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#WeToo

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The #MeToo movement has caused a widespread cultural reckoning over sexual violence, abuse, and harassment. "Me too" was meant to express and symbolize that each individual victim was not alone in their experiences of sexual harm; they added their voice to others who had faced similar injustices. But viewing the #MeToo movement as a collection of singular voices fails to appreciate that the cases that filled our popular discourse were not cases of individual victims coming forward. Rather, case after case involved multiple victims, typically women, accusing single perpetrators. Victims were believed because there was both safety and strength in numbers. The allegations were not by a "me," but far more frequently by a "we." The #MeToo movement is the success of #WeToo.

This Article assesses the implications of #WeToo for criminal law. #WeToo—multiple allegations against individual perpetrators—brings some grounds for hope about the criminal justice system's treatment of sexual assault. Currently, victims face unwarranted obstacles with respect to police, prosecutors, and juries, but #WeToo may spur better policing, encourage prosecution, and counteract a jury's credibility discounting of an individual victim's testimony. However, there are also significant reasons to worry. The rise of #WeToo risks frustrating jury expectations due to a narrative mismatch between the media's coverage of sexual violence and the typical facts on the ground, the imposition of a de facto corroboration requirement wherein individual victims cannot attain justice unless another person was victimized, and the perversion of fairness commitments due to the accused through permissive joinder rules and sloppy or unjustified evidentiary arguments. This Article grapples with these impacts that #WeToo will have on the criminal justice system, including the effects of #WeToo's intersection with racial injustices—the over-policing of Black men and under-protection of Black women.

#WeToo

*Kimberly Kessler Ferzan**

Content Advisory: This article discusses sexual violence in detail.

INTRODUCTION

In significant respects, the #MeToo movement has been a resounding success.[1] It has generated a public reckoning over the pervasiveness of sexual violence, abuse, and harassment.[2] It has caused heads to roll; rapists have gone to prison,[3] and myriad others have been called to account for their behavior.[4] It has led to broader debates about what constitutes sexual

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[1] The meaning and goals of "Me Too" changed over time. As Michelle Dempsey notes:

> The #MeToo movement, founded by Tarana Burke in 2006, was (and is) primarily intended to support survivors of sexual violence, particularly Black women and girls. That is, it is not primarily focused on holding perpetrators accountable. Still, the social media hashtag #MeToo went viral in October 2017, and the #TimesUp movement—which is primarily focused on holding perpetrators accountable—followed quickly thereafter.

Michelle Madden Dempsey, *Coercion, Consent, and Time,* 131 ETHICS 345, 345 n.1 (2021); *see also* Gurvinder Gill and Imran Rahman-Jones, *Me Too Founder Tarana Burke: Movement Is Not Over*, BBC NEWS (July 9, 2020), https://www.bbc.com/news/newsbeat-53269751 (discussing the founding of Me Too and the later tweet by Alyssa Milano, which caused the movement to go viral).

[2] Dempsey, *supra* note 1, at 346 ("No doubt, the #MeToo/#TimesUp era has sparked a cultural reckoning in terms of how people actually view sexual violation.").

[3] *See infra* Sections I.B and C.

[4] *See infra* Section I.A. There are difficult questions about when to deploy the criminal justice system and use incarceration. *See generally* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020). For discussion of restorative and transitional justice approaches to #MeToo wrongdoing, *see generally* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (2019).

wrongdoing.[5] It has opened up a dialogue for victims to articulate fully the wrong they have experienced.[6] It has spurred pay equity and sexual harassment legislation,[7] and shed light on the abuse of nondisclosure agreements (NDAs).[8]

And, it has exhibited the strength in numbers. The Time Magazine Person of the Year in 2017 was not a person. They were – "The Silence Breakers."[9] Harvey Weinstein, Bill Cosby, Larry Nassar, Kevin Spacey, Matt Lauer, Charlie Rose, and others were denounced by multiple victims.[10] And "multiple" fails to describe some of these cases. Cosby was accused by more

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[5] Dempsey, *supra* note 1, at 345 ("One of the most important contributions of the #MeToo/#TimesUp movement is the extent to which it has sparked new kinds of public conversations about coercion, consent, sexual violation, and sexual misconduct.").

[6] Miranda Fricker calls this "hermeneutical injustice." MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2007) (defining hermeneutical injustice as *"*a gap in collective interpretive resources [that] puts someone at an unfair disadvantage when it comes to making sense of their social experiences"). For instance, when discussing her harassment by Harvey Weinstein, Lupita Nyong'o wrote:

> I share all of this now because I know now what I did not know then. I was part of a growing community of women who were secretly dealing with harassment by Harvey Weinstein. But I also did not know that there was a world in which anybody would care about my experience with him. You see, I was entering into a community that Harvey Weinstein had been in, and even shaped, long before I got there. He was one of the first people I met in the industry, and he told me, "This is the way it is."

Lupita Nyong'o, *Lupita Nyong'o: Speaking Out about Harvey Weinstein*, N.Y. TIMES (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/opinion/lupita-nyongo-harvey-weinstein.html. And, one of Charlie Rose's victims noted, "It has taken 10 years and a fierce moment of cultural reckoning for me to understand these moments for what they were . . . . He was a sexual predator, and I was his victim." Irin Carmon and Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—with Nudity, Groping, and Lewd Calls,* Washington Post (Nov. 20, 2017), https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them--with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html.

[7] Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 22 U. CHI. L. F. 371, 387 (2019) ("From October 2016 to December 2018, 384 bills were introduced across nearly all 50 states, plus the District of Columbia.").

[8] Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 423 (2019) ([T]he cost of the current regime, vividly demonstrated by Weinstein, O'Reilly, Ailes, et al., is that it too often fails to prevent serial abuse").

[9] Stephanie Zacharek, et al., *Time Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), https://time.com/time-person-of-the-year-2017-silence-breakers/

[10] *See infra* Sections I.A.1 & I.B.

than 50 women,[11] Weinstein by over 85,[12] and Nassar by 265.[13] You read that correctly: *two hundred and sixty-five*. There was no "she said/he said."[14] There was "they said/he said."[15] And given that the "too" of "me too" was meant to indicate that one was adding one's voice to a chorus of others who had been sexually assaulted or harassed,[16] it fails to fully exemplify the extent to which these widely publicized allegations against individual perpetrators were almost never by a "me" but rather a "we." The cases that captured the public's attention are better understand as #WeToo's. It was group

[11] Chris Francescani & Linsey Davis, *Bill Cosby's Fate Could Turn On a Pivotal Court Decision Expected Next Week*, ABC NEWS (Mar. 2, 2018, 1:08 AM), https://abcnews.go.com/US/bill-cosbys-fate-turn-pivotal-court-decision-expected/story?id=53450806.

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

[13] *Larry Nassar Case: USA Gymnastics Doctor 'Abused 265 Girls'*, BBC NEWS (Jan. 31, 2018), https://www.bbc.com/news/world-us-canada-42894833; *Larry Nassar Case: The 156 Women Who Confronted a Predator*, BBC NEWS (Jan. 25, 2018), https://www.bbc.com/news/world-us-canada-42725339.

[14] Placing "she" first is more appropriate than "he said/she said." As Georgi Gardiner explains:

> Such cases are typically called 'he said, she said' cases. The male pronoun comes first and denotes the accused. In language male terms typically come first. We say 'boys and girls', 'guys and dolls', 'kings and queens', 'lords and ladies', 'men and women', 'man and wife', 'males and females', and so on. . . . But this order is epistemically pernicious for two reasons. Firstly, the accuser-accused order distorts and disguises the fact that in almost every case the accusation comes first. The denial responds to an antecedent accusation. . . . [T]his temporal order matters epistemically, since it bolsters the claim the accuser is likely telling the truth. Secondly, the expression 'he said, she said' melds with similar expressions, such 'boys and girls'. It suggests linguistic counterpoise—two halves, equally weighted—in which order is irrelevant. The linguistic balance implicitly suggests an epistemic balance. . . . [T]he two halves are not, however, epistemically balanced. Probably the accuser speaks truly and the denier speaks falsely, and the magnitude of the difference is significant. To destabilise these connotations of epistemic balance, I call them 'she said, he said' cases.

Georgi Gardiner, *She Said, He Said: Rape Accusations and the Preponderance of Evidence* (manuscript on file with author) 1, 5-6.

[15] Considering the significant gender disparities in offending, I will use "she" for victims and "he" for perpetrators. *See, e.g.*, U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 251773, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005-14), at 2 tbl.1 (2019) [hereinafter RECIDIVISM OF SEX OFFENDERS], https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf (stating that only 1.6% of persons incarcerated for rape or sexual assault in thirty states surveyed in 2005 were women). Some instances below deal with male victims of sexual violence. The invisibility of male victimhood is discussed *infra* Section IV.A; *see also* Bennett Capers, *Real Rape, Too*, 99 CAL. L. REV. 1259 (2011).

[16] See *infra* note 24.

allegations against individual perpetrators—what this Article calls "#WeToo"—that altered our assessment of whether the perpetrator "did it."

Nowhere will #WeToo's impacts, its triumphs and failures, be more strongly felt than in the criminal law. It is the criminal law that makes it hardest for us to believe victims with the requirement of proof beyond a reasonable doubt.[17] And it is the criminal law that simultaneously purports to punish the significant wrong of sexual violence.

This Article assesses criminal law's #WeToo reckoning. What does an understanding of sexual violence as one person who engages in a series of sexual wrongs mean for the likelihood that justice will be achieved or that defendants will be treated fairly? This Article maintains that #WeToo may be a force for good, but it also has the potential to cause harm to both victims and defendants.

#WeToo does generate significant, warranted grounds for optimism. Against a backdrop of unjustified skepticism about sexual assault allegations, a recognition that many crimes are repeat offenses can have positive impacts on policing and prosecution. What might individually be a weak case becomes stronger when other victims appear, and investigations can and should take these factors into account. Consciousness raising also impacts the overall willingness to believe that these acts actually happen—that a television executive could even presume to ask female journalists to "twirl" for him to assess their bodies before putting them on air.[18] This can affect both the general understanding of women as credible—#BelieveWomen—and the jury's willingness to find "reasonable doubt" within a narrative.[19]

But this success of the "we" is likely a double-edged sword for the "me." For defendants charged with multiple counts, their chances of conviction may increase by evidentiary sleights of hand. Courts and commentators are still mistaken about the functioning of evidentiary rules, particularly the "doctrine of chances," which is playing a significant role in some cases, including

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[17] This is to gloss what it means to "believe women." For discussion of the interaction of evidentiary burdens and believing witnesses, compare Kimberly Kessler Ferzan, *#BelieveWomen and the Presumption of Innocence*, *in* NOMOS LIX: TRUTH AND EVIDENCE (Melissa Schwartzberg & Philip Kitcher, eds. forthcoming 2021) with Renée Jorgensen Bolinger, *#BelieveWomen and the Ethics of Belief*, *in* NOMOS LIX: TRUTH AND EVIDENCE (Melissa Schwartzberg & Philip Kitcher, eds. forthcoming 2021).

[18] *See infra* text accompanying notes 25-28.

[19] In the Chicago Tribune, Professor Deborah Tuerkheimer said, "[T]he more typical case involves not 56 women, but one . . . ."; she "hopes for a 'trickle-down' effect that expands to help cases where there's a single accuser or women who are typically more marginalized." Vikki Ortiz Healy & Angie Leventis Lourgos, *Sexual Harassment and the #MeToo Movement: Catalyst for Change or Fleeting Moment?*, CHI. TRIB. (Oct. 28, 2017, 9:29 AM), https://www.chicagotribune.com/news/ct-met-sexual-harassment-tipping-point-20171027-story.html.

Cosby's.[20] And, disparate acts may be treated as a "plan" when they only truly support an illicit propensity inference.[21]

Then there's the victim. We should ask whether we have simply shifted the kind of corroboration requirement for sexual assault. In the past, women had to have corroborative evidence and make prompt complaints. Today, we should worry that a woman is not believable unless and until the person who victimized her also victimizes another person. There is no other crime where a defendant will not be held accountable for *this crime* unless he committed *another* crime. As the authors of *She Said* summarized the thoughts and actions of Christine Blasey Ford when Ford was deciding whether to come forward, "Why were the advisers so worried about the apparent lack of other victims? Wasn't what happened to her enough? Curled up alone in her child's bed, she sobbed."[22]

Lawyers and scholars need to recognize the challenge #WeToo presents. The trick for rape law reformers, prosecutors, defense attorneys, and judges will be to harness the good in #WeToo while avoiding its potential for harm. There is some low hanging fruit for achieving the good, including reforming how police departments investigate rape. But threading the needle with respect to the admissibility of evidence and the joinder of charges will be more difficult—sometimes group allegations can fairly be considered together, and sometimes they cannot. More generally, reformers will have to exercise caution in determining how and on what terms they declare victory. Convictions in #WeToo cases are not enough. And finally, scholars should not avoid the profound dilemma that underlies rape cases—that sexual assault will always present the challenge of whether one person's testimony, without corroboration, should be sufficient for a criminal conviction.

This Article proceeds as follows. Part I provides an overview of many of the myriad men accused of sexual wrongdoing—the cases that embody #WeToo. It also looks specifically at two criminal trials that are exemplars of the success of group accusations: Cosby and Weinstein.

Part II turns to the grounds for hope. After surveying the historic obstacles to rape claims, the Part turns to the challenges that still exist today. First, police officers are generally skeptical of rape allegations and only pursue cases with strong corroborating evidence or "righteous victims." Second, prosecutors make decisions in the shadow of this jury bias, and they, too, search for the same perfect victim. Finally, jurors are unjustifiably hostile to rape complaints and tend not to convict because they discount victim's credibility and convert farfetched possibilities into "reasonable

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[20] *See infra* Section III.C.3.

[21] The complexity of state and federal evidentiary rules is discussed *infra* Section III.C.3.

[22] JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 209 (2019).

doubt." However, as Part II argues, #WeToo may combat these failings. The recognition of multiple victims will spur better police investigations, and cases with multiple complainants provide prosecutors with stronger cases for conviction. In addition, multiple victims undercut credibility discounting and counteract farfetched hypotheses.

Part III turns to reasons for concern. First, the #WeToo narrative crafted by journalists does not perfectly mirror the reality. Jurors may expect narratives that rarely exist in the real world. As the Supreme Court has cautioned, failing to meet juror expectations can have negative repercussions for prosecutors seeking convictions.[23] Second, the success of groups may reveal, and indeed concretize, the insufficiency of an individual victim's testimony. Thus, what we take as progress for believing *women* may not yield that any one *woman* is being believed. Third, in cases of groups, we should be wary that overly permissive joinder rules and sloppy evidentiary arguments are undercutting the burden of proof, revealing that some group cases only succeed because we are willing to make unjustifiable propensity inferences.

Part IV looks at two otherwise neglected aspects of this Article. The first is race. Undoubtedly, the criminal justice system is having a reckoning with the racial injustice it perpetuates, if not creates. This question is complicated, though, by the system's failure to protect Black women and other vulnerable victims, even as it simultaneously over criminalizes, over enforces, and over incarcerates Black men. Finally, this Article briefly broadens the question, asking how other remedies and avenues affect #WeToo's impact on the criminal law. Ultimately, the jury is out on how to assess #WeToo.

I. #WETOO, NOT #METOO[24]

The accusations that spurred the #MeToo movement were made by groups, typically of women, against single perpetrators. In other words, they were #WeToo's. This Part summarizes many of the accusations that drew public attention, noting cases of single accusations as well as the failure of some group claims to "stick." Though certainly not exhaustive, this Part provides a representative overview of the flurry and fury of allegations of

[23] Old Chief v. United States, 519 U.S. 172, 188 (1997); *see infra* Section III.A.3.

[24] Although this Section details numerous allegations that arguably fall within the "#MeToo movement" broadly understood, it technically dates to its coinage in 2006 by Tarana Burke and then to Alyssa Milano's October 15, 2017, tweet that went viral. See Williams, Singh, and Mezey, supra note 6, at 374 (noting Burke's coinage of the term, Alyssa Milano's tweet on October 15, 2017, and the over 1 million tweets and re-tweets that followed within twenty-four hours of Milano's tweet); *see also* Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976.

sexual violence, abuse, and harassment that arose. Next, this Part details two exemplars of #WeToo in criminal trials: Cosby and Weinstein. The Cosby case is a perfect demonstration of the workings of #WeToo—it was not until multiple women testified at trial that the prosecution was able to secure a conviction. The Weinstein case, in which multiple charges were pursued at trial, was led by three women accusers, supported by testimony of three others, and likewise demonstrates the strength in numbers.

A. The Public Reckoning

1. The Force of #WeToo

#MeToo brought a widespread public reckoning, against politicians, powerful businessmen, and Hollywood actors and moguls. Once the floodgates opened, the press continually reported on sexual misconduct. Almost all allegations began as group allegations. The few that started as individual complaints typically gained momentum and notice because additional accusations followed immediately on the heels of the first.

In July 2016, Gretchen Carlson sued Fox News chief Roger Ailes alleging that she was sexually harassed by him. The internal investigation at Fox turned up additional women, and after a later *New York Times* account, the number totaled ten complainants.[25] Ailes engaged in similar behavior in each case. He invited women to his office and asked them to twirl to check out their bodies.[26] And, he suggested that if they had oral or vaginal sex with him, their careers would thrive.[27] Ailes was forced to resign.[28]

On April 1, 2017, the *New York Times* reported that Fox television host Bill O'Reilly had settled lawsuits with five women, four for sexual

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[25] Michael M. Grynbaum & John Koblin, *Gretchen Carlson of Fox News Files Harassment Suit Against Roger Ailes*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/07/business/media/gretchen-carlson-fox-news-roger-ailes-sexual-harassment-lawsuit.html; Gabriel Sherman, *6 More Women Allege That Roger Ailes Sexually Harassed The*m, N.Y. MAG.: INTELLIGENCER (July 9, 2016), https://nymag.com/intelligencer/2016/07/six-more-women-allege-ailes-sexual-harassment.html; Jim Rutenberg, Ben Protess & Emily Steel, *Internal Inquiry Sealed the Fate of Roger Ailes at Fox*, N.Y. TIMES (July 20, 2016), https://www.nytimes.com/2016/07/21/business/media/as-an-internal-inquiry-sinks-ailes-questions-about-fox-newss-fate.html; Gabriel Sherman, *Fox News Host Andrea Tantaros Says She Was Taken Off the Air After Making Sexual-Harassment Claims Against Roger Ailes*, N.Y. MAG.: INTELLIGENCER (Aug. 8, 2016, https://nymag.com/intelligencer/2016/08/andrea-tantaros-made-harassment-claims-against-roger-ailes.html.

[26] *See* sources cited *supra* note 25.

[27] *Id.*

[28] *Id.*

misconduct, for a total of $13 million. The article also included complaints of two other women who had not settled.[29] O'Reilly was forced out at Fox.[30]

On October 5, 2017, Jodi Kantor and Megan Twohey published their Pulitzer Prize winning exposé on Harvey Weinstein.[31] They detailed how Weinstein had been able to keep sexual harassment complaints at bay through NDAs.[32] Weinstein would summon female employees to his hotel room under the false pretense of doing work; he would ask for massages or for them to watch him shower or bathe.[33] That Weinstein's encounters were even more aggressive then this led to his criminal conviction in New York, and at the time of this writing, pending charges in Los Angeles.[34]

Then, there was the tweet heard round the world. On October 15, 2017, actress Alyssa Milano tweeted, "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet… we might give people a sense of the magnitude of the problem."[35] Just under a year later, the Pew Research Center found #MeToo had been used more than 19 million times on Twitter.[36]

The floodgates opened. Spurred by Milano's tweet, Olympic gymnast McKayla Maroney came forward to say she was sexually assaulted by Larry Nassar.[37] Fellow Olympic gymnasts Aly Reisman and Gabby Douglas soon followed.[38] By then, the charges against Nassar were numerous, if lacking

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[29] Emily Steel & Michael S. Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html.

[30] Emily Steel & Michael S. Schmidt, *Bill O'Reilly Is Forced Out at Fox News*, N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox-news-allegations.html.

[31] Jodi Kantor & Meghan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[32] *Id.*

[33] *Id.*

[34] *See infra* Section I.B.2; Stella Chan & Nicole Chavez, *Harvey Weinstein is Facing 6 More Sexual Assault Charges in Los Angeles*, CNN (Oct. 2, 2020, 4:24 PM), https://www.cnn.com/2020/10/02/us/harvey-weinstein-new-charges-los-angeles/index.html.

[35] Milano, *supra* note 24.

[36] Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RESEARCH: FACT TANK (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/.

[37] Rachel Axon, Roxanna Scott & Nancy Armour, *Olympic Gold Medalist McKayla Maroney Says She Was Victim of Sexual Abuse*, USA TODAY (Oct. 18, 2017, 9:06 PM), https://www.usatoday.com/story/sports/olympics/2017/10/18/olympic-gold-medalist-mckayla-maroney-says-she-victim-sexual-abuse/774970001/.

[38] Nancy Armour & Rachel Axon, *Aly Raisman, Three-Time Olympic Gold Medalist,*

the same notoriety achieved by these women coming forward.[39] Ultimately, Nassar was sentenced Nassar to 40 to 175 years in prison after seven days of testimony and statements by 156 women and girls in one case, and 40 to 125 years in another.[40]

Then, actor Anthony Rapp accused actor Kevin Spacey of throwing him on a bed, lying on top of him, and pressing into him until Rapp managed to free himself; the former was fourteen-years-old and the latter twenty-six.[41] More than thirty allegations followed.[42] In addition to harassing at least twenty men while he was the artistic director of the Old Vic theater in London,[43] Spacey also groped a journalist writing a story about him;[44] Harry

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Says She Was Abused by USA Gymnastics Doctor, USA TODAY (Nov. 10, 2017, 10:59 PM), https://www.usatoday.com/story/sports/2017/11/10/three-time-olympic-gold-medalist-aly-raisman-says-she-abused-usa-gymnastics-doctor/851252001/; Nancy Armour & Rachel Axon, *Gabby Douglas Says She Was Abused by Former USA Gymnastics Doctor Larry Nassar*, USA TODAY (Nov. 22, 2017, 9:45 AM), https://www.usatoday.com/story/sports/olympics/2017/11/21/gabby-douglas-says-she-was-abused-former-usa-gymnastics-doctor-larry-nassar/886447001/.

[39] Nassar's criminal case began in September 2016, when Rachael Denhollander filed a criminal complaint, claiming he had digitally penetrated her anus and vagina without gloves, and at another time, massaged her bare breasts while having an erection. Jen Kirby, *The Sex Abuse Scandal Surrounding USA Gymnastics Team Doctor Larry Nassar, Explained*, VOX (May 16, 2018, 4:45 PM), https://www.vox.com/identities/2018/1/19/16897722/sexual-abuse-usa-gymnastics-larry-nassar-explained. Nassar was charged on November 16, 2016. Christopher Haxel, *Schuette: Nassar Charges "Tip of the Iceberg"*, LANSING STATE J. (Nov. 16, 2016), https://www.lansingstatejournal.com/story/news/local/2016/11/22/bond-set-at-1m-for-former-msu-doctor-facing-sexual-assault-charges/94264864/. By that time the prosecutors had received *fifty* complaints. *Id.* One year later, facing multiple charges in two counties, Nassar pled guilty. *Who is Larry Nassar?: A Timeline of His Decades-Long Career, Sexual Assault Convictions, and Prison Sentences*, USA TODAY [hereinafter *Who is Larry Nassar?*], https://www.usatoday.com/pages/interactives/larry-nassar-timeline/ (last visited Feb. 25, 2021).

[40] *Who is Larry Nassar*?, *supra* note 39.

[41] Adam B. Vary, *Actor Anthony Rapp: Kevin Spacey Made A Sexual Advance Toward Me When I Was 14*, BUZZFEED NEWS (Oct. 30, 2017, 12:37 AM), https://www.buzzfeednews.com/article/adambvary/anthony-rapp-kevin-spacey-made-sexual-advance-when-i-was-14#.eoDnqn8nB.

[42]Aja Romano, *The Sexual Assault Allegations Against Kevin Spacey Span Decades. Here's What We Know.*, VOX (Dec. 24, 2018, 5:30 PM), https://www.vox.com/culture/2017/11/3/16602628/kevin-spacey-sexual-assault-allegations-house-of-cards; *see also* Teresa Roca, *Kevin Spacey Accused of Groping Filmmaker in Bar: 'He Grabbed My Whole Package'*, RADAR ONLINE (Oct. 31, 2017, 8:50 AM), https://radaronline.com/videos/kevin-spacey-accused-groping-man-bar-sexual-assault/; Georgina Rannard & Alice Hutton, *Kevin Spacey: New Allegations Emerge*, BBC NEWS (Nov. 8, 2017), https://www.bbc.com/news/entertainment-arts-41918966.

[43] Anna Codrea-Rado, *Old Vic Inquiry on Kevin Spacey Finds 20 Reports of Misconduct*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/theater/old-vic-kevin-spacey-misconduct-report.html.

[44] Romano, *supra* note 42; Adam B. Vary et al., *A Pattern Of Abuse: How Kevin Spacey*

Dreyfuss, Richard Dreyfuss's son, while running lines with Spacey;[45] an eighteen-year-old Spacey plied with drinks all night;[46] a British bartender whom Spacey allegedly bribed to stay silent;[47] and the King of Norway's son-in-law at a Nobel Peace Prize concert Spacey co-hosted.[48] Spacey was subject to criminal investigation;[49] he was "killed off" *House of Cards*;[50] he was cut from an already completed movie that was recast and reshot;[51] and Netflix abandoned a forthcoming movie.[52]

On November 9, 2017, the *New York Times* contained accusations by five women against comedian Louis C.K., who accused him of masturbating in front of them, asking to masturbate in front of them, or masturbating while he was on the phone with them.[53] His film distributor cancelled the release of his comedy, and media companies cut ties.[54]

In November 20, 2017, the *Washington Post* broke the story that renowned television journalist Charlie Rose had harassed eight women who worked for him.[55] The women alleged Rose would walk around nude in front of them in his home, put his hands on their thighs or breasts while in the car with them, rub their shoulders, call to them while he was in the shower, telephone them late at night or early in the morning, ask them about their sex

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Used The Closet To Silence His Victims, BUZZFEED NEWS (Nov. 3, 2017, 7:29 PM), https://www.buzzfeednews.com/article/adambvary/kevin-spacey-more-accusations-secrets-abuse#.wi4RJKoBMp.

[45] Romano, *supra* note 42.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Chris Francescani, *The Rise and Fall of Kevin Spacey: A Timeline of Sexual Assault Allegations*, ABC NEWS (Jun. 30, 2019), Thttps://abcnews.go.com/US/rise-fall-kevin-spacey-timeline-sexual-assault-allegations/story?id=63420983.

[50] *Kevin Spacey's House of Cards Character Is Officially Dead*, BBC NEWS (Sept. 6, 2018), https://www.bbc.com/news/entertainment-arts-45432413.

[51] Carolyn Giradina, *Ridley Scott Reveals How Kevin Spacey Was Erased from 'All the Money in the World*, HOLLYWOOD REP. (Dec. 18, 2017), https://www.hollywoodreporter.com/behind-screen/ridley-scott-reveals-how-kevin-spacey-was-erased-all-money-world-1068755.

[52] Neil Vigdor, *Kevin Spacey's Accuser's Estate Drops Sexual Assault Lawsuit*, N.Y. TIMES (Dec. 31, 2019), https://www.nytimes.com/2019/12/31/us/kevin-spacey-lawsuit-accuser.html.

[53] Melena Ryzick, Cara Buckley, & Jodi Kantor, *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html?_r=0

[54] David Itzkoff, *Louis C.K. Admits to Sexual Misconduct as Media Companies Cut Ties*, N.Y. TIMES (Nov. 10, 2017), https://www.nytimes.com/2017/11/10/movies/louis-ck-i-love-you-daddy-release-is-canceled.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer.

[55] Carmon & Brittain, *supra* note 6.

lives, and tell them what he fantasized about.[56] After the story broke, Rose was fired and now lives as somewhat of an outcast.[57]

That same day, *Vox* broke a story that *New York Times* White House Correspondent Glenn Thrush had made unwanted advances toward several young journalists. He was suspended from his job temporarily, and ultimately taken off the White House beat.[58]

Days later, American sweetheart Matt Lauer fell. One subordinate accused Lauer of anal rape during coverage of the Olympics in 2014; two further complaints followed suit. And then, *Variety* published an article which included three additional women who discussed inappropriate behavior by Lauer, and still more individuals who witnessed the assault or their after-effects.[59] Lauer was fired.[60]

Politicians also faced scrutiny in November 2017. Roy Moore, the Republican nominee in a U.S. Senate race, was accused by four women of pursuing sexual relationships with them when they were teenagers and he was an adult.[61] This included an incident when Moore was thirty-two and

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[56] *Id.*

[57] James Oliver Cury, *Charlie Rose's Life Now: "Broken," "Brilliant" and "Lonely"*, HOLLYWOOD REP. (Apr. 12, 2018, 6:30 AM), https://www.hollywoodreporter.com/features/what-happened-charlie-rose-we-asked-his-friends-associates-1101333.

[58] Laura McGann, *Exclusive: NYT White House Correspondent Glenn Thrush's History of Bad Judgment Around Young Women Journalists*, VOX (Nov. 20, 2017, 10:32 AM), https://www.vox.com/policy-and-politics/2017/11/20/16678094/glenn-thrush-new-york-times; *see also* Sydney Ember, *Glenn Thrush, Suspended Times Reporter, to Resume Work but Won't Cover White House*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/business/media/glenn-thrush-suspension-white-house.html?smid=tw-share.

[59] Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, VARIETY (Nov. 29, 2017, 12:34 PM), https://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959/; Kate Aurthur & Ramin Setoodeh, *Ronan Farrow Book Alleges Matt Lauer Raped NBC News Colleague*, VARIETY (Oct. 8, 2019, 9:56 PM), https://variety.com/2019/tv/news/matt-lauer-rape-nbc-ronan-farrow-book-catch-kill-1203364485/; Ellen Gabler, et al., *NBC Fires Matt Lauer, the Face of 'Today'*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html.

[60] Gabler et al., *supra* note 59.

[61] Stephanie McCrummen, et al., *Woman Says Roy Moore Initiated Sexual Encounter When She Was 14, He Was 32*, WASH. POST (Nov. 9 2017), https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0_story.html; *see also* Tina Nguyen, *Roy Moore's Wife: If Brett Kavanaugh Can Do It, So Can We*, VARIETY (May 1, 2019), https://www.vanityfair.com/news/2019/05/roy-moore-brett-kavanaugh-2020 ("Moore was accused by multiple women of sexually harassing and assaulting them when they were

one complainant was fourteen, who claimed that Moore touched her over her bra and had her touch his genitals over his underwear.[62] Republicans called on him to step aside.[63] He did not, but Moore lost the race.[64] John Conyers was accused of sexually harassing several women,[65] as well as using Congressional funds to settle one case.[66] He resigned.[67] And Al Franken resigned after allegations surfaced that he had groped or inappropriately kissed eight women.[68]

More allegations followed in the upcoming months. Congressman Trent Franks resigned after allegations that he had asked two women to serve as surrogate mothers, had tried to convince another she was in love with him,

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teenage girls and he was in his early thirties. Their accounts were supported by people who were aware of the alleged incidents at the time, people from his hometown who stated that there were rumors he'd been banned from a mall for trying to pick up teenagers, as well as a yearbook Moore had signed.").

[62] McCrummen et al., *supra* note 61.

[63] Michael Scherer, *Trump, McConnell Call on Roy Moore To Exit Alabama Senate Race 'If These Allegations Are True'*, WASH. POST (Nov. 10, 2017), https://www.washingtonpost.com/powerpost/mitch-mcconnell-and-chorus-of-republican-senators-call-on-roy-moore-to-step-aside-in-alabama-senate-race/2017/11/09/4e6da1d2-c57b-11e7-84bc-5e285c7f4512_story.html.

[64] *Alabama Senate Election Results*, WASH. POST, https://www.washingtonpost.com/special-election-results/alabama/ (last visited Feb. 22, 2021).

[65] Kimberly Kindy, Steve Hendrix & Michelle Ye Hee Lee, *Ethics Lawyer Says Conyers Mistreated Her During Her Years on Capitol Hill*, WASH. POST (Nov. 22, 2017), https://www.washingtonpost.com/politics/ethics-lawyer-says-conyers-mistreated-her-during-her-years-on-capitol-hill/2017/11/22/ed88a480-cf9c-11e7-81bc-c55a220c8cbe_story.html (including allegations of sexual harassment by one staffer and claims that he summoned another staffer to his office while he was only in his underwear and was otherwise generally abusive in his treatment of her); Paul McLeod & Lissandra Villa, *She Said a Powerful Congressman Harassed Her. Here's Why You Didn't Hear Her Story*, BUZZFEED NEWS (Nov. 21, 2017, 1:58 PM), https://www.buzzfeednews.com/article/paulmcleod/she-complained-that-a-powerful-congressman-harassed-her#.wdeG8KaWO.

[66] McLeod & Villa, *supra* note 65.

[67] Bryan Naylor & Domenico Montanaro, *Conyers Resigns Amid Sexual Harassment Allegations*, NPR (Dec. 5, 2017, 2:30 PM), https://www.npr.org/2017/12/05/567160325/conyers-resigning-amid-sexual-harassment-allegations.

[68] Leann Tweeden, *Senator Al Franken Kissed and Groped Me Without My Consent, and There's Nothing Funny About it*, 790 KABC (Nov. 16, 2017), https://www.kabc.com/2017/11/16/leeann-tweeden-on-senator-al-franken/; Heather Caygle, *Another Woman Says Franken Tried to Forcibly Kiss Her*, POLITICO (Dec. 6, 2017, 1:133 PM), https://www.politico.com/story/2017/12/06/al-franken-accusation-sexual-harassment-2006-281049; *see also* Jane Mayer, *The Case of Al Franken*, NEW YORKER (July 22, 2019), https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken.

and had denied access to a fourth who rebuffed his romantic advances.[69] Ruben Kihuen was accused by his finance director of asking for dates and sex, nonconsensually touching her thigh, and suggesting they get a hotel room;[70] her accusation was followed by a lobbyist who also described him nonconsensually touching her leg, grabbing her rear end, and sending her sexually suggestive texts.[71] He did not seek re-election to Congress, but ran for Las Vegas city council, prompting an opposition PAC entitled, "No Means No, Ruben."[72] And, five women complained of actor James Franco's misconduct: one involved Franco removing a plastic guard while simulating oral sex on a woman during a movie scene; two relayed his anger that they would not take off their shirts for a scene that he insisted on filming at a strip club; and others maintained that he held out the prospect of acting parts if they would take off their shirts or perform orgy scenes during Franco's acting class.[73] These allegations likely impacted a potential Oscar nomination for Franco; he was also removed from a forthcoming magazine cover.[74]

Accusations continued in the summer of 2018. In July, *The New Yorker* broke the story of CBS chairman and CEO Les Moonves' misconduct.[75] Six women were harassed or assaulted by Moonves; each involved forcible touching or kissing by Moonves and reprisals for rebuffing his advances.[76] A second article followed with six more women, two of whom claimed he

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[69] "Rachel Bade & Jake Sherman, *Female Aides Fretted Franks Wanted to Have Sex to Impregnate Them*, POLITICO (Dec. 8, 2017, 5:06 PM), https://www.politico.com/story/2017/12/08/trent-franks-sex-surrogacy-impregnate-287808.

[70] Kate Nocera & Tarini Parti, *She Says She Quit Her Campaign Job After He Harassed Her. Now He's in Congress.*, BUZZFEED NEWS (Dec. 2, 2017, 12:50 AM), https://www.buzzfeednews.com/article/katenocera/she-says-she-quit-her-campaign-job-after-he-harassed-her#.mijQr3MW3.

[71] Megan Messerly, *Second Woman Accuses Kihuen Of Persistent, Unwanted Sexual Advances*, NEV. INDEP. (Dec. 13, 2017, 6:03 PM), https://thenevadaindependent.com/article/second-woman-accuses-kihuen-of-persistent-unwanted-sexual-advances.

[72] Lissandra Villa, *The #MeToo Movement Brought Down a Political Star. Now His Hometown Has to Decide Whether He Can Come Back.*, BUZZFEED NEWS (Mar. 12, 2019, 3:57 PM), https://www.buzzfeednews.com/article/lissandravilla/ruben-kihuen-me-too-politics-las-vegas-no-means-no-ruben.

[73] Daniel Miller & Amy Kaufman, *Five Women Accuse Actor James Franco of Inappropriate or Sexually Exploitative Behavior*, L.A. TIMES (Jan. 11, 2018, 6:38 PM), https://www.latimes.com/business/hollywood/la-fi-ct-james-franco-allegations-20180111-htmlstory.html.

[74] Mike Miller, *James Franco Turns 40—Inside His "Hard" Life Since He Was Accused of Sexual Harassment*, PEOPLE (Apr. 19, 2018, 3:56 PM), https://people.com/movies/james-franco-turns-40-inside-his-hard-life-since-he-was-accused-of-sexual-harassment/.

[75] Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct.

[76] *Id.*

forced them to perform oral sex.[77] He resigned.[78]

Allegations from single accusers often did not much traction. No action was taken against MLB player Miguel Sano after a photographer claimed he kissed her and tried to force her into a bathroom.[79] Ryan Seacrest's long-time stylist came forward with allegations including his cupping her crotch, pushing her head in his crotch while she was dressing him, hugging her while he was in his underwear, and slapping her rear end so hard it left a welt.[80] Seacrest retained his roles hosting *American Idol* and co-hosting *Live with Kelly and Ryan.*[81] Similarly, allegations against actor Chris Hardwick by his ex-girlfriend, that he was controlling and repeatedly sexually assaulted her, resulted in his being briefly suspended while the allegations were investigated, but then after "careful review," reinstatement at AMC.[82]

Of course, there are different explanations for why single allegations fell on deaf ears. At times, single victim allegations were reported at the time as potentially lacking credibility. In reporting the sexual harassment allegations against Congressman Bobby Scott, the journalist noted that the accuser had given conflicting accounts.[83] In contrast, sometimes journalists did all they could to demonstrate the complainant's credibility. Actor Michael Douglas was accused by someone who worked for him thirty years earlier of improper

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[77] Ronan Farrow, *As Leslie Moonves Negotiates His Exit from CBS, Six Women Raise New Assault and Harassment Claims*, NEW YORKER (Sept. 9, 2018), https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims.

[78] *Id.*

[79] Dan Gartland, *Miguel Sano not Suspended by MLB for Alleged Sexual Assault*, SPORTS ILLUSTRATED (Mar. 23, 2018), https://www.si.com/mlb/2018/03/23/twins-miguel-sano-sexual-assault-allegations-no-suspension.

[80] Daniel Holloway, *Ryan Seacrest's E! Stylist Reveals Abuse and Harassment Allegations*, VARIETY (Feb. 26, 2018, 1:25 PM), https://variety.com/2018/tv/news/ryan-seacrest-sexual-abuse-allegations-stylist-details-1202710460/.

[81] *See, e.g.*, Caroline Framke, *Ryan Seacrest Was Accused of Sexual Misconduct. Hollywood Shrugged*, VOX (Mar. 15, 2018, 10:20 AM), https://www.vox.com/culture/2018/3/15/17097014/ryan-seacrest-sexual-harassment-allegations-me-too.

[82] Chloe Dykstra, *Rose-Colored Glasses: A Confession*., MEDIUM (June 14, 2018), https://medium.com/@skydart/rose-colored-glasses-6be0594970ca; Monica Hesse, *Chris Hardwick Is Back. So Is Ryan Seacrest. So, No, #Metoo Isn't Going 'Too Far.'*, WASH POST. (Aug. 14, 2018, 12:54 PM), https://www.washingtonpost.com/lifestyle/style/chris-hardwick-is-back-so-is-ryan-seacrest-so-no-metoo-isnt-going-too-far/2018/08/14/49e2b8f0-9fe1-11e8-8e87-c869fe70a721_story.html; Lisa Respers France, *Chris Hardwick's Tearful Return to "Talking Dead"*, CNN (Aug. 14, 2018, 7:30 AM), https://www.cnn.com/2018/08/13/entertainment/chris-hardwick-talking-dead/index.html.

[83] Heidi M. Przybyla, *Former Black Caucus Fellow Alleges Sexual Harassment Strongly Denied by Lawmaker*, USA TODAY (Dec. 15, 2017, 6:12 PM), https://www.usatoday.com/story/news/politics/2017/12/15/former-black-caucus-fellow-alleges-sexual-harassment-strongly-denied-lawmaker/955214001/.

comments and language, with one incident of masturbating in front of her. *The Hollywood Reporter* article did not just detail the complainant's accusations. Rather, the article included the entire verification process, corroborating that she worked for Douglas, made inquiries about sexual harassment at the time, and confided in friends immediately after it happened.[84] He suffered no repercussions.[85] It is difficult to say whether this lack of response was because the public did not believe her. It is equally possible the public was willing to write off a single incident thirty-years earlier as "not a big deal," was willing to assume it was no longer reflective of Douglas, or was simply too distracted by the onslaught of other allegations.[86]

2. Outliers

That #WeToo had a profound impact is fully consistent with there being some outliers. First, there may be some single allegations that do have an effect. Second, the fact that #WeToo was sufficient in many cases does not mean that that multiple allegations always worked. Unsurprisingly, some complaints against high profile politicians fall into this category. This section briefly surveys some of the more public examples of both categories.

First, some single allegations did stick. Most (in)famously was the one against Aziz Ansari.[87] A woman with the pseudonym "Grace" went on a date with Ansari, where they went back to his place at the end of the evening.[88] Although she indicated that she did not want to have sex with him, she maintained that he ignored her verbal and nonverbal cues and continued to harangue her; at one point, she relented and performed oral sex on him.[89] The Ansari allegation, however, was less about Ansari himself than more theoretical questions. First, was his behavior wrong?[90] Second, in

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[84] Matthew Belloni, *Michael Douglas, Alleged Harassment, Media and the #MeToo Moment*, HOLLYWOOD REP. (Jan. 18, 2018, 1:05 PM), https://www.hollywoodreporter.com/features/michael-douglas-alleged-harassment-media-metoo-moment-1075609.

[85] *Id.*

[86] As Michelle Dempsey maintains, claims of exculpation, with respect to wrongs in the past, have blurred three distinct arguments: the argument that the action was not wrongful at the time, the argument that the defendant ought not to be blamed for not knowing his action was wrong back then, and the argument that so much time has gone by that the person should no longer be called to account for past wrongdoing. Dempsey, *supra* note 1, at 347.

[87] Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE (Jan. 13, 2018), https://babe.net/2018/01/13/aziz-ansari-28355.

[88] *Id.*

[89] *Id.*

[90] *E.g.*, Bari Weiss, Opinion, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-

condemning the behavior, was the #MeToo movement going too far?[91]

Second, some #WeToo's were ignored. Dustin Hoffman was accused of sexual harassment or assault of at least eight women, three of whom claimed he digitally penetrated them when other people were around.[92] It is hard to say why these accusations were less successful; among possible explanations are the general perception of Hoffman as a "good guy," and the support from other actors, such as Bill Murray, and purported victims, including Meryl Streep.[93]

High profile political cases also captured the public attention, specifically Donald Trump, Joe Biden, and Brett Kavanaugh, but given the stakes of each case, it may be impossible to glean a singular lesson. Trump withstood an onslaught of allegations.[94] In an off-the-record conversation captured on

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sexual-harassment.html; Lucia Brawley, *Let's Be Honest About Aziz Ansari*, CNN (Jan. 18, 2018, 11:54 PM), https://www.cnn.com/2018/01/17/opinions/lets-be-honest-about-aziz-ansari-brawley/index.html; Emily Reynolds, Opinion, *Here's Why Aziz Ansari's Behaviour Matters*, THE GUARDIAN (Jan 15, 2018, 11:27 AM). For discussion of how to conceptualize "coercion" in sexual assault more generally, see Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951 (2019).

[91] Caitlin Flanagan, *The Humiliation of Aziz Ansari*, THE ATLANTIC (Jan. 14, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/; Daphne Merkin, Opinion, *Publicly, We Say #MeToo. Privately, We Have Misgivings.*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html.

[92] Anna Graham Hunter, *Dustin Hoffman Sexually Harassed Me When I Was 17*, HOLLYWOOD REP. (Nov. 1, 2017, 6:00 AM), https://www.hollywoodreporter.com/features/dustin-hoffman-sexually-harassed-me-i-was-17-guest-column-1053466; Daniel Holloway, *Dustin Hoffman Accused of Exposing Himself to a Minor, Assaulting Two Women*, VARIETY (Dec. 14, 2017, 2:26 PM) [hereinafter Holloway, *Hoffman Minor*], https://variety.com/2017/biz/news/dustin-hoffman-2-1202641525/; Kathryn Rossetter, *New Dustin Hoffman Accuser Claims Harassment and Physical Violation on Broadway*, HOLLYWOOD REP. (Dec. 8, 2017, 9:40 AM), https://www.hollywoodreporter.com/news/new-dustin-hoffman-accuser-claims-harassment-physical-violation-broadway-guest-column-1062349; Daniel Holloway, *'Genius' Producer Accuses Dustin Hoffman of Sexually Harassing Her in 1991*, VARIETY (Nov. 1, 2017, 7:07 PM), https://variety.com/2017/film/news/dustin-hoffman-sexual-harassment-1202604822/.

[93] Suzy Byrne, *Bill Murray Defends Dustin Hoffman Over Sexual Harassment Claims, Says He's A 'Great Man,' but a 'Flirt'*, YAHOO! ENT. (Sept. 28, 2018), https://www.yahoo.com/entertainment/bill-murray-defends-dustin-hoffman-sexual-harassment-claims-says-great-man-flirt-160504290.html; Ruth Graham, *Meryl Streep Once Said Dustin Hoffman Groped Her Breast the First Time They Met*, SLATE (Nov. 8, 2017), https://slate.com/culture/2017/11/meryl-streep-recalled-dustin-hoffman-groping-her-breast-during-their-first-meeting.html (noting in an update that Streep's representative described the unearthed 1979 *Time* interview as "not accurate" and that Hoffman apologized satisfactorily after the "offense" described therein).

[94] *See generally* Libby Nelson & Laura McGann, *E. Jean Carroll Joins at Least 21 Other Women in Publicly Accusing Trump of Sexual Assault or Misconduct*, VOX (June 21, 2019,

videotape, Trump told TV host Billy Bush that he would kiss women without permission, and that he would grab women by their genitalia.[95] Numerous women complained about these very sorts of acts, as well as others. Eight women accused Trump of aggressively kissing, or trying to kiss, them without their consent.[96] One detailed an event where Trump made women stand on a table, where he could look up their skirts, and comment on their underwear and genitalia.[97] Three separate allegations were made of Trump walking in on beauty pageant contestants in their dressing rooms while they were naked, including a teenage beauty pageant where contestants were as young as fifteen.[98] Five women complained that he grabbed their breasts or

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2:30 PM), https://www.vox.com/policy-and-politics/2019/6/21/18701098/trump-accusers-sexual-assault-rape-e-jean-carrolll.

[95] *US Election: Full Transcript of Donald Trump's Obscene Videotape*, BBC NEWS (Oct. 9, 2016), https://www.bbc.com/news/election-us-2016-37595321. As transcribed by BBC:

> Trump: "Yeah that's her with the gold. I better use some Tic Tacs just in case I start kissing her. You know I'm automatically attracted to beautiful . . . I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star they let you do it. You can do anything."
>
> Bush: "Whatever you want."
>
> Trump: "Grab them by the pussy. You can do anything."

[96] Natasha Stoynoff, *Physically Attacked by Donald Trump—A* PEOPLE *Writer's Own Harrowing Story*, PEOPLE (Oct. 12, 2016, 10:31 PM), https://people.com/politics/donald-trump-attacked-people-writer/; Michael Barbaro & Megan Twohey, *Crossing the Line: How Donald Trump Behaved With Women in Private*, N.Y. TIMES (May 14, 2016), https://www.nytimes.com/2016/05/15/us/politics/donald-trump-women.html; Nelson & McGann, *supra* note 86; *Exclusive: "Married Trump Kissed Me at His Offices"*, GRAZIA (June 24, 2019), https://graziadaily.co.uk/celebrity/news/donald-trump-jennifer-murphy-apprentice-contestant/; Molly Redden, *Donald Trump "Grabbed Me and Went for the Lips," Says News* Accuser, GUARDIAN (Oct. 16, 2016), https://www.theguardian.com/us-news/2016/oct/15/donald-trump-sexual-misconduct-allegations-cathy-heller; Beth Reinhard & Alice Crites, *Former Campaign Staffer Alleges in Lawsuit that Trump Kisser Her Without Her Consent. The White House Denies the Charge*., WASH. Post (Feb. 25, 2019, 1:47 PM), https://www.washingtonpost.com/investigations/former-campaign-staffer-alleges-in-lawsuit-that-trump-kissed-her-without-her-consent-the-white-house-denies-the-charge/2019/02/25/fe1869a4-3498-11e9-946a-115a5932c45b_story.html; Meghan Twohey & Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. TIMES (Oct. 12, 2016) [hereinafter Twohey & Barbaro, *Two Women*], https://www.nytimes.com/2016/10/13/us/politics/donald-trump-women.html; Meena Jang & Katie Kilkenny, *Former Fox Anchor Says Trump Once Tried to Kiss Her*, HOLLYWOOD REP. (Dec. 8, 2017, 4:41 PM), https://www.hollywoodreporter.com/news/fox-news-anchor-says-trump-once-tried-kiss-her-1065968.

[97] Mollie Reilly & Sam Stein, *Trump Faces Another Accusation—This Time, He Looked up Models' Skirts*, HUFFINGTON POST (Oct. 25, 2016), https://www.huffpost.com/entry/donald-trump-models-skirts-underwear_n_57ffd172e4b0162c043ac07f?a8zlrf6r= .

[98] Kendall Taggart, Jessica Garrison & Jessica Testa, *Teen Beauty Queens Say Trump Walked in on Them Changing*, BUZZFEED NEWS (Oct. 13, 2016, 12:26 PM), https://www.buzzfeednews.com/article/kendalltaggart/teen-beauty-queens-say-trump-

buttocks,[99] and three decried that he reached up their skirts, including touching their genitals.[100] He was also accused of violent sexual assault by E. Jean Carroll,[101] Ivana Trump,[102] and an anonymous accuser who claimed he raped her when she was thirteen.[103] Trump became and remained President of the United States.[104]

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walked-in-on-them-changing; *Former Beauty Queen: Contestants Were Forced to Greet Trump Even When Not Fully Dressed*, CBS L.A. (Oct. 11, 2016, 8:37 PM), https://losangeles.cbslocal.com/2016/10/11/former-beauty-queen-she-other-contestants-were-forced-to-greet-trump-even-when-not-fully-dressed/; Jessica Garrison & Kendall Taggart, *Trump and Women: Former Beauty Queens Speak*, BUZZFEED NEWS (May 18, 2016, 5:26 PM), https://www.buzzfeednews.com/article/jessicagarrison/heres-what-former-beauty-queens-think-of-donald-trump.

[99] Elizabeth Chuck, *Karena Virginia Becomes 10th Woman to Accuse Trump of Sexual Misconduct*, NBC NEWS (Oct. 21, 2016, 5:02 AM), https://www.nbcnews.com/news/us-news/karena-virginia-becomes-tenth-woman-accuse-trump-sexual-misconduct-n670146; Harriet Alexander, *Former Miss Finland Becomes 12th Woman to Accuse Trump of Sexual* Assault, TELEGRAPH (OCT. 27, 2016), https://www.telegraph.co.uk/news/2016/10/27/former-miss-finland-becomes-12th-woman-to-accuse-trump-of-sexual/; Lauren Tuck, *Donald Trump Reportedly Treated Miss USA Contestants Like "Property"*, YAHOO NEWS (June 17, 2016), https://www.yahoo.com/lifestyle/donald-trump-reportedly-treated-miss-000000927.html; Twohey & Barbaro, *Two Women*, *supra* note 102; Athena Jones, *Summer Zervos Shared Allegations of Trump's Sexual Assault with Lawyers in 2011, Court Filing States*, CNN (Oct. 24, 2019, 8:27 PM), https://www.cnn.com/2019/10/24/politics/summer-zervos-donald-trump-court-filing/index.html.

[100] Karen Tumulty, *Woman Says Trump Reached Under Her Skirt and Groped Her in Early 1990s*, WASH. POST (Oct. 14, 2016), https://www.washingtonpost.com/politics/woman-says-trump-reached-under-her-skirt-and-groped-her-in-early-1990s/2016/10/14/67e8ff5e-917d-11e6-a6a3-d50061aa9fae_story.html; Lucia Graves, *Jill Hart Speaks Out About Alleged Groping by Donald Trump*, GUARDIAN (Oct. 8, 2016), https://www.theguardian.com/us-news/2016/jul/20/donald-trump-sexual-assault-allegations-jill-harth-interview; Twohey & Barbaro, *Two Women*, *supra* note 88.

[101] E. Jean Carroll, *Hideous Men: Donald Trump Assaulted Me in a Bergdorf Goodman Dressing Room Dressing Room 23 Years Ago. But He's Not Alone on the List of Awful Men in my Life.*, THE CUT (June 21, 2019), https://www.thecut.com/2019/06/donald-trump-assault-e-jean-carroll-other-hideous-men.html.

[102] Brandy Zadrozny & Tim Mak, *Ex-Wife: Donald Trump Made Me Feel "Violated" During Sex*, DAILY BEAST (Feb. 27, 2019, 11:17 AM), https://www.thedailybeast.com/ex-wife-donald-trump-made-me-feel-violated-during-sex.

[103] Ryan Grim, *Donald Trump is Accused of Raping a 13-Year-Old. Why Haven't the Media Covered it?*, HUFFINGTON POST (Nov. 4, 2016), https://www.huffpost.com/entry/donald-trump-rape-case_n_581a31a5e4b0c43e6c1d9834?guccounter=1; Brandy Zadrozny, *Trump Rape Accusers Turn on Each Other*, DAILY BEAST (Apr. 13, 2017, 3:26 PM), https://www.thedailybeast.com/trump-rape-accusers-turn-on-each-other.

[104] Outside this time period, Bill Clinton also had numerous sexual misconduct charges made against him, most infamously Monica Lewinsky. Dylan Matthews, *The Sexual Harassment Allegations Against Bill Clinton, Explained*, VOX (Oct. 9, 2016, 9:02 PM),

The intersection of politics and #MeToo also proved complex in Joe Biden's case. Numerous women accused Biden of a range of inappropriate behavior: rubbing noses or foreheads, kissing heads, smelling hair, squeezing shoulders, invading personal space, hugging too long, holding hands, and touching a thigh.[105] News coverage often noted that many women found Biden's behavior "endearing" and that Biden engaged in some of the behaviors with men as well.[106] In April 2019, Tara Reade, after first accusing Biden of putting his hand on her shoulder and inappropriately running his finger up her neck,[107] accused Biden of non-consensually pushing her against a wall, kissing her, and digitally penetrating her.[108] The continued support among Democrats for Biden raised theoretical questions about what was required by #BelieveWomen.[109] Journalists remarked about the difficulty in substantiating Reade's account.[110]

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https://www.vox.com/2016/10/9/13221670/paula-jones-kathleen-willey-bill-clinton-sexual-harassment-accusations; *A Chronology: Key Moments in the Clinton-Lewinsky Saga*, CNN (1998), https://www.cnn.com/ALLPOLITICS/1998/resources/lewinsky/timeline/.

[105] Lucy Flores, *An Awkward Kiss Changes How I Saw Joe Biden*, THE CUT (Mar. 29, 2019), https://www.thecut.com/2019/03/an-awkward-kiss-changed-how-i-saw-joe-biden.html; Sheryl Gay Stolberg & Sydney Ember, *Biden's Tactile Politics Threaten His Return in the #MeToo Era*, N.Y. TIMES (Apr. 2, 2019), https://www.nytimes.com/2019/04/02/us/politics/joe-biden-women-me-too.html; Elise Viebeck, et al., *Three More Women Accuse Biden of Unwanted Affection, Say Apology Video Doesn't Quell Concerns*, WASH. POST (Apr. 4, 2019, 12:06 AM), https://www.washingtonpost.com/politics/biden-says-hell-adjust-his-physical-behavior-as-three-more-women-come-forward/2019/04/03/94a2ed2c-5622-11e9-8ef3-fbd41a2ce4d5_story.html?noredirect=on; Neil Vigdor, *Connecticut Woman Says Then-Vice President Joe Biden Touched Her Inappropriately at a Greenwich Fundraiser in 2009*, HARTFORD COURANT (Apr. 1, 2019, 5:23 PM), https://www.courant.com/politics/hc-pol-biden-grabbed-aide-20190401-vl7chim3hrdjtcwu2tszrhozzm-story.html.

[106] Viebeck et al., *supra* note 105.

[107] Alan Riquelmy, *Nevada County Woman Says Joe Biden Inappropriately Touched Her While Working in His U.S. Senate Office*, THE UNION (Apr. 3, 2019), https://www.theunion.com/news/nevada-county-woman-says-joe-biden-inappropriately-touched-her-while-working-in-his-u-s-senate-office/.

[108] Lisa Lerer & Sydney Ember, *Examining Tara Reade's Sexual Assault Allegation Against Joe Biden*, N.Y. TIMES (Sept. 28, 2020), https://www.nytimes.com/2020/04/12/us/politics/joe-biden-tara-reade-sexual-assault-complaint.html.

[109] Helen Lewis, *Why I've Never Believed in 'Believe Women'*, THE ATLANTIC (May 14, 2020), https://www.theatlantic.com/international/archive/2020/05/believe-women-bad-slogan-joe-biden-tara-reade/611617/.

[110] *See* Laura McGann, *The Agonizing Story of Tara Reade*, VOX (May 7, 2020, 1:55 PM), https://www.vox.com/2020/5/7/21248713/tara-reade-joe-biden-sexual-assault-accusation:

> All of this leaves me where no reporter wants to be: mired in the miasma of uncertainty. I wanted to believe Reade when she first came to me, and I worked hard to find the evidence to make certain others would believe her, too. I couldn't

Supreme Court Justice Brett Kavanaugh's confirmation hearing proved challenging as well. Christine Blasey Ford accused Kavanaugh of assaulting her when the two were teenagers.[111] Ford claimed that at a high school party, Kavanaugh and his friend Mark Judge, both of whom were very intoxicated, pushed her into a room and on a bed, turned up the stereo, and tried to sexually assault her.[112] Ford claimed Kavanaugh groped her, and he put his hand over her mouth such that she worried that he might accidentally kill her.[113] When Judge jumped onto the bed, the three of them toppled over and she was able to escape.[114] Ford's accusations were followed by those of Deborah Ramirez, who claimed that in their freshman year at Yale, Kavanaugh pushed his penis in her face when they were both intoxicated at a party.[115] Julie Swetnick then came forward, stating at high school parties that she attended along with Kavanaugh, men would drug or cause women to be heavily intoxicated, and rape them frequently, even sometimes standing outside a room in a line to "take turns."[116] She said that she witnessed Kavanaugh participating in these events.[117] Only Ford (and Kavanaugh) testified at the confirmation hearing,[118] the FBI then conducted an extraordinarily focused investigation,[119] and Kavanaugh was confirmed by a narrow margin.[120]

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find it. None of that means Reade is lying, but it leaves us in the limbo of Me Too: a story that may be true but that we can't prove.

[111] Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018, 10:28 PM), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Ronan Farrow & Jane Mayer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, from Brett Kavanaugh's College Years*, NEW YORKER (Sept. 23, 2018), https://www.newyorker.com/news/news-desk/senate-democrats-investigate-a-new-allegation-of-sexual-misconduct-from-the-supreme-court-nominee-brett-kavanaughs-college-years-deborah-ramirez.

[116] Steve Eder, et al., *Julie Swetnick is Third Woman to Accuse Brett Kavanaugh of Sexual Misconduct*, N.Y. TIMES (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/us/politics/julie-swetnick-avenatti-kavenaugh.html.

[117] *Id.*

[118] Ezra Klein, *The Ford-Kavanaugh Sexual Assault Hearings, Explained*, VOX (Sept. 28, 2018, 7:56 AM), https://www.vox.com/explainers/2018/9/27/17909782/brett-kavanaugh-christine-ford-supreme-court-senate-sexual-assault-testimony.

[119] Jane Mayer & Ronan Farrow, *The F.B.I. Probe Ignored Testimonies from Former Classmates of Kavanaugh*, NEW YORKER (Oct. 4, 2018), https://www.newyorker.com/news/news-desk/will-the-fbi-ignore-testimonies-from-kavanaughs-former-classmates.

[120] Emily Knapp, et al., *Kavanaugh Confirmed: Here's how Senators Voted*, POLITICO

Undoubtedly, both sides of the political divide believed the other was overreaching, with either outright falsehoods or overblown accusations. The fact that accusation after accusation was piled on is, in some respects, support for the power of #WeToo, as accusers hoped to find *enough* complaints to topple their powerful opponent. That #WeToo proved insufficient in these cases should not blind us to the overwhelming difference that multiple allegations made in countless cases.

3. Beyond the Rich and Famous

To this point, the perpetrators were famous. This means that these are the allegations that captured the public's attention. But one may wonder whether these cases are then representative of #MeToo and #WeToo. There are two points to note here. First, though women would arguably have more to gain in attacking a celebrity, they also had more to lose. The cases were sure to come under scrutiny, have career repercussions, and face a well-funded defense, making the cost of a false accusation more significant when targeting a famous person.

Second, famous heads weren't the only ones to roll. Larry Nassar is now infamous, but he was not famous. And, the #MeToo success stories were not just those that captivated the public's long-term attention. People simply didn't focus on the fact that seven women sued the Plaza Hotel for sexual harassment.[121] Or, that nine female meatpackers sued Smithfield Foods.[122] As Deborah Rhode observes:

> Although celebrities were the initial catalysts, the media quickly followed with stories about harassment in politics, technology, law, finance, science, and low-wage factory or service jobs, all contexts where women had long faced retaliation and blacklisting if they spoke publicly. Safety came with numbers.[123]

(Oct. 6, 2018, 4:02 PM), https://www.politico.com/interactives/2018/brett-kavanaugh-senate-confirmation-vote-count/.

[121] Zacharek et al., *supra* note 9.

[122] Lauren Kaori Gurley, *Women in Meatpacking Say #MeToo*, IN THESE TIMES (Oct. 10, 2019), https://inthesetimes.com/features/women_meatpacking_industry_workplace_sexual_harassment_investigation.html.

[123] Rhode, *supra* note 8, at 398 (citing articles in each area).

B. Criminal Case Exemplars: Cosby and Weinstein

1. Cosby

Cosby's case embodies the success of #WeToo within the criminal law. When Andrea Constand came forward at first, the county prosecutor *declined* her case. Years later, Cosby was brought to trial and the government was permitted to have one other victim testify. The jury hung. But the third time was a charm. One difference? Five other women testified to Cosby's misconduct.[124]

As Constand testified, she met Cosby at a basketball game.[125] They spoke on the phone on multiple occasions and ate dinner together several times.[126] At one dinner, Cosby made a move, Constand rejected it, he stopped, and nothing further was said.[127] Things changed when in January 2004, Constand had dinner with Cosby at his home.[128] Constand was nervous about a contemplated career move, and at one point in the evening, Cosby handed her three blue pills and said, "These are your friends. They'll help take the edge off."[129] Constand testified that she thought they were a "natural remedy," but soon after, she had double vision, slurred speech, "cottony" mouth, and an inability to walk.[130] Cosby walked her to the couch, wherein she drifted in and out of consciousness.[131] She was "jolted awake by [Cosby] forcefully" digitally penetrating her vagina.[132] He was also fondling her breasts, and he

[124] There is a risk of a *post hoc ergo propter hoc* fallacy here. Michelle Madden Dempsey indicates that from her conversations with the Cosby prosecutors, (1) there are those who would have charged Constand's claim initially, and (2) the difference in verdicts may be explainable by different reactions to the defense attorneys and different defense theories (shifting from consent to a less plausible argument that Constand was targeting a wealthy man). Email from Michelle Madden Dempsey, Harold Reuschlein Scholar Chair, Professor of L., Vill. Univ. Sch. of L., to Kimberly Kessler Ferzan, Earle Hepburn Prof. of L. and Professor of Phil., Co-Dir., Inst. of L. & Phil., Univ. of Pa. Carey L. Sch. (Feb. 20, 2021) (on file with author). Nevertheless, the defendant's change in narrative may have been motivated by the need to come up with a different account in light of the five supporting witnesses. That #WeToo required a more far-fetched denial may itself demonstrate the power of the group allegations.

[125] Brief for Appellant at 12, Commonwealth v. Cosby, No. 39 MAP 2020 (Pa. Aug. 11, 2020).

[126] *Id.* at 12-14.

[127] *Id.* at 14.

[128] *Id.* at 15.

[129] *Id.* at 15-16.

[130] *Id.* at 16.

[131] Commonwealth v. Cosby, 224 A.3d 372, 381 (Pa. Super. 2019) (quoting trial court's summary).

[132] *Id.* (quoting trial court's summary).

placed her hand on his penis and used it to masturbate himself.[133] She was unable to physically or verbally resist.[134] He claimed that he had given her one and a half Benadryl pills, that the contact was consensual, that he never had vaginal intercourse with her, and that they had engaged in such "petting" on prior occasions.[135]

When Constand initially sought prosecution in January 2005,[136] the Montgomery County District Attorney concluded, "[I]nsufficient, credible and admissible evidence exists upon which any charge against Cosby could be sustained beyond a reasonable doubt."[137] It is easy to see why such a decision would have been made, though to say one can see why is not to find it justifiable. Cosby and Constand were friends at the least. They had dinner together with others and alone. She was drinking, and she took pills to "take the edge off." And, the end result could be seen as a case of intoxicated mutual masturbation. She then waited a year to report it. This is not an easy case to win, but it could seem all but impossible when the defendant was "America's Dad."[138]

Constand, however, did not give up, and she sued Cosby civilly. Cosby claims that based upon representations that he would not be prosecuted,[139] he participated in a deposition, detailing his use of Quaaludes and contact with various women.[140] Over a ten-year period, the accusations built.[141] In July 2015, thirty-five of Cosby's victims appeared on the cover of *New York* magazine.[142]

On December 30, 2015, days before the statute of limitations would run,[143] Cosby was charged with three counts of aggravated indecent assault

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[133] *Id.* (quoting trial court's summary); Brief for Appellant, *supra* note 125, at 16.

[134] Brief for Appellant, *supra* note 125, at 16.

[135] *Cosby*, 224 A.3d at 385.

[136] After yet another nightmare, Constand eventually confided in her mother who urged her to go to the police. Commonwealth v. Cosby, Jr., Nos. 3932-16, 3314 EDA 2018, 2019 WL 2157653, at *3-4 (Pa. Ct. Com. Pl. May 14, 2019).

[137] Brief for Appellant, *supra* note 125, at 18.

[138] Callum Borchers & Jamie Bologna, *America's Dad? The Rise and Fall Of Bill Cosby*, WBUR (Apr. 24, 2019), https://www.wbur.org/radioboston/2019/04/24/americas-dad-cosby.

[139] This question is also the subject of appeal, and Cosby's account is disputed. *See, e.g.*, *Cosby*, 224 A.3d at 386.

[140] Brief for Appellant, *supra* note 125, at 19-20.

[141] *See* Matt Giles & Nate Jones, *A Timeline of the Abuse Charges Against Bill Cosby*, VULTURE (Dec. 20, 2015), https://www.vulture.com/2014/09/timeline-of-the-abuse-charges-against-cosby.html (detailing the sequence of events in Constand and others' complaints against Cosby).

[142] Noreen Malone, *35 Bill Cosby Accusers Tell Their Stories*, THE CUT (July 26, 2015, 9:00 PM), https://www.thecut.com/2015/07/bill-cosbys-accusers-speak-out.html#_ga=2.186588975.707020130.1612528514-1241896073.1612528514.

[143] The statute of limitations in Pennsylvania for major sexual offenses is 12 years. 42

for sexually assaulting Constand in 2004.[144] Of the myriad women who had come forward, the prosecution sought to have twelve testify.[145] One was permitted.[146] The jury deadlocked and the case resulted in a mistrial.[147]

On retrial, the prosecution sought to bring nineteen prior bad act witnesses, and the district court allowed the prosecution to choose five to testify.[148] Heidi Thomas, an aspiring actress, testified that in 1984, Cosby handed wine to sip as a prop, she was then in a fog, and she was forced to perform oral sex on Cosby.[149] Chelan Lasha, an aspiring actress/model, testified in 1986, Cosby gave her "an antihistamine" for a cold, and afterwards she was led by Cosby to a bed where he pinched her nipple and humped her leg to climax.[150] Janice Baker-Kinney, a casino worker, attended a party with Cosby in 1982, at which Cosby gave her a pill that she thought was a Quaalude. She blacked out, and later found herself naked. She concluded Cosby had sex with her because she "was wet down there."[151] Janice Dickinson, a model, was given a blue bill by Cosby in 1982. It purportedly was to alleviate her menstrual cramps. She then became immobilized, blacked out, and awoke to physical manifestations of vaginal and anal penetration.[152] Maud Lise-Lotte Lublin, an aspiring model, was given two dark brown drinks by Cosby in 1989. She also went in and out of consciousness, remembered Cosby stroking her hair, and then awoke in her own bed two days later.[153] In Cosby's deposition testimony, admitted at trial, he acknowledged that he gave women Quaaludes, and that he obtained the prescription for sex, as he never took the drugs himself because of how they made him feel.[154]

Cosby was found guilty.[155]

2. Weinstein

Harvey Weinstein's convictions were likewise celebrated as a #MeToo success story. Harvey Weinstein was charged with five criminal counts: two

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PA. CONS. STAT. § 5552(b.1).

[144] Brief for Appellant, *supra* note 125, at 9.

[145] Commonwealth v. Cosby, 224 A.3d 372, 395 (Pa. Super. 2019)

[146] *Id.*

[147] *Id.*; Brief for Appellant, *supra* note 125, at 10.

[148] Brief for Appellant, *supra* note 125, at 10-11.

[149] *Cosby*, 224 A.3d at 389-90.

[150] *Id.* at 390-91.

[151] *Id.* at 391-92.

[152] *Id.* at 392-93.

[153] *Id.* at 393-94.

[154] Brief for Appellee at 71-72, Commonwealth v. Cosby, No. 39 MAP 2020 (Pa. Sept. 14, 2020).

[155] Brief for Appellant, *supra* note 99, at 25-26.

counts of predatory sexual assault, one count of rape in the first degree, one count of rape in the third degree, and one count of criminal sexual act in the first degree.[156] Jessica Mann, an aspiring actress, testified Weinstein trapped her in a Manhattan hotel room, ordered her to undress, and raped her.[157] Mimi Haleyi, a production assistant, testified that she went to Weinstein's apartment for what she thought was a job offer; instead, Weinstein forcibly performed oral sex on her.[158] Although actress Anabella Sciorra's claim of rape was not itself within the statute of limitations,[159] predatory sexual assault requires that the defendant engage in more than one sexual assault,[160] and Sciorra's victimization satisfied this statutory condition.[161] Sciorra testified that after Weinstein gave her a ride home, he pushed his way into her apartment, held her down, and forcibly raped her.[162]

Three other women testified to support the charges. Lauren Young was summoned to Weinstein's hotel room, for what she thought was an audition. He then trapped her in the bathroom and proceeded to masturbate as he groped her breast and genitals.[163] Dawn Dunning testified that after Weinstein lured her to his hotel room for a purported audition, he fondled her genitals.[164] Tarale Wulff thought she was auditioning for a part as well, but instead, Weinstein held her down on a bed and forcibly raped her.[165]

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[156] Indictment, People of the State of New York v. Weinstein, No. 2018NY023971 (N.Y. Sup. Ct. 2018).

[157] Jan Ransom, Jessica Mann, *Weinstein Accuser, Breaks Down in Tears at Trial*, N.Y. TIMES (Feb. 4, 2020), https://www.nytimes.com/2020/02/03/nyregion/harvey-weinstein-trial-jessica-mann.html.

[158] Patrick Ryan & Maria Puente, *Harvey Weinstein Accuser Sobs as She Describes Trying to Fight Him Off: "I'm Being Raped"*, USA TODAY (Jan. 27, 2020, 4:13 PM), https://www.usatoday.com/story/entertainment/celebrities/2020/01/27/harvey-weinstein-trial-accuser-detail-alleged-sexual-assault/4566120002/.

[159] Jan Ransom, *Annabella Sciorra Will Testify Against Harvey Weinstein About Alleged Rape*, N.Y. TIMES (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/nyregion/harvey-weinstein-annabella-sciorra-trial-rape.html.

[160] N.Y. PENAL LAW § 130.95 (McKinney 2006).

[161] Ransom, *supra* note 159.

[162] Vanessa Romo & Rose Friedman, *Actress Annabella Sciorra Testifies That Harvey Weinstein Raped Her*, NPR (Jan. 23, 2020, 7:08 PM), https://www.npr.org/2020/01/23/799059027/actress-annabella-sciorra-testifies-that-harvey-weinstein-raped-her.

[163] Jeremy Barr, *Final Accuser in Harvey Weinstein's Trial Testifies That He Groped Her: "I Said No, No, No, the Whole Time"*, HOLLYWOOD REP. (Feb. 5, 2020, 11:38 AM), https://www.hollywoodreporter.com/thr-esq/final-accuser-harvey-weinstein-s-trial-testifies-he-groped-her-1276532.

[164] Daniel Arkin, *Harvey Weinstein's Trial: What Happened in Week* 2, NBC NEWS (Feb. 1, 2020, 9:37 AM), https://www.nbcnews.com/news/us-news/harvey-weinstein-s-trial-what-happened-week-2-n1126846.

[165] Elizabeth Wagmeister & Gene Maddaus, *Ex-Waitress Testifies Harvey Weinstein Held Her Down and Raped Her*, VARIETY (Jan. 29, 2020, 12:13 PM), https://variety.com/2020/biz/news/ex-waitress-testifies-harvey-weinstein-held-her-down-

Weinstein was convicted of the criminal sexual act in the first degree and rape in the third degree, receiving a twenty-three year sentence of imprisonment.[166]

The *Washington Post*'s editorial board celebrated the Weinstein verdict as a "singular moment in the #MeToo movement."[167] Delivering news of the verdict, the *New York Times* began with one sentence: "The criminal case against Harvey Weinstein was a long shot."[168] As the *Washington Post* reported, "Prosecutors did not have forensic evidence or corroborating witnesses to any of the assaults. Instead, they relied on the harrowing testimony of a half-dozen women on how Mr. Weinstein used his influence and the promise of potential acting roles to coerce them into degrading sexual encounters."[169] In other words, #WeToo won.

In sum, the story of #MeToo is the story of the success of group accusations. Though one woman alone might find it difficult to get justice, women as a group were far more likely to have their claims heard. Not all individuals failed and not all groups succeeded, but the #WeToo playbook for success was for woman after woman to cry out, until their complaints could no longer be ignored.

II. #WETOO: GROUNDS FOR OPTIMISM

Rape law has typically conceptualized rape as a "she said/he said." Rather than start with the flaws and foibles of current practice, consider the difficulties that exist in even the best of cases. Although some rape cases will include physical evidence, others will not. And, because the existence of semen is fully consistent with consent in cases of acquaintances, trials can easily come down to credibility contests. For the prosecution to win, the jury must not only find the victim more credible; the jury must find the defendant committed the offense beyond a reasonable doubt.

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and-raped-her-1203485627/?sub_action=logged_in .

[166] Colin Dwyer, *Harvey Weinstein Sentenced To 23 Years In Prison For Rape And Sexual Abuse*, NPR (Mar. 11, 2020, 11:06 AM), https://www.npr.org/2020/03/11/814051801/harvey-weinstein-sentenced-to-23-years-in-prison.

[167] *Opinion: The Weinstein Verdict Was a Singular Moment in the #MeToo Movement*, WASH. POST (Feb. 24, 2020, 6:15 PM), https://www.washingtonpost.com/opinions/the-weinstein-verdict-was-a-singular-moment-in-the-metoo-movement/2020/02/24/d3e813d2-574c-11ea-ab68-101ecfec2532_story.html.

[168] Meghan Twohey & Jodi Kantor, *With Weinstein Conviction, Jury Delivers a Verdict on #MeToo*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/us/harvey-weinstein-verdict-metoo.html.

[169] *The Weinstein Verdict Was a Singular Moment in the #MeToo Movement*, *supra* note 137.

This is a tough row to hoe. In discussing non-sexual assaults, say a fight between two men, prosecutors have noted the difficulty of obtaining convictions.[170] Essentially, whoever complains first is the victim, and the other the defendant.[171] But with a burden of proof of beyond a reasonable doubt, jurors may have difficulty being fully convinced who started it and who acted in self-defense. Moreover, empirical evidence has repeatedly shown that jurors are terrible at assessing demeanor evidence.[172] In short, a guilty verdict in a rape case is difficult to obtain even in a perfectly egalitarian world.

But we do not live in an egalitarian world. Women do not report. Police do not investigate. Prosecutors do not charge. Juries do not convict. One report found that *ninety-eight percent* of rape victims "never see their attacker caught, tried and imprisoned."[173]

This Part begins by describing the challenges rape complainants face in the criminal justice system. After surveying the historical backdrop of distrust and heightened evidentiary standards, I turn to the challenges that exist today. Police fail to investigate complaints of sexual assault. Prosecutors choose not to go forward. And even victims who have their day in court face obstacles with juries. Juries unwarrantedly distrust victims, and jurors are willing to credit farfetched explanations as reasonable doubts. In sum, the obstacles to justice are law enforcement's search for the "righteous victim," overuse of prosecutorial discretion, juror's distrusting and discounting victims, and juror's creating and crediting unreasonable doubts.

Next, this Part will turn to the ways that #WeToo gives new reasons for optimism in combatting some of these problems. A focus on multiple offenders creates investigative incentives, moving police away from the quest for the perfect victim. Stronger cases shift prosecutorial decision-making. But most importantly, group allegations counteract credibility discounting and doubt-finding by influencing jury assessments of the specific witnesses before them, as well as by shaping the general constructs they apply to the case.

A. Institutional Resistance to Rape Charges

Rape trials have long been plagued with false assumptions about

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[170] David P. Bryden and Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1324 (1997).

[171] *Id*. at 1324.

[172] *Id.* at 1323 ("A mass of social-scientific evidence suggests that this is a myth: people generally cannot determine whether someone is lying by observing his or her demeanor.").

[173] *Id.* at 1211 n.109 (quoting the Senate Judiciary Committee).

women's rape claims.[174] Before turning to today's challenges, consider the institutionally condoned skepticism with which rape claims were once greeted.

First, states often required prompt complaints. The American Law Institute's Model Penal Code, renowned in numerous ways for its innovative approach to the criminal law, required victims to complain within three months of the sexual assault for a prosecution to be brought.[175] Second, states also condoned explicit instructions urging heightened skepticism about victim's testimony. For example, the Model Penal Code both maintained that no conviction could be based solely on "the uncorroborated testimony of the victim," and urged heightened skepticism because of "the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."[176] Finally, unchastity was equated with lack of veracity. For instance, none other than John Henry Wigmore cautioned:

> The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. The real victim, however, too often in such cases is the innocent man for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.[177]

Today, rape shield statutes have removed the ability to infer incredulity (and consent) from lack of chastity, and states have dropped prompt complaint[178] and corroboration requirements.[179] Nevertheless, as detailed

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[174] *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017) ("Abundant evidence exists that credibility discounts are meted out at every stage of the criminal process: by police officers, prosecutors, jurors, and judges.").

[175] MODEL PENAL CODE § 213.6(4) (AM. L. INST. 1985). These portions of the Model Penal Code are subject to a redrafting project, see *Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST., https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ (last visited Feb. 25, 2021).

[176] MODEL PENAL CODE § 213.6(5) (AM. L. INST. 1985).

[177] JOHN HENRY WIGMORE, 3A EVIDENCE IN TRIALS AT COMMON LAW § 924A, 736 (James H. Chadbourn, ed., 4th ed. 1970).

[178] The exhaustive survey done by the American Law Institute's Model Penal Code sexual assault provision reform project reveals that only South Carolina and Texas have vestiges of these provisions. MODEL PENAL CODE § 213.7 cmt. B.2.a (AM. L. INST., Proposed Official Draft 2014).

[179] Although some states continue to have a corroboration requirement, in practice, it is limited in its applicability to testimony that is problematic on its own terms (contradictory, incredible, and so forth). *Id.* at cmt. B.2.b.

below, victims of sexual assault still face an uphill battle in criminal cases.

1. Police and Prosecutors

Police officers are the initial gatekeepers. They decide what to investigate and how to do so. A case that is pursued is "founded" and one that is not is "unfounded." Acquaintance rapes are "unfounded" at much higher rate than stranger rapes.[180] The acquaintance rape unfounding rate is "roughly four times higher than other major crimes."[181]

There is disagreement in the scholarly literature, both about whether police mishandle rape allegations and whether any mishandling will matter. To take the latter first, Tuerkheimer maintains, "The prevalence of truncated police investigations suggests that threshold credibility determinations are often outcome determinative."[182] In contrast Bryden and Lengnick argue, "Since prosecutors often decline to file charges, and juries often acquit, even in the relatively strong cases in which the police regard the complaint as credible, it seems probable that police attitudes, however mistaken they may be in some or even many cases, are rarely outcome determinative."[183]

How mistaken are police? Even Bryden and Lengnick, who surveyed the then-existing empirical literature and believe the studies do not fully support rape scholars' complaints about widespread victim mistreatment,[184] suggest police are unwarrantedly skeptical:

> [M]ale-dominated detective squads are likely to be at least somewhat too skeptical towards accusations of acquaintance rape. This conclusion does not require us to assume that police are uniquely biased; only that they are not uniquely free of bias."[185]

They further find that "most observers agree that founding decisions in acquaintance rape cases are strongly affected by the purported victim's contributory negligence, and by her perceived immorality."[186]

Other assessments of the literature are less generous to law enforcement. Corey Rayburn Yung notes that police use hostile interrogation techniques, threaten victims with prosecution for filing false complaints, deter reporting generally, and assure victims that they are working on their cases even when

[180] Bryden & Lengnick, *supra* note 170, at 1233.
[181] *Id.*
[182] Tuerkheimer, *supra* note 174 at 11.
[183] Bryden & Lengnick, *supra* note 170, at 1379.
[184] *Id.* at 1241. Bryden & Lengnick find most of the studies about enforcement problems to be "inconclusive."
[185] *Id*. at 1242.
[186] *Id.* at 1232.

the complaint has already been labeled "unfounded."[187] Yung also comments:

> A remarkable aspect of the stories discussed in this Article is that they involved rapes by strangers. . . . [P]olice aggressively rebuffed complaints even with evidence of substantial physical injuries and the identity of the perpetrator. In a world where police regularly dismiss complaints of violent stranger rapes, an intoxicated victim of non-stranger rape with no outward injuries stands little chance in seeing his or her claim investigated.[188]

Notably, Bryden and Lengnick's literature review occurred before two significant discoveries of substantial police indifference to sexual assault. First, police are underreporting rape. Indeed, after investigative reporting revealed that police departments in Baltimore, New Orleans, Philadelphia, and St. Louis were grossly undercounting the number of rapes, Corey Rayburn Yung empirically extrapolated the likelihood of rape underreporting by law enforcement from 1995 to 2012.[189] He found, by conservative estimates, that between 796,213 to 1,145,309 forcible vaginal rapes were never tracked.[190] This undercounting was accomplished by "unfounding" rape claims while performing little or no investigation, classifying rapes as lesser offenses, and failing to obtain a written record of the rape complaint.[191] If law enforcement is worried about keeping its stats down, it is not worried about properly documenting and pursuing claims of rape.

Second, police were not testing sexual assault kits (SAKs).[192] The backlog of SAKs is truly horrifying. As Lovell, Flannery, and Lumanais explain, "Hundreds of thousands of untested rape kits, also known as sexual assault kits (SAKs), have languished in evidence storage facilities across the United States."[193] SAKs contain evidence collected from the victim during a four-to-six-hour examination that includes photographing, swabbing, and essentially treating the victim's body as a "crime scene."[194] So, after

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[187] Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 219-220 (2017).

[188] *Id.* at 250.

[189] Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1212-1214 (2014).

[190] *Id.* at 1204.

[191] *Id.* at 1201-1202.

[192] Rachell Lovell, Daniel J. Flannery & Misty Luminais, *Lessons Learned: Serial Sex Offenders Identified from Backlogged Sexual Assault Kits (SAKs), in* THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION (Alexander T. Vazsonyi, Daniel J. Flannery & Matt DeLisi eds., 2d ed. 2018).

[193] *Id.* at 399.

[194] *Id.*

enduring a sexual assault, the victim endured this horrific examination, and then the kit containing the evidence, rather than being tested, sat on a shelf in an evidence locker.[195]

This neglect was largely due to a failure to take sexual assault seriously and to have policies in place for officers.[196] An exposé in *The Atlantic* discusses law enforcement's failure to pursue these cases because of the unworthiness of the victim:

> Usually only a certain type of victim will see her rapist prosecuted, says Cassia Spohn, the director of the School of Criminology and Criminal Justice at Arizona State University. Along with Katharine Tellis, a criminologist at California State University at Los Angeles, Spohn published an exhaustive report in 2012 that analyzed sexual-assault investigations and prosecutions in Los Angeles County. "We heard over and over detectives use the term *righteous victim*," she told me. A woman who didn't know her assailant, who fought back, who has a clean record and hadn't been drinking or offering sex for money or drugs—*that* woman will be taken seriously. Spohn recalled a typical comment: " 'If I had a righteous victim, I would do all that I could to make sure that the suspect was arrested. But most of my victims don't look like that.' "[197]

If the complaint is investigated, a prosecutor must still decide to charge it. Prosecutors make decisions in the shadow of the police and the jury. They cannot prosecute cases if the police poorly investigate them, and they will not prosecute cases if they think they cannot win.[198]

Prosecutors want corroboration and they want "good victims." Even without a legally required corroboration requirement, prosecutors opt not to

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[195] *Id.* at 400; Barbara Bradley Hagerty, *An Epidemic of Disbelief*, THE ATLANTIC (July 22, 2019, 11:17 AM), https://www.theatlantic.com/magazine/archive/2019/08/an-epidemic-of-disbelief/592807/.

[196] Lovell et al., *supra* note 192, at 401.

[197] Hagerty, *supra* note 195; *see generally* Cassia Spohn & Katharine Tellis, *Justice Denied? The Exceptional Clearance of Rape Cases in Los Angeles*, 74 ALBANY L. REV. 1379 (2011); Melinda Tasca et al., *Police Decision Making in Sexual Assault Cases: Predictors of Suspect Identification and Arrest*, 28 J. INTERPERS. VIOLENCE 1157, 1170-71 (2012) (finding victim drug use to be predictive of failure to identify or arrest a suspect); *see also infra* notes 364-371.

[198] For a brilliant discussion of the obligations of prosecutors to bring these cases to trial, see Michelle Madden Dempsey, *Prosecuting Violence Against Women: Toward a "Merits-Based" Approach to Evidential Sufficiency*, 14. REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO (U. PALERMO L. REV., Buenos Aires, Argentina) (2015). Bryden and Lengnick note that if unlikely to get a conviction then there may be good reasons not to put victim through an emotionally wrenching trial. Bryden & Lengnick, *supra* note 170, at 1248. Still they believe prosecutors should take more chances than they currently do. *Id.* at 1379.

charge in the absence of corroborating evidence. In 2009, the Chicago Alliance against Sexual Exploitation wrote to the Cook County State's Attorney alleging that the office was not bringing cases unless there was "bodily injury, a third-party witness, or an offender confession."[199] Cassia Spohn and Katherine Tellis's investigation of the police and sheriff departments in Los Angeles found similar barriers. First, district attorneys would not go forward unless there was sufficient evidence to prove the case beyond a reasonable doubt, and second, in making that determination the policy in sexual assault cases was to require corroboration, including DNA, injuries to the victim, witnesses who could corroborate the victim's testimony, or medical or physical evidence consistent with the victim's account. [200]

Like police, prosecutors also look for the right victim. Bryden and Lengnick note that the most common "judgmental comments concerned a woman's intelligence.[201] They thought this might be a proxy for class, quoting one experienced prosecutor as saying:

> Good Victims have jobs (like stockbroker or accountant) or impeccable status (like a policeman's wife); are well-educated and articulate, and are, above all, presentable to a jury: attractive—but not too attractive, demure—but not pushovers. They should be upset—but in good taste—not so upset that they become hysterical.[202]

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[199] *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases*: *Hearing before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 67-81 (2010) (Statement of Michelle Madden Dempsey, Associate Professor of Law, Villanova Univ. School of Law), https://www.congress.gov/111/chrg/CHRG-111shrg64687/CHRG-111shrg64687.pdf.

[200] Spohn & Tellis, *supra* note 197, at 1391-92.

[201] Bryden & Lengnick, *supra* note 170, at 1247.

[202] *Id*. One case that is often included in criminal textbooks is State v. Rusk, 424 A.2d 720 (Md. 1981). This was a she said/he said case as to the threat that Rusk employed. *Id.* at 728 ("Quite obviously, the jury disbelieved [him] and believed [her] testimony."). For our purposes, consider Jeannie Suk's description of the prosecutor's assessment of the complainant:

> [The prosecutor] met with the victim and heard her story. She seemed ordinary and unremarkable, if a bit foolish to go to a Fell's Point nightclub where guys were obviously looking to get laid. But she was sincere, even adamant about what happened. He thought a jury would believe her. She wasn't weird or dislikable, as key trial witnesses sometimes were. . . . Given his credible witness, the case was worth trying, but he told her the jury might well not convict.

Jeannie Suk, *"The Look in His Eyes": The Story of* Rusk *and Rape Reform*, in CRIMINAL LAW STORIES, 171, 176 (Donna Coker & Robert Weisburg, eds., 2013). And notably, there was then the judge's reaction, "Jimmy [the prosecutor], get rid of this piece of crap." *Id.* at 177.

The unrighteous victim does not see her case investigated or prosecuted.

2. Juries

Even if victims get their day in court, they face obstacles with the jury. This is no small challenge. Bryden and Lengnick concluded that jurors are the actors most likely to be illegitimately preventing rape convictions:

> If reformers wish to improve the chances of conviction, however, the main limiting factor is not skeptical police, cautious prosecutors, or sexist judges, but biased jurors. The empirical evidence suggests that the kinds of cases that police tend to unfound, and in which prosecutors are reluctant to file charges, and in which appellate courts occasionally reverse a conviction, are the kinds most juries are unlikely to convict.[203]

Jurors create two obstacles. They devalue women's testimony, and they employ farfetched theories to create "reasonable doubt."

a. Devaluing Women's Testimony

Women's claims of rape are systematically devalued in the eyes of the jury.[204] This is despite the significant scholarly consensus that false reporting is quite rare.[205] One way to articulate this "devaluing" is to see it as a credibility discount—jurors *discount* and *devalue*. Another is to see it is to say that jurors are adopting a *standpoint of distrust*.

Deborah Tuerkheimer argues that legal responses to rape include a "credibility discount."[206] She builds on the work of Miranda Fricker, who maintains that women suffer from testimonial injustice: "Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word."[207] This can be an attack on either

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[203] Bryden & Lengnick, *supra* note 170, at 1254 (examining at the Kalven and Zeisel data wherein trial judges—who in the 1950s certainly did not harbor decidedly feminist views—were far more likely to convict in rape cases than their jury counterparts).

[204] *See* Peter O. Rerick, et al., *Rape and the Jury*, *in* HANDBOOK OF SEXUAL ASSAULT AND SEXUAL ASSAULT PREVENTION 551, 563-64 (W. T. O'Donohue and P. A. Schewe eds., 2019), accessible at https://www.researchgate.net/profile/Tyler-Livingston-5/publication/340755019_Rape_and_the_Jury/links/5e9bcf2d4585150839e7f7fa/Rape-and-the-Jury.pdf (listing studies demonstrating skepticism on the part of both male and female jurors).

[205] Tuerkheimer, *supra* note 174, at 8, 20 (suggesting rates between 4.5 and 6.8 percent).

[206] *Id.* at 14 ("A listener engages in credibility discounting when, based upon a faulty preconception, he reduces a speaker's perceived trustworthiness or diminishes the plausibility of her account.")

[207] *Id.* at 42 n.246 (quoting MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER & THE

competence or sincerity grounds.[208] Whereas Fricker's argument points to ways that women are broadly devalued as speakers,[209] Tuerkheimer homes in on rape allegations, maintaining that women are seen as malicious or vindictive and therefore lying, are regretful about consensual activity, or are incapable of determining consent due to their intoxication.[210] To Tuerkheimer, we do not credit what the victim says to the extent that we should. It is as though, given what the victim says, a jury should be 95% confident that she is telling the truth, but instead attributes a much lower confidence level to her claims such as 65% (or lower).

This way of thinking about the jury's failure may be true, but it may miss out on an important aspect of the juror's assessment. When a woman says, "I was raped," she not only wants the hearer to come to believe that "she was raped," but to come to believe it because they *believe her*. Another way to frame the concern in these cases is that there is a lack of *trust*. In other work, I have argued that "#BelieveWomen" can be understood as two things: both a call to trust and an epistemic permission from that trust to belief.[211] That is, there is a degree of respect that we owe all speakers, and from that respect, we are also sometimes permitted to believe them simply on their say-so. Their word is enough. This is akin to believing what your mother did last night simply because she told you. Though a court of law requires that we examine testimony rigorously, the worry is that juries do not even begin with the right foundation.[212] They distrust women instead.

Whether perceived as a discount, or a lack of trust, both frameworks point to the fact that jurors may have misguided views as to the extent of false reporting and whether it is appropriate to start from a largely skeptical stance. Given that criminal law requires proof beyond a reasonable doubt, this sort of systematic discounting is fatal to a guilty verdict in cases without strong supportive physical evidence.

b. Having Unreasonable Doubts

But corroboration still may not be enough. Georgi Gardiner identifies

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ETHICS OF KNOWING (2007)).

[208] FRICKER, *supra* note 6, at 32.

[209] Ultimately, Fricker is making two claims that she takes to embody "epistemic injustice." First, that women's testimony is devalued "testimonial injustice," *see supra* note 203, and second, that women lack the resources to articulate the wrongs they experience, "hermeneutical injustice," *see supra* note 6.

[210] Tuerkheimer, *supra* note 174, at 9. Bryden and Lengnick point to "public biases against certain classes of alleged rape victims." Bryden & Lengnick, *supra* note 170, at 1327.

[211] Ferzan, *supra* note 17.

[212] Renée Jorgensen Bolinger, *supra* note 17 ("[W]e owe a *qualified* duty, to treat their testimony as reason-giving when we lack specific reason to doubt their reliability").

another way that jurors can fail to convict in sexual assault cases. Sexual assault faces what Georgi Gardiner calls, "disproportionate doubt" because "accusations are reliably true, yet are often met with undue suspicion."[213] Gardiner begins by explaining that we can reach knowledge by ignoring "undue doubt."[214] To use her example, imagine you see a bird and reach the immediate conclusion that bird is a robin. But then, your interlocutor tells you, "You don't know it is a robin, it could be a robot, a hologram, a disguised sparrow. Perhaps you are mistaken. Perhaps you have been drugged. Perhaps you are dreaming."[215] Gardiner claims you are entitled to ignore these farfetched and irrelevant possibilities and *know* the bird is a robin.[216] Even with the best of evidence, we can never rule out all error possibilities, but you may be able to rule out all but the most bizarre.[217]

Gardiner claims that a problem in rape cases is that farfetched possibilities are masked as plausible ones.[218] We take cases where the error is remote, but believe it to be far more probable. Consider Gardiner's real-world example:

> In Scotland a domestic abuser raped his girlfriend. During the attack, she surreptitiously recorded the ordeal. The victim submitted the recording to the police, who said it was the most harrowing evidence they had come across. The man was prosecuted in Scottish criminal courts. The defense lawyer raised an error possibility, by claiming the couple were consensually engaging in sexual roleplay. The defendant was acquitted.[219]

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[213] Georgi Gardiner, *Doubt and Disagreement in the #MeToo Era*, *in* FEMINIST PHILOSOPHERS ON #METOO (Yolonda Wilson ed. forthcoming 2021) (manuscript at 3) (on file with author).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.* at 4. In making this argument, Gardiner is drawing on the well-known worry in epistemology that because one cannot rule out all possibilities, one can never know, or as David Lewis summarizes, "[K]nowledge is elusive. Examine it and straightaway it vanishes." David Lewis, *Elusive Knowledge*, 74 AUSTRALASIAN J. PHIL. 549, 560 (1996).

Some theorists suggest that the very far-fetched alternatives that we can rule out, so as to preserve knowledge, are the ones that juries can rule out for proof beyond a reasonable doubt. *See* Sarah Moss, *Knowledge and Legal Proof*, *in* 7 OXFORD STUDIES IN EPISTEMOLOGY (forthcoming 2021) (manuscript at 6) ("The knowledge account of legal proof connects the elusiveness of knowledge with the elusiveness of proof beyond a reasonable doubt, using the former to explain the latter."). We need not accept that legal proof requires knowledge to mine the insights of this literature.

[218] Gardiner, *supra* note 213, at 4.

[219] *Id.* at 9-10.

Gardiner maintains that not many people would consider this possibility, and for most, this would be too farfetched and not generate reasonable doubt. As she notes, "[A]ccording to this error possibility, they consensually recorded the roleplay, but produced a poor quality recording or alternatively she recorded it without his knowledge. She then decided to frame her boyfriend with this recording, and continued their deceit into court—herself thereby committing a serious crime[,] [a]nd the consensual role play sounded so graphic that the police found it 'horrific.'"[220]

Gardiner diagnoses part of the problem as the way that juries evaluate evidence. We infamously ignore baseline probabilities (the base rate fallacy).[221] She illustrates with a hypothetical where A accuses B, a wealthy celebrity, of sexual assault and to corroborate her testimony uses the affidavit of her former therapist that A described the attack by B fifteen years prior, before B was famous.[222] The defense is that A has had a lifelong obsession with B. Gardiner suggests that the very fact that supports A's testimony—speaking to the therapist—also makes it more likely that there is a lifelong obsession, but crucially, this latter explanation is still farfetched.[223] The very evidence that supports the more likely story supports the far less likely story, and we then give the far less likely story additional credence, without taking into account that it is still far less likely to be true.[224]

Not only do we make this heuristic mistake, but we take it to be an intellectual accomplishment. Gardiner claims that we have "a-ha" moments when we are able to construct a story that is consistent with innocence, feelings that are usually consistent with truth and understanding.[225] But that "a-ha" moment is illicitly generated as it holds constant innocence and then looks for the best story, as opposed to asking whether that story, one of innocence, is really plausible.[226] Jurors thus have a phenomenological experience of finding truth, when they have cleverly come to an unlikely outcome.

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[220] *Id.* at 10.

[221] *See generally* Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCH. REV. 237 (1973) (empirically demonstrating that subjects ignore prior probabilities in assessing likelihood of an event).

[222] Gardiner, *supra* note 213, at 14. Such an affidavit would likely run afoul of the Confrontation Clause, but we need not let that concern us here.

[223] *Id.* at 14.

[224] *Id.* at 15.

[225] *Id.*

[226] *Id.*, at 15 ("The thinker was only following the path because of an over-attachment to the proposition that the defendant is innocent.").

B. The Impact of #WeToo

There are many ways that the reconceptualization of sexual assault, not simply as a perpetrator and a victim, but as a perpetrator and many victims can help vindicate victim's rights. With respect to police and prosecutors, #WeToo counteracts the search for the "righteous victim" and the overuse of prosecutorial discretion. And #WeToo can combat juror's distrusting and discounting victims, as well as juror's creating and crediting unreasonable doubts.[227]

1. Prosecutors and Police: Beyond the Righteous Victim

If there is anywhere that the interests of "we" align with those of the "me," it is in police investigations of sexual assault. This is because the cases are, at the outset, indistinguishable. As Barbara Bradley Hagerty argues in *The Atlantic*, the results of the backlogged SAKs leads to the conclusion that a significant enough number of rapists may be serial rapists, such that they should be investigated in that way:

> On a practical level, this suggested that every allegation of rape should be investigated as if it might have been committed by a repeat offender. "The way we've traditionally thought of sexual assault is this 'he said, she said' situation, where they investigate the sexual assault in isolation," Lovell told me. Instead, detectives should search for other victims or other violent crimes committed nearby, always presuming that a rapist might have attacked before. "We make those assumptions with burglary, with murder, with almost any other crime," Lovell said, "but not a sexual assault of an adult."[228]

Law enforcement's myopic view of individual victims prevents

[227] Let me address two loose threads. First, evidence scholars may wonder where the discussion of evidentiary rules appears; criminal procedure scholars may scratch their heads about joinder issues. These are important, indeed essential questions, about how groups will actually impact criminal trials. But they are not appropriately placed in the grounds for optimism section. Rather, there are live concerns here from the defendant's standpoint, and thus the testimonial impact of multiple victims and their intersection with procedural and evidentiary rules is discussed in Part III.

Second, the claim here is not that #WeToo is the silver bullet. Other work must be done. For instance, scholars have proposed other ways to reform police departments, including how data is collected and what training should be given. *See* Yung, *supra* note 187, at 240-249 (including resource allocation, training and discipline, and elimination of statistics to incentivize performance). #WeToo will have its biggest impact if it works in conjunction with other reform efforts.

[228] Hagerty, *supra* note 195.

significant and substantial cases from potentially being built. But journalists have revealed a different playbook: Start by crediting the complainant, then find other complainants, and corroborate along the way. Even using the lowest estimates available, the chances are one-in-four that this defendant committed another act of sexual assault.[229]

Cases with multiple victims can also liberate prosecutors from worries that an individual victim is not credible. If the police find multiple victims, *even "unrighteous" ones*, prosecutors will be able to counteract jury biases, as discussed next. Moreover, once recognized as a #WeToo, police can look for other actors. After all, multiple predatory acts can involve enablers—those who schedule appointments, drown out sound, or see a parade of women through a closed office door.[230] These enablers, whether criminally culpable or not, can provide further corroboration of criminal complaints in many cases. The lesson of #WeToo—that when there is smoke, there is fire—should spur greater investigation of complaints.[231]

That is, the original treatment of Weinstein, focusing on one victim, prevented earlier intervention against him. So, too, Robert Hadden, a New York gynecologist accused by numerous women, did not even receive jail time in a plea deal in 2016, but the later floodgates of accusations revealed that the Manhattan DA's office was too hasty in bringing the case to a close.[232] Brett Hankison, one of the officers involved in the Breonna Taylor shooting,

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[229] This is based on the statistic that 28% of rapists are serial rapists. *See infra* notes 254-55. But, a different way of looking at this is to ask what the chances are that a victim was raped by a serial rapist. There, the numbers are higher. If you have four rapists, and one is a serial rapist (and qualifies by raping just two women, a low simplifying assumption), then for four rapists, you will have five victims. Two of the five will have been raped by the same man, so there is a 40% that for any one victim, her perpetrator has raped other women. And, this calculation underestimates that probability because it is premised on a 25% serial rapist number and a repeat perpetration number of only 2 victims.

[230] Consider what others knew in this recent #WeToo against a local district attorney from when he was in private practice:

> Staff from Salsman's private law firm testified to the grand jury that he often met with his female clients one-on-one, and would keep the details of their files secret from his own legal staff. They also said Salsman had a long-standing policy of having his secretaries play music, run noise machines or run the air conditioner to drown out the sounds of his meetings with clients.

Michael Tanenbaum, *Pennsylvania District Attorney Charged in Alleged Pattern of Sexual* Misconduct, PHILLY VOICE (Feb. 3, 2021). I thank Robin Effron for suggesting the third-party corroboration angle to me.

[231] Hagerty, *supra* note 195 (noting that studying the SAKs indicated that men will commit both acquaintance and stranger rapes, and not just one or the other, so testing acquaintance rape SAKs helped identify stranger rapists).

[232] Jan Ransom, *19 Women Accused a Gynecologist of Abuse. Why Didn't He Go to Prison?*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/2019/10/22/nyregion/robert-hadden-gynecologist-sexual-abuse.html.

was accused of offering intoxicated women rides home, only to sexually assault them.[233] This last type of case involves officers who capitalize on victims who are "driving while female."[234] Although any single victim of Hankison's might have faced substantial credibility issues because she was intoxicated at the time, reasonable doubts dissipate when there are multiple accusers. The investigative imperative should be clear to both police and prosecutors—never look at a case as a "she said, he said."

2. Juries: Combatting Distrust and Unreasonable Doubt

Group allegations, both in the courtroom and in the public conception, are likely to counteract epistemic errors by jurors. #WeToo will help combat juror error both with respect to discounting the victim's credibility and with respect to the jury's ability to conjure "unreasonable doubts."

First, and most obviously, if multiple victims come forward, there is no longer a "she said/he said" but a "they said/he said." This alone means that even if every victim's testimony is systematically and inappropriately discounted, the whole will be greater than, or at least equal to, the sum of its parts.

Second, broader testimony can cause jurors to reconsider their background beliefs. Assume, for example, that the victim testifies and she appears angry, not hysterical. Jurors may then reference stereotypical assumptions ("rape scripts"), based perhaps on what they have seen on television, about how victims behave.[235] However, exposure to multiple victims, who may display myriad reactions, may cause jurors to reconsider how a rape victim is supposed to testify. So, too, it may cause jurors to reevaluate their pre-existing rape scripts about how a rape happens.

Third, the impact in the courtroom may be caused by #WeToo's impacts outside the courtroom. If we begin to give women more credit in instances of sexual violence—if we believe women—this may impact whether we conclude any particular woman is believable.[236] That is, as more cases are shown to be true, the credibility discount that any individual woman faces

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[233] Fabiola Cineas, *The Sexual Assault Allegations Against an Officer in Breonna Taylor's Killing Say A Lot About Police Abuse Of Power*, VOX (June 12, 2020, 10:10 AM), https://www.vox.com/2020/6/12/21288932/police-officers-sexual-violence-abuse-breonna-taylor.

[234] *Id.*; Philip Matthew Stinson, Sr., et al., *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, 26 CRIM. JUST. POL'Y R. 665 (2015).

[235] "Summoning pre-existing rape scripts, jurors are less likely to find that a rape occurred when the accuser's behavior does not comport with their understanding of what they believe rape victims do." Capers, *supra* note 15, at 863.

[236] *Cf.* Zacharek et al., *supra* note 9 ("When a movie star says #MeToo, it becomes easier to believe the cook who's been quietly enduring for years.").

may lessen. And, future jurors may begin to recognize that distrust is not the appropriate starting point.

Fourth, as allegation after allegation is legitimated in the public sphere, this will influence how jurors come to understand sexual violence writ large. As the populace learns more about the prevalence of sexual violence, the kinds of wrongs that can happen to women, and the fact that purported "good guys" may not be so good after all, jurors may be more willing to credit any given victim's testimony. Stories in the media may also increase the juror's ability to discern which accounts are plausible and which are farfetched.[237]

C. Summary

When police do not investigate rape charges, prosecutors do not go forward with them, and juries do not believe complainants and conjure unreasonable doubts, justice cannot be achieved. As we have witnessed since Alyssa Milano's tweet in 2017, there is power in numbers. And, this power will likely impact the criminal courtroom in ways that counteract the unwarranted obstacles to sexual assault convictions. Recognition of multiple victims spurs more investigation; more victims increase chances of prosecution and conviction; greater numbers counteract credibility discounts; and more corroborated stories counteract false narratives.

III. #WETOO: CAUSES FOR CONCERN

There is cause for celebration with #WeToo, but there are also reasons for concern. First, the public narrative that has been crafted may be mismatched with the reality of sexual violence in ways that distort public perception and influence jury decision-making.

Second, #WeToo may make it even harder for individual victims to get justice. While there is some hope that better understandings of sexual violence will have a trickle-down effect that benefits individual victims, it may be, instead, that a new rule of corroboration has been created—victims only get to trial if another person is also victimized.

Finally, multiple allegations may unfairly impact criminal defendants. To this point, this Article has used labels such as "victims," "perpetrators,"

[237] Notably, more victims cannot completely undermine the ability of jurors to attempt the "intellectual achievement" of finding an account consistent with innocence. For instance, with Cosby, after multiple women came forward, a conspiracy theory was formed. Lisa Respers France, *Conspiracy Claims Surround Bill Cosby Debate*, CNN (Jan. 8, 2015, 3:29 PM), https://www.cnn.com/2015/01/08/showbiz/feat-phylicia-rashad-bill-cosby-conspiracy (quoting Phylicia Rashad as arguing that these allegations were aimed at destroying Bill Cosby's legacy).

"rapists," and "sex offenders." But a criminal defendant may not be a rapist. And, even if he is, he may not have committed every act of which he stands accused. Hence, this final section raises the significant and substantial concerns from the defendant's perspective, both when multiple acts are charged together, such as in Weinstein's case, and when other complainants are permitted to testify as further evidence that the defendant committed the one act alleged, as in Cosby's and Weinstein's. If we are only getting convictions because we make evidentiary errors and implicitly undermine the burden of proof, we undermine what we owe to those charged with criminal offenses.

A. Does the Narrative Fit the Reality?

The cases that fill newspapers often speak of "patterns." Yet, the empirics do not support this image of a serial rapist with a particularized modus operandi. This mismatch between narrative and reality may negatively impact public policy interventions and create unreasonable juror expectations.

1. Reported Patterns

This Article began with the countless men accused of numerous acts of sexual wrongdoing. Notably, not only did these reports allege multiple victims, they were often pitched by the author as cases that involved a *pattern* of misconduct. For instance, "Speaking to Variety, the women described predatory incidents involving Hoffman that fit into a pattern of alleged behavior . . . ."[238] To be sure, Hoffman's behavior seems highly specific, as most of the reports of sexual violence and abuse do not involve digitally penetrating women in public.

Highly regularized conduct can also be cast as a pattern. In discussing Weinstein's behavior, Ronan Farrow frequently noted the similarity of the misconduct allegations: "They and others described a pattern of professional meetings that were little more than thin pretexts for sexual advances on young actresses and models."[239] "Like others I spoke to, this woman said that Weinstein brought her to a hotel room under a professional pretext, changed into a bathrobe, and, she said, 'forced himself on me sexually.'"[240] "Other

[238] Holloway, *Hoffman Minor*, *supra* note 92.

[239] Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories.

[240] *Id.*

women were too afraid to allow me to use their names, but their stories are uncannily similar to these allegations."[241] And, "[t]here are other examples of Weinstein's using the same modus operandi."[242]

The theme of "pattern" appears in many other articles. In the article about Bill O'Reilly in the New York Times, "The reporting suggests a pattern . . . ."[243] And, though the stories about Kevin Spacey came out separately, the later BuzzFeed and Vox articles, detailed "a pattern":[244] "Taken together, the allegations suggest a pattern of escalating physical contact, the consistent presence of alcohol, and Spacey making a habit of cornering his victims in order to confront them."[245]

Still, one might question what counts as a "pattern." In discussing Charlie Rose, the *Washington Post* reported, "There are striking commonalities in the accounts of the women."[246] As described:

> Most of the women said Rose alternated between fury and flattery in his interactions with them. Five described Rose putting his hand on their legs, sometimes their upper thigh, in what they perceived as a test to gauge their reactions. Two said that while they were working for Rose at his residences or were traveling with him on business, he emerged from the shower and walked naked in front of them. One said he groped her buttocks at a staff party.[247]

Without undermining the seriousness of these allegations, note the way that different sorts of actions are grouped together: putting a hand on a thigh, emerging naked from a shower, and groping someone's buttocks are disparate behaviors. But because some of them were repeated, the paragraph appears to work as *one common pattern*.

And, consider the reporting about Matt Lauer. The reader is told, "This was part of a pattern. According to multiple accounts, independently corroborated by *Variety*, Lauer would invite women employed by NBC late at night to his hotel room while covering the Olympics in various cities over the years."[248] But Lauer's behavior in that article ran the gamut, from anal rape in a hotel room to pulling out his penis at the office to playing "fuck, marry, kill" about his female co-workers with other male co-workers.[249]

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[241] *Id.*
[242] *Id.*
[243] Steel & Schmidt, *supra* note 29.
[244] Vary et al., *supra* note 44.
[245] Romano, *supra* note 42.
[246] Carmon & Brittain, *supra* note 6.
[247] *Id.*
[248] Setoodeh & Wagmeister, *supra* note 59.
[249] *Id.*

Finally, the article in *Vox* on Glenn Thrush, also purporting to "suggest a pattern,"[250] does not demonstrate anything other than how many men and women mate—that is, go to a bar, drink, wind up alone, and make a move.

Although not all reports were by multiple victims and not all reporters called the perpetrator's conduct a "pattern," enough of the reporting fits this description that a narrative of repeated, similar acts against multiple victims emerges. If this is the narrative created for our consumption of what sexual violence looks like, we should ask two questions. First, how accurate is that narrative overall? Second, if there is a mismatch, what effect could it have?

2. Fit Questions

If the stories that fill our newspapers are about perpetrators with multiple victims and a particularized modus operandi, then we might think that this is an accurate account of sexual violence. There are reasons to be dubious of this narrative, however. Here are four. The first two concerns are empirical. Studies dispute how many rapists are serial rapists. In addition, evidence suggests that serial rapists do not follow a highly specified modus operandi. The second two concerns are based upon selection bias. The kinds of cases that attract media attention will often be people in power with specific opportunities to repeatedly offend. Finally, journalistic standards may require corroboration in ways that distort the underlying reality. This Section considers all four of these issues.

First, it is difficult to know how many individuals who commit sexual assault are serial offenders. Because most sexual assaults are not reported, it is difficult to determine how many offenders actually exist.[251] One oft-quoted study is by David Lisak and Paul Miller, who surveyed 1,882 male university students.[252] They found that 6.4% of the men reported behavior that constituted rape or attempted rape, and that of this group, 63.3% reported committing multiple rapes, averaging 4 rapes each.[253] That study, one that singlehandedly forms the basis of just about every assertion about serial rapists,[254] has been criticized.[255] An alternative study with a different

[250] McGann, *supra* note 58.

[251] David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002) (citing references that somewhere between 64-96% of rape cases are never reported to the criminal justice system and that "only a small minority of reported cases" result in successful prosecution).

[252] *Id.* at 76.

[253] *Id.* at 78.

[254] Kevin M. Swartout, et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1149 (2015) (cataloging citations and pinpointing Lisak and Miller's study as the only source).

[255] *Id*. ("Every empirical study has strengths and limitations and must be scrutinized

methodology found the number was less than 28%.[256] Both studies rely on self-reporting by college students.

Serial offending can be distinguished from sexual recidivists, who are incarcerated for their offenses, and reoffend after release. Studies show sexual offenders are less likely to reoffend than nonsexual offenders—67% v. 84%, but more likely to be arrested for rape or sexual assault, 7.7% v. 2.3%.[257] These numbers will also be impacted by the low reporting and arrest rates for rape. The bottom line is that we do not have clear empirical support that most rapists rape more than once.

Second, just as the question of whether most rapists are serial rapists is empirically questionable, so, too, is the question of whether perpetrators have one specific modus operandi. One study analyzed backlogged SAKs in Cuyahoga County, where SAKs from 1993 to 2009, totaling 5000, were tested.[258] Although the number of serial offenders could not be estimated because of how the sampling was done,[259] it was possible for the researchers to analyze the behavior of serial offenders.[260] Importantly, the researchers, led by Rachell Lovell, found:

> [S]erial offenders do not have a consistent offending profile. Serial sex offenders with more than one unsubmitted SAK more consistently assaulted in the same [broadly defined] type of location and inflicted bodily force in the assault. However, they were less consistent with their use or threat of a weapon in the assault and with the type of relationship they had with the victim.[261]

As *The Atlantic* noted, this came as a surprise to the Lovell:

> Another surprise for police and prosecutors involved profiling. All but the most specialized criminologists had assumed that serial rapists have a signature, a certain style and preference. Gun or

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before it is used to inform policy. The aforementioned study had a large sample size' however, it was a cross-sectional design at a single institution and aggregated rapes that occurred before and during college.").

[256] *Id.* at 1152 (finding 72.8% of men who committed rape during college committed only one such act).

[257] RECIDIVISM OF SEX OFFENDERS, *supra* note 15.

[258] Lovell et al., *supra* note 192.

[259] *Id.* at 406 (cases selected for prosecution, upon which the study substantially focused, were more likely to include serial offenders).

[260] *Id.* at 406-411 (noting serial offenders were more likely to commit offenses in "open areas," to attack strangers, and to use a weapon, but they were less likely to inflict "gratuitous injury.").

[261] *Id.* at 411.

> knife? Alley or car? Were their victims white, black, or Hispanic? Investigators even named them: the ponytail rapist, the early-morning rapist, the preacher rapist.
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> But Lovell recalled sitting in Cleveland's weekly task-force meeting, listening to the investigators describe cases. They would say: *This guy approached two of his victims on a bicycle, but there was this other attack that didn't fit the pattern.* Or: *This guy assaulted his stepdaughter, but he also raped two strangers.* "I was always like, 'This seems so very different,' " Lovell said. "This is not what we think about a serial offender. Usually we think of serial offenders as particularly methodical, organized, structured—the ones that make TV." [262]

If the public narrative is mismatched to the empirics, we might ask why. One answer is the kind of cases that attract journalist's attention and hold the public's interest. Certain kinds of jobs and positions may make repeat offending easier—such as being a Hollywood mogul or famous actor—and those people are the very ones journalists are likely to focus on. (No one wants to read a story in *Variety* about your next-door neighbor, the architect.) Moreover, the public is more likely to retain information about the people they thought they knew—think Cosby—than about the reporting of other incidents, for example, the sexual misconduct at the Ford Motor Company with respect to blue collar workers.[263]

Another reason for selection bias is simply journalistic practice.[264] Journalistic standards, requiring corroboration, push reporters to find additional victims. Jessica Bennett, gender editor for *The New York Times*, needs two sources for every allegation.[265] And, because similar incidents corroborate a story more strongly than do disparate accounts, this corroboration requirement pushes towards crafting the narrative as presenting a pattern.

Early in *She Said*, the chronicle of Pulitzer Prize winners Jodi Kantor and

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[262] Hagerty, *supra* note 195. The success of #WeToo will thus also depend upon adequate training for police officers of what to look for. If serial rapists don't look like other serial offenders—if these crimes are more opportunistic than highly specialized—then it is imperative that investigators realize that they cannot rule out the possibility that they have a serial rapist just because there is not a highly specialized pattern.

[263] Karen Zraick, *Ford Workers Who Sued Over Sexual Harassment Face Setback*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/23/business/ford-sexual-harassment-lawsuit.html.

[264] I owe this insight to Abby Porter.

[265] The Takeaway, *How Journalists Corroborate Sexual Harassment and Assault Claims*, WNYC STUDIOS (Dec. 18, 2017), https://www.wnycstudios.org/podcasts/takeaway/segments/how-journalists-corroborate-metoo.

Megan Twohey's investigation of Harvey Weinstein and later involvement in the Kavanaugh case, Kantor describes her meeting with Rose McGowan. From the start, the journalist recognized that it could not be a single allegation: "As a sole account, McGowan's story had a high likelihood of becoming a classic 'he said, she said' dispute. McGowan would tell a terrible story. Weinstein would deny it. With no witnesses, people would take sides, Team Rose versus Team Harvey."[266] Kantor then discussed the case with her editor: "They discussed whether McGowan's account could be backed up, and the important question: did other women have similar stories about him?"[267] And, these concerns were legitimate. They realized that when Ashley Judd talked to *Variety* in 2015, without specifically naming Weinstein, all the attention focused on Judd.[268] "This was a cautionary tale. Judd's account in *Variety* had been gutsy, but it was a lone account without a perpetrator's name or any supporting information. Impact journalism came from specificity—names, dates, proof, and patterns."[269]

Then, early in their investigation, they realized, "The O'Reilly story offered a playbook. Almost no one ever came forward completely on their own. But if patterns of bad behavior could be revealed, there might be a way to tell more of these stories."[270] Ultimately, Kantor and Twohey describe the stories as "The Pattern":

> Weinstein's hallmark moves, so similar from account to account. Each of these stories was upsetting unto itself, but even more telling, more chilling, was their uncanny repetition. Actresses and former film company employees, women who did not know one another, who lived in different countries, were telling the reporters variations on the same story, using some of the same words, describing such similar scenes.[271]

One reason for such journalistic standards is surely self-protective. Just prior to #MeToo was an egregious case of journalistic malpractice, a story that served as a cautionary tale for newspapers and reporters alike: *Rolling Stone*. On November 19, 2014, *Rolling Stone* published, "A Rape on Campus,"[272] a now-retracted article, detailing a gang rape of a University of

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[266] KANTOR & TWOHEY, *supra* note 22, at 13.
[267] *Id.*
[268] *Id.* at 36.
[269] *Id.* at 36.
[270] *Id.* at 25.
[271] *Id.* at 73.
[272] Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), https://archive.vn/20141119163531/http:/www.rollingstone.com/culture/features/a-rape-on-campus-20141119.

Virginia student at a campus fraternity party, a rape that never happened.[273] The end result was a hefty settlement for defamation.[274]

Another reason is protecting the person accused. Toward end of book, Kantor and Twohey raise the concern about single accusations. On the Aziz Ansari accusation, the authors noted that "thin and one-sided" accounts raise "questions of fairness to those facing accusations."[275]

These standards also protect victims. Judd was left exposed, and the story was about her, because it was not corroborated. Journalists aim to protect their sources, not to leave them vulnerable to attack. The more bullet-proof the story, the more the victim is potentially vindicated.

Nevertheless, journalists are live to the concern that wanting such strong cases suppress some stories. Koa Beck, editor-in-chief of *Jezebel*, states that because of the need for corroboration, reporters may implicitly be telling uncorroborated victims, "Journalistically, your rape did not happen."[276]

3. Impact of Narrative Mismatch on Jury Assumptions

The popular narrative is clear. Sexual assault is about patterned, serial rape. This is the narrative against which the jury evaluates the victim's testimony.

Narratives that don't match reality can be problematic in many respects. First, we may unduly shift resources to serial cases, assuming that they represent the majority of the problem.[277] Second, we will have to undo this thinking for law enforcement, as the evidence is that even serial offenders do not offend with a particular modus operandi.[278]

Third, reifying a misleading narrative of what sexual violence looks like can present problems for prosecutors. The Supreme Court noted in *Old Chief*,

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[273] Sheila Coronel, Steve Coll & Derek Kravitz, Rolling Stone*'s Investigation: 'A Failure That Was Avoidable'*, COLUM. JOURNALISM REV. (Apr. 5, 2015), https://www.cjr.org/investigation/rolling_stone_investigation.php).

[274] Doreen McCallister, *"Rolling Stone" Settles Defamation Case With Former U.Va. Associate Dean*, NPR: THE TWO-WAY (Apr. 12, 2017, 4:32 AM), https://www.npr.org/sections/thetwo-way/2017/04/12/523527227/rolling-stone-settles-defamation-case-with-former-u-va-associate-dean.

[275] KANTOR & TWOHEY, *supra* note 22, at 185.

[276]The Takeaway, *supra* note 265; *see also* Monica Hesse, *Tara Reade, Joe Biden and the Limitations of Journalism*, WASH. POST (Apr. 26, 2020, 4:59 PM), https://www.washingtonpost.com/lifestyle/style/tara-reade-joe-biden-and-the-limitations-of-journalism/2020/04/16/da25211c-7dbd-11ea-a3ee-13e1ae0a3571_story.html (detailing the difficulty with investigating sexual assault allegations).

[277] This is Swartout et al.'s complaint about the Lisak and Miller study. *See* Swartout et al., *supra* note 254, at 1153 (cautioning against "'one-size-fits-all' institutional responses to misconduct resolution or sexual violence prevention").

[278] *See supra* text accompanying notes 258-62.

"there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be."[279] When jurors don't see what they expect to see, they may be less likely to convict, worried the Court.[280]

As an example, consider one aspect of the disbelief surrounding Tara Reade's claim that Joe Biden had pressed her against a wall, lifted her skirt, and digitally penetrated her.[281] One newspaper reporter, flummoxed by the difficulties in fairly reporting such cases, noted that she read the comments sections on various websites to assess the public reactions.[282] Among them she found:

> There were those who turned to academic literature, discussing patterns of predation — repeat offenders like Harvey Weinstein and Bill Cosby — and speculating that, if Biden were guilty, there would be more accusers. He'd previously been accused of shoulder rubs and hugs, but was this on the same spectrum?[283]

Tara Reade's claim was not just judged against the standard of whether it was plausible, but rather, whether there was the pattern of repeated, similar misconduct seen in other cases.

This worry is not limited to comments on websites. Empirical studies support that such narratives could influence juries. First, studies show that how subjects are primed to understand a category determines whether new evidence (the target) falls within it. When a category is extreme (as a serial rapist with a particular modus operandi is), a targeted stimuli (a typical rape accusation) will be contrasted against it.[284] That is, if the priming category is extremely negative, and the target is not, subjects assess the target as more positive than they would otherwise.

Second, the impact of public narratives on criminal trials is studied with respect to the "CSI effect." Do jurors expect what they see on television? Interestingly, although prosecutors worry that the effect raises the bar for

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[279] Old Chief v. United States, 519 U.S. 172, 188 (1997).
[280] *Id.*
[281] Hesse, *supra* note 276.
[282] *Id.*
[283] *Id.*
[284] Paul M. Herr, et al., *On the Consequences of Priming: Assimilation and Contrast Effects*, 19 J. EXPERIMENTAL SOC. PSYCH. 323, 338 (1983) (finding that when extreme categories are primed, contrast effects are seen); *see also* Paul M. Herr, *Consequences of Priming: Judgment and Behavior*, 51 J. PERSONALITY & SOC. PSYCH. 1106 (1986) (replicating findings with respect to social categories).

conviction,[285] one study found that the effect benefits prosecutors.[286] Irrespective of how this sorts out empirically, theorists do not doubt the more general point here—that the narrative does influence the lens through which jurors understand the criminal trial.[287]

Third, the concern that #WeToo reifies a particular way that rape occurs may simply be the newest iteration of the influence of well-documented "rape scripts." Recent studies have still found that both male and female mock jurors view testimony through scripts about how they think consent is communicated, how men are unable to easily curb sexual desire, where sex would occur, what type of people are sexually compatible, and whether sex is forceful.[288] Researchers found that scripts that were "highly suspect in terms of their factual grounding or normative value" "clearly played a key role in helping the jurors [of both genders] to delineate the boundaries between 'normal' sex and rape."[289] As reformers struggle to get the public to understand what rape actually looks like, #WeToo potentially compounds the current confusion.

B. Continued Discounting and Concretizing Corroboration

Is the success of #WeToo the success of #MeToo? There are two worries here. First, although multiple allegations yield that juries are likely to conclude that the defendant committed the offense, jurors can reach that conclusion merely because of the numbers. That is, they do not stop discounting. Second, the idea that convictions can be achieved with multiple victims is just a corroboration requirement. Instead of looking for other

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[285] *E.g.*, Andrew P. Thomas, *The* CSI *Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006), http://yalelawjournal.org/forum/the-csi-effect-fact-or-fiction.

[286] *E.g.*, Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2005).

[287] Tom R. Tyler, *Viewing* CSI *and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1063 (2006) ("Fictional depictions of crime and the criminal justice process can and do spill over to shape public views about the nature of crime and criminals.").

[288] Louise Ellison & Vanessa E. Munro, *Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation*, 18 SOC. & LEGAL STUD. 291 (2009).

[289] *Id.* at 307; *see also* Fiona Leverick, *What Do We Know About Rape Myths and Juror Decision Making* 35 (Scottish Jury Rsch. Working Paper 1, 2019), https://www.gla.ac.uk/media/Media_704445_smxx.pdf (surveying quantitative and qualitative evidence and concluding that "there is overwhelming evidence that jurors take into the deliberation room false and prejudicial beliefs about what rape looks like and what genuine rape victims would do and that these beliefs affect attitudes and verdict choices in concrete cases").

evidence, we look for other victims.

Consider first the concern about devaluing women's testimony. Although I will present this probabilistic reasoning more formally in the next section, we can simplify for our purposes here. Assume that you have five friends whom you like quite a bit, but you also take to be prone to exaggeration, hyperbole, and the occasional lie. You never take anything any one of them says at face value. But now all five of them independently tell you the same story. And you believe it. Even though you are only willing to credit each one to a limited extent, the group of five independently told stories is enough for you.

Now, perhaps there is a feedback loop, and you decide that each of one of these five, say your buddy Tony, is really a bit more reliable than you thought. After all, he told you the truth in this one case. But you wouldn't have to do much adjustment. You'd be able to get the "right" answer in the group case as to whether the event occurred while still remaining skeptical that any of your friends was a particularly reliable witness. Similarly, the fact that the jury credits Constand's allegations against Cosby might mean that they believe *her*. But the jury would not have to—they would only have to say that with six women testifying as to Cosby's acts, they are confident Cosby did this. And they can do that while maintaining a skeptical stance toward each individual woman's testimony.

For this reason, we should be wary in claiming victory for the *me's* because of the success of the *we's*. Only time will tell whether group benefits will inure to the benefits of the individual. We should not have blind faith in trickle down theories. Not in economics.[290] And not with respect to rape.

But there is a second concern. We are seeing the success of bringing cases with multiple victims. And, this spurs prosecutors to charge multi-victim cases. But women who have been sexually assaulted by non-serial rapists may be left behind. After all, individual cases will become (or remain) exceedingly hard to win. So, a woman may only see her rapist prosecuted, and potentially convicted, if her attacker attacks another person. #WeToo is about corroboration, and thus, there is a sense that rather than taking women's claims more seriously, we actually concretize devaluing them.

As Charles Barzun notes, corroboration rules, by devaluing the testimony of one person unless there is other evidence, effectively set the weight of that testimony.[291] Rules of weight place a ceiling on the persuasive value of the

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[290] Christopher Ingraham, *'Trickle-Down' Economics Doesn't Work, According to Comprehensive New Research*, WASH. POST (Dec. 23, 2020, 12:42 PM), https://www.washingtonpost.com/business/2020/12/23/tax-cuts-rich-trickle-down/.

[291] Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957 (2008). Barzun suggested rules of weight—not for sexual violence—but as an alternative to the on/off switch of admissibility. Instead, of excluding iffy evidence, the thought is to instruct the jury as to

evidence.[292] One example of such a rule is the requirement that there be two witnesses for treason.[293] Typically, corroboration comes from another witness, or physical evidence, that supports the conviction. The idea is that the witness' word alone is insufficient. It cannot get to beyond a reasonable doubt on its own. In these cases, if, to be successful, a claim of sexual assault must be accompanied by *another claim of sexual assault*, then an individual victim's testimony cannot meet the burden of beyond a reasonable doubt. Rather than overcoming the credibility discount, then, #WeToo threatens to embed it.

This is evident when we think about the reporting of sexual assault charges, and the way that the Christine Blasey Ford accusation was handled. Her handlers worried about her going forward alone. Of course, given that the Kavanaugh confirmation was unabashedly political, we cannot glean much from either side. But we can see how difficult it is for compelling witness testimony to meet an evidentiary threshold. The hope that other women would also come forward was ultimately a recognition that one woman's testimony was not going to be sufficient. In seeking groups, we may be giving up on the ability of any one woman's testimony to establish proof beyond a reasonable doubt.[294]

Now, one reply to this concern is that this does not change the status quo. After all, if there was already a devaluing and a de facto corroboration requirement, #WeToo is not causing the problem. So, how can it generate a new reason to worry?

This rejoinder is well taken, but the concern is that progress is actually a mirage. As advocates celebrate the success of #MeToo in the Weinstein verdict, they may be misinterpreting the success of #WeToo for enhanced credibility. The founder of the Equal Justice Foundation commented after the Weinstein verdict that she hoped it would inspire other prosecutors to bring similar charges, as "[w]e need prosecutors to show courage."[295] But if it takes *courage* to prosecute a case with six victims, prosecutors are not going to see a reason to risk acquittals in single victim cases. Prosecutors should be urged to go forward in individual cases when the evidence is sufficient, even if the jury will not convict,[296] and to abandon the search for additional corroborating evidence as a prerequisite to charging. Although a

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how much weight it might bear. *Id.* at 1958-59.

[292] *Id.* at 1984.

[293] US CONST. art. III, § 3, cl. 1 ("No person shall be convicted of Treason unless the Testimony of two Witnesses to the same over Act, or on Confession in open Court.").

[294] This will be particularly true in acquaintance rape cases in which it is unlikely that there is compelling physical evidence.

[295] Twohey & Kantor, *supra* note 168.

[296] *See generally* Dempsey, *supra* note 198 (urging the pursuit of cases even if juror bias will make convictions difficult to attain).

world where the likes of Nassar, Cosby, and Weinstein are convicted is better than a world in which they are not, our focus on these success stories may blind us to the fact that we have not removed the barriers to obtaining a rape conviction in individual cases, and indeed, may have just created another type of corroboration that police and prosecutors will not go forward without. We risk declaring victory when no individual victim is ever believed and few single acts of rape are bravely prosecuted.

C. Problematic Joinders, Illicit Evidentiary Arguments, and the Burden of Proof

Above I suggested that #WeToo may be problematic for individual allegations and whether they are, or are perceived as, able to surmount the beyond a reasonable doubt standard. But we should take a step back and ask why it is that group allegations can do so. Are group allegations coming in fair and square or by evidentiary sleights of hand?

Allegations by multiple victims can impact trials in two ways. First, when a defendant is charged with one criminal act, other allegations may be offered to prove that the defendant committed the crime alleged. Second, defendants can be charged with multiple acts of sexual assault in a single trial. As might be expected, more charges increase the likelihood of conviction.[297] As is likely expected, but regrettable, the admissibility of some of this evidence and the joinder of some of these charges, rests on potentially problematic evidentiary assumptions. In other words, multiple charges are bad for defendants, and sometimes, they are *unfairly* bad for defendants.

This Section begins by explicating the legal standards for admissibility of prior bad acts and for joinder of multiple counts. Because evidentiary arguments are the ones that support joinder as well as the denial of severance, the likelihood of multiple charges being brought together stands and falls with the advancement of legitimate evidentiary arguments. After laying out the basics, I raise four concerns—the simple objection to joinder, the probabilistic objection to joinder, the worry about faulty evidentiary arguments, and the illusory allure of the doctrine of chances.

1. Admissibility of Other "Bad Acts"

Allegations of one crime may be offered at trial to increase the probability that the defendant has committed the charged offense.[298] Assume a defendant

[297] Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349 (2006).

[298] Under the Federal Rules of Evidence, for example, the basic relevancy test is whether the proffered evidence has "any tendency" to make a fact of consequence "more or less

is charged with one act of rape, but the government wishes to introduce evidence that the defendant committed three other rapes in the past. In terms of everyday inferences, the fact that the defendant did something in the past might increase the probability that he is the sort of person to do it again. For instance, you make assumptions about whether someone is "trustworthy" or "chronically late" from which you then infer whether she is acting in accordance with her character on a particular occasion. However, evidentiary rules forbid this very inference in all civil cases and in almost all criminal ones, unless introduced by the defendant.[299] Although it is commonplace to rely on this sort of reasoning in our lives, it is pernicious in the courtroom because jurors may seek to punish the accused for the earlier act and not the crime on trial, and they may give too much weight to the predictive accuracy of character traits.[300] In short, the government may not use criminal propensity to attain a conviction. Nevertheless, in the sexual assault arena, two avenues of admissibility exist.

First, despite the general rule against propensity evidence, the rule in sexual misconduct cases differs in some jurisdictions. For civil and criminal actions involving sexual misconduct and child molestation, Congress adopted Federal Rules of Evidence (FRE) 413-415, rendering admissible evidence of one bad act to prove the defendant's propensity to commit such crimes.[301] Prosecutors are thus permitted to introduce evidence to show that a defendant has a propensity to commit sexual assault or child molestation and acted in accordance with this propensity. Many scholars have objected to these rules,[302] and the recent American Law Institute sexual assault reform project specifically rejects them in the revised Model Penal Code finding them "unsound."[303] Notably, many states have not adopted these provisions and, therefore, state cases, where most rape prosecutions occur, will not have this

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likely." *See* FED. R. EVID. 401.

[299] *See* FED. R. EVID. 404(a).

[300] Edward J. Imwinkelried, *The Evidentiary Issue Crystalized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony about an Accused's Uncharged Misconduct under the Doctrine of Objective Chances to Prove Identity*, 48 SW. L. REV. 1, 10 (2019).

[301] This adoption was controversial. Report of the Judicial Conference on the Admission of Character Evidence in Certain Misconduct Cases, *reprinted in* 159 F.R.D. 51, 53 (1995) (strongly opposing the adoption of FRE 413-415).

[302] *See, e.g.*, I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 828 (2013) (calling FRE 413 a "rape sword" and noting that such rules "not only tip the scales against innocence" but also "frustrate the truth-finding process, undermine the notion of innocent until proven guilty, and result in miscarriages of justice"); Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 623 (1997) ("Rule 413 is a dangerous means of securing more rape convictions. Its rationale is not supported by evolving standards of rape.").

[303] MODEL PENAL CODE § 213 (AM. L. INST., Tentative Draft No. 1, 2014).

evidentiary avenue available.[304]

Second, even without FRE 413-415, FRE 404(b) permits evidence of other acts for other inferences including motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. These are permissible uses of so-called "prior bad acts" evidence (which need be neither prior nor bad). For example, in *Home Alone*, the Wet Bandits left the sink running in each house they burgled.[305] Accordingly, when coming across a home with the sink running, the unique *modus operandi* allows for the inference that the defendants committed that burglary as well. Specifically, *modus operandi* helps to establish identity. To get from "sinks running" to "these defendants did it," requires no general assumption about the propensity of the defendants as "burglars." Rather, the inference is "these sinks are running," to "the Wet Bandits are known to have this highly specialized behavior of leaving the sinks running" to "the Wet Bandits committed this offense."

Consider how each of these approaches works in a sexual assault case. If Harvey is charged with sexually assaulting victim A, and evidence is introduced that he assaulted victims B, C, and D, then the jury may reason: "Harvey assaulted B, C, and D; therefore, Harvey is a rapist. Given that Harvey is a rapist, it is more likely that Harvey raped A." This is a propensity inference, permitted under the FRE. Alternatively, the jury might reason, "Bill gave pills to B, C, and D and they then passed out before he had sex with them. Therefore, he knew of the intoxicating properties of the pills when he gave them to A and the absence of her consent." This evidence certainly allows one to infer that "Bill is a rapist," but the jury need not reason from such an inference to reach the conclusion that Bill knew how the pills worked.

Three other evidentiary rules apply as well. First, in federal cases, under *Huddleston*, the existence of the prior bad act is a FRE 104(b) determination such that there need only be sufficient evidence for the jury to find the prior bad act occurred.[306] States may have more rigorous standards.[307] Second, the admissibility will still be governed by FRE 403, such that if the prejudicial effect substantially outweighs the probative value, the evidence may be

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[304] For states with similar provisions, *see, e.g.*, ARIZ. R. EVID. 404(c); CAL. R. EVID. 1108; FLA. R. EVID. 90.404(2)(c)(1); GA. CODE § 24-4-413(a) (2014); ILL. R. EVID. 413. States that do not have such provisions include New Jersey, New York, and Pennsylvania.

[305] *Home Alone (1990): Plot Summary*, IMDB, https://www.imdb.com/title/tt0099785/plotsummary?ref_=tt_stry_pl#synopsis (last visited Feb. 25, 2021).

[306] Huddleston v. United States, 485 U.S. 681 (1988).

[307] Jason Tortora, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 FORDHAM URB. L.J. 1493, 1511-1512 (2013) (surveying state legal standards that depart from *Huddleston*).

excluded.[308] Notably, as constructed, the rule is heavily weighted in favor of admissibility. FRE 403 serves as a constitutional safety hatch for FRE 413-414, as Federal Circuits faced with due process claims have found that 413 and 414 are not unconstitutional because 403 protects against unfair prejudice.[309] Again, states may deviate from this test, and Pennsylvania, where Cosby was tried, requires the probative value to outweigh the prejudicial effect.[310] Third, FRE 105 allows for limiting instructions.[311] Hence, the defendant is entitled to an instruction that the other acts evidence is being offered to prove knowledge but cannot be used to prove propensity (absent 413).[312]

2. The Legal Standard for Joinder

Under Federal Rule of Criminal Procedure 8(a) cases may be joined when they are part of the same act or transaction, are part of a common scheme or plan, or are of the "same or similar character." Though Circuits may vary on the exact requirements,[313] consider the Ninth Circuit's stringent test for "same or similar character":

> 1) whether the elements of each statutory offense are similar; 2) whether the charges involve a similar victim; 3) the location of the alleged crimes; 4) the modes of operation for each crime; 5) the temporal proximity of the acts; and 6) the extent of evidentiary overlap.[314]

Once joined, defendants can move to sever under Federal Rule of Criminal Procedure 14(a). The burden is then on defendants to demonstrate clear, manifest, or undue prejudice.[315] Here, the question of whether there is overlapping evidence plays a large role in this determination.[316]

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[308] FED. R. EVID. 403.

[309] Fang Bu, Note, *Searching for a Better Constitutional Guarantor for FRE 413-415*, 2016 U. ILL. L. REV. 1905 (2016).

[310] 225 PA. CODE § 404(b)(2).

[311] FED. R. EVID. 105.

[312] Most scholars are skeptical of the effect of limiting instructions. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985). *But see* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 419 (2013).

[313] Andrew Leipold, *Rule 8. Joinder of Offenses or Defendants*, *in* 1A FED. PRAC. & PROC.: FED. R. CRIM. PROC. § 144 (Charles A. Wright & Arthur R. Miller, eds., 5th ed. 2014).

[314] United States v. Jawara, 474 F.3d 565, 578 (9th Cir. 2007).

[315] United States v. Adler, 879 F.2d 491, 497 (9th Cir. 1988).

[316] Unites States v. Mujahid, 3:10-CR-00091-HRH-DMS, 2011 WL 13359594 (D.

Federal and state courts are likely to allow joint adjudication of distinct sexual assault allegations. In federal cases, FRE 413 renders the showing of manifest prejudice necessary for severance all but impossible. Consider *United States v. Tyndall,* wherein the Eighth Circuit affirmed the conviction of a defendant charged with two attempted sexual assaults.[317] First, the defendant asked a thirteen-year-old girl to accompany him in his car to his aunt's home because he might need her to drive him home as he had been drinking, but along the way, he pulled into a cornfield, held the knife to her throat, and told her he wanted her to "make love" to him.[318] She escaped.[319] A year later, Tyndall was at his brother's home where he encountered a sixty-seven-year-old woman whom he grabbed twice by the arm and requested that she perform oral sex on him.[320] She also escaped.[321] (Tyndall was only convicted of the former charge.[322]) The Eighth Circuit agreed with the district court that these two were sufficiently similar because both were "impulsive crimes of opportunity where it was alleged that Mr. Tyndall had managed to isolate his intended victims" and the events occurred over a "relatively short" time period.[323] Moreover, the evidence overlapped because FRE 413 rendered each incident admissible for the other, and the court did not believe admissibility ran afoul of FRE 403.[324]

State courts may be equally, or even more, liberal. Wisconsin has found a "same or similar character" if the evidence for each crime overlaps and they occur over a relatively short time period.[325] A Georgia appellate court found incidents to reflect a "common motive, plan, scheme, and bent of mind" that met a "common scheme or modus operandi" where the only supportive evidence was the similarity in age of the victims, that they did not know the defendant, and that each assault involved a "secluded location" where a handgun was used.[326]

Practical realities will determine much of what is and is not joined. A prosecutor cannot join different charges if they occurred outside her jurisdiction. And, the statute of limitations may have run on some of the complaints, such that they can only be used as evidence. Of course, even an acquittal in a prior case does not prevent its use as a prior bad act, as the

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Alaska, May 25, 2011).

[317] United States v. Tyndall, 263 F.3d 848 (8th Cir. 2001).

[318] *Id.* at 849.

[319] *Id.*

[320] *Id.*

[321] *Id.*

[322] *Id.*

[323] *Id.* at 850.

[324] *Id.*

[325] State v. Cramer, 321 Wis.2d 477, ¶ 3 (2009) (unpublished opinion).

[326] Ray v. State, 763 S.E.2d 361, 363 (Ga. Ct. App. 2014).

evidentiary standards are markedly different.[327]

3. Worries about Group Allegations

With these procedural and evidentiary rules in place, let us consider how things can go awry. We can unpack the concerns into four (ultimately related) categories: (1) the simple objection to joinder, (2) the probabilistic worry with joinder, (3) the concern about faulty evidentiary arguments, and (4) the illicit inference from the doctrine of chances.

a. Joinder: The simple objection

The conventional wisdom is that it is bad for defendants to have their charges joined. The question is whether that is supported by empirical evidence. Indeed it is. A study by Andrew Leipold and Hossein Abbasi revealed that joinder increases the probability of conviction on the most serious count charged by more than ten percent.[328] Hence, #WeToo before one jury increases the chances that the defendant will be convicted.

b. Joinder: The probabilistic worry

If joinder increases the probability of conviction, we must ask what the underlying mechanism is. One question is how the evidence relates to each other, a question to which we will return. But for now, we should ask whether the mere aggregation of cases impacts, and potentially circumvents, the burden of proof.

To understand this, let's consider Fred Schauer's recent challenge to conventional legal thinking.[329] As Schauer argues, if "Harvey" (Schauer's "not-so-hypothetical example") is alleged to have committed four sexual assaults, and each charge is, based on the evidence, 80% likely to be true, then the likelihood that Harvey committed at least one of these acts is

[327] *See, e.g.*, Commonwealth v. Young, 989 A.2d 920, 925-926 (Pa. Super. Ct. 2010).

[328] Leipold & Abbasi, *supra* note 297, at 401 ("Our study shows that the joinder of charges has a prejudicial effect on the defendant, increasing the chances of conviction of the most serious charge by more than 10%.).

[329] Frederick Schauer, *Sanctions for Acts or Sanctions for Actors*, (Va. Pub. L. and Legal Theory Rsch. Paper No. 2018-41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212111.

99.984%.[330] Notably, there is nothing special about sexual assault here.[331] The argument is simply math.

Schauer wonders whether we should have a problem convicting Harvey.[332] This is not punishing Harvey generally as a rapist. It is not to punish him based on a propensity.[333] Rather, the math is that he committed one of these crimes. Just because we do not know which one, asks Schauer, should it matter?

Our aim here is not to determine whether Schauer's methodology is correct or whether his normative conclusions are,[334] but rather, to recognize that this sort of probabilistic reasoning may be implicitly affecting jury reasoning and explicitly employed for evidentiary cases. Specifically, Schauer argument is useful both to articulate what might be at work in explaining Leipold and Abbasi's finding about the effect of joinder, and it will be useful to unpack a profound confusion about the "doctrine of chances," an argument at work in the Cosby case to which I will return later in this section.

To get us started, let's be clear on what this claim is. Assume that the question is whether Jane, who flipped a coin 20 times, flipped a heads at least once. The probability there ($1-.5^{20}$) is .9999. We thus are confident in saying that Jane's coin flips included a heads.

Of course, for Schauer's thought experiment to hold, it must be true, as he knows,[335] that the events are stochastically independent. Notice that no coin flip impacts the other. This can be true in sexual assault cases. Victims in different jurisdictions who go to the police at different times are unlikely to be aware of each other's identity. In contrast, if one victim only comes forward after she hears of another's allegations, the events may not be independent of each other.

For joinder cases, then, jurors may be relying on two different types of reasoning. The first "what are the chances?' argument simply relies on

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[330] *Id.* at 3. ("Assuming, crucially, that there is genuine independence among the multiple accusations, the likelihood that Harvey has committed at least one of these acts is 1 - ((1-.80) x (1-.80) x (1-.80) x (1-.80), which is .99984, a likelihood that is, for all (or at least most) practical purposes, equivalent to absolute certainty.").

[331] Porat and Posner suggest that criminal law should consider cross-claim aggregation more generally. *See* Ariel Porat & Eric A. Posner, *Aggregation and the Law*, 122 YALE L.J. 2, 34-37 (2012).

[332] Schauer, *supra* note 329, at 9.

[333] *Id.* at 13.

[334] For a rejection that legal fact-finding relies on classical logic's assumption of bivalence such that the multiplication rule applies, in favor of a view of legal fact-finding as "fuzzy logic," see Kevin M. Clermont, *Aggregation of Probabilities and Illogic*, 47 GA. L. REV. 165 (2012).

[335] Schauer, *supra* note 329, at 3 (noting that his hypothetical "crucially" rests on "genuine independence").

probabilities. There is a deep and important complaint here, and it is whether the burden of proof is satisfied with respect to the crime for which the defendant is convicted.

This is not to say that this would not be useful as a normative debate. If the prior section taught us anything, it was that getting to beyond a reasonable doubt is extremely difficult in these cases. But functionally, multiple allegations may be circumventing reasonable doubt with respect to every single victim because probabilistically we can be confident beyond a reasonable doubt that the defendant committed at least one act. Our procedural rules are allowing an evasion of the burden of proof without ever directly confronting that that is what they are doing. To be sure, jurors may be instructed that they must find that the defendant committed this particular act, but the Leipold and Abbasi finding reveals that joinder stacks the deck.

But it is the second sort of reasoning by jurors that should give us even greater pause: they may be relying on propensity inferences. Recall that outside the sexual assault context, the rules forbid propensity; that many jurisdictions reject propensity; and that scholars condemn it as normatively unjustified. We should worry that the increased likelihood of conviction rests on the jury's reliance on criminal propensity to draw conclusions across cases. Indeed, the worry is not that Harvey is convicted of one act (which is probabilistically justified), but that Harvey is convicted of all the acts (which would not be). To fully unpack this worry, let us turn to the evidentiary concerns with multiple allegations.

c. Faulty evidentiary arguments

With respect to Harvey, an interlocutor might reply that there is protection. After all, a case should be severed if the evidence would not be cross-admissible. Thus, there has to be a legitimate evidentiary purpose, and we should be less concerned about improper convictions.

But the force of this reply depends on what a legitimate evidentiary purpose is. Here, I want to suggest that there is a potential for at best mushy thinking and at worst significant abuse.

To see the concerns, let us return to Cosby.[336] Considered alone, Andrea

[336] I discuss Cosby and not Weinstein for two reasons. First, the sexual predator crime in New York effectively punishes serial rape. It therefore raises problematic propensity concerns, but embeds them within the substantive criminal law. It would take us too far afield to fully unpack this. Second, the motions and order with respect to the 404(b) witnesses, called *Molineux* witnesses in New York, are under seal at the time of this writing. Accordingly, only sparse newspaper reporting includes the theories of admissibility, namely gesturing at the very sort of pattern argument used in Cosby. Arguably, what Edward Imwinkelried calls a "template" pattern—that the defendant settles on one particular approach to consistently use—is tenable. *See* EDWARD J. IMWINKELRIED, UNCHARGED

Constand's claim was a classic she said/he said. She drinks, takes some pills, and claims Cosby assaulted her. He claims consent.

The prosecutor's brief for admitting the evidence of nineteen other women compellingly shifts that narrative.[337] Any individual instance, considered alone, was about intoxication and a debate about consent. Considered together, the picture is clear: Cosby clearly spiked women's drinks or gave women pills under false pretenses, knowing that it would render them barely conscious and/or immobile, and then he sexually violated them. The story is a harrowing one of serial rape.

Pennsylvania, where Cosby was tried, does not have a FRE 413 analogue. Thus, a legitimate 404(b) relevancy must be given, one that meets Pennsylvania's weighted test, against admissibility, for prior bad acts. [338]

In this case, the evidence suggests there is a higher probability that Cosby gave Constand something other than just wine and Benadryl, that he knew that what he had provided had a grossly intoxicating effect, that he knew she was unconscious, and thus, that not only was she not consenting but also he was aware of the fact that she was not consenting. At the very least, it is relevant to show "absence of mistake or accident." Hence, to be clear, there was a rather compelling case for admissibility for the "prior bad acts" that did not depend on propensity reasoning. The case for admissibility in Cosby is strong because he had engaged in prior conduct that has a strong tendency to prove he knew the pills he gave Constand would incapacitate her and render her unable to consent.[339]

Yet, not all cases are quite so perfectly patterned, and evidentiary arguments may be contorted for admissibility. Indeed, the potential for improper evidentiary arguments is apparent in the *Cosby* case itself—arguments made by the prosecutors, by the court, and by commentators all contain problematic evidentiary theories. And, if we can't get this right in *Cosby*, will we get it right in weaker cases?

First, the prosecutor's brief in *Cosby* points to a particular modus operandi—a signature crime. That seems true. But recall that what modus operandi is typically admissible for is to prove *identity*. That is, "<u>who</u>dunit." The prosecution argued this:

> The matching characteristics between the present case and the prior

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MISCONDUCT EVIDENCE § 3:24 (2021).

[337] Commonwealth's Memorandum of Law In Support Of Its Motion To Introduce Evidence Of 19 Prior Bad Acts Of Defendant, No. CP-46-CR-0003932-2016, (Pa. Ct. Com. Pl., Jan. 18, 2018) [hereinafter Commonwealth's Brief].

[338] 225 PA. CODE § 404(b)(2) ("In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.")

[339] *Accord* Baker, *supra* note 302 (noting that what seems to be propensity or "doctrine of chances" often supports absence of mistake or accident).

> incidents elevate the incidents into a unique pattern that distinguishes them from a typical or routine sexual abuse pattern, and instead establishes a *modus operandi* or pattern of behavior so distinctive—and, in fact, unprecedented—that these prior bad acts are all recognizable as the handiwork of the same perpetrator: defendant.[340]

But given that the question was never whether it was Cosby, so what?

Another argument made, both at the trial and the appellate level, is plan.[341] Plan and common scheme are useful evidentiary arguments when they show that what appears to be disparate acts are really part of an overarching plan. If A steals rope, and hacks the computer system to find B's schedule, they support the inference that A has a plan to kidnap B. In contrast, if C robs a 7-11 today, and another 7-11 tomorrow, he does not have a plan. If D swipes right on Tinder, he may be hoping to have sex with E, and the next time with F, but he does not have a "plan" that connects them. So, unless we want to say "C robs for money" or "D uses Tinder for sex" is a plan, and not just propensity evidence, we should be worried about construing plan so broadly. Now, to be fair to the Cosby advocates, there is Pennsylvania precedent that seems to support a broader understanding of "plan" more akin to what we have said about C and D,[342] but Pennsylvania has this wrong.[343] Using plan amorphously makes one wonder whether there was a plan at all.[344] Or, to quote a skeptical justice of the Pennsylvania Supreme Court during recent oral argument over Cosby's case, "Frankly, I don't see it."[345]

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[340] Commonwealth's Brief, *supra* note 341, at 337.

[341] *Id.* at 54-58 ("a recurring sequence of drug-induced sexual assaults over a continuous span of time"); Commonwealth v. Cosby, 224 A.2d 372, 402 (Pa. Super. Ct. 2019) ("His assault of Victim followed a predictable pattern . . . .").

[342] Commonwealth v. Tyson, 119 A.3d 353 (Pa. Super. Ct. 2015)

[343] *Id.* at 356.

[344] *Id.* at 366 (Pa. Super. Ct. 2015) (Donohue, J., dissenting) ("[U]nder the Majority's analysis, evidence is admissible as a common plan or scheme simply because a person has allegedly committed the same crime twice."); *see generally* IMWINKELRIED, *supra* note 336, § 3:24:

> [I]f the similarities are insufficient to establish modus [operandi] and there is no inference of a true plan in the defendant's mind [wherein he creates a template in advance as to how he will consistently commit the offense], the proponent is offering the evidence on a forbidden theory of [propensity]. It is immaterial that there are many instances of similar acts by the defendant; the large number of the acts increases the acts' probative value on the issue of the defendant's propensity, but standing alone the number of acts and similarities cannot change the propensity quality of the probative value.

[345] Gene Maddaus, *Pennsylvania Supreme Court Troubled by Bill Cosby Trial Witnesses*, VARIETY (Dec. 1, 2020, 8:04 PM), https://variety.com/2020/tv/news/bill-cosby-pennsylvania-supreme-court-argument-1234843012/.

d. The illusory allure of the doctrine of chances

But, you might say, the numbers don't lie. Nineteen women drink or take pills. Nineteen women become immobilized or barely conscious. Nineteen women say that any sexual contact was nonconsensual. Nineteen women. It is here, at its most compelling, that this evidence can be its most dangerous.

Enter the "doctrine of chances." This doctrine was invoked by the prosecutor, the trial court judge, amici, and evidentiary expert, Edward Imwinkelried, as a legitimate evidentiary avenue in the Cosby case.[346]

The doctrine of chances can be offered for both actus reus and mens rea. In the infamous Brides of Bath case,[347] the defendant was charged with murdering his wife, who was found drowned in a bathtub. His claim: accident. *Maybe, you might think.* She died just after she had purchased an insurance policy naming the defendant as the beneficiary. *Hmm*. And, then, there was one other fact. Two of his prior wives had died in exactly the same way. *So, he drowned her, right?* I think we conclude that he drowned them all.

As Imwinkelried argues, this is not propensity reasoning. Rather, the reasoning runs from other accidents to the inference "the objective improbability of so many accidents" to "one or some of the incidents were not accidents."[348]

This theory also applies to mens rea, specifically, absence of mistake or accident. Sure, you might not know there was marijuana in a secret compartment in your car once, but what are the chances this would happen four times without your knowing?[349]

Oddly, Imwinkelried argues that this kind of reasoning supports *identity* in the Cosby case.[350] But nowhere in his article does he articulate what he

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[346] *See* Commonwealth's Brief, *supra* note 341, at 63-73; *Cosby*, 224 A.3d at 401; Brief of Rape, Abuse & Incest National Network as Amicus Curiae in Support of the Commonwealth of Pennsylvania's Brief for Appellee, Commonwealth v. Cosby, No. 39 MAP 2020 (Pa. Sept. 14, 2020), at 11-16; Imwinkelried, *supra* note 300.

[347] R. v. Smith, 11 Cr. App. R. 229, 84 L.J.K.B. 2153 (1915).

[348] Edward J. Imwinkelried, *A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct*, 50 N.M. L. REV. 1, 7 fig.2 (2020).

[349] Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851, 878 (2017).

[350] Imwinkelried, *supra* note 300, at 17:

> Given the extensive publicity for the Cosby and Weinstein scandals, going forward we are likely to see more frequent citations of the doctrine of chances as a justification for admitting uncharged misconduct evidence to prove identity.

To be sure, identity can mean more than modus operandi. It can, for example, establish

means by identity, or why it would be relevant in the Cosby case. Instead, he depicts the inferences as follows:

> Evidence: "Other complaints of similar misconduct allegedly committed by the accused" ->
>
> "Intermediate inference": "the objective improbability of so many complainants making similar false accusations" ->
>
> "Ultimate inference": "The truth of one or some of the complaints."[351]

Did you see the rabbit go back in the hat? What the doctrine of chances is *is the very same kind of probabilistic reasoning that Schauer endorses at the beginning of this section*. As Imwinkelried himself explains:

> The doctrine rests on informal or intuitive probability reasoning. If the frequency of a type of event in a given case exceeds the normal incidence of such events, the extraordinary coincidence renders it implausible that random, innocent chance explains the higher frequency.[352]

Imwinkelried acknowledges the argument's implication: "the only warranted inference from the doctrine's applicability is that *one or some of the incidents* are likely not accidents."[353]

Here are two issues. First, once we see that this is math, we need to be careful about the independence of the allegations. The doctrine of chances works in the Brides of Bath case because none of the evidence was informed by the rest. The victims weren't talking to each other or comparing notes. Now, I do not want to be misunderstood. My goal is not to impugn the integrity of any complainant in the Cosby case. It is merely to note that this evidentiary argument makes a critical assumption about independence, and that assumption may not hold in many of these cases. Trial judges will need to exercise particular care here to make sure there is proof that predates the time that each witness came to know about the other's allegations.[354] That

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that the defendant was in the vicinity, and thus had opportunity, and thus he did it. But as the text above makes clear, Imwinkelried was offering a Schauerian argument about probabilities.

[351] *Id.*

[352] *Id.*

[353] Imwinkelried, *supra* note 369, at 10 (emphasis added).

[354] For an example of a case that clearly surpasses this threshold requirement, see People v. Kelly, 895 N.W.2d 230, 232 (Mich. Ct. App. 2016), wherein the state sought to introduce evidence of eight unrelated women in four different states. There, the allegations were connected not because the women knew of the other's allegations, but because the defendant

is, courts will need to require some showing of independence as a prerequisite to admissibility.

Second, even with this sort of independence, the doctrine of chances only supports the inference that one of the claims is true. But the problem becomes that rather than seeing the doctrine of chances as supporting that *one* of the witnesses in the Cosby case was drugged and raped by him, we are meant to see that he did that to *all of them*. The doctrine of chances, as merely a probability calculation, cannot get you there. As Sean Sullivan argues, if the doctrine of chances supports an inference that one of the acts occurred, then assume that you are 100% certain of it and *then you still must find a legitimate evidentiary inference for it*.[355] The doctrine of chances must be supplemented with another FRE 404(b) purpose.

That is, the doctrine of chances, which relies on stochastic independence, needs to be conjoined with a theory of dependence to prove anything beyond the probabilistic claim that Schauer makes.[356] Return to Jane. The fact that we can conclude she flipped a heads tells us nothing about the other coin tosses because each toss is independent. But, the doctrine of chances is supposed to tell us more—not only that the defendant committed one of the acts, but that he committed the charged act(s). That conclusion requires a link between the acts—like motive or plan—that ties them together. This second step, a form of dependent reasoning that turns on facts about Weinstein or Cosby, cannot come from the probabilistic doctrine of chances alone.

However, if the doctrine of chances alone only supports one of the acts, and not necessarily the one that has been charged, then what is it that causes the jury to be convinced the defendant committed the act(s) charged? Think about how you reasoned when you heard about Weinstein, Lauer, Nassar, or Cosby. All the charges mean he committed some of those acts, and then once you decided the perpetrator did some, it was an easy leap to the perpetrator committed many. And, you used everyday propensity reasoning to get there. But Pennsylvania rejected FRE 413 so it is impermissible to use this kind of reasoning in *Cosby*.

In sum, multiple allegations generate the potential for unfair verdicts. Group charges increase the possibility of conviction, and supplementary evidentiary arguments may implicitly rely on propensity reasoning. Propensity reasoning itself fails to take any individual charge seriously, relying instead on the assumption about who the defendant *is* and therefore

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was identified by DNA. *Id.*

[355] Sean P. Sullivan, *Probative Inference from Phenomenal Coincidence: Demystifying the Doctrine of Chances*, 14 LAW, PROB. & RISK 27, 50 (2015).

[356] *Id.*

what he must have done.[357]

D. Concluding Concerns

Criminal cases involve the possibility of error. We can fail to convict the guilty, and we can accidentally convict the innocent.

Sexual violence is particularly problematic because it is hard to prove. Indeed, as we looked at individual cases, the standard seems almost impossible to attain in the case of the individual victim. Although #WeToo offers some hope in group cases, the worry remains that we will declare victory while actually embedding the very discounting and corroboration worries that advocates had hoped to undermine.

Interestingly, where the sexual assault allegations are the most successful—in #WeToo situations—this success may be because we have circumvented the burden of proof. Defendants facing multiple charges are often encountering unfair grouping or illicit inferences putatively justified by broad joinder rules and expansive interpretations of evidentiary exceptions.

As things stand now, we risk failing both individual victims who cannot meet burdens and individual defendants who, faced with group allegations, watch the burden of proof diminish before their eyes.

IV. FURTHER QUESTIONS

A. Race

To this point, this Article has not discussed race, and yet, it purports to be about how justice may be unevenly distributed. Given that the criminal law is thought to itself contribute to gross racial inequalities, it is imperative to take stock of how race impacts our analysis of #WeToo.

Laws pertaining to sexual violence straddle two injustices. First, victims are left profoundly unprotected from grievous violence that is done to them. For some of these wrongs, a law does not exist on the books that prohibits it.

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[357] To be sure, the defendant receives some protection from jury instructions. However, consider how complex these instructions ought to be: they need to both vindicate the doctrine of chances (as probabilistic reasoning), prevent a straightforward assumption of guilt for the crime charged (that the probabilistic reasoning alone cannot support), direct the jury to consider permissible 404(b) purposes, and forbid the jury from considering propensity. In practice, the instructions are far more meager. The Cosby jurors were instructed that the evidence was admitted to show "common plan, scheme, design and/or absence of mistake" and no other purpose, including "bad character or… criminal tendencies." Transcript of Charge of the Court, Commonwealth v. Cosby, No. CR-3932-16, at 35-36 (Pa. Ct. Com. Pl. Apr. 25, 2018).

For others, that law exists in name only. A woman, who is raped, can have the courage to report it, subject herself to a four-to-six-hour inspection of every crevice of her body, only to find that the results of that physical inquisition are put on a shelf in an evidence locker, not for testing, not for investigation, but for storage. Her calls for justice left ignored and silenced.

And male victims of rape are essentially invisible.[358] The gendered nature of the discussion misses the myriad men who are likewise abused. Male rape is largely thought of as what happens in prison, neglecting that men may be abused as children and that their acquaintances and intimates may victimize them too.[359]

Here is the second injustice. Socio-economically disadvantaged men of color, or to be more specific, poor Black men, are, rather than being treated as citizens by the state and supported by it, seen as presumptive criminals who are overpoliced. And, in this context, a Black man near a white woman has from the darkest days in America, been sufficient for a claim of rape and a lynching. Moreover, as Bennett Capers notes, "Between 1930 and 1967, 89 percent of all of the men *officially* executed for rape in the United States were black."[360]

It is with these competing and compelling practical realities in place that #WeToo intervenes. Let us consider what happens to defendants first. If the rules of evidence are pushed, pulled, or contorted to support group allegations, it is likely that Black male defendants will disproportionately bear the brunt of this contortion.[361] There are thus reasons to be significantly wary of allowing broader conceptions of character evidence in these cases. The true worry is not just the injustice that may be done in instances of sexual violence,[362] but also whether the interpretations of these rules will lead to broader interpretations in other criminal cases. If the mere fact that a defendant is accused of five bank robberies, with a gun, at a bank, in the morning, could be sufficient for "common scheme" or "doctrine of chances," the rules of evidence will fail to protect the most vulnerable among us from

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[358] Capers, *supra* note 15, at 123 ("we render male rape victimization invisible").

[359] *Id.* at 1276-77.

[360] Capers, *supra* note 302, at 841.

[361] *Accord* Baker, *supra* note 302, at 596:

> Because black men are disproportionately involved in the criminal justice system and because police are going to be more likely to arrest those people whom they know to have some history of sexual offense, the police are going to be even more likely to arrest black men disproportionately. Because juries have always been and continue to be prejudiced against black men, whose "character" they are more likely to associate with criminality and rape, juries are likely to convict black men of rape disproportionately.

[362] Interestingly, several studies have found that race is statistically *insignificant* as a factor in juror's decisions in sexual assault cases, but this says nothing about policing and other enforcement decisions. Bryden & Lengnick, *supra* note 170, at 1276 & n.504.

the worst of our implicit biases and explicit assumptions.

What about victims? Let's be clear. The least advantaged woman is not Gywneth Paltrow.[363] She is Black.[364] Or trans.[365] Or an undocumented immigrant.[366] Or a sex worker.[367] She is not a "righteous victim."[368] If our system over-polices Black men, it also under-serves Black women.[369] Indeed, some studies have found a marked contrast between the treatment of Black men and women in rape cases, where it is the women whom the system is biased against.[370] As Kimberle Crenshaw poignantly argues, "daughters, mothers, sisters, and aunts also deserve at least a similar concern, since statistics show that Black women are more likely to be raped than Black men are to be falsely accused of it. Given the magnitude of Black women's vulnerability to sexual violence, it is not unreasonable to expect as much concern for Black women who are raped as is expressed for the men who are accused of raping them."[371] In media accounts, Black women are ignored or uncharitably portrayed.[372] Women of color are pressured not to use the

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[363] KANTOR & TWOHEY, *supra* note 22, at 39 (noting Weinstein lured Paltrow to a hotel room and propositioned her for sex).

[364] Tuerkheimer, *supra* note 174, at 31 ("While the poor treatment of rape cases by police is generally rampant, police responses to sexual assault are particularly defective in cases involving women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers.").

[365] Rebecca Stotzer, *Violence Against Transgender People: A Review of the United States Data*, 14 AGGRESSION & VIOLENT BEH. 170, 178 (2007)("the most common finding across surveys and needs assessments is that 50% of transgendered persons report unwanted sexual activity").

[366] Gurley, *supra* note 122.

[367] Amy Dellinger Page, *Judging Women and Defining Crime: Police Officers' Attitudes Toward Women and Rape*, 28 SOCIO. SPECTRUM 389, 405 (2008) (44% of police officers were unlikely to believe a prostitute who claimed rape).

[368] *See* Bryden & Lengnick, *supra* note 170, at 1305 n.655 (citing studies that women being drunk, prostitutes, poor, a hitchhiker, or black impacts police reactions to complaints).

[369] Shamika M. Kelley, et al., *The Sexual Stratification Hypothesis and Prosecuting Sexual Assault: Is the Decision to File Charges Influenced by the Victim-Suspect Racial-Ethnic Dyad?* CRIME & DELINQUENCY 22 (Feb. 6, 2021), https://doi.org/10.1177/0011128721991821 ("these findings might suggest that prosecutors hold beliefs about Black-on-Black SA as not being equally worthy of criminal-legal protection compared to other intraracial victim-offender relationships").

[370] Gary D. LaFree, et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 397 n.17, 402 (1985) (noting "jurors' predisposition to exonerate [Black] men accused of raping black women").

[371] Kimberly Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1274 (1991).

[372] Joanne Ardovini-Brooker & Susan Caringella-MacDonald, *Media Attributions of Blame and Sympathy in Ten Rape Cases*, 15 JUST. PRO. 3, 5 (2002) ("the media portray black rape victims as loose, promiscuous, oversexed, whorish women—in the relatively few instances where the rape of black women is focused on in news accounts.").

criminal justice system against men of color because of the discrimination inherent in the system.[373] And, [i]f they do report, Black women are less likely than White women to have a rape case come to trial and lead to conviction."[374] And, so the question is, will the success of #WeToo benefit her as well?

The jury is still out. The irony that a movement started by a Black woman to support Black women and girls victimized by sexual violence was co-opted by a Hollywood actress and with it came a public calling to account by rich, attractive, white women, must be acknowledged. At the same time, there are seeds of hope within group accusations. First, when men prey on vulnerable women, that vulnerability can exist in any color, and the ability *qua* group to build strong cases does exist. The safety in numbers means that like the white women who were unheard when standing alone, women of color are more likely to have their rights vindicated as part of a group. Indeed, the #WeToo floodgates included reporting that specifically focused on women of color, including a significant exposé on the Ford Motor Company.[375] Still, as *The New York Times* reported, there were significant coverage disparities: "The accounts of the working conditions at the Ford plants threw into stark relief how little attention blue-collar workers had received as the #MeToo movement gained steam that year, following revelations of harassment by celebrities and white-collar professional women. A former worker at one of the Ford plants proposed a new hashtag: #WhatAboutUs."[376] Nevertheless, if the lesson for police and prosecutors is to pursue individual allegations as if they are part of a group, the implicit biases and rape myths that plague the enforcement of Black women's rights may be counteracted.

There is little doubt, however, that our worries about the individual remain. Victims who suffer greater credibility deficits, about whom even broader doubts are made "reasonable," have a far greater chasm to cross to reach justice. Perhaps with successful prosecution of group allegations, when the group composition is diverse, the same reversals may be possible. But we cannot count on the criminal law to bridge this divide on its own. For instance, the frightening oversexualization of young Black girls requires a much broader societal rethinking of its approach to Black women,[377] that

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[373] Lynn Hecht Schafran, *Women of Color in the Courts*, TRIAL, at 21, 22 (Aug. 1999).

[374] William H. George & Lorraine J. Martínez, *Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism*, 26 PSYCH. WOMEN Q. 110, 111 (2002).

[375] Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html.

[376] Zraick, *supra* note 225.

[377] As Tarana Burke notes in her PBS interview:

> I also think it is rooted in the way we are socialized to think about black girls and

reaches far more widely than whether they can be victims of rape.[378]

B. Beyond the Criminal Law

This leads to a second large avenue left unpursued in this Article: that much of the quest for sexual equality, to live fairly, to work without harassment or sexual *quid pro quos*, lies outside the province of the criminal law. The criminal law need not, and should not, confront all of society's wrongs. And #WeToo has had its impacts outside the criminal justice system, raising issues from pay equity to harassment training. The lesson learned, that group mobilization can have an impact, is true here. Legislation, spurred by the many, will accrue to the benefit of the individuals impacted.

It may be easier to attain justice and accountability outside the criminal law. Civil cases require a preponderance standard, and colleges and universities also require less than beyond a reasonable doubt. This means that women have less of a credibility deficit to overcome, and that the kind of skepticism necessary to undermine a legitimate claim cannot be even close to far-fetched. Indeed, if anything, the court of public opinion puts pressure on how we treat accused perpetrators, who are certainly owed equal treatment and concern, though not a criminal "presumption of innocence as beyond a reasonable doubt" standard.[379]

CONCLUSION

There is no single conclusion to draw about #WeToo. Group allegations against one perpetrator have increased public awareness of sexual violence, led to greater accountability of sexual wrongs, and resulted in cases of criminal conviction that would have been impossible in earlier decades. It is

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> women of color, right? We're socialized to not believe black women. We're socialized to believe that [black women] are fast and sexually promiscuous and things of that nature.

Interview by Hari Sreenivasan with Tarana Burke, *The Founder of #MeToo Doesn't Want Us to Forget Victims of Color*, PBS NEWSHOUR (Nov. 15, 2017, 6:35 PM), https://www.pbs.org/newshour/show/the-founder-of-metoo-doesnt-want-us-to-forget-victims-of-color.

[378] REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD (2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf; JAMILA J. BLAKE & REBECCA EPSTEIN, GEO. L. CTR. ON POVERTY & INEQ., LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS (2019), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/Listening-to-Black-Women-and-Girls.pdf.

[379] *See* Ferzan, *supra* note 17.

perhaps a sad commentary on our society that a prosecutor would need "courage" to pursue a case like Weinstein's, but such cases are now pursued and winnable.

The good of #WeToo is possible to harness. We can train police to look beyond individual victim. Prosecutors can have stronger cases, built by more thorough investigations, with legitimate evidentiary arguments. And, even when direct reforms are not prescribed by #WeToo, its very existence in the ether generates a different understanding of sexual assault and victim credibility. We must be sure to channel these benefits to ensure that all victims benefit, and not just the righteous ones the police were protecting all along.

But "courage" will require more than taking the multi-victim cases. Courage will require taking on the she said/he said's. From the courtroom to the newsroom, it cannot be acceptable for a rape "not to happen," if there is not someone else who says it happened to her as well. No reformer can declare victory while individual victims remain unheard.

Every participant in the criminal justice also has a responsibility to make sure that all victories are won fair and square. Our commitments to due process for criminal defendants ought not to be sacrificed through evidentiary parlor tricks. This concern is all the more pressing when contorted evidentiary rules can impact all criminal cases, and some citizens bear the brunt of our criminal injustices more than others.

Ultimately, the conflict, between what we owe individual victims, who find their cases unprovable, and what we owe criminal defendants, in disregarding propensity and taking seriously reasonable doubt, remains a vexing question. We should not be distracted from that question. It is a conflict that we must face at every level of our interactions. What do we owe both sides in the court of public opinion? What should civil or administrative findings require? How can truly vindicate egregious wrongs without fundamentally denying the accused his rights or at least, our respect? The #MeToo movement places those questions squarely before us, and we should not and cannot avoid or evade them by relying on #WeToo.