

# UNIVERSITY *of* PENNSYLVANIA LAW REVIEW

Founded 1852

---

Formerly  
AMERICAN LAW REGISTER

---

© 2017 *University of Pennsylvania Law Review*

---

---

VOL. 166

DECEMBER 2017

NO. 1

---

---

## ARTICLE

### INCREDIBLE WOMEN: SEXUAL VIOLENCE AND THE CREDIBILITY DISCOUNT

DEBORAH TUERKHEIMER†

*Credibility is central to the legal treatment of sexual violence, as epitomized by the iconic “he said/she said” contest. Over time, the resolution of competing factual accounts has evidenced a deeply skeptical orientation toward rape accusers. This incredulous stance remains firmly lodged, having migrated from formal legal rules to informal practices, with much the same result—an enduring system of disbelief. Introducing the concept of “credibility discounting” helps to explain the dominant feature of our legal response to rape. Although false reports of rape are uncommon,*

---

† Class of 1940 Research Professor of Law, Northwestern University Pritzker School of Law. J.D., Yale Law School; A.B., Harvard College. My thanks to Ronald Allen, Miranda Fricker, Terry Fromson, Andrew Gold, Emily Kadens, Sherry Kolb, Andrew Koppelman, Jennifer Lackey, Sarah Lawksy, Gregory Mark, Janice Nadler, and John McGinnis for their helpful suggestions and insights. Sarah Crocker and Tom Gaylord, Faculty Services and Scholarly Communications Librarian, contributed outstanding research assistance, and the Northwestern University Pritzker School of Law Faculty Research Program furnished generous financial support.

*law enforcement officers tend to default to doubt when women allege sexual assault, resulting in curtailed investigations as well as infrequent arrests and prosecutions. Credibility discounts, which are meted out at every stage of the criminal process, involve downgrades both to trustworthiness (corresponding to testimonial injustice) and to plausibility (corresponding to hermeneutical injustice).*

*By conceptualizing prejudiced disbelief as a distinct failure of justice, one deserving of separate consideration, we may begin to grasp the full implications of credibility discounting, beyond faulty criminal justice outcomes. Attending to this failure of epistemic justice on its own terms advances a conversation about how best to reform institutions so that credibility judgments do not perpetuate inequality. To this end, credibility discounting should count as actionable discrimination. Under certain conditions, moreover, this recognition raises constitutional concerns. When rape victims confront a law enforcement regime predisposed to dismiss their complaints, they are effectively denied the protective resources of the state.*

INTRODUCTION .....	3
I. INCREDIBLE WOMEN .....	8
A. <i>The Centrality of Credibility</i> .....	9
B. <i>Components of Credibility</i> .....	13
C. <i>Discounting: An Overview</i> .....	14
II. MAPPING THE CREDIBILITY DISCOUNT .....	20
A. <i>Incredulous Law</i> .....	21
1. Corroboration Requirements, “Prompt Outcry” Rules, and Cautionary Jury Instructions .....	21
2. Substantive Definitions of Crime and Defense .....	25
B. <i>Incredulous Law Enforcement</i> .....	27
1. Police .....	28
2. Prosecutors.....	36
III. THEORIZING THE CREDIBILITY DISCOUNT .....	41
A. <i>Failures of Belief</i> .....	42
B. <i>Failures of Understanding</i> .....	46
IV. DISCOUNTING AS DISCRIMINATION.....	50
A. <i>Toward Legal Redress</i> .....	50
B. <i>Credibility Discounting as Unequal Protection</i> .....	52
CONCLUSION.....	56

## INTRODUCTION

Rape allegations are, and always have been, deeply intertwined with questions of credibility. In the paradigmatic case of “he said/she said,” accuser and accused offer two opposing versions of events: one party is telling the truth; the other is not. To pick between competing accounts, the decider must judge credibility.

Accusers—typically women<sup>1</sup>—do not tend to fare well in these contests. Over time, skepticism of rape complaints has remained firmly lodged, migrating from formal legal rules to informal practices, toward much the same end—the dismissal of women’s reports of sexual violation. Although systemic disbelief is variegated,<sup>2</sup> the staying power of what I call “credibility discounting” is the dominant feature of our legal response to rape.<sup>3</sup>

While I will later elaborate on this idea of credibility discounting, I use the term to refer to an unwarranted failure to credit an assertion where this failure stems from prejudice.<sup>4</sup> Abundant evidence exists that credibility discounts are meted out at every stage of the criminal process: by police officers,<sup>5</sup> prosecutors,<sup>6</sup> jurors,<sup>7</sup> and judges.<sup>8</sup> So too are credibility discounts offered by

<sup>1</sup> Nationwide survey data suggests that nearly one in five women have been raped at some point in their lives; for men, the figure is one in seventy-one. MICHELE C. BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011) [hereinafter NISVS], [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) [<https://perma.cc/NC45-5DRG>].

<sup>2</sup> Relevant dimensions include characteristics of the accuser, characteristics of the accused, and characteristics of the accusation.

<sup>3</sup> I aim to conceptualize a set of normative constructs, rather than apply social psychological insights, to explain how implicit bias operates. By attempting to theorize a distinct kind of injustice and how it operates on the ground, my orientation is different from a behavioral approach, although implicit bias experts would generally agree that becoming more versed in the workings of implicit bias is no substitute for a deep account of how the privileging of certain belief structures over others perpetuates hierarchy.

<sup>4</sup> For a further discussion of how prejudice bears on credibility discounting, see *infra* notes 246–59 and accompanying text.

<sup>5</sup> See *infra* notes 159–208 and accompanying text.

<sup>6</sup> See *infra* notes 209–39 and accompanying text.

<sup>7</sup> See *infra* notes 217–34 and accompanying text.

<sup>8</sup> Credibility discounting at sentencing lies outside the confines of this discussion. It is worth nothing, however, that the issue obliquely surfaced in the recent high-profile case of former Stanford swimmer Brock Turner, whose six-month sentence for sexually assaulting an unconscious woman generated widespread outrage, at least in part because the judge’s remarks indicated that he credited the defendant’s version of events despite a contrary jury verdict. See Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge’s Controversial Decision*, GUARDIAN (June 14, 2016), [https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky?CMP=share\\_btn\\_tw](https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky?CMP=share_btn_tw) [<https://perma.cc/LSD3-2VT8>] (“I mean, I take [the defendant] at his word that, subjectively, that’s his version of events. The jury, obviously, found it to be not the sequence of events. . . . But the trial is a search for the truth. It’s an imperfect process. And there’s ambiguity at each stage of the proceedings.”).

those who form judgments about the veracity of rape accusations from outside the criminal process.<sup>9</sup>

This has always been true, but ongoing sociolegal developments have further elevated the importance of these evaluations. One such development has been the gradual dislodging of stranger rape as archetypical,<sup>10</sup> accompanied by a growing recognition that the vast majority of sexual violence is committed by an acquaintance without the use of weapons or abundant physical force.<sup>11</sup> This greater awareness has in turn propelled nationwide efforts to eliminate the traditional force requirement from the statutory definition of rape.<sup>12</sup>

With this progression toward consent-based understandings of sexual assault,<sup>13</sup> added pressure has been placed on fact-finding in cases that hinge on credibility. The difficulty of fact-finding exists regardless of how consent

---

<sup>9</sup> A related observation acknowledges that “law and culture reciprocally influence understandings of what is and is not the crime of rape.” Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 132 (1992).

<sup>10</sup> For an early critique of the stranger rape paradigm, see Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986). Estrich writes:

At one end of the spectrum is the “real” rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law—judges, statutes, prosecutors and all—generally acknowledge that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight, the understanding is different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman.

*Id.* at 1092.

<sup>11</sup> See *id.* at 1161 (“The available data suggest that while violent, stranger rape may be among the most frequently reported crimes in this country, the non-traditional rape—the case involving non-strangers, less force, no beatings, no weapons—may be among the least frequently reported, even when its victims perceive it to be ‘rape.’”). Further, “[i]n many if not most of these cases, forced sex is tolerated by its victims as unavoidable, if not ‘normal.’” *Id.* Of women victimized by rape, half are raped by an intimate partner and forty percent by an acquaintance. NISVS, *supra* note 1, at 21.

<sup>12</sup> See Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1950-53 (2016) (describing decades long efforts to abolish the force requirement and concluding that “[d]espite some continued resistance to the criminalization of nonconsensual sex, the tide on the question appears to be shifting”).

<sup>13</sup> See Myka Held & Juliana McLaughlin, *Rape and Sexual Assault*, 15 GEO. J. GENDER & L. 155, 157-59 (2014) (discussing states’ use of the terms “sexual assault” and “rape,” sometimes interchangeably, and the various, often synonymous, definitions of both terms). As is typical, I use the terms interchangeably unless a more particular meaning is specified.

is defined,<sup>14</sup> but controversy over affirmative consent<sup>15</sup> has increased the salience of factual discrepancies while also activating the widespread perception that word-on-word (normally “he said/she said”) cases are not provable. For this reason, credibility discounting threatens to stall progress toward modernizing rape law.<sup>16</sup>

Credibility discounting in the criminal justice system also hampers ongoing work in the campus sexual assault setting. Rather than focusing on colleges’ obligation to provide an educational environment that allows all students, regardless of gender, to learn and thrive,<sup>17</sup> policymakers are essentially asking administrators to fill a void created by a dysfunctional criminal legal process.<sup>18</sup> While understandable, this impulse to work around the criminal justice system<sup>19</sup> is ultimately doomed to failure. Institutions of higher education cannot substitute for the criminal justice system, but the bias perceived as endemic to criminal justice outcomes encourages resort to this alternative.

Bias is not confined to the criminal justice system, of course, and campus adjudication requires university officials to assess credibility. Word-on-word scenarios are even more commonplace in the university setting (as compared to the criminal justice arena) because college disciplinary procedures lack compulsory mechanisms for obtaining corroborating evidence.<sup>20</sup> Without the

---

<sup>14</sup> For example, whether “no means no” or “yes means yes.” Affirmative consent rules do not tend to alter the likelihood of factual discrepancies arising, although they may increase the odds of interpretative variation between the parties about what constitutes a “yes” to sexual activity. See generally Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441 (2016). For a study of interpretive variance in rape adjudication, see generally Dan M. Kahan, *Culture, Cognition and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010).

<sup>15</sup> See Tuerkheimer, *Affirmative Consent*, *supra* note 14 (analyzing various arguments against affirmative consent rules). While affirmative consent standards have ascended in the university setting, there remains considerable resistance to their adoption in a criminal code. *Id.* at 443.

<sup>16</sup> For a normative defense of modernizing rape law, see generally Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335 (2013).

<sup>17</sup> See Deborah Tuerkheimer, *Reforming Rape Policies on Campus*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/reforming-rape-policies-on-campus.html> [<https://perma.cc/QYM4-CAY5>] (arguing that universities are failing in their obligation to protect students and facilitate learning).

<sup>18</sup> See Diana Moskovitz, *Why Title IX Has Failed Everyone on Campus Rape*, DEADSPIN (July 7, 2016, 2:58 PM), <http://deadspin.com/why-title-ix-has-failed-everyone-on-campus-rape-1765565925> [<https://perma.cc/WSU5-7NUT>] (“Ideally, the criminal justice system and Title IX would work along parallel but separate tracks, with the police investigating to determine whether a crime happened and the university doing what it has to do to keep students safe and ensure their rights to an education.”).

<sup>19</sup> See Bernice Yeung, *A Problem of Evidence*, HUFFINGTON POST (Nov. 14, 2013), [http://www.huffingtonpost.com/bernice-yeung/sexual-assault-rape\\_b\\_3917144.html](http://www.huffingtonpost.com/bernice-yeung/sexual-assault-rape_b_3917144.html) [<https://perma.cc/VLR4-LXGE>] (describing another effort to bypass a faulty criminal justice system using federal civil rights law). However, despite “dozens of federal sexual harassment cases [brought by the U.S. Equal Opportunity Employment Commission] involving farmworkers who claimed that they had been assaulted or raped on the job,” not one criminal prosecution resulted. *Id.*

<sup>20</sup> See *infra* notes 42–47, 53 and accompanying text (discussing types of corroborative evidence that are often available in rape and sexual assault cases).

benefit of search warrants, subpoenas, and grand jury investigations, administrators frequently rely in full on the parties' accounts of what occurred. When these accounts diverge, as is typical, credibility discounting threatens to impair the integrity of campus proceedings.

Identifying this dynamic enables a more nuanced approach to the design of college disciplinary procedures. For instance, one way of making sense of the preponderance of evidence standard—the standard that, although controversial,<sup>21</sup> has now been adopted by most universities<sup>22</sup>—is that it represents an attempt to compensate for longstanding and continuing credibility discounts assigned to women alleging rape on campus.<sup>23</sup> Measures to target these discounts directly,<sup>24</sup> if effective, might ultimately shift the calculus regarding the appropriate burden of proof.

As this portrayal of legal and policy flux suggests, we are at a liminal moment for sexual assault reform both on and off campus. Because credibility discounting has the potential to thwart the evolution of sound laws and procedures regarding rape, exposing the phenomenon assumes particular urgency.

This Article provides a first conceptual analysis of the systemic discounting of rape accusers' credibility.<sup>25</sup> It does so by situating prejudiced disbelief as a separate failure of justice, one itself deserving of consideration. Only by attending to this failure of justice on its own terms can we begin to

---

<sup>21</sup> See Conor Friedersdorf, *What Should the Standard of Proof Be in Campus Rape Cases?*, ATLANTIC (June 17, 2016), <https://www.theatlantic.com/politics/archive/2016/06/campuses-sexual-misconduct/487505> [<https://perma.cc/CX72-GFMX>] (summarizing objections to the preponderance of the evidence standard); see also Anderson, *supra* note 12, at 1984-90 (responding to criticisms of the standard).

<sup>22</sup> Friedersdorf, *supra* note 21 (noting that most universities have adopted a preponderance standard to comply with the directive contained in the Department of Education's 2011 Dear Colleague Letter).

<sup>23</sup> See Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Senator James Lankford, Chairman of the Subcomm. on Regulatory Affairs & Fed. Mgmt. Comm. on Homeland Sec. & Governmental Affairs (Feb. 17, 2016), <http://chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf> [<https://perma.cc/NP3E-DUST>] (defending the preponderance of evidence standard at educational institutions, and requiring that institutions adopt "grievance procedures providing for prompt and equitable resolution" of complaints"). Such requirements arguably aim to correct for systemic credibility discounting. A fuller analysis of the pros and cons of the 2011 Department of Education guidance is beyond the scope of this discussion.

<sup>24</sup> Similar measures are emerging in the law enforcement context. See *infra* note 309 and accompanying text.

<sup>25</sup> This analysis advances a conversation about how best to ensure that credibility is judged in a way that does not perpetuate inequality. In a world without credibility discounts, a given allegation may be false; an allegation may not be credible; and a credible allegation may not rise to the requisite level of proof. These possibilities would remain, but without the same implications for epistemic injustice.

fathom the full harm to victims<sup>26</sup>—quite apart from downstream effects on criminal justice outcomes.<sup>27</sup>

The analysis proceeds in four parts. Part I begins by elaborating on the centrality of credibility assessment to the processing of rape allegations. Although the availability of corroborative evidence complicates conventional accounts of the “he said/she said” model, unwarranted disbelief nonetheless undermines effective investigation and accurate adjudication. After describing this dynamic, the discussion disaggregates the construct of credibility. It then introduces the concept of discounting.

Part II documents the phenomenon of credibility discounting. Throughout history, rape law formally embedded deep skepticism of sexual assault allegations. The systemic disregard of rape victims was accomplished through a set of unique legal requirements—corroboration,<sup>28</sup> prompt outcry,<sup>29</sup> and cautionary jury instructions<sup>30</sup>—along with a special defense to rape for a victim’s “social companion.”<sup>31</sup> While much of this legal regime has been dismantled, credibility discounts have endured by relocating to the realm of law enforcement practice.<sup>32</sup>

Part III provides an epistemological account of credibility discounts that casts new light on the processing of rape allegations. A main contribution in this regard is to transplant the philosophical idea of epistemic injustice to legal scholarship. Epistemic injustice encompasses both the injustice of disbelief (testimonial injustice), which entails the downgrading of a speaker’s perceived trustworthiness due to prejudice,<sup>33</sup> and the injustice of misinterpretation (hermeneutical injustice), which prevents a person from making sense of her experience and protesting it in comprehensible form.<sup>34</sup> Each category of epistemic injustice flows from structural inequalities; each results in a primary harm and a further cascade of harms; and each pervades the criminal justice system’s treatment of rape.

Part IV situates credibility discounting within law, arguing for its recognition, under delineated circumstances, as actionable discrimination. Without needing to resort to a new cause of action, I urge the application of existing anti-discrimination frameworks to the systemic provision of

---

<sup>26</sup> See *infra* notes 260–75; 290–92 and accompanying text (describing the “primary harm” inflicted on the victim in her capacity as a knower).

<sup>27</sup> Although not my focus here, it is worth highlighting the inverse relationship between credibility discounting and accurate factfinding.

<sup>28</sup> See *infra* notes 113–17 and accompanying text.

<sup>29</sup> See *infra* notes 118–19 and accompanying text.

<sup>30</sup> See *infra* notes 120–21 and accompanying text.

<sup>31</sup> See *infra* notes 142–44 and accompanying text.

<sup>32</sup> See *infra* Section II.B.

<sup>33</sup> See *infra* notes 246–75 and accompanying text.

<sup>34</sup> See *infra* notes 276–99 and accompanying text.

credibility discounts. To ground this proposal, I sketch a new equal protection claim—a claim premised on the insight that, when rape victims confront a law enforcement regime predisposed to dismiss their complaints, they are effectively denied the protective resources of the state.

This Article concludes by drawing attention to the political dimensions of epistemic justice and their bearing on equality norms. Because, as a general proposition, those who are epistemically disempowered are prone to suffering unremedied injuries, cognizing the harm of epistemic injustice holds real promise even beyond the realm of sexual violence.<sup>35</sup>

### I. INCREDIBLE WOMEN

When a listener is called upon to evaluate the truthfulness of a woman's account of rape, the listener inevitably draws upon a store of existing beliefs about rape complainants. This set of assumptions may vary by person, of course. Yet if we focus on the listeners most often situated in evaluative positions vis-a-vis accusations of sexual violence, certain patterns emerge. By attending to police and prosecutors in particular, we may discern a widely shared set of background assumptions about women who allege rape. These assumptions lead law enforcement officers to disregard truthful allegations, not simply because rape and its impact on victims are misunderstood, but also because the incidence of false reporting is substantially overestimated.<sup>36</sup>

---

<sup>35</sup> See *infra* notes 331–33 and accompanying text.

<sup>36</sup> See *infra* notes 81–106 and accompanying text. Errors regarding the likelihood of a false report may be compounded by underestimations of the actual incidence of rape, which is strikingly high. A 2010 National Intimate Partner Survey found that nearly one in five women (18.3 percent) reported having experienced rape, which was defined as any completed or attempted unwanted vaginal (for women), oral, or anal penetration using physical force or threats of physical harm, in addition to penetration when a victim was drunk, high, drugged, or passed out and unable to consent. NISVS, *supra* note 1, at 18. In addition, 44.6 percent of women reported having experienced other forms of sexual violence, including sexual coercion and unwanted sexual conduct. *Id.* Recent studies of sexual assault on college campuses indicate that 10.8 percent of female undergraduates have experienced sexual penetration by force or incapacitation. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 14 (Sept. 21, 2015).

Surveys that rely on a broader definition of sexual assault that includes forced kissing and fondling have proven controversial. See Jake New, *One in Five?*, INSIDE HIGHER ED (Dec. 15, 2014), <https://www.insidehighered.com/news/2014/12/15/critics-advocates-doubt-oft-cited-campus-sexual-assault-statistic> [<https://perma.cc/AN22-N22D>] (describing criticism of the National Institute of Justice's 2007 Campus Sexual Assault Study for its "broad definition of sexual assault" and that "some argue that an unwanted kiss should not be conflated with other kinds of more severe sexual assault or rape"). Applying this definition, nearly one in five college women report have been sexually assaulted; for men, the figure is one in seventy-one. NISVS, *supra* note 1, at 1; see also CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS RESEARCH & DEVELOPMENT SERIES, CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT 73–74 (Jan. 2016), <http://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<https://perma.cc/48FC-RQK2>] (reporting

Recurring tropes of disbelief center on three possibilities: the rape accuser is malicious or vindictive and therefore lying about her rape;<sup>37</sup> she is regretful about consenting to sexual activity with the accused and therefore lying about her rape; or she is incapable of assessing whether she consented due to intoxication, and therefore lying when she claims otherwise. Although a rape accuser is occasionally perceived as offering a truthful account, she may nevertheless be deemed unworthy of the law's protection, either because she is seen as inviting her violation<sup>38</sup> or as exaggerating the extent of her injury.<sup>39</sup>

Identifying this constellation of presumptions illuminates the influence of what I will call the “paradigmatic rape accuser” on the credibility assessments of police and prosecutors. Focus on this constellation also reveals the hold this accuser maintains on the legal rules created to inoculate against her lies and exaggerations.<sup>40</sup>

Before developing these observations, however, it is useful to expand upon three underlying concepts: the centrality of credibility, the components of credibility, and the meaning of discounting.

#### A. *The Centrality of Credibility*

Modern day sexual assault cases, which tend to hinge on questions of consent,<sup>41</sup> are commonly perceived as “he said/she said” or “word-on-word” contests. Yet this understanding is reductionist, for it overlooks the pivotal role of corroborative evidence. Corroborative evidence—i.e., evidence that tends to support one party's version of events<sup>42</sup>—can include electronic

---

that, among 23,000 undergraduates surveyed, 21 percent of female students said that they had been sexually assaulted while in college, while 7 percent of male students said the same).

<sup>37</sup> In non-stranger rape cases, the relationship between accuser and accused is thought to motivate the impulse to falsely allege a crime. *But see infra* notes 103–05 (suggesting that false allegations, when they occur, arise more often regarding strangers than non-strangers).

<sup>38</sup> This trope rests on two slightly different misunderstandings. One is that, by behaving in a certain manner, the complainant impliedly consented to intercourse. The other is that a woman considered to have “asked for it” has waived her right to withhold consent. I am grateful to Sherry Colb for articulating this latter formulation.

<sup>39</sup> This often arises in cases involving previous consensual sex between the accuser and accused. *See infra* notes 204–208 and accompanying text.

<sup>40</sup> *See infra* Section II.A.

<sup>41</sup> *Cf. supra* notes 10–16 and accompanying text.

<sup>42</sup> *See, e.g.*, MISSOULA CTY. ATTORNEY'S OFFICE, SEXUAL ASSAULT POLICY & PROCEDURE MANUAL 123-27 (2014), <https://dojmt.gov/wp-content/uploads/SEXUAL-ASSAULT-POLICY-AND-PROCEDURE-MANUAL.pdf> [HTTPS://PERMA.CC/ERW4-LUC8] (explaining that corroborating evidence can include physical evidence, outcry witnesses, eyewitnesses, surveillance recordings, medical evidence, the defendants' testimony, texts, and phone calls); MASS. DIST. ATTORNEYS ASS'N, MASSACHUSETTS PROSECUTOR'S MANUAL: DOMESTIC VIOLENCE & SEXUAL ASSAULT 177-78 (July 2010), [www.mass.gov/mdaa/docs/dv-sa-manual-7-10.doc](http://www.mass.gov/mdaa/docs/dv-sa-manual-7-10.doc) [https://perma.cc/E3WM-Q9MJ] (describing types of corroborative evidence, including computer records and other electronic evidence, tapes of 911 telephone calls, surveillance tapes, photos of the victim, crime scene, and defendant, forensic evidence, the victim's excited utterances, and eyewitnesses);

evidence like text messages, voicemails, photographs or social media posts,<sup>43</sup> forensic reports,<sup>44</sup> witnesses to the lead-up or aftermath,<sup>45</sup> and, on rare occasions, eyewitnesses to the incident.<sup>46</sup> In addition to evidence that supports a victim's account by tending to confirm specific factual assertions, expert testimony that dispels rape myths can also be considered a type of corroborative evidence.<sup>47</sup> A more holistic approach contemplates the potential availability of corroboration, which—if properly gathered—obviates the need to pit word against word. This more complicated depiction of how

---

WIS. OFFICE OF JUSTICE ASSISTANCE, WISCONSIN PROSECUTOR'S SEXUAL ASSAULT REFERENCE BOOK 42 (Oct. 2009), [https://www.wcasa.org/file\\_open.php?id=3](https://www.wcasa.org/file_open.php?id=3) [<https://perma.cc/N8Q3-CWE9>] (mentioning areas of potential corroboration, including the victim's post-assault behavior and forensic evidence obtained by a Sexual Assault Nurse Examiner); ILL. LAW ENFT TRAINING & STANDARDS BD., MODEL GUIDELINES & SEX CRIMES INVESTIGATION TRAINING MANUAL FOR LAW ENFORCEMENT 102-04 (May 1996), <https://iletsbei.com/docs/publications/sexassault.pdf> [<https://perma.cc/Y6V4-2HAV>] (stating that potential corroboration includes medical evidence, the defendant's statements, and eyewitnesses).

<sup>43</sup> See, e.g., Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES (Dec. 16, 2012), <http://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html> [<https://perma.cc/JEQ5-S8SA>] (noting the impact of social media on sexual assault allegations against a high school football team, "when teenagers are capturing much of their lives on their camera phones—even repugnant, possibly criminal behavior, as they did in Steubenville in August—and then posting it on the Web, like a graphic, public diary"); Tyler Bishop, *Graphic Evidence Introduced in Rape Trial*, VANDERBILT HUSTLER (Jan. 17, 2015), [http://www.vanderbilthustlerarchives.com/news/safety/article\\_f4cad6a0-9e67-11e4-9e55-5bac2611b4b.html](http://www.vanderbilthustlerarchives.com/news/safety/article_f4cad6a0-9e67-11e4-9e55-5bac2611b4b.html) [<https://perma.cc/NG4F-6G8E>] (describing admission of "graphic photo and video evidence from the phones of the accused in the rape case against four former Vanderbilt football players"); Lizzie Crocker, *Was it Sex or Rape at St. Paul's?*, DAILY BEAST (Aug. 26, 2015), <http://www.thedailybeast.com/articles/2015/08/26/was-it-sex-or-rape-at-st-paul-s.html> [<https://perma.cc/6VMB-D23Y>] (detailing how "prosecutors showed Facebook messages in May 2014 between [defendant] Labrie and another friend" to support their case).

<sup>44</sup> See, e.g., Adrienne LaFrance, *What Makes the Stanford Rape Case So Unusual*, ATLANTIC (June 9, 2016) <https://www.theatlantic.com/politics/archive/2016/06/what-makes-the-stanford-rape-case-so-unusual/486374/> [<https://perma.cc/3RCJ-29NE>] (noting that prosecutors introduced forensic evidence that pine needles were found inside the victim's vagina and toxicology reports showing victim's extreme level of intoxication).

<sup>45</sup> See, e.g., JON KRAUKAUR, *MISSOULA* 138 (2015) (describing a case where the victim texted her housemate about the rape just after the rapist walked from the bedroom into an adjacent bathroom).

<sup>46</sup> See, e.g., Ema O'Connor, *In Their Words: The Swedish Heroes Who Caught the Stanford Sexual Assailant*, BUZZFEED (June 7, 2016), [https://www.buzzfeed.com/emaconnor/meet-the-two-swedish-men-who-caught-brock-turner?utm\\_term=.vbNjom45Y#.cxjX7VAEa](https://www.buzzfeed.com/emaconnor/meet-the-two-swedish-men-who-caught-brock-turner?utm_term=.vbNjom45Y#.cxjX7VAEa) [<https://perma.cc/6XJK-CV8B>] (describing how two eyewitnesses to the sexual assault of an unconscious woman interrupted the attack and called the police); cf. Tyler Kingkade, *Why Would Anyone Film a Rape and Not Try to Stop It?* HUFFINGTON POST (Apr. 23, 2016), [http://www.huffingtonpost.com/entry/why-film-a-rape\\_us\\_5717b957e4b0c9244a7a8e07](http://www.huffingtonpost.com/entry/why-film-a-rape_us_5717b957e4b0c9244a7a8e07) [<https://perma.cc/TBD8-PG3U>] ("It sounds unimaginable: someone witnesses a friend being sexually assaulted, but instead of seeking help, they film it and post it on social media. But sadly, stories like this are more common than one would think.").

<sup>47</sup> Prosecution manuals and resources often discuss the importance of using experts to correct such misimpressions and to educate juries about counter-intuitive conduct on the part of the victim. See, e.g., Teresa P. Scalzo, *Overcoming the Consent Defense*, 1 VOICE 1, 3 (2006) (asserting that expert witnesses can help to "explain behaviors a jury might not otherwise understand").

rape allegations are processed reveals that, for several reasons, the construct of credibility remains critical to the legal response to sexual assault.

First, law enforcement officers are presented at the outset with a complainant's account of events; only after preliminarily evaluating this account do officers decide whether and how to proceed with an investigation.<sup>48</sup> Yet often, as we will see, rape accusations are promptly disregarded, short-circuiting sexual assault investigations well before the opportunity to gather available corroborative evidence is exhausted.<sup>49</sup> The prevalence of truncated police investigations suggests that threshold credibility determinations are often outcome determinative.

Moreover, a rape victim's willingness to report an incident to law enforcement (or, in the university setting, to college administrators) frequently turns on an appraisal of the probability that—as a starting proposition—she will be believed. While lacking a name for the phenomenon,<sup>50</sup> survivors of sexual assault widely discern the pervasiveness of credibility discounting.<sup>51</sup> Consequently, before corroboration can possibly enter the mix, most survivors opt to keep their credibility from ever being judged.<sup>52</sup>

Relatedly, the availability of corroborative evidence depends on the forum. The promise of corroboration has its greatest purchase in the criminal context, where police and prosecutors can obtain search warrants and harness the investigative power of the grand jury. Outside the criminal context, in contrast, corroboration is generally harder to come by.<sup>53</sup> This reality restricts

---

<sup>48</sup> Initial impressions of a complainant's credibility will tend to trigger what social psychologists have called the confirmation bias. See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 80-81 (2013) (noting that people "seek data that are likely to be compatible with beliefs they currently hold").

<sup>49</sup> See *infra* notes 163-208 and accompanying text; see also Kathy Dobie, *To Catch A Rapist*, N.Y. TIMES MAGAZINE (Jan. 5, 2016) <https://www.nytimes.com/2016/01/10/magazine/to-catch-a-rapist.html> [<https://perma.cc/4TU5-5F65>] ("[T]he most current thinking on sexual-assault investigations is that there is always corroborating evidence. Detectives just have to be willing to search for it.")

<sup>50</sup> See *infra* note 331 (noting the importance of creating a workable vocabulary to describe previously overlooked harm).

<sup>51</sup> As Katie Baker notes, "Sexual assault victims are 'less likely to go to the police because they are so often unbelievably: The possibility of being ridiculed, doubted, shamed, or even thrown in jail dissuades many from coming forward.'" Katie J. Baker, *The Police Told Her to Report Her Rape, Then Arrested Her for Lying*, BUZZFEED (Sept. 27, 2015), <https://www.buzzfeed.com/katiejmbaker/the-police-told-her-to-report-her-rape-then-arrested-her-for> [<https://perma.cc/92TA-Q8QE>]. See *infra* notes 152-158 and accompanying text.

<sup>52</sup> See *infra* notes 152-58 and accompanying text (describing the prevalence of underreporting).

<sup>53</sup> To be clear, this is not suggesting that it is impossible to obtain corroboration in non-criminal proceedings. See Sarah Brown, *"I Want to Get This Right": Scenes from a Conference on Campus Sexual Assault*, CHRON. HIGHER EDUC. (July 25, 2016) (emphasizing the importance of investigators seeking corroborative evidence in campus investigations).

the evidence obtainable in campus disciplinary proceedings and in any other forum without compulsory process.<sup>54</sup>

Last, even where a complainant's allegations are corroborated, her credibility will always matter. This observation is likely intuitive, but a few underlying points are worth noting. Corroboration, which tends to bolster a particular version of events, comes in degrees of power—from nearly definitive to extremely ambiguous.<sup>55</sup> Given this spectrum, in consent cases the probative force of corroborative evidence will almost invariably<sup>56</sup> be dwarfed in importance by a victim's description of what transpired.<sup>57</sup>

---

<sup>54</sup> The workplace is another context in which obtaining corroborating evidence is often especially difficult. See William R. Tamanyo, *Sexual Harassment and Assault in the Workplace: A Basic Guide for Attorneys in Obtaining Relief for Victims under Federal Employment Law*, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT 6, 10 (2013), <http://library.niwap.org/wp-content/uploads/2015/pdf/CULT-Man-Ch18-GuideObtainingReliefUnderFedEmploymentLaw-07.10.13.pdf> [<https://perma.cc/VLY2-5E8K>] (discussing reasons why witnesses may be fearful to come forward and describing procedures the Equal Employment Opportunity Commission should adopt to obtain evidence during its investigation).

<sup>55</sup> One example is the notorious 2012 Columbia University rape case. There, Emma Sulkowicz alleged that Paul Nungesser, a friend and fellow student, held her down on his bed and violently raped her. In that case, seemingly friendly, even intimate, Facebook messages exchanged between Sulkowicz and Nungesser after the alleged sexual assault ultimately became public, raising questions (for some) about whether Sulkowicz's interactions with the accused rapist were inconsistent with the behavior of a rape victim. For instance, two days after the alleged assault, Nungesser messaged Sulkowicz on Facebook about getting together, to which she responded "lol yusss . . . Also I feel like we need to have some real time where we can talk about life and thingz . . . because we still haven't really had a paul-emma chill sesh since summmerrr." Cathy Young, *Columbia Student: I Didn't Rape Her*, DAILY BEAST (Feb. 3, 2015), <http://www.thedailybeast.com/articles/2015/02/03/columbia-student-i-didn-t-rape-her.html> [<https://perma.cc/RJ6Z-V5WM>]. Several weeks later, Sulkowicz initiated Facebook contact with Nungesser, asking if he wanted to "hang out a little bit . . . whatever I want to see yoyououyou." *Id.* The following week, Nungesser messaged Sulkowicz on her birthday, to which she responded the next morning with, "I love you Paul. Where are you?!?!?!?" *Id.* When asked to describe what motivated her messages, Sulkowicz generally explained, "Paul was one of my closest friends freshman year. We'd had consensual sex twice. We were so close that we would say, 'I love you,' and we would confide in each other about our love lives." Erin Gloria Ryan, *How to Make an Accused Rapist Look Good*, JEZEBEL (Feb. 6, 2015), <http://jezebel.com/how-to-make-an-accused-rapist-look-good-1682583526> [<https://perma.cc/ER4C-MKZ9>]. Sulkowicz offered a detailed account of why she sent the messages. For instance, when Nungesser messaged her about coming to a party two days after the assault and Sulkowicz responded affirmatively and said they should talk "about life and thingz," she hadn't "faced him since he assaulted [her], and [she] want[ed] to talk with him about what happened;" she "tried to say this in a friendly tone, so that he [wouldn't] get scared;" she didn't "want him to avoid the conversation." *Id.* In retrospect, Sulkowicz described her conduct as "irrational, thinking that talking with [Nungesser] would help [her]." *Id.* Evidence of this sort is ambiguous, although expert testimony on the aftermath of rape can be useful in interpreting such exchanges. See *supra* note 47 and accompanying text.

<sup>56</sup> One prime exception is for filmed assaults, which seem to surface with surprising frequency. See Kingkade, *supra* note 46 (suggesting that reasons for this include the bystander effect, which is "particularly pronounced in teens and young adults" and "competitive attitudes on social media, where some engage in a culture of one-upping their friends").

<sup>57</sup> See generally Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557 (2013). As Allen and Stein explain, factfinders "[c]onsider the parties' competing

Moreover, those charged with determining the facts will tend to interpret the significance of corroborative evidence in light of their initial assessment of complainant credibility.<sup>58</sup>

In short, the potential for corroboration does not alter the profound significance of credibility evaluations in rape cases.

### B. Components of Credibility

A speaker who offers a factual claim—in philosophical parlance, a “testifier”—will likely be believed if she is considered trustworthy and her report deemed plausible.<sup>59</sup> Each component of credibility, although often conflated in practice,<sup>60</sup> should be considered separately.

The first factor—trustworthiness—is perhaps most salient to our credibility determinations. Put simply, to accept the testifier’s version of events, “we stake our bets on the trustworthiness of the testifier.”<sup>61</sup> Assessments of this sort are very much rooted in the context of a given report.<sup>62</sup> Consider, as just one example from the policing context, that a woman’s trustworthiness might well be evaluated differently depending on whether she is reporting a rape or a robbery. As we will see, trustworthiness valuations can derive from evidence or from prejudice; when they result from the latter, the resulting downgrading of credibility raises concerns for epistemic injustice.<sup>63</sup>

The perceived plausibility of an account—the second foundation of credibility—is similarly grounded in a listener’s preexisting belief structures, which are often problematic. For instance, in the sexual assault context, preconceived notions of how a rape victim behaves or how rape is perpetrated,

---

stories and decide which is superior; in some cases, they construct their own account of the events in light of the parties’ evidence and arguments.” *Id.* at 568.

<sup>58</sup> See *infra* notes 66–69 and accompanying text (discussing the downgrading of plausibility based on perceived low trustworthiness). This dynamic accords with the confirmation bias. See *supra* note 48.

<sup>59</sup> See Karen Jones, *The Politics of Credibility*, in *A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 154–55 (Louise Antony & Charlotte Witt eds., 2002). Jones writes: “It is a commonplace that the credibility we ascribe to reports should be a function of the trustworthiness of the testifier, or testifiers, and the plausibility of what they say in the light of what else we believe.” *Id.* at 155. Adopting Lockean terminology, Jones identifies trustworthiness and plausibility as the two “foundations” or “grounds” of credibility. *Id.* (citing JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 663 (1689)).

<sup>60</sup> See *infra* notes 66–69 and accompanying text.

<sup>61</sup> Jones, *supra* note 59, at 156.

<sup>62</sup> See *id.* (“However, the trustworthiness we bet on need not be global; what we care about is local, namely, trustworthiness with respect to this exchange of information . . .”).

<sup>63</sup> See Jennifer Lackey, *Norms of Credibility 1* (Aug. 3, 2017) (unpublished manuscript) (on file with author) (“What is taken to lie at the heart of testimonial injustice is that it stems entirely from receiving a credibility deficit—being treated as less worthy of belief or trust than the evidence suggests.”); see also *infra* notes 248–257 and accompanying text (discussing concerns for epistemic justice when trustworthiness valuations stem from prejudice).

however inaccurate, inevitably inform a listener's assessment of whether an accusation is plausible.<sup>64</sup> When evaluated against a store of misinformation about how the world operates, truthful reports seem strange or even bizarre.

In short, each component of credibility—trustworthiness and plausibility—raises distinct epistemic dangers.

### C. Discounting: An Overview

A listener engages in credibility discounting when, based upon a faulty preconception, he reduces a speaker's perceived trustworthiness or diminishes the plausibility of her account. I will later describe in depth how police officers and prosecutors discount the credibility of rape complainants.<sup>65</sup> For now, a general overview of the practice will suffice.

As we have already seen, inquiries into both trustworthiness and plausibility raise concerns about prejudice. But these hazards are aggravated by a tendency on the part of listeners to conflate trustworthiness and plausibility.<sup>66</sup> As philosopher Karen Jones explains, "Testifiers who belong to 'suspect' social groups and who are bearers of strange tales can thus suffer a double disadvantage. They risk being doubly deauthorized as knowers on account of who they are and what they claim to know."<sup>67</sup> The consequences of this "double discounting," so to speak, are severe:

Distrust puts in place a suspicious cognitive set that colors how we will interpret the words of another. It leads us to look for signs of deception, irrationality, or incompetence and thus leads us to seek out evidence of inconsistencies, to magnify those we suppose ourselves to have found, and to focus on them in our assessment of the story as a whole. It also leads us to overlook the ways in which any inconsistencies that we take ourselves to have found can be explained away. Thus a low initial trustworthiness rating, if not insulated from affecting the assessment of the prior probability of the report, can give rise to runaway reductions in the probability assigned to a witness's story.<sup>68</sup>

---

<sup>64</sup> See *infra* notes 232–38 and accompanying text (identifying this dynamic in prosecutorial decisionmaking).

<sup>65</sup> See *infra* Section II.B.

<sup>66</sup> See also *infra* notes 293–99 and accompanying text (discussing Fricker's framework for understanding this phenomenon).

<sup>67</sup> Jones, *supra* note 59, at 158. Jones further suggests that "[i]f we operate with norms of credibility that do not take into account the influence of background beliefs *and* of prejudice on our credibility judgments, there is a very real risk of committing epistemic injustice." *Id.*

<sup>68</sup> *Id.* at 159. The effect also runs in the opposite direction—"assessments of low plausibility, when permitted to infect assessments of trustworthiness, can lead to a two-way mutually reinforcing loop." *Id.* at 160.

As Jones concludes, “When we violate the rule for the independence of assessments of trustworthiness and of plausibility, there is little the doubly epistemically disadvantaged can do to persuade us—we make it impossible for them to convince us by words of the truth of what they say.”<sup>69</sup>

We can further refine this explanation of credibility discounting in two ways. First, while there is some disagreement about whether credibility is a finite good, under certain circumstances—notably the word-on-word case—a determination that one party is worthy of belief requires a judgment that the other is not.<sup>70</sup> This scenario raises the prospect that one party might be afforded greater credibility than is warranted by the evidence.<sup>71</sup> Consider that where A accuses B of raping her and B denies doing so, a prejudiced listener’s credibility determination might assume one of three of forms: A is downgraded and B is upgraded; A is downgraded and B is properly assessed; A is properly assessed and B is upgraded.<sup>72</sup> All of these possibilities fall under the rubric of credibility discounting as I employ the term.<sup>73</sup>

To further complicate the picture, credibility estimations fall along a continuum of belief.<sup>74</sup> This suggests that discounting is not an all or nothing

<sup>69</sup> *Id.*

<sup>70</sup> Jennifer Lackey refers to this as a “credibility clash,” where “[s]omebody is telling the truth and somebody else is lying, and to say where the truth falls is *ipso facto* to point the finger of falsehood at the other.” Lackey, *supra* note 63, at 2-3.

<sup>71</sup> Lackey calls this a “credibility surplus.” *Id.* at 1. For example, a person accused of rape may be believed when he disputes the allegation “without regard for the fact that people accused of sexual assault often lie in denying the charge.” *Id.* at 2; see also Jose Medina, *The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary*, 25 SOC. EPISTEMOLOGY 15, 17 (2011) (“To the extent that an excessive attribution of credibility belongs to a chain of attributions that promotes epistemic vices, that attribution contributes to epistemic injustice.”).

<sup>72</sup> It is also possible that the credibility of both parties is assessed without resort to prejudice and still the listener disbelieves the account. This scenario does not implicate epistemic injustice. See *supra* note 25 and accompanying text.

<sup>73</sup> Cf. Lackey, *supra* note 63, at 14 (arguing that “credibility assessments need to be understood relationally: whether my credibility assessment of you is just—epistemically and morally—can only be characterized in relation to my assessments of other members of the relevant context or community”).

<sup>74</sup> Richard Foley, *Beliefs, Degrees of Belief, and the Lockean Thesis*, DEGREES BELIEF 37 (Franz Huber & Christoph Schmidt-Petri eds., 2009) (“[B]elief talk is but a general way of classifying an individual’s confidence in a proposition.”). Philosophers have advanced considerable efforts to understand the degree of confidence that is sufficient for belief. This inquiry is usefully framed as follows:

What propositions are rational for one to believe? With what confidence is it rational for one to believe these propositions? Answering the first of these questions requires an epistemology of beliefs, answering the second an epistemology of degrees of belief . . . . The two accounts would seem to be close cousins. An account of rational degrees of belief simply takes a more fine-grained approach than does an account of rational beliefs. The latter classifies belief-like attitudes into a threefold scheme of believing, disbelieving, and withholding judgment, whereas the former introduces as many

proposition; a speaker might receive a slight downgrading, a sizeable downgrading, or anywhere in between.<sup>75</sup>

Acknowledging the existence of the credibility discount is not the same as insisting that all rape allegations are true.<sup>76</sup> The problem that I identify here is a profound disconnect between perceptions of falsity and actual falsity.<sup>77</sup> Before we further probe this disconnect, ask yourself: what percentage of rape accusations reported to the police are false? In one survey of nearly nine hundred police officers, more than half of the respondents stated that ten to fifty percent of sexual assault complainants lie about being assaulted, while another ten percent of respondents asserted that the number of false reports is fifty-one to hundred percent.<sup>78</sup> Another study found that more than half of the detectives interviewed believed that forty to eighty percent of sexual assault complaints are false.<sup>79</sup> This openly manifested skepticism largely explains the unusually high unfounding rates that characterize the police treatment of rape allegations.<sup>80</sup>

---

distinctions as needed to talk about the levels of confidence one has in various propositions.

*Id.*

Ultimately, the “belief-talk” and the “degree-of-belief talk” may not be “fundamentally different. Both categorize one’s confidence in the truth of a proposition. Belief-talk does so in a less fine-grained and more vague way, but on the other hand vagueness may be just what is needed, given it is often not possible to specify the precise degree of confidence that someone has in a proposition.” *Id.*; see also Hans Rott, *Degrees All the Way Down: Beliefs, Non-Beliefs, and Disbeliefs*, DEGREES BELIEF 301 (Franz Huber & Christoph Schmidt-Petri eds., 2009) (“Beliefs can be thought of as being equipped with labels specifying their ‘certainty’, or, to use a different terminology, their ‘entrenchment’ in a person’s belief state.”).

<sup>75</sup> Fricker acknowledges, “There will of course be a spectrum of cases spanning those in which the speaker’s credibility is only marginally deflated to those where it is drastically deflated, and also spanning cases where . . . it either is or isn’t sufficient to bring the level of credibility below the threshold for hearer acceptance.” Miranda Fricker, *Epistemic Justice as a Condition of Political Freedom?*, 190 SYNTHÈSE 1317, 1319 (2013).

<sup>76</sup> See *supra* note 25; see also *infra* notes 86–101 and accompanying text (discussing the prevalence of false rape allegations).

<sup>77</sup> The contours of this disconnect vary along multiple dimensions, such as gender, race, sexual orientation, and socioeconomic status. See *infra* note 175 and accompanying text.

<sup>78</sup> Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers’ Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008).

<sup>79</sup> MARTIN D. SCHWARTZ, NATIONAL INSTITUTE OF JUSTICE VISITING FELLOWSHIP: POLICE INVESTIGATION OF RAPE—ROADBLOCKS AND SOLUTIONS 28 (Dec. 2010). Less experienced detectives were more skeptical than those with greater experience; of those with more than eight years on the job, a majority estimated that the number of false reports was “low” or less than ten percent. *Id.* at 27; see also Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample*, 39 CRIM. JUST. & BEHAV. 646, 648-49 (May 2012) (citing research demonstrating “a tendency on the part of the police to view rape victims’ behavior through a narrow perspective, with an approach that emphasizes suspicion and disbelief”).

<sup>80</sup> See *infra* notes 159–78; see also *The Criminal Justice System: Statistics*, RAINN, <https://rainn.org/get-information/statistics/reporting-rates> [<https://perma.cc/L9LB-MDKP>] (estimating, based on recent FBI

Research on false rape allegations suggests that such skepticism is unwarranted. Admittedly, studying the prevalence of false reports is difficult because of the methodological challenge of identifying ground truth—a difficulty that largely accounts for significant discrepancies in findings. As one researcher aptly summarized the problem, “significant adherence to rape myths by the public, media, jurors, and the criminal legal system makes it practically impossible to unravel the highly layered ‘truth’ about false rape allegations.”<sup>81</sup>

One major limitation of the research is its frequent reliance on official law enforcement documents to classify an allegation as false.<sup>82</sup> Equating a police determination that an accusation is “unfounded” with the falsity of that accusation results in the uncritical adoption of any and all credibility discounts meted out in the course of an investigation. Yet researchers often fail to note, much less to disentangle, this effect.<sup>83</sup> Another common methodological flaw is to equate an accuser recanting with a false accusation. Since many factors may cause a truthful complainant to recant her allegation, a failure to independently assess the underlying accusation tends to result in

---

and DOJ figures, that out of every 1000 rapes, 310 are reported to the police; only fifty-seven lead to an arrest); Alex Campbell & Katie J.M. Baker, *Unfounded*, BUZZFEED (Sept. 8, 2016), [https://www.buzzfeed.com/alexcampbell/unfounded?utm\\_term=.kvpJlmmo2#.ih3qVXXkW](https://www.buzzfeed.com/alexcampbell/unfounded?utm_term=.kvpJlmmo2#.ih3qVXXkW) [<https://perma.cc/Z6KK-CZY3>] (identifying eleven police departments with unfounding rates ranging from twenty-four to fifty-four percent). The clearance rates for sexual assault provided by the FBI Uniform Crime Report (UCR), a primary source of national criminal justice data, are unduly high. One important reason is that when “[a law enforcement] agency determines that complaints of crimes are unfounded or false, the agency eliminates that offense from its crime tally through an entry on the monthly report.” *Methodology*, CRIME IN THE UNITED STATES, 2015, U.S. DEP’T OF JUSTICE (2015), [https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/resource-pages/2015-methodology\\_final](https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/resource-pages/2015-methodology_final) [<https://perma.cc/HUC2-ZWVX>]. Because crimes categorized as unfounded are not used to determine UCR clearance rates, the frequency of unfounding sexual assault offenses greatly undermines the accuracy of the report. See JOANNE ARCHAMBAULT & KIMBERLY A. LONSWAY, CLEARANCE METHODS FOR SEXUAL ASSAULT CASES, END VIOLENCE AGAINST WOMEN 12-13 (May 2012) (discussing methodological issues underlying UCR reports). A separate problem with the UCR is that law enforcement agencies improperly use the “exceptional clearance” classification for rape cases, often because a victim is deemed “uncooperative.” *Id.* at 9. See generally Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014).

<sup>81</sup> Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335, 1336 (2010).

<sup>82</sup> See *id.* (critiquing a frequently cited study for relying on “official documents and reports of the police interviews” to classify a rape allegation as false).

<sup>83</sup> See, e.g., Jan Jordan, *Beyond Belief? Police, Rape and Women’s Credibility*, 4 CRIM. JUST. 29, 35-36 (2004) (reporting within its study that “cases which the police said were false” contained both cases where the police report stated the complaint was considered to be false, and also those where the police “decided to halt investigating”); Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES SEXUAL BEHAV. 81-87 (1994) (“There is ample evidence . . . that in practice, unfounded rape can and does mean many things, with false allegation being only one of them, and sometimes the least of them.”).

findings of false reporting rates that are misleadingly high.<sup>84</sup> In short, methodological shortcomings in this area are rampant.<sup>85</sup>

The best available research on false allegations involves an independent evaluation of reports deemed unfounded by police.<sup>86</sup> The prime example is a 2012 study of a random sample of cases classified as unfounded by the Los Angeles Police Department (LAPD) in a single year.<sup>87</sup> For each of the eighty-one cases investigated, researchers reviewed the complete police file, including the initial report prepared by the responding patrol officer, all follow-up reports from the assigned detective, and the detective's reasons for classifying the report as unfounded.<sup>88</sup> Researchers divided reports ultimately determined to be false<sup>89</sup> into two categories: cases in which the complainant recanted and there was evidence to support a conclusion that a crime did not occur; and cases in which the complainant did not recant but there was "either evidence that the crime did not occur or no evidence that the crime did occur."<sup>90</sup> Of the eighty-one cases determined to be unfounded by police, fifty-five were deemed by researchers to have been false reports.<sup>91</sup> After comparing this number to the total number of sexual assault complaints made

---

<sup>84</sup> See Belknap, *supra* note 81, at 1339-41; see also T. Christian Miller & Ken Armstrong, *An Unbelievable Story of Rape*, PROPUBLICA (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story> [<https://perma.cc/E7A2-GZGZ>] (documenting police skepticism of a woman's rape allegation, her subsequent recantation of her allegation, and the later apprehension and conviction of her rapist based on unequivocal evidence of his guilt).

<sup>85</sup> See *supra* notes 81-84 and accompanying text; see also David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1324 (2010) (discussing the research in LORENNE CLARK & DEBRA LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY (1977), which conflated false reports made by an alleged victim and those filed by someone other than the victim).

<sup>86</sup> Research of this sort is highly labor intensive and has been rarely undertaken.

<sup>87</sup> CASSIA SPOHN & KATHARINE TELLIS, NAT'L INST. OF JUSTICE, POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE 13-14 (Feb. 2012).

<sup>88</sup> *Id.* at 14-15. "The case files also included either verbatim accounts or summaries of statements made by the complainant, by witnesses (if any), and by the suspect (if the suspect was interviewed); a description of physical evidence recovered from the alleged crime scene, and the results of the physical exam (forensic medical sexual assault exam) of the victim (if the victim reported the crime within 72 hours of the alleged assault)." *Id.* at 15.

<sup>89</sup> A false report was defined as "a report of a sexual assault that did not happen." *Id.* at 45.

<sup>90</sup> *Id.* at 45. "Regardless of whether the complainant recanted, [the researchers] looked for evidence that would support a conclusion that a crime did not occur: witness statements, video evidence, or physical evidence that clearly contradicted the complainant's statement." *Id.* at 46.

<sup>91</sup> *Id.* at 48. Of these fifty-five false reports, there were thirty-one cases in which the victim recanted and there was evidence that the crime did not occur, and twenty-four in which the victim did not recant but there was evidence that the crime did not occur or there was no evidence that the crime did occur.

to the LAPD that year, researchers calculated that 4.5 percent of all cases reported to the LAPD that year were false.<sup>92</sup>

Another study that adopted a similar methodology is a 2010 review of all sexual assault cases reported to a major northeastern university over a ten-year period; the number of cases totaled 136.<sup>93</sup> Defining a false claim as one in which a full investigation took place<sup>94</sup> and the evidence showed by a preponderance that the reported sexual assault had not occurred, researchers found that only eight cases (5.9 percent) of the reported sexual assaults were false reports.<sup>95</sup> In half of the allegations deemed by the research team to be false, the alleged victim ultimately admitted to fabricating some or all of their claims.<sup>96</sup>

A different approach trains police officers to more accurately and precisely classify reports, then assesses the prevalence of allegations officers deem false. This methodology was employed by the only multistate study to evaluate the incidence of false reports.<sup>97</sup> Law enforcement agencies in eight U.S. communities collected data for all sexual assault reports received over an eighteen to twenty-four month period (a total of 2059 cases). Participating agencies received training in how to properly classify sexual assault cases,<sup>98</sup>

---

<sup>92</sup> *Id.* at 49. Of this 4.5 percent, “2.2 percent were cases in which the complainant recanted and there was evidence that a crime did not occur and 2.3 percent were cases in which the complainant did not recant but there was evidence that a crime did not occur.” *Id.* Crucially, because the eighty-one unfounded cases were not a random sample of all cases reported to the LAPD in 2008, the ratio of false reports in the sample does not reflect the overall ratio. Therefore, to determine the percentage of false reports, researchers “used data that were weighted by the proportion of cases from each division and, within each division, the proportion of cases from each case closure type.” *Id.* They then extrapolated from the limited sample analyzed to the entire population of reported rapes and sexual assaults. *Id.*

<sup>93</sup> Lisak et al., *supra* note 85, at 1329.

<sup>94</sup> *Id.* at 1328. Full investigations included the police interviewing witnesses such as the alleged perpetrator, the victim, and others, and when applicable, the collection of forensic evidence such as medical records or security camera recordings. *Id.*

<sup>95</sup> *Id.* at 1318, 1329.

<sup>96</sup> *Id.* at 1329. In addition to conducting independent research, Lisak and his colleagues also reviewed studies spanning several decades regarding false sexual assault allegations from the United States, the United Kingdom, Canada, and Australia. Although the estimated prevalence of false rape allegations varied between two percent and ten percent, many of the studies finding rates in the upper end of this range employed methodologies that were flawed. *Id.* at 1318, 1322-26.

<sup>97</sup> Kimberly A. Lonsway & Joanne Archambault, Understanding the Criminal Justice Response to Sexual Assault: Analysis of Data from the Making a Difference Project (2008) (unpublished study) (on file with the University of Pennsylvania Law Review).

<sup>98</sup> Possible classifications included “cleared by arrest” and “closed as an informational report (elements of a sexual assault offense not met).” *Id.* Importantly, another classification was “Unfounded/False (based on investigative findings that a crime did not occur, according to UCR [Uniform Crime Report] criteria),” which was defined to include only cases that were determined, based on evidence collected, to be false allegations. A separate classification, “Unfounded/Baseless (elements of the crime were not met, but not false, according to UCR criteria),” was created for cases that do not meet the FBI’s Uniform Crime Report criteria for a false report but where the events do not constitute a crime according to the state’s penal code. *Id.*

along with technical assistance to help ensure consistency and reliability.<sup>99</sup> These efforts were designed to reduce the effects of law enforcement biases. The study found a slightly higher incidence of false reports—140 of the 2,059 cases (6.8 percent) were classified as such—as compared to research relying on an independent assessment of the allegations.<sup>100</sup>

In sum, among these studies, which require a reasonably sound basis to believe that an allegation is false before classifying it accordingly, we see false reporting rates of 4.5 percent, 5.9 percent, and 6.8 percent.<sup>101</sup> These figures are significantly lower than those provided by law enforcement officers when asked to estimate the incidence of false reporting.<sup>102</sup> Moreover, research suggests that the kinds of cases most likely to be considered false—namely, those involving non-strangers and those involving intoxication—are in fact least likely to be false.<sup>103</sup> Relatedly, commonplace assumptions on the part of law enforcement officers regarding rape accusers' motivations<sup>104</sup> are misguided; even in false reports, revenge, regret and guilt are not usually factors.<sup>105</sup>

Law enforcement practices are steeped in misconceptions about the truthfulness of women alleging sexual assault.<sup>106</sup> We now consider how pervasive skepticism is expressed in the meting out of credibility discounts.

## II. MAPPING THE CREDIBILITY DISCOUNT

The legal response to rape has long been shaped by entrenched disbelief of women who level accusations of sexual assault. With one important

---

<sup>99</sup> *Id.* Moreover, researchers checked a random selection of cases for data entry errors. KIMBERLY A. LONSWAY, SUMMARY OF RESEARCH METHODS FOR “MAKING A DIFFERENCE” (MAD) PROJECT 4-5 (May 2012), <http://www.evawintl.org/images/uploads/ResearchMethods.pdf> [<https://perma.cc/B7WV-AH3H>].

<sup>100</sup> See *supra* notes 86–96 and accompanying text.

<sup>101</sup> See also Dara Lind, *What We Know About False Rape Allegations*, VOX 2 (June 1, 2015), <http://www.vox.com/2015/6/1/8687479/lie-rape-statistics> [<https://perma.cc/PM8Q-XEE8>] (“[R]esearch has finally nailed down a consistent range for how many reports of rape are false: somewhere between 2 and 8 percent, which is a lot narrower than the 1.5 percent to 90 percent range of the past.”).

<sup>102</sup> See *supra* notes 78–80 and accompanying text; see also *infra* Section II.B.

<sup>103</sup> Lind, *supra* note 101, at 2.

<sup>104</sup> See *supra* notes 37–40 and accompanying text (discussing paradigmatic rape accuser).

<sup>105</sup> *Id.*; cf. Max Ehrenfreund & Elahe Izadi, *The Scientific Research Shows Reports of Rape are Often Murky, but Rarely False*, WASH. POST (Dec. 11, 2014) [https://www.washingtonpost.com/news/wonk/wp/2014/12/11/the-scientific-research-shows-reports-of-rape-are-often-murky-but-rarely-false/?utm\\_term=.4f21fie2da17](https://www.washingtonpost.com/news/wonk/wp/2014/12/11/the-scientific-research-shows-reports-of-rape-are-often-murky-but-rarely-false/?utm_term=.4f21fie2da17) [<https://perma.cc/U7JJ-6CUP>] (reporting on recent research studying rape, false accusations, and how the trauma of sexual assault affects a victim's memory); Donna Zuckerberg, *He Said, She Said: The Mythical History of the False Rape Allegation*, JEZEBEL (July 30, 2015), <http://jezebel.com/he-said-she-said-the-mythical-history-of-the-false-ra-1720945752> [<https://perma.cc/S6VD-JN6T>] (discussing the ancient history of rape and the paradoxical tendency of cultures to fixate on false allegations despite the commonality of rape).

<sup>106</sup> See *infra* Section II.B.

exception—that is, for cases of white women alleging rape by black men<sup>107</sup>—the criminal justice system has generally treated rape complainants with incredulity.

For much of American history, this distrust was openly baked into the law. Although modern reform efforts have mostly succeeded in abolishing formal rules of disbelief, the intuition behind these rules persists today, coalescing in an expansive enforcement gap. Scrutinizing the justificatory rhetoric underlying traditional legal doctrine enables us to track the migration of credibility discounts from formal legal process to law enforcement. In turn, tracing the origins of contemporary misgivings about rape allegations to repudiated legal structures provides purchase on why (and how) systemic incredulity endures.

### A. *Incredulous Law*

American law has long embodied a stance of overt suspicion toward rape accusers. By examining both the common law and the Model Penal Code, we can disaggregate several related concerns about the woman alleging rape—specifically, her motivation to lie, her comparative fault in the rape, and the *de minimis* nature of her resulting injury. Our legal rules were designed to protect against this lying, inviting, exaggerating complainant—or the paradigmatic rape accuser, as I have described her.<sup>108</sup> Her specter haunts rape law, from corroboration requirements,<sup>109</sup> to prompt outcry rules,<sup>110</sup> to cautionary jury instructions,<sup>111</sup> to substantive definitions of crime and defense.<sup>112</sup>

#### 1. Corroboration Requirements, “Prompt Outcry” Rules, and Cautionary Jury Instructions

To make the crime of rape more difficult to prove, a set of rules required (in various permutations) corroborative evidence of the alleged victim’s

---

<sup>107</sup> The criminal justice system’s longstanding response to this fact pattern was exemplified as follows by the judge in the infamous Scottsboro rape trial:

Where the woman charged to have been raped, as in this case is a white woman there is a very strong presumption under the law that she would not and did not yield voluntarily to intercourse with the defendant, a Negro; and this is true, whatever the station in life the prosecutrix may occupy, whether she be the most despised, ignorant and abandoned woman of the community, or the spotless virgin and daughter of a prominent home of luxury and learning.

DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 297 (1970). *See generally* Jennifer Wriggins, *Rape, Racism, and the Law*, 6 *HARV. WOMEN’S L.J.* 103 (1983).

<sup>108</sup> *See supra* notes 37–40 and accompanying text.

<sup>109</sup> *See infra* notes 115–17 and accompanying text.

<sup>110</sup> *See infra* notes 116–19 and accompanying text.

<sup>111</sup> *See infra* notes 120–21 and accompanying text.

<sup>112</sup> *See infra* notes 122–45 and accompanying text.

account, the alleged victim's "prompt" disclosure of the incident, and jury instructions warning the jury about the danger of wrongly convicting the defendant.<sup>113</sup> The history of these requirements is telling, as it reveals deeply ingrained doubts about the veracity of women alleging rape.<sup>114</sup>

For instance, when New York first enacted a special corroboration requirement in 1886,<sup>115</sup> it did so to shield defendants from "untruthful, dishonest, or vicious" accusers.<sup>116</sup> Other states soon adopted this approach, including Georgia, whose Supreme Court proclaimed that "[w]ithout [a corroboration requirement], every man is in danger of being prosecuted and convicted on the testimony of a base woman in whose testimony there is no truth."<sup>117</sup>

Likewise, the requirement of a "prompt complaint" rested on a presumptive distrust of rape allegations.<sup>118</sup> Writing in 1900, the Utah Supreme Court equated delayed reporting with falsehood:

---

<sup>113</sup> Michelle Anderson has aptly described these doctrines as "adjacent bands in a spectrum of unique legal rules that made the crime of rape harder to prove than other felonies." Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 953 (2004). The trio of rules have often been applied in relation to one another.

For example, in many jurisdictions, if a woman failed to complain promptly, she would be forgiven if she had evidence corroborating the rape. If a woman suffered a rape that produced no corroborative evidence, a prompt complaint itself might serve as the necessary legal corroboration. A judge was frequently required to issue cautionary instructions in a rape case unless the complainant proffered corroborative evidence of the offense. Thus, in many jurisdictions, prompt complaint and corroboration substituted for one another with cautionary instructions only triggered by a complainant's failure to either promptly complain or offer corroborative evidence of the crime.

*Id.* at 954.

<sup>114</sup> My discussion of this history draws from Michelle Anderson's comprehensive account. *See id.*

<sup>115</sup> *Id.* at 956. The corroboration requirement barred a conviction based exclusively on the testimony of a rape complainant by considering the case against the defendant legally insufficient without additional evidence of guilt. This requirement rested on the notion that a rape victim should be able to "display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress." HENRICI DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGILAE 483 (Sir Travers Twiss trans., 1879) (quoted in Anderson, *supra* note 113, at 947).

<sup>116</sup> Anderson, *supra* note 113, at 957 (quoting *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (N.Y. App. Div. 1939), *rev'd on other grounds*, 29 N.E.2d 185 (1940)). According to the language of the statute: "No conviction can be had for abduction, compulsory marriage, rape, or defilement upon the testimony of the female abducted, compelled or defiled, unsupported by other evidence." *See* Anderson, *supra* note 113, at 956-57.

<sup>117</sup> Anderson, *supra* note 113, at 957 (quoting *Davis v. States*, 48 S.E. 180, 181-82 (Ga. 1904) (alteration in the original)).

<sup>118</sup> This notion has deep roots in the Anglo-American tradition. As Henry de Bracton, a prominent thirteenth century English legal scholar, suggested,

When therefore a virgin has been so deflowered and overpowered . . . forthwith and whilst the act is fresh, she ought repair with hue and cry to the neighbouring vills, and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the

The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to a relative or friend who naturally has the deepest interest in her welfare; and the absence of such disclosure tends to discredit her as a witness.<sup>119</sup>

Perhaps the starkest expression of the law's orientation toward rape accusers were jury instructions explicitly warning the jury to use special suspicion in evaluating the testimony of a rape complainant. Based on the seventeenth-century ruminations of Lord Hale,<sup>120</sup> cautionary instructions sought to ensure jurors would remain particularly distrustful of the complainant's version of events. In the parlance of one typical pattern instruction, since a rape charge "is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent . . . the law requires that you examine the testimony of the female person named in the information with caution."<sup>121</sup>

The Model Penal Code (MPC), which includes a corroboration requirement, a rigid prompt outcry rule, and cautionary jury instructions, incorporates intense mistrust of rape complainants.<sup>122</sup> Familiar rationales underlie the MPC's skeptical stance toward allegations of sexual assault. In order to defend the exceptional requirement of corroboration,<sup>123</sup> the

---

hundred and to the serjeant of the lord the king, and to the coroners and to the viscount and make her appeal at the first county court . . . ."

DE BRACON, *supra* note 115, at 483 (quoted in Anderson, *supra* note 113, at 947).

<sup>119</sup> Anderson, *supra* note 113, at 955 (quoting *State v. Neel*, 60 P. 510, 511 (Utah 1900)). Anderson added that "[t]his sentiment remained prevalent until the early 1980s." *Id.*

<sup>120</sup> For instance, Hale warned that if a rape accuser

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

SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 633 (1847). Hale also emphasized that a woman's failure to promptly report the rape "always carries a presumption of a malicious prosecution." *Id.* at 632.

<sup>121</sup> *People v. Rincon-Pineda*, 538 P.2d 247, 253 (Cal. 1975); *see also* *Hardin v. State*, 840 A.2d 1217, 1223-24 (Del. 2003) (similarly criticizing Lord Hale's jury instruction).

<sup>122</sup> The Model Penal Code was approved in 1962; revisions to the provisions governing sexual assault began in 2012 for the first time. *Project to Revise MPC Article 213 on Sexual Offenses Begins*, ALI REPORTER 1 (Summer 2012), [https://www.ali.org/media/filer\\_public/2e/3c/2e3c57ef-ddfe-4efa-acce-50d7594a39e9/2012-summer.pdf](https://www.ali.org/media/filer_public/2e/3c/2e3c57ef-ddfe-4efa-acce-50d7594a39e9/2012-summer.pdf) [<https://perma.cc/QC6M-KDNA>].

<sup>123</sup> *See* Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423, 454 (2015). As Stein explains,

our evidence law allows fact finders to convict a person of murder and many other serious crimes on the testimony of a single witness. All the fact finders need to do is

commentary cites “the difficulty of defending against false accusation of a sexual offense,” while explaining that “[t]he corroboration requirement is an attempt to skew resolution of [word-on-word] disputes in favor of the defendant.”<sup>124</sup> To justify a hard prompt outcry rule,<sup>125</sup> the commentary references a “vindictive complainant,” along with the “dangers of blackmail or psychopathy of the complainant.”<sup>126</sup> And to rationalize an instruction that tells jurors “to evaluate the testimony of a victim . . . with special care,” the MPC relies on “the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.”<sup>127</sup>

The MPC provisions on sexual assault are currently undergoing long overdue revision.<sup>128</sup> And most (though not all) jurisdictions have already

---

believe that witness “beyond a reasonable doubt.” The “one witness” rule is the norm, while the corroboration requirements are properly viewed as exceptions to the norm.

*Id.*

Corroboration requirements for rape prosecutions can thus be juxtaposed with a stance of credulity towards witnesses in other criminal contexts, which reflects its own set of assumptions. For an argument that jurors are too willing to convict in cases involving uncorroborated eyewitness identification testimony, see Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1523-42 (2008).

<sup>124</sup> MODEL PENAL CODE § 213.6 cmt. at 428 (AM. LAW INST., Official Draft and Revised Comments 1980).

<sup>125</sup> The rule precluded a prosecution unless the victim reported the crime to authorities within three months of the offense. MODEL PENAL CODE § 213.6(4) (AM. LAW INST., Official Draft and Revised Comments 1980).

<sup>126</sup> MODEL PENAL CODE § 207.4 cmt. at 265 (AM. LAW INST., Proposed Official Draft 1962). In 1980, the Model Penal Code’s commentary modified its defense of the prompt outcry requirement:

The requirement of prompt complaint springs in part from a fear that unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant. Barring prosecution if no report is made within a reasonable time is one way of guarding against such fabrication. Perhaps more importantly, the provision limits the opportunity for blackmailing another by threatening to bring a criminal charge of sexual aggression.

MODEL PENAL CODE § 213.6 cmt. at 421 (AM. LAW INST., Official Draft and Revised Comments 1980).

<sup>127</sup> MODEL PENAL CODE § 213.6(5) (AM. LAW INST., Official Draft and Revised Comments 1980) (internal quotation marks omitted).

<sup>128</sup> See *supra* note 122.

abolished formal rules of disbelief.<sup>129</sup> Even so, as we will see,<sup>130</sup> these same requirements are now imposed informally, yielding credibility discounts that are in many respects the functional equivalent of their legal predecessors.

## 2. Substantive Definitions of Crime and Defense

About two-thirds of the states still rely on the concept of force in criminalizing rape.<sup>131</sup> Many jurisdictions expressly define rape as requiring physical force,<sup>132</sup> a term that, for purposes of rape law, generally means more force than the force inherent in the act of intercourse.<sup>133</sup> Other states define rape as sex without consent but include force as a component of non-consent.<sup>134</sup> In short, across the majority of states and in various guises, the force requirement endures.

---

<sup>129</sup> Early drafts of the proposed MPC revisions contain a useful overview of the state of the law on prompt complaint, corroboration, and cautionary instructions. AM. LAW INST., MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSE, PRELIMINARY DRAFT NO. 5 184-89 (Sept. 8, 2015). According to this summary, South Carolina is the only jurisdiction that retains a prompt outcry requirement, as applied exclusively to marital rape; Texas maintains a modified rule that is triggered by uncorroborated testimony. *Id.* at 185. Thirteen states continue to require corroboration, although these rules operate only in cases where “the testimony of the complaining witness is itself inherently contradictory or patently incredible, or where the complaining witness has recanted.” *Id.* at 186. Six states—Arkansas, Hawaii, Kentucky, Nebraska, Oklahoma, and West Virginia—and the federal courts allow the trial court to issue a cautionary instruction, in some cases only when the complainant’s testimony is uncorroborated. *Id.* at 187 n.31.

<sup>130</sup> See *infra* Section II.B.

<sup>131</sup> John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1084-86 (2011).

<sup>132</sup> For states that include force in their statutory offense definition, see ALA. CODE § 13A-6-61 (2014); ARK. CODE ANN. § 5-14-103 (2013); CAL. PENAL CODE § 261 (West 2013); CONN. GEN. STAT. § 53a-70 (2014); D.C. CODE § 22-3002 (2013); FLA. STAT. § 794.011 (2002); GA. CODE ANN. § 16-6-1 (2011); HAW. REV. STAT. § 707-730 (2008) (using “strong compulsion” rather than force specifically); 720 ILL. COMP. STAT. 5/11-1.20 (2011); IND. CODE § 35-42-4-1 (2013); IOWA CODE § 709.1 (2014); KAN. STAT. ANN. § 21-5503 (2013); KY. REV. STAT. ANN. § 510.040 (West 2013); LA. STAT. ANN. § 42:1 (2013); ME. REV. STAT. ANN. tit. 17-a, § 253 (2016); MD. CODE ANN. CRIM. LAW § 3-303 (West 2009); MASS. GEN. LAWS ch. 265, § 22 (2014); MICH. COMP. LAWS § 750.520b (2014); MO. REV. STAT. § 566.030 (2017); N.M. STAT. ANN. § 30-9-11 (2009); N.Y. PENAL LAW § 130.35 (McKinney 2014); N.C. GEN. STAT. § 14-27.2 (2013); OHIO REV. CODE ANN. § 2907.02 (West 2008); OKLA. STAT. tit. 21, § 1114 (2013); OR. REV. STAT. § 163.375 (2014); 18 PA. CONS. STAT. § 3121 (2014); 11 R.I. GEN. LAWS § 11-37-2 (2013); S.C. CODE ANN. § 16-3-652 (2010); S.D. CODIFIED LAWS § 22-22-1 (2013); VA. CODE ANN. § 18.2-61 (2013); WASH. REV. CODE § 9A.44.040 (2013); W. VA. CODE § 61-8B-3 (2006); WIS. STAT. § 940.225 (2013); WYO. STAT. ANN. § 6-2-302 (2013).

<sup>133</sup> See, e.g., *State v. Jones*, 299 P.3d 219, 228 (Idaho 2013) (defining “extrinsic force” as “anything beyond that which is inherent or incidental to the sexual act itself”).

<sup>134</sup> For states with consent definitions that include force, see ALASKA STAT. § 11.41.410 (2013); ALASKA STAT. § 11.41.470(8) (2013); ARIZ. REV. STAT. ANN. § 13-1406 (2013); ARIZ. REV. STAT. ANN. § 13-1401(7) (2015); DEL. CODE ANN. tit. 11 § 773 (2010); DEL. CODE ANN. tit. 11 § 761 (2015); MONT. CODE ANN. § 45-5-502 (2012); MONT. CODE ANN. § 45-5-501(1) (2012).

This requirement has been heavily critiqued<sup>135</sup> and my purpose here is not to retread well-covered ground.<sup>136</sup> Rather, I wish simply to observe that, among the many functions performed by a force standard,<sup>137</sup> one is to serve as the ultimate corroboration requirement by insisting, as a matter of law, that an accuser's testimony regarding her lack of consent be bolstered by proof beyond a reasonable doubt of a separate, more "objective" element.<sup>138</sup> On this view, the traditional (and still prevalent) definition of rape embodies grave misgivings about a rape complainant's say-so.

This perspective finds resonance in the MPC, which defines rape by reference to force<sup>139</sup> and justifies this treatment by tacitly invoking the paradigmatic accuser—her lying, inviting and exaggerating.<sup>140</sup> As the commentary explains,

Often the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say "no." Her confusion at the time of the act may later resolve into non-consent. Some have expressed the fear that a woman who subconsciously wanted to have sexual intercourse will later feel guilty and "cry rape."<sup>141</sup>

The same set of concerns lies behind the MPC's recognition of a "Voluntary Social Companion" defense to rape.<sup>142</sup> The defense codifies the view that, as compared to stranger rape or "real rape,"<sup>143</sup> non-stranger rape is less violative and more (problematically) dependent on "subjective" forms of

<sup>135</sup> For decades, commentators have argued that rape should be defined by reference to an absence of consent. Indeed, "[v]irtually all modern rape scholars want to modify or abolish the force requirement as an element of rape." David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000).

<sup>136</sup> For a seminal critique, see Estrich, *supra* note 10. For a taxonomy of cases where non-consensual intercourse can be accomplished without sufficient force to satisfy the traditional definition of rape, see generally Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 16-38 (2015).

<sup>137</sup> Cf. Estrich, *supra* note 10, at 1098-99 ("The requirement that sexual intercourse be accompanied by force or threat of force to constitute rape provides a man with some protection against mistakes to consent.").

<sup>138</sup> See Anderson, *supra* note 113, at 948 (discussing the obligation of rape complainant to "display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress" (internal quotation marks omitted)).

<sup>139</sup> This is likely changing. See *supra* note 122.

<sup>140</sup> See *supra* notes 37-40 and accompanying text (elaborating on this construct).

<sup>141</sup> MODEL PENAL CODE § 213.1 cmt. at 302-03 (AM. LAW INST., Official Draft and Revised Comments 1980).

<sup>142</sup> The defense, which reduces Rape in the First Degree to Rape in the Second Degree, is unavailable where "the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties." MODEL PENAL CODE § 213.1(1). The Model Penal Code provisions on sexual assault, including § 213.1, are currently under revision. See *supra* note 122.

<sup>143</sup> See *supra* note 10.

evidence—namely, the testimony of an accuser. The commentary describes the rationale for the defense as follows:

First, when previous sexual liberties have been allowed and the persons involved are voluntary companions on the occasion of the offense, the gravity of the wrong is arguably less severe. Second, the fact that the actor is a stranger to the victim, or the fact that sexual liberties have not been permitted in the past, is strong objective corroboration of the fact that the sexual act was accomplished by imposition. The criterion is thus consistent with the efforts of the Model Code to avoid making the imposition–consent inquiry entirely on a subjective basis and to seek objective indicia to support the necessary finding of compulsion.<sup>144</sup>

This commentary reflects an understanding of the non-stranger rape accuser as not only less-than violated, but also less-than credible.

In recent decades, progressive law reform has undone most rules that formally discount the credibility of rape accusers,<sup>145</sup> and this trajectory continues.<sup>146</sup> Yet, to this day, the logic of the forcible compulsion standard and of the Voluntary Social Companion defense influence how rape law is enforced. And the basic assumptions underlying the corroboration requirement, the “prompt outcry” rule, and cautionary jury instructions<sup>147</sup> persist in new guises.

We turn now to current incarnations of the credibility discount.

### B. *Incredulous Law Enforcement*

In the field of law enforcement—where vast discretion is afforded to those charged with the investigation and prosecution of crime—wide-ranging impulses to downgrade the credibility of rape accusers find a capacious outlet. Informal practices quietly sustain a regime that disadvantages those seeking criminal justice redress for sexual violence, and serve as a substitute for the formally disavowed legal rules crafted to achieve this same end.

In the policing arena, we can discern the appearance of the paradigmatic accuser, who—either in the alternative or in combination—invited the alleged rape, was not harmed by it, and did not in fact experience it.<sup>148</sup> Again, disbelief stems from three possibilities: the complainant is malicious or vindictive; she

---

<sup>144</sup> MODEL PENAL CODE § 213.1 cmt. at 307 (AM. LAW INST., Official Draft and Revised Comments 1980).

<sup>145</sup> No jurisdiction retains the Voluntary Social Companion defense.

<sup>146</sup> See *supra* note 12 and accompanying text.

<sup>147</sup> See *supra* notes 120–24 and accompanying text.

<sup>148</sup> See *supra* notes 37–40 (introducing the paradigmatic rape accuser).

is regretful about consenting to sexual activity with the accused; or she is incapable of assessing whether she consented due to intoxication.<sup>149</sup>

Although false reports of rape are uncommon,<sup>150</sup> law enforcement officers often default to incredulity when women allege sexual assault, resulting in curtailed investigations and infrequent arrests. Prosecutorial charging practices are less easily tracked, but evidence shows that credibility discounts are also imposed at this stage of the criminal process.<sup>151</sup> Indeed the effects of systemic disbelief extend beyond the estimations of individual prosecutors: because prosecutors consider the likely reaction of jurors when evaluating whether to proceed with a case, personal credibility reductions are compounded by a calculus about the layperson's biases. I will refer to this dynamic as anticipatory discounting.

But first, we examine practices of credibility discounting in the policing of sexual assault.

### 1. Police

A majority of sexual assault victims preempt the deployment of credibility discounts by declining to relate the crime's occurrence to law enforcement officials.<sup>152</sup> According to recent Justice Department estimates, the population most vulnerable to sexual assault—females ages 18-24<sup>153</sup>—report to police at rates of only twenty percent for college students and thirty-two percent for non-college students.<sup>154</sup> Women of color, both on and off campus, may be even less likely to report sexual assault than their white

---

<sup>149</sup> *Id.*

<sup>150</sup> *See supra* notes 86–101 and accompanying text.

<sup>151</sup> *See infra* Subsection II.B.2.

<sup>152</sup> *See* PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (Jan. 2006) (finding that, among rape victims, 19.1 percent of adult women and 12.9 percent of adult men reported the crime to police); *see also* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1222 (1997) (suggesting the probability that “unreported rapes are, disproportionately, acquaintance rapes”); Baker, *supra* note 51.

<sup>153</sup> *See* SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T JUSTICE BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 1, 5 (Dec. 2014) (“For the period 1995–2013, females ages 18 to 24 had the highest rate of rape and sexual assault victimizations compared to females in all other age groups. . . . College-age male victims accounted for 17% of rape and sexual assault victimizations against students and 4% against nonstudents.”).

<sup>154</sup> *Id.* at 9.

counterparts.<sup>155</sup> One reason is the predictability of a non-response.<sup>156</sup> Among non-students, nearly one in five surveyed did not report because “police would not or could not do anything to help.”<sup>157</sup> Rape survivors are mostly foregoing the criminal justice system in anticipation of how their case will be (mis)handled.<sup>158</sup>

The widespread perception that police are unlikely to pursue allegations of non-stranger rape is often accurate.<sup>159</sup> Little has changed since a 1997 survey demonstrated the unfounding, or deeming unsubstantiated, of rape

<sup>155</sup> See Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It*, CHRON. HIGHER EDUC. (June 18, 2015), <http://www.chronicle.com/article/Another-Challenge-on-Campus/230977> [<https://perma.cc/GE9D-GL49>] (describing the reporting gap between white college women and college women of color and positing that the “layers of privilege” required to pursue a complaint through the college administrative process are often less available to minority students). Off campus, commentator Hannah Giorgis has posited that an “impossible hierarchy of acceptable victimhood” means that “black women who walk willingly into the rooms of men they call ‘brother’ are considered undeserving of protection from any violence that happens therein.” Hannah Giorgis, *Many Women of Color Don’t Go to the Police After Sexual Assault for a Reason*, GUARDIAN (Mar. 25, 2015), <http://www.theguardian.com/commentisfree/2015/mar/25/women-of-color-police-sexual-assault-racist-criminal-justice> [<https://perma.cc/GPL5-SC2Y>]. Giorgis continues:

If we report our assaults to police, we risk being retraumatized . . . by the violence of the criminal justice system itself, which treats rape victims like suspects. Worse yet, the police themselves commit assault with impunity; often, they target black women in particular, knowing our existence at the intersections of racism and misogyny make crimes against us far less likely to be investigated. To be “a good rape victim” is to immediately report your assault to the police (even knowing will likely never see “justice”), but to be a good *black person* is to avoid the police entirely because your life quite literally depends on it. The tightrope walk is impossible.

*Id.*; see also Jennifer C. Nash, *Black Women and Rape: A Review of the Literature*, (Brandeis Univ. Feminist Sexual Ethics Project, June 2009), <https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/nash2009.pdf> [<https://perma.cc/JN7G-5TKJ>] (surveying literature on black women and rape, including studies finding that black women are less likely than white women to report rape).

<sup>156</sup> Sinozich & Langton, *supra* note 153, at 9.

<sup>157</sup> *Id.* The corresponding figure for students is nine percent. *Id.* Apart from their perceptions of the likely police response, victims’ *own* internalization of the public/private divide is reflected in the category “personal matter,” which was given as a reason for non-reporting by twenty-six percent of students and twenty-three percent of non-students. *Id.*

<sup>158</sup> *Id.*; see also Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS NEWSHOUR (Dec. 11, 2014), <http://www.pbs.org/newshour/rundown/four-five-acts-campus-sexual-assault-go-unreported-police/> [<https://perma.cc/L8X9-ZAWR>] (quoting a sexual assault victims’ rights lawyer as explaining the massive underreporting of campus rape as significantly attributable to the fact that victims “know in our society that the only rapes that are taken seriously are those committed by strangers and are significantly violent”).

<sup>159</sup> See generally Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145 (2012) (documenting the attrition of rape allegations as cases progress through the criminal justice system); see also Tjaden & Thoennes, *supra* note 152, at 33 (“[A]mong all women who were raped since age 18, only 7.8 percent said their rapist was criminally prosecuted, 3.3 percent said their rapist was convicted of a crime, and a mere 2.2 percent said their rapist was incarcerated.”).

allegations at disproportionately high rates<sup>160</sup> while detailing the salient operation of police biases, especially in cases involving acquaintances.<sup>161</sup> Recent empirical research on policing consistently establishes the disparate treatment of rape,<sup>162</sup> and failures to investigate sexual assault cases have been well documented.<sup>163</sup> Consistent with this nation-wide data,<sup>164</sup> police have systematically mishandled rape cases<sup>165</sup> in jurisdictions including Los

---

<sup>160</sup> See Bryden & Lengnick, *supra* note 152, at 1230 (“As with all crimes, the police decide whether a reported rape actually occurred, and attempt to determine who committed it. If they want the case to go forward, they ‘found’ the complaint and transmit the file to the prosecutor’s office.”); *id.* at 1233 (noting that “the unfounding rate for rape is roughly four times than for other major crimes”).

To make an arrest or “found” a complaint, the police merely require probable cause, a far lower evidentiary burden than the standard of proof of guilt beyond a reasonable doubt that the prosecutor must surmount at trial to convict. As the Supreme Court has explained, “[t]he substance of all the definitions’ of probable cause ‘is a reasonable ground for belief of guilt.’ And this ‘means less than evidence which would justify condemnation’ or conviction.” *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (citation omitted).

<sup>161</sup> See Bryden & Lengnick, *supra* note 152, at 1243 (“[M]ost observers agree that founding decisions in acquaintance rape case are strongly affected by the purported victim’s contributory negligence, and by her perceived immorality . . . . If police bias does indeed distort founding decisions, this appears to be the type of case in which most of the distortion occurs.”); see also SPOHN & TELLIS, *supra* note 87, iv (analyzing rapes reported to the Los Angeles Police Department from 2005–2009 and finding that the existence of a relationship between the victim and the suspect influenced case processing); *supra* notes 192–197 and accompanying text. David Bryden has also explained:

Whatever their other disputes, rape-law scholars agree about several fundamental realities. They agree that, for practical purposes, forcible rape is really two crimes. The consensus is that the criminal justice system performs at least reasonably well in dealing with ‘aggravated’ rapes, defined as rapes by strangers, or men with weapons, or where the victim suffers ulterior injuries. With equal unanimity, scholars agree that the justice system often has performed poorly in cases involving rapes by unarmed acquaintances . . . and in which the victim suffers no additional injuries. Victims are less likely to report these acquaintance rapes (or even to recognize that they are rapes); if a victim does report it, the police are less likely to believe her; prosecutors are less likely to file charges; juries are less likely to convict; and any decision by an appellate court is more likely to be controversial.

*Supra* note 135, at 317–18 (citations omitted).

<sup>162</sup> See *supra* note 161. An ongoing study funded by the National Institute of Justice is further exploring factors influencing the attrition of rape cases. Sandra Seitz, *\$1.2M Funds Study on Sexual Assault Case Processing*, U. MASS. LOWELL (Mar. 29, 2013), <http://www.uml.edu/News/stories/2013/SexualAssaultGrant.aspx> [https://perma.cc/H2NG-F3F3].

<sup>163</sup> See *supra* notes 160–62 and accompanying text.

<sup>164</sup> See also *supra* note 80.

<sup>165</sup> For a helpful overview, see *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 55 (Sept. 14, 2010) (statement of Carol E. Tracy, Executive Director, Women’s Law Project).

Angeles,<sup>166</sup> Baltimore,<sup>167</sup> St. Louis,<sup>168</sup> New Orleans,<sup>169</sup> New York,<sup>170</sup> Salt Lake County,<sup>171</sup> Philadelphia,<sup>172</sup> and Missoula, Montana.<sup>173</sup> While the poor treatment of rape cases by police is generally rampant,<sup>174</sup> police responses to sexual assault are particularly defective in cases involving women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers.<sup>175</sup> Officers'

---

<sup>166</sup> See SPOHN & TELLIS, *supra* note 87.

<sup>167</sup> See Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALT. SUN (June 27, 2010), <http://www.baltimoresun.com/news/bs-md-ci-rapes-20100519-story.html> [https://perma.cc/82GZ-Z3CX] (reporting that each year, more than thirty percent of cases investigated are “deemed unfounded,” which is five times the national average, and “in 4 of 10 emergency calls to police involving allegations of rape, officers conclude that there is no need for a further review, so the case never makes it to detectives”).

<sup>168</sup> See Jeremy Kohler, *What Rape?*, DART CENTER (Mar. 3, 2006), <https://dartcenter.org/content/what-rape?section=2> [https://perma.cc/BT8N-S6NC] (reporting on the police practice of diverting rape complaints from formal processing channels).

<sup>169</sup> See Laura Maggi, *NOPD Downgrading of Rape Reports Raises Questions*, TIMES-PICAYUNE (July 11, 2009), [http://www.nola.com/news/index.ssf/2009/07/nopd\\_downgrading\\_of\\_rape\\_repor.html](http://www.nola.com/news/index.ssf/2009/07/nopd_downgrading_of_rape_repor.html) [https://perma.cc/A594-HCX7] (reporting that most reported rapes were classified as noncriminal).

<sup>170</sup> See John Eligon, *Panel Seeks More Police Training on Sex Crimes*, N.Y. TIMES (June 3, 2010), <http://www.nytimes.com/2010/06/03/nyregion/03rape.html> [https://perma.cc/6B38-MY7E] (reporting that the number of forcible rape complaints deemed unfounded had dramatically increased and that the category of sex crimes classified as misdemeanors had grown by six percent).

<sup>171</sup> See Erin Alberty & Janelle Stecklein, *Study: Most Cases in Salt Lake County Never Prosecuted*, SALT LAKE TRIB. (Jan. 7, 2014), <http://archive.sltrib.com/story.php?ref=/sltrib/news/57323282-78/cases-rape-police-victim.html.csp> [https://perma.cc/6QR4-X8L6] (reporting on an audit of 270 rape cases in Salt Lake County which showed that six percent were prosecuted).

<sup>172</sup> See Mark Fazlollah et al., *Women Victimized Twice in Police Game of Numbers*, PHILA. INQUIRER (Oct. 17, 1999), <http://inquirer.philly.com/packages/crime/html/sch101799.asp> [https://perma.cc/F57K-WBNS] (reporting that hundreds of Philadelphia rape cases per year were “mothballed” by being administratively categorized as an “investigation of person,” and that such cases were not reflected in crime statistics).

<sup>173</sup> See Letter from Thomas E. Perez, Assistant Attorney Gen. for Civil Rights & Michael W. Colter, U.S. Attorney for the Dist. of Mont., to John Engen, Mayor, Missoula 1 (May 15, 2013), [http://www.justice.gov/crt/about/spl/documents/missoulapdfind\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf) [https://perma.cc/US59-4VSQ] (finding that “there are significant deficiencies in [the Missoula Police Department]’s investigations of sexual assault”).

<sup>174</sup> Regarding campus sexual assault allegations in particular, one study of six colleges in the midwest found that 171 reports to police resulted in only twelve arrests. Todd Lighty et al., *Few Arrests, Convictions in Campus Sex Assault Cases*, CHI. TRIB. (June 16, 2011), [http://articles.chicagotribune.com/2011-06-16/news/ct-met-campus-sexual-assaults-0617-20110616\\_1\\_convictions-arrests-assault-cases](http://articles.chicagotribune.com/2011-06-16/news/ct-met-campus-sexual-assaults-0617-20110616_1_convictions-arrests-assault-cases) [https://perma.cc/5V2X-JYE5].

<sup>175</sup> See generally AM. CIV. LIBERTIES UNION, *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING* (Oct. 2015), <https://www.aclu.org/report/sexual-assault-domestic-violence-and-policing> [https://perma.cc/27YX-52MG]. The nationwide survey of more than 900 advocates, service providers, and attorneys confirmed “the entrenched nature of long-recognized, gender-driven biases by police against domestic violence or sexual assault claims.” *Id.* at 40. The survey also underscored the problem of police bias against “survivors of color, and against survivors who are poor, Native American, immigrant, or LGBTQ.” *Id.*; see also *infra* note 190–207 (describing similar findings of the Detroit Sexual Assault Kit Action Research Project). An intersectional approach to equal protection requires accounting for the multitudinous ways that bias confronts victims. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and*

premature closings of rape investigations (frequently at the initial stages),<sup>176</sup> along with “unfounding” allegations at disproportionately high rates,<sup>177</sup> are byproducts of credibility discounting.<sup>178</sup>

On occasion, law enforcement officers make explicit their priors regarding the probability that a rape allegation is false. For instance, in March 2016, explaining his resistance to a law that would require the testing of sexual assault kits, an Idaho sheriff asserted that “the majority of our rapes that are called in, are actually consensual sex.”<sup>179</sup> Similarly, in late 2015, a police chief at a Georgia college noted that “[m]ost of these sexual assaults are women waking up the next morning with a guilt complex. That ain’t rape, that’s being stupid. When the dust settles, it was all consensual.”<sup>180</sup>

While it is rather unusual for law enforcement officers to publicly acknowledge and endeavor to legitimate systemic disbelief, studies indicate that skepticism of rape accusations is endemic.<sup>181</sup> There is also abundant anecdotal evidence that police officers are discounting complainant credibility when responding to allegations of rape.<sup>182</sup> Consider, as just one example, the

*Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-44 (1991); see also Nash, *supra* note 155, at 1 (summarizing research that underscored differences between experiences of sexual assault for black and white women, specifically: “black women are less likely to disclose rape, prosecutors are less likely to pursue criminal charges against an assailant when a black woman is the survivor, and jurors are more likely to believe that a white survivor’s assailant is guilty than a black woman’s assailant”).

<sup>176</sup> See *supra* notes 48–49 and accompanying text (describing the problem of short-circuited investigations).

<sup>177</sup> See *supra* notes 160–78 and accompanying text.

<sup>178</sup> Credibility discounting is an especially common response to the kinds of allegations that are, in reality, most apt to be true. See Dobie, *supra* note 49 (“In a tragic twist, the most likely sexual-assault situations are often the ones most doubted or discounted by law enforcement—assaults involving drugs or alcohol, or those whose victims know their assailant or delay reporting the crime.”).

<sup>179</sup> Patricia Bowen, *Bill Introducing Minimal Standard for Rape Kits Should Be Passed*, ARBITER ONLINE (March 1, 2016), [https://issuu.com/thearbiter/docs/3-1-16\\_online](https://issuu.com/thearbiter/docs/3-1-16_online) [<https://perma.cc/3AQ3-9E2P>].

<sup>180</sup> Shannon Wiggins, *ABAC Police Chief: Most Sexual Assaults ‘Ain’t Rape’*, WALB NEWS (Nov. 11, 2015), <http://www.walb.com/story/30496970/abac-police-chief-most-sexual-assaults-aint-rape> [<https://perma.cc/NH5L-PHU2>]. The police chief added, “[i]t doesn’t happen here. It doesn’t show up here.” *Id.* For a similar orientation toward campus sexual assault allegations in particular, see Erica L. Green & Sheryl Gay Stoylberg, *Campus Rape Policies Get New Look as the Accused Get DeVos’s Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html> [<https://perma.cc/>] (reporting on comments by the head of the Department of Education’s Office for Civil Rights that “the accusations—90 percent of them—fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right’”).

<sup>181</sup> See *supra* notes 78–80.

<sup>182</sup> According to a recent synopsis of the social science, “[o]fficers tend to overestimate the percentage of false reports, reflecting the myth that rape is rare.” Karen Rich & Patrick Seffrin, *Police Interviews of Sexual Assault Reporters: Do Attitudes Matter?*, 27 VIOLENCE & VICTIMS 263, 265 (2012) (citation omitted); see also Baker, *supra* note 51 (“The prospect of false rape claims seems to loom large in police perception.”).

case of Lara McLeod, who in 2011 was arrested for falsely reporting her rape before the charges were ultimately dropped.<sup>183</sup> From the beginning, the detective who first interviewed McLeod appeared to doubt her claims.<sup>184</sup> Later, internal police documents and recordings would “show how grievously the police botched their investigation from start to finish, allowing their beliefs about sexual assault to influence the way they pursued the case.”<sup>185</sup> In the end, with McLeod’s alleged rapist still uncharged, the police chief admitted that the investigation had been “shortcutted” while taking pains to underscore that “women do lie about rape, so it was important for officers not to be too credulous.”<sup>186</sup> The chief added that “[i]t is not uncommon for people to make false, malicious, salacious allegations of sexual assault.”<sup>187</sup>

The typical law enforcement investigation is guilt-presumptive (and potentially problematic for that reason). In sexual assault cases, this presumption is flipped. Investigators start from the proposition that the complainant is lying and act to confirm this belief. As the McLeod case demonstrates, the starting point and path to confirmation in rape cases are mirror images of typical investigations of other types of crime.<sup>188</sup> Credibility discounting by police investigators curtails the collection of corroborative evidence that might otherwise mitigate the effects of downstream credibility discounts.<sup>189</sup> Untested “rape kits” are concrete substantiation of this practice and emblematic of dismissive attitudes toward sexual assault allegations.

---

<sup>183</sup> Baker, *supra* note 51 (critiquing the investigation into McLeod’s allegation by Prince William County, Virginia police).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* Further:

[Investigators] could have sought out the security footage from the 7-Eleven where Lara told him that Joaquin had taken her while they were arguing about whether she’d sleep with him . . . could have reviewed Lara’s medical records or run Joaquin’s name to see if he had ever come to the attention of local authorities before. The police record does not indicate that the detective did any of those things, however.”

*Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Under both circumstances, the steps taken by investigators are selected to advance an early-formed conclusion about the case. *See supra* note 48 (discussing the impact of initial impressions to find support for a particular outcome).

<sup>189</sup> *See, e.g.,* Amanda Hess, *Test Case: You’re Not a Rape Victim Unless Police Say So*, WASH. CITY PAPER (Apr. 9 2010), <http://www.washingtoncitypaper.com/columns/the-sexist/article/13038641/test-case-youre-not-a-rape-victim-unless-police-say> [<https://perma.cc/668M-MXCX>] (“D.C.’s record of unfounded cases doesn’t include all the sexual assault allegations that are dismissed without so much as a report, nevermind an investigation. According to [an] MPD officer . . . ‘probably half’ [of sexual assault allegations] ended in the determination that no police report would be filed.”); *see also infra* notes 222–238 and accompanying text (discussing prosecutorial discounting of complainant credibility).

A 2015 study of the policing of sexual violence in Detroit provides the most thorough examination to date of untested (or “shelved”) rape kits.<sup>190</sup> A rape kit, or forensic sexual assault examination, collects and preserves evidence obtained through an invasive physical examination of the victim, including hair, fibers, semen, saliva, skin cells, and blood.<sup>191</sup> Importantly, the Detroit study offers an in-depth analysis of why police officers fail to test rape kits.<sup>192</sup> What researchers discovered is that cases where suspect identity was not an issue—that is, cases involving non-strangers—were typically not considered worthy of investigation.<sup>193</sup> In hundreds of interviews, police officers indicated that the failure to submit a rape kit for testing was reflective of a decision not to pursue the case. Put differently, the kits were shelved because the allegations had already been disregarded, not because the case was perceived as sufficiently strong even without the kit.<sup>194</sup> As researchers explained:

In many respects, the untested kits were a tangible sign about the dispositions of these cases—the case had been shelved, figuratively; the kit had been

---

190 REBECCA CAMPBELL, ET AL., THE DETROIT SEXUAL ASSAULT KIT ACTION RESEARCH PROJECT, FINAL REPORT (Nov. 9, 2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf> [<https://perma.cc/HU8T-CTZ6>]. The Detroit study, which was funded by the National Institute for Justice, provides the most comprehensive examination of *why* police officers fail to test rape kits. But the study makes clear that the practices described extend far beyond Detroit or any particular jurisdiction. Indeed, evidence is mounting that untested rape kits are a national problem. In 2015, the “most detailed nationwide inventory of untested rape kits . . . found at least 70,000 neglected kits in an open-records campaign covering 1,000-plus police agencies—and counting.” Steve Reilly, *Tens of Thousands of Rape Kits Go Untested Across USA*, USA TODAY (July 16, 2015), <http://www.usatoday.com/story/news/2015/07/16/unttested-rape-kits-evidence-across-usa/29902199/> [<https://perma.cc/83YV-EELN>]. As the report noted, “[d]espite its scope, the agency-by-agency count covers a fraction of the nation’s 18,000 police departments, suggesting the number of untested rape kits reaches into the hundreds of thousands.” *Id.* As a functional matter, a rape kit may be considered “shelved” when the police fail to submit the evidence for testing or when a lab fails to process the evidence.

191 For a description of the kind of evidence contained in a rape kit, see Lynn Hecht Schafran, *Medical Forensic Sexual Assault Examinations: What Are They, and What Can They Tell the Courts?*, JUDGES’ J., Summer 2015, at 16, 17-19.

192 CAMPBELL ET AL., *supra* note 190, at 60-137. Researchers counted over 11,000 sexual assault kits in police custody, of which 1600 were randomly selected for further study of case processing. *Id.* iii, v.

193 *Id.* at 121 (“It appears then that the attitudes and beliefs among crime lab personnel were similar to those of the police in that victims suspected of prostitution, adolescent victims, and victims of non-stranger rape were not deemed credible and/or worthy of investigational and testing resources.”). A major finding of the study was that, among those kits submitted for testing, there was no statistically significant difference in “hit” rates for stranger and non-stranger sexual assaults. *See id.* at 172 (“If the DNA from a [sexual assault kit] matches to other sexual assault offenses . . . the hit reveals a pattern of serial sexual offending.”). Based on the “hit rate” equivalency, researchers concluded, “these data do *not* support prioritization of testing on the basis of victim-offender relationship.” *Id.* at 228.

194 *Id.* at 136-37.

shelved, literally . . . [A]s one police official put it: “The kits [that weren’t] tested were cases that we couldn’t or wouldn’t do anything about.”<sup>195</sup>

Frequently, officers would “disbelieve victims who knew their assailants: police doubted victims’ credibility if they knew or were even minimally acquainted with the assailant.”<sup>196</sup> When asked “how common it was that known associates, friends, and/or partners rape their partners, police acknowledged that it does happen, but, in their belief, not that often.”<sup>197</sup>

Officers’ accounts of why they dismiss rape allegations were remarkably consistent with longstanding conceptions of the paradigmatic rape accuser.<sup>198</sup> A repeatedly expressed concern was that rape accusations are simply “revenge report[s].”<sup>199</sup> For instance, as one officer related, “I don’t have time to deal with . . . wake-up and regret. You did what you did. That’s that. It’s not a crime and don’t take up our time with it.”<sup>200</sup> The regret trope is premised on a notion that consensual sex is often rued in retrospect; this lament is perceived as the impetus for fabricating rape accusations.<sup>201</sup>

Another prevailing sentiment is that, under certain circumstances, sex—with or without consent—is inevitable. According to researchers, many police officers suggested that victims “ought to expect ‘what they get’ if they invite someone over or agree to go somewhere with them.”<sup>202</sup> As one investigator stated, “it might not be right, but it’s what happens, you go over there, what do you think’s gonna happen?”<sup>203</sup> By placing blame on the victim, investigators directly shift responsibility away from the rapist.

---

<sup>195</sup> *Id.* at 105 (emphasis and alteration in original). The notion that the police “wouldn’t do anything” about certain cases was confirmed by data suggesting the operation of “negative beliefs and stereotypes about victims, which adversely affected the quality of the investigation.” *Id.* at 109; *see also id.* at 101 (reporting one interviewee’s assessment that “this is a crime that affects women, and in this city, that means Black women, poor Black women . . . there’s a good chunk of the explanation [for why kits aren’t submitted] right there.”).

<sup>196</sup> *Id.* at 115. Other specific attitudes that “appear to have negatively impacted case investigations (and ultimately [sexual assault kit] submissions” were that victims were engaged in prostitution/sex work, and that adolescent victims were claiming rape to “cover up for ‘bad’ behavior.” *Id.* at 109, 113.

To analyze the influence of police attitudes toward sexual assault on case processing, the study utilized investigator reports “to illustrate how these beliefs appear to be enacted in practice.” *Id.* at 118. While “acknowledg[ing] that police reports do not tell the full story of an investigation,” researchers underscored that “what *was* expressed, clearly and frequently, in the reports we reviewed was a widespread disbelief of victims, particularly those who might have been involved in sex work, those who were adolescents, and those who knew their offenders.” *Id.*

<sup>197</sup> *Id.* at 115.

<sup>198</sup> *See supra* notes 148–50 and accompanying text.

<sup>199</sup> CAMPBELL ET AL., *supra* note 190, at 115.

<sup>200</sup> *Id.*

<sup>201</sup> *See supra* note 105 (noting the improbability of revenge as motivation for a false report).

<sup>202</sup> CAMPBELL ET AL., *supra* note 190, at 116.

<sup>203</sup> *Id.*

Related to this blaming tactic is an urge to discount the harm of non-stranger rape. In interviews, this impulse was often cloaked by reference to the difficulties of disproving a defense of consent.<sup>204</sup> But in actuality, investigators were deciding that the investment of time and effort in successfully closing a case was not worth the payoff.<sup>205</sup> This implicit trivializing of acquaintance rape appears grounded in an intuition that rape within a relationship (or acquaintanceship) does not cause serious injury, likely because consent as a dividing line between sex and rape is not seen as all that significant.<sup>206</sup> Remark on the “he-said, she-said” nature of non-stranger cases<sup>207</sup> is thus readily deployed to justify police refusal to investigate allegations that—even if provable—are deemed insufficiently serious to warrant the necessary expenditure of law enforcement resources.<sup>208</sup>

## 2. Prosecutors

Even when police “found” a rape complaint, prosecutors often choose not to pursue the case. To understand why prosecutors charge only a fraction of the sexual assault cases referred to them<sup>209</sup> and how credibility discounts function at this stage of the process, we begin by considering the discretion generally afforded prosecutors.

---

<sup>204</sup> This concern is in tension with the low standard of probable cause. *See supra* note 160 (defining the standard).

<sup>205</sup> *See* CAMPBELL ET AL., *supra* note 190, at 115 (finding that “police expressed frustration about these kinds of cases because the accused perpetrators often claim that the incident was consensual, which law enforcement felt was difficult to prove or disprove”). When investigators were asked why lack of consent was “impossible” to prove, one clarified that “they can establish the elements of the crime, including lack of consent, but that it is often time-consuming to do so and time to invest in such cases is often limited.” *Id.*

<sup>206</sup> *See supra* notes 131–145 (describing the force requirement). *See generally* Tuerkheimer, *supra* note 136 (critiquing “criminal law’s consent problem”).

<sup>207</sup> *But see* CAMPBELL ET AL., *supra* note 190, at 181 (noting that where the testing of previously shelved rape kits resulted in “hits” in non-stranger cases, “it became clear that the assailant had committed previous rapes,” changing things from “a ‘he-said, she-said’ case to a ‘he-said, she-said, she-said’ case”).

<sup>208</sup> One police investigator described how non-stranger rape cases are approached as follows: “if this [is] boyfriend-girlfriend stuff, then that’s not my business and I tell them that.” *Id.* at 116.

<sup>209</sup> *See, e.g.,* Cassia Spohn, Dawn Beichner, & Erika Davis-Frenzel, *Prosecutorial Justification for Sexual Assault Case Rejection: Guarding the “Gateway to Justice”*, 48 SOC. PROBS. 206, 213 (2001) (finding that prosecutors in the jurisdiction studied rejected over forty percent of cases at the initial screening stage, and in just over eleven percent of cases, charges were filed but later dismissed, meaning that less than half of the cases received by the office were fully prosecuted).

Prosecutors make several key determinations,<sup>210</sup> chief among them whether to charge a defendant with a crime.<sup>211</sup> The various rules that apply to prosecutorial charging reference fairly low thresholds of evidence,<sup>212</sup> including probable cause<sup>213</sup> and evidence sufficient to support a finding of guilt.<sup>214</sup> In practice, however, prosecutors generally impose far more stringent standards on the decision to proceed with charges,<sup>215</sup> including the belief that the case would likely result in a conviction at trial.<sup>216</sup>

The “convictability standard,” as it is known, requires prosecutors to consider, not just whether jurors could convict based on the admissible evidence (the sufficiency standard), but whether jurors would probably do

<sup>210</sup> See generally Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507 (1976); Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976).

<sup>211</sup> See Spohn et al., *supra* note 209, at 206 (“None of the discretionary decisions made by the prosecutor is more critical than the initial decision to prosecute or not . . . Prosecutors have wide discretion at this stage [because] there are no legislative or judicial guidelines on charging and a decision not to file charges ordinarily is immune from review.”).

Decisions regarding plea bargaining are also central to the exercise of prosecutorial discretion. See generally Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

<sup>212</sup> See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, BYU L. REV. 669, 679-80 (1992) (“The relevant disciplinary rule prohibits prosecutors from instituting criminal charges which they know or should know are not based upon probable cause. The relevant aspirational pronouncement of the Model Code is less precise, encouraging prosecutors to “seek justice . . . . The ABA Prosecution Standards, which have been adopted in many jurisdictions, do permit prosecutors to take into consideration their reasonable doubt about the defendant’s actual guilt, and do recommend charging based on sufficient admissible evidence to support a conviction.”).

<sup>213</sup> See *id.* at 680-81 (“Probable cause is little more than heightened suspicion, and it is not even remotely sufficient to screen out individuals who are factually not guilty. More importantly, the criminal justice system itself provides for an early finding of probable cause, thus allowing the ministerial prosecutor to avoid any case-specific evaluation . . .”).

<sup>214</sup> See *id.* at 681 (“The recommended threshold of the ABA Prosecution Standards—sufficient admissible evidence to support a conviction—is likewise far too easily satisfied to provide any real limitation upon, or incentive to exercise, case-specific evaluation by the prosecutor.”). Further, this standard arguably fails “to require the prosecutor to consider defenses known to the prosecutor,” and “to evaluate witness credibility.” *Id.*

<sup>215</sup> Many commentators have argued that ethical charging practices require individual prosecutors to be personally convinced beyond a reasonable doubt of guilt. See, e.g., Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 353-54 (2001) (arguing that a “good prosecutor, after careful analysis and active preparation, will have no reasonable doubt of a defendant’s guilt and may appropriately pursue the case vigorously and fairly,” but that if he possesses unresolvable doubt, “then the only proper course is to dismiss the case, however difficult that action might be”). One factor to be considered in this determination may include, among many others, the probability of conviction. *Id.*

<sup>216</sup> According to the Prosecution Standards of the National District Attorneys Association, charging should further the interest of justice. NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS § 4-2.4 (3d ed. 2009), <http://www.ndaa.org/pdf/NDAAS%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> [<https://perma.cc/2M7W-RJQR>].

so.<sup>217</sup> In order to reach this conclusion, prosecutors endeavor to predict how jurors would likely evaluate the proof at trial, including the credibility of the complainant.<sup>218</sup> Although this inquiry is not generally sanctioned,<sup>219</sup> it is unsurprising that prosecutors with limited resources—and, less admirably, concerns about conviction rates—often incorporate the expected reaction of jurors into charging decisions.<sup>220</sup> A prosecutor’s determination not to charge a defendant may thus encompass not only his or her own personal skepticism,<sup>221</sup> but also anticipatory credibility discounting.

Prosecutorial charging in sexual assault cases, especially those involving acquaintances,<sup>222</sup> is inexorably linked to concerns—whether well-founded or not<sup>223</sup>—that jurors will downgrade the accuser’s credibility. As one prosecutor stressed, “[t]he bottom line is whether the jury will believe the victim. Rape cases rarely involve witnesses and don’t always involve physical evidence, so it all comes down to the victim and her credibility.”<sup>224</sup>

It is difficult to know the extent to which these concerns provide cover for prosecutors themselves to engage in this discrediting.<sup>225</sup> Put differently, we

<sup>217</sup> Credibility discounting by jurors is worth separate consideration.

<sup>218</sup> This calculus departs from what is required by the sufficiency standard, *supra* note 214, which considers the evidence in the light most favorable to the prosecution.

<sup>219</sup> See, e.g., AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 71 (3d ed. 1993) (“In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.”).

<sup>220</sup> See *infra* notes 230–40; see also Jennifer G. Long & Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, STRATEGIES: PROSECUTORS’ NEWSL. VIOLENCE AGAINST WOMEN, Apr. 2014, at 1, 4 (noting that “for many reasons, ranging from bias to resource shortages to concern about conviction rates, prosecutors weed out far too many cases because they wrongly believe they cannot win them”).

<sup>221</sup> *Id.* at 5 (“[P]rosecutors’ determinations of the probability of conviction are easily influenced by their own biases, misconceptions or experiences. As such, if prosecutors are not regularly charging, investigating, preparing, and trying seemingly ‘challenging’ cases, they become *incapable* of determining whether cases are or are not likely to result in a conviction.” (citation omitted) (emphasis in original)).

<sup>222</sup> See Spohn et al., *supra* note 209, at 207–08 (“Several studies conclude that prosecutors are less likely to file charges if the victim knew the offender. These studies suggest that a prior relationship with the offender may raise questions about the truthfulness of the victim’s story . . . .” (citations omitted)).

<sup>223</sup> See *infra* notes 225–27 and accompanying text.

<sup>224</sup> Spohn et al., *supra* note 209, at 229.

<sup>225</sup> See Sofia Resnick, *Why Do D.C. Prosecutors Decline Cases So Frequently? Rape Survivors Seek Answers*, REWIRE (Mar. 11, 2016, 11:02 AM) <https://rewire.news/article/2016/03/11/d-c-prosecutors-decline-cases-frequently-rape-survivors-seek-answers/> [<https://perma.cc/5P5N-TE9A>] (recounting how survivors felt that prosecutors “seemed to disbelieve their stories or blame them for the alleged assault” and also questioned “to what degree the available evidence in their cases was carefully scrutinized [by prosecutors]”); see also Long & Nugent-Borakove, *supra* note 220, at 5 (warning prosecutors that “the challenge of sexual assault cases may appear, to the inexperienced eye, to be unsurmountable, thus creating a self-perpetuating cycle and a low number of cases being taken forward”).

cannot tell who precisely is wronging the complainant by discounting her credibility—the prosecutor or the imagined factfinder.<sup>226</sup> For present purposes, however, this distinction matters less than the outcome generated by the prosecutor’s ostensible reliance on the jury’s expected response.<sup>227</sup> Even if this reliance is genuine or correct, it results in systemic credibility discounting.<sup>228</sup>

Prosecutors’ explanations for their reluctance to charge word-on-word rape cases provide considerable support for the significance of downstream discounts.<sup>229</sup> For instance, one prosecutor acknowledged that her office “does consider jury bias when determining whether to prosecute,” adding that, “A lot of the cultural attitudes about sexual assault come into play in a jury trial and are part of the consideration about whether or not we would be able to prove it beyond a reasonable doubt.”<sup>230</sup>

Quantitative and qualitative research on prosecutorial charging practices is consistent with this account. Studies have demonstrated that “convictability

<sup>226</sup> See *supra* note 221 (noting that prosecutors’ biases may impact their analysis of the likely jury outcome). It is also worth emphasizing that jurors might reject the testimony of a witness or decide that the testimony (along with any other evidence in the case) does not constitute proof beyond a reasonable doubt without violating norms of epistemic justice. See *infra* Section III.B (elaborating on why credibility discounting is epistemically unjust).

<sup>227</sup> See Lisa Frohmann, *Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 224 (1991) (quoting one prosecutor’s assertion that “[t]here is a difference between believing a woman was assaulted and being able to get a conviction in court”).

<sup>228</sup> See Long & Nugent-Borakove, *supra* note 220, at 1 (observing that “[f]or many reasons, ranging from bias to resource shortages to concern about conviction rates, prosecutors weed out far too many cases because they wrongly believe they cannot win them”).

<sup>229</sup> See, e.g., Jennifer Temkin, *Prosecuting and Defending Rape: Perspectives from the Bar*, 27 J. L. & SOC’Y 219, 224 (2000) (finding, in a study of British barristers, that “[s]ave in stranger rape cases, it was felt [by prosecutors] to be extremely difficult to achieve a conviction where there was a lack of supporting evidence unless the complainant was ‘amazingly good’ in the witness box.”); Resnick, *supra* note 225 (“A common reason that [prosecutors in D.C.] give . . . when they decline to prosecute cases is that it is unlikely a jury would convict the accused rapist, based on the case’s set of circumstances.”). One prosecutor, expressing a fairly typical view, has said that she decides whether to move forward based on an account of the offense “that is credible and that is corroborated,” emphasizing that the “‘and’ is important.” *Id.* As other prosecutors have variously explained, proving guilt beyond a reasonable doubt is “enormously difficult for many sexual assault cases . . . . ‘The fact that this high legal standard can lead to our inability to prosecute a case should not be confused with victim-blaming . . . . It is the reality of a criminal justice system that has set a high bar.’” *Id.*; see also Leila Atassi, *Fears of Juror Biases Often Prevent Rape Cases from Making It to Trial, Cuyahoga Prosecutors Say*, CLEVELAND.COM (Oct. 24, 2010, 12:00 PM), [http://blog.cleveland.com/metro/2010/10/fears\\_of\\_juror\\_biases\\_often\\_pr.html](http://blog.cleveland.com/metro/2010/10/fears_of_juror_biases_often_pr.html) [<https://perma.cc/Z7AJ-V64Q>] (“Prosecutors often feel they have to review their cases with consideration to how the facts might play on a jury. And that means many cases are never brought to trial or are pleaded down to lesser charges . . . .”).

<sup>230</sup> Resnick, *supra* note 225. As one victims’ advocate relayed, “what survivors often come away with is the idea that prosecutors just don’t want to take hard cases. They’re all hard. That’s the reality. They’re all hard cases.” *Id.*

is the organizational standard on which prosecutors file cases.”<sup>231</sup> Anticipatory credibility discounting in rape cases is intersectional, as prosecutors contemplate a range of demographic characteristics perceived as relevant to the likelihood of juror belief.<sup>232</sup> This calculus draws on a stock of narratives that “incorporate[] stereotypes of real crimes and credible victims.”<sup>233</sup> In sum, framed by an inquiry into how the archetypical juror would assess the complainant’s account, prosecutorial decision-making transposes the widespread acceptance of rape myths into a legitimate rationale for declining to pursue charges.<sup>234</sup>

The explanations provided by prosecutors for their charging decisions show that the paradigmatic rape accuser—she who lies and invites her rape<sup>235</sup>—is often deployed to justify discounted credibility determinations.<sup>236</sup> Invoking the inviting complainant, for instance, one prosecutor noted that, in non-stranger cases, “jurors typically have questions about her behavior at the time of the incident—why did she agree to go back to his room after the date, why did she agree to watch pornographic movies with him, and so on.”<sup>237</sup>

---

<sup>231</sup> Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC’Y REV. 531, 533 (1997). Relying on an ethnographic study of prosecutorial decisionmaking, Frohmann explains, “prosecutors orient particularly toward ‘the jury;’ they assess convictability based on their prior trial experience and cultural norms about sexuality, heterosexual relationships and violence, and then decide whether a credible narrative can be told.” *Id.* at 535-36. Based on the findings of her research, Frohmann emphasizes that “a prosecutor’s anticipated inability to get a guilty verdict from a jury is a legitimate justification for case rejection.” *Id.* at 536.

<sup>232</sup> *Id.* at 552 (arguing that the prosecutorial categorization of jurors “reveals how prosecutors maintain and reproduce cultural stereotypes about race, class, and gender through their decisionmaking practices”).

For one demonstration of how prosecutors deploy anticipated juror biases regarding the victim, consider this deputy district attorney’s reasoning: “I don’t understand the kind of life [the complainant] lives. People in Mission Hills and Glen View [upper- and middle-class white suburbs] don’t understand it either. It is a lot easier to dirty up a victim like that. The defense will tear her to shreds. Her story is so unbelievable.” *Id.* at 546. This prosecutor “position[ed] himself closer to the jurors than to the victim,” and ultimately chose not to pursue the case. *Id.* at 546-47.

<sup>233</sup> Spohn, Beicher & Davis-Frenzel *supra* note 209, at 208.

<sup>234</sup> *See id.* at 216 (describing factors that led the prosecutor to think that the conduct in question was consensual).

<sup>235</sup> *See supra* notes 37-40 and accompanying text (identifying the paradigmatic rape accuser). Although it is unusual for prosecutors to expressly suggest that a complainant has not been truly harmed by non-stranger rape, this notion is often implicit in justifications for non-charging decisions.

<sup>236</sup> Consider these examples from prosecutors’ explanations for the decision not to proceed with charges: “There appears to be a motive for the victim to fabricate . . . Victim clearly indicated that she has always disliked suspect, who was mother’s live-in boyfriend”; the victim admitted that “a couple of days before the assault, she and the defendant had consensual sex although they had broken up”; “the victim was very intoxicated on the night of the incident.” Spohn, Beicher & Davis-Frenzel, *supra* note 209, at 213, 215, 217.

<sup>237</sup> *Id.* at 230.

Conjuring the liar in order to defend a starting point of disbelief, one prosecutor urged:

We have to recognize that there are situations in which people make false allegations—a woman may be angry at her husband, who is having an affair, and may see this as a way to get back at him. Or, a woman may falsely claim that she was raped in order to cover up a premarital or extramarital sexual relationship or to explain away a sexually transmitted disease or pregnancy. In these situations, you have to determine whether the victim is being truthful. You have to see if there are circumstances that allow you to conclude that the allegation is real.<sup>238</sup>

Overall the prosecution of sexual violence is burdened by compounded credibility discounts, resulting in the assumption that jurors will prove unwilling to convict based on the complainant's testimony. Where expected juror skepticism is the effect of prejudice—a subject to which we will shortly turn<sup>239</sup>—prosecutor deference to the likely trial outcome begets epistemic injustice.

### III. THEORIZING THE CREDIBILITY DISCOUNT

Integral to the criminal justice system's response to sexual assault is the practice of what I am calling "credibility discounting." To conceptualize this practice, I draw on the idea of epistemic injustice developed in Miranda Fricker's seminal work, *Epistemic Injustice: Power and the Ethics of Knowing*.<sup>240</sup> In recent years, Fricker's framework has become quite influential in philosophical quarters<sup>241</sup> while barely penetrating the legal academy.<sup>242</sup>

---

<sup>238</sup> *Id.*

<sup>239</sup> See *infra* notes 249–57 and accompanying text.

<sup>240</sup> MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING* (2007). As one review notes, the book is truly "ground-breaking" in that Fricker "names the phenomenon of *epistemic injustice*, and distinguishes two central forms of it . . ." Rae Langton, *Book Review*, 25 *HYPATIA* 459, 459 (2010). While Fricker is generally credited with advancing the concept of epistemic justice, she was not the first to do so. See Rachel McKinnon, *Epistemic Injustice*, *PHILOSOPHY COMPASS* 437, 438 (2016) (noting that, prior to Fricker's work addressing the concept, "there's a long history in black feminist thought, and other feminists of color, that should be seen as also working on issues of epistemic injustice").

<sup>241</sup> See, e.g., Lackey, *supra* note 63, at 1 ("[I]n recent years, the issue of testimonial injustice has gained traction in academic circles. The idea that people can be victims of injustice by having their testimony rejected or devalued simply because they're black or female, for instance, is now widely accepted."); McKinnon, *supra* note 240, at 442–43 ("In short, the broad topic of epistemic injustice is currently the center of a rapidly expanding and exciting literature . . . Looking back, I suspect that future epistemologists will see the recent focus on issues of epistemic injustice as a watershed moment.").

<sup>242</sup> A notable exception, where Fricker's work is discussed at some length, is Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics and Human Rights*, 87 *WASH. L. REV.* 1133 (2012).

Epistemic injustice is a distinctive type of injustice in which a person is wronged in her capacity as a knower.<sup>243</sup> Because each of us is socially situated,<sup>244</sup> our judgments about which claims to credit are bound up in power and, often, prejudice.<sup>245</sup> Fricker identifies two types of epistemic injustice—testimonial and hermeneutical—which together provide a useful vantage on the practice of credibility discounting in sexual assault cases.

#### A. *Failures of Belief*

Broadly speaking, testimonial injustice occurs when a credibility assessment results from prejudice.<sup>246</sup> The use of “testimony” in this context does not correspond to its legal meaning; it simply refers to the effort to communicate a factual assertion.

Although prejudice can sometimes lead to unwarranted elevations of credibility,<sup>247</sup> testimonial injustice is defined by unwarranted credibility reductions.<sup>248</sup> With this kind of epistemic dysfunction, “prejudice will tend surreptitiously to . . . deflate the credibility afforded the speaker, and sometimes

---

<sup>243</sup> FRICKER, *supra* note 240.

<sup>244</sup> Fricker’s analysis proceeds from this premise; given its rather distinctive qualities, her methodological approach is worth describing at some length:

A socially situated account of a human practice is an account such that the participants are conceived not in abstraction from relations of social power (as they are in traditional epistemology, including most social epistemology) but as operating as social types who stand in relations of power to one another. This socially situated conception makes questions of power and its sometimes rational, sometimes counter-rational rhythms arise naturally as we try to account for the epistemic practice itself. Many philosophical questions may be best served by the traditional, maximally abstracted conception of the human subject, but confining oneself to that conception restricts the sorts of philosophical questions and insights one can come up with, so that philosophical repertoire incurs a needless impoverishment. Starting from the socially situated conception, by contrast, allows us to trace some of the interdependencies of power, reason, and epistemic authority in order to reveal the ethical features of our practices that are integral to those practices. Ultimately, the point is to see how our epistemic conduct might become at once more rational and more just.

FRICKER, *supra* note 240, at 3-4. For further discourse on the function of power in social relations, see *id.* at 9-17.

<sup>245</sup> See *infra* notes 249-57 and accompanying text.

<sup>246</sup> FRICKER, *supra* note 240, at 1 (“Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker’s word . . .”).

<sup>247</sup> A “credibility excess” may be found where “prejudice results in the speaker’s receiving more credibility than she otherwise would have.” *Id.* at 17. The converse is a “credibility deficit.” *Id.*; see also *supra* notes 71-73 and accompanying text.

<sup>248</sup> *Id.* at 21 (“The primary characterization of testimonial injustice . . . remains such that it is a matter of credibility deficit and not credibility excess.”). For the reasoning behind this conclusion, see *id.* at 20-21.

this will be sufficient to cross the threshold for belief or acceptance so that the hearer's prejudice causes him to miss out on a piece of knowledge."<sup>249</sup>

Integral to this conception is the idea of prejudice, which mainly enters a testimonial exchange "via stereotypes that we make use of as heuristics in our credibility judgements."<sup>250</sup> In accordance with what social psychology tells us about human decisionmaking,<sup>251</sup> stereotypes can be defined as empirical generalizations about a particular social group.<sup>252</sup> Although these generalizations may in theory be reliable,<sup>253</sup> in social practice the stereotypes we rely upon are often unreliable or prejudiced.

Moreover, consider the impact of power and group identity on the deployment of familiar stereotypes. As Fricker observes:

Many of the stereotypes of historically powerless groups such as women, black people, or working-class people variously involve an association with some attribute inversely related to competence or sincerity or both: over-emotionality, illogicity, inferior intelligence, evolutionary inferiority, incontinence, lack of 'breeding', lack of moral fibre, being on the make, etc. A first thing to say about such prejudicial stereotypes is that in so far as the association is false, the stereotype embodies an unreliable empirical generalization about the social group in question.<sup>254</sup>

Negative identity prejudice, as Fricker calls it, is especially concerning because it tends to be "resistant to counter-evidence."<sup>255</sup>

This is not to suggest that prejudicial stereotypes are consciously maintained and mobilized in our epistemic exchanges; just the opposite is true.<sup>256</sup> Even so,

<sup>249</sup> *Id.* at 17; see *supra* notes 74–75 (discussing degrees of belief).

<sup>250</sup> *Id.* at 30. Fricker employs "stereotype" in a "neutral sense," meaning that "stereotypes may or may not be reliable." *Id.*

<sup>251</sup> *Id.* at 31 ("The past few decades have witnessed a shift away from a view of judgements as the products of rational, logical decision making marred by the occasional presence of irrational needs and motives toward a view of the person as [a] heuristic user." (citation omitted)).

<sup>252</sup> *Id.* at 31. For elaboration on the idea of stereotypes and its variation along multiple dimensions, see *id.* at 30–31.

<sup>253</sup> *Id.* at 30 (suggesting that stereotypes can constitute a "proper part of the hearer's rational resources in the making of credibility judgements").

<sup>254</sup> *Id.* at 32. Fricker further suggests that epistemic culpability results when these judgements are maintained "without proper regard for the evidence." *Id.* at 33. Although much of Fricker's work explores the circumstances that give rise to epistemic culpability when a hearer resorts to prejudiced stereotypes, in this Article I concentrate less on this ethical question than I do on the justice angle.

<sup>255</sup> *Id.* at 35. A negative identity-prejudicial stereotype is "a widely held disparaging association between a social group and one or more attributes, where this association embodies a generalization that displays some (typically, epistemically culpable) resistance to counter-evidence owing to an ethically bad affective investment." *Id.* A testimonial injustice may be considered systematic if the identity prejudice causing it "track[s] the subject through different spheres of social activity, rendering them susceptible to other forms of injustice besides testimonial." *Id.* at 155; see Lackey, *supra* note 63, at 3 (where prejudice "tracks the subject through different dimensions of social activity—economic, educational, professional, and so on—it is systematic, and the type of prejudice that tracks people in this way is related to social identity, such as racial and gender identity.").

<sup>256</sup> See FRICKER, *supra* note 240, at 36 (asserting her belief that "the right vision of epistemic relations is such that testimonial injustice goes on much of the time, and while it may be hard enough

being situated in a structurally unequal social landscape—one in which group identities shape individual relations—cannot but impact how we make sense of the world.<sup>257</sup>

Of course, the normalcy of testimonial injustice<sup>258</sup> does not negate its wrongfulness. Most glaring in this regard is the “purely epistemic harm” that occurs when knowledge that should be imparted to a hearer is irrationally rejected.<sup>259</sup> Not only does the hearer experience a truth deficit, but so too does the epistemic ecosystem in which the hearer is embedded. Consider, for instance, a police officer’s resort to a negative identity prejudice to evaluate a rape accuser’s credibility. If the initial report is perceived as false, there may be no further investigation; the case will be closed based on faulty factual premises. Even apart from the disadvantage that flows to the hearer (and the epistemic ecosystem of which the hearer is part), the speaker is significantly harmed “in her capacity as a knower” when she experiences testimonial injustice. This harm—a “primary harm,” in Fricker’s terms—has gone largely unnoticed in legal discourse.<sup>260</sup>

To describe the contours of the primary harm, we might begin by observing that a speaker whose capacity as a knower is undermined has been, in important respects, dehumanized.<sup>261</sup> Rationality is a core feature of humanity. The capacity to share knowledge is “essential to human value.”<sup>262</sup> In its starkest iteration, to deny one’s capacity as a knower then is to deny one’s humanity.<sup>263</sup> As Fricker argues:

The fact that the primary injustice involves insult to someone in respect of a capacity essential to human value lends even its least harmful instances a

---

to police one’s beliefs for prejudice, it is significantly harder reliably to filter out the prejudicial stereotypes that inform one’s social perceptions directly”).

<sup>257</sup> See *id.* at 38-39 (“The collective social imagination inevitably contains all manner of stereotypes, and that is the social atmosphere in which hearers must confront their interlocutors. No wonder the prejudicial elements in the social imagination can impinge on our credibility judgements without our say-so.”).

<sup>258</sup> See *id.* (noting that the typicality of testimonial injustice is consistent with the fact that “injustice is in fact a normal social baseline, while active cries of resentment and demands for rectification are the precious exception”).

<sup>259</sup> See *id.* at 43 (“There is of course a purely epistemic harm done when prejudicial stereotypes distort credibility judgements: knowledge that would be passed on to a hearer is not received. This is an epistemic disadvantage to the individual hearer, and a moment of dysfunction in the overall epistemic practice or system.”).

<sup>260</sup> Cognizing the harm of epistemic injustice also holds promise beyond the realm of sexual violence, particularly for racial oppression. See *infra* notes 282, 333 and accompanying text.

<sup>261</sup> FRICKER, *supra* note 240, at 44.

<sup>262</sup> *Id.*

<sup>263</sup> See *id.* (“No wonder too that in contexts of oppression the powerful will be sure to undermine the powerless in just that capacity, for it provides a direct route to undermining them in their very humanity.”).

symbolic power that adds a layer of harm of its own: the epistemic wrong bears a social meaning to the effect that the subject is less than fully human. When someone suffers a testimonial injustice, they are degraded qua knower, and they are symbolically degraded qua human. In all cases of testimonial injustice, what the person suffers from is not simply the epistemic wrong in itself, but also the meaning of being treated like that.<sup>264</sup>

The treatment of a subject as incapable of giving knowledge is a form of objectification, which often induces the would-be speaker's silencing.<sup>265</sup> This silencing can take more than one form. At times, an objectifying stance on the part of the hearer leads to a "failure of uptake" that prevents the words from registering as communication.<sup>266</sup> At other times, hearer prejudice preempts a testimonial exchange altogether,<sup>267</sup> denying a victim of testimonial injustice the very opportunity to speak.<sup>268</sup> This latter dynamic,

---

<sup>264</sup> *Id.* For further discussion of the epistemic harms of testimonial injustice, including the loss of epistemic confidence, see *id.* at 47-51. Based on these harms, Fricker mounts a persuasive case that "[w]here it is not only persistent but also systematic, testimonial injustice presents a face of oppression." *Id.* at 58.

<sup>265</sup> As Catharine MacKinnon has observed: "Objects do not speak. When they do, they are by then regarded as objects, not as humans, which is what it means to have credibility." CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSE OF LIFE AND LAW* 182 (1987) (quoted in FRICKER, *supra* note 240, at 139)); see also *id.* at 132 ("[T]estimonial injustice—especially when it is systematic—also wrongfully deprives the subject of a certain fundamental sort of respect . . . . The subject is wrongfully excluded from the community of trusted informants, and this means that he is unable to be a participant in the sharing of knowledge . . . . He is thus demoted from subject to object."). On the connection between epistemic objectification and sexual objectification, see *id.* at 139-42.

<sup>266</sup> *Id.* at 140 ("Like pre-emptive testimonial injustice, such cases of silencing involve a massive advance credibility deficit, but here it is in advance of an utterance that is forthcoming. What is not forthcoming is any genuine credibility judgement in respect of the speaker's utterance . . . . [H]er utterance simply fails to register with his testimonial sensibility." (emphasis omitted)). Fricker provides the example of a woman whose stated "No" in a sexual encounter "does not receive its required uptake from a man, with the result that her would-be illocution thereby fails to communicate—it fails to even be the illocutionary act it would be been." *Id.*

<sup>267</sup> Fricker refers to this "commonplace form of testimonial injustice" as preemptive testimonial injustice. *Id.* at 130. She explains:

[T]hose social groups who are subject to identity prejudice and are thereby susceptible to unjust credibility deficit will, by the same token, also tend simply not to be asked to share their thoughts, their judgements, their opinions. (If the word of people like you is generally not taken seriously, people will tend not to ask for it.) This kind of testimonial injustice takes place in silence. It occurs when hearer prejudice does its work in advance of a potential informational exchange: it pre-empts any such exchange.

*Id.*; see also *id.* at 131 (noting that the phenomenon of preemptive testimonial injustice can function as a "mechanism of silencing").

<sup>268</sup> *Id.* ("[N]ot being asked is one way in which powerless social groups might be deprived of opportunities to contribute their points of view to the pool of collective understanding.").

variously referred to as “pre-emptive testimonial injustice”<sup>269</sup> or “testimonial smothering,”<sup>270</sup> keeps a would-be speaker from ever sharing her account.<sup>271</sup>

All told, testimonial injustice tends to exacerbate oppression, not only of the speaker herself,<sup>272</sup> but also of the prejudged groups to which she may belong.<sup>273</sup> Because prejudice is commonly rooted in structures of power,<sup>274</sup> the suppression of knowledge overwhelmingly disadvantages those who are already subordinated.<sup>275</sup>

### B. Failures of Understanding

Hermeneutical injustice undermines one’s ability to make sense of certain experiences—typically, experiences not shared by those with greater power to shape the realm of interpretation.<sup>276</sup> As we will see, hermeneutical injustice and testimonial injustice overlap in important respects.<sup>277</sup> But before exploring this intersection, it is useful to isolate the unjust failures of understanding that characterize the realm of hermeneutical injustice.

A starting premise is that power influences the ability to participate in the construction of social experience.<sup>278</sup> As a result, particular areas of social

<sup>269</sup> See *supra* note 267.

<sup>270</sup> See Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236, 244 (2011) (identifying a kind of “testimonial oppression [that] occurs because the speaker perceives one’s immediate audience as unwilling or unable to gain the appropriate uptake of proffered testimony”). This “testimonial smothering,” as Dotson calls it, involves the “truncating of one’s own testimony in order to insure that the testimony contains only content for which one’s audience demonstrates testimonial competence.” *Id.*

<sup>271</sup> Dotson identifies three conditions that generally lead to testimonial smothering: i) the content of the testimony is unsafe/risky; ii) the audience demonstrates testimonial incompetence with respect to the content of testimony; and iii) testimonial incompetence flows from, or appears to flow from, “pernicious ignorance.” *Id.* at 249.

<sup>272</sup> See Lackey, *supra* note 63, at 15 (discussing how credibility deficits or surpluses “beget[] downstream injustices”).

<sup>273</sup> See FRICKER, *supra* note 240, at 58-59 (“A culture in which some groups are separated off from [an essential] aspect of personhood by the experience of repeated exclusions from the spread of knowledge . . . would indeed be one in which a species of epistemic injustice had taken on the proportions of oppression.”).

<sup>274</sup> See *supra* notes 249–57 and accompanying text.

<sup>275</sup> See *supra* note 268.

<sup>276</sup> See FRICKER, *supra* note 240, at 1 (“[H]ermeneutical injustice occurs at a prior stage [to testimonial injustice], when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences.”); see also Linda Martín Alcoff, *Epistemic Identities*, 7 EPISTEME 128, 129 (2010) (explaining that “whereas testimonial injustice wrongly responds to speech, hermeneutical injustice preempts speaking. Testimonial and hermeneutical injustice are in this way distinct on [Fricker’s] view, though they can be mutually supportive.”).

<sup>277</sup> See *infra* notes 293–99 and accompanying text.

<sup>278</sup> As Fricker explained,

One way of taking the epistemological suggestion that social power has an unfair impact on collective forms of social understanding is to think of our shared

life—hermeneutical “hotspots”<sup>279</sup>—come to be defined by markedly unequal participation in the construction of meaning.<sup>280</sup> This hermeneutical marginalization, as Fricker describes it, is problematic because it “renders the collective hermeneutical resource structurally prejudiced.”<sup>281</sup> As examples,<sup>282</sup> Fricker cites the framing of “sexual harassment as flirting, rape in marriage as non-rape, post-natal depression as hysteria, reluctance to work family-unfriendly hours as unprofessionalism, and so on.”<sup>283</sup> Rape myths too are a type of hermeneutical injustice.<sup>284</sup> What these illustrations reveal is that membership in a group with relatively scant social power can correspond to a distinct hermeneutical disadvantage: experiences not shared by the

---

understandings as reflecting the perspectives of different social groups, and to entertain the idea that relations of unequal power can skew shared hermeneutical resources so that the powerful tend to have appropriate understandings of their experiences ready to draw on as they make sense of their social experiences, whereas the powerless are more likely to find themselves having some social experiences through a glass darkly, with at best ill-fitting meanings to draw on in the effort to render them intelligible.”

FRICKER, *supra* note 240, at 148. Fricker considers recognition of this power structure as a tenet of feminist theory. *Id.* at 147.

<sup>279</sup> See *id.* at 152 (defining hotspots as “locations in social life where the powerful have no interest in achieving a proper interpretation, perhaps indeed where they have a positive interest in sustaining the extant misinterpretation”); see also *id.* at 151 (hermeneutical disadvantage renders a subject “unable to make sense of her ongoing mistreatment, and this in turn prevents her from protesting it, let alone securing effective measures to stop it”).

<sup>280</sup> See *id.* at 153 (“When there is unequal hermeneutical participation with respect to some significant area(s) of social experience, members of the disadvantaged group are hermeneutically marginalized.”).

<sup>281</sup> *Id.* at 155. A structurally prejudiced hermeneutical resource “will tend to issue interpretations of [a subordinated] group’s social experiences that are biased because insufficiently influenced by the subject group, and therefore unduly influenced by more hermeneutically powerfully groups.” *Id.*

<sup>282</sup> Fricker focuses her discussion on gender, but hermeneutical injustices often occur with regard to race. See, e.g., McKinnon, *supra* note 240, at 441 (noting a “tremendous resistance to the concept of ‘white privilege’ by white people, particularly in US contexts” as an example of hermeneutical injustice for people of color).

<sup>283</sup> FRICKER, *supra* note 240, at 155. With regard to hermeneutical marginalization, which is generally suffered by socially powerless groups, Fricker adds:

[F]rom the moral point of view, what is bad about this sort of hermeneutical marginalization is that the structural prejudice it causes in the collective hermeneutical resource is essentially discriminatory: the prejudice affects people in virtue of their membership of a socially powerless group, and thus in virtue of an aspect of their social identity. It is, then, akin to identity prejudice. Let us call it *structural identity prejudice*.

*Id.*

<sup>284</sup> See generally Katharine Jenkins, *Rape Myths and Domestic Abuse Myths as Hermeneutical Injustices*, 34 J. APPLIED PHIL. 191 (Feb. 2017).

powerful find no meaningful outlet in collective notions of reality. This is the essence of hermeneutical injustice.<sup>285</sup>

The structural disadvantage that undermines the ability to make sense of an experience varies along multiple axes.<sup>286</sup> First, a collective misunderstanding can deviate from the subject's interpretation to greater or lesser extents.<sup>287</sup> Next, the subject may not understand her own experience adequately; or if she is able to communicate it to similarly situated group members she nonetheless may be powerless to convey it to the community at large.<sup>288</sup> Last, the subject might find herself epistemically disadvantaged by the collective's misunderstanding of the content of her experience or by the form in which that content is expressed.<sup>289</sup>

Regardless of how it manifests, hermeneutical injustice renders a member of the discriminated-against group "unable to make communicatively intelligible something which it is particularly in his or her interests to be able to render intelligible."<sup>290</sup> As a result, the would-be speaker is unfairly excluded

---

<sup>285</sup> As Fricker defines it, hermeneutical injustice is "the injustice of having some significant area of one's social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource." FRICKER, *supra* note 240, at 155.

<sup>286</sup> See Fricker, *supra* note 75, at 1319 (observing that hermeneutical injustice "comes in different degrees of severity, and along more than one dimension").

<sup>287</sup> See *id.* (arguing that "there is internal diversity as regards the degree of misunderstanding;" for example, domestic violence viewed as acceptable versus domestic violence viewed as unacceptable but treated in keeping with myths like victims leave)).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 1319-20. For a lengthier discussion of this dimension, see FRICKER, *supra* note 240, at 160-61.

<sup>290</sup> FRICKER, *supra* note 240, at 162.

from participating in the spread of knowledge.<sup>291</sup> This, as we have already seen in the context of testimonial injustice, represents a profound primary harm.<sup>292</sup>

Finally, we arrive at the junction of testimonial and hermeneutical injustices. To see how the two converge in a “double epistemic injustice,”<sup>293</sup> let us take up the question of timing: when precisely does a hermeneutical injustice occur, particularly since a subject’s exclusion from the collective knowledge pool is ongoing?<sup>294</sup> Fricker pegs the injustice to the moment when the would-be speaker confronts the practical impossibility of conveying her experience to the wider world.<sup>295</sup> This insight suggests that members of marginalized groups tend simultaneously to confront the deflation of their

---

291 *Id.* This harm is very much related to the harm of testimonial injustice:

The primary harm of (the central case of) testimonial injustice concerns exclusion from the pooling of knowledge owing to identity prejudice on the part of the hearer; the primary harm of (or central case of) hermeneutical injustice concerns exclusion from the pooling of knowledge owing to structural identity prejudice in the collective hermeneutical resource. The first prejudicial exclusion is made in relation to the speaker, the second in relation to what they are trying to say and/or how they are saying it. The wrongs involved in the two sorts of epistemic injustice, then, have a common epistemic significance running through them—prejudicial exclusion from participation in the spread of knowledge.

*Id.* In later work, Fricker recasts this idea:

[T]here is a generic wrong to any kind of epistemic injustice . . . which is a matter of the subject being *wronged specifically in their capacity as an epistemic subject*. In respect of testimonial justice, this generic wrong becomes somewhat specified in the idea of the subject’s being wronged as a giver of knowledge (an unjust deficit of credibility); and in respect of hermeneutical injustice it becomes the idea of the subject’s being wronged in their capacity for social understanding (an unjust deficit of intelligibility). These two forms of the intrinsic ethical-epistemic wrong of epistemic injustice are then supplemented by the observation that various more general epistemic ills tend to emanate from them—notably, the hearer’s missing out on knowledge offered, and the decline in the circulation of epistemic goods in the social epistemic system. . . . Thus the wrong of epistemic injustice against an individual tends to ramify into wider social epistemic loss.

Fricker, *supra* note 75, at 1320.

292 *See supra* notes 261–73 and accompanying text. The subject who finds herself unable to convey her experience to her larger community may also suffer a further epistemic disadvantage—that is, a diminished belief in her capacity to make sense of the world. FRICKER, *supra* note 240, at 163.

293 FRICKER, *supra* note 240, at 160; *see also supra* notes 66–69 and accompanying text (discussing double discounting).

294 *See supra* notes 278–281 (defining hermeneutical marginalization).

295 FRICKER, *supra* note 240, at 159 (“[T]he hermeneutical inequality that exists, dormant, in a situation of hermeneutical marginalization erupts in injustice.”). Put differently, the “background condition for hermeneutical injustice is the subject’s hermeneutical marginalization,” but the “moment of hermeneutical injustice comes only when the background condition is realized in a more or less doomed attempt on the part of the subject to render an experience intelligible, either to herself or to an interlocutor.” *Id.*

own credibility<sup>296</sup> and a collective misunderstanding of the experience sought to be communicated.<sup>297</sup> When this happens, “the speaker is doubly wronged.”<sup>298</sup> Testimonial injustice is thus exacerbated by hermeneutical injustice and vice versa.<sup>299</sup>

This returns us to the credibility discount, which lies at the nexus of both categories of epistemic discrimination.

#### IV. DISCOUNTING AS DISCRIMINATION

Thus far, I have described the phenomenon of credibility discounting, identified it as a widespread form of law enforcement practice and argued that it constitutes an unrecognized type of injustice that results in overlooked harm. Here, I urge the legal redress of this harm by defining credibility discounting as potentially actionable discrimination.

##### A. Toward Legal Redress

Only after an injury is identified as such can the question of legal redress be contemplated, thereby refashioning the meaning of the violation. Among the most dramatic illustrations of this dialectic is sexual harassment, which once was largely invisible as an experience, but ultimately became a cause of action.<sup>300</sup> The example underscores the power of law to transform a widely pervasive social practice.<sup>301</sup>

---

<sup>296</sup> See *supra* Section III.A.

<sup>297</sup> See *supra* notes 277–92 and accompanying text. Fricker also argues,

That hermeneutical injustice most typically manifests itself in the speaker struggling to make herself intelligible in a testimonial exchange raises a grim possibility: that hermeneutical injustice might often be compounded by testimonial injustice. This will indeed tend to be the case wherever the hermeneutical injustice is systematic, because members of multiple marginalized groups will tend to be subject to identity prejudice. If they try to articulate a scantily understood experience to an interlocutor, their word already warrants a low *prima facie* credibility judgement owing to its low intelligibility. But if the speaker is also subject to an identity prejudice, then there will be a further deflation.

FRICKER, *supra* note 240, at 159.

<sup>298</sup> *Id.* To further elaborate, the speaker is wronged “once by the structural prejudice in the shared hermeneutical resource, and once by the hearer in making an identity-prejudiced credibility judgment.” *Id.* This observation maps nicely onto the construct of credibility, which encompasses both plausibility and trustworthiness. See *supra* Part I.B.

<sup>299</sup> FRICKER, *supra* note 240, at 160 (“[T]he implausibility of what is said creates a lens through which the personal credibility of the speaker may become unduly deflated, which in turn creates a lens through which the credibility of what is said may come to be even more deflated . . . and so on.”).

<sup>300</sup> See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (describing the evolution of sexual harassment from a legally ignored commonplace social practice to a cognizable cause of action).

<sup>301</sup> Around the time that her decisive work on the theory and legal treatment of sexual harassment was coming to fruition, Catharine MacKinnon wrote: “Sexual harassment, the

For present purposes, the analogy is also instructive for other reasons. Like sexual harassment, credibility discounting, in the sexual assault context and beyond,<sup>302</sup> is a form of discrimination based on group membership. This is not to say that credibility discounting is only a form of discrimination; it might additionally be a tort, for instance.<sup>303</sup> But the discrimination rubric provides an especially nice fit, as it captures the social dimensions of the practice,<sup>304</sup> along with its inequality-perpetuating features.

To conceive of credibility discounting as a form of discrimination that should be actionable under certain circumstances raises a host of questions, the answers to which are largely dependent on context. As a general proposition, discriminatory conduct has varying legal consequences and available redress, depending on the actor and the setting. For instance, behaviors that might otherwise be considered sexually harassing are legally cognizable only in certain contexts—primarily the workplace and school environs—and not in others (say, the street). Likewise, a rape accuser might find redress for credibility discounting by a police detective or campus administrator, but not a skeptical neighbor.

Moreover, even where a behavior is considered actionable discrimination, what precisely the law prohibits varies. On campus, discrimination that undermines educational opportunity is the problem;<sup>305</sup> in the workplace, discrimination that interferes with the job matters;<sup>306</sup> and in the criminal justice system, discrimination that distributes protection unequally is prohibited.

---

experience, is becoming 'sexual harassment,' the legal claim. As the pain and stifled anger have become focused into dissatisfaction, gripes have crystallized into a grievance, and women's inner protest is becoming a cause of action." *Id.* at 57.

302 On the relevance of credibility discounting for practices of racial oppression, see *supra* notes 282, 333 and accompanying text.

303 *Cf.* MACKINNON, *supra* note 300, at 171-73 (describing the appeal and limitations of tort law for redressing sexual harassment). MacKinnon concludes: "All of this is not to say that sexual harassment is not both wrong and a personal injury, merely that it is a social wrong and a social injury that occurs on a personal level. To treat it as a tort is less simply incorrect than inadequate." *Id.* at 173.

304 *See id.* at 174 (noting that such practices "express and reinforce the social inequality of women to men are clear cases of sex-based discrimination"). By positing that credibility discounting in particular is a case of sex-based discrimination, I do not mean to suggest that only female rape accusers receive credibility discounts, that all female rape accusers receive credibility discounts, or that females who report other crimes are treated with similar skepticism. Nevertheless, as embodied by the paradigmatic rape accuser, constructions of gender and female sexuality are central to the discounting dynamic. *See supra* notes 37-40 and accompanying text. Once again, MacKinnon's work on sexual harassment is relevant here, as she has observed that "[w]omen's sexuality is a major medium through which gender identity and gender status are socially expressed and experienced." MACKINNON, *supra* note 300, at 182.

305 Title IX prohibits discrimination based on sex in any federally funded education program or activity. 20 U.S.C. § 1681 (1972).

306 Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. 42 U.S.C. § 2000e (1964).

Returning to the discrimination at issue when credibility is discounted, rape complainants<sup>307</sup> should rely on federal civil rights guarantees (Title IX in particular) when discounts are meted out on campus. Systemic skepticism of claims of sexual violations constitutes discrimination on the basis of sex, which federal law prohibits.

Most germane to the law enforcement context, rape complainants should rely on the constitutional guarantee of Equal Protection when law enforcement officials engage in credibility discounting. I now develop this Equal Protection argument.

### B. *Credibility Discounting as Unequal Protection*

To ground the claim that credibility discounting should count as unlawful discrimination under existing jurisprudential frameworks, I turn to the doctrinal setting most appropriate to address credibility discounting by police departments in particular.<sup>308</sup> By outlining the parameters of an Equal Protection claim, specifically, I aim to begin a conversation about how best to translate the theory—credibility discounting as discrimination—to law.<sup>309</sup> Given this ambition, I set aside legitimate critique of existing Equal Protection jurisprudence.<sup>310</sup> Rather, I show how the articulation of a separate

<sup>307</sup> As one important example, interventions on the part of the Obama Administration's Justice Department into local police departments revived the "protection model" of Equal Protection. Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1310, 1322-34 (2016).

As I have argued, the Justice Department's deployment of "pattern or practice" enforcement authority substantially increased police accountability for discriminatory underenforcement of the law—particularly of the law against sexual assault. *Id.*

<sup>308</sup> See *supra* Subsection II.B.1 (discussing in depth credibility discounting by police).

<sup>309</sup> Litigation is of course not the only mechanism for change (nor is it necessarily the best). For several reasons, including but certainly not limited to litigation threats, voluntarily implemented best practices in policing and prosecuting sexual violence are proliferating, creating tremendous potential to disrupt systemic credibility discounting. See Dobie, *supra* note 49 ("Across the country, in this city and that jurisdiction, improvements in sexual-assault investigation are slowly being made . . . [D]etectives are trained extensively in interviewing trauma victims, making suspects the focus of their investigations and dismantling their assumptions about 'real rape' and how a 'real victim' is supposed to respond."); see also Brown, *supra* note 53 (describing a new nationwide curriculum for college administrators and campus police officers); Long & Nugent-Borakove, *supra* note 220 (pointing to an evolution in best prosecutorial practices). To be clear, strategies to combat the workings of bias (implicit and explicit) are piecemeal solutions. More global responses to epistemic injustice would alleviate the need to constantly correct for the prejudices that develop along lines of power. Even so, the movement to reduce biased policing (both on and off campus) and biased prosecution should be celebrated. Assuming these techniques, properly implemented, continue to spread, we may yet witness a significant shift in how the credibility of rape complainants is assessed.

<sup>310</sup> It should, however, be noticed that the Court's discriminatory-intent requirement has proven especially problematic. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 1287 (1987) (arguing that racial discrimination is substantially motivated by unconscious bias, making "intent" hard to establish); see

form of discrimination might work in practice. I do so by analyzing a lawsuit currently pending in federal district court.<sup>311</sup> My contention is that alleging a practice of credibility discounting would bolster the plaintiff's "failure to protect" claim. By contemplating the contours of this augmented claim, we can begin to envision a model for future Equal Protection litigation.

Ultimately, this more robust legal response can help to delegitimize practices of discounting that remain commonplace, propelling much needed cultural transformation.

\* \* \*

On May 16, 2010, Heather Marlowe and a group of her friends attended San Francisco's Bay to Breakers race.<sup>312</sup> According to her complaint:

While at Bay to Breakers, Marlowe was handed a beer in a red plastic cup by a male attendee, and Marlowe drank the beer. Subsequently, Marlowe began feeling much more inebriated than would have been normal given her moderate alcohol consumption up to that point. Marlowe regained consciousness inside an unfamiliar home approximately 8 hours after she was last seen at Bay to Breakers. Marlowe was physically injured, experienced vaginal and pelvic pain, was nauseous and vomited several times, was dazed,

---

also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1321 n.170 (1991) (noting that intent "requires perpetrators to know what they are doing and why" and that "[m]ost discrimination does not happen this way"); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1138 (1997) (stating that discriminatory purpose "is a juridical concept that does not reflect prevailing understandings of the ways in which racial or gender bias operates").

<sup>311</sup> Complaint, *Marlowe v. City & County of San Francisco*, No. 3:16-cv-00076-MMC (N.D. Cal. filed Oct. 21, 2016) [hereinafter *Marlowe* Complaint] (filing suit against San Francisco for engaging in a practice of failing to assure evidence of sexual assaults was not lost and failing to diligently investigate allegations of sexual assault). Although *Marlowe* may be the first of its kind, it is reasonable to expect such lawsuits to become increasingly commonplace. See, e.g., *Jane Doe v. Village of Robbins*, No. 1:17-cv-00353 (N.D. Ill. Filed Jan. 17, 2017) (alleging an Equal Protection violation based on a police department's widespread failure to investigate rape allegations).

<sup>312</sup> All facts are drawn from the "Second Amended Complaint for Damages," which was filed in the Northern District of California on October 21, 2016. *Marlowe* Complaint, *supra* note 311. The First Amended Complaint was dismissed for failure to allege facts sufficient to support the allegation that "defendants have treated sexual assault reports from women with less priority than other crimes not involving women reporting sexual assaults," with leave to file for purposes of amending the equal protection claim. *Marlowe v. City and County of San Francisco*, No. 3:16-cv-00076-MMC (N.D. Cal. Sept. 27, 2016) (order granting motion to dismiss and affording plaintiff leave to amend).

Early in 2017, the district court dismissed the Second Amended Complaint. Order Granting Defendants' Motion to Dismiss, *Marlowe v. City and County of San Francisco*, Case No. 16-cv-00076-MMC (N.D. Cal. Jan. 10, 2017). In a brief opinion, the court concluded that Marlowe had included "no facts" to support the allegations that sexual assault complainants were treated "less favorably than persons who are similarly situated." *Id.* Marlowe has appealed the ruling to the Ninth Circuit.

confused, and had no memory of what had occurred in the house. Marlowe asked a man sitting in the bed with her what had happened. The man told Marlowe, “we had sex.” At this point, Marlowe realized that she had been drugged and raped.<sup>313</sup>

Soon after, Marlowe went to the nearest emergency room, where a specially trained nurse collected a “rape kit.” The San Francisco Police Department (SFPD), which took Marlowe’s report at the hospital, indicated that the evidence would be processed in the next fourteen to sixty days.<sup>314</sup>

The following week, Marlowe performed a Google search for the person she believed had raped her—it is unclear from the complaint how she was able to draw this connection. After locating a picture of a man that resembled her memory of the rapist, Marlowe contacted Police Officer Joe Cordes, the SFPD officer investigating her allegation. According to the complaint, Cordes responded by

instruct[ing] Marlowe to make contact with Suspect, and flirt with him in order to elicit a confession that Suspect had indeed raped Marlowe. Cordes also instructed Marlowe to set up a date with Suspect to prove that Marlowe could identify Suspect in a crowd. Cordes told Marlowe that, if she refused to engage in this action, SFPD would cease its investigation of her rape.<sup>315</sup>

When Marlowe later met with Cordes to “clarify what [he] wanted [her] to do,” Cordes “strongly discouraged Marlowe from further pursuing her case, indicating that it was too much work for the SFPD to investigate and prosecute a rape in which alcohol was involved.”<sup>316</sup> Eventually, after repeatedly attempting to set up the “date,”<sup>317</sup> as Cordes had instructed, Marlowe contacted Cordes to inform him that she “refused to continue to privately investigate her case.”<sup>318</sup> Only then did SFPD inform Marlowe that the suspect had been taken in for questioning and his DNA sample collected. Marlowe was told that the suspect’s DNA was being processed at the lab, and that her rape kit results would be available shortly.<sup>319</sup>

---

<sup>313</sup> Marlowe Complaint, *supra* note 311, at \*3.

<sup>314</sup> *Id.* at \*4.

<sup>315</sup> *Id.* at \*4.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* As the complaint describes: “Marlowe created an alias and began communicating with Suspect. Marlowe purchased a disposable mobile phone in order to text with Suspect, without revealing her true phone number. Eventually, Marlowe set up a ‘date’ with Suspect . . . . Suspect cancelled the ‘date’ and subsequently cancelled a second ‘date . . . .’” *Id.*

<sup>318</sup> *Id.* at \*5.

<sup>319</sup> *Id.*

Over the course of the next two years, Marlowe unsuccessfully sought testing of her rape kit.<sup>320</sup> At one point, “Marlowe was told that due to the passage of time, her case was considered ‘inactive’ and was placed in a storage facility. SFPD also told Marlowe that because she was ‘a woman,’ ‘weighs less than men,’ and has her ‘menstruations,’ that Marlowe should not have been out partying,” on the day of the incident.<sup>321</sup> When her kit was finally tested, Marlowe discovered that her experience was not unusual. In 2014, after first denying the existence of a backlog, SFPD acknowledged that “several thousand” rape kits dating back to 2003 remained untested.<sup>322</sup>

Marlowe sued the City of San Francisco, along with various top police officials, alleging a violation of Equal Protection<sup>323</sup> and seeking damages and injunctive relief.<sup>324</sup> The complaint charges that the police department “had the policy, practice and/or custom of failing to diligently investigate sexual assault allegations,”<sup>325</sup> as evidenced by its failure to test thousands of rape kits.<sup>326</sup>

Regardless of whether Marlowe ultimately prevails, it is worth observing that, even on its face, her claim is sufficiently broad to encompass far more than the shelved rape kits. Although Marlowe’s complaint focuses on SFPD’s failure to test her rape kit, she could (and perhaps would, were the case ever to proceed to discovery and trial) provide a rich chronicle of why her allegations were deemed unworthy of investigation. We see glimpses of this discounting already (she invited her rape by drinking too much; her account of having been drugged is dismissed; her casual acquaintance with her alleged rapist is perceived as a mitigating factor), but there is far more to say about the deep skepticism that led not only to the police refusal to test her rape kit, but to its decision to place her case on “inactive” status.

Perhaps more important, expanding the allegations to encompass SFPD’s practice of credibility discounting substantially strengthens the case for

---

320 Marlowe’s efforts, which are detailed in her complaint, were met with various explanations from SFPD regarding reasons for the delay. *Id.* at \*5-6. On October 20, 2012, SFPD informed Marlowe that her rape kit had at last been tested and placed in the national DNA database (CODIS), although this latter fact would later become the subject of further dispute. *Id.* at \*6-8. Marlowe ultimately managed to succeed in having her rape kit tested only after involving various well-placed connections in city and state government (a network that—it should be emphasized—very few rape accusers are able to access).

321 *Id.* at \*6.

322 *Id.* at \*7; see *supra* note 190 (describing the national rape kit backlog).

323 The complaint alleges a deprivation of both federal and state equal protection guarantees per 42 U.S.C. § 1983 and the California Constitution, respectively.

324 The complaint seeks an order “requiring Defendants to test all “back logged” rape kits, and enjoining Defendants from continuing with their institutional policy of failing and/or refusing to properly investigate sexual assaults and test rape kits.” *Marlowe* Complaint, *supra* note 312, at \*2.

325 *Id.* at \*8.

326 *Id.* at \*10. SFPD allegedly acknowledged that it would only test rape kits in cases involving unknown suspects. *Id.* at \*11.

discrimination. To succeed on the merits, Marlowe must demonstrate that she was provided an unequal measure of police protection, at least in part, because she is a woman.<sup>327</sup> The existence of shelved rape kits is relevant to this claim, but it is only part of the story of how sexual assault survivors confront a law enforcement regime predisposed to dismiss their complaints.

Recall the Detroit Sexual Assault Kit Action Research Project, which established that the failure to submit a rape kit for testing meant that the police had already decided not to pursue an investigation.<sup>328</sup> As demonstrated by this study and others like it, shelved rape kits result from credibility discounting. Indeed, they are powerful, tangible evidence of it. Incorporating this deeper causal account into claims of unequal protection exposes the discrimination driver.

### CONCLUSION

Credibility discounting is a pervasive feature of our legal response to rape. Even today, rape accusers remain subject to a pronounced credibility discount. This discount involves downgrades both to plausibility (corresponding to hermeneutical injustice) and to trustworthiness (corresponding to problems of testimonial injustice).<sup>329</sup> By surfacing the

---

<sup>327</sup> One framing of this burden is captured by the defendants' argument on their motion to dismiss:

The first question in any equal protection claim is to identify the classification of the comparison groups. Here, the proper comparison group is victims of rape. Plaintiff has not, and cannot, allege that the Department treats male rape kits differently . . . . Nothing here suggests that anyone intentionally treated female rape victims differently from male rape victims.

Defendants' Notice of Motion & Motion to Dismiss Plaintiff's First Amended Complaint, *Marlowe v. City & County of San Francisco*, No. 3:16-cv-00076-MMC (N.D. Cal. July 14, 2016) (citation omitted). Marlowe contends, not that female rape victims were treated differently from male rape victims, but that SFPD's "policy [of failing to properly investigate sexual assault reports made by women] was intentional and, when enforced, had a discriminatory impact on women." *Marlowe* Complaint, *supra* note 312, at \*13-14. To prove intentional discrimination, as I have suggested, the inclusion of credibility discounting in an equal protection claim might well bolster the case.

In its order affording Marlowe leave to amend her equal protection claim, the court cited a different legal standard—rational basis review—which, even absent evidence of gender discrimination, might prohibit treating sexual violence differently from other crimes. Order Granting Motion to Dismiss & Affording Plaintiff Leave to Amend, *Marlowe v. City & County of San Francisco*, No. 3:16-cv-00076-MMC, at \*2 (N.D. Cal. Sept. 27, 2016) (citing *Navarro v. Block*, 72 F.3d 712, 715-717 (9th Cir. 1995) (allowing equal protection claim to proceed to give plaintiffs the opportunity to prove that sheriff's differential response to domestic violence/non-domestic 911 calls was not rational). Gender-based "failure to protect" litigation has mostly involved domestic violence and rarely prevailed. Niji Jain, Comment, *Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Clause*, 60 EMORY L.J. 1011, 1019-21 (2011).

<sup>328</sup> *Supra* notes 190-208 and accompanying text.

<sup>329</sup> Testimonial smothering also manifests as widespread failure to report rape. See *supra* notes 152-158, 267-271 and accompanying text (separately discussing the two dynamics).

discounting phenomenon, I have endeavored to give content to its practice, first by reviewing the legal rules that once formally embedded skepticism of rape complaints, and then by highlighting a contemporary outlet for this skepticism in police and prosecutorial responses to sexual violence.

Throughout this migration from law to law enforcement, the paradigmatic rape accuser has maintained her hold. She is a woman who falsely reports rape because she is vengeful, regretful, or too intoxicated to know better; she invites rape; she needlessly complains about rape when the perpetrator is an acquaintance. Often when police officers and prosecutors confront an allegation of sexual violence, they unduly doubt the trustworthiness of the complainant and the plausibility of her account. In the main, reports of sexual assault are met with skepticism born of prejudice. Absent a true reckoning with how sexual assault victims are perceived by those with the power to dismiss their claims, future reform efforts, both on and off campus, will inevitably be constrained.<sup>330</sup>

Theorizing credibility discounts as epistemically unjust represents a significant conceptual advance. Identifying the systemic downgrading of credibility as itself a problem—a problem with a specific name<sup>331</sup> and developed theoretical underpinnings—facilitates an understanding of all that is at stake when rape complaints are unduly disregarded. This discussion has centered on primary epistemic harms, which have until now mostly escaped attention.

Epistemic injustice also undermines norms of equal citizenship, especially when the downgrading party is a state actor and where the speaker's account is not just any account, but one that tells of violation. These concerns are distinctive and separately deserving of our attention.<sup>332</sup> Within the realm of sexual violence and beyond—perhaps especially in the context of racial oppression<sup>333</sup>—contemplating the political dimensions of epistemic injustice

<sup>330</sup> See *supra* notes 48–58 and accompanying text (detailing the importance of credibility in the treatment of rape allegations).

<sup>331</sup> As Robin West has observed, “[a]n injury uniquely sustained by a disempowered group will lack a name, a history, and in general a linguistic reality.” Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 85 (1987). Although West was writing in the context of gender-specific suffering, her point is generalizable to gendered harms and, beyond, to harms disproportionately suffered by subordinated groups.

<sup>332</sup> Fricker begins to develop this aspect of epistemic injustice in later work. Fricker, *supra* note 75. Relying on the work of political philosopher Philip Petit, she posits that epistemic injustice can “disable a contestee, thus rendering them dominated.” *Id.* at 1324. The upshot is that “institutional bodies to whom citizens may need to contest must, on pain of facilitating domination, achieve epistemic justice in their hearings.” *Id.* at 1326.

<sup>333</sup> See, e.g., Jack Healy & Nikole Hannah-Jones, *A Struggle for Common Ground, Amid Fears of a National Fracture*, N.Y. TIMES (July 9, 2016), <https://www.nytimes.com/2016/07/10/us/a-struggle-for-common-ground-amid-fears-of-a-national-fracture.html> [<https://perma.cc/8LFE-5KUQ>] (describing a nation “increasingly . . . mired in bloodshed and blame” confronting sizeable “discrepancies in the everyday lives of black and white Americans”).

has the potential to enrich a newly revived national conversation about the full implications of inequality.

Our construction of knowledge is bound to reflect the hierarchies in which we are situated. In a more just world, each of us would be able to meaningfully contribute to the constitution of a collective reality, which only then could be transformed.