom I had to work, and maybe even other victims would judge me as not professionally competent to work on rape and sexual assault cases. When Kim Foxx, former Cook County, Illinois, State’s Attorney (the equivalent office of an elected District Attorney), came forward as a victim of child sexual abuse²¹ and rape as a college student,²² her objectivity and professional competency were privately questioned in a way unlikely to have happened if she had been the victim of a less stigmatized crime like burglary. Coming forward as a victim of sexual assault seems to flout many long-established trappings of respectability in the legal profession.

I have also experienced this professional shaming to some extent after writing, publishing, and presenting my recent article, “*Ruined*.” While the vast majority of the feedback that I have received has been encouraging and substantive, some of it has been very similar to what I heard as a prosecutor working on sexual assault cases. For example, I have had people praise my article, then abruptly ask if it was embarrassing to have it appear online or in print. I had a fellow law professor at a regional workshop critique the work on grounds that he felt he could not critique it at all, contending that I had rendered my arguments unassailable from normal inquiry because I had shared my story. In that sense, he performed a very similar maneuver to that which I heard in prosecution trainings and to that which Kim Foxx has faced—arguing that

²⁰ When using the word “ineffective,” I mean it in a much more general sense, rather than as a specific reference to ineffective assistance of counsel as discussed in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

²¹ Carol Felsenthal, Kim Foxx Wants to Tell You a Story, *Chi. Mag.* (Dec. 10, 2018, 12:22 PM), <https://www.chicagomag.com/chicago-magazine/january-2019/kim-foxx-wants-to-tell-you-a-story/> [https://perma.cc/ZGE7-JDKH].

²² Carol Thompson & Dorothy Tucker, Kim Foxx Calls Findings Showing as Many as 1 in 3 Black Women in 2022 Were Victims of Crime “Jarring,” *CBS News* (Dec. 4, 2023, 10:27 PM), <https://www.cbsnews.com/chicago/news/kimberly-foxx-findings-black-women-crime-jarring/> [https://perma.cc/V25P-JVH2].

my experience has somehow rendered me unable to do my job well or even properly, and that it might have been better if I had never talked about it at all. Yet another couple of professors have told me that they refused to read the piece because they found the premise of another law professor sharing such a story too “uncomfortable.”

Law professors do not like being uncomfortable. Sure, they may enjoy being intellectually challenged; they may even enjoy arguing with each other over philosophical differences, interpretive differences, or ideological conflicts generally. Some of us may even enjoy debating the nature of legal scholarship—what it is, what it can be, and what it should be. But we do not like being uncomfortable, which is how I think much of my recent scholarship makes people feel. It is not meant to be enjoyable or easy, but rather to embrace the tradition of Martha Fineman and her approach to having “uncomfortable conversations.”²³ This is the sort of discomfort that has led some law professors to stop teaching rape and sexual assault law in their first-year criminal law courses.²⁴ These uncomfortable conversations, however, need to be had, and I think by not having them, we do our students, the legal profession, and even ourselves a great disservice.

Part I of this Article starts by defining (or attempting to define) shame while distinguishing it from the related concept of stigma. It answers questions regarding why people engage in shaming victims, specifically those who have been raped or sexually assaulted. It also presents historical examples of shaming to demonstrate that the shame that is heaped upon victims today is of a long historical, cultural, and legal lineage. Not only does Part I explore examples of this shaming in the law, but it also offers a sampling of examples from literature, art, and popular culture to show just how pervasive this phenomenon is. Part II examines current ways that victims are shamed specifically by the criminal legal system, introducing a typology of shame and shaming that is the first of its kind in legal scholarship. Part III examines shaming in professional settings, particularly in the legal profession and in legal academia. It reflects on my experiences writing and publishing “*Ruined*” and scrutinizes what certain pedagogical choices in the criminal law

²³ Martha Albertson Fineman, Introduction: Feminist and Queer Legal Theory, *in* *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* 1, 1 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

²⁴ Jeannie Suk Gersen, The Trouble with Teaching Rape Law, *New Yorker* (Dec. 15, 2014), <https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law>.

classroom communicate to students. In that sense, it looks at shame in the larger legal and law school cultural environment. The Article closes by advocating for having the uncomfortable conversations that can push back against the shaming with which I and this Article take issue.

I. DEFINING, PERCEIVING, AND FEELING SHAME

In “*Ruined*,” I explored the language that judges use during sentencing in rape and sexual assault cases, arguing that pronouncing victims of such crimes as “broken,” “ruined,” or “destroyed” does little to help those victims²⁵ but rather actively harms them.²⁶ I related my experience watching judges attempt to use shame during these hearings, writing in one instance:

I thought I understood at the time the point the judge was attempting to make, that he was trying to shame the defendant and to show that he had done something shameful. I shuddered, however, at the implication and the shame that seemed to run in both directions—this terrible thing was not only committed by the defendant, but also, according to the judge, something that weighed on the victim, who would live with a related sort of shame, forever.²⁷

This Article circles back to this observation to explore the role of shame not just in the adjudication of rape and sexual assault cases, but in the larger legal landscape. Before attempting to tackle those larger issues, however, it is important to consider some foundational questions. This Section aims to clearly define what shame is, distinguish it from the related concept of stigma, and explain how the “just world” fallacy leads people to engage in shaming. It then provides historic and contemporary examples to demonstrate the pervasiveness of shame and shaming in relation to rape and sexual assault.

²⁵ I explain later in the Article why I insist on using the word and referring to myself as a “victim,” but it is important to clarify at this point that, as in “*Ruined*,” “I do not purport to police the language that victims of sexual assault and abuse choose to use to describe their own experiences.” Romero, *supra* note 16, at 244.

²⁶ *Id.* at 269–70.

²⁷ *Id.* at 242.

A. “Shame” Versus “Stigma”

Shame and stigma are essential pieces and, perhaps, even drivers of the American criminal legal system. Scholars like Toni Massaro, Dan Markel, Dan Kahan, Eric Posner, and James Whitman have written about shaming sanctions and penalties in varying contexts.²⁸ However, much of the legal scholarship discussing shame and stigma often uses the words rather interchangeably and, very often, does not bother to define what the terms mean at all. In that sense, readers of such scholarship can import their own understandings of what “shame” and “stigma” mean when reading such scholarship. Shame and stigma “are rarely juxtaposed or differentiated.”²⁹ For purposes of this Article, at least, it is important to understand that there is a difference between the two concepts and that while they may be very much interrelated, they act in different ways and can be used to accomplish different goals. Other fields, such as medicine, psychology, and sociology, have done a better job of clarifying the distinctions between the two and provide a useful starting point in understanding the difference.

In *Shame Anxiety, Stigma and Clinical Encounters*, medical philosopher Luna Dolezal explains that stigma “is a socialized conception of what is disgraceful, unacceptable or abnormal within a particular social group, and being marked as stigmatized does not merely designate someone as different, but denotes them as profoundly discredited, denigrated, devalued and disgraced.”³⁰ Dominant social groups usually set out cultural customs and standards of behavior that are then taken to be “normal” in a community, while also delineating what is to be stigmatized—“unacceptable or deviant and, therefore, inferior.”³¹

²⁸ See generally, e.g., Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880 (1991) (exploring formal shaming as a criminal sanction); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 Vand. L. Rev. 2157 (2001) (arguing that shaming punishments are incompatible with a retributivist viewpoint); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & Econ. 365 (1999) (discussing formal shaming penalties for individual white-collar offenders); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 Yale L.J. 1055 (1998) (arguing that shame sanctions reflect an undesirable system of governance).

²⁹ Robert Walker, *The Shame of Poverty* 50 (2014).

³⁰ Luna Dolezal, *Shame Anxiety, Stigma and Clinical Encounters*, 28 J. Evaluation Clinical Prac. 854, 855 (2022).

³¹ Id. (quoting Luna Dolezal, *Shame, Stigma and HIV: Considering Affective Climates and the Phenomenology of Shame Anxiety*, Lambda Nordica, Nov. 4, 2021, at 47, 51).

Stigma can be thought of as the social devaluing of “a personal attribute” and only exists in a specific social context.³² It is then “generally categorized into discrimination and internalized stigma.”³³ It is this stigma, whether external (in the form of discrimination of some kind) or internal, that can lead to a person feeling shame. Shame is a “negative self-conscious emotion, triggered when individuals experience failure in regards to personal or social standards”³⁴ that are determined by dominant social groups. It is a reaction that can be found across cultures and classes as it is a “universal, adaptive and common emotional response.”³⁵ In this sense, shame can be understood as the result of stigma, and the process of stigmatizing a certain characteristic, experience, or attribute as engaging in shaming itself. Shaming a person or group of people is stigma put in motion.

For not only scholars but also policymakers, disaggregating stigma and shame can facilitate new understandings and approaches, both in the field of rape and sexual assault law and in other fields of law more generally. There may well be situations where stigmatizing certain attributes is laudable and useful, but shaming those who possess such attributes is not. In demonstrating why they are not one and the same, I hope that other legal scholars will also begin to recognize this subtle but important dichotomy and will therefore approach these two concepts with greater nuance.

³² Hao Li et al., *The Mediating Role of Internalized Stigma and Shame on the Relationship Between COVID-19 Related Discrimination and Mental Health Outcomes Among Back-to-School Students in Wuhan*, *Int'l J. Env't Rsch. & Pub. Health*, Dec. 2020, at 1, 2, <https://pmc.ncbi.nlm.nih.gov/articles/PMC7764740/pdf/ijerph-17-09237.pdf> [<https://perma.cc/39SH-NJGZ>].

³³ *Id.*

³⁴ *Id.* (footnote omitted).

³⁵ Claudia Helmert et al., *An Explorative Cross-Sectional Analysis of Mental Health Shame and Help-Seeking Intentions in Different Lifestyles*, *Sci. Reps.*, July 4, 2023, at 1, 2 (quoting Alun Charles Jones, *Stigma and Shame: Conceptualisations and Views Concerning Service Use and Health Care Provision: A Literature Review and Commentary*, *J. Clinical & Med. Rsch.*, Apr. 30, 2019, at 1, 5, https://www.researchgate.net/publication/333907008_Stigma_and_ShameConceptualisations_and_Views_ConcerningService_Use_and_Health_Care_Provision_A_Literature_Review_and_Commentary_Available_at_httpswwwredelvecbackendimagesarticle1556952786pdf [<https://perma.cc/5UB6-3E4R>]), <https://www.nature.com/articles/s41598-023-37955-8.pdf> [<https://perma.cc/UCD4-ME98>].

B. Why People Shame

On May 10, 2023, a jury found Donald Trump liable for battery and defamation against E. Jean Carroll, a well-known advice columnist and author, and concluded that she had been “sexually abused.”³⁶ The first person Carroll told about the attack was her friend, author Lisa Birnbach.³⁷ The abuse happened in a dressing room at Bergdorf Goodman in Manhattan in 1996.³⁸ Birnbach recalled in an interview that Carroll “repeatedly” said, “He pulled down my tights, he pulled down my tights.”³⁹ Birnbach encouraged Carroll to report what had happened to the police, but Carroll refused.⁴⁰ Carroll also told another friend, journalist Carol Martin.⁴¹ Martin “advised Ms. Carroll to stay silent.”⁴²

Carroll did stay silent for more than two decades. When she chose to come forward, however, it was in very public fashion—with an excerpt from her forthcoming book *What Do We Need Men For? A Modest Proposal*, published in *New York Magazine’s The Cut*.⁴³ Carroll relates in excruciating and necessary detail what happened in the dressing room.⁴⁴ Before that, however, she addressed a question that she very wisely anticipated: “Why haven’t I ‘come forward’ before now?”⁴⁵ In answer, she wrote:

Receiving death threats, being driven from my home, being dismissed, being dragged through the mud, and joining the 15 women who’ve come forward with credible stories about how the man grabbed, badgered, belittled, mauled, molested, and assaulted them, only to see

³⁶ Tamara Keith, Andrea Bernstein, Mara Liasson & Carrie Johnson, Trump “Sexually Abused” E. Jean Carroll in 1990s, Jury Says, NPR (May 10, 2023, 5:01 PM), <https://www.npr.org/2023/05/10/1175266795/trump-sexually-abused-e-jean-carroll-in-1990s-jury-says> [<https://perma.cc/7QD5-2YBZ>].

³⁷ Jessica Bennett, Megan Twohey & Alexandra Alter, Why E. Jean Carroll, ‘the Anti-Victim,’ Spoke Up About Trump, N.Y. Times (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/politics/jean-carroll-trump-sexual-assault.html>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ E. Jean Carroll, Hideous Men: Donald Trump Assaulted Me in a Bergdorf Goodman Dressing Room 23 Years Ago. But He’s Not Alone on the List of Awful Men in My Life, N.Y. Mag.: The Cut, <https://www.thecut.com/article/donald-trump-assault-e-jean-carroll-other-hideous-men.html> (last updated Jan. 26, 2024).

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasis omitted).

the man turn it around, deny, threaten, and attack them, never sounded like much fun. Also, I am a coward.⁴⁶

Carroll proved herself to be anything but cowardly while testifying at the battery and defamation trial. When asked why she stayed silent, she explained her fear of suffering professional repercussions but also explained, “I was ashamed. I thought it was my fault,” powerfully describing her own feelings.⁴⁷ She also described the stigmatization that caused those feelings, relating how people view sexual assault victims as “soiled goods” and question what they could have done to prevent being assaulted while still telling victims, “You’re so brave. You’re so brave.”⁴⁸

One of the first people I ever told about my experiences of childhood rape, sexual assault, and trafficking was my ex-husband. I felt at the time that I had a duty to him to disclose what I then considered to be part of my sexual past. I also assumed that he was a safe person with whom I could share what was then a secret—he was my husband, after all. While he also exclaimed that I was “so brave” for telling him, I could tell that his regard of me changed somehow, and not for the better. He advised me that I should not tell anyone else and that having anyone know this about me could harm our professional prospects and reputations. It seemed to make sense at the time, and so I did as I was told. Even as our marriage deteriorated, it took me a long time to tell anyone else because I, too, was ashamed. My ex-husband made it clear he thought I was the sort of “soiled goods” Carroll testified about. At the time, I agreed with my ex-husband. Who else could ever want or love me, given what I had been through?

Stigmatization and shaming make it difficult, if not impossible, for many sexual assault victims to come forward with their stories. Rather than asking victims questions such as why they took “so long” in some instances to talk about what happened to them,⁴⁹ the more useful and

⁴⁶ *Id.*

⁴⁷ Adam Klasfeld (@KlasfeldReports), X (Apr. 26, 2023, 12:36 PM), <https://x.com/KlasfeldReports/status/1651264020173795329> [<https://perma.cc/KQ7P-J22G>].

⁴⁸ Adam Klasfeld (@KlasfeldReports), X (Apr. 26, 2023, 12:38 PM), <https://x.com/KlasfeldReports/status/1651264432352161792> [<https://perma.cc/4DN7-BL2B>].

⁴⁹ Victims either stay silent or are not immediately forthcoming about being raped or sexually assaulted for a variety of reasons, including fear of being blamed, fear of being disbelieved, fear of retaliation, and fear of reputational harm, among other reasons. Beverly Engel, Stop Shaming Victims of Sexual Assault for Not Reporting, *Psych. Today* (Sept. 23, 2018), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201809/stop-shaming-victims-of-sexual-assault-for-not-reporting> [<https://perma.cc/T92E-HMCN>].

appropriate inquiry would be to think about why people would engage in shaming victims in the first place.

1. A (Brief) Introduction to Just World Theory

There are so many injustices in the world happening every day, around the clock, that trying to think of all of them at once can feel suffocating. Moreover, trying to make sense of why they happen could lead one to feel hopeless and, perhaps even more distressingly, powerless. Psychologists Melvin Lerner and Carolyn Simmons theorized that “people need to believe that the world is a just place in which individuals get what they deserve.”⁵⁰ While there may be differing levels to which people accept just world theory as part of their world view, “most subscribe to this belief to some degree.”⁵¹ Belief in a just world functions to make the inexplicable make sense and to make one feel more in control of one’s environment and the things that happen within its confines. Those with a strong belief in such a world “want to believe that the world is safe and protected even in the face of harsh reality.”⁵² Francis Shen has argued that people create myths about rape⁵³—such as who gets raped, how rape victims should behave, and the usual relationships between victims and rapists—when they need to reconfirm their own “belief in a just world.”⁵⁴ She has also suggested that the creation and reliance on these rape myths

⁵⁰ Carolyn L. Hafer & Laurent Bègue, *Experimental Research on Just-World Theory: Problems, Developments, and Future Challenges*, 131 *Psych. Bull.* 128, 128 (2005) (citing Melvin J. Lerner & Carolyn H. Simmons, *Observer’s Reaction to the “Innocent Victim”: Compassion or Rejection?*, 4 *J. Personality & Soc. Psych.* 203, 204 (1966)).

⁵¹ Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. Chi. L. Rev.* 571, 582 (1998).

⁵² Yael Idisis, Sarah Ben-David & Efrat Ben-Nachum, *Attribution of Blame to Rape Victims Among Therapists and Non-Therapists*, 25 *Behav. Scis. & L.* 103, 104 (2007).

⁵³ Rape myths are “commonly held beliefs about what a typical rape situation looks like which influence the decision-making process and guilt assessment of lay people as well as jurors.” Madeleine van der Bruggen & Amy Grubb, *A Review of the Literature Relating to Rape Victim Blaming: An Analysis of the Impact of Observer and Victim Characteristics on Attribution of Blame in Rape Cases*, 19 *Aggression & Violent Behav.* 523, 524 (2014). It is likely that rape myths “determine the degree to which a victim is blamed and the perpetrator is exonerated for the rape.” *Id.* Examples of rape myths include the idea that women commonly lie about being raped, that women owe men sex when men take them out and pay for dates (commonly referred to as “putting out”), or that all women have rape fantasies. Rebecca M. Hayes, Katherine Lorenz & Kristin A. Bell, *Victim Blaming Others: Rape Myth Acceptance and the Just World Belief*, 8 *Feminist Criminology* 202, 207–08 (2013).

⁵⁴ Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 *Colum. J. Gender & L.* 1, 23 (2011).

might be inadvertent as “researchers [have] found ‘strong support for the theory that just-world beliefs are automatically activated and subsequently used by people in social perception.’”⁵⁵

As just world theory and its real-world application rely on a narrative that suggests that if a person complies with “social norms, no harm will come to them,” it also assigns victims to a status of “otherness,” given the presumption that they must have been acting outside of social norms to have something unfortunate befall them.⁵⁶ Just world theory, therefore, perpetuates “the social perception that victims of crime are located at the margins of society”⁵⁷ while allowing those who subscribe to such a belief to feel safe in the world and maintain the illusion of control over their surroundings.⁵⁸ It also presents an often unrealistic picture of criminality and victimhood, in which those who commit crimes have never been victimized themselves. Not only is it helpful to understand how a belief in a just world influences the general public at large when it comes to interacting with and determining how to regard victims of rape and sexual assault, but it is important to remember that actors in the criminal adjudication process—prosecutors, police, defense counsel, judges, and juries—are also subject to and likely to subscribe to just world theory, even if they are not familiar with its formal premise.

2. Just World Theory, Victim Blaming, and Rape Culture

The “otherness” of crime victims that arises in a just world theory paradigm makes it all the easier to attempt to fit them into the mold of the prototypical “victim,” as Hadar Dancig-Rosenberg and Noa Yosef have noted.⁵⁹ Belief in a just world causes people “to respond in various ways to observed injustice,” such as by helping a victim or, conversely, blaming a victim for whatever adversity has befallen them.⁶⁰ Seeing misfortune strike someone who already seemed to “deserve” it only serves to

⁵⁵ Id. at 24 (quoting John D. Murray, Jo Ann Spadafore & William D. McIntosh, *Belief in a Just World and Social Perception: Evidence for Automatic Activation*, 145 *J. Soc. Psych.* 35, 42 (2005)).

⁵⁶ Hadar Dancig-Rosenberg & Noa Yosef, *Crime Victimhood and Intersectionality*, 47 *Fordham Urb. L.J.* 85, 87 & n.8 (2019).

⁵⁷ Id. at 87 (citing Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 *Santa Clara L. Rev.* 605, 607–08 (2009)).

⁵⁸ Hayes et al., *supra* note 53, at 203.

⁵⁹ Dancig-Rosenberg & Yosef, *supra* note 56, at 87.

⁶⁰ Carolyn L. Hafer, *Do Innocent Victims Threaten the Belief in a Just World? Evidence from a Modified Stroop Task*, 79 *J. Personality & Soc. Psych.* 165, 165 (2000).

reinforce belief in a just world and the idea that bad things will happen to “bad people.” In fact, there are many examples of English language idioms that stress the belief in a just world: “everything happens for a reason,” “what goes around comes around,” “you reap what you sow,” and, more recently perhaps, the rudely phrased “fuck around and find out.”

But what of innocent victims who are suffering from some sort of perceived injustice or unfairness where none of these catchphrases make any sense? If anything, such victims threaten the belief in a just world and are subject to unfair attempts to keep this belief intact, such as through victim blaming or attacks on a victim’s character.⁶¹ This type of reaction—a devaluation or derogation of a victim—becomes more acute when a victim cannot be compensated for the injustice.⁶² Perhaps this reaction makes sense, as witnessing senseless misfortune threatens one’s perception of safety and predictability in the everyday world.

Belief in a just world can be especially harmful in the context of rape and sexual assault. Experiencing the cognitive dissonance of an innocent victim suffering serious harm could lead a person to “try[] to deny or nullify the injustice . . . [by] blaming the victim” or to try to “mak[e] the injustice tolerable enough for them to live with . . . by belittling the victimization.”⁶³ This derogation and diminishment has been recognized in feminist scholarship since the 1970s as being part of a larger rape culture that objectifies women “through movies, television, advertising, and ‘girlie’ magazines.”⁶⁴

⁶¹ *Id.*

⁶² Bruce W. Godfrey & Charles A. Lowe, Devaluation of Innocent Victims: An Attribution Analysis Within the Just World Paradigm, 31 *J. Personality & Soc. Psych.* 944, 944 (1975); see Adrian Furnham, Belief in a Just World: Research Progress Over the Past Decade, 34 *Personality & Individual Differences* 795, 801–02 (2003).

⁶³ Hayes et al., *supra* note 53, at 204.

⁶⁴ Martha R. Burt, Cultural Myths and Supports for Rape, 38 *J. Personality & Soc. Psych.* 217, 219 (1980). The concept of “rape culture” has grown into a very wide lens which attempts to understand social and cultural phenomena. Authors have written about rape culture in professional, college, and high school sports. See, e.g., Kristy L. McCray & Elizabeth A. Taylor, Sexual Violence in Athletic Organizations, in 5 *Handbook of Interpersonal Violence and Abuse Across the Lifespan* 4107, 4110–14 (Robert Geffner et al. eds., 2021). Dress codes have been interpreted as being reflections of a larger rape culture, see, e.g. Stephan Wah, Note, “Boys Will Be Boys, and Girls Will Get Raped”: How Public School Dress Codes Foster Modern Day Rape Culture, 23 *Cardozo J.L. & Gender* 245, 261–63 (2016), while other scholars have written about the existence of rape culture in modern and popular music, see Alexandria Johnson, We Deserve Better: How Hip Hop Perpetuates the Rape Culture of Black Women, 42 *N.C. Cent. L. Rev.* 139, 145–46 (2019) (discussing rape culture and Hip

Just world belief, however, is not the only predictor of whether a person will engage in victim blaming or the acceptance of rape myths. Another factor to consider is the person's ability to personally identify with a rape victim—being able to identify with and empathize with a victim “lessen[s] the extent to which victim blaming occurs.”⁶⁵ While it is important to remember that men and boys can be victims of rape and sexual assault, the large majority of victims of these crimes are women and girls.⁶⁶ Perhaps unsurprisingly then, women are less likely to victim blame and more likely to respond to rape and sexual assault victims with empathy and to believe those victims' accounts of their assaults compared to men.⁶⁷

Sexual assault victims, too, may have a strong belief in a just world which may influence their own self-perception as well as how successfully they are able to cope after experiencing sexual violence.⁶⁸ Such a belief may lead to a victim blaming themselves for being assaulted

Hop). See generally Rosemary Lucy Hill, Daisy Richards & Heather Savigny, *Normalising Sexualised Violence in Popular Culture: Eroding, Erasing and Controlling Women in Rock Music*, 23 *Feminist Media Stud.* 1107 (2023) (discussing rape culture and rock music).

Scholars such as Erin Sheley have warned against the use of the term and concept “rape culture” as “a blanket critique of much of male behavior generally.” Erin Sheley, *A Broken Windows Theory of Sexual Assault Enforcement*, 108 *J. Crim. L. & Criminology* 455, 470 (2018). She has argued that overusing the concept of rape culture, especially in the service of social commentary, portrays victims as trapped in a “subordinating cultural context” in which they are understood to be weak and “perpetually fragile,” while also removing what should be the focus on individual culpability of men who rape to more nebulous cultural factors. *Id.* at 471–72.

Aya Gruber, too, has expressed her objections to rape culture narratives, particularly those that are prevalent on college campuses. She has written about how reaction against rape culture effectively places limitations on sharing information and teaching certain subjects, such as rape law, which may lead many professors to choose not to teach about rape in their criminal law classes to avoid any risks. Aya Gruber, *Anti-Rape Culture*, 64 *Kan. L. Rev.* 1027, 1049–52 (2016).

⁶⁵ Hayes et al., *supra* note 53, at 206.

⁶⁶ Romero, *supra* note 16, at 243 (citing Bureau of Just. Stat., U.S. Dep't of Just., *Female Victims of Sexual Violence, 1994–2010*, at 3 (2013), <https://bjs.ojp.gov/content/pub/pdf/fvsv9410.pdf> [<https://perma.cc/TKB2-3MVJJ>]); Holly Kearl, *Stop Street Harassment, The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Assault 7* (2018), <https://www.raliance.org/wp-content/uploads/2018/05/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf> [<https://perma.cc/V49K-C9NW>].

⁶⁷ Hayes et al., *supra* note 53, at 206–07.

⁶⁸ See generally Detlef Fetchenhauer, Gabriele Jacobs & Frank Belschak, *Belief in a Just World, Causal Attributions, and Adjustment to Sexual Violence*, 18 *Soc. Just. Rsch.* 25 (2005) (empirically examining the relationship between belief in a just world and emotional recovery from sexual violence).

or abused.⁶⁹ On the other hand, some victims with a strong belief in a just world may be better able to adjust after suffering sexual violence by being more likely to blame external and situational factors, essentially concluding that because they regard themselves as “good people,” they could not be at fault for what happened.⁷⁰ In that sense, researchers have found, belief in a just world can be either harmful or hurtful.⁷¹ It is important to note at this juncture that a person’s perception of a just world may change depending on whether it is viewed through a personal or general lens—many believe in a more just world for themselves than for others.⁷²

3. *The Meaning of “Justice” for Victims*

This Article uses the term “justice” in numerous contexts, both in the description of the system of laws and institutions that impose criminal punishments on individuals (“criminal justice” and “criminal justice system”) as well as in the more abstract sense, related to concepts of fairness and desert. At this juncture in the Article, I want to consider, if briefly, what exactly justice might mean to victims. There is, rightfully, a well-developed literature regarding access to justice from a number of different angles—for example, for those accused of and charged with crimes,⁷³ for those embroiled in critical civil legal matters like custody or eviction proceedings who have no constitutional right to an attorney and cannot afford to hire one,⁷⁴ or for those attempting to access justice in

⁶⁹ Hayes et al., *supra* note 53, at 205.

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² Claudia Dalbert, *The World Is More Just for Me Than Generally: About the Personal Belief in a Just World Scale’s Validity*, 12 *Soc. Just. Rsch.* 79, 92 (1999).

⁷³ See generally, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 *Geo. Wash. L. Rev.* 1564 (2018) (arguing that public defense for indigent criminal defendants remains underfunded and inadequate).

⁷⁴ See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *Fordham Urb. L.J.* 37, 39 (finding that “representation is a significant variable affecting a claimant’s chances for success in eviction [and] custody . . . cases”).

rural communities.⁷⁵ In those examples, “access to justice” might be thought of “as access to lawyers . . . and court-based processes.”⁷⁶

Prosecutors have, historically, positioned themselves as the most capable of helping victims secure justice. Victim advocates offices, formed purportedly with the goal of assisting victims to have their needs met, especially during the criminal adjudicative process, often function as yet another part of the investigative and prosecutorial team,⁷⁷ giving rise to numerous potential conflicts of interest.⁷⁸ While prosecutors and some prosecution-affiliated victim advocates and nonprofit organizations may depict testifying against one’s abuser and securing a conviction as the main route for a victim to secure “justice” for themselves,⁷⁹ it is critical to remember that victims are not a monolith and that not all victims may want the same type of resolution to their case or circumstances: “The word ‘justice’ can mean something different” from one victim of sexual abuse to another.⁸⁰ While some victims may wish to see their abusers incarcerated, which would comport with a much more traditional view of victims securing “justice” for themselves in the American criminal legal

⁷⁵ See generally, e.g., Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 *Harv. L. & Pol’y Rev.* 15 (examining the rural attorney shortage).

⁷⁶ Susan McDonald, *Victims of Crime Research Digest No. 12: Access to Justice for Victims of Crime*, Gov’t of Can., <https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd12-rr12/p4.html> [<https://perma.cc/8FMD-EGWA>] (last updated Dec. 13, 2021).

⁷⁷ See Sexual Assault Kit Initiative & RTI Int’l, *Advocacy Meets Prosecution: The Benefits of a Strong Partnership 1*, <https://www.sakitta.org/toolkit/docs/Advocacy-Meets-Prosecution-The-Benefits-of-a-Strong-Partnership.pdf> [<https://perma.cc/R73F-KAGN>] (last visited Nov. 11, 2024) (explaining that while victim advocates “focus on victims’ needs,” they also “work together with prosecutors to move a case forward”).

⁷⁸ See Sexual Assault Kit Initiative & RTI Int’l, *Guiding and Supporting a Victim’s Choice to Participate in the Prosecution of Sexual Violence 2*, <https://sakitta.org/toolkit/docs/14405S-AKIVctmChoiceProsecution.pdf> [<https://perma.cc/N2E7-BHZK>] (last visited Nov. 16, 2024) [hereinafter *Sexual Assault Kit Initiative, Guiding and Supporting*] (explaining that police-affiliated victim advocates “do not maintain the same level of confidentiality” as community-based advocates, and “may be obligated to disclose information shared by the victim with law enforcement, prosecution, or—in some situations—the defense team”).

⁷⁹ See George Gascón, L.A. Cnty. Dist. Att’y’s Off., *Sexual Assault* (2023), <https://da.lacounty.gov/sexual-assault> [<https://perma.cc/6SXP-CYUY>] (providing five reasons why victims should report sexual assault to law enforcement, including that “[b]y taking action to bring an attacker to justice, a victim may be empowered”); see also *Sexual Assault Kit Initiative, Guiding and Supporting*, supra note 78, at 1 (discussing ways that victim advocates and prosecutors can encourage victims to increase their likelihood of cooperating with a prosecution).

⁸⁰ Zero Abuse Project, *Tip Sheet: The Meaning of Justice to Survivors*, *SurvivorSpace*, <https://survivorspace.org/wp-content/uploads/2023/03/Meaning-of-Justice.pdf> [<https://perma.cc/38K6-L9EF>] (last visited Nov. 11, 2024).

system, other approaches to redressing harm caused by crime may provide alternate paths for securing the sort of justice for which many victims might wish. Restorative justice approaches, which often center the needs of victims more than conventional criminal legal systems do, offer promising alternatives that might afford a more fair and satisfactory experience not only for offenders and other stakeholders, but for victims as well.⁸¹

4. *Experiencing the Just World Belief*

As I detailed in “*Ruined*,” my biological father raped and sexually abused me repeatedly when I was a young child up until a few years before I hit puberty.⁸² He also trafficked me to people he knew throughout the Los Angeles area and Southern California. While it is difficult for me to pinpoint exactly when the abuse began because of how young I was, I can, at least, estimate that it started when I was about three years old, given my memories of wearing certain articles of clothing like sweaters or coats that I am able to identify in materials like school photographs and other family album snapshots. I cannot remember a time in my life that existed before the sexual abuse started. In that sense, it feels like I have been a victim of rape and sexual assault since the start of my life because it is impossible for me to remember not being one at all.

I grew up with what I now understand to have been a very strong belief in a just world. I think this belief was informed by growing up Catholic and by looking for answers about how the world around me worked, just like any other child my age would. Once I learned to read shortly before kindergarten, studying the catechism—essentially a summary of Catholic doctrine that also conveys fundamental ideas about faith and morality—now feels like my first foray into studying something akin to the law. Going to Mass and Sunday school and growing up in Latinx Catholic culture, I learned important lessons about love, sacrifice, and the love between parents and their children. While I was certainly taught about and vaguely aware of the concept of original sin, which can be thought of as

⁸¹ See Ana M. Nascimento, Joana Andrade & Andreia de Castro Rodrigues, *The Psychological Impact of Restorative Justice Practices on Victims of Crimes—A Systematic Review*, 24 *Trauma, Violence & Abuse* 1929, 1929–30 (2023), <https://journals.sagepub.com/doi/epub/10.1177/15248380221082085> [<https://perma.cc/2T84-XE3A>] (citing multiple studies suggesting “that participation in [restorative justice] programs has a beneficial impact on the level of satisfaction for victims and offenders”).

⁸² Romero, *supra* note 16, at 240.

an inherent propensity in all people to do sinful things, this teaching was tempered by the notion that God loves all people and living things, answers sincere prayers, and protects and comes to the aid of people seeking help. Because of these teachings, I very much believed in a just world early on in life.

This belief was paradoxical. Unlike the way that many psychological studies such as the ones I have cited above seem to regard the effects of the belief—all good or all bad—this belief felt like both a curse and a comfort. I now realize that is because the way the belief functions differs depending on its directionality. Was I thinking about the belief and how it applied to my situation? Or was I thinking about how it applied to others? Depending on where I was directing the belief, it was varyingly hurtful or helpful.

Applying the belief to myself, I could not understand what I had done to “deserve” the rape and abuse by my biological father and the like-minded adult men he knew. I figured that there was something inherently wrong with me and that it was much worse than the original sin that I then believed everyone carried with them. I sometimes wondered if my biological father knew something about my character that I could not see and that no one else could perceive. In that way, I developed a very early belief that I deserved what happened to me, even if I could not say why. I could not understand otherwise how a just world where parents were supposed to protect and love their children could be one where such a thing would happen. At the time, my own exceptional badness, dirtiness, and internal rot seemed to be the only answer, even if I did not yet have the words to express that feeling or idea. It would, however, become a self-perception that has been long-lasting and haunts me to this day, just not nearly as badly as it did before.

On the other hand, when I directed my belief in a just world outwardly, I found it of great comfort, believing that when I was very bad, the things that were happening to me could not be happening to anyone else because other people were better than me deep down. Because of that, when they did do something that was “bad,” they would suffer less of a consequence because of it. This conviction grew even firmer once my younger sister was born shortly before I turned seven. My mother, who to this day swears that she was not aware of the abuse that I faced, told me to never let my sister be alone with my biological father. Once my sister was old enough to spend time away from my mother, my biological father wanted to start taking her out of the house to “spend time” with her. She was about three

and I was about ten, which was apparently too old for my biological father to abuse me any longer. I tagged along on every trip and every outing, making sure to watch them whenever there was opportunity for them to be alone around the house or in the backyard. It was exhausting and, I now realize, an entirely inappropriate thing to ask a child to do. But I did it, and I would go to sleep at night wondering what I had done to deserve having to guard my younger sister while also comforted by the fact that she was not subject to the same harsh standard to which I believed a “just world” was subjecting me. The belief in a just world can cut both ways.

*C. Examples of the Shaming and Minimization
of Sexual Assault Victims in Media*

As is true for so many other people, much of my world view, for good or for ill, was influenced by the pop culture, media, and art around me. In “*Ruined*,” I provided a brief historical account of misogyny in law and culture;⁸³ a brief accounting of victim shaming and the minimization of sexual assault in different media helps to show that shame and shaming are long-lasting cultural traditions. Law does not exist in a vacuum and is but one element in the larger overall culture of communities and societies. Considering, if briefly, different representations of rape and sexual assault also serves to give a greater social context to the shaming of sexual assault and rape victims that happens in the criminal law, a typology which I introduce and elaborate upon in Part II of this Article.

1. In Art

Rape and its aftermath have long been depicted in European art with an emphasis on the “heroic,” wherein the rapist portrayed “is a Greek or Roman god or hero.”⁸⁴ This typical depiction of rape was what made Gentileschi’s *Lucretia* so memorable to me—its stark departure from the heroic tradition was unusual then and is still unusual now. The other depiction of Lucretia with which I was familiar at the time, Botticelli’s *The Story of Lucretia*,⁸⁵ is very busy, with the feel of a Renaissance action

⁸³ Id. at 244–53.

⁸⁴ Diane Wolfthal, “A Hue and a Cry”: Medieval Rape Imagery and Its Transformation, 75 *Art Bull.* 39, 39 (1993) (quoting Susan Brownmiller, *Against Our Will: Men, Women, and Rape* 313–42 (1981)); id.

⁸⁵ Sandro Botticelli, *The Story of Lucretia*, c. 1500, tempera and oil on panel, 83.8 × 176.8 cm, Isabella Stewart Gardner Museum, <https://www.gardnermuseum.org/experience/collecti-on/10986> [<https://perma.cc/2KF8-2TW2>].

movie. While Lucretia herself is an important element of the composition, there is much to distract the viewer otherwise—the harmonious illustration of ancient Roman architecture and warriors fighting with swords draws the viewer’s attention. Lucretia’s rape is merely a plot element to the founding of the ancient Roman Republic.

While visiting the Herbert F. Johnson Museum of Art at Cornell University in October 2024, I was struck by a depiction⁸⁶ of Lucretia that came about a century before Gentileschi’s. Painted by Leonardo Grazia, also known as Leonardo da Pistoia, Lucretia has been eroticized to nearly comic effect. Lucretia’s left hand frames her right breast, appearing as if she might be about to fondle herself. She looks longingly at a dagger that she holds aloft in her right hand, as one might gaze at a lover. The tragic elements of Lucretia’s story have been lost in its eroticized depiction in Leonardo Grazia’s version.

Sandro Botticelli, *The Story of Lucretia* (c. 1500)



⁸⁶ Leonardo Grazia, called Leonardo da Pistoia, *Lucretia*, c. 1541–45, oil on panel, 87.9 × 62.2 cm, Herbert F. Johnson Museum of Art, Cornell University, <https://emuseum.cornell.edu/objects/50389/lucretia> [<https://perma.cc/Q438-BTEU>].

Leonardo Grazia, *Lucretia* (c. 1541–1545)

Heroic depictions of rape seem to abound in art history books and museums. In several paintings depicting the rape of the Sabine women, rape “is generally sanitized or eroticized.”⁸⁷ Some of these renderings appear pastoral, set out in the open.⁸⁸ Others show a scene that looks more like a raucous dance.⁸⁹ These artworks portray the moment at which the Sabine women were carried away by Roman men unable to find wives and do not focus on the sexual assault that would have, impliedly, followed.⁹⁰

Visual art, however, does not “prioritize narrative or truth” and is unique in the way that it “liberates its makers” to tell their own stories of

⁸⁷ Wolfthal, *supra* note 84, at 39.

⁸⁸ See *id.* at 39–40.

⁸⁹ See, e.g., Nicolas Poussin, *The Abduction of the Sabine Women*, c. 1633–34, oil on canvas, 154.6 × 209.9 cm, Metropolitan Museum of Art, <https://www.metmuseum.org/art/collection/search/437329> [<https://perma.cc/HXZ2-PMTZ>].

⁹⁰ See Wolfthal, *supra* note 84, at 39.

sexual assault, without mediation and from their own point of view.⁹¹ In the fall of 2018, the John Jay College of Criminal Justice hosted the exhibition *The Un-Heroic Act: Representations of Rape in Contemporary Women's Art in the U.S.*⁹² Rather than emphasizing the heroic, action movie aspects of classical myths that merely featured rape as a plot point, the artworks in *The Un-Heroic Act* are primarily concerned with the “effects and feelings” that victims experience during and in the aftermath of sexual assault.⁹³

While I desperately wanted to go to New York to see *The Un-Heroic Act* in 2018, I did not have the time or resources to make the trip. However, reading about the exhibit and seeing photographs of the artworks made me think about how I could incorporate more of my own experiences, feelings, and emotions into my own scholarship—it was one of several inspirations that led me to experiment with auto-ethnographic methods. Legal scholars have much to learn from the art world, especially given its unique ability to allow victims of sexual violence to tell their stories in an unmediated fashion.

2. *In Music*

“Blurred Lines,”⁹⁴ sung by Robin Thicke and featuring Pharrell Williams and T.I., was released in 2013, so I was surprised to hear it being played prominently in multiple settings in Provo, Utah, while I worked as a visiting assistant professor at the J. Reuben Clark Law School at Brigham Young University from the fall of 2015 to the spring of 2017. On one occasion, I heard the song in a shop where a few law school colleagues and I had gathered for ice cream and smoothies. “I love this song,” one of them said. “It’s so great for working out.” I scoffed and protested: “Have you listened to the lyrics of this song?” A few of my colleagues told me that I should, maybe, “lighten up.” Something about the delivery of the lyrics, however, prevented me from ever doing so. The

⁹¹ Jillian Steinhauer, Female Artists Delete Rape’s ‘Heroic’ Underpinnings, N.Y. Times (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/arts/design/review-the-un-heroic-act-sexual-violence.html>.

⁹² The Un-Heroic Act: Representations of Rape in Contemporary Women’s Art in the U.S., Anya and Andrew Shiva Gallery, https://shivagallery.org/featured_item/the-un-heroic-act-representations-of-rape-in-contemporary-womens-art-in-the-u-s/ [https://perma.cc/W5C9-LF4K] (last visited Nov. 11, 2024).

⁹³ Steinhauer, *supra* note 91.

⁹⁴ Robin Thicke, Blurred Lines ft. Pharrell Williams & T.I., *on* Blurred Lines (Star Trak Entertainment & Interscope Records 2013).

song's repeated refrain to the listener, "Good girl / I know you want it,"⁹⁵ grated on me and made me wonder if I was the only one experiencing such visceral revulsion when listening. I realized that it reminded me of the "encouragement" my biological father would offer when abusing me. However, women also write and perform music that could be seen as minimizing or even romanticizing sexual assault and abuse. In "E.T.," Katy Perry sings, "Take me, ta-ta-take me / Wanna' be your victim, ready for abduction."⁹⁶

This is, of course, an admittedly miniscule sampling of song lyrics that could plausibly be read to refer to and minimize sexual assault or to undermine women's autonomy to make their own choices.⁹⁷ For the purposes of this paper, it is sufficient to acknowledge that music is yet another popular media form that is part of an overall cultural landscape that minimizes sexual violence and blames and shames assault and abuse victims.

3. In Television, Movies, and News Media

Rape and sexual assault have long been minimized and exploited as plot points in television and film, and scrutinizing a few examples illustrates just how this happens. Television critics, viewers, and reporters all commented on a relatively recent but already infamous example from the HBO show *Game of Thrones*, in which one character, Jaime Lannister, rapes his sister, Cersei, while she implores him to stop and even cries.⁹⁸ Many asked why this scene was written and filmed in this way when the source material for the show, a book in a series by George R.R. Martin, depicted a consensual scene between the two characters.⁹⁹

Depictions of rape and sexual violence in television and movies are not, however, merely a recent phenomenon. Rape has been used as a plot device in prime-time television frequently enough that Lisa Cuklanz has noted the common characteristics of "[b]asic [p]lot [v]ictim[s]."¹⁰⁰ Victims are often depicted as being "single," with "very few (if any)

⁹⁵ Id.

⁹⁶ Katy Perry, *E.T.*, *on Teenage Dream* (Capitol Records 2010).

⁹⁷ For a more in-depth discussion, see generally Johnson, *supra* note 64 (discussing rape culture and Hip Hop); Hill et al., *supra* note 64 (discussing rape culture and rock music).

⁹⁸ *Game of Thrones: Breaker of Chains* (HBO television broadcast Apr. 20, 2014).

⁹⁹ Jaime Weinman, *Why Are There So Many Rapes on TV?*, *Maclean's* (May 11, 2014), <https://macleans.ca/culture/television/why-are-there-so-many-rapes-on-tv/>.

¹⁰⁰ See Lisa M. Cuklanz, *Rape on Prime Time: Television, Masculinity, and Sexual Violence* 101 (1999).

women friends,” without “close contact with their families,” and mostly, having “careers or jobs outside the home.”¹⁰¹

Though purportedly factually based, news media has also traded in rape myths, victim blaming, and victim shaming.¹⁰² News media has tended to delegitimize acquaintance rape and “eroticize sexual assault” while continuing to rely on corrosive rape myths such as the implication that victims lie or that they “wanted it.”¹⁰³

I should make it clear that I do not believe that it is one piece of art, one movie, one song, or one article that could somehow catastrophically lead to rape or sexual assault. Media, however, can reflect prevailing social mores and offer evidence of how people regard victims of rape and sexual assault. It can also “play . . . important role[s] in shaping public perceptions of issues and solutions across an array of topics.”¹⁰⁴

II. SHAMING VICTIMS IN THE CRIMINAL ADJUDICATIVE CONTEXT

Stigma and shaming are, as I discussed earlier in the Introduction and Part I of this Article, manners in which norms are enforced and through which those who do not comply are pushed to the edges of their societies. This process, as I have demonstrated so far, happens largely because most, if not all, people retain a belief in a just world. The dismissal and minimization of victims’ experiences of rape, sexual assault, and abuse have also long been depicted in creative endeavors such as art, music, film, and television, demonstrating a larger cultural tendency to shame and ignore victims.

Law “governs a complex array of human activity,” does not merely operate on the level of direct coercion or deterrence, and exists in a broader social context.¹⁰⁵ Criminal law, in particular, is often focused on questions of culpability and blameworthiness. In that sense, it should be of no surprise that criminal law is suffused with stigma, shame, and shaming itself. Not only does conviction for a crime render a person a member of a much-stigmatized group—a “criminal,” or maybe a “felon” or “con”—but merely being charged with a crime, despite the

¹⁰¹ *Id.*

¹⁰² Claire R. Gravelin, Monica Biernat & Emily Kerl, *Assessing the Impact of Media on Blaming the Victim of Acquaintance Rape*, 48 *Psych. Women Q.* 209, 209 (2024).

¹⁰³ *Id.* at 211.

¹⁰⁴ *Id.*

¹⁰⁵ Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 *Law & Soc. Inquiry* 60, 60–61 (2017).

presumption of innocence, can subject someone to life-changing shaming, among other consequences.¹⁰⁶ It can be difficult to pin down what exactly this type of shaming is supposed to accomplish as “shame rhetoric” has grown “too general, too horoscope-like, to be of real assistance either in diagnosing or in treating specific social ills.”¹⁰⁷ Shame is a poorly understood emotion, but that has not prevented scholars from engaging in lengthy arguments regarding whether shaming sanctions, both judicial and extrajudicial, especially in lieu of imprisonment, are worthwhile to pursue or not.¹⁰⁸ So many scholars were writing about shaming punishments in the late 1990s that Bernard Harcourt pronounced the topic as being “hot,” back then, “particularly in the criminal law.”¹⁰⁹ So it seems that scholarly trends come and go.

For all the discussion of employing shame and shaming sanctions as potential alternatives to imprisonment and as tools in reintegrating defendants into communities through restorative justice paradigms, there has not been a corresponding discussion about victims. More specifically, discussions have ignored the shame that victims—especially sexual assault, violence, and abuse victims—are often subject to and feel when participating in the criminal adjudication of cases in which they are the ones who have been harmed or are otherwise serving as witnesses. And

¹⁰⁶ See Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 *Tex. L. Rev.* 937, 943 (2024) (noting that even “defendants whose cases are ultimately dismissed can languish in jails for weeks; incur financial burdens and criminal records; lose their jobs; and undergo the prolonged trauma of being marked and treated as criminals”).

¹⁰⁷ Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 *Psych. Pub. Pol’y & L.* 645, 647 (1997).

¹⁰⁸ See generally, e.g., Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 *Tex. L. Rev.* 2075 (2006) (suggesting that shaming sanctions are too culturally and politically divisive to be an effective alternative to imprisonment, and endorsing the use of restorative justice measures instead); Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 *Tex. L. Rev.* 1385 (2007) (criticizing Kahan’s argument); Steven Arrigg Koh, “Cancel Culture” and Criminal Justice, 74 *Hastings L.J.* 79 (2022) (examining shaming and cancel culture through social media); A. Rachel Camp, *Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril (and Utility?) of Shame*, 98 *B.U. L. Rev.* 1677 (2018) (urging caution against the use of shaming interventions for perpetrators of intimate partner abuse); Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan’s Laws*, 42 *Harv. J. on Legis.* 355 (2005) (suggesting that public disclosures of sex offender information may be an efficient form of non-legal punishment).

¹⁰⁹ Bernard E. Harcourt, *Placing Shame in Context: A Response to Thomas Scheff on Community Conferences and Therapeutic Jurisprudence*, 67 *Revista Juridica U. P.R.* 627, 627 (1998).

while legal scholars have laudably written about the re-traumatization that rape and sexual assault victims can face when having to participate in the criminal adjudicative process,¹¹⁰ this body of scholarship lacks an account of the differing dimensions of shame and shaming that victims face. These dimensions are flattened when grouped under the broad umbrella of “re-traumatization,” which mainly addresses the aftereffects of contact with the criminal legal system and adjudication process.

There are three different avenues of shaming that I intend to explore in this Part of the Article, each of which I have experienced and each of which I feel I have foisted on other victims while prosecuting crimes involving rape, abuse, or sexual violence. First, this Part considers the shame that victims feel or are made to feel by the criminal investigation and adjudicative process, including investigation and trial. Second, this Part discusses the shame that victims are supposed to perform for others. Third, this Part returns to some of the discussion earlier in this Article to scrutinize the shame that a victim is supposed to feel.

A. Shamed by Investigations and Proceedings

I mentioned earlier in this Article that I told my ex-husband about the rape and sexual abuse I faced as a child at the hands of my biological father and those to whom I was trafficked. He was the second person that I ever told. The very first person was a therapist, whom I saw at the student health center when I was a first-year student in law school at U.C. Berkeley. As a first-generation¹¹¹ student I felt stressed, isolated, and completely out of my depth that first year, but when we started discussing sexual assault in different classes and not just criminal law, something in me snapped. I could not focus. I could not sleep. I could not read. I was terrified that my fellow students could tell that it was me, that I was the statistic that some professors talked about when they casually mentioned that one in four women has been raped or has experienced attempted rape.¹¹²

¹¹⁰ See generally, e.g., Dorislee Gilbert & Emily Bonistall Postel, Truth Without Trauma: Reducing Re-Traumatization Throughout the Justice System, 60 U. Louisville L. Rev. 521 (2022) (arguing for the use of trauma-informed practices to reduce secondary victimization by the justice system).

¹¹¹ My parents did not graduate from high school, and none of my family members before them did either.

¹¹² Ctrs. for Disease Control & Prevention, About Sexual Violence (Jan. 23, 2024), https://www.cdc.gov/sexual-violence/about/?CDC_AAref_Val [<https://perma.cc/UZE6-QUK9>].

I walked into the University Health Services building one afternoon on Bancroft Way. I do not recall even deciding to go; rather, I felt like I simply ended up there, somehow. I do not remember how, but I was able to meet with someone I understood to be a mental health practitioner. He asked me what the problem was, and everything spilled out of me. I talked about my father raping and abusing me. I talked about having to meet men at campgrounds in the deserts around Los Angeles and Southern California. I talked about my mother instructing me when I turned seven to sleep with a knife under my pillow, “just in case.” The therapist asked me if this was the first time I had disclosed this information, and I let him know that it was. Then he got up, left the room, and disappeared.

He left me alone in the room for nearly an hour. When he came back, he informed me that he was on the phone with the Berkeley Police Department; since he was a mandatory reporter and what had happened to me had never been reported before, he had to fulfill his legal duty and report what I had told him.

The game of telephone began.

The therapist asked me how long it had been since everything happened—I told him thirteen years. He got up and, I assume, communicated my answer to a police officer on a telephone line outside of the room in his private office. He returned with another question for me: Why did it take me so long to disclose? I told him that I did not know and felt utterly embarrassed and ashamed. He left to relay my answer. He then called me into his office. An officer with the Berkeley Police Department introduced himself on the phone and explained that no further investigation would be needed. The officer, a man, told me that it was “too much of a he said, she said kind of thing. And it was so long ago.” Mortified, I said something like, “Okay,” and the officer hung up.

1. Shaming by Police

At the time when I first told my story at Berkeley, I was shocked that a police officer would determine not to do anything. Though I know the law better now, at that point in my life, I was not aware that the police generally have no affirmative constitutional duty to protect people, but can pick and choose when to intervene in the lives of others and when to enforce the law.¹¹³ While police officers and police departments have long

¹¹³ See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989) (holding that “a State’s failure to protect an individual against private violence simply does

had a great deal of discretion in determining how to do their jobs and how to pursue departmental priorities, legal scholars only began to concern themselves with police discretion starting in the 1950s.¹¹⁴ Examination of the ways that police officers and police departments use their discretion has found particular importance in scholarship questioning the origins of inequities and disparities in the criminal legal system.¹¹⁵ Police “enjoy broad discretion to believe or disbelieve reports of crimes, and further discretion as to whether to investigate and file criminal charges if the report is believed.”¹¹⁶ There are some circumstances in which discretion is “subject only to the most deferential oversight,”¹¹⁷ but even in those narrow situations, they may only be limited by the need to demonstrate that they had “reasonable suspicion” to stop someone,¹¹⁸ or “probable cause” to seek and execute a search warrant.¹¹⁹

Even with this nearly unfettered discretion in method, manner, and frequency of investigation, police and law enforcement agencies have attempted to adopt guidelines and pay heed to best practices for interviewing victims of rape, sexual abuse, and sexual violence.¹²⁰ The Department of Justice, through its Office on Violence Against Women, has provided guidance to other law enforcement agencies in publications such as *Improving Law Enforcement Response to Sexual Assault and*

not constitute a violation of the Due Process Clause”); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (“[T]he benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause . . .”).

¹¹⁴ Nirej S. Sekhon, *Redistributive Policing*, 101 *J. Crim. L. & Criminology* 1171, 1174–75 (2012).

¹¹⁵ *Id.* at 1178.

¹¹⁶ Marie Pryor, Kim Shayo Buchanan & Phillip Atiba Goff, *Risky Situations: Sources of Racial Disparity in Police Behavior*, 16 *Ann. Rev. L. & Soc. Sci.* 343, 347 (2020).

¹¹⁷ David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 *Geo. L.J.* 1059, 1072 (1999).

¹¹⁸ *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

¹¹⁹ See generally *Illinois v. Gates*, 462 U.S. 213 (1983) (refining the probable cause standard applicable to the issuance of search warrants). The *Gates* Court described the probable cause standard as one that is “practical” and “nontechnical” and that considers “factual and practical considerations of everyday life on which reasonable and prudent men . . . act.” *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949)). The standard, therefore, is malleable and, practically, can change from case to case for entirely fact-dependent reasons.

¹²⁰ See, e.g., Int’l Ass’n of Chiefs of Police, *Sexual Assault Response Policy and Training Content Guidelines 23–28* (2015), <https://www.theiacp.org/sites/default/files/all-i-j/IACP%20Sexual%20Assault%20Response%20Policy%20and%20Training%20Content%20Guidelines.2017.3.23.pdf> [<https://perma.cc/P22H-NTS8>] (providing recommendations to law enforcement officers on how to conduct victim interviews in sexual assault cases).

Domestic Violence by Identifying and Preventing Gender Bias,¹²¹ which recognizes that police bias and acceptance of rape myths can not only impact law enforcement agencies' "ability to protect and serve their communities" but also "compromis[e] the response to, and investigation of" sexual assault crimes.¹²² Law enforcement agencies have also, in efforts to improve their responses to initial reports of sexual assault, started to participate in sexual assault response teams ("SART") that include not only police officers but also nurses, social workers, victim advocates, and prosecutors.¹²³ This multiagency and multidisciplinary approach is intended to "respond to victims in a compassionate, trauma-informed" way.¹²⁴

Even with all these innovations in rape and sexual assault investigations, "[e]ndorsement of rape myths may influence the way in which police officers respond, given the amount of discretion they have" when interviewing victims and compiling reports to present to a prosecutor for screening and other purposes.¹²⁵ Police officers often continue to be the first hurdle that victims need to jump over to have their day in court or to have justice done.¹²⁶ Police continue to be "aggressive gatekeepers that prevent rape complaints from advancing through the criminal justice system."¹²⁷ This type of treatment on the part of police often revictimizes those who attempt to report their experiences to the

¹²¹ Off. on Violence Against Women, U.S. Dep't of Just., *Improving Law Enforcement Response to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias* (May 2022), <https://www.justice.gov/ovw/page/file/1509451/dl?inline> [<https://perma.cc/QD9R-XHCV>].

¹²² Off. on Violence Against Women, U.S. Dep't of Just., *Improving Law Enforcement Response to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias Summary 1* (May 2022), <https://www.justice.gov/ovw/page/file/1509456/dl?inline> [<https://perma.cc/525Y-J9FA>].

¹²³ Lisa Avalos, *Reversing the Decriminalization of Sexual Violence*, 21 Nev. L.J. 1, 53 (2020).

¹²⁴ *Id.*

¹²⁵ Rachel M. Venema, *Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias*, 33 *Violence & Victims* 176, 176 (2018).

¹²⁶ Corey Rayburn Yung, *Private Prosecution of Rape*, 13 *Calif. L. Rev. Online* 86, 89 (2022).

¹²⁷ *Id.* (first citing Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 *B.C. L. Rev.* 205 (2017); and then citing Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 *Iowa L. Rev.* 1197 (2014)).

police and “can invoke shame and other negative and sometimes long-term consequences” for them.¹²⁸

Several recent examples of police shaming victims attempting to report incidents of rape and sexual assault have received well-deserved news coverage. In a case arising in New York City, a woman lost consciousness at a nightclub and woke up to find that a man, who had dragged her to his home from the club, was raping her.¹²⁹ The woman, who was from Iceland, wanted to return home, but friends convinced her to go to a hospital, where workers called the police.¹³⁰ Though the victim would ultimately play a critical role in identifying her attacker, the responding officer, Rafael Astacio, prematurely closed the case on the grounds that she had been “uncooperative.”¹³¹ This malfeasance on Astacio’s part, along with that of other officers, led to an investigation of the New York Police Department’s Special Victims Squad—a unit that purports to know how to best investigate sexual assault cases—that discovered “detectives were yelling at the victims and saying inappropriate things such as [‘]the District Attorney is going to make you look like a slut on trial[’]” and threatening victims with jail.¹³²

In another case in Canton, Connecticut, a victim attempted to report an incident of sexual assault perpetrated by her employer to police.¹³³ While the victim was at work at her employer Calvin Nodine’s restaurant, Nodine pulled her into the bathroom, “exposed himself and ordered her to perform oral sex.”¹³⁴ Prior to this incident, the victim had already

¹²⁸ Venema, *supra* note 125, at 177.

¹²⁹ Josh Saul, Police Told Rape Victims They Would ‘Look Like a Slut on Trial’: How Law Enforcement Fails Women, *Newsweek Mag.* (Oct. 20, 2017, 8:00 AM), <https://www.newsweek.com/police-slut-shame-rape-sex-assault-nypd-district-attorney-investigation-688796>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* Astacio, in an unrelated matter, “pleaded guilty to conspiracy to commit interstate transportation of stolen property and filing a fraudulent tax return,” leading to his being sentenced to seventy-two months’ imprisonment. U.S. Att’y’s Off., E. Dist. of N.Y., Former NYPD Detective Sentenced to 72 Months (Jan. 21, 2016), <https://www.justice.gov/usao-edny/pr/former-nypd-detective-sentenced-72-months> [<https://perma.cc/FM9G-BTQK>]. He broke into residences to steal cash and property, “victimizing the very same people he took an oath to serve and protect.” *Id.*

¹³³ Rachel de Leon, ‘If the Police Don’t Believe You, They Might Prosecute You’: How Officers Turn Victims of Sexual Assault Into Suspects, *Reveal News* (Sept. 25, 2023), <https://revealnews.org/article/if-the-police-dont-believe-you-they-might-prosecute-you-how-officers-turn-victims-of-sexual-assault-into-suspects/> [<https://perma.cc/YG8U-62W9>].

¹³⁴ *Id.*

suffered previous sexual harassment in the workplace by Nodine.¹³⁵ The victim would eventually meet with detective John Colangelo.¹³⁶ During their meeting, Colangelo lied to the victim, saying that Nodine had already taken two polygraph examinations that supposedly revealed that the victim was not telling the truth.¹³⁷ Detective Colangelo also told the victim that he knew that “no one comes and tells us the entire truth,” implying that the victim was lying.¹³⁸ The victim broke down in tears and revealed for the first time that she had done as her employer demanded after he forcibly pulled her into a bathroom, and did not physically resist.¹³⁹ The victim explained that this happened because she was scared of losing her job, but that she also felt embarrassed about how she had supposedly “given in to him without a fight.”¹⁴⁰ Colangelo later attempted to charge her with making a false statement and wanted to have her arrested.¹⁴¹

Victim advocates in Baltimore, Maryland, have long complained about the Baltimore Police Department’s (“BPD”) investigatory practices specific to sexual assault that appear to be deeply informed by rape myths.¹⁴² BPD officers have “interrogat[ed] rape victims, question[ed] women in the emergency room, threaten[ed] to hook up women reporting sexual assault to lie detectors, and not inform[ed] victims about the status of their cases.”¹⁴³ They have also been found to “disregard[] reports of sexual assault by people involved in the sex trade.”¹⁴⁴

Even if victims are able to get over the high hurdles imposed by police officers attempting to gatekeep the prosecutorial system from allegations of rape and sexual assault, they must then face the prospect of further shaming by different actors in the criminal adjudicative system. In the next Subsection, I turn to the shame meted out upon victims by attorneys, judges, and juries.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See C.R. Div., U.S. Dep’t of Just., Investigation of the Baltimore City Police Department 123–24 (Aug. 10, 2016), https://www.justice.gov/d9/bpd_findings_8-10-16.pdf [<https://perm.a.cc/RE4H-RENG>].

¹⁴³ *Id.* at 124.

¹⁴⁴ *Id.* at 123.

2. *Shaming in the Criminal Adjudicative Process*

Like police, other actors in the criminal courtroom are also influenced by rape myths and prone to shaming and blaming victims of sexual assault for their victimization.¹⁴⁵ These influences, as well as the body of rape law itself that used to require that victims physically resist rapists and abusers,¹⁴⁶ result in a criminal adjudicative process that “puts the victim rather than the defendant on trial.”¹⁴⁷ This Subsection mainly focuses on the attorneys who are usually perceived to be on a victim’s side and with whom a victim will likely interact the most: prosecutors.¹⁴⁸

As a prosecutor, I was often shocked by how cavalierly and dismissively my colleagues would “joke” about the facts of a particular sexual assault case or the attributes of a victim with whom they were working. In one case that I recall, some of my colleagues laughed amongst

¹⁴⁵ See Mikah K. Thompson, *Just Another Fast Girl: Exploring Slavery’s Continued Impact on the Loss of Black Girlhood*, 44 *Harv. J.L. & Gender* 57, 90 (2021).

¹⁴⁶ While reforms to rape law around the country have tended to dilute, if not abandon, resistance requirements, the fact that many rape statutes around the country require that rape be committed with force necessarily implies that there must have been some sort of resistance that such force was trying to overwhelm. Susan Estrich, *Real Rape* 58–71 (1987).

¹⁴⁷ David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 *J. Crim. L. & Criminology* 1194, 1196 (1997).

¹⁴⁸ Defense counsel certainly engage in victim shaming and blaming in sexual assault, abuse, and rape cases. See, e.g., Clare Carlson, Note, “This Bitch Got Drunk and Did This to Herself:” Proposed Evidentiary Reforms to Limit “Victim Blaming” and “Perpetrator Pardoning” in Rape by Intoxication Trials in California, 29 *Wis. J.L. Gender & Soc’y* 285, 288–89 (2014) (describing one defense counsel’s attempts to discredit an alleged rape victim). In response, many “state legislatures have moved to eliminate victim-blaming elements from rape laws and to sharply limit defense attorneys’ use of victim-blaming tactics while defending their . . . client[s].” Michal Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 *Wis. J.L. Gender & Soc’y* 341, 366 (2014).

Even with these limitations, there is still evidence that defense attorneys “employ rape myths strategically in cross-examinations of alleged sexual assault victims.” Suzanne St. George, Emily Denne & Stacia N. Stolzenberg, *Blaming Children: How Rape Myths Manifest in Defense Attorneys’ Questions to Children Testifying About Child Sexual Abuse*, 37 *J. Interpersonal Violence* NP16623, NP16627 (2022). This even includes questions posed to child witnesses testifying about experiencing sexual abuse. *Id.*

Criminal defense counsel are, of course, required and expected to be “loyal and zealous advocates for their clients,” and are permitted to “act zealously within the bounds of the law.” *Crim. Just. Standards for the Defense Function* §§ 4-1.2, 4-1.4 (Am. Bar Ass’n, 4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [<https://perma.cc/ZP5X-DLSV>]. An entire treatment of defense counsel’s duties and their effect on victim cross-examination establishing (or questioning) victim credibility would necessitate a deep discussion of defense attorney ethics and constitutional duties that, I believe, would be more appropriately addressed in a later, separate article.

themselves while reviewing the facts to screen for charges. The victim alleged that she had been raped by an acquaintance, but also detailed that this was not the first time there had been unwanted sexual contact from the person who had raped her. My colleagues found this to be utterly unbelievable, and one joked that it was her inherent need to “hook up” that had gotten the best of her and landed her “in trouble.”

Though I was the most junior attorney in the office, I admonished my colleagues for talking that way. I then reported the incident to my supervisor who waved me off, dismissing it as the type of “gallows humor” that helps attorneys work through difficult facts on a repeated basis. My worry, however, was how my colleagues would approach preparing the victim to be a witness in the future. My fears were well-founded—when sitting in on witness prep meetings, it was clear to me that my colleagues who were tasked with preparing the victim to testify approached her with scorn. Though they would explain that the victim would face hard questions from defense counsel about why she had continued contact with the then-criminal defendant, I could tell by their tone that the incredulity was real and personal. At the time, I did not know what to do or say. I had already had my complaints dismissed. Watching it happen froze me into place. With hindsight, I realize that this experience was me reacting to an emotional trigger.

Different prosecutor groups have mounted efforts to form standard best practices for prosecuting rape and sexual assault cases. The National District Attorneys Association (“NDAA”), which describes itself as “supporting the prosecution profession and advancing justice for all,”¹⁴⁹ has promulgated its own best practices guide for investigation and prosecution of sexual assault cases.¹⁵⁰ Trainings and seminars can also be big business for hosting organizations.¹⁵¹ The existence of trainings and guidelines, however, does not necessarily mean that prosecutors are

¹⁴⁹ Who We Are, Nat’l Dist. Att’ys Ass’n, <https://ndaa.org/who-we-are/> [<https://perma.cc/RH5U-BS7R>] (last visited Nov. 12, 2024).

¹⁵⁰ See Nat’l Dist. Att’ys Ass’n, National Sexual Assault Investigation and Prosecution: Best Practices Guide (2021), https://ndaa.org/wp-content/uploads/WPS-Best-Practice-Guide_Sexual-Assault-Jan.-2021-REVISED.pdf [<https://perma.cc/WH63-LG52>].

¹⁵¹ A recent four-day training on investigating and prosecuting sexual assault held in Atlanta, Georgia, and organized by the NDAA in partnership with the Prosecuting Attorneys’ Council of Georgia cost \$795 for organization members and \$945 for nonmembers. Investigating and Prosecuting Sexual Assault, Nat’l Dist. Att’ys Ass’n, <https://ndaa.org/training/investigating-and-prosecuting-sexual-assault-2/> [<https://perma.cc/26MN-TZPG>] (last visited Nov. 12, 2024).

following the advice they are receiving. “[P]rosecutorial decisionmaking”—which includes not only the decisions of who to charge and with what, but also how to do the substantial portion of their jobs that does not directly affect a criminal defendant’s constitutional rights—“is unreviewable by courts, and disciplinary controls are weak at best.”¹⁵²

Perhaps because many view the role of the prosecutor as somehow allied with or representing victims, studies regarding prosecutors’ habits of victim shaming and victim blaming have not been widely undertaken in the United States. Prosecutors, however, do not have discernible individual clients and instead represent the government—specifically, the federal government, a state, or some political subdivision of the state, such as a county, city, or town.¹⁵³ Prosecution goals, in fact, often do not converge with those of victims at all.¹⁵⁴ Certainly the fact that prosecutors do not generally need to justify their choice to prosecute versus not prosecute a case¹⁵⁵ makes such study difficult, but in any potential sexual assault case, a prosecutor will feel compelled to evaluate the victim’s character, their willingness to move forward with and testify at trial, and the personal relationship between the victim and the accused.¹⁵⁶ In this sense, prosecutors necessarily need to consider the victim shaming and blaming that the community they represent would likely engage in, given that the same community would be the source of a potential jury.¹⁵⁷ It is, therefore, little wonder that prosecutors would engage in victim shaming and blaming themselves when the nature of the adversarial process encourages them to do so.

¹⁵² Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. Rev. 762, 850 (2016) (citing Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 Wash. & Lee L. Rev. 1587, 1604–09 (2010)).

¹⁵³ Danielle M. Shelton, *Accommodating Victims with Mental Disabilities*, 127 Dick. L. Rev. 163, 203 (2022).

¹⁵⁴ Claye Epperson, *Restoring Balance to Domestic Violence Prosecution After Crawford*, 9 Va. J. Crim. L. 163, 172 (2021).

¹⁵⁵ See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (explaining the wide breadth of prosecutorial discretion).

¹⁵⁶ Patricia Lopez, *He Said . . . She Said . . . An Overview of Date Rape from Commission Through Prosecution Through Verdict*, 13 Crim. Just. J. 275, 291 (1992).

¹⁵⁷ See *id.* at 291–92.

B. The Shame Victims Are Supposed to Perform

I originally went to law school to become a prosecutor. As I explained in “*Ruined*”:

I wanted not only to be feared by my biological father but also to be feared by anyone else who would mean to do me similar harm in the future or to do such harm to others. Part of me clung to a naive vision of “prosecutor as hero,” imbued with the power and authority to bring those who committed sexual crimes to justice and those who suffered such crimes the peace that they were seeking. I desperately wanted to control my own narrative—“victim becomes powerful voice for others”—and help others reclaim theirs while meting out the punishments I believed sexual offenders deserved.¹⁵⁸

I had fully bought into the vision of other victims being weak, needing help from some strong and paternalistic arm of the government, and missing someone who had gone through something similar who could advocate for the tough-on-defendant policies I once thought were in their best interest. I was a believer, in that sense, in the idea that victims were too ashamed to be able to make rational decisions for themselves and needed someone who could speak for them. I was disabused of that notion, however, when I started my first prosecutor job and saw “how the sausage was made.” Not only did I witness the ways in which the criminal legal system and the adjudicative process essentialize victims’ stories, but I also actively participated in the system, naively thinking I was doing something good, then quickly developed a distaste for the role.

“*Ruined*,” in one respect, described the type of shame that victims are expected to perform during sentencing at the behest of a judge—they are pronounced “broken,” “ruined,” or “destroyed” not because they actually have been but because judges think they have been or will be.¹⁵⁹ Victims of rape, sexual assault, and sexual violence are also expected to perform feeling ashamed in ways that satisfy police, prosecutors, and juries.

1. Performing Shame for Police

Police largely determine which cases reach screening by prosecutors, which presents salient problems in the adjudication of rape and sexual assault cases. While police officers serve the important role of referring

¹⁵⁸ Romero, *supra* note 16, at 240–41 (footnote omitted).

¹⁵⁹ See *id.* at 269–70.

cases to prosecutors to screen for potential charges, “73–93% of reported sexual assault cases are never prosecuted” because they seldom get referred.¹⁶⁰ Acceptance of rape myths by law enforcement affects how police investigations are conducted. For example, officers “who subscribe to rape myths” might conduct their investigations in irregular and substandard ways, making such cases impossible to prosecute.¹⁶¹ While police officers may have access to programmatic opportunities and trainings to learn how to best investigate sexual assault cases, folk knowledge—which oftentimes is largely comprised of belief in rape myths—can still threaten to usurp knowledge of best practices when an officer has years of experience.¹⁶² This folk knowledge may include myths that “victims lie about rape, invite rape, deserve rape, enjoy rape, are not harmed by rape, or can stop rapes, that rape is a crime of passion, and that men cannot be raped,” in addition to the assumption that “real” rape victims will be “emotionally shattered and self-blaming.”¹⁶³

Psychological studies suggest that officers have prototypical “ideal victim[s]” for rape and sexual assault cases.¹⁶⁴ Victims should be “heterosexual, chaste, family-oriented, cautious, well regarded in the community, averse to using drugs or alcohol, willing to risk death to fight off a rapist, motivated to report a rape immediately, Caucasian, law-abiding, polite, articulate, conventionally attractive, and middle class.”¹⁶⁵ Meanwhile, victims are less likely to be believed when

they were cheating on a partner, if they did not have physical injuries, if they changed their minds during voluntary sexual activity, if they were intoxicated during the assault, if they were in a romantic partnership with the accused, if they did not immediately report the offense, if they reported rape in the past, if their narrative lacks sufficient detail, if they use drugs, if they are a prostitute, if they do not

¹⁶⁰ Jessica Shaw, Rebecca Campbell & Debi Cain, *The View from Inside the System: How Police Explain Their Response to Sexual Assault*, 58 *Am. J. Cmty. Psych.* 446, 447 (2016).

¹⁶¹ See Kristen McCowan, Henry F. Fradella & Tess M.S. Neal, *A Rape Myth in Court: The Impact of Victim-Defendant Relationship on Sexual Assault Case Outcomes*, 26 *Berkeley J. Crim. L.* 155, 168 (2021).

¹⁶² Karen Rich, *Improving the Police Response to Rape Victims: Persistent Challenges and New Directions*, in 5 *Handbook of Interpersonal Violence and Abuse Across the Lifespan*, *supra* note 64, at 4135, 4138.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 4138–39.

¹⁶⁵ *Id.* at 4139.

appear distraught, or if they are in any way uncooperative with police.¹⁶⁶

Victims attempting to report rape or sexual assault to law enforcement must walk a tightrope. They should never get confused, frustrated, or talk back to law enforcement, even under harsh questioning, because that is not how “real victims” behave.¹⁶⁷ They cannot be devoid of emotion and should present evidence of being “shattered.” However, they cannot be so shattered that they are unable to relate minute details about the assault or events surrounding the assault. They should have the presence of mind to call the police immediately. It is also beneficial that they abide by the law and social norms rather than use drugs or engage in prostitution. Given these requirements to be the “ideal victim” in the eyes of law enforcement, it is little wonder that the first time I reported what happened to me, my case went nowhere. As it did with me, having a report dismissed can make victims feel “disempowered, objectified, silenced, shamed, and threatened.”¹⁶⁸

2. Performing Shame for Prosecutors

Prosecutors also try to make sexual assault victims fit the mold of a perfect, ideal victim, or get them as close to it as they can. As Bennett Capers explained in a footnote, “As a former prosecutor for nearly a decade, I can attest to the lengths to which prosecutors go to present their witnesses in the most positive light. In short, prosecutors often pigeonhole rape victims into a perceived acceptable type and require them to perform.”¹⁶⁹ Prosecutors often very explicitly direct how victims should perform shame, modesty, and distress for consumption by juries in the courtroom. Many victims are told to dress conservatively with admonishments such as, “Dress as you would for church” and “Wear what you wear to work,” or may be told what not to wear: “Don’t wear fishnets or anything like that.”¹⁷⁰ Child sexual assault victims might also be instructed to wear especially youthful clothes for the purpose of

¹⁶⁶ *Id.*

¹⁶⁷ Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women’s Claims About Sexualized Victimization*, 65 *Cath. U. L. Rev.* 429, 460 (2016).

¹⁶⁸ Rich, *supra* note 162, at 4136.

¹⁶⁹ I. Bennett Capers, *Real Women, Real Rape*, 60 *UCLA L. Rev.* 826, 864 n.197 (2013).

¹⁷⁰ Amanda Konradi, *Too Little, Too Late: Prosecutors’ Pre-Court Preparation of Rape Survivors*, 22 *Law & Soc. Inquiry* 1, 27 (1997).

emphasizing their innocence.¹⁷¹ Victims are generally encouraged to cultivate an appearance of respectability and modesty, sometimes purchasing new clothes just to meet these expectations.¹⁷² Dress still intersects with the law in many respects, and victims who do not comply with the stereotype of what a victim should look like might not be believed.¹⁷³ Unsurprisingly, concerns about dress and personal appearance invoke a host of inequities in the treatment of victims. For example, Black victims are often deemed to be “less credible and . . . ‘receive less empathy, consideration, and judicial support than their White counterparts.’”¹⁷⁴

Not only do prosecutors often attempt to regulate the appearance of victims for the purpose of bolstering their credibility on the witness stand, but they also attempt to direct victims’ visible in-court emotional responses. The NDAA’s best practices guide on sexual assault cases advises prosecutors:

Research demonstrates that the responses of victims of sexual assault . . . before, during, and after the assault [are] often counter-intuitive to the general public, as are common offender dynamics. The counter-intuitive nature of these responses and mechanisms of offending can serve to create barriers in the assessment of a victim’s credibility. As a result, it is imperative that law enforcement officers and prosecutors obtain training relating to victim and offender dynamics so that they can better understand and assess the evidence in any given case.¹⁷⁵

Prosecutors are predisposed to presume that victim behavior is counterintuitive and take this bias into their interactions with victims. These “counterintuitive” behaviors might range from being too emotionally “flat[,]” to not reporting an assault, to not identifying an

¹⁷¹ *Id.* at 28.

¹⁷² *See id.*

¹⁷³ I. Bennett Capers, *Cross Dressing and the Criminal*, 20 *Yale J.L. & Humans* 1, 10–11 (2008).

¹⁷⁴ Thompson, *supra* note 145, at 80 (quoting Roxanne Donovan & Michelle Williams, *Living at the Intersection: The Effects of Racism and Sexism on Black Rape Survivors*, 25 *Women & Therapy* 95, 98 (2002)).

¹⁷⁵ Nat’l Dist. Att’ys Ass’n, *supra* note 150, at 12.

attacker.¹⁷⁶ Prosecutors have relied on characterizing such behaviors as indicative of victims suffering from Rape Trauma Syndrome, not only dismissing the fact that some of these behaviors make a great deal of sense under many circumstances, but also pathologizing them into something that hints at mental illness brought on by assault.¹⁷⁷ If a victim's behavior does not make sense to a prosecutor and, therefore, potentially to a jury that is "burdened by myths and misconceptions about how victims of sexual assault should behave, and what type of victim experience is credible,"¹⁷⁸ labeling victims as having a "syndrome" is meant to make up for it.

Prosecutors might ask victims to curate their emotional responses in the courtroom to better fit the image of legitimate rape victims. Victims are told that crying and appearing fearful are acceptable but that a flat affect is not, as it would somehow seem to minimize the seriousness of the assault.¹⁷⁹ Such coordinated emotional responses are regularly understood to be authentic reactions that are not as easily manipulable as choosing how to dress for court.¹⁸⁰ However, while some emotional response is appreciated by prosecutors and fits juror expectations, being unable to regulate strong emotions while testifying and not keeping one's composure is also often seen as threatening to a prosecutor's case and discouraged.¹⁸¹ While having to testify in court about being sexually assaulted can be difficult as it is, having to fulfill a prosecutor's expectations regarding physical appearance and emotional responses can be further "psychologically demanding."¹⁸²

I still feel a great deal of guilt for following these same patterns when I was a young prosecutor helping prepare victims to testify at trial. I would try to get them to be able to tell their stories in chronological order because that was what juries expected, rather than understand that memories of traumatic events are often not recalled in such order. I directed other

¹⁷⁶ Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 *Calif. L. Rev.* 1631, 1633 (2012) (quoting *State v. Robinson*, 431 N.W.2d 165, 168, 171–72 (Wis. 1988)).

¹⁷⁷ See *id.* at 1633–34.

¹⁷⁸ Kaarin Long, Caroline Palmer & Sara G. Thome, *A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule Its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases*, 31 *Hamline J. Pub. L. & Pol'y* 569, 571 (2010).

¹⁷⁹ Konradi, *supra* note 170, at 30.

¹⁸⁰ *Id.* at 31.

¹⁸¹ *Id.* at 32.

¹⁸² *Id.* at 30 & n.30.

victims to dress in a conservative fashion, telling them to wear what they would wear to church or what they would wear to visit their significant other's parents for the first time. I would also tell them that it was okay to cry, but not too much because juries might think they were "putting on a show." But I also warned that they had to show *some* negative emotions because otherwise, the jury would swing to the other extreme and assume such stoicism was possible only because an assault never happened. Part of me felt guilty for flattening the experiences of other victims this way by making them meet jury expectations that I assumed (with good reason) to be true. But another part of me rationalized that this was what was necessary for "justice to be done" somehow. The whole of me, however, started to doubt my own story because I could think of it without crying and talk about it with selective people with a flat affect.

I had internalized the norms that prosecutors inflict upon sexual assault and rape victims, and I found myself caught in a painful feedback loop of shame.

3. Performing Shame for Juries

Attempting to direct victims' appearances and emotional responses felt like a necessity to me—a young prosecutor just out of law school—if I wanted to secure convictions of criminal defendants who had been charged with rape. Based on the trainings and guidelines I received in practice, and even based on my practical experience watching my colleagues take rape cases to jury trial and later handling such trials on my own, it was clear to me that juries wanted victims to perform a socially acceptable level of shame. Juries, just like many others outside the courtroom, enjoy "the pleasures of condescension and a certain brand of concupiscent imagery" with victim testimony producing an "allur[ing] and erotic charge."¹⁸³

Studies of mock jurors also confirm that they are influenced by how closely victims hew to the prototypical "ideal victim," which influences whether they deem a sexual assault claim valid.¹⁸⁴ Potential jurors expect emotionally distraught reactions from victims, especially if they present as gender-stereotypical women, and question the accounts of gender-

¹⁸³ Murray, *supra* note 176, at 1656; *id.* (quoting Sara Sharratt, *Gender, Shame, and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* 33 (2011)).

¹⁸⁴ Regina A. Schuller, Blake M. McKimmie, Barbara M. Masser & Marc A. Klippenstine, *Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 *New Crim. L. Rev.* 759, 776 (2010).

stereotypical women who are able to remain calm and controlled.¹⁸⁵ Perhaps this should not be surprising, given that jurors are laypersons selected from their communities and usually do not have the training or experience to try to avoid these sorts of rape myths. Instead, they demand victims perform shame for them.

C. The Shame Victims Are Supposed to Feel

In “*Ruined*,” I addressed the language that judges use to describe victims and their assumed emotional states during sentencing.¹⁸⁶ As a prosecutor, I repeatedly listened to judges pronounce victims “broken,” “ruined,” and “destroyed,” much as if they were inanimate objects. While I had learned how to hold my expression in place and react to such statements without any emotional response, internally, I was not only irate, but also ashamed. I was angry that victims were being told what they should be when no one should be able to dictate their feelings or their outlook on life. But I also wondered what exactly was wrong with me, given that I did not seem to feel the type of shame and anguish that judges expected from a victim of sexual abuse. It seemed that I was too functional to be a “real” rape and abuse victim—I was good at my job, I was politically involved in my community, and I enjoyed many aspects of my life. Looking back at what I was feeling, I can see that I was ashamed of not feeling the type of shame that people would have expected me to feel if they had known I was a victim.

At trial, victims might testify about the psychological effects of experiencing rape, sexual assault, or sexual violence. While this should not have any bearing upon a jury’s verdict, “jurors’ expectations regarding the amount of harm that is likely to occur” will often go to weighing a victim’s credibility, improper though it may be, and “must be taken into account when predicting jurors’ judgments.”¹⁸⁷ Outside of the courtroom, however, victims’ personal narratives of rape and sexual assault are often unwanted, ignored, or dismissed.¹⁸⁸ These narratives

¹⁸⁵ *Id.* at 776–77. Interestingly, “assailants of victims who presented as emotional had more blame attributed to them than assailants of victims who presented as calm.” *Id.* at 777.

¹⁸⁶ See Romero, *supra* note 16, at 244.

¹⁸⁷ Kerri L. Pickel & Rachel H. Gentry, Mock Jurors’ Expectations Regarding the Psychological Harm Experienced by Rape Victims as a Function of Rape Prototypicality, 23 *Psych. Crime & L.* 254, 255 (2017).

¹⁸⁸ Constance J. Ostrowski, The Clothesline Project: Women’s Stories of Gender-Related Violence, 19 *Women & Language* 37, 37 (1996).

have been and often still are considered “unspeakable issues”—things that one should only talk about in private settings.¹⁸⁹ Victims are supposed to feel too ashamed to tell their stories unless they do so in the context of a criminal courtroom, subject to shaming by the adjudicative process and having to perform shame in a socially acceptable way.

III. PROFESSIONAL SHAMING, RESPECTABILITY, AND PERSONAL NARRATIVE

Thus far, this Article has examined why people shame rape and sexual assault victims and how media and cultural outlets largely normalize this phenomenon. It has also explored shame in the context of criminal cases wending their way through both the investigative and adjudicative process, introducing a new typology of the shaming victims face: the shame victims are made to feel by the criminal legal system, the shame victims are supposed to perform, and the shame they are supposed to feel. The next Section of the Article examines for the first time the shame rape victims feel both within the legal profession as well as in the legal academy, largely based on my experience in both groups.

A. Shaming and Respectability in the Legal Profession

My first husband initially seemed accepting and understanding after I told him about the rape and abuse I experienced as a child. We were both in our early twenties, and I was just starting to come to terms with what had happened to me. I now know that I probably should not have married so young and should have taken the time to get to know myself and understand my needs better. I was, however, so grateful that anyone wanted to marry me and felt that I needed to take the chance when it presented itself. As E. Jean Carroll related, I felt like I was “spoiled goods,”¹⁹⁰ and that if anyone wanted to commit to me through something as official as marriage,¹⁹¹ I should not let the opportunity pass.

¹⁸⁹ Id. at 38 (quoting Carole Boyce Davies, *Collaboration and the Ordering Imperative in Life Story Production*, in *De/Colonizing the Subject: The Politics of Gender in Women's Autobiography* 3, 15 (Sidonie Smith & Julia Watson eds., 1992)).

¹⁹⁰ Jacob Shamsian, *E. Jean Carroll Said in Deposition She Held Back Trump Rape Allegation to Not Be Seen as 'Spoiled Goods,'* *Bus. Insider* (Dec. 20, 2022, 7:06 PM), <https://www.businessinsider.com/e-jean-carroll-held-trump-claims-rape-victim-spoiled-goods-2022-12>.

¹⁹¹ Very few, if any, of my family members were formally married at this time. Several cohabitated with their partners, but no one could remember any official marriage ceremonies.

Over the years, he became resentful that I told him anything. He started blaming my childhood abuse for anything that he saw as a flaw in me. Whenever I wanted to talk about the abuse, he refused to listen but would continue to refer to the abuse whenever it could be weaponized. At one point, after dealing with this dynamic for years, I broke down and could not stop crying. He yelled at me to stop. He threatened to divorce me. These threats did nothing to help and, if anything, made me more tearful and anxious. Only after several tries did he find a threat that worked. At this point, I had left my first prosecutorial job and was in private, small-town, general practice. He threatened to have me taken to the emergency room to be placed on a psychological hold. “This is a small place. The rumors will fly. Everyone will think you’re crazy and everyone will know what happened to you.” The thought of losing my clients, my reputation, and my livelihood was enough to get me to stop crying. I feared my then-husband, but I was even more terrified of losing everything I had built professionally.

As a young, Latina attorney practicing in a small community, I was already flouting the accepted norms of what an attorney looks like and who attorneys are. I was the first attorney of color ever in my entire local judicial district. I already stood out in the legal community as someone who obviously did not belong, especially in the courtroom or at any local gathering of attorneys, most of whom were middle-aged or elderly white men.

Lawyers have long been noted to be members of a conservative profession.¹⁹² Early efforts at regulation stressed the need to bring greater “honor and respectability” to the legal profession.¹⁹³ Perhaps the conservative nature of the legal profession is reflected in the demographics of attorneys. The legal profession remains

in recent history. My family members were delighted that I would have the benefits and status that came with being legally married, and I now know that this social pressure influenced my decision to go through with it.

¹⁹² See Edgar Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 *Ind. L.J.* 221, 221 (1948) (noting that lawyers have often been criticized for opposing progress and adhering to long-standing traditions). See generally Arthur Larson, *The Lawyer as Conservative*, 40 *Cornell L.Q.* 183 (1955) (examining the common belief that lawyers are naturally conservative due to their role in preserving established laws and precedents).

¹⁹³ Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 *Ala. L. Rev.* 471, 490 (1998) (quoting *Proceedings of the Tenth Annual Meeting of the Alabama State Bar Association* 96 (Montgomery, Brown Printing Co. 1888)). The 1887 Alabama Code of Ethics would serve as the basis for the first ethical codes and standards adopted by the American Bar Association. *Id.* at 471 n.2.

“overwhelmingly white and male.”¹⁹⁴ This is not surprising, given the history of the legal profession in the United States. “[W]omen, persons of color, and religious minorities” were long prohibited from joining the bar.¹⁹⁵ Professionalization of the practice of law led to discrimination initially against Southern and Eastern European immigrants, but has since expanded to women and people of color.¹⁹⁶ This discrimination, while no longer formalized in rules or codes, continues today with particularly harsh consequences for women of color and others with intersectional identities.¹⁹⁷ Given the history of discrimination in the legal profession and its long-standing domination by white men, perhaps it should be expected that attorneys who belong to stigmatized groups, such as rape victims, would not want to come forward openly with their stories.

While there seems to be precious little written about the professional experiences of attorneys who have been victims of rape, sexual assault, or abuse, it can be instructive to look at the experiences of other stigmatized populations in the legal profession and the burdens that they face. Many attorneys face mental health difficulties, yet starting in law school, attorneys are discouraged from getting the help that they need.¹⁹⁸ The culture of the legal profession itself discourages attorneys and law students from doing so due to the fear of being stigmatized and reputationally damaged.¹⁹⁹ A recent study by the American Bar Association found that, out of nearly 13,000 lawyers, 28% experienced depression, 19% experienced anxiety, and 23% experienced stress.²⁰⁰ Law students learn in law school to ignore their mental well-being as part of a “hidden curriculum,” and it is “not uncommon for a law student’s

¹⁹⁴ Hassan Kanu, ‘Exclusionary and Classist’: Why the Legal Profession Is Getting Whiter, Reuters (Aug. 10, 2021, 7:49 PM), <https://www.reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10/>.

¹⁹⁵ Veronica Root Martinez, Combating Silence in the Profession, 105 Va. L. Rev. 805, 807 (2019).

¹⁹⁶ *Id.* at 815 (citing Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 295 (1976)).

¹⁹⁷ *Id.* at 818–19.

¹⁹⁸ Pamela Bucy Pierson, Ashley Hamilton, Michael Pepper & Megan Root, Stress Hardiness and Lawyers, 42 J. Legal Pro. 1, 16–18 (2017).

¹⁹⁹ *Id.* at 13; New Study on Lawyer Well-Being Reveals Serious Concerns for Legal Profession, Am. Bar Ass’n (Dec. 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/secretcy-and-fear-of-stigma-among-the-barriers-to-lawyer-well-bei/> [https://perma.cc/T6HP-ZAAE].

²⁰⁰ Karen Oehme & Nat Stern, Improving Lawyers’ Health by Addressing the Impact of Adverse Childhood Experiences, 53 U. Rich. L. Rev. 1311, 1317–18 (2019).

mental health to deteriorate during law school.”²⁰¹ The stigma of mental illness is quite powerful and one that lawyers learn early that they should avoid, even at the cost of their own mental health. It is understandable, then, that lawyers would be disinclined to admit to belonging to other stigmatized groups when there seems to be no personal or professional advantage to doing so.

B. My Experience with Shaming in Legal Academia

I originally started my legal academic career writing about rural criminal legal systems and their organization, particularly from a public choice theory lens.²⁰² I initially chose such a research agenda not only because it was something I cared about, but also because it seemed relatively inoffensive—brand new legal academics often get advice to be careful about what they write in their early careers so as not to ruffle feathers and limit potential opportunities. I still write about rurality and the criminal law today. My resolve to keep my writing impersonal started to break down over the years, however, as I wrote about people of color and their interactions with rural criminal legal systems.²⁰³ I started incorporating my experience as a rural prosecutor into my writing more often.

The idea of writing an article about my experiences with rape and sexual abuse, as well as my experiences prosecuting such cases, weighed on me a great deal during my early years in academia. It seemed too risky and too vulnerable. The more time I spent in academia, however, the more necessary it seemed. Fellow criminal law professors had stopped teaching rape law, and it appeared that most of those who continued to do so were weighing the risks.²⁰⁴ The need to write the piece that would eventually become “*Ruined*” struck me very suddenly one spring. After thinking of writing the piece over several years, writing it took just three days.

²⁰¹ Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession*, 24 S. Cal. Interdisc. L.J. 147, 187–88 (2014).

²⁰² See generally Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. Crim. L. & Criminology 161 (2017) (examining the practice of outsourcing criminal prosecutors common in small or rural municipalities and highlighting the risks in hiring prosecutors through a competitive bidding process).

²⁰³ See generally Maybell Romero, *Viewing Access to Justice for Rural Mainers of Color Through a Prosecution Lens*, 71 Me. L. Rev. 227 (2019) (examining the relationship between people of color and elected district attorneys in rural Maine).

²⁰⁴ See Gersen, *supra* note 24.

I wish I could say that I was surprised by the range of reactions from my fellow law professors. Many of them were extraordinarily supportive and excited about the project. Especially after word got around that it had placed well, law professors invited me to speak about the paper at their law schools, at the conferences they were planning, and at the roundtables they were organizing. However, on multiple occasions, other law professors have told me, either in person, by email, or perhaps via social media direct message, that they would not be coming to an organized presentation or reading the draft of *“Ruined”* that had been circulated for comment. Some of these colleagues clarified that they did not even wish to read the paper once they learned of its premise, stating that it sounded too “lurid” for them to read. Another told me that the idea of reading the paper made them “uncomfortable.” I responded, “If it makes you uncomfortable thinking of reading it, imagine living it.”

Law professors do not like to be uncomfortable, and, from my experience, there are many who do not know what to do when one of their own is able to talk about, let alone write about, the experience of being raped and the fallout. While many law professors are openly supportive, some of them might reach out to me privately, away from others who might judge them, to ask me questions like “I think this is so brave of you, but aren’t you embarrassed? How are you not embarrassed?”²⁰⁵ “The paper is amazing, but why did it take you *so* long to report what happened?”²⁰⁶ and “This happened to you so long ago—are you really sure that this is what happened? Maybe you’re remembering this and it’s not quite accurate.”²⁰⁷ I should not have been surprised to learn that many

²⁰⁵ This question makes it very clear that the person asking stigmatizes rape and sexual assault victims and assumes that admitting such a status should be something that one would be too embarrassed to ever do.

²⁰⁶ This question demonstrates that the person asking believes that not reporting an incident immediately is a counterintuitive behavior, rather than a response that is rational under the individual circumstances of an assault and given its effect on a victim’s life. There was nothing counterintuitive about me waiting until law school to report. Those who ask this question seem to forget that I was a child when this happened and was told that if I reported it, my entire family would be torn apart, with each individual member forced to live someplace in utter destitution. Also, the abuse stopped when I was about eight or nine years old. It seems unreasonable to me to demand that a child immediately report such abuse.

²⁰⁷ People who ask this question do not necessarily do so malevolently. Rather, they wish that I had made the whole thing up because it is easier to believe this than to think that this is something that could happen to someone they know. Being asked this question always reminds me of the Lucille Clifton poem *why some people be mad at me sometimes*:

they ask me to remember
but they want me to remember

law professors still cling to victim shaming and rape myths, and yet I was, which seems very naive of me now.

C. Why I Continue to Write Myself

While she was attending the University of Iowa in 1972, Cuban-American artist Ana Mendieta learned about the rape and murder of fellow student Sarah Ann Ottens, who was studying nursing.²⁰⁸ News of what happened spread quickly on campus and through local news.²⁰⁹ In reaction to the news, Mendieta performed the work now known as *Untitled (Rape Scene)* on campus.²¹⁰ “Mendieta invited her fellow students to her apartment where, through a door left purposefully ajar, they found” that she had “recreated the scene as reported in the press.”²¹¹ While the original artwork was the performance of a crime scene, photographs were taken of the performance. In the photographs, Mendieta is

stripped from the waist down and bent over a table. Blood is smeared over and drips down her buttocks, thighs and calves and a pool of it is partially visible on the dark floor beside her feet. The scene is dramatically lit, highlighting her legs, the side of her body and the table, and casting strong shadows onto the wall behind her. Her head and her arms, which are tied to the table, are not visible in the darkness; broken crockery and bloodied clothes disappear into the shadows on the floor to her right.²¹²

Mendieta explained that her audience of classmates “all sat down, and started talking about it. I didn’t move. I stayed in position about an hour.

their memories
and i keep on remembering
mine.

Lucille Clifton, *Why Some People Be Mad at Me Sometimes*, in *The Collected Poems of Lucille Clifton: 1965–2010*, at 262, 262 (Kevin Young & Michael S. Glaser eds., 2012).

²⁰⁸ Bryony White, *Returning to the Scene of the Crime: Gendered and Racialized Violence in Ana Mendieta’s Rape Scene*, *Art J.*, Summer 2023, at 68, 68.

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ *Id.* at 69 (quoting Elizabeth Manchester, *Untitled (Rape Scene)*, Tate (Oct. 2009), <https://www.tate.org.uk/art/artworks/mendieta-untitled-rape-scene-t13355> [<https://perma.cc/MPX6-HPX7>] (follow “Artwork Information” hyperlink; then “Collection Text” dropdown)).

²¹² Manchester, *supra* note 211. I have not included any visual depiction of the performance in this Article due to its graphic nature.

It really jolted them.”²¹³ Mendieta’s artwork, including her performance art, “famously used the natural world and her own body”²¹⁴ to offer commentary on violence and cruelty, our connection with the earth, and womanhood.²¹⁵ As artist Kate Horsfield related, Mendieta’s work is “an enormously powerful and moving example of how artists can use inner struggle to inform their work and choose appropriate materials and processes to empower it.”²¹⁶

I believe that legal scholarship and legal academia need jolting. They both need more than the arm’s-length and impersonal lens that is still accepted as neutral and considered a “conventional analytic method[.]”²¹⁷ The neutral approach that never acknowledges any sort of personal connection to the material being written only appears to be neutral because it has been used time and again, taking on the veneer of being “natural and true”²¹⁸ when it is anything but. Personal narrative and storytelling “developed in response to the exclusion of the disempowered from mainstream academic discourse.”²¹⁹ Rape, sexual assault, and sexual abuse victims have long been disempowered from all discourse, let alone academic discourse. Using my experiences and personal narrative in this way is not meant to place all of the focus on myself personally but rather to give readers, whether they are legal academics, attorneys, judges, or anyone else, the opportunity to connect with and understand my work and arguments better than if I insisted on using a traditional, purely third-person analytic lens.

I have had people ask me if, after “*Ruined*,” I would write about my own experiences again, with what I can tell has the edge of a suggestion that maybe I should not. I have been especially inspired to continue to do so by Latin American testimonio literature, which “centers on the participant, who narrates her experiences to reveal exploitative and

²¹³ Id. (citation omitted).

²¹⁴ Christopher Alessandrini & Stephanie Wuertz, Remembering Ana Mendieta, Metro. Museum of Art (Oct. 20, 2021), <https://www.metmuseum.org/perspectives/articles/2021/10/from-the-vaults-remembering-ana-mendieta> [<https://perma.cc/RWK2-6VG8>].

²¹⁵ See Miss Rosen, Ana Mendieta Fought for Women’s Rights and Paid with Blood, Vice (Apr. 30, 2018, 10:53 AM), <https://www.vice.com/en/article/ana-mendieta-fought-for-womens-rights-and-paid-with-blood/> [<https://perma.cc/5JQH-E9A9>].

²¹⁶ Alessandrini & Wuertz, supra note 214.

²¹⁷ Michael Serota, Response, Humanity and Law, 160 U. Pa. L. Rev. Online 1, 4 (2011).

²¹⁸ Richard Delgado, On Telling Stories in School: A Reply to Farber and Sherry, 46 Vand. L. Rev. 665, 666 (1993).

²¹⁹ Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 Calif. L. Rev. 1241, 1268 n.126 (1993).

oppressive conditions while validating her own experiential knowledge.”²²⁰ Narrative can be a powerful tool to avert injustice and to “prevent[] . . . atrocity.”²²¹ The story that I know best is my own, and I can access it freely without having to worry about whether I am harming someone else by interviewing them, pushing at their boundaries too much inadvertently, or emotionally exhausting them beyond their capacity by making them speak about some of the most harrowing moments in their life. My story exists in my scholarship as merely an example because I know many others are living similar experiences. Frida Kahlo once explained why she painted herself so frequently: “I paint myself because I am so often alone, and because I am the subject I know best.”²²² I am the subject I know best and because of that, I will continue to write about my experiences as long as they have something useful to offer to legal scholarship, the legal academy, and others who feel they may have something to learn from them.

D. Points of Optimism

This Article has focused on different aspects of shame, shaming, and the stigmatization of rape, sexual assault, and abuse victims. It includes not only shaming in the criminal legal system, but also shaming in the legal profession and in legal academia. I would be remiss, however, if I failed to highlight the good and encouraging results I experienced by disclosing my story in “*Ruined*,” especially since I did not know whether I would continue to develop a research agenda centered on rape and sexual assault when writing that piece.

I have been honored to have many people reach out to me through email, letter, social media, and text message to say how much they connected with “*Ruined*” and my story. Many of those people shared their stories of rape and sexual violence with me; in that sense, not only has my disclosure helped them feel less alone, but their disclosures make me feel less alone, too. Judges have asked me how they can be more

²²⁰ Lindsay Pérez Huber, Beautifully Powerful: A LatCrit Reflection on Coming to an Epistemological Consciousness and the Power of *Testimonio*, 18 Am. U. J. Gender Soc. Pol’y & L. 839, 841 n.4 (2010).

²²¹ Julie Stone Peters, “Literature,” the “Rights of Man,” and Narratives of Atrocity: Historical Backgrounds to the Culture of Testimony, 17 Yale J.L. & Humans. 253, 255 (2005).

²²² Jennifer Nalewicki, Explore Frida Kahlo’s Mexico City, Smithsonian Mag. (July 6, 2016), <https://www.smithsonianmag.com/travel/frida-kahlo-mexico-city-180959634/> [<https://perma.cc/2B77-7VFH>].

considerate of victims in the courtroom, not by being more punishing and dismissive of criminal defendants, but by changing the language that they use so as not to consign victims to a lifetime of being “ruined.” I assign “*Ruined*” to my first-year criminal law students every year as an introduction to the unit on rape and sexual assault. My students have told me that disclosing my status as a rape victim has brought an additional dimension to their studies of rape law and criminal law more broadly. While trying to fight against the tide of long-standing rape myths, traditional victim shaming and blaming, and the need for respectability in both the legal profession and academia, these early successes have shown, at least to my satisfaction, that self-disclosure can be worth doing.

CONCLUSION

Legal scholarship has previously examined the merits and demerits of shaming sanctions and the use of shame more broadly as a punishment. What has been missing, however, is a fuller accounting of stigmatization and shame that victims encounter, both practically and conceptually, when interacting with the criminal legal system. As a follow-up to my previous article “*Ruined*,” I have further examined the nature and function of shame, specifically related to victims of rape, sexual assault, and sexual abuse.

The novel typology set forth in this Article for examining how victims are made to interact with shame—the shame victims are made to feel by the criminal adjudicative process, the shame victims are supposed to perform, and the shame victims are supposed to feel—provides a more three-dimensional model of victims’ experiences than has existed in prior legal scholarship. I use my personal experiences to help illustrate this new typology for understanding shame as well as to explain the shaming of victims that happens in the legal profession and legal academia. Further study of other questions that arise from this Article, such as whether shame can be used to good effect, what the effects of shaming criminal defendants charged with sex crimes are, and what the overlap between the status of “victim” and “defendant” means regarding shame, is very much needed and will be explored in additional papers in the future.