ARTICLE

DISCOUNTING WOMEN: DOUBTING DOMESTIC VIOLENCE SURVIVORS' CREDIBILITY AND DISMISSING THEIR EXPERIENCES

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In recent months, we've seen an unprecedented wave of testimonials about the serious harms women all too frequently endure. The #MeToo moment, the #WhyIStayed campaign, and the Larry Nassar sentencing hearings have raised public awareness not only about workplace harassment, domestic violence, and sexual abuse, but also about how routinely women survivors face a Gaslight-style gauntlet of doubt, disbelief, and outright dismissal of their stories. This pattern is particularly disturbing in the justice system, where women face a legal twilight zone: laws meant to protect them and deter further abuse often fail to achieve their purpose, because women telling stories of abuse by their male partners are simply not believed. To fully grasp the nature of this new moment in gendered power relations—and to cement the significant gains won by these public campaigns—we need to take a full, considered look at when, how, and why the justice system and other key social institutions discount women's credibility.

We use the lens of intimate partner violence to examine the ways in which women's credibility is discounted in a range of legal and social service system settings. First, judges and others improperly discount as implausible women's stories of abuse,

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based on a failure to understand both the symptoms arising from neurological and psychological trauma, and the practical constraints on survivors' lives. Second, gatekeepers unjustly discount women's personal trustworthiness, based on both inaccurate interpretations of survivors' courtroom demeanor and negative cultural stereotypes about women and their motivations for seeking assistance. Moreover, even when a woman manages to overcome all the initial modes of institutional skepticism that minimize her account of abuse, she often finds that the systems designed to furnish her with help and protection dismiss the importance of her experiences. Instead, all too often, the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse.

Two distinct harms arise from this pervasive pattern of credibility discounting and experiential dismissal. First, the discrediting of survivors constitutes its own psychic injury—an institutional betrayal that echoes the psychological abuse women suffer at the hands of individual perpetrators. Second, the pronounced, nearly instinctive penchant for devaluing women's testimony is so deeply embedded within survivors' experience that it becomes a potent, independent obstacle to their efforts to obtain safety and justice.

The reflexive discounting of women's stories of domestic violence finds analogs among the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus. For these women, too, credibility discounts both deepen the harm they experience and create yet another impediment to healing and justice. Concrete, systematic reforms are needed to eradicate these unjust, gender-based credibility discounts and experiential dismissals, and to enable women subjected to male abuses of power at long last to trust the responsiveness of the justice system.

INTRODUCTION

We are at something of a feminist watershed moment in our society. For months, women have been coming forward in large numbers to share their stories about sexual harassment and assault in the workplace; stories of events that occurred over the course of decades, stories that survivors kept private until now.[1] It is both painful and exhilarating.

But as we hear this slow drip of horror stories, many of us struggle with the acute awareness that we've been here before. Back in 1991, during the Anita Hill–Clarence Thomas hearings,[2] the whole country confronted the ugly dynamic of sexual harassment—most particularly, how men use their power in the workplace hierarchy to subordinate women. (Some of us still have our "I believe Anita" buttons.) And yet here we are today, more than twenty-five years later, experiencing a similar sense of abrupt revelation and shock.

How can we still be surprised by these stories? It's not that workplace assault took a hiatus in the intervening quarter century. There were women all around us, women reading this essay right now, who continued to be sexually harassed. Women seeking legal protection from this kind of discriminatory abuse filed hundreds of thousands of complaints of sexual harassment and assault with the Equal Employment Opportunity

1 *See, e.g.*, Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME, Dec. 18, 2017; Anna Codrea-Rado, *#MeToo Floods Social Media With Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html?_r=0.

2 When she was in her mid-twenties, Anita Hill worked for Clarence Thomas at the Equal Employment Opportunity Commission. When President George H.W. Bush nominated Thomas to replace Justice Thurgood Marshall on the U.S. Supreme Court, Hill testified that Thomas had subjected her to sexual harassment on the job. Millions watched the televised broadcast of the confirmation hearings, as members of the Senate Judiciary Committee, all male and all white, questioned Hill. Ultimately, Thomas was confirmed, with a vote of 52–48. *See, e.g.*, JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994).

Commission during that time.[3] But the broader culture stopped listening, relapsing into a long-standing tendency to trivialize women's experiences of abuse at the hands of powerful, predatory men.

Today's stories pouring out of Hollywood, Congress, and the media are just one facet of this long-simmering public scandal. After experiencing an initial victimization, many women also face a societal gauntlet of doubt, dismissal, or outright disbelief.

As more and more women stepped forward in all spheres of life to offer new testimonials to the #MeToo movement, we began to wonder about how this credibility discounting phenomenon plays out in the context of intimate partner violence[4]—another category of abuse that women primarily suffer at the hands of men.

The parallels are dramatic. Story after story demonstrates how, despite a substantial increase in public awareness of the problem, accompanied by improvements stemming from four decades of activism, scholarship, and training, women survivors of domestic violence face a persistent skepticism regarding both their accounts of abuse and their recitations of harm. Women find their credibility discounted[5] by the partners who abuse them, by the larger society in which they live, and by the gatekeepers of the justice and social service systems to which they turn for help.[6] This skepticism and suspicion compound the pre-existing, myriad harms inflicted via domestic abuse itself. And, perhaps even more important, the pronounced, nearly instinctive penchant for devaluing women's testimony is so deeply embedded within women's experience that it constitutes its own distinct obstacle to their ability to obtain safety and justice. Philosopher Alison Bailey captures, in part, the harm to which we refer: "Imagine living in an epistemic twilight zone, a world

3 *See, e.g.*, Danielle Paquette, *Not Just Harvey Weinstein: The Depressing Truth About Sexual Harassment in America*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/10/12/not-just-harvey-weinstein-the-depressing-truth-about-sexual-harassment-in-america/?utm_term=.5ecb78df70a9.

4 We use the terms *intimate partner violence* and *domestic violence* interchangeably throughout this Article to describe a wide range of abuse—psychological, physical, sexual, or economic—inflicted by a partner or former partner.

5 The term "credibility discount," used frequently in this essay, was originally coined by Deborah Tuerkheimer, in a thoughtful analysis of women's experiences of sexual assault. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017). We use the same term here in part to advance a dialogue about the universality of credibility discounting across contexts where women attempt to resist male abuses of power.

6 This essay focuses on the credibility of straight women survivors in particular. We recognize, of course, that other survivor groups experience serious challenges in terms of achieving credibility. Male survivors, both in heterosexual and same-sex intimate relationships, are often dismissed or even ridiculed. Genderqueer survivors also face major credibility challenges. Our main objective here is to bring to light the persistent and particularized story of our cultural refusal to credit *women as women*, and especially those who have experienced relationship abuse at the hands of men. We also address the ways in which women's intersecting identities, on dimensions such as race, class, and sexual orientation, profoundly affect the likelihood that they will be discredited, as well as their experience of discrediting.

where many of your lived experiences are regularly misunderstood, distorted, dismissed, erased, or simply rejected as unbelievable."[7] But even this capacious understanding fails to capture the full dimensions of the problem. Women also face a legal twilight zone; laws meant to protect them, compensate them, and deter further abuse often fail in application, because women telling stories of abuse by their male partners are simply not believed.

This experience—the reflexive discounting of women's stories of domestic violence—offers a useful vantage point into the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus.[8] For all of these women, credibility discounts both deepen the harm they experience and create yet another obstacle to healing and justice.

This Article critically examines how the justice system and other key institutions of our society systematically discount the credibility of women survivors of domestic violence. Our analysis is based on a wide range of legal, psychological, philosophical, and cultural sources, including the more than twenty-five years of experience each of us has had, individually and in collaboration, representing survivors in civil protection order cases, conducting empirical research with survivors of intimate abuse, and consulting with local and national domestic violence organizations.[9]

A central focus here is on the civil justice system, with particular attention paid to women's efforts to secure safety and a measure of redress in the form of civil protection orders—the legal remedy most commonly utilized by

7 Alison Bailey, *The Unlevel Knowing Field: An Engagement with Dotson's Third-Order Epistemic Oppression*, 3 SOC. EPISTEMOLOGY REV. & REPLY COLLECTIVE 62, 62 (2014).

8 *See infra* text accompanying notes 244–219.

9 Author Deborah Epstein has represented or closely supervised the representation of over 750 petitioners in civil protection order cases in D.C. Superior Court. She served as Co-Chair of the effort to create and implement the D.C. Superior Court's integrated Domestic Violence Unit, Co-Director of the D.C. Superior Court's Domestic Violence Intake Center, and Chair of the D.C. Domestic Violence Fatality Review Commission. She is the author of the D.C. Superior Court's *Domestic Violence Benchbook*, has trained hundreds of police officers, worked in close collaboration with prosecutors on intimate partner violence cases, and written numerous articles addressing domestic violence issues. She has been a member of the D.C. Mayor's Commission on Violence Against Women, and the National Football League Players' Association Domestic Violence Commission, and has served on the Board of Directors of the D.C. Coalition Against Domestic Violence and the House of Ruth. Author Lisa Goodman has published over one hundred peer-reviewed articles based on her extensive research on the experience of intimate partner survivors as they move through systems designed to help them, including social service and justice systems. She has also supervised scores of domestic violence advocates working in a residential setting; conducted numerous evaluations of domestic violence programs; led workshops on trauma-informed approaches to domestic violence services, survivor-defined approaches to advocacy, and evaluating domestic violence programs; and consulted to the National Domestic Violence Resource Center, The National Domestic Violence Hotline, Futures Without Violence, The Full Frame Initiative, and The Second Step.

domestic violence survivors.[10] Because the civil justice system offers no right to counsel, only those who can afford an attorney, or find a pro bono lawyer, are represented. These cases are quite different than those in the criminal courts, where the prosecution commands the investigative resources of the police and wields the full power of the state to subpoena corroborative evidence and compel witnesses to testify. In contrast, in approximately eighty percent of civil protection order and related family law cases,[11] neither the survivor nor the accused perpetrator has a lawyer, discovery is limited,[12] and virtually no one has the resources to retain a private investigator.[13] As a result, few survivors have access to potentially powerful corroborative evidence. Moreover, they lack the benefit of legal advice about what types of more easily available evidence would be useful to bring to court.[14]

These forces all but guarantee that most civil protection order cases end up in the "he said/she said," or "word on word" realm. It's the survivor's testimony against that of her intimate partner. This testimonial structure places enormous pressure on individual credibility. In the end, most protection order cases boil

10 Caroline Vaile Wright & Dawn M. Johnson, *Encouraging Legal Help Seeking for Victims of Intimate Partner Violence: The Therapeutic Effects of the Civil Protection Order*, 25 J. TRAUMATIC STRESS 675, 675 (2012).

11 *See, e.g.*, Amy Barasch, *Justice for Victims of Domestic Violence: One Thing They Really Need Is Lawyers*, SLATE (Feb. 19, 2015, 9:30 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/domestic_violence_protection_victims_need_civil_courts_and_lawyers.html ("[Eighty] percent of people in our civil courts do not have a lawyer . . ."); *see also* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANs 52 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/KZL3-RGUD] ("Low-income survivors of recent domestic violence or sexual assault received inadequate or no professional legal help for 86% of their civil legal problems in 2017."); STATE OF MD. ADMIN. OFFICE OF THE COURTS, DOMESTIC VIOLENCE MONTHLY SUMMARY REPORTING (2017), http://jportal.mdcourts.gov/dv/DVCR_Statewide_2017_1.pdf [https://perma.cc/4HCC-APE6] (demonstrating that, in Maryland, 82.5% of petitioners were pro se in protective order cases during 2017) Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RIGHTS L. REV. 557, 567 (2006) (noting that in Illinois, neither party was represented in 83.4% of protective order cases).

12 In a recent survey of chief judges in courts across the United States, thirty-three percent reported that pro se litigants faced challenges related to discovery issues that were sufficiently problematic that they could affect the case in most or all cases. DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 21-23 (2011), https://www.fjc.gov/content/assistance-pro-se-litigants-us-district-courts-report-surveys-clerks-court-and-chief-judge-1 [https://perma.cc/3WWE-N6RG].

13 Many survivors of domestic violence, and thus many petitioners in protection order cases, are low income. *See infra* text accompanying note 141.

14 A survivor may have access to some corroborative evidence, typically in the form of voice mails, photographs, texts, and social media posts. In many cases, however, a survivor no longer has access to such evidence; particularly in the absence of legal advice, she may have deleted the relevant files, either inadvertently or because they were too upsetting to retain. And because these cases are scheduled as emergency litigation, they typically move from filing to trial in two to three weeks—insufficient time to subpoena useful evidence in the absence of focused legal advice, even in jurisdictions providing nonlawyers with subpoena power.

down to this: if a survivor is believed, the judge will award her protection. If she is not believed, the judge will deny it. This fact—the central importance of a survivor's credibility in the protection order and broader civil justice system—led us to focus on that system as a core area of inquiry.

We examine credibility discounting from a variety of perspectives. In Part I, we analyze the two essential ways in which justice and social service system gatekeepers discount the credibility of women survivors seeking safety. First, judges and others *improperly discount as implausible women's stories of abuse*, due to a failure to understand the symptoms arising from neurological and psychological trauma as well as the practical realities of survivors' lives. Second, gatekeepers *unjustly discount women's personal trustworthiness*, based on inaccurate interpretations of survivors' courtroom demeanor, as well as negative cultural stereotypes about women and their motivations for seeking assistance.

In Part II, we explore how these credibility discounts are reinforced by the broader context of legal and social service systems that are willing to tolerate the harmful impact of laws, policies, and practices on survivors. Even when a woman makes it through the credibility discount gauntlet, she often finds that the systems to which she turns for help *dismiss her experiences and trivialize the importance of her harms*, adopting and enforcing policies with little or no regard for the ways in which they operate to her detriment.

In Part III, we examine the harms inflicted by this combination of discounting women's credibility and dismissing women's experiences. First, these harms can be measured as an additional psychic injury to survivors, an institutional betrayal that echoes the psychological abuse imposed by individual perpetrators. Second, the pervasive nature of these harms creates a distinct obstacle to survivors' ability to access justice and safety, in addition to the many, more concrete stumbling blocks with which domestic violence victims are all too familiar.

Finally, in Part IV, we offer suggestions for initial efforts to eradicate these unjust, gender-based credibility discounts and experiential dismissals. Adopting these reforms would allow women subjected to male abuses of power to trust the responsiveness of the justice system and our larger society.

I. TYPES OF GATEKEEPER-IMPOSED CREDIBILITY DISCOUNTS

Women survivors of abuse inflicted by their intimate partners encounter doubt, skepticism, or disbelief in their efforts to obtain justice and safety from judges and other system gatekeepers.[15] First, their stories of abuse appear less plausible than other stories told in the justice system. We tend to believe stories

15 The most complete exploration of credibility-based obstacles to date can be found in the brief but insightful essay by Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES' J., Winter 1995, at 42.

that are internally consistent—they have a linear thread and are emotionally and logically coherent. But domestic violence often results in neurological and psychological trauma, both of which can affect a survivor's comprehension and memory. The result is a story that, to the untrained ear, sounds internally inconsistent and therefore implausible. In addition, we tend to believe stories that are externally consistent—that fit in with how we believe the world works. But many aspects of the domestic violence experience are foreign, and therefore incomprehensible, to most nonsurvivors. The result is a story that appears on its surface to lack external consistency, and therefore—again—to be less plausible. Second, our assessments of women's personal trustworthiness suffer from skepticism rooted in perceptions of survivors' apparent "inappropriate" demeanor, prejudicial stereotypes regarding women's false motives, and the long-standing cultural tendency to disbelieve women simply because they are women.

A. *Story Plausibility*

Narrative theorists and cognitive scientists agree that human beings are hard-wired to organize facts into "meaningful patterns."[16] This "need for narrative form is so strong that we don't really believe something is true unless we can see it as a story."[17] And storytelling is central to the justice system as well;[18] it is the primary method judges and juries use to assess the reliability of facts presented at trial. Accordingly, any time a survivor needs to go through a gatekeeper to access resources or justice or safety, she has to tell some sort of story about her domestic violence experience. And if she is to succeed, her story must be a plausible one. So what makes a story plausible?

1. Internal Consistency

First, we believe stories that are *internally consistent*. That is, we grant credibility to stories that make logical and emotional sense, have a continuous,

16 CAROLYN GROSE & MARGARET E. JOHNSON, LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS 15-16 (2017); *see also* DAVID CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 93-94 (2002); LISA CRON, WIRED FOR STORY: THE WRITER'S GUIDE TO USING BRAIN SCIENCE TO HOOK READERS FROM THE VERY FIRST SENTENCE 185–199 (2012); Kay Young & Jeffrey Saver, *The Neurology of Narrative*, SUBSTANCE, Mar. 2001, at 74.

17 H. PORTER ABBOTT, THE CAMBRIDGE INTRODUCTION TO NARRATIVE 44 (2d ed. 2008). "For anyone who has read to a child or taken a child to the movies and watched her rapt attention, it is hard to believe that the appetite for narrative is something we learn rather than something that is built into us through our genes." *Id.* at 3.

18 "[T]he law is awash in storytelling." ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000).

linear thread, form a coherent whole, and contain no significant, unexplained gaps in time or action.[19]

But for many domestic violence survivors, telling the truthful story of their abusive experience involves a narrative that is more impressionistic than linear, and that appears somewhat illogical or emotionally off-kilter. The tension between our desire for internal consistency and the realities of survivor stories can be explained in part by some of the neurological and psychological consequences of domestic violence itself, such as traumatic brain injury and posttraumatic stress disorder.

a. *Neurological Trauma: Traumatic Brain Injury*

Traumatic Brain Injury (TBI) can result from either blunt-force trauma to the head (for example, being hit by an object, having your head smashed against something, or being violently shaken), or from reduced oxygen to the brain (for example, through strangulation).[20] Blows to the head can cause cranial bleeding or damage cranial blood vessels and nerves. A lack of oxygen can result in the decreased function or death of brain cells.[21]

In domestic violence cases, both blunt force trauma and strangulation are relatively common. One study of women in three New York domestic violence

19 GROSE & JOHNSON, *supra* note 16, at 16. These correlations apply in the courtroom as well; research demonstrates strong correlations between courtroom credibility determinations and the internal consistency of stories. Numerous studies reveal a strong belief that inconsistencies indicate inaccuracies, and this perception guides juror decisionmaking. *See, e.g.*, Garrett L. Berman, Douglas J. Narby & Brian L. Cutler, *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability, and Verdicts*, 19 LAW & HUM. BEHAV. 79 (1995); Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. APPLIED PSYCHOL. 170 (1996); Neil Brewer et al., *Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony*, 13 APPLIED COGNITIVE PSYCHOL. 297 (1999); Neil Brewer & R.M. Hupfeld, *Effects of Testimonial Inconsistencies and Witness Group Identity on Mock-Juror Judgments*, 34 J. APPLIED SOC. PSYCHOL. 493 (2004); Sarah L. Desmarais, *Examining Report Content and Social Categorization to Understand Consistency Effects on Credibility*, 33 LAW & HUM. BEHAV. 470 (2009); Rob Potter & Neil Brewer, *Perceptions of Witness Behaviour–Accuracy Relationships Held by Police, Lawyers and Mock Jurors*, 6 PSYCHIATRY, PSYCHOL. & L. 97, 101 (1999). The centrality of internal consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. *See, e.g.*, PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 58 (5th ed. 2013).

20 OR. DEP'T OF JUSTICE, TRAUMATIC BRAIN INJURY AND DOMESTIC VIOLENCE, http://www.doj.state.or.us/wp-content/uploads/2017/08/traumatic_brain_injury_and_domestic_violence.pdf [https://perma.cc/7ZVD-XBWJ] (last visited Jan. 23, 2018); PARTNERS FOR PEACE, *Understanding Traumatic Brain Injury, Concussion and Strangulation in Domestic Violence* (Oct. 11, 2016), http://www.partnersforpeaceme.org/understanding-traumatic-brain-injury-concussion-strangulation-domestic-violence/ [https://perma.cc/D7CX-V9F9].

21 NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, *Traumatic Brain Injury: Hope Through Research: How Does TBI Affect the Brain*, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Hope-Through-Research/Traumatic-Brain-Injury-Hope-Through#3218_2 [https://perma.cc/C8HD-SBEL] (last modified June 28, 2017).

shelters found that ninety-two percent of the women questioned had been hit in the head by their partners more than once; eighty-three percent had been hit in the head and shaken severely; and eight percent had been hit in the head over twenty times in the preceding year.[22] Forty percent of these women lost consciousness as a result of at least one of the assaults they endured.[23] In another study, emergency room data indicated that sixty-seven percent of women treated for intimate partner violence–related injuries reported problems consistent with a diagnosis of head injury.[24]

Even mild TBI—which can occur after only a short period without oxygen to the brain—can result in a significant and profound impact on memory and behavior, inducing symptoms such as confusion, poor recall, inability to link parts of the story together or to articulate a logical sequence of events, uncertainty about detail, and even recanting of stories (i.e., renouncing them as untrue after accurately reporting them to friends, family, police, or even judges).[25] In many ways, this is hardly surprising; people with an impaired sense of the consistency of their own experience are unlikely to produce consistent narratives of that experience on demand.

Because research demonstrating the frequency of TBI in the domestic violence context is relatively new, however, few justice system gatekeepers are aware of its potential neurological effects.[26] Even in hospital emergency rooms, where medical professionals now routinely perform TBI screens when

22 Helene Jackson, Elizabeth Philp, Ronald L. Nuttall & Leonard Diller, *Traumatic Brain Injury: A Hidden Consequence for Battered Women*, 33 PROF. PSYCHOL.: RES. & PRAC. 39, 41, 42 (2002) (showing that correlations between frequency of being hit in the head and severity of cognitive symptoms were statistically significant).

23 *Id.* at 41.

24 John D. Corrigan et al., *Early Identification of Mild Traumatic Brain Injury in Female Victims of Domestic Violence*, AM. J. OBSTETRICS & GYNECOLOGY, May 2003, at S71, S74. Yet another sampled women from both shelter and non-shelter populations who all had sustained at least one physically abusive encounter and found nearly seventy-five percent of the entire sample reported a domestic violence–related TBI. Eve M. Valera & Howard Berenbaum, *Brain Injury in Battered Women*, 71 J. CONSULTING & CLINICAL PSYCHOL. 797, 799 (2003).

25 Valera & Berenbaum, *supra* note 24, at 801; Eve Valera, *Increasing Our Understanding of an Overlooked Public Health Epidemic: Traumatic Brain Injuries in Women Subjected to Intimate Partner Violence*, 27 J. WOMEN'S HEALTH 735, 735 (2018) ("[T]he greater the number and more recent . . . the TBIs, the more poorly women tended to perform on measures of memory, learning, and cognitive flexibility, and the higher . . . the levels [of PTSD symptoms]."); *see also* Gwen Hunnicut, Kristine Lundgren, Christine Murray & Loreen Olson, *The Intersection of Intimate Partner Violence and Traumatic Brain Injury: A Call for Interdisciplinary Research*, 32 J. FAM. VIOLENCE 471, 474 (2017); Maria E. Garay-Serratos, *A Secret Epidemic: Traumatic Brain Injury Among Domestic Violence Victims*, L.A. TIMES (Oct. 12, 2015), http://beta.latimes.com/opinion/op-ed/la-oe-1012-garayserratos-tbi-domestic-abuse-20151012-story.html; Rachel Louise Snyder, *No Visible Bruises: Domestic Violence and Traumatic Brain Injury*, NEW YORKER (Dec. 30, 2015), https://www.newyorker.com/news/news-desk/the-unseen-victims-of-traumatic-brain-injury-from-domestic-violence.

26 *See* Kevin Davis, *Brain Trials: Neuroscience Is Taking a Stand in the Courtroom*, 98 A.B.A. J. 37, 37-38 (2012).

a patient presents with certain kinds of athletic injuries, partner abuse victims are rarely screened.[27] And because most injuries caused by strangulation are internal, patients admitted in the absence of such screens are unlikely to be considered for a TBI diagnosis.[28] As a result, survivors themselves are unlikely to know that they are at risk for TBI, unlikely to get treatment, and unlikely to know about the possible symptoms they may later experience.[29] This creates a perfect storm of ignorance: a survivor is more likely to tell justice system gatekeepers a story that lacks internal consistency; the survivor herself is unlikely to be able to understand or explain this apparent failing; and those gatekeepers, in turn, are more likely to hear her story as less plausible and, accordingly, impose an unjust credibility discount on her narrative.

The following true story illustrates the problem.[30] Grace Costa[31] was diagnosed with mild TBI, caused when her ex-boyfriend strangled her with a telephone cord. She's inconsistent when she tries to tell the story: the date changes; sometimes she remembers the assault taking place in one year; other times, another. Her memory varies as to which of her adult children were present. Sometimes she thinks they were about to eat dinner, sometimes that they were talking about a half-eaten apple on the kitchen floor.

Grace can't tell her story with a linear narrative. She says memories of the incident come to her in flashes, one image at a time—apple, blood, cord—but the disparate pieces never fit together as a whole.

Grace's explanation of events is confused. Pieces of her story hang untethered in her mind. She remembers being inside, then outside; being down, then up, and maybe down again. The police weren't there, then they were. Half the time, she says, she doesn't "remember much of anything."

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27 *See* Eve Valera & Aaron Kucyi, *Brain Injury in Women Experiencing Intimate Partner-Violence: Neural Mechanistic Evidence of an "Invisible" Trauma*, 11 BRAIN IMAGING BEHAV. 1664, 1664 (2017) ("TBI treatments are typically absent and IPV interventions are inadequate."); *see also* Garay-Serratos, *supra* note 25; Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. EMERGENCY MED. 303, 308 (2001).

28 This challenge is illustrated by a study of 300 nonfatal domestic violence strangulation cases, where researchers found that only fifteen percent of victims had injuries that were sufficiently visible for police officers to photograph; they further found that even where the injuries were visible, they were often minimized in police descriptions with terms such as "redness, cuts, scratches, or abrasions to the neck." Strack et al., *supra* note 27, at 303, 305-06.

29 *See* Jacquelyn C. Campbell et al., *The Effects of Intimate Partner Violence and Probable Traumatic Brain Injury on Central Nervous System Symptoms*, 27 J. WOMEN'S HEALTH 761, 762 (2018) (noting that "for many abused women, head injuries occur multiple times, in an escalating pattern, and cognitive or psychological effects are often viewed within the context of abuse rather than as a specific medical injury" (i.e., cognitive effects are attributed to mental health conditions resulting from the abuse, rather than a TBI)); Valera & Kucyi, *supra* note 27; Valera, *supra* note 25, at 735 (majority of abuse-related TBI's in study sample "were considered to be mild TBIs for which medical attention [was] almost never sought").

30 This story relies heavily on the account written by Rachel Louise Snyder, *supra* note 25.

31 This is not her real name. *Id.*

To a trauma expert, the way Grace tells her story strongly indicates that she was, indeed, strangled and deprived of brain oxygen that night. The disjointed, incoherent way she tells her story makes it all the more plausible.[32]

But the opposite is true when Grace is telling her story to justice system gatekeepers. To the untrained ear, her story's disjointed, inconsistent nature makes it sound *im*plausible, and therefore she is likely to incur a credibility discount if she tells it to the police, deciding whether to make an arrest; to prosecutors, deciding whether to bring a criminal case; or to a judge, deciding whether to issue a protection order. The more Grace tries to remain faithful to what she actually remembers, the more likely she is to be denied assistance and protection.

b. *Psychological Trauma: Post-Traumatic Stress Disorder*

Psychological trauma can operate similarly to neurological trauma in undermining the internal consistency of a survivor's story; like TBI, it commonly produces memory lapses or dissociative states.[33] Research shows that a majority of survivors meet diagnostic criteria for Post-Traumatic Stress Disorder (PTSD),[34] and many more women exhibit serious symptoms of psychological trauma, though not enough to reach the threshold of a formal diagnosis. These symptoms are another common source of internal inconsistency in survivor accounts provided to police, judges, and other system gatekeepers.

The symptoms that comprise PTSD include avoidance, hyperarousal, and intrusive destabilizing experiences such as dissociative flashbacks and intense or prolonged emotional responses to reminders of the original traumatic event.[35] These reminders are commonly known as "triggers."[36] For many survivors, being in a courtroom, in close proximity to an abusive partner—particularly while being instructed to review his abusive behavior in detail—constitutes a potent trigger.[37] Instead of providing the judge with a clear, logical narrative, a

32 *See supra* text accompanying notes 20–25.

33 *See, e.g.*, Jonathan E. Sherin & Charles B. Nemeroff, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13 DIALOGUES CLINICAL NEUROSCIENCE 263, 263 (2011) ("Several pathological features found in PTSD patients overlap with features found in patients with traumatic brain injury . . . .").

34 A meta-analysis of eleven studies investigating the prevalence of PTSD among IPV survivors demonstrated a weighted mean prevalence of 63.8%. *See* Jacqueline M. Golding, *Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 J. FAM. VIOLENCE 99, 116 (1999); *see also* Loring Jones, Margaret Hughes & Ulrike Unterstaller, *Post Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 TRAUMA, VIOLENCE, & ABUSE 99, 100 (2001).

35 AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271-72 (5th ed. 2013) [hereinafter DSMD].

36 *See, e.g.*, BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 182 (2014).

37 NAT'L CTR. ON DOMESTIC VIOLENCE, TRAUMA AND MENTAL HEALTH, PREPARING FOR COURT PROCEEDINGS WITH SURVIVORS OF DOMESTIC VIOLENCE: TIPS FOR CIVIL LAWYERS

survivor may have flashbacks or feel overwhelmed by emotion. The predictable result is that she will skip, or forget, certain parts of her story—or, indeed, be unable to speak key elements of it out loud.[38] Again, this disconnected, inconsistent testimony is in fact evidence of the truth of her narrative; to the untrained ear, however, it makes her story suspect.

Psychological trauma, or even extreme stress, can affect the memory as well. As Judith Herman puts it: "Traumatic memories have a number of unusual qualities. They are not encoded like the ordinary memories of adults in a verbal, linear narrative that is assimilated into an ongoing life story."[39] Instead, these memories often lack verbal narrative detail and context; they are encoded in the form of sensations, flashes, and images, often with little or no story.[40] And as with neurological trauma, psychologically traumatic memories encode the physical and psychic harms that generate them in a way that is prone to create a steep credibility discount based on the seeming implausibility of a survivor's story.

The tendency to discount survivors' stories based on internal inconsistencies is not restricted to police and judges alone. Courthouse clerks, for example—whose essential function is to create and maintain case files—often take on the role of credibility-assessors and system gatekeepers.[41] This happens even though clerks have no formal authority to determine whether a complaint has merit; such power is reserved to members of the judiciary, through Article III of the Constitution. Here is one example, from attorney and law professor Jane Stoever:

> I recall waiting in a Domestic Violence Unit clerk's office . . . and seeing a clerk confront an unrepresented abuse survivor about the lack of specific dates in her

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AND LEGAL ADVOCATES 1 (2013), http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH-2013-Preparing-for-Court-Proceedings.pdf [https://perma.cc/2UDK-JPRL].

38 Jerrell Dayton King & Donna J. King, *A Call for Limiting Absolute Privilege: How Victims of Domestic Violence, Suffering with Post-Traumatic Stress Disorder, Are Discriminated Against by the U.S. Judicial System*, 6 DEPAUL J. WOMEN, GENDER & L. 1, 29 (2017) (testifying in court can cause a survivor to reexperience trauma and dissociate); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1313 (1993) (noting that dissociation can make testimony appear "'plastic' or 'fake' while hyperarousal can make survivors appear overly excitable").

39 JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 37 (1997).

40 *Id.* at 38. An inability to recall key features of the trauma is one criterion of the posttraumatic stress disorder diagnosis. *See* DSMD, *supra* note 35, at 271. As Dr. Jim Hopper explains: "Remembering always involves reconstruction and is never totally complete or perfectly accurate . . . . [G]aps and inconsistencies are simply how memory works – *especially* for highly stressful and traumatic experiences . . . where the differential encoding and storage of central versus peripheral details is the greatest. Such gaps and inconsistencies are never, on their own, proof of *anyone's* credibility, innocence, or guilt." Jim Hopper, *Sexual Assault and Neuroscience: Alarmist Claims Vs. Facts,* PSYCHOL. TODAY (Jan. 22, 2018), https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/201801/sexual-assault-and-neuroscience-alarmist-claims-vs-facts [https://perma.cc/RG6P-EX38].

41 This observation is based on the first author's twenty-seven years of experience representing survivors in hundreds of civil protection order cases. *See supra* note 9.

> petition. The clerk insisted that the litigant had to plead with specificity, which included identifying specific calendar dates. When the *pro se* survivor was unable to remember exact dates for the years of abuse she had endured, the clerk tore up her petition [and refused to let her file a protection order case].[42]

2. External Consistency

In addition to crediting stories based on their degree of *internal* consistency, we are far more likely to credit stories that are *externally* consistent—i.e., chronicles of abuse that resonate with our pre-existing and publicly sanctioned narratives about how the world works.[43] An example taken from Professors Carolyn Grose and Margaret Johnson underlines this dynamic:

> A narrative that tells of a person entering a home and closing a wet, dripping umbrella while exclaiming, "I just walked through a fire!" would not fit with our sense of normal. To be externally consistent, she should have burnt clothes, not a dripping wet umbrella, or be coughing from the smoke.[44]

The demand for external credibility, however, is complicated by the unconscious process of "false consensus bias"—the tendency to see one's "own behavioral choices and judgments as relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, or inappropriate."[45] In other words, we tend to assume that our own personal experiences are universal: what *we* would likely do, say, and feel is what *all others* would do, say, and feel.[46]

In reality, of course, these assumptions are misleading. Passengers who have survived a serious car crash tend to react quite differently to a driver's sudden slamming of the brakes than those who have experienced only unremarkable

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42 Interview with Jane Stoever, Clinical Professor of Law, Univ. Cal., Irvine Sch. of Law (Jan. 6, 2018).

43 GROSE & JOHNSON, *supra* note 16, at 15-16. As with internal consistency, the importance of external consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. *See, e.g.*, BERGMAN, *supra* note 19, at 62–63.

44 GROSE & JOHNSON, *supra* note 16, at 16.

45 Lee Ross, David Greene & Pamela House, *The "False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1976); *see also* Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCHOL. BULL. 72, 72 (1987) (noting that over a ten-year period, "over 45 published papers have reported data on perceptions of false consensus and assumed similarity between self and others"); Leah Savion, *Clinging to Discredited Beliefs: The Larger Cognitive Story*, 9 J. SCHOLARSHIP TEACHING & LEARNING 81, 87 (2009) ("People tend to over-rely on instances that confirm their beliefs, and accept with ease suspicious information"); Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1268 (2008).

46 *See* Marks & Miller, *supra* note 45; Ross, Greene & House, *supra* note 45; Solan, Rosenblatt & Osherson, *supra* note 45.

car rides.[47] Veterans who have spent time in military conflict tend to react quite differently to loud, unexpected noises than do civilians leading peaceful lives.[48] In each of these examples, a profound difference in experience results in fundamentally different expectations about how the world works. And such expectations tend, in turn, to provoke diverse behaviors.

The most consequential experiential gap that separates domestic violence survivors from gatekeepers of the justice system involves, of course, the behaviors that stem from suffering abuse at the hands of an intimate partner. Despite decades of activism and research, the experiences of women survivors fall into what philosopher Miranda Fricker calls a persistent "gap in collective interpretive resources" that prevents the dominant culture from making sense of a particular kind of social experience.[49] In the intimate abuse context, this gap prevents most nonsurvivors from being able to make sense of how survivors might actually behave.

a. *Women Who Stay*

To see the real-world impact of this interpretive gap, consider a quandary that has assailed survivors since the early days of the anti–domestic violence movement.[50] We know that many women stay with their abusive partners in the aftermath of violent episodes. This tends to occur in the context of relationships characterized by coercive control, a pattern of domination that

47 *See* J. Gayle Beck & Scott F. Coffey, *Assessment and Treatment of PTSD After a Motor Vehicle Collision: Empirical Findings and Clinical Observations*, 38 PROF. PSYCHOL. RES. & PRAC. 629, 629 (2007) (explaining that survivors of motor vehicle accidents are at heightened risk of post-traumatic stress disorder and may experience intrusive symptoms or avoid driving altogether).

48 *See, e.g.*, Anke Ehlers, Ann Hackmann & Tanja Michael, *Intrusive Re-Experiencing in Post-Traumatic Stress Disorder: Phenomenology, Theory, and Therapy*, 12 MEMORY 403, 407 (2004).

> [M]any of the trigger stimuli are cues that do not have a strong meaningful relationship to the traumatic event, but instead are simply cues that were temporally associated with the event, for example physical cues similar to those present shortly before or during the trauma (e.g., a pattern of light, a tone of voice); or matching internal cues (e.g., touch on a certain part of the body, proprioceptive feedback from one's own movements). People with PTSD are usually unaware of these triggers, so intrusions appear to come out of the blue.

Id. (emphasis omitted) (citation omitted). For a vivid visual/aural exposition of the triggers veterans face in daily life, see David Lynch Found., *Sounds of Trauma*, YOUTUBE (Apr. 11, 2017), https://www.youtube.com/watch?v=bgpRw92d1MA.

49 MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2007).

50 *See, e.g.*, Nancy R. Rhodes & Eva Baranoff McKenzie, *Why Do Battered Women Stay?: Three Decades of Research*, 3 AGGRESSION AND VIOLENT BEHAV. 391 (1998).

includes tactics to isolate, degrade, exploit and control the survivor.[51] The perpetrator creates and enforces a set of "rules" governing numerous aspects of his partner's life—"her finances, clothes, contact with friends and family, even what position she sleeps in."[52] Once a perpetrator of abuse has appropriated the power to verbally restrict his partner's day-to-day life choices, physical violence then serves as both the abuser's means of enforcing that control and the punishment for attempts to resist it.[53] Many of us, but perhaps especially those privileged enough to live lives untouched by violence and with easy access to supportive resources, respond to stories of women who stay by focusing obsessively on the question "Why didn't she leave?"[54] The question is really more of an accusation: "In her shoes, I would most definitely have left." Or, in the words of a judge presiding over a civil protection order case: "[S]ince I would not let that happen to me, I can't believe that it happened to you."[55]

In recent years, judges are less likely to make such explicit statements on the record, but many continue to perceive a woman's decision to stay as externally inconsistent.[56] Judges tend to express their belief in the connection between women staying and story plausibility in less formal contexts, such as judicial training sessions and casual conversations outside of the courtroom.[57] And this failure of understanding affects case outcomes. In 2015, for example, one of the first author's clinic clients lost her civil protection order suit based on a judge's discrediting the woman's story. The judge explained that her credibility determination derived from photographs, introduced by the perpetrator boyfriend, showing that, not long after a particularly serious violent episode and just a few days after she obtained a temporary protection order, the woman had

51 Evan Stark, Re-Presenting Battered Women: Coercive Control and the Defense of Liberty (2012) (unpublished manuscript), http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf [https://perma.cc/DJK3-LVW7].

52 Deborah Epstein & Kit Gruelle, *Should an Abused Wife Be Charged in Her Husband's Crime?* N.Y. TIMES (Mar. 12, 2018), https://www.nytimes.com/2018/03/12/opinion/noor-salman-vegas-shooting-trial.html.

53 Scholar Michael Johnson has developed a widely used typology of intimate partner violence, based on the extent to which coercive control is involved. Relationships that take the form of "intimate terrorism" are characterized by one partner's use of coercive control to exert power over the other. In contrast, "situational couple violence" is not embedded within a broader pattern of controlling behaviors. Survivors who tend to seek help from social services and the justice systems are more likely to be involved in relationships of coercive control than are survivors in the general population. *See* Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322, 323-24, 347 (2005).

54 *See infra* text accompanying notes 60–66.

55 Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1275 (1993).

56 This observation is based on the first author's twenty-seven years of experience representing survivors in hundreds of civil protection order cases. *See supra* note 9.

57 The first author has observed or participated in several such conversations at judicial training sessions, conferences, and in informal social settings over the last ten years.

gone to a Red Lobster restaurant with him.[58] The judge was not interested in hearing about why the woman had decided to have dinner with her abusive partner—whether it was because she believed that the best way to ensure her immediate safety was to comply with her boyfriend's requests, because she was struggling with the challenges of ending a long-term relationship, or because she wanted her children to be able to see their father. Instead, the judge simply concluded that the photographs proved her incredibility.[59]

This persistent interpretive gap separating survivor and nonsurvivor understandings of the world was a powerful theme of the recent #WhyIStayed movement. In the fall of 2014, Baltimore Ravens running back Ray Rice assaulted his then-fiancée Janay Palmer in an elevator, knocking her unconscious. The video of the incident, which also showed Rice dragging Palmer's limp body out of the elevator, was made public.[60] Both the media and the general public focused their attention disproportionately on variations of the victim-blaming question, "Why didn't she leave?" Far more ink was spilled discussing whether Janay provoked the assault (she slapped Rice in the face) and on Janay's longer-term response to the incident (electing to stay with Rice and eventually marrying him) than was devoted to Rice's knock-out punch to her head.[61]

Frustrated with the media response to the Rice–Palmer story, survivor Beverly Gooden decided to share with her family and friends, for the first time, the abusive conduct that had besieged her own marriage.[62] She did so by sending out the following three tweets under the hashtag #WhyIStayed:

> I tried to leave the house once after an abusive episode, and he blocked me. He slept in front of the door that entire night - #WhyIStayed.
>
> I stayed because my pastor told me that God hates divorce. It didn't cross my mind that God might hate abuse, too - #WhyIStayed.
>
> He said he would change. He promised it was the last time. I believed him. He lied - #WhyIStayed.[63]

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58 Interview with Gillian Chadwick, Assoc. Professor, Washburn Univ. Sch. of Law (Jan. 1, 2018).

59 *Id.*

60 *See, e.g.*, Charles M. Blow, *Ray Rice and His Rage*, N.Y. TIMES (Sept. 14, 2014), https://www.nytimes.com/2014/09/15/opinion/charles-blow-ray-rice-and-his-rage.html.

61 *See, e.g.*, Greg Howard, *Does the NFL Think Ray Rice's Wife Deserved It?*, DEADSPIN (July 31, 2014), https://deadspin.com/does-the-nfl-think-ray-rices-wife-deserved-it-1612138248 [https://perma.cc/7DMH-22R4]; Mel Robbins, *Lesson of Ray Rice Case: Stop Blaming the Victim*, CNN (Sept. 16, 2014), http://www.cnn.com/2014/09/08/opinion/robbins-ray-rice-abuse/index.html [https://perma.cc/EV9Y-MF24].

62 *Hashtag Activism in 2014: Tweeting 'Why I Stayed'*, NAT'L PUB. RADIO (Dec. 23, 2014), https://www.npr.org/2014/12/23/372729058/hashtag-activism-in-2014-tweeting-why-i-stayed [https://perma.cc/XT7G-99MX] [hereinafter *Hashtag Activism*].

63 *Id.*

Much to Gooden's surprise—she had previously used Twitter only to make relatively mundane comments about the details of her day[64]—the hashtag was soon trending; it remained steadily active for weeks and continued to receive daily contributions for over a year.[65]

The numbers are telling here. Within hours, #WhyIStayed had unleashed thousands of tweets, with an avalanche of more than 100,000 in the first four months.[66] The sheer scale of the response is a strong indication of a pent-up sense among survivors that their stories are simply not understood by the larger culture.

b. *Physical Versus Psychological Harm*

The pronounced disconnect between survivor and nonsurvivor understandings of the world also strongly shapes common judicial expectations about experiences of harm. Most judges in our courts are men[67] and presumably—based on statistical probabilities alone—most are also nonsurvivors.[68] Anyone working in the justice system (including the first author) knows that many nonsurvivor judges in civil protection order cases tend to assume that, if they were to find themselves in an abusive relationship,

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64 *Id*.

65 Melissa Jeltsen, *The Ray Rice Video Changed the Way We Talk About Domestic Violence*, HUFFINGTON POST (Sept. 8, 2015), https://www.huffingtonpost.com/entry/ray-rice-janay-video-domestic-violence_us_55ec7228e4b002d5c07646cb [https://perma.cc/R92T-F4FH]. The top three reasons cited by survivors in the first year of #WhyIStayed posts were: a desire to keep the family intact, love of the abusive partner, and fear of the dangers inherent in leaving. *Id.* Early responses to the hashtag included:

> @HToneTastic #WhyIStayed - Because his abuse was so gradual and manipulative, I didn't even realize what was happening to me.
>
> @BBZaftig #WhyIStayed - Because he told me that no one would love me after him, and I was insecure enough to believe him.
>
> @MonPetitTX - Because I had watched my mother stay and she had watched hers before that.

Hashtag Activism, *supra* note 62.

66 *Hashtag Activism, supra* note 62; Lizzie Crocker, *Harsh Truths about Domestic Violence: Why Voicing Terrible Experiences Can Help Others*, THE DAILY BEAST (Sept. 20, 2014), https://www.thedailybeast.com/harsh-truths-about-domestic-violence-why-voicing-terrible-experiences-can-help-others [https://perma.cc/5Q5B-AUES].

67 Thirty percent of judges in U.S. state courts (where domestic violence cases typically are heard) are women. NAT'L ASS'N OF WOMEN JUDGES, 2016 U.S. STATE COURT WOMEN JUDGES (2016), https://www.nawj.org/statistics/2016-us-state-court-women-judges [https://perma.cc/LV2M-W9EF].

68 National survey data show that nearly one in three women and one in four men will experience domestic violence at some point in their lives. 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 (NISVS): 2010 SUMMARY REPORT 2 (2010).

the most troubling aspect would be the physical, not the psychological, violence.[69] This prioritization of physical over psychological harm is reflected in the written law: criminal law, most of tort law, and civil protection order statutes all focus heavily on physical assaults and threats of violence, rather than emotional abuse or threats of psychological harm.[70] For judges and other justice system actors, the law tends to dictate psychic reality: what the law prohibits *must* be what is harmful. The end result is that most judges assume that the way the world works, and therefore what is externally consistent, is that physical violence is far worse than psychological abuse. [71]

How does this assumption translate into courtroom expectations? A common judicial expectation is that a "real" victim will lead with physical violence in telling her story on the witness stand.[72] But in fact, many survivors tell their stories quite differently. For many women, abusive relationships are characterized by episodic, sometimes relatively infrequent, outbursts of physical violence and threats.[73] The day-to-day, routine abuse often occurs solely in the psychological realm.[74] Psychologists explain that in many abusive relationships victims are subjected to their partners' coercive control through a wide variety of psychological tactics, including, for example, "fear and intimidation[,] . . . emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles."[75] An abusive partner might effectively isolate a woman and increase his control over her life by sabotaging her efforts to find or keep a job or to attend a job-training session by refusing to allow her to

69 This prioritization of physical over psychological harm is reflected in the written law: both criminal statutes and civil protection order laws focus on heavily on physical assaults and threats of violence rather than emotional abuse or threats of psychological harm. *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1143-44 (2009).

70 *Id*. at 1134-38

71 *Id*. at 1143. This assumption may well vary depending on the particularities of a survivor's identity. The stereotype of women as especially frail and vulnerable, for example, derives primarily from cultural images of white, heterosexual women.

72 This observation is based on the first author's twenty-seven years of litigating hundreds of civil protection order cases. *See supra* note 9.

73 *See* NAT'L CTR. FOR VICTIMS OF CRIME, INTIMATE PARTNER VIOLENCE (2017) (on file with authors) (demonstrating that emotional and psychological abuse more prevalent than physical violence); WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN: INTIMATE PARTNER VIOLENCE (2012), http://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=72E1B41F23450EB8BFA1B9A66985F90E?sequence=1 [https://perma.cc/4M79-8R8M] (showing lifetime reported prevalence rate of emotional abuse higher than rate of physical abuse).

74 In one study of 1443 women, 86.2% of those who had experienced physical violence also reported emotional abuse without physical/sexual violence. Ann L. Coker et al., *Frequency and Correlates of Intimate Partner Violence by Type: Physical, Sexual, and Psychological Battering*, 90 AM. J. PUB. HEALTH 553, 557 (2000).

75 Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 245 (2000).

sleep the night before a job interview, hiding or destroying her work clothing, inflicting noticeable injuries to create a disincentive to appear in public, hiding car keys or disabling her family car, threatening to kidnap the children if she leaves them with a babysitter or at day care, and harassing her at work.[76]

These pervasive, abusive experiences lead an overwhelming number of survivors to feel that the emotional harm inflicted by their partners is far more damaging than the physical injuries.[77] And this response is consistent with what we know from research; women report that psychological abuse is by far the greatest source of their distress,[78] regardless of the frequency or severity of the physical harm they've experienced.

So when a judge in a civil protection order court says to a woman: "tell me what happened," she may well focus on the harm that is most salient to her—the constant derogatory name calling, the way he made her feel that everything was her fault, the way he always checked her phone to see who she was talking to. The physical violence and threats may take a back seat; she might not even mention them unless specifically asked.[79] Thus, survivors often frame their courtroom stories in a way that fails to fit the expectations of most judges, and even of the law itself: what may feel to victims like the most insidious and intimate brand of abuse can come across to legal gatekeepers as something that really doesn't count as abuse at all.

The result is what philosophers call a serious "epistemic asymmetry" between marginally situated survivors and the judges who serve as their audience.[80] I (the first author) have frequently been in courtrooms and

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76 Jody Raphael, *Battering Through the Lens of Class*, 11 J. GENDER, SOC. POL'Y. & L. 367, 369 (2003); *see also* Postmus, *supra* note 75, at 246. For an excellent discussion of the failure of the legal system to incorporate the full range of survivor harms, see generally Johnson, *supra* note 69.

77 The authors have observed this prioritization throughout their over fifty years of combined experience talking to women survivors.

78 *See, e.g.*, Mary Ann Dutton, Lisa A. Goodman & Lauren Bennett, *Court-Involved Battered Women's Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse,* 14 VIOLENCE & VICTIMS 89, 101-02 (1999) (finding that symptomatic responses to abuse, including PTSD and depression, were largely predicted by psychological abuse, rather than by physical violence); Mindy B. Mechanic, Terri L. Weaver & Patricia A. Resick, *Mental Health Consequences of Intimate Partner Abuse*, 14 VIOLENCE AGAINST WOMEN 634, 649-50 (2008). In addition, the psychological component of intimate partner violence appears to be the strongest predictor of posttraumatic stress disorder. *See* Maria Angeles Pico-Alfonso, *Psychological Intimate Partner Violence: The Major Predictor of Posttraumatic Stress Disorder in Abused Women*, 29 NEUROSCIENCE & BIOBEHAV. REVS. 181, 189 (2005) ("When the role of psychological, physical, and sexual aspects of intimate partner violence were considered separately, the psychological component turned out to be the strongest predictor [of PTSD].").

79 This has been a consistent experience of the first author in representing many hundreds of women survivors, and watching thousands more, not represented by counsel, tell their stories in civil protection order court.

80 *See, e.g.*, Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, *in* ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 167, 170 (Ian James Kidd et al. eds., 2017) [hereinafter ROUTLEDGE HANDBOOK].

witnessed judges, presiding over protection order cases, get frustrated with women who testify at length about their mental anguish at their partner's hands. These survivors—more than eighty percent of whom proceed without the benefit of legal representation[81]—have no idea that this part of their stories will not trigger legal relief. It is often only after aggressive judicial questioning that survivors volunteer information about physical abuse or threats, and when they do, they may sound—to the judges, at any rate—less concerned about those aspects of their stories than about the day-to-day psychic harms they have endured. In this context, the admission of physical abuse can sound to judges like something of an afterthought. Because so many judges do not understand survivors' frames for their experiences, they may suspect that women's too-little, too-late testimony about physical violence is either exaggerated or fabricated out of whole cloth; that they are adding it only after belatedly realizing that the law demands such facts.

This profound gap in understanding—assuming a woman survivor's story is less plausible when it fails to meet her judicial audience's expectations about how the world works—creates real obstacles for survivors. The survivor has tried her best to faithfully recount her story as she experienced it, and thus with actual fidelity to the truth. But the judge has a fundamentally different understanding of how the world works, and he may well assume his is a universal one. As a result, the woman may well suffer a credibility discount based not on a fair assessment of her case, but rather on a fundamental failure of understanding.

As the above discussion illustrates, even after nearly five decades of anti-domestic violence advocacy, many justice system gatekeepers still lack a sophisticated understanding of what constitutes a truly plausible story about women's experiences of intimate partner abuse. Extensive and often high-profile media coverage, radical changes in the civil and criminal laws, the creation of specialized domestic violence courts, support for a massive proliferation of shelters and advocacy programs, and millions of dollars' worth of research[82] have not realigned the way many officials go about making sense of plausible survivor behavior.

The dominant culture's persistent failure to absorb the different experiences shared among a marginalized group may well derive from what philosopher Gaile Pohlhaus calls a "willful hermeneutical ignorance."[83] Pohlhaus describes how our culture's asymmetrical authority systems essentially downgrade women into a status of less competent "knowers" than men.[84] Men, in contrast, are:

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81 *See* Barasch, *supra* note 11.

82 *See, e.g.*, Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 3-4 (1999).

83 Gaile Pohlhaus, Jr., *Varieties of Epistemic Injustice*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 17.

84 *Id*.

> [E]ncouraged to develop a kind of epistemic arrogance in order to maintain that their experience of the world is generalizable to the entirety of reality, a close-mindedness to the possibility that others may experience the world in ways they cannot, and an epistemic laziness with regard to knowing the world well in light of those [who are] oppressed . . . .[85]

The result here is that members of the predominantly male, nonsurvivor culture place too much weight on their own—uninformed, inexperienced—perceptions about key features of domestic violence, and too little on the perceptions of survivors with firsthand experience. When male authority figures are made aware of how their perceptions conflict with the stories of women survivors, they resolve the conflict by doubting women's articulated experience.[86] Cognitive scientists refer to this phenomenon as "belief perseverance"—the process by which people tend to hold onto a set of beliefs as true, even when ample discrediting evidence exists.[87]

Women victimized by domestic violence often fail to offer narratives that are recognized as internally consistent, due, paradoxically enough, to symptoms of neurological and psychological trauma that *are themselves the effects of abuse*. Such women also fail to tell stories that fit the way nonsurvivors believe the world operates, resulting in the appearance of external inconsistency and, as an all-too predictable outcome, the reflexive dismissal of their experience within the justice system and the broader culture. Together, these apparent—but not real—inconsistencies in survivors' stories cast doubt on the stories' plausibility. And the real-world costs are steep indeed: judges, police officers, and other justice system gatekeepers are likely to impose credibility discounts that interfere with a woman's ability to obtain justice, safety, and healing.

B. *Storyteller Trustworthiness*

In addition to obstacles rooted in story plausibility, survivors face serious challenges in convincing justice system gatekeepers to accept them as personally trustworthy storytellers. In other words, regardless of the *content* of her story, a woman may be considered an unreliable reporter of her own experiences. In the philosophy literature, this is referred to as "testimonial injustice": a discriminatory disbelief of the storyteller herself, independent of the story she tells.[88]

Three of the most critical factors that contribute to our assessments of storyteller trustworthiness are (1) the storyteller's demeanor;[89] (2) the

85 *Id.* at 17.

86 McKinnon, *supra* note 80, at 170-71.

87 *See, e.g.*, Savion, *supra* note 45, at 81.

88 FRICKER, *supra* note 49, at 4.

89 *See infra* text accompanying notes 912–111.

storyteller's motive;[90] and (3) the storyteller's social location.[91] All three of these factors are particularly salient in the experiences of women domestic violence survivors trying to establish credibility in the eyes of justice system gatekeepers.

1. Demeanor

As discussed above,[92] when a survivor tells the story of the abuse she has experienced, her demeanor may be symptomatic of psychological trauma induced by extended abuse. Three core aspects of PTSD—numbing, hyperarousal, and intrusion[93]—can influence demeanor in obvious ways. And despite the proliferation of police and judicial training, many gatekeepers continue to misinterpret—and, as a result, discount—the credibility of women who display each set of symptoms when telling their stories of abuse.

A survivor can respond to overwhelming trauma by becoming emotionally numb, a compensating psychic response that often manifests as a highly constrained affect.[94] This symptom can profoundly shape the way a woman appears in court and, in turn, how a judge or other justice system gatekeeper perceives her. Numbing may cause many survivors to testify about emotionally charged incidents with an entirely flat affect or render them unable to remember dates or details of violent incidents.[95] A woman may tell a story about how her partner sexually assaulted her as if she is talking about the weather outside. The disconnect between expectations about affect and story can be jarring and can result in the imposition of a credibility discount.

PTSD also alters demeanor via hyperarousal—that is, an anxious posture of alertness and reactivity to an imminent danger.[96] This "[h]yperarousal can cause a victim to seem highly paranoid or subject to unexpected outbursts of rage in response to relatively minor incidents."[97] In the courtroom, for example, an accused abusive partner may give the survivor a particular look or adopt a particular tone of voice. The judge may not notice anything out of the ordinary, but the partner does: She knows that the abuser is communicating a message of intimidation or threat. As a result, she may suddenly break down on the witness stand, gripped by fear, frustration, fury, or all three. But to the judge, who has no window into the triggering event, the survivor is likely to sound

90 *See infra* text accompanying notes 112–141.

91 *See infra* text accompanying notes 143–165.

92 *See supra* text accompanying notes 33–40.

93 DSMD, *supra* note 35, at 271-72.

94 *Id.* at 272.

95 *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221 (1993); *see also* HERMAN, *supra* note 39, at 45.

96 DSMD, *supra* note 35, at 272.

97 Epstein, *supra* note 82, at 41.

out of control, even a bit crazy.[98] The survivor now fits the stereotype of a classic hysterical female—an image commonly associated with exaggeration and unreliability.[99] The judge is therefore more likely to apply a credibility discount in such settings and assume that, regardless of the content of her story, the survivor is not a fully trustworthy witness.

Finally, as discussed in the context of story plausibility, PTSD symptoms affect demeanor through *intrusion*—reliving the violent experience as if it were occurring in the present, often through flashbacks.[100] Such unbidden re-experiencing of traumatic events may badly impair a witness' ability to testify in a narratively seamless—or indeed, even a roughly sequential—fashion.[101]

Once more, domestic violence complainants can find themselves in a double bind. The symptoms of their trauma—the reliable indicators that abuse has in fact occurred—are perversely wielded against their own credibility in court. Because PTSD symptoms can make abused women appear hysterical, angry, paranoid, or flat and numb, they contribute to credibility discounts that may be imposed by police, prosecutors, and judges.[102]

Even demeanor "evidence" that is not symptomatic of trauma but that is a "normal" response to stressful courtroom circumstances can lead judges to discount a survivor's credibility. In a 2017 Boston trial court proceeding, for example, a woman seeking a one-year extension of her existing protection order testified about her abiding fear of her former partner. Following a contested trial, the judge awarded her the extension. Sitting next to her attorney as she listened to the court's ruling, she smiled and slumped in her seat, her torso sagging with relief. A few days later, the trial judge, sua sponte, set a reconsideration hearing. He told the woman that, in his view, she had appeared "too celebratory" when he had ruled in her favor at the previous hearing. As a result, he realized that she was not, in fact, a credible witness. The judge then vacated his previous decision to extend her protection order.[103]

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98 *See* Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1078 (2011).

99 *See id.* at 1079 ("Female jurors, according to one study, already believe that women are generally 'less rational, less trustworthy, and more likely to exaggerate than men.'").

100 DSMD, *supra* note 35, at 275.

101 Epstein, *supra* note 82, at 41.

102 *See, e.g.*, *id.*; Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1878 (1996); Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim–Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 742 (2003).

103 Interview with Community Advocate, Transition House, in Cambridge, Mass. (Dec. 18, 2017). The classic example of the justice system's misuse of affective evidence is Albert Camus's novel, *The Stranger*. The protagonist, Meursault, is sentenced to death for a murder based in part on a condemnation of his unrelated, "inappropriate" actions in the days following his own mother's death. Witnesses testified that Meursault did not cry but smoked a cigarette and drank coffee as he sat near his mother's coffin, and that the day after her funeral he swam in the ocean, saw a comedy film, and then made love with a woman he'd long been romantically interested in. This behavior, inconsistent

Credibility discounts based on presumed inappropriate demeanor are imposed by other justice system gatekeepers as well. One attorney recalls a recent California case as follows:

> In my county, domestic violence cases involving children may be referred to court evaluators to meet with the parties and provide the judge with an assessment as to the veracity of the allegations. One client went to her appointment with the evaluator and reported that her ex-boyfriend had been texting her in violation of an initial, temporary protection order. She showed her phone to the evaluator, who saw that she had saved her ex-boyfriend's phone number under an expletive, instead of using his actual name. Based on this evidence of the woman's anger, the evaluator determined that she was not afraid of the respondent (a fact irrelevant to the applicable legal standard), and for this reason deemed her domestic violence claim inconclusive.[104]

At the same time, abusive men often provide a sharp credibility contrast; they tend to excel at presenting themselves as self-confident and in control, are adept at manipulation, and "are commonly able to lie persuasively, sounding sincere," all of which tends to trigger assumptions that they are in fact credible.[105] A 2015 study of survivors conducted by the National Domestic

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with society's image of a grieving son, led the community to despise him and a jury to condemn him for a murder to which he had no connection. *See* ALBERT CAMUS, THE STRANGER 8, 20-21, 64 (Matthew Ward trans., Vintage Books 1988) (1942). The tendency, in both the public and the justice system, to discount credibility and assume guilt persists today, as demonstrated by the case of Amanda Knox, a young woman from Seattle who went to Perugia, Italy, and was twice convicted in Italian courts—and, years later, fully exonerated—of murdering her housemate. *See* Martha Grace Duncan, *What Not to Do When Your Roommate Is Murdered in Italy: Amanda Knox, Her "Strange" Behavior, and the Italian Legal System*, HARV. J.L. & GENDER-CREATIVE CONTENT, Sept. 19, 2017, http://harvardjlg.com/2017/09/what-not-to-do-when-your-roommate-is-murdered-in-italy-amanda-knox-her-strange-behavior-and-the-italian-legal-system-by-martha-grace-duncan/ [https://perma.cc/VBS7-P23B]. Amanda's initial conviction was heavily dependent on her "inappropriate" actions in the days following the murder, including kissing her boyfriend not far from the scene, cuddling with him at the police station, turning a cartwheel—at a police officer's request—while waiting to be interviewed, and shopping for underwear not long after the murder (because she had no access to her apartment, which was locked down as a crime scene). *Id.* at 10-23. Similarly, Lindy Chamberlain was convicted of murdering her infant daughter while camping in the Australian outback. Clyde Haberman, *Vindication at Last for a Woman Scorned by Australia's News Outlets*, N.Y. TIMES (Nov. 16, 2014), https://www.nytimes.com/2014/11/17/us/vindication-at-last-for-a-woman-scorned-by-australias-news-media.html. Public sentiment condemned Chamberlain early on, based largely on her attire and affect in the courtroom. Lindy described feeling "trapped in a no-win situation. 'If I smiled, I was belittling my daughter's death . . . . If I cried, I was acting.'" *Id.* Forensic evidence subsequently exonerated Chamberlain, confirming the accuracy of her report that a wild dog pulled her daughter out of a tent and killed her. *Id*.

104 Interviews with Jane Stoever, Clinical Professor of Law, Univ. of Cal., Irvine Sch. of Law (Jan. 6 & 9, 2018).

105 LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT 15-16 (1st ed. 2002); *see also* Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 174

Violence Hotline is full of examples of this profoundly damaging credibility gap, including this one from a female survivor: The police made "things worse and act[ed] like I was the bad guy because I came in crying, but my abuser was calm after 2 years of hell—duh[,] I was scared and he was fine."[106]

The skeptical reactions of justice system gatekeepers to survivor demeanor can trigger a vicious cycle of credibility discounts. The more a police officer or judge appears to doubt a survivor's credibility, the more likely she is to feel upset, destabilized, or even (re)traumatized.[107] This reaction may trigger an increase in the intensity of her emotionally "inappropriate" demeanor, making her appear even less credible.[108] In other words, the testimonial injustice that women experience as they seek to be recognized as credible witnesses to their own abuse can become a self-fulfilling phenomenon: they internalize the court's image of themselves as unreliable narrators of their own experience.[109]

Social psychologists have coined the term "stereotype threat" to explain such harm. Stereotype threat arises when a person feels that she is at risk of conforming to a cultural stereotype about her particular social group. The existence of negative stereotypes—regardless of whether an individual herself accepts them—can make that individual anxious, and harm her ability to perform.[110] Thus, the existence of

(2009)("[B]atterers tend to be self-confident and ultra-controlled in their outward appearance and thus testify in a way that is traditionally perceived as truthful.").

106 TK LOGAN & ROB VALENTE, NAT'L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 9-10 (2015), http://www.thehotline.org/resources/law-enforcement-responses [https://perma.cc/CC5Z-Z56H] [hereinafter National Hotline Survey]. Two national studies, both conducted in 2015, help us understand what is happening on the ground in terms of police refusal to credit survivor stories. One study, conducted by the ACLU, surveyed more than 900 domestic violence service providers about their clients' experiences with police. ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE AND POLICING (2015), www.aclu.org/responsesfromthefield [https://perma.cc/3CKD-6J9E] [hereinafter Responses from the Field]. The other, conducted by the National Domestic Violence Hotline, surveyed survivors themselves. National Hotline Survey, *supra* note 106, at 2. In the National Domestic Violence Hotline survey, just over half of the 637 women surveyed reported that they had never called the police for help when they experienced domestic violence. *Id.* at 2. When asked for the reason, fifty-nine percent of these participants said that their decision was based on either their fear that the police would not believe them or—and this is where we get to consequential credibility—that they would do nothing in response to their reports of abuse. *Id.* at 4. Much the same perceived deficit in consequential credibility hampered the reporting efforts of the remaining 309 women interviewed in the National Hotline Survey who *had* in fact interacted with the police: two-thirds of these women reported that they were "somewhat or extremely afraid" to call again in the future, based on the same sets of concerns. *Id.* at 8.

107 *See* Jennifer Saul, *Implicit Bias, Stereotype Threat, and Epistemic Injustice*, in ROUTLEDGE HANDBOOK, *supra* note 80, at 236-38.

108 *See supra* text accompanying notes 91–107; *infra* notes 109–110.

109 Saul, *supra* note 107.

110 *See, e.g.*, Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 617 (1997); Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379, 389 (2002).

such stereotypes, and women's concern about conforming to them, can diminish survivors' ability to effectively communicate their experiences.[111]

2. Motive

To assess the trustworthiness of a woman's account of domestic violence, judges and other gatekeepers are inevitably (though perhaps unconsciously) influenced by stereotypical beliefs about women, particularly in the context of intimate relationships.[112] Although such beliefs vary by the individual, certain fundamental cultural tropes about women's motives to lie and manipulate tend to resonate here. Two of the most persistent and crude stereotypes about women's false allegations about male behavior are the grasping, system-gaming woman on the make and the woman seeking advantage in a child custody dispute.

A recent review of the first twenty websites to appear in a Google search of the term "domestic violence false allegations" underlines the power of these stereotypes in the legal context. The vast majority of the "hits" in response to this search were websites maintained by small firm and sole practitioner defense attorneys; in other words, lawyers available to represent those accused of domestic violence, typically in the face of criminal prosecution. These lawyers post advice for potential clients, and most explain that "false allegations" of domestic violence tend to derive from women scheming for some sort of material payday or other advantage, such as a leg up in a child custody case.[113] Each of these stereotypes, and their implications for women's credibility, is explored below.

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111 *See* Saul, *supra* note 107, at 238.

112 Philosopher Kristie Dotson calls this "testimonial quieting." Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236, 242-43 (2011).

113 *See* Memorandum Analyzing First Twenty Hits for "Domestic Violence False Allegations" (Nov. 15, 2017) (on file with authors). The twenty websites are: https://www.breedenfirm.com/domestic-violence/defending-false-accusations-domestic-violence; https://billingsandbarrett.com/new-haven-criminal/domestic-violence-lawyer/false-accusations; https://www.adamyounglawfirm.com/Criminal-Defense/Violent-Crimes/False-Allegations-Of-Domestic-Violence.shtml; https://criminallawdc.com/dc-domestic-violence-lawyer/false-accusations; https://www.bajajdefense.com/san-diego-domestic-violence-attorney; https://www.jonathanmharveyattorney.com/Domestic-Violence/False-Allegations.shtml; https://www.lafaurielaw.com/Criminal-Defense/Domestic-Violence-Order-of-Protection-in-Family-IDV-Courts/False-Domestic-Violence-Accusations.shtml; https://chicagocriminaldefenselawyer.com/false-accusations-domestic-violence; http://www.amcoffey.com/Criminal-Defense-Overview/False-Domestic-Violence-Allegations.shtml; https://criminallawyermaryland.net/maryland-domestic-violence-lawyer/false-accusations; http://www.lnlegal.com/blog/2017/february/have-you-been-falsely-accused-of-domestic-violence; http://www.scottriethlaw.com/blog/2017/06/how-false-allegations-of-domestic-violence-can-ruin-your-life.shtml; https://www.weinbergerlawgroup.com/domestic-violence/false-allegations/defending-faqs; https://www.dworinlaw.com/false-domestic-violence-austin-texas; https://stearns-law.com/family-law-services/domestic-violence/false-accusations; http://www.inlandempiredomesticviolence.com/Domestic-Violence/Falsely-Accused-of-Domestic-Violence.aspx; https://www.carlahartleylaw.com/Domestic-Violence-And-Criminal-Law/False-Accusations-Of-Domestic-Violence.shtml; http://www.bosdun.com/Blog/2017/March/What-To-Do-if-You-Have-

a. *The Grasping Woman on the Make*

The grasping woman stereotype flourished in the Reagan era, when legislators portrayed poor women as "welfare queens," whose family planning decisions were solely dependent on a desire to expand their monthly benefit check by a few dollars. Though factually discredited,[114] the welfare queen image continues to have an impact on the law: to this day, fifteen states prohibit families from receiving higher benefit levels if a baby is born while the household is on assistance, in an effort to ensure that cash aid will not serve as a putative incentive for poor women to have more children.[115]

This same stereotype is reflected in our contemporary obsession with women as "gold diggers," based on the 1933 movie of that name.[116] This stereotype imbues the lyrics of the eponymous hip hop song about women who target wealthy men, falsely claim that these men are the fathers of their children, and then soak them for child support.[117] It is readily apparent in Silicon Valley,

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Been-Wrongly-Accused-of-D.aspx; http://www.flowermoundcriminaldefense.com/domestic-violence; https://www.kefalinoslaw.com/miami-domestic-violence-defense-lawyer.

114 *See* Stephen Pimpare, *Laziness Isn't Why People Are Poor. And iPhones Aren't Why They Lack Health Care*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/posteverything/wp/2017/03/08/laziness-isnt-why-people-are-poor-and-iphones-arent-why-they-lack-health-care/?utm_term=.59f65871be13; Eduardo Porter, *The Myth of Welfare's Corrupting Influence on the Poor,* N.Y. TIMES (Oct. 20, 2015), https://www.nytimes.com/2015/10/21/business/the-myth-of-welfares-corrupting-influence-on-the-poor.html.

115 Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 249 (2014).

116 GOLD DIGGERS OF 1933 (Warner Bros. 1933) (portraying aspiring actresses experiencing financial hardship who conspire to find wealthy husbands).

117 Kanye West's song, *Gold Digger*, contains the following lyrics:

> Eighteen years, eighteen years
> She got one of your kids got you for eighteen years
> I know somebody payin' child support for one of his kids
> His baby mama car and crib is bigger than his
> You will see him on TV, any given Sunday
> Win the Super Bowl and drive off in a Hyundai
> She was supposed to buy your shorty Tyco with your money
> She went to the doctor, got lipo with your money
> She walkin' around lookin' like Michael with your money . . .
> If you ain't no punk
> Holla "We want prenup! We want prenup!" (Yeah!)
> It's somethin' that you need to have
> 'Cause when she leave yo' ass she, gon' leave with half
> Eighteen years, eighteen years
> And on the eighteenth birthday he found out it wasn't his?!
> . . . Now I ain't saying she a gold digger . . .
> But she ain't messin' with no broke n* . . .

KANYE WEST, *Gold Digger*, *on* LATE REGISTRATION (Roc-A-Fella Records & Def Jam Recordings 2005).

where tech magnates swap warnings about women they refer to as "founder hounders."[118] These gender stereotypes are, of course, shaped by race, class, and other identity-based assumptions. The image of the welfare queen, as one example, was purposefully designed to draw its power from racialized narratives;[119] at the same time, it operates more broadly to negatively affect societal perceptions of all women, perhaps especially those who are also poor or low income. As with all stereotypes, those that affect women as women are not monolithic in their impact: gender stereotypes are racialized (the unrapeable black woman, for example), and racial discounts are gendered (blackness in women is stigmatized in ways specific to black women in particular). Despite this diversity of impact and complexity of harm, the bottom line is that we tend to discount the trustworthiness of all women who appear to be motivated by a desire to get something, either from the government or from their male partners.

This social myth is particularly lethal for women seeking safety from intimate partner violence, especially those who are trying to exit their abusive relationships. Most survivors need concrete resources to bring about this fundamental change in their living situation. Although a woman's informal network of support, made up of family and friends, may be able to help by providing a place to stay, transportation, childcare, or financial assistance,[120] these resources may well not be sufficient and are often stop-gap or finite in nature. Eventually, many abuse survivors need to secure additional resources, frequently by turning to the social welfare system or the safety furnished by a civil protection order.[121] This quest for some sort of subsidized autonomy is, once again, a reflection of the underlying dynamics of domestic abuse.[122]

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118 *See* Emily Chang, *"Oh My God, This Is So F---ed Up": Inside Silicon Valley's Secretive, Orgiastic Dark Side*, VANITY FAIR (Feb. 2018), https://www.vanityfair.com/news/2018/01/brotopia-silicon-valley-secretive-orgiastic-inner-sanctum ("Whether there really is a significant number of such women is debatable. The story about them is alive and well, however, at least among the wealthy men who fear they might fall victim.").

119 Premilla Nadasen, *From Widow to "Welfare Queen": Welfare and the Politics of Race*, 1 BLACK WOMEN, GENDER & FAMILIES, 52 (2007), 69-70.

120 Ruth E. Fleury-Steiner et al., *Contextual Factors Impacting Battered Women's Intentions to Reuse the Criminal Legal System*, 34 J. COMMUNITY PSYCHOL. 327, 339 (2006); Lisa A. Goodman & Katya Fels Smyth, *A Call for a Social Network-Oriented Approach to Services for Survivors of Intimate Partner Violence*, 1 PSYCHOL. OF VIOLENCE 79, 81 (2011); Stephanie Riger, Sheela Raja & Jennifer Camacho, *The Radiating Impact of Intimate Partner Violence in Women's Lives*, 17 J. INTERPERSONAL VIOLENCE 184, 198–200 (2002).

121 *See, e.g.*, ELEANOR LYON, SHANNON LANE & ANNE MENARD, NAT'L INST. JUSTICE, MEETING SURVIVORS' NEEDS: A MULTI-STATE STUDY OF DOMESTIC VIOLENCE SHELTER EXPERIENCES iv (2008) (noting that "domestic violence shelters address compelling needs that survivors cannot meet elsewhere"); PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 52 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf [https://perma.cc/3TSQ-6PKY] (noting that a substantial percentage of women survivors of intimate partner violence seek a civil protection order).

122 *See supra* text accompanying notes 112, 114.

An all-too-common strategy of abusers is to force women into social isolation, thus limiting their access to those family and friends who might have been willing to provide them with help.[123] The law in most states authorizes system officials to provide survivors assistance such as priority in shelter access, or a protection order provision ordering their abusive partner to vacate a home in which they share a legal interest.[124] Again, these resources for survivors are built into our law and policy for good reason—survivors need them to stave off repeat violence.[125] But when women actually pursue such concrete, practical assistance, they often suffer an immediate credibility discount; their trustworthiness is now colored by the suspicion that they are motivated by a desire to obtain shelter or sole access to a residence, rather than by the urgent need to protect themselves from violence.[126]

I (the first author) have participated in numerous judicial training sessions with judges in the D.C. Superior Court's Domestic Violence Unit. Year after year, I have listened as veteran judges warn those who are more junior, cautioning that "so many times I hear these stories and something seems wrong; then I realize the woman is just here to get shelter, or to kick her ex out of the house without having to go through a divorce. Keep an eye out for that." These judges are encouraging their colleagues to discount the personal trustworthiness of women based on their efforts to seek legally authorized resources on their path to safety.[127]

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123 LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 107 (2009); *see also* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1021-22 (2000) ("[Battered women] frequently become estranged from family and friends who might otherwise provide them with material aid."); Jody Raphael, *Rethinking Criminal Justice Responses to Intimate Partner Violence*, 10 VIOLENCE AGAINST WOMEN 1354, 1357 (2004) ("Women are not allowed to talk on the telephone, visit their friends, attend church, decide on their own what to wear, or go to school or work.").

124 SUSAN L. KEILITZ, PAULA L. HANNAFORD & HILLERY S. EFKEMAN, NAT'L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE, 12-14 (1997), https://www.ncjrs.gov/pdffiles1/Digitization/164866NCJRS.pdf [https://perma.cc/3SXH-SJ6E].

125 *See, e.g.*, MONICA MCLAUGHLIN, NAT'L LOW INCOME HOUS. COAL., HOUSING NEEDS OF VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING, 1 (2017), http://nlihc.org/sites/default/files/AG-2017/2017AG_Ch06-S01_Housing-Needs-of-Victims-of-Domestic-Violence.pdf [https://perma.cc/SJT7-2DBX] (explaining that "safe housing can give a survivor a pathway to freedom").

126 As noted above, women of color may be especially likely to experience such credibility discounts due to the racialized nature of the stereotypes that drive them.

127 One more example: In a 2012 Baltimore protection order case, Judge Bruce S. Lamdin listened to Heather Myrick-Vendetti testify about her husband's abuse, including the following statement: "He pinned me to a shelf, busted my arm open, left a gash in my forearm. He then threw me down on the floor and stomped me in the ribs so hard that I peed my pants. My oldest, who was 12 years old, got my son and hid in a closet with a hammer and called someone to come get us." *Judge Bruce Lamdin Interrogates Woman Seeking Restraining Order*, WASH. POST (Sept. 9, 2012), https://www.washingtonpost.com/opinions/judge-bruce-lamdin-interrogates-woman-seeking-

And attorneys representing survivors pick up on the power that these unfair stereotypes can exert in the courtroom. Until recently, I (the first author) had often joined the ranks of many other victim advocates in doing just that: when representing a client who is privileged enough not to need much assistance from the court (perhaps she doesn't have children with her abusive partner, she doesn't live with him, or their relationship was relatively limited so she was more easily able to cut him out of her life), I have argued that the court should find my client especially credible *for this reason*. In other words, because my client is seeking only narrowly limited, safety-based remedies, rather than requesting the full range of relief legally available to her, the court should view her as particularly credible. I've done this for the same reason lawyers use to make every strategic decision: because my audience—the court—is likely to buy the argument. My lawyering instincts tell me that a judge will, in fact, understand a more limited request for relief as a real indication of a survivor's credibility.[128]

But I have belatedly come to realize that in pursuing this approach I am helping one client but simultaneously lending support to a prejudicial, gender-based credibility discount. Logically, the flip side of my argument must also be true: judges view survivors who seek more extensive remedies as *less* credible—as women who may be fabricating or exaggerating their allegations in order to obtain resources such as shelter and financial support.[129]

It is worth noting here that these judicial suspicions—discounting credibility when a woman asks for the full scope of available relief—simply do not arise in contexts that are not dominated by women litigants. It is laughable to imagine a judge suspecting the credibility of a business owner if, after presenting a colorable legal claim, that owner sought to recover an

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restraining-order/2012/09/09/614fd664-faae-11e1-875c-4c21cd68f653_video.html?tid=areinl; *see also Baltimore County Judge Bruce Lamdin Faces Complaint* (WBAL TV television broadcast Sept. 4, 2012), https://www.wbaltv.com/article/911-dispatcher-responds-to-call-at-his-own-home-i-just-handled-it-like-any-other-call/25239609 [https://perma.cc/PP3K-83BB]. Ms. Myrick-Vendetti then described her husband's attempt to burn down their house a few days later. *Id.* When she told the judge that her husband constituted a threat to her safety and requested that he be ordered to leave the home they shared, Judge Lamdin responded, "Ma'am there are shelters," and "It confounds me that people tell me they are scared for their life and then they stay in a situation where they can remove themselves and go to a shelter." *Id.* Although this story is an extreme one, it reflects a deeply held suspicion that woman seeking resources are operating from false motives and cannot be trusted.

128 Other lawyers representing survivors report doing the same. *See, e.g.*, Interview with Megan Challender, Supervising Attorney, Md. Ctr. for Legal Assistance (July 12, 2017) (reporting that she has observed lawyers making these arguments in court on multiple occasions); Interview with Margo Lindauer, Assoc. Teaching Professor & Dir. of the Domestic Violence Inst., Ne. Univ. Sch. of Law (Jan. 21, 2018).

129 One survivor attorney recently shared an experience where the judge in a Washington, D.C., civil protection order case explicitly ruled that the survivor was credible because "she was not asking for anything other than to be left alone." Interview with Megan Challender, *supra* note 128; *see also* Interview with Courtney K. Cross, Assistant Clinical Professor of Law & Dir., Domestic Violence Clinic, Univ. of Ala. Sch. of Law (July 12, 2017).

extensive range of statutorily enumerated remedies. Why are women subjected to male violence held to a different standard?

Credibility discounts based on the grasping woman stereotype extend beyond the judicial realm to other gatekeepers. In Washington, D.C., for example, court-appointed attorney negotiators meet with unrepresented parties in civil protection order cases and attempt to resolve matters without the need for a contested trial. Several of these negotiators have, on many occasions, shared the view that petitioners are not "real" victims of domestic violence, but instead are there to get housing and other resources.[130] These suspicions about survivors' motives color the work of the D.C. Superior Court's Crime Victim's Compensation ("CVC") program as well. The CVC provides a variety of material and housing-related resources to local victims of crime. A survivor is entitled to obtain emergency shelter based on an initial, emergency judicial determination that she is entitled to a short-term temporary protection order. CVC officials then monitor her actions. If the court docket reveals that she ultimately has dropped her request for a permanent order—regardless of whether this decision was made because she was reassaulted and intimidated into doing so, she decided to move to another jurisdiction to better protect herself, or she was unable to accomplish the necessary service of process—the CVC will peremptorily terminate her request for assistance.[131]

This grasping woman stereotype puts survivors in a terrible bind. We know that victims of domestic violence frequently are unable to successfully handle the violence in their lives without seeking outside help.[132] Many, if not most, need the full set of remedies permitted in civil protection order statutes, such as shelter, financial support, and other assistance. By superimposing stereotype-based credibility assessments onto women's requests for relief, we are forcing these women to make an untenable choice: they may either seek the full range of assistance they actually need to achieve safety, but risk suffering a court-imposed credibility discount; or they may make a bid to appear more credible by forgoing essential resources needed for protection. And, of course, the women who are most disadvantaged, and thus need the greatest amount of help, are the ones who are least likely to be believed.

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130 This observation is based on the first author's extensive experience litigating hundreds of civil protection order cases. *See supra* note 9. Other D.C. domestic violence advocates confirm the routine nature of such comments. *See, e.g.*, Interview with Gillian Chadwick, *supra* note 58; Interview with Courtney K. Cross, *supra* note 129.

131 *See* Interview with Janese Bechtol, Chief, Domestic Violence Section, Office of the Attorney General for the District of Columbia (Aug. 17, 2018). For an overview of the Washington, D.C., crime victim compensation program, see *Crime Victim Compensation & Services in Washington, D.C.*, Interview by Len Sipes with Laura Banks Reed, Dir., Crime Victims' Compensation Program of the D.C. Superior Court (Mar. 3, 2014), https://media.csosa.gov/podcast/transcripts/category/audiopodcast/page11/ [https://perma.cc/LYK5-8H5V].

132 *See* LYON, LANE & MENARD, *supra* note 121.

b. *The Woman Seeking Unfair Advantage in a Child Custody Dispute*

Women seeking to escape violent relationships often must turn to the family courts to resolve custody and other issues with their abusive partners. And virtually every state custody statute requires family court judges to consider intimate partner abuse as a factor weighing against an award of custody to the parent-abuser.[133] Indeed, the U.S. House of Representatives recently passed a concurrent resolution urging state courts to determine family violence claims and risks to children before turning to the consideration of any other custody factors.[134]

The rationale for such legal provisions is that parent-on-parent violence harms not only the victim-parent, but also the children, who may witness the violence or its aftermath.[135] But women's experience in these courts defies the sense of the law as written: in fact, mothers' allegations of domestic violence are discounted or even fully discredited by family court judges.

Recent studies of family court custody decisions reveal that mothers who allege intimate partner violence are actually *more* likely to lose custody than mothers who do not make such assertions.[136] In other words, a claim of parent-on-parent violence operates to *undermine, rather than strengthen*, custody requests made by survivor-mothers. Judges tend to conclude, typically with no evidence other than the perpetrator-father's uncorroborated assertion, that women are fabricating abuse allegations as part of a strategic effort to alienate the children from their father.[137] The mother's experience of abuse is turned on its head to support the perpetrator's claim that he is the better parent.

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133 AM. BAR ASS'N, *Custody Decisions in Cases with Domestic Violence Allegations*, https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/domestic_violence_chart1.pdf (demonstrating that Connecticut is the sole exception to this rule).

134 H.R. Con. Res. 72, 115th Cong. (Sept. 25, 2018).

135 *See* Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797, 797 (2008) ("This review finds that children and adolescents living with domestic violence are at increased risk of experiencing emotional, physical and sexual abuse, of developing emotional and behavioral problems and of increased exposure to the presence of other adversities in their lives.").

136 *See* Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 L. & INEQUALITY 311, 328 (2017) ("Overall, fathers who were accused of abuse and who accused the mother of alienation won their cases 72% of the time; slightly *more* than when they were *not* accused of abuse (67%)."); *see also* Janet R. Johnston, Soyoung Lee, Nancy W. Olesen & Marjorie G. Walters, *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 290 (2005).

137 Meier & Dickson, *supra* note 136, at 318. This credibility discount is particularly disconcerting in light of studies examining the reliability of domestic violence allegations in the context of family law proceedings. Such studies have found that the allegations of women-mothers are substantiated—in other words, corroborated by sources in addition to the testimony of the woman who asserted them—in a high percentage of cases. *See, e.g.*, Johnston et al., *supra* note 136, at 290 (finding corroboration rate of sixty-seven percent). Although the remainder of these allegations lack independent corroboration, this does not mean that they are false; instead, it simply means that insufficient additional information exists beyond the parent's testimony.

Family court studies further reveal that when a father alleges that a mother has engaged in "parental alienation,"[138] his chances of being awarded custody increase *even when his allegations are not credited or are left unresolved by the court*.[139] The judicial assumption that women falsely allege or exaggerate domestic violence in an effort to obtain custody runs so deep that family court judges appear to cling to it even in cases where they themselves determine that such a claim is untrue.[140]

The credibility discounting operates in the reverse direction as well. At a 2016 "Bench–Bar" social event, two judges involved with the D.C. domestic violence court commented that they were well aware that women who file for protection orders after having already initiated custody proceedings are trying to "pull the wool over [the judge's] eyes."[141]

The result is that survivor-mothers often leave family court having been wrongly denied custody of their children, and may be unfairly discredited and denied relief in their civil protection order hearings as well. A judicial willingness to discount their trustworthiness can have repercussions that will last throughout their own lives and those of their children.

3. Social Location

Cognitive psychology teaches us that our wider culture—as translated by the media, authority figures, family members, etc.—transmits stereotypes to individuals that we then adopt on a deep, unconscious level.[142] Our most

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138 Parental alienation syndrome is a hypothesized disorder first proposed by psychiatrist Richard Gardner in 1985. Gardner believes that the disorder arises primarily in the context of child custody disputes and involves a child being manipulated by one parent into internalizing the unjustified denigration of the other parent. In the more than thirty intervening years, the diagnosis has yet to be accepted in the mental health community. *See* Holly Smith, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. MASS. L. REV. 64, 64 (2016). Instead, a great deal of psychological and legal literature has critiqued the construct, and both leading researchers and most professional institutions have renounced the concept as lacking in empirical basis or objective merit. *See* Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 236 (2009) ("The critiques of Gardner's PAS are legion . . . "). Despite all of this, claims of parental alienation syndrome have come to dominate custody litigation in family court, especially in cases involving allegations of abuse. *Id.* at 233.

139 Meier & Dickson, *supra* note 136, at 331 ("[W]hen courts believed mothers were alienating, they switched custody to the father 69% of the time; and even when the alienation claim was rejected or not decided, they transferred custody of the children to an allegedly abusive father 25-50% of the time.").

140 This refusal to accept facts that contradict a person's theory of how the world works is explained in part by the concept of confirmation bias. *See supra* text accompanying note 41.

141 Interview with Andrew Budzinski, Graduate Teaching Fellow, Georgetown Univ. Law Ctr. Domestic Violence Clinic (Jan. 22, 2018).

142 *See, e.g.*, RACHEL D. GODSIL ET AL., PERCEPTION INST., 2 SCIENCE OF EQUALITY : THE EFFECTS OF GENDER ROLES, IMPLICIT BIAS, AND STEREOTYPE THREAT ON THE LIVES OF WOMEN AND GIRLS 12 (2016), https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Volume-2.pdf [https://perma.cc/5Q62-R9U7]("Popular culture plays an important part in

commonly held derogatory stereotypes include those that devalue the words of women, people of color, those living in poverty, and other marginalized groups. Once formed, these stereotypes tend to be highly resistant to counterevidence.[143] As philosopher Miranda Fricker explains, "If we examine stereotypes of historically powerless groups such as women, African Americans, or poor/working-class people, they often are associated with attributes related to poor truth-telling in particular: things like over-emotionality, lack of logical thinking, inferior intelligence, being on the make, etc."[144]

Although it is outside our scope to make a full case for each of these social categories, we will examine one of them in detail here: the practice of discounting *women's* credibility *as women*. In Rebecca Solnit's compelling essay, *Cassandra Among the Creeps*,[145] she describes the myth of Cassandra, daughter of the king of Troy. When the god Apollo tried to seduce her, Cassandra rejected him. In retribution, Apollo cursed Cassandra so that, although she could accurately foresee the future, her people always disbelieved her and shunned her as a crazy liar. Solnit notes,

> I have been thinking of Cassandra as we sail through the choppy waters of the gender wars, because credibility is such a foundational power in those wars and because women are so often accused of being categorically lacking in this department. Not uncommonly, when a woman says something that impugns a man . . . or an institution . . . the response will question not just the facts of her assertion but her capacity to speak and her right to do so.[146]

This refusal to listen to women's stories of male abuses of power runs so deep that it may have played a significant role in Sigmund Freud's early decision to upend his entire psychoanalytic theory.[147] Early in his career, Freud listened as his female patients told him story after story of their experiences of childhood sexual abuse, often at the hands of their fathers.[148] Freud believed these stories and, in the late 1880s developed his "seduction theory," arguing that early childhood

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reinforcing these gendered associations. Implicit biases are not the result of individual psychology—they are a social phenomenon that affects us all.").

143 Jeremy Wanderer, *Varieties of Testimonial Injustice*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 28.

144 *See* FRICKER, *supra* note 49, at 32; *supra* text accompanying note 41 (discussing confirmation bias).

145 Rebecca Solnit, *Cassandra Among the Creeps*, HARPER'S MAG., Oct. 2014, at 4.

146 *Id.* Professor Catharine MacKinnon, the theorist who created the term "sexual harassment" notes: "I kept track of . . . cases of campus sexual abuse over decades; it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person." Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html.

147 *See, e.g.*, SIGMUND FREUD, AN AUTOBIOGRAPHICAL STUDY 62-65 (James Strachey trans., W. W. Norton & Co. 1963) (1925).

148 *Id.* at 62.

sexual abuse constituted the root cause of his patients' neuroses.[149] Later, however, Freud abandoned this idea, proclaiming instead that his patients' stories were not based in actual experience, but instead on fabricated, wishful fantasies that all women experience.[150] Freud's shift from crediting to discrediting women eventually led him to develop his profoundly influential theory of psychosexual development.[151]

For almost a century, conventional psychoanalytic wisdom held that Freud's shift represented an appropriate course correction—an important move toward greater accuracy in analyzing his traumatized patients. In the early 1980s, however, Jeffrey Masson, a former Sanskrit professor who had subsequently trained as a psychoanalyst and become Projects Director of the Freud Archives, turned this assumption on its head. Based on correspondence between Freud and a contemporary, Willhelm Fliess, Masson argued that Freud did not abandon his belief in his original observation—that girls were being abused in huge numbers by male relatives—based on factual evidence.[152] Instead, Freud was unable to accept the disturbing truth he had uncovered; he also may have been unwilling to risk the disapprobation of the conservative medical establishment.[153] Ultimately, Freud decided to abandon his original idea[154] and create a new theory based on the premise that women's stories of sexual violence were not fact, but fantasy.[155] In the words of psychiatrist Judith Herman, "[t]he dominant psychological theory of the next century was founded in the denial of women's reality."[156]

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149 *Id.*

150 *Id.* at 63.

151 *Id.* at 63-64. Freud's theory of psychosexual development rests on the idea that from birth, human beings possess an instinctual sexual energy (libido) that develops in five stages. According to Freud, a person who experiences frustration during any one of these developmental stages experiences a resulting anxiety that can persist into adulthood in the form of neurosis. During the third stage, called the phallic phase, which occurs between the ages of two and five, a child focuses libidinal energy or sexual wishes on the opposite sex parent and experiences feelings of jealousy and rivalry toward the same sex parent. 7 SIGMUND FREUD, *Three Essays on the Theory of Sexuality*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1975).

152 JEFFREY MOUSSAIEFF MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY 107-13 (1984).

153 *Id.*

154 *Id.*

155 *Id.* at 110.

156 HERMAN, *supra* note 39, at 14. It should be noted that Masson's claim provoked a good deal of controversy in the psychiatric community, where Freud is still largely revered. *See, e.g.*, Judith Herman, *The Analyst Analyzed*, NATION (Mar. 10, 1984), at 293 (reviewing JEFFREY M. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984)) (arguing that Masson is "right and courageous"); Charles Rycroft, *A Case of Hysteria*, 31 N.Y. REV. BOOKS 3 (1984) (reviewing JEFFREY M. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984)) (accusing Masson of ignoring evidence contrary to his theory and presenting flimsy evidence to support it); Anthony Storr, *Did Freud Have Clay Feet?*, N.Y. TIMES, Feb. 12, 1984, at 3 (reviewing JEFFREY M. MASSON, THE ASSAULT ON

Contemporary culture continues to impart strong lessons about women's lack of trustworthiness. Our teenagers watch TV shows like *Pretty Little Liars*, *Don't Trust the Bitch in Apartment 23*, and *Devious Maids*; younger children watch animated movies like *Shark Tale*, which features a catchy tune that describes women as scheming.[157] Rap lyrics are full of stories of women deceiving and taking advantage of men.[158]

The same insidious stereotype of women as unreliable-to-hysterical distorters of the truth has quietly overtaken the justice system, where women witnesses tend to be disbelieved more than their male counterparts. In one study in which a group of "credibility raters" assessed the believability of actual witnesses testifying in trials in a mid-sized Southern city, researchers found that male witnesses were considered more credible than female witnesses.[159] Similarly, the available evidence indicates that, as a general rule, judges view women as less credible witnesses and advocates than they do men.[160] And recent studies show that the police routinely discredit female survivors of intimate partner abuse. In the 2015 National Domestic Violence Hotline Survey, for example, a substantial percentage of women reported that the police did not believe their stories of intimate partner abuse because they were women.[161]

In addition, as no end of literary and cultural texts manifest, when women—such as victims of domestic violence—are burdened with the cultural script of acting other-than rationally, or permit themselves to succumb to expressions of emotional intensity, our tendency to discredit them as individuals gains new momentum.[162] In a recent study, researchers asked a diverse group of college

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TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY) (arguing that "[e]verything we know about [Freud's] character makes Mr. Masson's accusation wildly unlikely").

157 Soraya Chemaly, *How We Teach our Kids that Women Are Liars*, ROLE REBOOT (Nov. 19, 2013), http://www.rolereboot.org/culture-and-politics/details/2013-11-how-we-teach-our-kids-that-women-are-liars [https://perma.cc/3N2E-RCEM].

158 Terri M. Adams & Douglas B. Fuller, *The Words Have Changed but the Ideology Remains the Same: Misogynistic Lyrics in Rap Music*, 36 J. BLACK STUD. 938, 945, 948 (2006).

159 Jacklyn E. Nagle, Stanley L. Brodsky & Kaycee Weeter, *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 BEHAV. SCI. & L. 195, 195, 203 (2014).

160 Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 61 (1996); *see also* Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 629 (2000)("[W]omen, more than men, are stereotyped as liars even though men and women are equally adept at telling lies."). It should be noted that existing data on judicial gender bias in credibility determinations are somewhat outdated; however, no evidence exists to indicate that the relevant findings have changed in recent years.

161 NATIONAL HOTLINE SURVEY, *supra* note 106, at 7.

162 "[I]t's also a common view, particularly in many Western patriarchal societies, that emotionality is at odds with rationality." McKinnon, *supra* note 80, at 169. For example, consider just one of many Internet memes: A young boy asks, "Dad can you explain women's logic?" His father replies, "You're grounded!" When the boy asks for the reason, the father replies with the non-sequitur: "Peanut Butter." Image, PINIMG.COM, https://i.pinimg.com/474x/73/6b/43/736b43231b83b92e7f55b22e0a386ca9.jpg [https://perma.cc/KJH7-AHYY].

students to take on the role of mock jurors, and review a condensed version of a murder trial transcript. The researchers charged the students with making a preliminary decision as to how they would vote—guilty or not guilty. They were then asked to deliberate electronically with participants whom they believed to be their fellow jurors. The other participants, however, were actually the researchers themselves—an approach designed to ensure that there was always a single "holdout" on the jury, whose messages would sound increasingly angry over the course of deliberations. Participants whose holdout was assigned a clearly male-identified name began doubting their initial opinions; in contrast, those for whom the holdout was assigned a clearly female name became significantly more confident in their initial opinions, at a statistically significant level.[163] In sum, the tendency to discredit women *because they are women* is deeply embedded in our broader culture—and clearly influences the way credibility is assessed in the legal system.

People of color, particularly Black people, have the same experience. As many legal scholars have noted, American courts have a long history of discrediting African American witnesses on the basis of their blackness. Such discrediting can occur based on stereotypes that African Americans are less intelligent than are whites, or that they are untrustworthy and dishonest.[164] Based on all of the above, it stands to reason that black women risk being doubly disbelieved.

Poor people are also vulnerable to stereotypes about their trustworthiness, as in the earlier example of welfare queens, who cheat the system to take what is not theirs. Because so many survivors live at the intersection of all three of

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163 Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 L. & HUM. BEHAV. 581, 581 (2015).

164 *See, e.g.*, Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 467 (2016) (quoting Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42 (2000)). In one striking study of judicial racial bias, 133 state and local trial judges from multiple jurisdictions were given an Implicit Association Test in which they were asked to categorize photos of white and black faces with positive attitude words (like pleasure), or negative attitude words (like awful), as quickly as possible. As hypothesized, the judges responded consistently with the general population, associating black with bad and white with good. Next, the judges engaged in a nonconscious "priming" task, in which the experimenters flashed coded words on participants' computer screens, too rapidly to be consciously processed. For example, the black prime consisted of flashed words like dreadlocks, hood, and rap; the control group prime consisted of words like summer, trust, and stress. After being primed, the judges were asked to make various determinations regarding a hypothetical case involving two juvenile defendants. Judges with higher implicit bias scores rendered harsher judgments when primed with the black racial category. *See* Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1198-99 (2009). Similarly, a recent study of 239 federal and state courts found that judges held strong to moderate implicit biases against both Asians and Jews relative to Caucasians and Christians, respectively, and that on a scenario-based task, they gave slightly longer prison sentences to Jewish defendants compared to identical Christian defendants. Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104 (2017).

these identities—they are poor women of color—these stereotypes feed into each other to further undermine assumptions about their trustworthiness.[165]

And as one might expect, a woman who is mentally ill or abusing substances may experience even further credibility discounts. When a judge talks to a jury about how to assess credibility, the standard instruction emphasizes how important it is for witnesses to articulate strong and clear memories of the events they are relating, as well as their ability under the particular circumstances to have perceived—to have seen and heard—the events in question.[166] A survivor who has abused substances to cope with her partner's violence is less likely to meet this standard. So is a survivor struggling with a mental illness, regardless of whether that illness contributed to her original vulnerability, or was a consequence of it.

Each of these credibility discounts—story plausibility and individual trustworthiness—operate in a distinct fashion, but they are not necessarily independent of each other; in fact, they are often intertwined. 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."[167]

Indeed, a wide array of women may be viewed as untrustworthy because of who they are—women, Black women, poor women, women who exhibit trauma symptoms that are easily conflated with a lack of credibility, and women who

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165 Carolyn M. West, *Violence Against Women by Intimate Relationship Partners*, *in* SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143, 164-65 (Claire M. Renzetti et al. eds., 2001) (noting that African-American women are three times as likely as white women to be killed by an intimate partner). Women receiving public financial assistance are significantly more likely to experience domestic violence than are other women. Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 663 (2000). Moreover, intimate partner abuse pushes many women into homelessness. Across the United States, between twenty-two and fifty-seven percent of homeless women identify domestic violence as the immediate cause. GOODMAN & EPSTEIN, *supra* note 123, at 107; INST. FOR CHILDREN & POVERTY, THE HIDDEN MIGRATION: WHY NEW YORK CITY SHELTERS ARE OVERFLOWING WITH FAMILIES (2002), https://rhyclearinghouse.acf.hhs.gov/library/2002/hidden-migration-why-new-york-city-shelters-are-overflowing-families [https://perma.cc/9F6E-XPYE]; Rebekah Levin, Lisa McKean & Jody Raphael, *Pathways to and From Homelessness: Women and Children in Chicago Shelters*, CTR. FOR IMPACT RESEARCH (Jan. 2004), http://www.http://advocatesforadolescentmothers.com/wp-content/uploads/homelessnessreport.pdf [https://perma.cc/PG8A-H2LA]. In addition, African American women are thirty-five percent more likely to experience intimate partner violence than are white women. Women of Color Network, *Facts & Stats: Domestic Violence in Communities of Color*, DEP'T OF JUSTICE (June 2006), https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf [https://perma.cc/6ZU3-6ATL].

166 *See, e.g.*, John L. Kane, *Judging Credibility*, 33 LITIG. 31, 32 (2007); *Model Civil Jury Instructions for the District Courts of the Third Circuit, Rule 1.7* (2010), http://federalevidence.com/pdf/JuryInst/3d_Civ_Ch1-3_2010.pdf [https://perma.cc/69AN-F2QJ].

167 Karen Jones, *The Politics of Credibility*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 154, 158 (Louise M. Antony & Charlotte Witt eds., 2002).

are many or all of the above. This distrust, in turn, creates a broader hermeneutics of suspicion, through which the listener interprets the substance of her story. In other words, once a listener has discounted a woman's trustworthiness, he will be hyperalert for signs of deception, irrationality, or narrative incompetence in her story. He will tend to magnify inconsistencies and overlook the ways in which any inconsistencies might be explained away. In this way, Jones observes, "a low initial trustworthiness rating . . . can give rise to *runaway* reductions in the probability assigned to a witness's story."[168] Because women survivors tend to spark hermeneutic suspicion, both in terms of personal trustworthiness and story plausibility, they are particularly vulnerable to this kind of doubly disadvantaging credibility discount.

II. GATEKEEPER-IMPOSED EXPERIENTIAL DISCOUNTS

The discounts women survivors face are not limited to the credibility arena. All too frequently, system gatekeepers also discount the importance of women's actual experiences and of the ways in which the system itself exposes women to additional harms. Such experiential discounting occurs when, regardless of the plausibility of a survivor's story and regardless of her personal trustworthiness—in other words, *even when system actors believe her*—they nonetheless adopt and enforce laws and policies that, in practice, revictimize her.[169]

These issues—credibility discounting and experiential discounting—cannot be considered in isolation. Such an approach would fail to capture the way that each relies on and reinforces the other, both in practical reality and through the personal lens of survivor experience. As Catherine MacKinnon explains, in the sexual harassment context:

> Even when [a woman survivor] was believed, nothing [a male perpetrator] did to her mattered as much as what would be done to him if his actions against her were taken seriously. His value outweighed her . . . worthlessness. His career, reputation, mental and emotional serenity and assets counted. Hers didn't. *In some ways, it was even worse to be believed and not have [his actions] matter. It meant she didn't matter*.[170]

Experiential discounting does not entail total disregard for harms inflicted on women, just as credibility discounting does not entail total disbelief of women's stories. Instead, gatekeepers impose experiential discounts when, in the pursuit of objectively worthy policy goals, they choose to ignore or trivialize

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168 *Id.* at 159.

169 Lynn Hecht Schafran calls this women's "consequential credibility." Lynn Hecht Schafran, *Credibility in the Courts: Why is There a Gender Gap?*, 34 JUDGES' J. 5, 40-41 (1995).

170 Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html (emphasis added).

the attendant harm to survivors. Women receive the message that system actors are relatively indifferent to the realities of their lives and the risks that shape their experiences. For an individual woman survivor, this experiential (or ontological)[171] discounting of the law's impact on her life exponentially increases the negative power of the credibility discounts she also must face.

The tendency to discount women's experiences permeates our society, including the social service and justice-based systems to which so many survivors turn for help in their efforts to be safe. The following examples illustrate this phenomenon.

A. *Criminal Justice System*

Despite enormous improvements in the responsiveness of police and prosecutors to domestic violence over the past several decades,[172] the criminal justice system continues to discount important aspects of women's experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors. As one example, we have known for decades that participation in a criminal prosecution can increase a woman's risk of retaliatory violence: studies show that twenty to thirty percent of perpetrators reassault their targets before the criminal court process is over.[173] Data also show that women are at greater risk of homicide at the time of separation from their abusive partners (and prosecution, indeed, creates such separation).[174] It is hardly surprising that a major reason survivors cite for withholding cooperation from prosecutors is fear of future harm.[175]

Nonetheless, prosecutors around the country often subpoena, arrest, and even jail survivors in an effort to ensure that they will testify against their abusive partners at trial.[176] The intent of these government lawyers is far from malicious;

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171 This type of discounting could be conceptualized in philosophical terms as "ontological injustice," operating alongside the above-described categories of hermeneutic and epistemic injustice.

172 *See, e.g.*, Epstein, *supra* note 82, at 13-16.

173 *See, e.g.*, Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 TRAUMA, VIOLENCE & ABUSE 141, 143, 159 (2005).

174 Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 AGGRESSION & VIOLENT BEHAV. 514, 519 (2006).

175 Lauren Bennett, Lisa A. Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761, 768-69 (1999); Sara C. Hare, *Intimate Partner Violence: Victims' Opinions About Going to Trial*, 25 J. FAM. VIOLENCE 765, 771 (2010).

176 Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced To Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 387 (2001); Betty Adams, *Battered Wife Jailed After Refusing To Testify Against Husband*, PRESS HERALD (June 3, 2014), https://www.pressherald.com/2014/06/03/maine-domestic-violence-victim-jailed-after-refusing-to-testify/; *Domestic Violence Victims Could Be Arrested if They Don't Show Up for Court To Face Accuser*, WSMV.COM (Apr. 25, 2013), http://www.wsmv.com/story/22081502/domestic-violence-victims-in-rutherford-county-could-be-arrested-if-they-dont-show-up-for-court [https://perma.cc/TWVZ-XZEP].

they hope to use the power of their office to put an end to intimate partner abuse, and they believe that mandating victim participation is—regardless of an individual survivor's own analysis of her situation—the best way to accomplish this goal. But in the process, the secondary harms visited on victims are too often ignored. As Professor Jane Stoever notes, "[j]ail sentences for defendants in domestic violence cases are typically only several days long, and most offenders receive only probation, but abuse victims have been jailed for contempt for much lengthier periods for refusing to comply with subpoenas to testify."[177] To obtain testimonial compliance, prosecutors threaten to refer victims to child protection agencies, where they could risk losing custody of their children, and they institute perjury prosecutions against women who have recanted prior statements, often obtaining lengthy jail sentences for survivors.[178] As one example, a 2016 investigation in Washington County, Tennessee, showed that women were routinely imprisoned for as long as a week for failing to testify against their abusive partners.[179] In the words of defense counsel representing one of the women: "I mean, it's kind of chilling. Here's a woman that called the police, because she needed help and now a couple months later she gets a voicemail that says now you might be the one that's going to jail. Think about that."[180] The local prosecutor refused to apologize for the practice, claiming that "I think we were doing the right thing."[181]

Prosecutorial use of coercive tactics increased in the aftermath of U.S. Supreme Court decisions that made it far more difficult to engage in the practice of "victimless prosecutions." *See* Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 585-86 (2010).

177 Jane K. Stoever, *Parental Abduction and the State Intervention Paradox*, 92 WASH. L. REV. 861, 870-71 (2017).

178 For an extensive compilation of stories of women subjected to such harms, see *id.*

179 Nate Morabito, *Advocates Horrified After Domestic Violence Victims Jailed in Washington County, TN*, WJHL.COM (Sept. 11, 2016), http://wjhl.com/2016/09/11/advocates-horrified-after-domestic-violence-victims-jailed-in-washington-county-tn/ [https://perma.cc/KM36-5EXL].

180 *Id.*

181 *Id.* Prosecutorial dismissal of women's risk of harm also can be seen in Honolulu Prosecuting Attorney Ken Kaneshiro's 2016 decision to restrict access to the city's Family Justice Center shelter to victims who promised to testify against their abusive partners in a criminal trial. Kaneshiro claimed that the victims who declined to testify "did not know what's good for them." Rebecca McCray, *Jailing the Victim: Is It Ever Appropriate to Put Someone Behind Bars to Compel Her to Testify Against Her Abuser?*, SLATE (July 12, 2017, 12:07 PM), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/07/is_it_ever_appropriate_to_put_an_abuse_victim_in_jail_to_compel_her_to_testify.html. Honolulu's approach to domestic violence prosecution sends a clear message to survivors: we discount the realities of your safety concerns and your risks of future harm. Unsurprisingly, during the first eight months the Honolulu shelter was open, sixteen of its twenty beds remained empty. *Id.* This example is, of course, an extreme one: no other Family Justice Center has a similar policy. *Id.* But extreme examples can offer a window into the less dramatic and more routine discounts women suffer in terms of their consequential credibility. In October 2015, a Florida judge jailed a victim of domestic violence who indicated that she would not appear to testify in the criminal prosecution of her abusive partner. She had endured terrifying violence at her husband's hands: he had strangled her, threatened her with a kitchen knife, and smashed her head into a microwave. She told the judge that the abuse had caused her to struggle with depression and anxiety. In addition, her husband was the father of her one-year-

A similar theme sounds in the actions of police officers responding to domestic violence calls across the country. The 2015 ACLU survey reveals a serious lack of police concern regarding the harms experienced by survivors: eighty-three percent of polled service providers reported that their clients called the police only to find that they "sometimes or often" did not take allegations of domestic violence seriously.[182]

The 2015 National Hotline Survey echoes this finding. In the words of one respondent, "I think [the police] feel that I do not matter, that as an ex-wife, I have to withstand the harassment and stalking." Another woman put it this way: "They sympathized with him and said he [just] needed to stay away from me. Then they pointed me in the direction of [name of city withheld] and said to call someone when I got there . . . . [They] left me by the side of the road alone in my car with my daughter and afraid." Yet another said: "The cops acted as if they did not care . . . . They sat in the drive while my ex poured gas all over my decks to my home and took what he wanted. Even though I had an [order of protection] and told them he could not enter the home."[183] Another: "[The police] have threatened to arrest me more than once. I am the victim! They blame me for taking him back."[184]

Police officers also use their power to coerce victim testimony at trial. In the spring of 2018, a police sergeant in Buncome County, North Carolina, told an advocate, "When I get to a domestic [violence call], if I get a sense that she's not going to cooperate, I drive away." [185] A minute later he added, "But when I go to my misdemeanor B&E's [breaking and entering cases], I stay until I've got all the evidence."[186]

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old daughter, and she was concerned about her ability to support her child if he went to jail and lost his job. She cried in open court as she explained, "I'm homeless now. I'm living at my parents' house . . . I had to sell everything I own," and added, "I'm just not in a good place right now." The judge responded by mocking her, saying, "You think you're going to have anxiety now? You haven't even seen anxiety," and ordered police to handcuff the woman, sending her to jail for three days. Kate Briquelet, *Judge Berates Domestic Violence Victim—and Then Sends Her to Jail*, THE DAILY BEAST (Oct. 9, 2015, 1:00 AM), https://www.thedailybeast.com/judge-berates-domestic-violence-victimand-then-sends-her-to-jail.

182 RESPONSES FROM THE FIELD, *supra* note 106, at 12.

183 NATIONAL HOTLINE SURVEY, *supra* note 106, at 6, 10.

184 *Id.* at 10. Additional police coercion may be imposed on women in jurisdictions utilizing lethality or danger assessment protocols. These protocols are comprised of a series of questions, posed by police on the scene of a domestic violence call and designed to determine a survivor's risk of future harm. In situations where this (relatively new) tool indicates "highest risk," the protocol directs officers to manipulate women into separating from their abusive partner, by refusing to accept a woman's decision to take no action, or by pressuring an unwilling victim to speak to a National Domestic Violence Hotline counselor. Margaret Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 536, 566-67 (2010). Lethality assessment programs are being used in counties in states including Delaware, Florida, Georgia, Indiana, Maryland, Missouri, and Vermont. *Id.* at 539.

185 Interview with Kit Gruelle, domestic violence advocate (June 6, 2018).

186 *Id.*

By discounting the importance of survivors' experiences and their risks of harm, police officers discourage women from seeking police assistance in subsequent emergency situations. As the ACLU Survey concluded, "Clients often do not call the police because they have had experiences in the past . . . in which they have received a negative response . . . in which the incident is minimized, the client is blamed, or the police simply take no action."[187] In all of these ways, the criminal justice system tends to dismiss its policies' effects on women's lives as relatively inconsequential, at least as compared to their effects on offender accountability.

In addition, the criminal justice system tends to devalue violence that is inflicted by an intimate partner as compared to a stranger. A 2005 Department of Justice report on Family Violence Statistics reveals that seventy-seven percent of those incarcerated for non-family assaults received sentences that were longer than two years.[188] In sharp contrast, this was true of only forty-five percent of those incarcerated for family assault.[189] Thus, the criminal justice system discounts the importance of women's experiences and, further, devalues the meaning of the harms they suffer at the hands of their partners.

B. *Subsidized Housing and Public Shelters*

This tendency to discount the impact of laws and policies on the lives of domestic violence survivors extends well beyond the justice system. The public housing system provides an important case in point, in part because the availability of affordable housing is essential to many women's ability to both escape abuse and to remain safe after leaving an abusive relationship.[190] Despite this fact, substantive discounting of survivors' experience is readily apparent in the already intense and bureaucratically intimidating struggle for public housing.

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187 RESPONSES FROM THE FIELD, *supra* note 106, at 16.

188 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 2 (June 2005), https://www.bjs.gov/content/pub/pdf/fvs.pdf [https://perma.cc/TD25-2HYZ].

189 Similar results were reached in a recent study conducted in Australia, where domestic violence offenders were compared to those who committed violent crimes outside of a familial/intimate relationship context. Moreover, domestic violence assaults were less likely to result in a prison sentence and, if incarcerated, intimate offenders received significantly shorter terms. Christine E. W. Bond & Samantha Jeffries, *Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases*, 54 BRITISH J. CRIMINOLOGY 849, 849 (2014).

190 Survivors who cannot remain in public housing often are forced to choose between homelessness and returning to their abusive partners. "'When we ask survivors why they had to stay [in their violent relationships], one of the top answers is always lack of access to housing,' said Karma Cottman, executive director of the D.C. Coalition Against Domestic Violence. 'They stay because they can't afford to go anywhere else.'" Elise Schmelzer, *Gentrification Eats Away at Shelter Options for Domestic-Abuse Victims*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/local/dc-politics/gentrification-eats-away-at-shelter-options-for-domestic-abuse-victims/2016/07/10/0470d18c-43c0-11e6-8856-f26de2537a9d_story.html?utm_term=.ad4ce2d6365a.

At the state and local levels, crime control or nuisance ordinances require public housing landlords to evict tenants for "disorderly behavior" if, within a specified time period, three calls are made to 911 about a particular apartment unit.[191] Fifty-nine counties, cities, and other localities have such ordinances in place today.[192] In 2013, Illinois alone had adopted more than 100 such ordinances;[193] in 2014, Pennsylvania had passed thirty seven.[194] The geographic areas these laws cover include the twenty largest cities in the country.[195] A landlord who fails to comply can be fined and have his rental license suspended. Accordingly, landlords have no discretion in enforcing this draconian measure—tenants have no realistic opportunity to appeal to their human empathy. To stay in business, a landlord *must* evict after three 911 calls.[196] To be clear, the underlying goal of these laws is the reduction of crime and the resulting safety of all residents; any impact on women survivors of domestic violence is solely incidental.

Despite this fact, these ordinances have a sizable negative impact on survivors of domestic violence. Thirty-nine of them explicitly include calls to 911 from domestic violence *victims* as a basis for prohibited activities that can result in eviction; only four explicitly exclude such calls.[197] And who ends up getting evicted? It's not just the perpetrators; it's the victims, too. The ordinances make no effort to distinguish between abusers and victims—if a victim chooses to use 911 emergency services to protect herself and her children on three or more occasions, she'll lose her home.[198]

A study conducted by Matthew Desmond and Nicole Valdez in Milwaukee found that close to one-third of the "excessive" 911 call citations over a two-year period were based on emergency reports of domestic violence; fifty-seven percent of these calls resulted in the victim being evicted, and another twenty-

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191 PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 135 (2017).

192 *Id.* at 141.

193 Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW 1 (2013), http://povertylaw.org/files/docs/cost-of-being-crime-free.pdf [https://perma.cc/K4XE-CFYS].

194 News Release, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction*, PA. COAL. AGAINST DOMESTIC VIOLENCE (Oct. 16, 2014), http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf [https://perma.cc/TS8P-MRFB].

195 EDELMAN, *supra* note 191, at 141.

196 *Id.*

197 *Id.*

198 *See, e.g.*, U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL, GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES 4 (2016), https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF [https://perma.cc/YW5F-SNKL].

six percent received formal threats of eviction.[199] Similarly, a 2015 ACLU study of two upstate New York ordinances found that domestic violence comprised the largest category of incidents resulting in nuisance enforcement, with citations frequently resulting in eviction of the victim.[200] Peter Edelman describes the experience of one victim, Rosetta Watson, in St. Louis: "She called the police several times to ask for protection to keep her safe from her former boyfriend. They did not protect her and she was attacked by the man, and then she was literally banished from the city for six months . . . ."[201]

Similarly, Lakisha Briggs of Norristown, Pennsylvania, was abused by her boyfriend, and her adult daughter called the police.[202] Before leaving, one of the officers warned Briggs that this was her first strike. After that warning, Briggs, who also had a three-year-old daughter, was reluctant to call the police when her boyfriend beat her up.[203] But one night, he stabbed her in the neck with a broken ashtray.[204] When she regained consciousness she found herself in a pool of blood, but knew she could not dial 911.[205]

"The first thing in my mind is let me get out of this house before somebody call," she says. "I'd rather them find me on the street than find me at my house like this, because I'm going to get put out if the cops come here."[206] Just as she feared, a neighbor saw her bleeding outside and called the police.[207] Briggs was airlifted to the hospital, and when she returned home

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199 Matthew Desmond & Nicole Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 132-33 (2012). Racial bias influences police decisions regarding enforcement of these laws: tenants living in predominantly black Milwaukee neighborhoods were three times as likely to receive a nuisance citation as women living in predominantly white neighborhoods. *Id.*

200 ACLU, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 22-23 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisance ord-rel3.pdf [https://perma.cc/7EML-ETV3].

201 EDELMAN, *supra* note 191, at 143. Nancy Markham had a similar experience in Surprise, Arizona. After making multiple calls to 911 because of abuse at the hands of her boyfriend, the local police department pressured her landlord to evict her—even though they had finally arrested her former partner for his violence against her. Sandra S. Park, *With Nuisance Law, Has "Serve and Protect" Turned Into "Silence and Evict"?*, MSNBC (Mar. 25, 2016), http://www.msnbc.com/msnbc/nuisance-laws-has-serve-and-protect-turned-silence-and-evict [https://perma.cc/LF9D-TPV2]. It took a federal lawsuit, filed by the ACLU Women's Rights Project, for the city to repeal the nuisance ordinance. *Id.*

202 Pam Fessler, *For Low-Income Victims, Nuisance Laws Force Ultimatum: Silence or Eviction*, NATIONAL PUBLIC RADIO (June 29, 2016), https://www.npr.org/2016/06/29/482615176/for-low-income-victims-nuisance-laws-force-ultimatum-silence-or-eviction [https://perma.cc/W2RC-ZWZQ.

203 *See* Complaint at 10, 12, Briggs v. Borough of Norristown, No. 13-02191 (E.D. Pa. Apr. 24, 2013).

204 *Id.* at 15.

205 *See* Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911,* GUARDIAN, Sept. 11, 2015, https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911.

206 *See* Fessler, *supra* note 202.

207 Briggs, *supra* note 205.

several days later, she was evicted from her apartment.[208] The ACLU sued, and the Norristown law was eventually repealed.[209]

But similar measures continue to be enacted as local communities try to get a handle on crime and safety. And despite a series of federal lawsuits challenging the plainly discriminatory impact of these ordinances, hardly any of the affected communities have voluntarily created an exception for domestic violence victims. Nor have they sought out ways to accomplish the overall goal of crime control without imposing new and additional harms on survivors, such as barring repeat perpetrators from the building or the housing complex. Such systemic discounting of women's needs and experiences is—of course—devastating to survivors of intimate partner abuse. It is difficult to comprehend how a legal system that takes survivors' experiences seriously could permit itself to visit on them the casually brutal choice between emergency police protection and affordable housing.

Such apparent disregard for survivors' risks and needs also exists in the closely related access-to-shelter context. In 2014, for example, the mayor of Washington, D.C., requested (for the second time in two years)[210] emergency authority to limit access to shelter for local families. Specifically, the mayor proposed that applicants be permitted to stay in a public shelter only on a provisional, two-week basis; during that time caseworkers would contact applicants' friends and relatives in an effort to assess whether they had any alternate housing option.[211] Those who did would be given twenty-four hours to vacate the shelter. In the words of the mayor's office: "Our goal is to get people out of shelters . . . or never into shelters in the first place, even if that means living with a grandmother, a sister, whatever."[212] But such a policy turns a blind eye to the risks facing domestic violence survivors, where "whatever" might mean a denial of shelter and being forced to return to the home of an abusive partner.[213] Although the mayor ultimately withdrew his request,[214] a similar rule was again proposed in 2017, as an amendment to the

208 *Id.*

209 *See* Fessler, *supra* note 202.

210 *The Homeless Services Reform Amendment Act of 2014: Hearing Before the Washington, D.C., Comm. on Human Servs.* (D.C. 2014) (statement of Marta Beresin, The Washington Legal Clinic for the Homeless), available at https://www.legalclinic.org/wp-content/uploads/2018/09/Testimony-MB-DHS-oversight-hearing.pdf [https://perma.cc/UMY9-2V6X].

211 Aaron C. Davis, *D.C. Mayor Asks for Emergency Legislation to Deal with Surge of Homeless into Shelters*, WASH. POST (Feb. 19, 2014), http://wapo.st/1giNpOH?tid=ss_mail&utm_term=.31cabe14e6ed.

212 *Id.*

213 Patty Mullahy Fugere, *There Is a Family Homelessness Crisis and Provisional Placement Is Not the Answer*, HUFFINGTON POST: THE BLOG (Feb. 21, 2014) (updated Apr. 23, 2014), https://www.huffingtonpost.com/patty-mullahy-fugere/there-is-a-family-homeles_b_4827364.html.

214 Aaron C. Davis, *Gray Steps Back on Unpopular D.C. Homeless Legislation*, WASH. POST (Feb. 25, 2014), https://www.washingtonpost.com/local/dc-politics/gray-steps-back-on-unpopular-dc-homeless-legislation/2014/02/25/803bcf66-9e53-11e3-9ba6-800d1192d08b_story.html?utm_term=.e28673d02941.

city's Homeless Services Reform Amendment Act, this time requiring applicants to city shelters to prove, by clear and convincing evidence, that they had no other housing options.[215] Advocates testified, once again, that victims of domestic violence were "routinely being denied shelter" if their names were on a current lease with, for example, their abusive partner.[216]

After intensive advocacy efforts, a domestic violence exception was added to the statute.[217] But the reintroduction of shelter laws with such draconian provisions, year after year, demonstrates a deep-seated tendency to discount the importance of survivors' lived experiences and to trivialize the harmful impact these policies will inflict on large numbers of women, in service of other policy priorities.

In sum, even when a woman survivor, seeking help from the criminal justice, subsidized housing, or public shelter systems, finds that her story of intimate partner abuse *is actually believed*, gatekeepers are likely to communicate some degree of indifference about her experiences, and to accept with apparent unconcern the harms that laws, policies, and practices impose on her. Many women experience this substantive, experiential discounting as directly connected to the credibility discounting they also face. Together, these discounts create a gauntlet of disbelief and dismissal that women must overcome in order to be safe from the first-order abuse they suffer at the hands of their intimate partners.

III. THE IMPACT OF CREDIBILITY DISCOUNTS ON WOMEN SURVIVORS

Survivors suffer a wide range of credibility and experiential discounts when they seek emergency help from the police, *and* when they try to convince judges to award them a civil protection order, *and* when they struggle to obtain a safe place to live, *and* when they try to get custody of their children. They may suffer these discounts because their true stories of abuse don't sound plausible, because they are perceived as personally untrustworthy, or because their stories just don't matter much to system gatekeepers.

All of this may feel like déjà vu for a survivor. Institution-based discounting closely replicates the dynamics of abuse she endures at home. Perpetrators of intimate partner violence, like system actors, often discredit both the plausibility of a survivor's story and her trustworthiness as a truth teller. It is all too common for a survivor to be subject to a constant barrage of: "No, that's

215 Wash. Legal Clinic for the Homeless, *Requiring that Families Show "Clear and Convincing Evidence" of Homelessness*, PUBLIC (Aug. 22, 2017), http://www.publicnow.com/view/F8B804EF4654FB4D115F7E08715D8867B561EF7B?2017-08-22-22:30:10+01:00-xxx9517 [https://perma.cc/3H8Y-79WT].

216 *Id.*

217 D.C. CODE § 4–753.02.a-4 (2018).

not what happened"; or "I would never have touched you if you didn't keep provoking me"; or "You're the only one who makes me this angry."[218]

Abusive partners often discredit the woman based on her personal trustworthiness. Frequent comments tend to sound like: "You always exaggerate"; or "You're hysterical and over-emotional"; or "You're crazy; I didn't hurt you"; or "No one would believe you. Even *I* don't believe you."[219] Finally, perpetrators often dismiss the weight or consequences of the abuse: "Why do you always make such a big deal out of everything?"[220]

In other words, the credibility discounts imposed on a woman by the justice system and other institutions often echo those imposed by her abusive partner. These institutional and personal betrayals operate in a vicious cycle, each compounding the effects of the other. That web can cause women to doubt their power to remedy their situations and—in more extreme cases—the veracity of their own experiences.

System actors are not privy to that broader web of experience. A judge who doubts a survivor's story in court is not likely to be aware that he is reinforcing other discrediting messages from her abusive partner and from that partner's defense attorney. An advocate who perceives with indignation that a survivor's credibility is being discounted in family court may not know that this experience mirrors an earlier one with a police officer, and yet another with her public housing landlord. In other words, for system gatekeepers, it is almost impossible to see the whole picture. But from the perspective of a survivor, on the receiving end of one credibility discount after another, these experiences coalesce into a single, interwoven fabric. Credibility discounts become as pervasive as the air these women breathe.

So what does it mean for a survivor to be caught within a web of credibility discounting? The consequences include two major categories of harms: (1) those related to psychological wellbeing; and (2) those related to accessing justice and safety.

A. *Psychological Harms and Institutional Gaslighting*

When a survivor undertakes the considerable risks involved in seeking help, she is looking for resources and safety, to be sure. But she is also hoping

218 *See, e.g.*, *Hashtag Activism*, *supra* note 62.

219 As survivor and activist Beverly Gooden explains: Such statements are "easy to believe when it's just the two of you." *Id*.

220 The National Domestic Violence Hotline website, for example, provides the following examples of gaslighting: "Your abuser might call you 'too sensitive' or raise a skeptical eyebrow when you try to complain about his or her behavior, asking you why you would get upset over 'something so dumb.'" *What Is Gaslighting?*, NAT'L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), http://www.thehotline.org/what-is-gaslighting/ [https://perma.cc/64K3-PYTA].

for validation of the harm she has endured—in other words, to have her experience credited. As Rebecca Solnit puts it: "To tell a story and have it and the teller recognized and respected is still one of the best methods we have of overcoming trauma."[221]

Research provides ample evidence for this proposition. When Judith Herman interviewed twenty-two victims of violent crimes of all sorts on the meaning of justice, she found that wherever her interview subjects sought justice, their most important goal was to gain validation or "an acknowledgment of the basic facts of the crime and an acknowledgment of harm."[222]

In the domestic violence context, a recent qualitative study of women in a Massachusetts family court has several women noting the importance of being credited. As one woman said: "Well, validation [from the court] is huge. It really is huge. When you've got someone telling you on a constant basis that you're bad, you're wrong, [you need the courts to say you are right] . . . ."[223]

But when the institutions to which the survivor turns for help (often at great personal risk)[224] refuse to acknowledge this harm, and instead echo a woman's abusive partner by discounting her credibility, the effort to report and remedy abuse instead works to replicate the denial of a survivor's experience that takes place at home—only, this time, at an institutional level. And the institutions involved are those purportedly charged with hearing victims' stories and meting out justice. It's no wonder that survivors find the experience of systemic discrediting in our police districts and courthouses particularly crippling.

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221 Solnit, *supra* note 145, at 4.

222 Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 585 (2005). Herman goes on to explain:

> Whether the informants sought resolution through the legal system or through informal means, their most important object was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgment of harm. Although almost all of the informants expressed a wish for the perpetrator to admit what he had done, the perpetrator's confession was neither necessary nor sufficient to validate the victim's claim. The validation of so-called bystanders was of equal or greater importance. Many survivors expressed a wish that the perpetrator would confess, mainly because they believed that this was the only evidence that their families or communities would credit. For survivors who had been ostracized by their immediate families, what generally mattered most was validation from those closest to them. For others, the most meaningful validation came from representatives of the wider community or the formal legal authorities.

Id.

223 Ellen Gutowski & Lisa A. Goodman, Intimate Partner Violence Survivors' Subjective Experiences of Probate and Family Court: A Qualitative Study (2018) (unpublished manuscript) (on file with authors) [hereinafter *Massachusetts Family Court Study*].

224 *See, e.g.*, Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 467-68 (2003).

Survivors suffer a range of harms when they find that their experiences are repeatedly discredited and invalidated. We conducted a focus group outside of Boston with twelve advocates who shared extensive experience working with survivors in a variety of systems. Participants described three distinct outcomes.

First, survivors develop *a sense of powerlessness and futility*, expressed in statements such as: "I have taken this enormous risk to share my most vulnerable experiences in public—and they can't/won't hear/see me. I can't find the right words to make them help me. There is nothing I can do." This is a feeling akin to how numerous survivors eventually come to feel in their abusive relationships; there is nothing they can say or do that will make the perpetrator of violence hear or really "see" me.[225]

Second, survivors develop *a sense of personal worthlessness*. "Maybe they believe my story and still—if no one does anything in response to my story, then my experience must not have worth or merit. My pain doesn't matter. I myself must have no value."[226] This too replicates abuse dynamics: He has no empathy for me as a human being. I am worthless in his eyes.

Finally, survivors develop *a sense of self-doubt*, as the machinery of credibility discounting lurches into gear: "They are twisting my story, casting doubt, maybe I didn't remember it right, maybe it didn't happen as I think it did. I must be crazy."[227] This dynamic is well illustrated by the 1944 film

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225 Platt, Barton & Freyd describe the experience of institutional betrayal for domestic violence survivors as follows:

> [W]hen this same woman seeks assistance from the police, child protective services (CPS), or health care providers, she enters a world in which her agency cannot be taken for granted. She has no personal role with respect to decisionmaking by police, CPS, or the hospital and so is particularly vulnerable to objectification or betrayal. . . . When these institutions betray victims of domestic violence, the 'secondary trauma' from this experience can amplify the feelings of helplessness and loss of control elicited by abuse . . . . Betrayal in these situations may be more abstract than the betrayal by an intimate partner. But the violations of promises implied by their standing in the community—the promise to protect, or heal, or provide for children's welfare—are no less devastating than a partner's betrayal.

Melissa Platt, Jocelyn Barton & Jennifer J. Freyd, *A Betrayal Trauma Perspective on Domestic Violence*, *in* VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: VICTIMIZATION AND THE COMMUNITY RESPONSE 185, 201-02 (Evan Stark & Eve S. Buzawa eds., 2009).

226 In the Massachusetts Family Court Study, one participant described her experience of betrayal by the family court judge: "You think that somebody's coming, is going to enter the picture that will help you. You're so desperate and when you're let down, it's. And I you know, there's some that are like, 'I don't even want to live anymore. I don't want to live anymore.'" *Massachusetts Family Court Study*, *supra* note 223.

227 The National Domestic Violence Hotline website warns survivors to pay attention to this sort of dynamic:

> "You're crazy—that never happened."
>
> "Are you sure? You tend to have a bad memory."

Gaslight,[228] in which a man manipulates his wife's routine experiences in a concentrated effort to create opportunities to discredit her and convince her that she is insane. He does this so effectively that she eventually comes to doubt her own perceptions and memory, and ultimately accepts his story that she is delusional and mentally unsound.[229]

Abusive men gaslight their women partners when they express love and affection on the heels of a violent episode, or deny that certain promises or commitments were ever made, or simply deny that events took place. Over time, these small incidents build until, like the wife in *Gaslight*, survivors may come to doubt their own memory, perception, and experience.[230]

Judy Herman explains:

> After every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it on herself; and in any case it is time to forget the past and move on. The more powerful the perpetrator, the greater is his prerogative to name and deny reality, and the more completely his arguments prevail.[231]

A quote from the Massachusetts Family Court study illustrates this phenomenon:

> It's always that you're overreacting, you're too emotional. He'd do something like the night I woke up with him with his hands around my neck and I was like, "What are you doing?" I start crying, and he started laughing. And he said, "I was dreaming." . . . "I wasn't going to do anything. I was just

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> "It's all in your head."
>
> Does your partner repeatedly say things like this to you? Do you often start questioning your own perception of reality, even your own sanity, within your relationship? If so, your partner may be using what mental health professionals call "gaslighting."
>
> Gaslighting typically happens very gradually in a relationship; in fact, the abusive partner's actions may seem harmless at first. Over time, however, these abusive patterns continue and a victim . . . can lose all sense of what is actually happening. Then they start relying on the abusive partner more and more to define reality, which creates a very difficult situation to escape.

What is Gaslighting?, NAT'L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), http://www.thehotline.org/2014/05/29/what-is-gaslighting/ [https://perma.cc/64K3-PYTA].

228 The film is based on a 1938 Patrick Hamilton play of the same name, *Gaslight*. GASLIGHT (Metro-Goldwin-Mayer 1944).

229 *Id.*

230 Darlene Lancer, *How To Know if You're a Victim of Gaslighting*, PSYCHOL. TODAY (Jan. 13, 2018), https://www.psychologytoday.com/blog/toxic-relationships/201801/how-know-if-youre-victim-gaslighting.

231 HERMAN, *supra* note 39, at 8.

> dreaming." He was laughing, and then he says, "Stop overreacting. I wouldn't hurt you. Stop overreacting." And I would believe that I was overreacting: Right?. [Maybe] he didn't really hurt me. I mean really?[232]

As one of the first author's clients put it:

> He found my most vulnerable point, a tiny kernel of insecurity in my soul, and he exploited it to trap me in a painfully confusing state of nearly total self-doubt. I spent more than a year working so hard to regain trust in my own perceptions and my own humanity. But now I find that the legal system doubts me too, even as I share my more painful and personal story. I get hurt again and again. It is painfully confusing and I find that it has caused a significant regression in my overall healing.[233]

These individual experiences are reinforced by the institutional gaslighting women experience in the form of system-based credibility discounts and experiential trivialization. When our official bodies of justice and law enforcement effectively collaborate in the same patterns utilized by perpetrators of abuse, survivors may be even more likely to doubt their own abilities to perceive reality and understand their own lives.

B. *Harms Related to Access to Justice and Safety*

The sense of institutional gaslighting that commonly accompanies the progress of abuse claims through the justice system has immediate and baleful consequences for survivors: the system itself becomes an impediment to, rather than a conduit toward, justice. Indeed, credibility discounts are analogous to other, more tangible obstacles that are already all too familiar to those who work in the domestic violence field, such as economic dependence, isolation, and fear.

First, as we've already seen, credibility discounting may discourage women from continuing to pursue justice or other forms of support. Having their claims met with system-wide denial and disbelief gives women ample cause to distrust, and then possibly avoid, the institutions ostensibly there to help them.[234] As the Gender Bias Study of the Court System in

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232 *Massachusetts Family Court Study*, *supra* note 223.

233 Communication from client to Deborah Epstein (July 28, 2017).

234 Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution. Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOLOGIST 575, 575 (2014). The secondary victimization of women seeking legal services in the aftermath of interpersonal violence is described by researcher Rebecca Campbell, who found that when survivors reach out for help, often at a time of great vulnerability and need, "they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help." Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCHOLOGIST 702, 703 (2008); *see also* Platt et al., *supra* note 225, at 202; Heidi Grasswick, *Epistemic Injustice in Science*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 313.

Massachusetts explains: "The tendency to doubt the testimony of domestic violence victims and to 'blame' them for their predicament not only hampers the court's ability to provide victims with the protection they deserve, it also has a chilling effect on the victims' willingness to seek relief."[235]

A woman in the Massachusetts Family Court study captured this fatalistic process in heartbreaking detail:

> [The court] didn't believe [the abuse] . . . so I felt like it didn't matter . . . . The way my case was handled, I am very afraid of [the government in] this state now . . . . I'm so afraid of all he needs to do is just file a motion and bang! He'll get, he'll prove me wrong, you know, I'll get discredited again. So I just always keep a watchful eye.[236]

Perhaps most perniciously, each individual woman's experience can have a large-scale chilling effect. As one advocate described it, "A judge discredits one woman, and it's like a bomb that goes off in the community, affecting a hundred women. Within many communities, these stories spread like wildfire."[237]

A woman in the Massachusetts Family Court study voiced much the same criticism:

> [My advice to other women is:] Just don't say anything about it. The way the system is now . . . you've got to talk to your priest, talk to your family, tell them your story of woe and you know, the fact that you've been abused. Have the support, get therapy if you need therapy, do talk to them. But don't, don't, don't bring it into the courtroom, because . . . [the judge will think] 'oh, that couldn't have happened to you.'[238]

Such advice—editing one's speech so that it includes only what the listener is ready or able to hear—is described in the philosophy literature as "testimonial smothering."[239]

In the 2015 National Domestic Violence Hotline study,[240] both women who had called the police and those who hadn't shared a strong reluctance to turn to law enforcement for help. One in four women reported that they would not call the police in future, and more than half said doing so would

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235 FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL & GENDER BIAS IN THE JUSTICE SYSTEM 405 (2003).

236 *Massachusetts Family Court Study*, *supra* note 223. In addition, women who do not receive the support they need from law enforcement are less likely to turn to law enforcement in the future. *See* Ruth E. Fleury et al., "*Why Don't They Just Call the Cops?*": *Reasons for Differential Police Contact Among Women with Abusive Partners*, 13 VIOLENCE & VICTIMS 333, 342 (1998).

237 Interview with Ronit Barkai, Assistant Dir., Transition House (Dec. 20, 2017).

238 *Massachusetts Family Court Study*, supra note 223.

239 Dotson, *supra* note 112, at 249.

240 NATIONAL HOTLINE SURVEY, *supra* note 106, at 9.

make things worse.[241] Why? Two-thirds or more said they were afraid the police would not believe them—or would do nothing, if they called.[242]

Credibility discounts and experiential trivialization harm women in an abundance of ways—up to and including the supremely destabilizing process of prompting women to question the truth of their own experience. Women are devalued and gaslighted from every direction, discouraging them from continuing to seek systemic support. Ripple effects discourage the broader community of women from seeking the help they need. And our entire society suffers from the failure to fully understand, credit, and value a substantial portion of the human experience. Together, these harms operate to form a formidable obstacle to women's healing, safety, and ability to obtain justice.

IV. MOVING FORWARD: INITIAL STEPS TOWARD ERADICATING CREDIBILITY DISCOUNTS IN THE JUSTICE SYSTEM

At this point, we have a fairly comprehensive sense of how the justice system and influential actors in related social service networks unfairly discredit women and their stories of abuse, and devalue their most difficult experiences. How can we recalibrate these core institutions to tear down the gauntlet of doubt, disbelief, and dismissal women face in their efforts to be safe and achieve justice?

Several forms of credibility discounting may be amenable to fairly straightforward interventions—specifically, those that derive from listeners' failure to understand a woman's experience of intimate partner violence. For example, gatekeepers within the justice system often lack information about the effects of violence-based neurological and psychological trauma on information processing and memory, about the way that potent courtroom triggers can affect witness demeanor, and about the ways survivors understand their options and prioritize their harms.[243] The best way to cure these knowledge gaps is—of course—improved understanding. Intensive training could, in theory, allow individual judges, police officers, prosecutors, clerks, and social service providers to better understand the medical, mental health, and experiential correlates of domestic violence. Such education should help to eradicate those credibility discounts that are rooted in incomplete understandings.

A cautionary note, however, is in order here. For decades, antidomestic violence activists have engaged in intensive judicial training efforts throughout the country. Some individuals have absorbed this learning and are far more adept at avoiding knowledge-based pitfalls in assessing survivor credibility. For others, however, knowledge gaps persist despite exposure to

241 *Id.* at 5.

242 *Id.* at 4.

243 *See supra* text accompanying notes 19–95.

high quality training, raising doubts that training alone may be enough. Training must be accompanied by a genuine commitment to absorbing new and sometimes complex understandings about the world.[244]

Other forms of credibility discounting described above—particularly those rooted in negative stereotypes and bias—are more resistant to change and may require a more complex set of interventions. The cultural assumption that women tend to be improperly motivated by an outsized concern for financial, material, or child custodial gain—and the related assumption that women simply lack full capacity as truthtellers—are longstanding and deeply held.[245]

Regardless of the type of credibility discount in question, change will not come easily; it will require a combination of motivation, awareness, and effort. The responsibility here lies with the listening audience—justice and social service system gatekeepers—to intentionally, consciously shift their assumptions. In Fricker's words, the listener must adopt "an alertness or sensitivity to the possibility that the difficulty one's [witness] is having as she tries to render something communicatively intelligible is due not to its being [a] nonsense or her being a fool, but rather to some sort of gap in [the existing interpretive] resources."[246]

The crucial first step is to shift away from an automatic, uninformed disbelief of women's stories—to begin, in other words, to distrust one's own distrust. Philosopher Karen Jones proposes the imposition of a "self-distrust rule": gatekeepers should allow "the presumption against . . . believing an apparently untrustworthy witness [to] be rebutted when it is reasonable to distrust one's own distrust or [one's own] judgments of implausibility."[247]

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244 These conclusions are based on the first author's extensive experience in conducting trainings with judges, police officers, and prosecutors, as well as numerous conversations with other trainers in the field of intimate partner violence.

245 *See supra* text accompanying notes 112–168. A central challenge here is that many system gatekeepers are unaware of the gender-based stereotypes that are, in fact, shaping their perceptions and decisions. As long as these biases remain unconscious, change is unlikely. Psychologists interested in challenging unconscious prejudicial perceptions, also called "implicit biases," have shown that participants who develop both a strong negative attitude toward prejudice and a strong belief that they themselves are indeed prejudiced, are able to reduce the manifestations of their implicit bias. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164 (2007). One of the most prominent and well-researched approaches to bias reduction is called the "prejudice habit-breaking intervention." Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1267 (2012). Once participants achieve awareness of their own biases and of the damage such biases can cause, they use cognitive strategies to accomplish behavioral change, such as stereotype replacement, perspective-taking, and counter-stereotypic imaging. One notable study based on such strategies demonstrated that habit-breaking interventions produced long-term changes in key outcomes related to implicit racial bias, increased concern about discrimination, and greater reported beliefs that there could be bias present in participants' thoughts, feelings, and behaviors. These changes endured two months following the intervention. *Id.*

246 FRICKER, *supra* note 49, at 169.

247 Jones, *supra* note 167, at 164.

Let us be clear: We are in no way arguing that by distrusting one's instincts to distrust a survivor, state actors must go to the other extreme and automatically credit all survivor stories. Instead, system actors need only resist the reflexive presumption *against* crediting women's stories, make an effort to avoid false assumptions, overcome hermeneutic gaps, and open their minds to accepting a broader range of stories and storytellers. We might call this process one of cultivating a capacity for "virtuous listening."[248]

System gatekeepers can build this openness into their traditional approaches to assessing credibility. Contributing factors such as the internal and external consistency of story, as well as witness demeanor, can easily expand to accommodate new understandings. For example, a judge who notices temporal gaps in a survivor's story can resist the urge to automatically discount her credibility. Instead, the judge can ask follow up questions in an effort to obtain more concrete factual information and avoid making unjustified assumptions. Such questions might include:

- What kinds of injuries did you sustain?
- Did you ever feel unable to breathe for any period of time?

Additional questions might focus on obtaining information about the impact of trauma on the witness. For example:

- Are you able to remember the full story of what happened, from beginning to end?
- It's fine if you can't tell me what happened in complete detail; just tell me any specific part of this experience that you *do* remember.
- How would you describe your ability to remember what happened here? Do you remember some pieces, like visual images, smells, sounds, or anything like that? Tell me about those.
- Is your memory of what happened consistent over time? How does it change?
- Is this a good or a bad day for your memory of what happened? Do you sometimes remember more or less than what you've been able to recall today?
- Is your memory of what happened similar to or different from your memory of other events in your life? How so?

A gatekeeper listening to a woman describe her experience of abuse with either a flat affect or a tone overwhelmed with hysteria or fury might ask:

- I notice you seem completely calm right now. Does that reflect how you felt at the time of the events you're describing?

248 Jose Medina, *Varieties of Hermeneutical Injustice*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 48.

- (If not): What do you think explains the difference?

or:

- I notice you seem extremely upset/angry right now. Can you help me understand what you're feeling, and why?

When receiving testimony focused on psychological, rather than physical abuse, listeners can use a prompt along these lines:

- You've talked about the psychological harm you experienced in your relationship. Was there ever physical violence? Can you help me understand why you have focused primarily on the emotional aspects of your experience?

When suspecting that a woman is improperly motivated by a desire to access housing/shelter, or to gain an advantage in a custody case:

- You've spent a lot of time explaining that you need to have a safe place to live. Can you help me understand why you've focused more on this issue than you have on the violence you've described?
- I see that you filed a permanent custody case a few weeks ago. Can you help me understand why you have filed your protection order case now? I need you to explain to me why you didn't file this case first.

To help counter the more general tendency to discredit women *as women*, a judge might take the issue on directly:

- One of the most basic things a judge has to do is to decide whose story to believe. In this case, like so many others, each of you is telling me a different story. Can you help me see the reasons I should credit, or believe, your side of the story, as well as the reasons I should not credit the story told by the other party?

The judge may ultimately find a woman's story implausible, or find her personally untrustworthy. But by engaging in a systematic reorientation of their beliefs, judges can begin to reverse unfair and automatic presumptions of distrust and thus avoid inflicting testimonial and hermeneutic injustice.

In addition, in cases where a judge or other system gatekeeper concludes that a survivor is, indeed, telling the truth, the gatekeeper should explicitly communicate that to her. In light of the frequency with which women face credibility discounts and the psychological harm such discounts impose, a counter-message of belief and support (where warranted) can be deeply cathartic.[249]

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249 *See supra* text accompanying notes 218–223. Being believed is critical to a survivors' ability to heal. A judge's explicit statement that a survivor is credible can serve as a stark counter narrative

And judges must be held accountable for instituting such changes. Court watch programs should expand to include observations about individual judicial efforts (and failures) to look beyond surface indicators of credibility and ask questions targeted at more accurate assessments. Court watch reports, shared with the local judiciary and made available to the public, would create much-needed pressure to follow through with a change in existing credibility assessment tools.

Still, experience has taught us that judicial training has its limits; accordingly, suggestions for changing gatekeeper behavior are not enough. Reform efforts also must focus on improving survivors' access to powerful forms of corroborative evidence. The story of White House staff secretary Rob Porter serves as a potent reminder that a picture—there, one that showed his ex-wife's black eye—can dramatically reduce the initial credibility discounting imposed on women's stories of abuse.[250] But survivors often lack such evidence. Many perpetrators routinely look through their targeted victim's phones, deleting any incriminating photos, texts, or voice mails that are stored there. Many women are afraid to maintain such evidence in the first instance, due to fear that discovery will lead to further abuse.

Recent technological innovations have created safe spaces for women seeking to maintain corroborative evidence. The SmartSafe+ mobile app, developed by the Domestic Violence Resource Centre in Victoria, Australia, enables survivors to create an online diary containing written, photographic, video, and audio entries that are stored on a cloud account, rather than on their phones.[251] It also contains guidance about the most important forms of corroborative evidence that can be useful in a courtroom.[252] On the phone itself, the app looks like a routine news feed. It can be downloaded, free of charge, at domestic violence advocacy organizations, where service providers have been trained to ascertain whether a survivor's phone is being monitored and ensure that the download cannot be detected.[253]

Efforts also are underway to develop online programs that use plain language to improve survivor access to justice.[254] Such efforts could be expanded to educate

to her abusive experiences, reinforcing the validity of her own perceptions and helping to restore the sense of self-worth she may have lost.

250 *See, e.g.*, Maggie Haberman & Katie Rogers, *Rob Porter, White House Aide, Resigns After Accusations of Abuse*, N.Y. TIMES (Feb. 7, 2018), https://www.nytimes.com/2018/02/07/us/politics/rob-porter-resigns-abuse-white-house-staff-secretary.html.

251 *Family Violence App Wins Inaugural Premier's iAward*, CIVIL VOICES (June 30, 2016) https://probonoaustralia.com.au/news/2016/06/family-violence-app-wins-inaugural-premiers-iaward/ [https://perma.cc/3PV9-5L4X].

252 *See, e.g.*, SmartSafe+ Mobile App, https://www.youtube.com/watch?v=09tdxEr1nww (last visited Oct. 16, 2018).

253 *Id.*

254 Brigitte Lewis, Lisa Harris & Georgina Heydon, *The Conversation We Need to Have: Victoria Has Made Progress on Tackling Domestic Violence, But There Is Still Much to Be Done*, ASIA & PAC.

survivors about the importance of focusing courtroom storytelling around applicable legal standards. Community education focused on storytelling could prompt women to highlight their experiences of physical harm, for example, helping them to focus on what is most important for their legal case, rather than what might be most emotionally salient to them on a personal level. In addition, online programs and in-person advocates could help women think through how to effectively communicate how trauma might be impairing their ability to effectively tell their story in court, or to any system gatekeeper.

Together, these initial reforms could have a substantial individual and institutional impact, with a concomitant diminution in discounting women's credibility. But, as noted above, two prerequisite conditions—whether in reducing the "willful interpretive gap" in understanding women's experiences, in eradicating cultural stereotypes of women as inherent untrustworthy, or in taking women's experiences seriously—are the *acknowledgement of gender-based bias, and the will to change*.

Progress is possible. The #MeToo moment represents the beginning of a shift in cultural understanding and good will. The floodgate of stories from blue collar workers to Hollywood A-listers has forced society to face the realities encountered by so many women in the American workplace. Similarly, the #WhyIStayed campaign brought into sharp relief the ways that women are often trapped in abusive relationships. And the January 2018 sentencing hearing in the criminal prosecution of Larry Nassar, a sports therapist at Michigan State University who sexually assaulted more than 150 female students over two decades, raised national awareness about women's experiences of sexual assault.[255]

Perhaps most importantly, the Nassar case represents an initial effort to break crucial barriers directly related to credibility discounting. The women Nassar exploited told the court and the wider world, explicitly and in painful detail, their stories of being discredited by the institutions ostensibly designed to help them. Over 150 women from Michigan State University ("MSU") came forward with story after story of how they

> told MSU administrators, explicitly and more than once, that Nassar was sexually abusing them during medical appointments. [The administrators] listened to women describe the rubbing back and forth, the digital penetration that sometimes lasted 15 minutes, the ungloved hands. But when

POL'Y SOC'Y (Sept. 6, 2016), http://www.policyforum.net/the-conversation-we-need-to-have/ [https://perma.cc/5AQA-697Z].

255 Caroline Kitchener, *Larry Nassar and the Impulse to Doubt Female Pain*, ATLANTIC (Jan. 23, 2018), https://www.theatlantic.com/health/archive/2018/01/larry-nassar-and-the-impulse-to-doubt-female-pain/551198/.

> those women said there was a problem—that this didn't feel right, that they were hurt—*the administrators didn't believe them*.[256]

Instead, school administrators consistently discounted the credibility of Nassar's victims, telling them: "He's an Olympic doctor"; or "No way"; or "[You] must be misunderstanding what was going on."[257] When asked about the women's reports of abuse, the university's Title IX investigator, Kristine Moore, said "the women likely did not understand the 'nuanced difference' between proper medical procedure and sexual abuse."[258]

The sentencing hearing in this case was a groundbreaking opportunity for women to share both their experiences of sexual assault and, in painful detail, their experiences of credibility discounting. The seven days of hearings were cathartic for the survivors; they also shone a light on the institutional gaslighting that women routinely experience.[259] It is time to build on the momentum of this new awareness and take concrete steps to implement meaningful reform in the justice and social service systems.

CONCLUSION

Women experience credibility discounts in their homes and in the systems they turn to for help. As the torrent of #MeToo stories have made clear, these same discounts pervade workplaces where women are sexually harassed. The Larry Nassar case further shows that these discounts are rampant among campus administrators responsible for handling sexual assaults. The routine experience of credibility discounting indeed is an integral part of male abuses of power, making those experiences far more painful and difficult for women to surmount.

But assaults on women's credibility also exist independently of those abusive contexts. In fact, women routinely face credibility discounting in multiple spheres of their lives. As we have worked on this essay, we've started to notice credibility discounting in our own lives everywhere we turn. When we've talked to colleagues and friends about this project, they too reliably respond with a story of their own, typically from the past few days.

For example, one colleague—an extremely well-known legal theorist—exclaimed, "That happens to me, all the time!"[260] She told us the story of a dinner party she had just attended, where the conversation turned to the question of who would succeed to the presidency if Donald Trump, Mike Pence, and Paul Ryan were all somehow removed from office. Our colleague

256 *Id.* (emphasis added).

257 *Id.*

258 *Id.*

259 Sophie Gilbert, *The Transformative Justice of Judge Aquilina*, ATLANTIC (Jan. 25, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/.

260 Thanks to Professor Robin West for providing us with this story.

(a woman) volunteered that she'd been thinking about this quite a bit, and that the next person in line was Orrin Hatch—the President Pro Tempore of the Senate. The other guests responded with deep skepticism: "That can't be right," etc. She insisted that she was certain, but she was ignored. Several guests pulled out their phones and started to Google the question; others brainstormed possibilities among themselves. Eventually, the group concluded that the next in line was . . . Orrin Hatch.[261] No one acknowledged that our colleague had ever even suggested this answer. Not only was there no apology for doubting her; it was as though she had never spoken at all.

Other friends and colleagues shared experiences where they reported unusual physical symptoms to male medical professionals. They were concerned, in advance, that they might be dismissed as "hysterical" or as exaggerating their experiences, and, in fact, they often were told that the problem was likely "all in their heads."[262] Gender-based credibility discounting is a serious concern in the medical field: among emergency room patients complaining of abdominal pain, women are thirteen to twenty-five percent less likely than men to receive high-strength "opioid" pain medication; in addition, women wait an average of sixteen minutes longer than men to receive treatment.[263]

Indeed, credibility discounting stands on its own as an essential aspect of the female experience. Doubt, skepticism, and trivializing are familiar phenomena to women. In other words, credibility discounting and experiential trivializing are distinct injuries women experience, as part of, and *in addition to*, other forms of gender-based, discriminatory harms.

It is time for a credibility-discounting #MeToo movement. Women need to come forward in massive numbers to tell their stories of discounts based on

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261 This story has a sharp ironic edge. Orrin Hatch took a leading role in the Clarence Thomas confirmation hearings before the Senate Judiciary Committee. *See, e.g.*, *Thomas Hearing Day 1, Part 1*, C-SPAN, at 48:37–57:02 (Oct. 12, 1991), https://www.c-span.org/video/?21974-1/thomas-hearing-day-1-part-1. Reflecting on these hearings nearly twenty years later, in an interview with CNN, Hatch reasserted his view that Anita Hill fabricated her story about Thomas' harassment, but "talked herself into believing it." Hatch explains:

> I believe that Anita Hill was an excellent witness. I think she actually believed, and talked herself into believing, what she said. There was a sexual harasser at that time, according to the sources I have, and he was her supervisor. He just wasn't Clarence Thomas. And I think she transposed that to where she believed it . . . .

Why Ask for Anita Hill's Apology Now?, CNN (Oct. 20, 2010), https://www.youtube.com/watch?v=6Og0LRu028Q.

262 For a more in-depth look at this type of credibility discount, see Jennifer Brea, *They Told Me My Illness Was All in My Head. Was It Because I'm a Woman?*, BOS. GLOBE (Dec. 27, 2017), https://www.bostonglobe.com/magazine/2017/12/27/they-told-illness-was-all-head-was-because-woman/47zuihgBfZqPdNe7S40hSJ/story.html.

263 Esther H. Chen et al., *Gender Disparity in Analgesic Treatment of Emergency Department Patients with Acute Abdominal Pain*, 15 ACAD. EMERGENCY MED. 414, 414 (2008).

story plausibility and storyteller trustworthiness, as well as ways in which their experiences have been minimized and dismissed, in an effort to force society to see with clarity this distinct form of gender-based harm.[264] And perhaps once the scale of this injustice is made manifest, we can, at long last, enact a body of genuine institutional remedies, so that women already victimized by abuse, sexual assault, and harassment need not fear that the legal system and the broader culture is set up to perpetuate, rather than alleviate, their harms.

264 Playwright Timberlake Wertenbaker puts it well:

> What the #MeToo moment is besides sexual harassment is the end of women being quiet. And that is almost more important—that is, the ability and the right of women to speak up about what's happened to them or what they think in general, without being told to shut up I hope that's what lasts forever."

Nelson Pressley, *Second Women's Voices Theater Festival Arrives as #MeToo Is in the Spotlight*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/entertainment/theater_dance/second-womens-voices-theater-festival-arrives-in-metoo/2018/01/04/bfadec08-e66e-11e7-833f-155031558ff4_story.html?utm_term=.fed8f623d01b.