

11-22-2019

Evidence's #MeToo Moment

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Recommended Citation

Aníbal Rosario-Lebrón, *Evidence's #MeToo Moment*, 74 U. Miami L. Rev. 1 (2019)
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ARTICLES

Evidence's #MeToo Moment

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The #MeToo movement has drawn attention to the prevalence of sexual and gender-based violence. But more importantly, it has exposed how society discounts the testimony

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This work is dedicated to my nieces Anilisse E. Rosario Valentín, Alexya S. Medina Morales, Alyah I. Medina Morales, and Alayza A. Medina Morales in hope that they become adults in a world where their voices are as not discounted.

The culmination of this work was made possible by the 2018 summer research stipend provided by Howard University School of Law. This Article benefited from presentations at the 2019 Evidence Summer Workshop, the ALWD Scholars Workshop at the 2019 Biennial Empire State Legal Writing Conference, the NY Area Family Law Scholars Workshop, the Howard University School of Law Faculty Colloquium, the 2017 Family Law Scholars & Teachers Conference, the U.S. Feminist Judgments Project: Rewriting the Law, the Writing the Future Conference, the 2014 Law and Society Association, and the 2013 LatCrit Biennial Conference Work in Progress Colloquia.

I am grateful to Professors Bennett Capers, Christine Goodman, Cynthia Godsoe, Danielle Tully, Deseriee Kennedy, Ed Stein, Heidi Brown, Jamie R. Abrams, Jessica Miles, JoAnne Sweeny, Julia Simon-Kerr, Lori Johnson, Matt Bruckner, Meghan Boone, Rachel Rebouche, Richard Chused, Sarudzayi M. Matambanadzo, Sha-Shana Crichton, Solangel Maldonado, Susan Hazeldean, and Suzanne Rowe for their helpful commentaries at different stages of this Article. My deepest gratitude as well to former Solicitor General of Puerto Rico Margarita L. Mercado Echegaray, for her continuous feedback and encouragement. Also, many thanks to Aaron P. Riggs, Christine Thomas, Sheyla Soriano, and Chassity Bobbitt for their research assistance. Finally, I would like to acknowledge the editors of the *University of Miami Law Review*, especially Hannah Gordon, Stephanie

of women. This Article unfolds how this credibility discounting is reinforced in our evidentiary system through the use of character for untruthfulness evidence to impeach victims. Specifically, through defense attorneys' practice of impeaching sexual and gender-based violence victims' character for truthfulness as a way to introduce functional evidence of credibility biases regarding the trustworthiness of sexual and gender-based violence victims and the plausibility of their testimonies. The Article further shows a correlation between the poor performance of our legal system in redressing the harms associated with sexual and gender-based violence and our evidentiary rules. Accordingly, the Article advocates reforming the use of character for untruthfulness evidence and proposes a rule that attempts to temper the prejudicial effects caused by long-held credibility biases against sexual and gender-based violence victims with a well-established impeachment tradition, constitutional protections, and judicial efficiency. It does so in hopes that the #MeToo movement becomes a catalyst in the judicial response against sexual and gender-based violence.

Moran, Meaghan Goldstein, and Keigan Vannoy, for their insightful edition, dedication, and loving work on this Article.

#FEM2: INTRODUCTION	4
I. #MeToo: A NOT CREDIBLE WITNESS	8
II. #BELIEVEHER: DISCOUNTING SGBV VICTIMS WITH CHARACTER FOR UNTRUTHFULNESS EVIDENCE.....	19
A. <i>Women's Lack of Trustworthiness</i>	32
1. COLLECTIVE CREDIBILITY BIAS	32
2. CONSEQUENTIAL CREDIBILITY BIAS.....	35
B. <i>Perceived Implausibility of SGBV Victims' Testimony</i>	37
1. CONTEXTUAL CREDIBILITY BIAS.....	38
2. "HE SAID/SHE SAID" CREDIBILITY BIAS	45
III. #TIMESUP: THE COSTS OF CHARACTER FOR UNTRUTHFULNESS EVIDENCE IN SGBV CASES	49
IV. #NEVERMORE: REFORMING IMPEACHMENT OF SGBV VICTIMS' CHARACTER FOR TRUTHFULNESS	56
A. <i>United States Landscape on the Use of Sexual and Gender-Based Violence Victims' Character for Untruthfulness Evidence</i>	57
1. OPINION & REPUTATION EVIDENCE	58
2. PRIOR CONVICTION EVIDENCE	60
3. PRIOR ACTS OF UNTRUTHFULNESS EVIDENCE.....	63
B. <i>Proposed Rule for the Impeachment of SGBV Victims' Character for Truthfulness</i>	75
RULE 101X. Scope; Definitions	76
RULE 403X. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons	76
RULE 608X. Witness' Character For Truthfulness Or Untruthfulness	76
(A) Reputation or Opinion Evidence	76
(B) Prior Convictions.....	77
RULE 416X. Impeachment of Sexual and Gender-Based Violence Victims with Prior Acts of Untruthfulness.....	79
C. <i>Advisory Comments on the Rule</i>	82
1. BALANCING TESTS	83
2. SEPARATE HEARING FOR DETERMINING IMPEACHMENT WITH PRIOR ACTS OF UNTRUTHFULNESS.....	83
3. REALIGNMENT OF ADMISSIBILITY OF PRIOR ACTS WITH ADMISSIBILITY OF PRIOR CONVICTIONS	87
4. COUNSEL FOR VICTIM	88

5. NOTIFICATION REQUIREMENT	90
D. <i>Proposed Rule for Impeachment in Action</i>	91
V. #EVERYDAYSEXISM: OBJECTIONS TO SPECIFIC IMPEACHMENT	
RULES FOR SGBV VICTIMS	94
A. <i>Defendants' Rights</i>	95
B. <i>Over-Conviction of False Accusations</i>	97
C. <i>Burden to the Judicial System</i>	100
D. <i>No Gender Specific Rule</i>	102
E. <i>SGBV Exceptionalism</i>	104
#WOMENSREALITY: CONCLUSION	105

#FEM2: INTRODUCTION

Well the icecaps are melting pretty fast and the change here [in workplace sexual harassment] seems to be glacially slow. But I will say, that if we do nothing the change is not gonna come.¹

¹ LastWeekTonight, *Workplace Sexual Harassment: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (July 29, 2018), <https://www.youtube.com/watch?v=dHiAls8loz4> [hereinafter *Last Week Tonight with John Oliver*] (Professor Anita Hill discussing the changes our judicial system has experienced in redressing sexual harassment and SGBV at 28:15–28:30).

Historically, in sexual and gender-based violence (“SGBV”) cases,² women have been doubly victimized.³ With the rise of social

² The term sexual and gender-based violence cases will be used in this Article as an umbrella term for cases in which the majority of victims are women and its violence has a gender or sexual component such as sexual harassment, rape, sexual assault, intimate partner violence, stealthing, upskirting, and similar aggressions.

[SGBV] refers to harm or threat of harm perpetrated against a person based on her/his gender. It is rooted in unequal power relationships between men and women; thus, women are more commonly affected. It is often used interchangeably with “violence against women” and can include sexual, physical, economic and psychological abuse. SGBV manifests in various forms including physical, emotional and sexual violence, sexual exploitation, discrimination and harassment.

ALYS M. WILLMAN & CRYSTAL CORMAN, WORLD BANK, SEXUAL AND GENDER-BASED VIOLENCE: WHAT IS THE WORLD BANK DOING, AND WHAT HAVE WE LEARNED? A STRATEGIC REVIEW 5 (2013), <https://openknowledge.worldbank.org/handle/10986/16733>. “This does not mean that all acts against a woman are gender-based violence, or that all victims of gender-based violence are female.” *Definitions of Sexual and Gender-Based Violence*, NEW HUMANITARIAN (Sept. 1, 2004), <http://www.thenewhumanitarian.org/feature/2004/09/01/definitions-sexual-and-gender-based-violence>. Men who do not conform to society’s views of masculinity could be victims of SGBV. *Id.*

Although reliable figures are difficult to compile, it is estimated that between 1993 and 2001 eighty-five percent of intimate partner violence victims were women. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), <https://bjs.gov/content/pub/pdf/ipv01.pdf>. Similarly, it is estimated that less than two percent of men in the United States—as opposed to twenty percent of women—will be raped. *See Get Statistics*, NAT’L SEXUAL VIOLENCE RES. CTR., <https://www.nsvrc.org/node/4737> (last visited Oct. 8, 2019). The proportion of reported cases of rape and sexual assault in the United States show a similar trend, with a ratio of about 1:10 (men to women). *See Number of Forcible Rape and Sexual Assault Victims in the United States from 1993 to 2017, by Sex*, STATISTA, <https://www.statista.com/statistics/251923/usa--reported-forcible-rape-cases-by-gender/> (last updated Apr. 29, 2019); *Number of Rape or Sexual Assault Victims in the United States per Year from 2000 to 2017, by Gender*, STATISTA, <https://www.statista.com/statistics/642458/rape-and-sexual-assault-victims-in-the-us-by-gender/> (last updated Apr. 29, 2019). The pattern repeats itself in cases of sexual harassment. *See, e.g., Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 - FY 2018*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited Oct. 10, 2019) [hereinafter *Charges Alleging Sex-Based Harassment*]. The EEOC reports that in the last nine years males are on average 16.8% of the complainants. *See id.*

awareness about the embodiment of patriarchal norms in our legal system, we reformed our probative and substantive laws to no longer require corroborative testimony,⁴ in an attempt to put somewhat of a stop to victim-blaming and slut-shaming in court.⁵

Today, the #MeToo movement, originated by Tarana Burke, is raising social awareness about rape culture and credibility biases against SGBV victims.⁶ As a result, men have been forced to acknowledge their patriarchal behavior and resign from positions of power.⁷ Nevertheless, reporting, prosecution, and conviction rates remain well below acceptable levels and have even fallen.⁸

This Article argues that, while some of the discounting of narratives denounced by the #MeToo movement has been partially eradicated from the judicial process,⁹ there is a correlation between the

Consequently, although males are also targets of SGBV, throughout the Article feminine pronouns will be used to refer to victims, except in the proposed rule that will use gender-neutral language to maintain its constitutionality. *See infra* Sections IV.B, V.B.

It is also important to stress that, although this Article focuses on how gender intersects with credibility, understanding how gender intersects with race, religion, class, and other identities is critical to addressing patterns and forms of sexual and gender-based violence. *See, e.g.,* Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 *HOW. L.J.* 459, 474–75 (1997) (discussing allegations of rape when made by and against African Americans); Nesa E. Wasarhaley et al., *The Impact of Gender Stereotypes on Legal Perceptions of Lesbian Intimate Partner Violence*, 32 *J. INTERPERSONAL VIOLENCE* 635, 651–53 (2015) (discussing credibility discounting of same-sex couples).

³ *See infra* notes 26–30 and accompanying text.

⁴ *See* Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 *TULSA L. REV.* 1, 13–15 (2017).

⁵ *See infra* note 26 and accompanying text.

⁶ Stephanie Zacharek et al., *Person of the Year 2017: The Silence Breakers*, *TIME* (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/>.

⁷ *See* Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, *N.Y. TIMES*, <https://www.ny-times.com/interactive/2018/10/23/us/metoo-replacements.html> (last updated Oct. 29, 2018).

⁸ *See The Criminal Justice System: Statistics, RAPE, ABUSE & INCEST NAT'L NETWORK*, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Oct. 10, 2019).

⁹ *See, e.g.,* Buller, *supra* note 4, at 13–15.

poor performance of our legal system in addressing SGBV cases and our evidentiary rules. Specifically, this Article posits that neutral rules regarding the impeachment of a witnesses' character for untruthfulness are used in practice by attorneys to discount victims' testimonies through credibility biases based on trustworthiness and testimony plausibility.¹⁰

As a possible solution, this Article advocates enacting impeachment rules that would prevent attorneys from using societal narratives about victims' perceived lack of credibility and working them in as part of the defense. The proposed rule,¹¹ based on the Federal Rules of Evidence ("FRE"), attempts to temper the prejudicial effects caused by credibility biases with a long-standing tradition of impeaching witnesses with evidence of character for untruthfulness, constitutional protections, and judicial efficiency. The Rule provides for different balancing tests depending on the type of character for untruthfulness evidence and lists concrete factors to aid the court in SGBV cases when weighing the probative value of the character for untruthfulness evidence against its prejudicial effects.

The Article opens with a short story that sheds light on some of the discounting that SGBV victims often experience when they come to court to vindicate their grievances.¹² The Article then explores how these unjust experiences are part of an evidentiary system that, through the impeachment of victims' character for truthfulness, discounts women's voices by not gatekeeping credibility biases from SGBV trials.¹³ After describing this phenomenon, this Article presents how SGBV continues to be a pressing issue in our society and how the low reporting, prosecution, and conviction rates correlate with the undue exploitation of credibility biases in trials.¹⁴ Next, it explores the current evidentiary landscape in the United States regarding the impeachment of SGBV victims with character for untruthfulness evidence and the costs of keeping an evidentiary system that reinforces SGBV through credibility biases.¹⁵ After the problem is explained, the Article includes a model impeachment

¹⁰ See *infra* Part II.

¹¹ See *infra* Section IV.B.

¹² See *infra* Part I.

¹³ See *infra* Part II.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Section IV.A.

rule, as well as a commentary explaining the rule and its application.¹⁶ Finally, the Article discusses the benefits and disadvantages of implementing the rule.¹⁷

I. #METOO: A NOT CREDIBLE WITNESS

I dreaded that moment. Their silent treatment. Their faces of disappointment. The look in their eyes letting me know that I have failed them.

I was so terrified of that moment. I could feel the chills going through my spine. It was worse than the punishment itself. The look on their faces said it all. I lied. I misbehaved. I deserved no mercy.

I went all throughout my childhood trying to avoid that feeling. Yet, as I grew older, I kept running into it.

It was different for sure. It was no longer my parents. It was then my friends', my teachers', and my colleagues' turn. Even though I hadn't done anything wrong, it felt like I had. Like I was a child and had broken an old vase in the living room. It still felt like I had lied, like I had misbehaved. But the only thing broken was me.

If a high school teacher made unsolicited sexual advances and I said something about it, I'd have to respond to a myriad of questions. Did I misunderstand the situation? Had I asked for it? Was it my fault for staying alone with him? Was I deflecting? Was I lying because I did not get the highest grade? Was I making a big deal out of nothing?

I quickly learned to keep silent. If I did not want to be made a liar, it was better to shut up. If I wanted a future, it was better to let it go than to taint my reputation.

I thought I had learned all the tricks. Never be alone with your boss. Never walk by yourself late at night. Make sure you know the men you go out with well. Ask other women what they've heard.

Yet, here I am again. Three decades later, feeling those same chills.

I thought this time was going to be different. They told me to break the silence. They told me to tell my story. They told me there were other women like me.

But the look in their eyes said it all. The foreman, the jurors, the judge.

¹⁶ See *infra* Sections IV.B–IV.D.

¹⁷ See *infra* Part V.

I told the truth. It didn't matter. I cooperated with the police. It didn't matter. I came forward. It didn't matter.

The look was there. Lingering, like his beatings. I had lied. I misbehaved. I deserved no mercy.

Initially, I did not intend to be in court for the verdict. But my family and friends convinced me otherwise. They said I should keep my head high. However, I knew from the moment I took the stand that he was going to walk.

This trial was never about him. It was about me not coming forward promptly, me keeping silence in my own hell, me lying to keep appearances, me putting on makeup, me not stopping going to work. It was about whatever it was that I did that they could not understand.

This case was not about how many times he hit me, how many times he yelled at me, or how he made me feel. It was not about how many times he pushed me against the wall or raped me.

It was about the people who didn't know about it. The people who didn't see it. The people I didn't tell about it.

It was about him saying that he is not the kind of man that would do such things, but I am the kind of woman who would make such things up. It was about me being unreliable, unstable, and perhaps scorned.

What type of car do you have, Jennifer?

As soon as his attorney asked that question, I knew it was over for me.

An Audi. Why?

Objection, your Honor! The prosecutor intervened.

Your Honor, this question is related to the credibility of the witness.

Your Honor, I fail to see how this is related to the credibility of the victim.

Your Honor, if I may?

Sidebar please, the judge commanded.

No one was supposed to hear what they were discussing, but I did. His attorney was arguing how he had evidence that I maliciously lied in a loan application and that it will show my character for untruthfulness. Since all the State had was my testimony against that of my ex, the information was extremely relevant. The prosecutor did not even reply, and the judge just nodded and said: “Get to the point right away.”

Jennifer, you took a loan for that car, no?

Yes, I did.

Isn't it true that you lied in the loan application?

I don't know what you are talking about. That was like six years ago.

Do you remember completing a loan application to buy the car?

Yes.

Do you remember lying about your income?

I don't think so.

The attorney kept looking at his papers, like he was searching for something. I started wondering if he had my loan application with him and was about to show it to the court.

Are you sure that you didn't write that you made 45k when you applied for the loan? He kept looking.

I might have.

But that was not your income at the time?

I think a friend told me to . . .

I didn't ask you about what your "friend" told you. I asked you about what you wrote in the application. Did you write 45k when you were making less than that?

Yes.

So, you lied, correct?

I guess you can say I did. I followed my friend's advice.

But the application was in your name, no?

Yes.

You were not married to my client at the time?

No.

But you made everyone think you were.

Excuse me?

Objection, your Honor! Relevance? The prosecutor interjected.

Your Honor, we are trying to get at the credibility of this witness.

Overruled. The judge disinterestedly intervened.

I will repeat my question. At that time, six years ago, did you go by Mrs. Johnson or Miss Jones?

I don't understand.

Did your manager at your job call you Mrs. Johnson?

Well . . . the manager of the office knew Mark, and he thought that we were married. I did not want to give any explanations about us. It was easier to do that.

So, when it is easier for you, you lie?

No. I did not say that.

So, when you don't want to give explanations you lie?

No. I did not say that.

But you lied to your manager, no?

No.

Well . . . legally you were Miss Jones, no?

Yes.

And you referred to yourself as Mrs. Johnson with your manager, correct?

Yes. We were not married at the time, but we were living together, so people referred to me as Mrs. Johnson.

But that was not your legal name, right?

No.

So, you were lying, no?

I wouldn't say that.

Let's go back to the car. You did not tell Mark that you were buying a car, right?

No.

Of course! As you testified, he allegedly wouldn't let you buy even a cell phone, so he wouldn't have let you buy a car, am I correct?

I don't think he would've. No.

But you did apply for a loan, right?

Yes.

So, you took a loan behind Mark's back, behind the back of the man you called your "husband"?

It wasn't behind his back.

But he didn't know?

No, he did not know.

I could see the face of the lady in the second row of the jury box and I knew exactly what she was thinking. "This woman is a liar. Look at her. She doesn't look like a victim at all." I should've listened to my mom when she told me that no one was going to believe me if I look like nothing had happened. "Victims don't dress like you do, Jen. They look sad. You look too attractive." And then, all a sudden, the attorney went for what I thought was the final blow.

You eventually married my client, right?

Yes.

In fact, you are still married to him?

Yes. I'm in the process . . .

Now. Mrs. Johnson, did you recently take a pregnancy test?

Objection! The State's attorney jumped from her chair.

Again, the attorneys came to the bench. This time the prosecutor was more forceful in her defense. She insisted that the pregnancy test had nothing to do with the case. That it was impermissible to use that type of evidence. His attorney insisted that it was to prove my deceitful character, not to pry into my sexual life. The judge simply said, "I'll allow it."

Please answer my question, Mrs. Johnson. Did you take recently a pregnancy test?

Yes. I went to my doctor's and she ordered one for me.

It has been more than six months since you have lived with my client, correct?

That's correct.

But you are still married to him, no?

Yes, I am . . . We are in the middle of the divorce process.

In that divorce you are asking for alimony, no?

Yes. I think my attorney asked for it.

And for full custody of your children?

Yes.

Now, Jennifer, did you try to kill yourself?

I expected the question.

Yes. It was a difficult time. I was depressed.

Did you think about your children?

Objection?!

Sustained.

Apologies, your Honor. Were you depressed or are you still depressed?

Well . . . I'm still in treatment. As I said, it has been a difficult time.

And when you tried to take your life, it was just a few days after your relationship with Mark ended, no?

Yes. But that wasn't . . .

In fact, he left you, no?

That's right.

But just two weeks after your suicide attempt, you let Mark into your house.

No. He showed up.

Thanks. In your testimony, you mentioned that around that time you decided not to have anything else to do with Mark, right?

Yes.

But you let him in.

I didn't have the strength to . . .

You did not have the strength to call the police?

No, I did. But I did not mean that.

Your kids were not with you, no?

No. They were with my parents.

So, you did not call the police when Mark showed up?

No.

Even though you alleged that he had hit you many times before, right?

No, I did not call the police at that moment.

And no one could verify that he has hit you before, right?

No one was at our house when he hit me.

And you did not call the police when he showed up even though you allege that he raped you in the past.

No.

And you never told anyone about him raping you before until this trial, right?

That's correct.

Not even your mom?

No.

Or your friends?

No.

In fact, you told the police when you made the report that you have never been the victim of domestic violence. No?

Yes. I meant that . . .

Just a simple yes or no will do. In fact, you told your friends and family how happy you were with Mark?

Yes. I didn't want people to know . . .

And on Facebook, you were always talking about all the nice things Mark would do for you?

Yes. As I told you, I did not want people to know.

You never said on Facebook that he raped you, no?

That's not something you post on Facebook.

So, that was a no?

Yes. That was a no.

And you had sex with him that night he "showed up" at your house, no?

No. He raped me.

But you did not have any bruising on your arms when the police came?

No.

Or anywhere on your body, isn't that correct?

That's correct. I did not have any bruising. That doesn't mean he did not rape me.

I could see in the foreman's eyes. He was certain that I was lying because I never shared with anyone that he was abusing me. He thought that I was unstable. He was sure that I had sex voluntarily with him and that I was being vindictive and jealous because he left.

So, you called the police when he was in the bathroom and he was about to leave, right?

Yes. That was when I . . .

And the police took you to the hospital, right?

Yes. I was very anxious.

And in the hospital, they administered a rape kit on you, no?

No. I did not say, at that moment, that he had raped me.

So, this is the first time you have told someone that my client, your husband, who you let in your house, allegedly raped you?

Yes.

Now, my client went to check on you after your suicide attempt, no?

That's what he said when he showed up at my doorstep.

No more questions, your Honor.

Then it came down to the closing.

As the attorney went into his argument, I remembered the bed-time stories my mom used to tell me as a child about how the wolf came, and no one believed the shepherd boy. That day, I was the shepherd. But this time I wasn't being believed not for what I said but for what I did not say.

“Heaven has no rage like love to hatred turned, nor hell a fury like a woman scorned.”¹⁸ We are here today because of Jennifer's scorn.” The defense attorney yelled. “She is a person who would lie when she sees fit. You heard her tell you how she lied about the relationship she had with my client. She pretended to be his wife. And after getting what she wanted, when he decided to call it quits, she lied again, like she did in her loan application. She is just looking to ruin this honest man's life. The man who, before leaving, she was telling everybody how well he treated her.

There is no victim in this case. Or yes, there is one: my client. A man whose life is about to get ruined because of this woman's lies. She is trying to ruin Mark's life by lying. Just like she told you she does when she doesn't want to give explanations, when it's easier for her to get what she wants, when she really wants something that she can't have like a car, my client, or money. Like she lied here in court when she told you that my client wouldn't let her buy a cell phone when she was buying things more expensive and less easily concealable. Things that—if it were true that my client wanted to control her—she would not have been able to have. But we all know that she was lying about the cell phone, as she was lying about the punches, the restrictions, and the insults.

We all know that she was lying about being raped. Who lets an abuser come into her house when the relationship has ended? Who doesn't tell the police she has been raped? No one. It's a lie. A lie from an unstable woman, a woman who hasn't been able to deal with her depression.

And if you have any doubts, look at the other witnesses the State brought. Who does she have to support her story? Her parents. Her friends. People who would do anything for her. People who did not like my client in the first place. People who were not present at any of the alleged instances of abuse. People who, as Mrs. Johnson did, lied to you.

¹⁸ WILLIAM CONGREVE, *THE MOURNING BRIDE* act 3, sc. 2. (original spelling has been modernized).

But you know better than that. You know my client is incapable of the atrocities that he has been accused of. And you know Jennifer. You know she is capable of lying to get her way.”

But I did not “get my way.” He did.

I just kept my head high.

II. #BELIEVEHER: DISCOUNTING SGBV VICTIMS WITH CHARACTER FOR UNTRUTHFULNESS EVIDENCE

*All wickedness is but little to the wickedness of a woman.*¹⁹

Jennifer’s story is more common than what we would like to think. In fact, her story is based on a fairly publicized intimate partner violence case in Puerto Rico between a then-legislator and his spouse.²⁰ As both fiction and reality demonstrate, discounting

¹⁹ *Ecclesiasticus*, 25:19 (King James).

²⁰ Liza Yajaira Rivera Colón pressed charges against her husband, attorney and legislator Luis Farinacci, for domestic violence. See *Esposa del legislador Luis Farinacci Morales relata patrón violencia doméstica* [*Wife of Legislator Luis Farinacci Morales Recounts Pattern of Domestic Violence*], PRIMERA HORA (Aug. 8, 2010, 12:00 AM), <https://www.primerahora.com/noticias/puerto-rico/nota/esposadellegisladorluisfarinaccimoralesrelatapatronvioleciadomestica-409310/>. The defense attorney in the case, Pablo Colón, impeached Liza Yajaira’s credibility to argue that the accusations were aimed at destroying his client. *Cuestionan credibilidad de esposa de Farinacci* [*Credibility of Farinacci’s Wife Called into Question*], EL NUEVO DÍA, <https://www.elnuevodia.com/noticias/politica/nota/cuestionancredibilidaddeesposadefarinacci-811028/> (last updated Nov. 3, 2010, 6:04 PM); *Liza Yajaira niega que quisiera destruir a Farinacci* [*Liza Yajaira Denies Attempting to Destroy Farinacci*], EL NUEVO DÍA, <https://www.elnuevodia.com/noticias/politica/nota/lizayajairaniegaquequisiera-destruirafarinacci-997334/> (last updated June 21, 2011, 7:12 PM); *No culpable el exrepresentante Farinacci de violencia doméstica* [*Former Representative Farinacci Acquitted of Domestic Violence*], EL NUEVO DÍA, <https://www.elnuevodia.com/noticias/politica/nota/noculpableelxrepresentantefarinaccideviolenciadomestica-1008503/> (last updated June 5, 2011, 10:40 PM).

Liza Yajaira’s case inspired this Article and my first reflection on this topic in 2011. See Aníbal Rosario Lebrón, *Atando los cabos sueltos del machismo en el sistema judicial de Puerto Rico* [*Tying up the Loose Ends of Machismo in the Judicial System of Puerto Rico*], DERECHOALDERECHO (Aug. 17, 2011), <http://derechoalderecho.org/2011/08/17/atando-los-cabos-sueltos-del-machismo-en-el-sistema-judicial-de-puerto-rico/>. After proposing a reform to the Puerto Rican Rules of Evidence to address the impeachment of domestic violence victims, I decided to research deeper the use of character for untruthfulness evidence in the context of SGBV victims. See Anibal Rosario Lebrón, *Scorned Law: Rethinking*

victims in SGBV cases by impeaching their credibility is part of a larger defense strategy to deny the charges or to boost other defenses.²¹

This is not a new occurrence. Our legal system has a long patriarchal history of discounting women's credibility during trials and adversely affecting the fair prosecution of crimes committed against them.²² For example, in rape cases, our legal system has historically required corroboration testimony,²³ prompt outcry,²⁴ and cautionary

Evidentiary Rules in Cases of Gender-Based Violence, CONCURRING OPINIONS (Feb. 16, 2014), <https://concurringopinions.com/archives/2014/02/scorned-law-rethinking-evidentiary-rules-in-cases-of-gender-based-violence.html>. The ideas from those early reflections culminated in this Article.

²¹ See ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 19–21 (1999) (discussing how *The Little Mermaid* is an example of a tale built upon intergender sexual behaviors that illustrates a cultural rape narrative of women lying about rape); Carolyn Capps Hartley, “*He Said, She Said*”: *The Defense Attack of Credibility in Domestic Violence Felony Trials*, 7 VIOLENCE AGAINST WOMEN 510, 522–34 (2001) (describing study of strategies used by the defense attorneys in domestic violence felony cases); Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES’ J., Winter 1995, at 5, 5–6, 40–41 (explaining credibility biases against women); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 11–13 (2017) (illustrating how rape allegations have been always intertwined with questions about victims’ credibility); see also Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Ominibus?*, 7 YALE J.L. & FEMINISM 243, 271–72 (1995) (discussing the effects of using prior victim’s alleged false allegations of wrongdoing); Kim Lane Scheppelle, *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of the Truth*, 37 N.Y. L. SCH. L. REV. 123, 150–51 (1992) (explaining how SGBV victims are not believed for their customary inconsistent behavior).

²² See Buller, *supra* note 4, at 9–13.

²³ See *id.* at 9–15 (describing the historical context of the corroboration requirement and the rape-reform movement); see also Crooms, *supra* note 2, at 469–70, 477–78 (discussing how rape corroboration rules rested in assumptions about credibility based on sex and race).

²⁴ See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 964–68 (2004) [hereinafter Anderson, *Legacy*]; Tuerkheimer, *supra* note 21, at 22–25.

jury instructions.²⁵ It has also allowed the use of victims' prior sexual history²⁶ and social companion defenses.²⁷ However, the impeachment of SGBV victims' character for truthfulness is a subtler and perhaps more pernicious patriarchal vestige as it shields itself behind the *neutral* façade of character for untruthfulness evidence.²⁸

The mechanism by which our evidentiary system operates is quite simple.²⁹ It allows not only the impeachment of witnesses' credibility with their character for untruthfulness through reputation or opinion testimony,³⁰ but also through evidence of prior specific

²⁵ Anderson, *Legacy*, *supra* note 24, at 973–77.

²⁶ See Michelle J. Anderson, *Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armor*, CRIM. JUST., Summer 2014, at 14, 15 [hereinafter Anderson, *Time to Reform Rape Shield Laws*] (detailing how in the '70s and early '80s jurisdictions in the United States adopted rape shield statutes to prevent jurors from giving less credence to victims based on their sexual histories and avoid jurors deciding cases based on stereotypes about complainants' sexual histories).

²⁷ Tuerkheimer, *supra* note 21, at 26–27.

²⁸ See Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 190–92, 200–01 (2017) [hereinafter Simon-Kerr, *Credibility by Proxy*] (discussing how impeachment rules related to character for (un)truthfulness enforce a cultural conception of who is worthy of belief, not an actual view of truth, in the context of race and gender).

²⁹ The analysis in this Part is based on the FRE, which are followed in the majority of jurisdictions in the United States. See *id.* at 186 (“Most states have gradually adopted the Federal Rules’ approach to impeachment, and dual focus on crimes and character evidence is nearly universal.”); Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 872 (2018) [hereinafter Capers, *Evidence Without Rules*] (“In a very real sense, the Federal Rules of Evidence *are* the Rules of Evidence.”). For a discussion on the distinctions of the relevant rules between the FRE and other jurisdictions and the implications of such differences, see *infra* Section IV.A.

³⁰ For example, FRE 608, titled “A Witness’s Character for Truthfulness or Untruthfulness,” in pertinent part, provides the following:

- (a) REPUTATION OR OPINION EVIDENCE. A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.

FED. R. EVID. 608(a).

acts.³¹ As to specific acts, the FRE distinguish between criminal acts³² and other bad acts related to untruthfulness.³³ Although these

³¹ For example, FRE 608 and 609, respectively, allow the use of prior acts and criminal convictions for the impeachment of a witness. *See* FED. R. EVID. 608(b), 609.

Rule 608 provides, in pertinent part:

Rule 608 provides, in pertinent part:

- (b) SPECIFIC INSTANCES OF CONDUCT. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
- (1) the witness; or
 - (2) another witness whose character the witness being cross-examined has testified about.

FED. R. EVID. 608(b).

As to prior criminal convictions, Rule 609, "Impeachment by Evidence of a Criminal Conviction," states:

Rule 609 provides, in pertinent part:

- (a) IN GENERAL. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
 - (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
 - (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

FED. R. EVID. 609.

³² *See* FED. R. EVID. 609(a).

³³ *See* FED. R. EVID. 608(b).

exceptions to the prohibition against character evidence³⁴ are predicated on truth seeking,³⁵ the notion that people who lie in one context would lie in others has been disproven.³⁶ Yet, because our system emphasizes the adversarial discovery of the truth through the presentation of conflicting versions, the honesty of each witness is crucial in deciding which of the conflicting accounts is the truth.³⁷ Thus, any evidence somewhat probative of how honest the witness is could be admissible in spite of the risks of confusion or skewing the perception of truth.³⁸

The importance of a witness's credibility implicates how attorneys litigate,³⁹ which in turn affects the structure of the rules of impeachment based on character for untruthfulness.⁴⁰ As Professor Méndez explains,

³⁴ FRE 404 precludes the admission of character evidence; however, the Rules provide for exceptions under Rules 607, 608, and 609. FED. R. EVID. 404.

³⁵ See Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 565–68 (1992).

³⁶ See *id.* at 546–49, 565–66; Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 763–64 (2008); Jonathan D. Kurland, *Character as a Process in Judgment and Decision-Making and Its Implications for the Character Evidence Prohibition in Anglo-American Law*, 38 LAW & PSYCHOL. REV. 135, 143–48 (2014); Miguel A. Méndez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1051–53 (1984) [hereinafter Méndez, *California's New Law on Character Evidence*]; Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 964–68 (2006); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1996 (2016); Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 208–09.

³⁷ See, e.g., *Gordon v. United States*, 383 F.2d 936, 940 (1967) (“[W]e must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a ‘bad’ person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses.”).

³⁸ See Miguel A. Méndez, *V. Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence*, 39 U.S.F. L. REV. 455, 465–66 (2005) [hereinafter Méndez, *V. Witnesses*]; Jenn Montan, Comment, *N.J.R.E. 608 and Specific Instances of Conduct: The Time Has Come for New Jersey to Join the Majority*, 49 SETON HALL L. REV. 441, 459–62 (2019).

³⁹ See Méndez, *V. Witnesses*, *supra* note 38, at 465.

⁴⁰ See *infra* Sections II.A–II.B.

[t]rial lawyers know that the outcome of a trial will be determined in almost all cases by the witnesses the jurors choose to believe and the ones they decide to ignore. Telling jurors which witnesses to believe or disbelieve is thus a crucial part of a closing argument. But such an appeal will not be persuasive unless the lawyer can give the jurors reasons rooted in the evidence about why a witness should be believed or disbelieved. This inescapable dynamic of jury trials encourages lawyers to produce the most favorable evidence about the credibility of their witnesses and the most unfavorable about their opponents. Rules of evidence generally counter this inclination by placing strict limits on the use of evidence to support or attack the credibility of witnesses. Despite the *unquestioned* relevance of such evidence, the rules proceed on the assumption that the unrestrained use of evidence on witness credibility may distract and confuse jurors about the substantive issues to be decided.⁴¹

For that reason, except for convictions for prior felonies⁴² and *crimen falsi*,⁴³ the impeachment based on character for untruthfulness is subject to the balancing of prejudice required by FRE 403.⁴⁴

⁴¹ Méndez, *V. Witnesses*, *supra* note 38, at 465 (emphasis added).

⁴² FED. R. EVID. 609. For example, FRE 609(a)(1)(B) provides for the admission of a prior felony conviction if the probative value outweighs the prejudicial effect, a higher standard than FRE 403. FED. R. EVID. 609(a)(1)(B). Further limits are placed on prior felony convictions that are more than ten years old, have been the subject of a pardon, or were the subject of juvenile adjudication. *See* FED. R. EVID. 609(b)–(d).

⁴³ FED. R. EVID. 609(a)(2). A *crimen falsi* is an “offense that involves some element of dishonesty or false statement.” *Crimen falsi*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also* Roberts, *supra* note 24, at 1983.

⁴⁴ FRE 403, entitled “Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons,” reads as follows:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Under FRE 403, the court has the discretion to exclude evidence of character for untruthfulness or prevent questioning in such matters if the evidence is ineffective towards aiding in the determination of truth, is unfairly prejudicial, leads to confusion of the issues, or misleads the jury.⁴⁵ Likewise, FRE 611 limits the use of character for untruthfulness evidence on cross-examination when use of that evidence constitutes harassment.⁴⁶

The final protection put in place when attorneys impeach a witness with evidence of character for untruthfulness comes when the evidence used is in the form of specific acts. In that case, the use of extrinsic evidence to support the previous act of untruthfulness is precluded unless it is evidence of a conviction allowed under FRE 609.⁴⁷ In other words, in order to undermine the credibility of the witness through specific acts, the attorney must do so without presenting any documentary evidence to support the inquiry.⁴⁸ As a result, the answers given by the witness are as far as an attorney can go.⁴⁹ Purportedly, the reasons for excluding extrinsic evidence in-

FED. R. EVID. 403. *See also* Roberts, *supra* note 36, at 1983 (explaining how convictions under FRE 609(a)(1)(B) must be admitted irrespective of its probative value or prejudicial effect).

⁴⁵ FED. R. EVID. 403.

⁴⁶ FRE 611, in pertinent part, establishes the following:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

- (a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
- (1) make those procedures effective for determining the truth;
 - (2) avoid wasting time; and
 - (3) protect witnesses from harassment or undue embarrassment.

FED. R. EVID. 611(a).

⁴⁷ FED. R. EVID. 608 (precluding impeachment by introduction of extrinsic evidence of specific acts, except where permitted under Rule 609); FED. R. EVID. 609 (permitting introduction of extrinsic evidence of certain prior convictions to impeach for untruthfulness). There are other limits regarding prior convictions (remoteness, pardon, annulment, rehabilitation, or juvenile adjudications). *See* FED. R. EVID. 609(b)–(d).

⁴⁸ *See* FED. R. EVID. 608, 609.

⁴⁹ *See* FED. R. EVID. 608, 609. This does not mean that extrinsic evidence or its shadow does not find its way into the jurors' attention. Capers, *Evidence Without Rules*, *supra* note 29, at 871, 895. As Professor Bennett Capers points out, there is functional evidence that escapes the gatekeeping directives of the FRE. *Id.* at 871 (2018) (explaining the term functional evidence as evidence that is not

clude avoiding distracting the jury from the matter being adjudicated, limiting undue delay, preventing confusion of the issues, and precluding the unfair treatment of witnesses.⁵⁰ Yet, in SGBV cases, as this Article will explain, the use of prior acts of untruthfulness exacerbates jury confusion, treats victim witnesses unfairly, and distracts adjudicators from the matter to be judged.⁵¹

Previous acts of untruthfulness are the most powerful type of character evidence in an attorney's repertoire.⁵² This is remarkably true in cases of SGBV, which are often described as "he said/she said" contests,⁵³ where perceptions of credibility are already skewed against the victims.⁵⁴ In SGBV cases, like Jennifer's case,⁵⁵ attorneys impeach the victim's credibility with specific acts of untruth-

regulated by the FRE but is used by jurors in their fact-finding role). In Jennifer's case, for example, the shadow of the extrinsic evidence of the loan application comes into evidence by the simple flickering of documents by defense counsel when inquiring into whether Jennifer recalls the details of her false statement.

⁵⁰ Montan, *supra* note 38, at 459–62; see Okun, *supra* note 35, at 544; see also Cassandra Altantulkhuur, Note, *A Second Rape: Testing Victim Credibility Through Prior False Accusations*, 2018 U. ILL. L. REV. 1091, 1095 (2018).

⁵¹ See *infra* Section II.B.2.; Montan, *supra* note 38, at 459–62.

⁵² Michael D. Schwartz & Phillip R. Maltin, *Strength of Character: The Admissibility of Character Evidence in Civil Trials is Subject to Exacting Standards*, L.A. LAW., June 2010, at 26, 26–28 (2010).

⁵³ Hartley, *supra* note 21, at 514. Most of these cases happen in private with no witnesses but the people implicated, giving the sense to others that it is a swearing contest between the victim and the alleged perpetrator. *Id.* at 527, 535–36.

⁵⁴ See TASLITZ, *supra* note 21, at 6 (pointing out how "[d]espite several decades of a renewed women's movement and increasing attention to the problem of rape, judges and juries continue to be skeptical of rape, demanding greater proof than for many other types of crimes and demonstrating deep suspicion of victims."); Hartley, *supra* note 21, at 514. In reality, "[f]ormulations such as 'nobody really knows what happened' in the cases of sexual assault and rape, for example, work to discredit victims before they speak." LEIGH GILMORE, *TAINTED WITNESS: WHY WE DOUBT WHAT WOMEN SAY ABOUT THEIR LIVES* 140 (2017); see also Sherry F. Colb, *The Difference Between Presuming Innocence and Presuming Victim Perjury in Acquaintance Rape Trials*, DORF ON LAW (July 16, 2018), <http://www.dorfonlaw.org/2018/07/the-difference-between-presuming.html> [hereinafter Colb, *The Difference Between*] (explaining how "[c]enturies of misogyny have . . . presume[d] that a woman who claims to have been raped is an insane perjurer").

⁵⁵ See *supra* Part I.

fulness in order to further a sexist narrative that women are not credible and SGBV victims' accounts are implausible.⁵⁶ These attorneys take advantage of the cultural discounting of victims and the often-misunderstood or unknown processes through which victims relate their accounts of abuse.⁵⁷ By discrediting victims, defense lawyers benefit from adjudicators' integrative processing.⁵⁸ When jurors are unable to reconcile a victim's actual behavior with imaginary or cultural narratives about SGBV crimes⁵⁹ and how a victim "should" act or look,⁶⁰ jurors may be more likely to conclude that the SGBV accounts are false.⁶¹

As it was shown in Jennifer's account,⁶² this sexist defense strategy resonates well with adjudicators by hindering convictions and deterring victims from coming forward.⁶³ For this reason, defense attorneys impeach the credibility of SGBV victims with evidence of character for untruthfulness.⁶⁴ Plaintiff's attorneys in high profile

⁵⁶ See TASLITZ, *supra* note 21, at 6; Hartley, *supra* note 21, at 514.

⁵⁷ See Altantulkhuur, *supra* note 50, at 1111 (explaining the process of recanting and how it does not mean that the victim is lying); Scheppele, *supra* note 21, at 138–40 (explaining customary behavior from SGBV victims such as delay in reporting, revised stories, and taking the blame).

⁵⁸ Integrative processing refers to the phenomenon that "people make connections between various pieces of information and base decisions on overall impressions rather than on specific pieces of information." Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity and Its Influence on Juror Decision Making*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 254, 257 (Neil Brewer & Kipling D. Williams eds., 2005); see also Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 *PERSONALITY & SOC. PSYCHOL. BULL.* 1046, 1050 (1997) (showing that jurors adjust the exclusion of evidence to their preexisting beliefs lessening the effects of a limiting instruction).

⁵⁹ See, e.g., TASLITZ, *supra* note 21, at 19–21.

⁶⁰ Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization*, 65 *CATH. U. L. REV.* 429, 436–46 (2016) (discussing Nils Christie's theory of the ideal victim as applied to SGBV victims).

⁶¹ See Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 *FAM. L.Q.* 43, 44 (2000).

⁶² See *supra* Part I.

⁶³ See *infra* Part III. For an analysis on how and why these strategies work, see TASLITZ, *supra* note 21, at 44–57 (discussing the rape cases of Mike Tyson and Glen Ridge).

⁶⁴ See Méndez, *V. Witness*, *supra* note 38, at 465.

accusations, such as Britney Taylor's,⁶⁵ are also aware of this strategy, and try to counteract it by preemptively rehabilitating their client's credibility.⁶⁶

Although research in this area is scarce,⁶⁷ analyses exist of well-publicized SGBV cases in and outside the courtroom, including Professor Anita Hill's,⁶⁸ Nafisatou Diallo's,⁶⁹ Katelyn Faber's,⁷⁰ and Doctor Christine Blasey Ford's.⁷¹ There are also news reports on less-publicized trials, such as Liza Yajaira's,⁷² and court opinions that recount the defense strategies used by attorneys in these types of cases.⁷³ Additionally, some scholars have conducted targeted

⁶⁵ In September 2019, Britney Taylor accused NFL player Antonio Brown of sexually assaulting her. Patrik Walker et al., *Antonio Brown Cut by Patriots: Timeline of How He Wore Out His Welcome in Pittsburgh, Oakland, New England and What's Next*, CBS SPORTS, <https://www.cbssports.com/nfl/news/antonio-brown-cut-by-patriots-timeline-of-how-he-wore-out-his-welcome-in-pittsburgh-oakland-new-england-and-whats-next/> (last updated Sept. 19, 2019). Not long after Taylor went public with her allegations, another accuser, who remains anonymous came forward accusing Antonio Brown of sexually assaulting her. Mike Reiss, *Brown Out: Pats Cut WR Amid Off-Field Allegations*, ESPN (Sept. 19, 2019, 4:15 PM), https://www.espn.com/nfl/story/_id/27662788/brown-pats-cut-wr-amid-field-allegations.

⁶⁶ *Antonio Brown Rape Accuser Claims She Passed Lie Detector*, TMZ SPORTS (Sept. 11, 2019 6:20 AM), <https://www.tnz.com/2019/09/11/antonio-brown-rape-accuser-claims-she-passed-lie-detector/>.

⁶⁷ See Hartley, *supra* note 21, at 510–11.

⁶⁸ See Scheppele, *supra* note 21, at 128–45; GILMORE, *supra* note 54, at 27–58.

⁶⁹ See GILMORE, *supra* note 54, at 135–45.

⁷⁰ See JOHN F. WUKOVITS, *KOBE BRYANT* 58–62 (2011); Renae Franiuk et al., *Prevalence of Rape Myths in Headlines and Their Effects on Attitudes Toward Rape*, 58 *SEX ROLES* 790, 790–800 (2008); Anderson, *Time to Reform Rape Shield Laws*, *supra* note 26, at 14–19.

⁷¹ See Kate Shaw, *How Strong Does the Evidence Against Kavanaugh Need to Be?*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/opinion/kavanaugh-blasey-allegation-disqualify.html>; Mimi Rocah et al., *Brett Kavanaugh Allegations: Why They Are Not Simply A 'He Said, She Said' Situation*, NBC NEWS (Sept. 18, 2018, 3:41 PM), <https://www.nbcnews.com/think/opinion/allegations-against-brett-kavanaugh-are-not-simply-he-said-shencna910771>.

⁷² See *supra* note 20 and accompanying text.

⁷³ See, e.g., *Halstead v. Texas*, 891 S.W.2d 11, 13 (Tex. Crim. App. 1994) (cross-examination of victim raised issue of whether she had a history of making false accusations of sexual misconduct against men she did not like); *New Jersey v. Frost*, 577 A.2d 1282, 1288 (N.J. Super. Ct. App. Div. 1990) (victim's conduct

studies of the defenses used by attorneys in certain types of SGBV cases.⁷⁴

While sources suggest that defense themes in SGBV cases are not necessarily different from other cases,⁷⁵ they show an interesting way in which defenses are assembled and how often they are employed.⁷⁶ For instance, one study found that in domestic violence cases, the most common defenses are self-defense or provocation, a lesser charge, diminished capacity, and innocence.⁷⁷ The defense of innocence was reported to be used 37.5% of the time, while self-defense, diminished capacity, or a lesser charge were used 15%, 25%, and 22.5%, respectively.⁷⁸

Remarkably, attorneys apparently feel quite confident about their chances of prevailing by denying their clients committed the actions charged, despite the State's evidence to the contrary.⁷⁹ In contrast, defenses that would admit some lesser type of wrongdoing and which do not require negating all of the allegations are less frequently used.⁸⁰ One possible explanation is that denying all allegations is somewhat easier in SGBV cases because these cases are ultimately credibility contests.⁸¹

If two people are equally believable, completely contradicting one party's account of the facts, arguably, does not seem to be the best strategy because it automatically implies that someone is lying. However, that does not seem to worry defense attorneys in SGBV

of staying with her abuser makes it appear that she is lying about the attack); *Wisconsin v. Jensen*, 432 N.W.2d 913, 915 (Wis. 1988) (defense cross-examined several witnesses to establish that the victim's delay in reporting the assault and denying the incident to family members supports the theory of fabrication); *Washington v. Ciskie*, 751 P.2d 1165, 1173 (Wash. 1988) (defense implied to jury that behavior of battered woman indicated that she lied about attack).

⁷⁴ See, e.g., Hartley, *supra* note 21, at 537.

⁷⁵ See *id.* at 513.

⁷⁶ See *id.* at 522–34.

⁷⁷ *Id.* at 518. Having an alibi does not seem to be a defense used in these types of cases even though it would negate the charges. *Cf. id.* However, because the aggression in these types of cases happen in private spaces between people with close relationships, presumptively, the easiest defense to negate the charges is to argue that the victim is lying. See *id.* at 535–36.

⁷⁸ *Id.* This does not seem to be different from defenses in rape cases. See, e.g., TAsLITZ, *supra* note 21, at 47, 55.

⁷⁹ See Hartley, *supra* note 21, at 518.

⁸⁰ See *id.*

⁸¹ *Id.* at 534.

cases.⁸² Perhaps the reason why attorneys prefer the innocence path is that they know that SGBV victims' testimony could be easily discounted.⁸³ Defense attorneys can easily impeach the victims' versions of the events because triers of fact tend to believe victims less than defendants.⁸⁴ In other words, they know that the victim's perceived lack of credibility provides their best defense.

Recently, we witnessed a great display of this strategy in the nomination hearings of Justice Brett Kavanaugh.⁸⁵ The White House *gave a spin* to negating Dr. Blasey Ford's accusations by stating that they had no doubt that something terrible happened to her but that she was *confused* about who her aggressor was.⁸⁶ In other words, she remembered the assault but not who the aggressor was and therefore she was lying about Kavanaugh sexually assaulting her.

In fact, Hartley's study shows that some of the strategies or impeachment techniques used to mount these defenses depend on the theory that the victim is lying.⁸⁷ Depending on the defense, the most frequent strategies used include no witnesses, general victim's character assassination, highlighting that the accused never threatened the victim, and turning victim's behavior against her.⁸⁸ Another theory frequently employed is that the relationship was fine and the accused was remorseful after the offense.⁸⁹ These defense narratives are used to establish the victim's propensity to lie, a lack of evidence of defendant's prior abusive behavior, or a lack of corroborative testimony.⁹⁰ Professor Andrew Taslitz made a similar observation when he highlighted that, in cases of rape, the cultural story of *the*

⁸² *See id.* at 518.

⁸³ *See id.* at 530–34.

⁸⁴ *See Aiken & Murphy, supra* note 61, at 44.

⁸⁵ *See Kellyanne Conway: Christine Blasey Ford "Absolutely Was Wronged by Somebody,"* CBS NEWS (Sept. 28, 2018), <https://www.cbsnews.com/video/kellyanne-conway-christine-blasey-ford-absolutely-was-wronged-by-somebody/> (Kellyanne Conway discussing Dr. Christine Blasey Ford's testimony at 4:10–5:30).

⁸⁶ *Id.*

⁸⁷ *See Hartley, supra* note 21, at 534 ("These tactics range from outright denying the abuse (it didn't happen, she's lying) to minimizing the abuse (I never punched her, I just slapped her) . . .").

⁸⁸ *Id.* at 533.

⁸⁹ *Id.*

⁹⁰ *Id.* at 534–37.

lying woman helps to craft a portrait “of the vengeful, spurned woman, lying on the stand to reap her retribution.”⁹¹ When these defensive narratives are combined with the reality that the offenses often take place without witnesses,⁹² the prevalence of revised accounts,⁹³ and the phenomenon of testimonial injustice,⁹⁴ defense attorneys have a reliable foundation from which to argue that the offense never occurred.

Testimonial injustice ensues when “the prejudice results in the speaker’s receiving more credibility than she otherwise would have—a *credibility excess*—or it results in her receiving less credibility than she otherwise would have—a *credibility deficit*.”⁹⁵ In the context of SGBV victims, the credibility deficit is caused by the narrative of women as tainted witnesses⁹⁶ and the narrative of implausibility associated with the “he said/she said” credibility bias.⁹⁷ As Professor Tuerkheimer observes, credibility has two components: (1) the trustworthiness of the witness; and (2) the plausibility of the testimony.⁹⁸ In the case of SGBV victims both components are af-

⁹¹ See TASLITZ, *supra* note 21, at 18.

⁹² See Hartley, *supra* note 21, at 535–36.

⁹³ See Scheppele, *supra* note 21, at 138–40. The term *revised accounts* refers to stories that are altered over time, often because victims repress what happened to them, hope the abuse will go away, and cover up for their abusers. *Id.* Revised accounts can also be attributed to the physical and psychological harms caused by the abuse. Deborah Epstein & Lisa A. Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women*, 167 U. PA. L. REV. 399, 449–51 (2019).

⁹⁴ MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 17 (2007).

⁹⁵ *Id.*

⁹⁶ See *id.* at 21.

⁹⁷ See Hartley, *supra* note 21, at 514. As a corollary to this credibility deficit, SGBV defendants experience a net credibility excess—they benefit from a surplus caused by the victims’ credibility deficit. See Schafran, *supra* note 21, at 42 (“As a group [women] are perceived as less competent than men; the context of the harms we seek redress in courts is often completely foreign to the trier of fact; and even when the harm is acknowledged, it is often minimized by a *de minimis* punishment for those who injure us.”).

⁹⁸ Tuerkheimer, *supra* note 21, at 13 (citing Karen Jones, *The Politics of Credibility*, in *A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 154, 155 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002) (adopting Lockean terminology of credibility)).

fects. Firstly, women are perceived as less trustworthy, and therefore less credible than men.⁹⁹ Secondly, SGBV accounts are perceived as implausible because of biases against victims and frequent misunderstandings of victims' conduct.¹⁰⁰

A. Women's Lack of Trustworthiness

The ways in which women are frequently turned into tainted or less credible witnesses have been well documented.¹⁰¹ Schafran, for instance, suggested in her analysis of intimate partner violence that this perception is triggered by three credibility biases: (1) collective credibility; (2) consequential credibility; and (3) contextual credibility.¹⁰² The first two biases are related to the first component of credibility—the trustworthiness of the witness.¹⁰³

1. COLLECTIVE CREDIBILITY BIAS

The lack of collective credibility points to a history in which our culture has deemed women less credible as a group.¹⁰⁴ Simply being female brands a victim as untruthful or untrustworthy.¹⁰⁵ This is true not only for victims, but for women involved in the judicial process in any capacity.¹⁰⁶ Jurors (1) find female witnesses to be slightly less

⁹⁹ See GILMORE, *supra* note 54, at 18.

¹⁰⁰ See *supra* note 54 and accompanying text.

¹⁰¹ See, e.g., GILMORE, *supra* note 54, at 138–39; Franiuk et al., *supra* note 70, at 795.

¹⁰² Schafran, *supra* note 21, at 5. Other authors have pointed to these phenomena, albeit having labeled the three differently. See, e.g., GILMORE, *supra* note 54, at 18. For example, Gilmore wrote that “[w]omen are often seen as unpersuasive witnesses for three related reasons: because they are women, because through testimony they seek to bear witness to inconvenient truths, and because they possess less symbolic and material capital than men as witnesses in courts of law.” *Id.*

¹⁰³ See GILMORE, *supra* note 54, at 18.

¹⁰⁴ *Id.*; see Schafran, *supra* note 21, at 5 (“Yet for women, achieving credibility in and out of the courtroom is no easy task.”).

¹⁰⁵ Schafran, *supra* note 21, at 5 (“[S]ocial science and legal research reveal that women are still perceived as less credible than men.”).

¹⁰⁶ See, e.g., Nicole D. Galli & Marta L. Villarraga, *Does Your Expert's Gender Matter? Explicit and Implicit Bias in the Courtroom*, A.B.A. (Aug. 17, 2017), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2017/does-your-experts-gender-matter-explicit-implicit-bias-in-courtroom/>.

credible and persuasive than men;¹⁰⁷ (2) are less likely to credit witnesses who use voice patterns regularly associated with women;¹⁰⁸ and (3) perceive female attorneys as “shrill, irrational, and unpleasant” for expressing the same emotions that, when expressed by male attorneys, are interpreted as appropriate.¹⁰⁹

This lack of credibility is based solely on the identity of women as women.¹¹⁰ However, its roots are shared with the credibility discounts other groups experience.¹¹¹ As Miranda Fricker has pointed out, “[m]any of the stereotypes of historically powerless groups such as women, black people, or working-class people variously involve an association with some attribute inversely related to competence or sincerity or both.”¹¹²

However, credibility is not only discounted in cases in which parties are of the opposite sex.¹¹³ This phenomenon is a function of how witnesses are gendered.¹¹⁴

For example, in a study about lesbian intimate partner violence, researchers found that when participants read a defendant and a victim as masculine, they viewed the victim as more credible than victims read as feminine.¹¹⁵ Similarly, when participants believed that a defendant and a victim both had traditionally-masculine traits, the participants also assessed higher levels of defendant’s responsibility.¹¹⁶ Conversely, “when the victim was [perceived as] feminine, the defendant’s appearance did not impact ratings of defendant responsibility.”¹¹⁷ Also, participants had more sympathy for victims

¹⁰⁷ *Id.*

¹⁰⁸ See Ken Broda-Bahm, *Avoid Rising Intonation?*, PERSUASIVE LITIGATOR (May 26, 2014), <https://www.persuasivelitigator.com/2014/05/avoid-rising-intonation.html> (summarizing studies finding that rising intonation or upspeak negatively impact perceptions of credibility).

¹⁰⁹ Lara Bazelon, *What It Takes to be a Trial Lawyer if You’re Not a Man*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/>.

¹¹⁰ Schafran, *supra* note 21, at 5.

¹¹¹ See Tuerkheimer, *supra* note 21, at 42–44.

¹¹² FRICKER, *supra* note 94, at 32.

¹¹³ See, e.g., Wasarhaley et al., *supra* note 2, at 651–53.

¹¹⁴ See *id.* This bias, like any of the biases that are discussed throughout, is not held only by men. See *id.* at 647–48.

¹¹⁵ *Id.* at 648.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

seen as masculine.¹¹⁸ In sum, the study found that exhibiting masculine traits leads to higher believability and in turn a higher likelihood of attributing guilt to a charged abuser.¹¹⁹ These results came as a surprise to the researchers that expected more pro-victim ratings when the defendant exhibited masculine traits.¹²⁰ However, when we account for the lack of collective credibility of women or victims with feminine traits, the results are expected and coherent.

Overcoming this type of trustworthiness-bias based on a witness's gender is very difficult. "Negative identity prejudice, as Fricker calls it, is especially concerning because it tends to be 'resistant to counter-evidence.'"¹²¹ In addition, as Professor Capers has observed, this bias is a type of evidence that is put before the jury without any check, as it is part of the functional evidence that the FRE do not regulate.¹²² However, we cannot pinpoint the particular conduct from an attorney or witness that would make such evidence apparent.¹²³

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 648, 651.

¹²⁰ *Id.* at 647–48.

¹²¹ Tuerkheimer, *supra* note 21, at 43 (quoting FRICKER, *supra* note 94, at 35).

¹²² Capers, *Evidence Without Rules*, *supra* note 29, at 871, 895.

¹²³ Perhaps the best way to counter this bias is through implicit bias training. However, the effectiveness of implicit bias training has been questioned. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 152 (2013); Frank Kineavy, *Implicit Bias Training for Police Gaining Attention*, DIVERSITYINC (Oct. 10, 2016), <http://www.diversityinc.com/news/implicit-bias-training-police-gaining-attention> (stating that "it is undetermined whether implicit bias training is effective"); Destiny Peery, *Opinion, Implicit Bias Training for Police May Help, but It's Not Enough*, HUFFINGTON POST (Mar. 14, 2016, 9:29 PM), http://www.huffingtonpost.com/destiny-peery/implicit-bias-training-fo_b_9464564.html (stating that there is little evidence that implicit bias trainings alone will have a positive effect on racial bias in policing and may, in fact, lead to negative backlash). See Jason A. Cantone, *Federal and State Court Cooperation: Effectiveness of Implicit Bias Trainings*, FED. JUD. CTR., <https://www.fjc.gov/content/337738/effectiveness-implicit-bias-trainings> (last visited Oct. 3, 2019) (explaining discussions held with judges in an effort to combat implicit bias). If implicit bias training is a solution, it would be more easily implemented for judges and attorneys who the state can require to be continuously trained well in advanced of a trial. See Anita Chabria, *California May Soon Push Doctors and Lawyers to Confront Their Biases*, L.A. TIMES (September 12, 2019), <https://www.latimes.com/california/story/2019-09-12/california-implicit-bias-legislation-doctors-lawyers>. Training jurors would unduly extend the trial or be ineffective as it would be done

Victims are well aware that this bias exists.¹²⁴ For example, in *Time's* article titled *Time 2017 Person of the Year: The Silence Breakers*, one of the victims interviewed stated that “[she] stayed anonymous because [she] live[s] in a very small community. And they just think usually that [the women are] lying and complainers.”¹²⁵ As seen in Jennifer’s case, victims are deterred from coming forward even under the guise of anonymity.¹²⁶ Furthermore, as discussed *infra* Part III, pervasive biases hinder convictions and favorable adjudications for victims in SGBV cases.

2. CONSEQUENTIAL CREDIBILITY BIAS

Consequential credibility bias, another bias Schafran proposes that is rooted in women’s identities, also affects convictions and favorable adjudications.¹²⁷ Schafran argues that women are afforded less consequential credibility, meaning they are part of a group whose injuries and harms are not taken seriously.¹²⁸ Thus, their claims are trivialized and minimized.¹²⁹

One way in which the consequential credibility bias manifests is in the reluctance to arrest or prosecute abusers.¹³⁰ Jurors and judges treat SGBV cases with the same disdain as police officers and prosecutors,¹³¹ suggesting that they think SGBV injuries, cases, and

shortly before the trial. However, for jurors, implicit bias can be address through jury instructions. *See e.g.*, Capers, *Evidence Without Rules*, *supra* note 29, at 898–900.

¹²⁴ *See, e.g.*, Zacharek et al., *supra* note 6.

¹²⁵ *Id.*

¹²⁶ *See supra* Part I.

¹²⁷ Schafran, *supra* note 21, at 40–41.

¹²⁸ *Id.*; *see also* Tuerkheimer, *supra* note 21, at 28 (“Although false reports of rape are uncommon, law enforcement officers often default to incredulity when women allege sexual assault, resulting in curtailed investigations and infrequent arrests.”).

¹²⁹ *See* Schafran, *supra* note 21, at 40–41.

¹³⁰ Hartley, *supra* note 21, at 512. Part of the reason why police officers do not arrest for this type of offense is their skepticism regarding the occurrence of SGBV, as they tend to overestimate the incidence of false reporting. *See* Tuerkheimer, *supra* note 21, at 16.

¹³¹ *See* Schafran, *supra* note 21, at 9, 40; Gender Fairness Implementation Comm., *Gender Fairness in North Dakota’s Courts: A Ten-Year Assessment*, 83 N.D. L. REV. 309, 337–40 (2007); Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 HARV. WOMEN’S L.J. 263, 265–66 (1997); Aiken & Murphy, *supra* note 61, 45–46.

abuses are inconsequential. A recent example of this bias was seen in the defense of Justice Brett Kavanaugh by two women featured during a CNN panel of Republican women from Florida.¹³² For instance, Gina Sosa stated, “What boy hasn’t done this in high school?”¹³³ Similarly, Irina Villarino argued that there was no harm because there was no intercourse.¹³⁴ In short, by exposing their consequential credibility bias, both women underplayed and trivialized the harms suffered by victims in situations similar to Dr. Blasey Ford.¹³⁵

As with the lack of collective credibility, consequential credibility bias is hard to combat because it is rooted in the identity of the victims.¹³⁶ Like collective credibility bias, SGBV victims are aware that consequential credibility bias exists.¹³⁷ As in Jennifer’s case, victims frequently opt not to go to the police or even talk to friends and family about the SGBV they suffer.¹³⁸ For instance, nearly twenty percent of non-student female victims of rape or sexual assault of college age, decided not to report because “police would not or could not do anything to help.”¹³⁹

The preferred strategy to counteract this problem has been training all actors in the judicial system about the prevalence and importance of prosecuting SGBV cases and about implicit bias.¹⁴⁰ However, the effectiveness of educating members of the judiciary

¹³² See CNN, *GOP Voter on Kavanaugh: What Boy Hasn’t Done This in High School?* YOUTUBE (Sept. 20, 2018), <https://www.youtube.com/watch?v=fIIM3AUyQ3A>.

¹³³ *Id.* at 1:11–1:14. All the women dismissed her claims as either misremembering, based in jealousy, or overblown. *Id.* at 2:29–2:42. They also questioned her silence and recanting of the story, in addition to victim-blaming Dr. Blasey Ford. *Id.* at 1:26–1:44, 2:29–2:42. All of their comments show how consequential, contextual, and collective credibility operate at the same time in SGBV cases.

¹³⁴ *Id.* at 0:49–1:01.

¹³⁵ See *id.* at 0:49–1:16.

¹³⁶ See Schafran, *supra* note 21, at 41.

¹³⁷ See, e.g., SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, at 1, 9 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

¹³⁸ See *id.*; Hartley, *supra* note 21, at 536.

¹³⁹ SINOZICH & LANGTON, *supra* note 137, at 9.

¹⁴⁰ See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 44 (1999).

about the prevalence of SGBV has not really been measured.¹⁴¹ Moreover, its effectiveness might be diminished when triers of fact are faced with impeachments that reinforce collective and contextual biases against a backdrop of a lack of physical evidence.¹⁴²

B. *Perceived Implausibility of SGBV Victims' Testimony*

As anticipated, not only are SGBV victims disbelieved because their trustworthiness is discounted,¹⁴³ but their trustworthiness is discounted based on a perceived implausibility.¹⁴⁴ This perceived implausibility stems from a failure of understanding victims' reality.¹⁴⁵ Like the lack of collective and consequential credibility, this failure of understanding is the result of centuries of diminished social power as women have not been able to participate in the construction of the social experience.¹⁴⁶ As a result, women's experiences not shared by the hegemonic group of men "find no meaningful outlet in collective notions of reality."¹⁴⁷ This translates into two

¹⁴¹ See Jane K. Stoeber, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1216 n.220 (2009) ("There is consensus among advocates that training is the most effective for judges who are receptive to learning about domestic violence; however, the true effectiveness of judicial training programs has not been measured.").

¹⁴² See BANAJI & GREENWALD, *supra* note 123, at 152. Some researchers, however, have pointed out that training jurors about implicit bias at the beginning of the trial or jury instructions regarding implicit bias could be effective at preventing jurors from engaging in this type of thinking when adjudicating cases. See David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 439, 452–53 (2013); Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1729–30 (2015). This may be true as the time between the training and the instruction is not so far removed from the decision. However, the literature also seems to indicate that over time bias training loses its effectiveness. See *supra* note 123 and accompanying text.

¹⁴³ See Schafran, *supra* note 21, at 5.

¹⁴⁴ See Tuerkheimer, *supra* note 21, at 46 (citing FRICKER, *supra* note 94, at 1) (explaining how hermeneutical injustice overlaps with testimonial injustice).

¹⁴⁵ *Id.* at 46–48.

¹⁴⁶ *Id.* at 46 (citing FRICKER, *supra* note 94, at 148).

¹⁴⁷ *Id.* at 47–48.

phenomena regarding SGBV: (1) society misunderstands the processes of SGBV because of an inability to empathize,¹⁴⁸ and (2) the collective framing of the SGBV and its harms are structurally prejudiced with biased labels and stereotypes.¹⁴⁹

1. CONTEXTUAL CREDIBILITY BIAS

Schafran denominates the first phenomenon as contextual credibility bias.¹⁵⁰ This bias refers to the inability to put oneself in the victim's shoes.¹⁵¹ In other words, triers of fact are unable to understand victims' experiences because of stereotypes, social narratives or scripts, misconceptions about how victims process their trauma, and underestimation of the effects of abuse on victims.¹⁵²

Some of the representative narratives of this bias identified in the literature, and present in Jennifer's case,¹⁵³ include the idea that the victim is lying when recanting or revising her story; nothing happened, because if it had the victim would have come forward sooner; the abuser is not the type of person who would commit such an act; and questioning why would the victim put herself in the situation of violence.¹⁵⁴ President Trump embodied a perfect example of this type of credibility bias in a tweet about Dr. Blasey Ford not coming forward when the alleged attack first happened:

I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities [sic] by either her or her loving parents. I ask that she

¹⁴⁸ See, e.g., St. Joan, *supra* note 131, at 290–92 (discussing how cultivating a sense of empathy with judges for victims will help to lessen cultural myths about SGBV victims).

¹⁴⁹ See Tuerkheimer, *supra* note 21, at 47 (citing FRICKER, *supra* note 94, at 155) (explaining the hermeneutical marginalization of women's experiences).

¹⁵⁰ Schafran, *supra* note 21, at 6.

¹⁵¹ See *id.*

¹⁵² See *id.* at 6; see also Hartley, *supra* note 21, at 512, 539; Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE & VICTIMS 271, 281 (1991). This helps to explain why it has been reported that expert testimony in SGBV cases is very effective in rehabilitating the victims and securing pro-victim judgments. Scheppele, *supra* note 21, at 157–60.

¹⁵³ See *supra* Part I.

¹⁵⁴ See Franiuk et al., *supra* note 70, at 790–91.

bring those filings forward so that we can learn date, time, and place!¹⁵⁵

Scholars argue that these narratives are in place to protect us from uncomfortable truths and to let us think that we might have control over these events and might even be able to prevent them.¹⁵⁶ In other words, we believe these narratives because it allows us to assume that such an aggression will not happen to us. However, the endorsement of these narratives has the effect of diminishing sympathy towards victims.¹⁵⁷

This self-preservation strategy causes us to disparage and question the victim more if her case does not fit into some of the stereotypical narratives.¹⁵⁸ For instance, one of the most prevalent stereotypical scripts in cases of rape or sexual violence is that the perpetrator is a stranger.¹⁵⁹ If the victim was abused by someone close to her, one tends to question more whether she is actually telling the truth.¹⁶⁰

Another negative effect of this aspect of contextual credibility is that stereotypes and narratives are reinforced by popular culture.¹⁶¹ For example, in studies performed about the Kobe Bryant rape case, researchers found that

65% of newspapers articles perpetuated at least one myth about sexual assault, with “she’s lying” being the myth most commonly perpetuated. Further, participants in this study who were exposed to a rape myth-supporting article were less likely to think Bryant was guilty (before the case went to trial) and more

¹⁵⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 21, 2018, 6:14 AM), <https://twitter.com/realdonaldtrump/status/1043126336473055235?lang=es>.

¹⁵⁶ Franiuk et al., *supra* note 70, at 791.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; see also Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, 78 OHIO ST. L.J. 733, 754 (2017) (discussing how asylum seekers are often disbelieved for not comporting to stereotypical victim behavior).

¹⁵⁹ Franiuk et al., *supra* note 70, at 791.

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 792.

likely to think the victim was lying than those exposed to a rape myth-attenuating article.¹⁶²

This type of reinforcement is also present in television and cinema.¹⁶³

The danger of these myths in the media is that they mislead and encourage people to distrust the victim, even when examining the evidence might counter misconceptions.¹⁶⁴ In addition, these myths provide a fertile substratum for future triers of fact and attorneys to explain the SGBV with which they come across in court.¹⁶⁵ For instance, Pennington and Hastie found that jurors will consider external information as part of their thought processes to determine the guilt or innocence of a defendant.¹⁶⁶ Basically, triers of fact will “fill in the blanks” in the cases with their preconceived notions or previous knowledge about the dynamics of SGBV.¹⁶⁷ Thus, these studies explain why the impeachment of victims’ credibility is so commonplace and successful.

Attorneys, as part of society, are susceptible to believing these stereotypes about victims in SGBV cases.¹⁶⁸ That is why attorneys use them as a bridge to communicate with triers of fact. Driven by these stereotypes, attorneys and triers of fact instinctively question victims and find material to support their distrust.¹⁶⁹

As Hartley points out,

¹⁶² *Id.* Another study looking exclusively at headlines from the same case found that myths were present in almost ten percent. *Id.* at 797.

¹⁶³ *See id.* at 792; *see also* TASILTZ, *supra* note 21, at 19–25 (discussing the embodiment of rape narratives in *The Little Mermaid*, *Where the Boys Are*, and *Thelma and Louise*).

¹⁶⁴ Franiuk et al., *supra* note 70, at 792.

¹⁶⁵ *See* Hartley, *supra* note 21, at 539 (citing Nancy Pennington & Reid Hastie, *Juror Decision-Making Models: The Generalization Gap*, 89 PSYCHOL. BULLETIN 246, 248–49 (1981)).

¹⁶⁶ Pennington & Hastie, *supra* note 165, at 246, 248–49.

¹⁶⁷ Hartley, *supra* note 21, at 539; *see* Scheppele, *supra* note 21, at 137–38 (analyzing the filling of silences and revised stories in Professor Anita Hill’s case); TASILTZ, *supra* note 21, at 7–8 (explaining how jurors think in terms of stories and how they fill the gaps in the stories).

¹⁶⁸ *See* Tuerkheimer, *supra* note 21, at 38 (discussing how prosecutors consider their own skepticisms and credibility discounting when deciding whether to pursue sexual assault cases).

¹⁶⁹ *See, e.g.*, Hartley, *supra* note 21, at 539.

if jurors accept the commonly held myths about domestic violence [or any other type of SGBV] and the defense further reinforces these misconceptions at trial, they may “fill in the blanks” with an unrealistic view of the violent relationship, and their evaluation of the evidence may be based on misconceptions and prejudices unsupported by scientific research.¹⁷⁰

For example, in Jennifer’s case,¹⁷¹ jurors will fill in the blanks as to why she did not speak of the rape before, why Mark was able to come into her house even when they were separated, why she took a pregnancy test, or why she said to the police that she has not been a victim of domestic violence.¹⁷² They would likely assume that she was heartbroken and lying, trying to get back at Mark for leaving by having sex with other men clandestinely. The defense attorney just needs to ask the questions that will open the door to stereotypes that undermine the victim’s credibility.¹⁷³

Consequently, the balance in these credibility contests is resolved in favor of the defendants, especially when defense counsel highlights a lack of corroborative testimony or evidence.¹⁷⁴ Recall the common impeachment strategies used to undermine the victim’s credibility,¹⁷⁵ such as pointing out that there are no witnesses besides the parties and eliciting that the defendant never threatened the victim.¹⁷⁶ As Scheppele has pointed out,

[c]ases of sexualized violence [or SGBV] often evolve into a “he said, she said” battle of competing narratives in which the “he,” who is the defendant, wins by default simply because the evidence is contested. Default rules about the burden of proof and the benefit of the doubt resolve all divergent accounts

¹⁷⁰ *Id.*

¹⁷¹ *See supra* Part I.

¹⁷² *See Hartley, supra* note 21, at 539 (explaining how jurors fill in the blanks with own life experiences).

¹⁷³ *See Méndez, V. Witnesses, supra* note 38, at 465.

¹⁷⁴ *See, e.g., Crooms, supra* note 2, at 471.

¹⁷⁵ *See Hartley, supra* note 21, at 522–34.

¹⁷⁶ *Id.* at 535–36.

in favor of the accused when there are merely contested stories with no “hard” evidence to compel choice between them. Though laws on the books look more woman-friendly on issues of sexualized violence than they used to, women do not always find that helpful laws produce victories for women.¹⁷⁷

Moreover, common stereotypes connected to victims are reinforced by the lack of understanding triers of fact hold about the dynamics of SGBV.¹⁷⁸ Specifically, one of the most damaging of those stereotypes is that victims who change their stories are liars.¹⁷⁹ However, the most misunderstood characteristic of domestic violence victims is that such victims have a tendency to tell revised stories of their abuse.¹⁸⁰ It has been reported that women tend to move from less stereotyped, general, emotionless accounts of their abuse to more detailed, compelling, and specific narratives.¹⁸¹ In fact, one sign of recovery is that women’s stories of abuse change in this way as they recover their sense of safety and make coherent their memories of abuse.¹⁸² However, this sign of recovery from the abuse is turned against victims, as in Jennifer’s case, to become the very thing that discredits the victims as liars.¹⁸³

Similarly, victims’ previous silence about the abuse, victims’ history of no reporting, and the fact that victims depict their relationships as happy and normal are all processes that are used against the victims to undermine their credibility,¹⁸⁴ as the defense attorney did in Jennifer’s case.¹⁸⁵ However, these actions are normal processes of SGBV victims while they come to terms with the fact that they have been victims of SGBV and recover from the traumatic

¹⁷⁷ Scheppele, *supra* note 21, at 123–24. *See infra* Section II.B.2, for a discussion on how this script is the all-encompassing narrative for SGBV, how it came to be, and how it drives this lack of empathy and contextual credibility bias.

¹⁷⁸ *See* Hartley, *supra* note 21, at 539.

¹⁷⁹ *See* Scheppele, *supra* note 21, at 144–45.

¹⁸⁰ *Id.* at 140–41.

¹⁸¹ *Id.* at 139–40.

¹⁸² *Id.* at 140.

¹⁸³ *See* TASLITZ, *supra* note 21, at 18; *see also* Scheppele, *supra* note 21, at 133.

¹⁸⁴ *See* Scheppele, *supra* note 21, at 169–70.

¹⁸⁵ *See supra* Part I.

events.¹⁸⁶ Yet, these actions are viewed in conjunction with a discredited character to show that the abuse never happened.¹⁸⁷ As Scheppele so poignantly summarizes,

[w]omen who delay in telling their stories of abuse at the hands of men or who appear to change their stories over time about such abuse are particularly likely to be discredited as liars. The very fact of delay or change is used as evidence that the delayed or changed stories cannot possibly be true. But abused women frequently have exactly this response: they repress what happened; they cannot speak; they hesitate, waver, and procrastinate; they hope the abuse will go away; they cover up for their abusers; they try harder to be “good girls”; and they take the blame for the abuse upon themselves. Such actions produce delayed or altered stories over time, which are then disbelieved for the very reason that they have been revised.¹⁸⁸

Consequently, women not only face the disbelief of those closest to them, who generally hold the contextual credibility bias and are unable to understand why victims stay with their abusive partners,¹⁸⁹ but they also bear the cross of being depicted as less credible in court when they seek to redress the wrongs committed against them. The law facilitates discrediting these women by allowing the introduction of character for untruthfulness evidence that reinforces credibility biases.¹⁹⁰

The resulting credibility discount, contrary to the purposes of evidentiary rules,¹⁹¹ leads to unfair prejudice, confusing the issues, and misleading jurors and judges in their fact-finding function.¹⁹²

¹⁸⁶ See Scheppele, *supra* note 21, at 138–39.

¹⁸⁷ *Id.* at 145.

¹⁸⁸ Scheppele, *supra* note 21, at 126–27.

¹⁸⁹ See Franiuk et al., *supra* note 70, at 791.

¹⁹⁰ See *supra* note 51–61 and accompanying text.

¹⁹¹ See, e.g., FED. R. EVID. 102 (stating that “[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination”).

¹⁹² See Montan, *supra* note 38, at 459–62; see also FED. R. EVID. 403.

Even though some confusion and prejudice could be countered through expert testimony, corroborating evidence, similar accounts from other victims, jury instructions, and rehabilitative testimony, it is more difficult in practice to fight against the credibility discount.

Although expert testimony helps explain the inconsistent victim behavior,¹⁹³ it is expensive and time consuming,¹⁹⁴ and thus not always accessible to the parties.¹⁹⁵ Also, attorneys may strategically choose not to use expert testimony at trial to keep it shorter for both the victims' and jurors' sake.¹⁹⁶

Similarly, jury instructions directing jurors to properly weigh the credibility impeachment by explaining that not believing part of a witness's testimony does not mean that they cannot believe the rest of a testimony might not be effective.¹⁹⁷

Furthermore, because of the cycle of violence or the past silence from the victim, as in Jennifer's case, physical corroborative evidence might not be available.¹⁹⁸ But even when it is available, credibility biases might diminish its value. Once a victim is impeached as not credible, the impeachment spreads to the evidence associated with her.¹⁹⁹ The same holds true to other witnesses, who are usually related to the victim, that become tainted by association.²⁰⁰

¹⁹³ Montan, *supra* note 38, at 459–62

¹⁹⁴ Jill Starbuck, *Expert Witnesses: Worth the Time and Money?*, IND. CONTINUING LEGAL EDUC. F. (Sept. 20, 2012), <https://iclef.org/2012/09/expert-witnesses-worth-the-time-and-money/> (explaining how “time and money are significant factors for hiring an expert witness”).

¹⁹⁵ See, e.g., *Commonwealth v. Serge*, 896 A.2d 1170, 1184–85 (Pa. 2006) (discussing how states do not have an obligation to pay for an expert witness for an indigent defendant).

¹⁹⁶ See Starbuck, *supra* note 194 (discussing the time considerations made when deciding to use an expert).

¹⁹⁷ See Kassin & Sommers, *supra* note 58, at 1053 (discussing literature about the ineffectiveness of jury instructions).

¹⁹⁸ See Hartley, *supra* note 21, at 535–36; see Scheppele, *supra* note 21, at 155–56.

¹⁹⁹ See GILMORE, *supra* note 54, at 142 (“[Doubt] may be initially withheld as one hears an account of sexual harassment, for example, but creep[s] in as evidence is presented.”).

²⁰⁰ Those close to victims who are called as a witness are likely to be impeached for bias because their closeness to the victim is likely to be interpreted as cause for their testimony to be slanted toward the victim. See Phillip W. Broadhead, *Why Bias is Never Collateral: The Impeachment and Rehabilitation of Witnesses in Criminal Cases*, 27 AM. J. TRIAL ADVOC. 235, 263 (2003).

In terms of other victims coming forward, that strategy also requires considerable efforts, as plaintiffs will need to devote resources to finding victims and convincing them to participate in the action even when they might have decided not to bring actions in their own names.²⁰¹ In addition, the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis*²⁰² might have eliminated this option for some victims as arbitration agreements requiring individualized proceedings are legal and might become the norm.²⁰³

Finally, rehabilitative testimony might not be effective because the victim's testimony might be compromised by the biases associated with trustworthiness. The factfinders' integrative process might have led them to already come up with explanations as to why the victim is allegedly lying and reaffirm that the victim should not be believed. Thus, countering the consequential bias with the victim herself could be even more damaging.

2. "HE SAID/SHE SAID" CREDIBILITY BIAS

The effectiveness and pervasiveness of consequential credibility bias and the resulting credibility discounting is due to the history of the prejudiced collective framing of SGBV.²⁰⁴ As Professor Julia Simon-Kerr has pointed out, the script of a truthful woman was fraught with ideas about her sexual purity—equating unchastity with untruthfulness.²⁰⁵ The idea of a woman's veracity entered early impeachment practice and jurisprudence involving women.²⁰⁶ However, states ultimately barred this type of impeachment in cases

²⁰¹ Scheppele, *supra* note 21, at 155.

²⁰² 138 S. Ct. 1612, 1619 (2018) (holding that arbitration agreements requiring individual arbitration are enforceable under the Federal Arbitration Act, irrespective of provisions in the National Labor Relations Act).

²⁰³ Najah Farley, *How the US Supreme Court Could Silence #MeToo*, GUARDIAN (Apr. 18, 2018, 6:00 PM) <https://www.theguardian.com/commentis-free/2018/apr/18/supreme-court-metoo-arbitration-clauses-decision-sexual-harassment> (discussing how corporations use forced arbitration clauses to take harassment claims into private arbitration proceedings, which prevents other women from coming forward as they are usually kept confidential).

²⁰⁴ See Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1879 (2008) [hereinafter Simon-Kerr, *Unchaste and Incredible*].

²⁰⁵ See *id.*

²⁰⁶ *Id.* at 1169–70.

other than rape.²⁰⁷ The decision to remove it from cases other than SGBV cases signals how SGBV cases were, and still are, socially perceived as different from others.

This differential treatment of unchastity, as applied to women, helped create the social script that we as a society must be careful in SGBV cases of convicting male defendants because they can be the victims of women's proclivity to lie.²⁰⁸ Such a script, in turn, was embodied in the law with requirements of corroboration testimony, prompt outcry, and cautionary jury instructions, as well as the availability of victims' prior sexual history as impeachment and social companion defenses.²⁰⁹ However, these stereotypes and prejudices against female victims are not issues of the past and still linger in our impeachment practices. For example, jurisdictions that have abolished the use of specific acts of untruthfulness to impeach a witness's credible character have carved out exceptions for rape cases to use this type of evidence because of the particular nature of SGBV cases.²¹⁰

The persistence of carving out SGBV cases as ones in which we must exercise caution with victims because they tend to lie is a direct result of the cultural endurance of the description of SGBV cases as "swearing contests," "nobody really knows what happened," or "he said/she said" cases.²¹¹ Professor Taslitz, who labels these phenomena as themes, pointed out that the four most common in rape cases were silenced voices, bullying, black beasts, and a little more than persuading.²¹² This Article adopts the term "he said/she said" *credibility bias* to denominate the collective framing discounting of SGBV victims and all its prejudiced and biased societal narratives.

Behind these *neutral* descriptions of SGBV cases lies the presumption that victims are lying about what happened to them.²¹³ This perceived implausibility about SGBV victims' testimony is built into the fabric of how we talk about these cases.²¹⁴

²⁰⁷ See *id.* at 1870.

²⁰⁸ See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 181; Simon-Kerr, *Unchaste and Incredible*, *supra* note 204, at 1875.

²⁰⁹ See *supra* notes 26–30 and accompanying text.

²¹⁰ See *infra* Section IV.A.3.

²¹¹ See GILMORE, *supra* note 54, at 6–7.

²¹² TASLITZ, *supra* note 21, at 19.

²¹³ See Colb, *The Difference Between*, *supra* note 54.

²¹⁴ See, e.g., GILMORE, *supra* note 54, at 6–7.

Two of the stickiest judgments that circulate in response to claims by women of sexual violence are “he said/she said” and “nobody really knows what happened.” . . . They render as unknowable and undecidable both physical evidence and verbal testimony. They deflect a more rigorous engagement with narratives, persons, evidence, and scenes of abuse that are complicated. Physical evidence is discounted when, for example, “she said” the sexual contact that the evidence confirms was rape, but “he says” it was consensual. . . . It represents the introduction of reasonable doubt, the legal standard by which rape is judged in criminal court. But we should remember also that “he said/she said” simply identifies how witnesses in an adversarial legal structure are positioned. How “he said/she said” has come to be seen as something other than the prompt from which due process begins suggests that women lie outside the frame of justice from the beginning.²¹⁵

In other words, these formulations that are depicted as neutral portrayals of a situation in which we only have as witnesses the parties themselves serve to discredit the victims before they even speak.²¹⁶ “They represent a free-floating form of collective judgment that attaches to testimony in the form of doubt.”²¹⁷ These formulations, coupled with contextual credibility bias, are why biases that discount the trustworthiness of women are exacerbated in cases of SGBV.²¹⁸ They are also the reason why the use of character for

²¹⁵ GILMORE, *supra* note 54, at 6–7.

²¹⁶ *See id.* at 140. Even though these narratives of “he said/she said” are presented as neutral, it is interesting to note how the speech privileges the man’s voice by mentioning him first, notwithstanding that the accuser is usually the woman and the person who will tell first the story. This construction signals that the voice to which everything must be compared is the man’s. This results in a subtler way of stating that women’s accounts of abuse we will be measured in function of whatever the principal voice (the man’s) will say about the case.

²¹⁷ *Id.*

²¹⁸ *See, e.g.,* Hartley, *supra* note 21, at 539.

untruthfulness evidence in the impeachment of SGBV victims has undue prejudicial effects as opposed to in other contexts.²¹⁹

As Professor Colb points out, these prejudiced scripts have consequences on the treatment of witnesses in SGBV cases, their credibility, and the perception of jurors regarding the issues being tried.²²⁰ Colb, reflecting on acquaintance rape *vis-à-vis* robbery, states the following:

Some folks, however, make the mistake of thinking that in order to presume innocence, we must conclude that the complaining witness in a rape case, the alleged rape victim, is perjuring herself when she provides incriminating testimony against the accused rapist. They compound this mistake by imagining that we must give as much credence to the defendant as we do to the alleged victim and that we cannot convict a rapist on the basis of the victim's testimony alone.

None of that is true. Think about a non-rape case, an armed robbery. Juries must presume that the defendant is innocent there as well, and the prosecution there must prove guilt beyond a reasonable doubt to avoid an acquittal too. Yet no one presumes that the robbery victim, as he testifies, is lying on the stand. I know, because I was a robbery victim, and the defense attorney bent over backwards to treat me with respect and to make clear that he thought I might have been mistaken but not that I might have been lying. He is not an outlier. Juries would hate a defense attorney who approached a crime victim witness as one would approach a liar, unless, that is, the victim accuses the defendant of acquaintance rape.²²¹

²¹⁹ See GILMORE, *supra* note 54, at 6–7 (explaining that victim testimony is often times the only evidence in these cases).

²²⁰ See Colb, *The Difference Between*, *supra* note 54.

²²¹ *Id.*; see also *House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments*, 61 A.B.A. J. 463, 464 (1975) (quoting Connie K. Borkenhagen while urging the House of Delegates to redefine rape).

As noted, the interaction between the *neutral* rules of allowing character for untruthfulness evidence magnifies the credibility biases discussed. The underlying bias tends to confuse the issues for triers of fact whose views are already skewed against SGBV victims because of their gender identity.²²² In turn, the inherent biases in the rules aid attorneys in achieving not guilty verdicts by creating narratives about the defendant's innocence, victim's tendency to lie, and victim's revengeful prosecutions. In Jennifer's case, for example, these narratives imbedded in the functional evidence were the bedrock from which the defense attorney's cross and closing drew support.²²³

Moreover, this credibility discounting through perceived implausibility also deters victims from coming forward.²²⁴ In fact, conviction rates seem to suggest that when attorneys employ these strategies, they are quite effective.²²⁵

III. #TIMESUP: THE COSTS OF CHARACTER FOR UNTRUTHFULNESS EVIDENCE IN SGBV CASES

*When I testified, I had already had to watch this man's attorney bully, badger and harass my team, including my mother . . . I was angry.*²²⁶

SGBV remains an alarming problem. Most of these crimes are not prosecuted, mainly because they go unreported.²²⁷ Organizations working in the field estimate that less than twenty-five percent of all sexual assaults,²²⁸ a third of all rapes,²²⁹ and around forty percent of all stalking crimes are in fact reported.²³⁰ Moreover, meta-

²²² See Montan, *supra* note 38, at 459–62.

²²³ See *supra* Part I.

²²⁴ Tuerkheimer, *supra* note 21, at 28.

²²⁵ See *The Criminal Justice System: Statistics*, *supra* note 8.

²²⁶ Zacharek et al., *supra* note 6 (quoting Taylor Swift).

²²⁷ See *The Criminal Justice System: Statistics*, *supra* note 8.

²²⁸ *Id.*

²²⁹ Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences.*, WASH. POST (Oct. 6, 2018, 7:00 AM), <https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/>.

²³⁰ KATRINA BAUM ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STALKING VICTIMIZATION IN THE UNITED STATES (2009),

analysis of police and judicial statistics reveals that only one out of six domestic violence cases reported to the police in the United States results in conviction.²³¹ Furthermore, only one third of the people arrested end up convicted.²³² “About 0.7% of rapes and attempted rapes end with a felony conviction for the perpetrator, according to an estimate based on the best of the imperfect measures available.”²³³ It is also estimated that a robbery accusation is four times more likely to end in a conviction.²³⁴

These numbers illustrate a twofold problem. First, a large percentage of the victims are not seeking judicial redress.²³⁵ Second, the ones that do go through the legal process are not receiving the justice they deserve.²³⁶

There are multiple reasons attributed to the low reporting rates in these types of crimes.²³⁷ It has been widely documented that victims do not feel comfortable going to the authorities because police officers do not validate their accusations, and instead they are received with a new iteration of the SGBV that they have been trying to escape.²³⁸ As discussed, victims are received this way due to credibility discounting.²³⁹ In addition, in many instances, women are try-

<https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf>.

²³¹ Joel H. Garner & Christopher D. Maxwell, *Prosecution and Conviction Rates for Intimate Partner Violence*, 34 CRIM. JUST. REV. 44, 53 (2009).

²³² *Id.*

²³³ Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/?noredirect=on&utm_term=.3fc0f7b254d2.

²³⁴ See *The Criminal Justice System: Statistics*, *supra* note 8.

²³⁵ See *id.*

²³⁶ See *id.* This conclusion presumes that most victims do not lie about their harms. See Tuerkheimer, *supra* note 21, at 20 (discussing how false report rates fall between 4.5%, 5.9%, and 6.8%).

²³⁷ See, e.g., Altantulkhuur, *supra* note 50, at 1109; SINOZICH & LANGTON, *supra* note 137, at 9; Epstein & Goodman, *supra* note 93, at 431.

²³⁸ See Altantulkhuur, *supra* note 50, at 1109; SINOZICH & LANGTON, *supra* note 137, at 9; Tuerkheimer, *supra* note 21, at 29.

²³⁹ See *supra* Part II.

ing to avoid the negative effects that prosecuting these abuses present in their lives, such as adverse child custody determinations or becoming the object of criminal investigations themselves.²⁴⁰

Another important reason for the low reporting rate is how the credibility discounting operates by activating trustworthiness and plausibility biases through the impeachment of victims with character for untruthfulness evidence.²⁴¹ Victims are cognizant of that possibility and, as a result, are deterred from coming forward.²⁴² As we saw in Jennifer's case, victims know that they could be doubly victimized during cross-examination.²⁴³ They are aware that they would have to relive their abusive experiences and subject themselves to re-enactments of the abuse and disparagement during the trial.²⁴⁴ Moreover, our adversarial system values aggressiveness during the trial, particularly during cross-examination.²⁴⁵

These problems with the adversarial system grow even deeper when factors such as race, socio-economic position, and immigration status are thrown into the mix.²⁴⁶ Not only are they accentuated

²⁴⁰ Melissa A. Trepiccione, Note, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution when Her Child Witnesses Domestic Violence?*, 69 *FORDHAM L. REV.* 1487, 1490–91 (2001); Epstein & Goodman, *supra* note 93, at 431; Aiken & Murphy, *supra* note 61, at 51.

²⁴¹ Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1359–60 (2005).

²⁴² *See id.* at 1376; Tuerkheimer, *supra* note 21, at 28; *see also* Diana Friedland, *27 Years of "Truth-in-Evidence": The Expectations and Consequences of Proposition 8's Most Controversial Provision*, 14 *BERKELEY J. CRIM. L.* 1, 27 (2009).

²⁴³ *See supra* Part II; *see also supra* notes 22–28 and accompanying text.

²⁴⁴ *See* Lininger, *supra* note 241, at 1359–60; TASLITZ, *supra* note 21, at 99.

²⁴⁵ TASLITZ, *supra* note 21, at 81–83.

²⁴⁶ *See* Capers, *Evidence Without Rules*, *supra* note 29, at 895 (discussing how factors such as race and gender matter as "evidence" when considering plea negotiations).

by extrajudicial factors or functional evidence,²⁴⁷ but the legal system is increasing the harshness of cross.²⁴⁸ The holdings in *Crawford v. Washington*,²⁴⁹ *Blakely v. Washington*,²⁵⁰ and *United States v. Booker*,²⁵¹ the erosion of evidentiary privileges for accusers;²⁵² increasing sentences;²⁵³ mandatory prosecutions (no-drop policies);²⁵⁴ and the legality of arbitration agreements providing for individualized proceedings²⁵⁵ have made indispensable the testimony of the victims during the trial, expanded the scope of issues victims must testify about, and strained the relationships between prosecutors and victims.²⁵⁶ This, in turn, has made cross harsher and the experience of victims worse.²⁵⁷

Because of the aforementioned changes, defendants are more likely to go to trial and contest their convictions because sentences

²⁴⁷ *See id.*

²⁴⁸ *See* Lininger, *supra* note 241, at 1363.

²⁴⁹ 541 U.S. 36, 68–69 (2004) (holding that the Sixth Amendment requires a defendant to be afforded the opportunity to cross-examine a witness making testimonial statements); *see also* Lininger, *supra* note 241, at 1363–66 (explaining how *Crawford* has required victims to testify, resulting in unpleasant cross examinations of the victim).

²⁵⁰ 542 U.S. 296, 304–05 (2004) (holding that in order for a judge to sentence a defendant beyond the statutory maximum, the facts being relied on to support the increase in punishment, must be submitted to the jury); *see also* Lininger, *supra* note 241, at 1367–71 (stating how *Blakely* has expanded proceedings that victims would be subjected to).

²⁵¹ 543 U.S. 220, 244–45 (2005) (holding “that the Sixth Amendment as construed in *Blakely* does apply to the [Federal] Sentencing Guidelines”); *see also* Lininger, *supra* note 241, at 1367–69 (explaining how *Booker*, in conjunction with *Blakely*, has increased the likelihood of trials and therefore the likelihood of victims being subject to cross-examinations).

²⁵² Lininger, *supra* note 241, at 1371–74 (explaining how the erosion of spousal privilege, self-incrimination, privilege for psychiatric and counseling records make victims less likely to wish to testify).

²⁵³ *Id.* at 1379–80 (explaining how increased sentences makes trials and cross-examinations more likely and more aggressive).

²⁵⁴ *Id.* at 1362 (explaining how “‘no drop’ policies in many prosecutors’ offices have added to victims’ sense of frustration during cross-examination”).

²⁵⁵ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (holding that the Arbitration Act requires the enforcement of agreements that provide for individualized arbitration).

²⁵⁶ *See, e.g.*, Lininger, *supra* note 241, at 1373, 1380, 1392, 1394.

²⁵⁷ *See id.* at 1363, 1373.

could be longer, meaning the defendant has more at stake.²⁵⁸ This translates to more aggressive cross examinations of victims.²⁵⁹ Furthermore, the relationship between victims and prosecutors has been shaken, as the latter are now required to force witnesses to testify with low expectations of prevailing or transforming the nature of their personal and family relationships with the defendants.²⁶⁰ As a result, the tortuous process for the victim is lengthened.

As discussed, the credibility discounting women face impacts conviction rates because credibility biases constrain victims into not reporting and drive police officers away from going forward with investigations.²⁶¹ Similarly, based on the convictability standard,²⁶² prosecutors choose not to pursue cases as they know they will not prevail in court because jurors will discount victims' credibility.²⁶³

These underreporting and low conviction rates are not exclusive to criminal proceedings—the same story repeats itself in civil cases for sexual harassment.²⁶⁴ For example, it is estimated that seventy-five percent of people who experience sexual harassment, eighty-three percent of which are women, do not report it.²⁶⁵ Moreover, in the past decade, over half of the sexual harassment claims have resulted in no charge.²⁶⁶

²⁵⁸ See *id.* at 1380.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1362; Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 453 (2015).

²⁶¹ See Tuerkheimer, *supra* note 21, at 28–32.

²⁶² See *id.* at 37–38.

²⁶³ *Id.* at 36–41; see also Capers, *Evidence Without Rules*, *supra* note 29, at 895 (discussing how prosecutors and defense attorneys, when deciding whether to enter plea negotiations or proceed with a case, take into account functional evidence, such as gender and the effect of credibility biases, in assessing the strength of the evidence).

²⁶⁴ See, e.g., Mona Chalabi, *Sexual Harassment at Work: More Than Half of Claims in US Result in No Charge*, GUARDIAN (July 22, 2016, 12:30 PM), <https://www.theguardian.com/money/2016/jul/22/sexual-harassment-at-work-roger-aites-fox-news>.

²⁶⁵ *Id.*

²⁶⁶ *Charges Alleging Sex-Based Harassment*, *supra* note 2; see also Chalabi, *supra* note 264. This does not include the approximately twenty-two percent of cases that were closed for “administrative reasons” over the last nine years. *Charges Alleging Sex-Based Harassment*, *supra* note 2.

Credibility discounting helps to explain some of the reasons for low conviction rates in SGBV cases, and also gives us an explanation as to why rape shield laws have been unsuccessful in bringing reporting and conviction rates up.²⁶⁷ Notwithstanding this reality, character for untruthfulness evidence continues to be allowed by the FRE in SGBV cases, in spite of data showing that such evidence is not a good predictor of whether a witness is lying²⁶⁸ and that false accusations in these cases are estimated to be less than ten percent.²⁶⁹

The #MeToo movement has not only drawn attention to the prevalence of SGBV, but also to the discounting of women's credibility in SGBV cases and its consequences.²⁷⁰ The movement has made clear the consequences women endure by coming forward about their experiences and how that has caused them to remain silent and not press charges or file lawsuits.²⁷¹ It has shown us how class, race, and nationality affect the outcome in SGBV cases.²⁷²

²⁶⁷ See Cassia C. Spohn & Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, 86 J. CRIM. L. & CRIMINOLOGY 861, 880–82 (1996); Julie Horney & Cassia C. Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 L. & SOC'Y REV. 117, 880–82 (1991); Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J. L. & GENDER 183, 205 (2017) (“[R]ape shield rules have not protected rape victims as hoped. . . . Rape shields certainly have not leveled the playing field for victims of rape. Rapes remain under-reported, conviction rates remain low, and victims who come forward continue to face demeaning and victim-blaming cross-examination in the courtroom amounting to a ‘second victimization.’”).

²⁶⁸ See Victor Gold, *Two Jurisdictions, Three Standards: The Admissibility of Misconduct Evidence to Impeach*, 36 SW. U. L. REV. 769, 771–72 (2008) (stating that “a person’s behavior in a given situation cannot accurately be predicted on the basis of personality test scores or even past behavior in a similar situation”).

²⁶⁹ *Get Statistics*, *supra* note 2 (stating how the prevalence of false reporting is between two and ten percent); Tuerkheimer, *supra* note 21, at 20 (discussing how false report rates fall between 4.5%, 5.9%, and 6.8%).

²⁷⁰ See Zacharek et al., *supra* note 6.

²⁷¹ See *id.*

²⁷² For example, if we consider Taylor Swift’s successful claim, we notice that she is white, rich, and filed a lawsuit for the symbolic amount of one dollar. See Hillary Weaver, *Taylor Swift Has Finally Been Sent the Symbolic Dollar She Won in Court*, VANITY FAIR (Dec. 7, 2017), <https://www.vanityfair.com/style/2017/12/former-dj-david-mueller-says-he-sent-taylor-swift-dollar-payment>. We can infer how all these factors played out in her favor by highlighting to jurors that she could not have any ulterior motive to bring charges

More importantly, it has made evident that it is one thing to publicly and temporarily ostracize aggressors and another to secure convictions or judgments against them.²⁷³

Unfortunately, the #MeToo movement has also created a backlash in terms of victims' credibility.²⁷⁴ It has been reported that from 2017 to 2018 people distrust victims more and think of SGBV as an inconvenience rather than a real problem in need of solution:

The share of American adults responding that men who sexually harassed women at work 20 years ago should keep their jobs has risen from 28% to 36%. The proportion who think that women who complain about sexual harassment cause more problems than they solve has grown from 29% to 31%. And 18% of Americans now think that false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished, compared with [a previous] 13%²⁷⁵

Parallel, we have seen an increase of “no cause” determinations in sexual harassment cases and the decrease in settlements.²⁷⁶

against her assailant. In fact, most of the women we have seen in the media associated with the #MeToo movement have been largely white, non-immigrant, and wealthy. See generally Zacharek et al., *supra* note 6. Meanwhile, we ignore how unsuccessful the movement has been for women of color, undocumented, in jobs with minimum wage. See Charisse Jones, *When Will MeToo Become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY, <https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002/> (last updated Jan. 30, 2019, 5:13 PM).

²⁷³ Since April 2017, of the 263 celebrities, politicians, CEOs, and others who have been accused of sexual misconduct only a few have faced legal consequences for their actions. Anna North et al., *A List of People Accused of Sexual Harassment, Misconduct, or Assault*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list> (last updated Jan. 9, 2019). This suggests that it is easier to publicly condemn these men than to pursue legal action.

²⁷⁴ See, e.g., *After a Year of #MeToo, American Opinion has Shifted Against Victims*, ECONOMIST (Oct. 15, 2018), <https://www.economist.com/graphic-detail/2018/10/15/after-a-year-of-metoo-american-opinion-has-shifted-against-victims> [hereinafter *After a Year of #MeToo*].

²⁷⁵ *Id.*

²⁷⁶ *Charges Alleging Sex-Based Harassment*, *supra* note 2.

This backlash should serve, however, as an incentive to take advantage of the rise in awareness brought by the #MeToo movement.²⁷⁷ Otherwise, the #MeToo movement could just become another chapter in the cycle of increased awareness followed by no change, just like the movement in the '90s.²⁷⁸

IV. #NEVERMORE: REFORMING IMPEACHMENT OF SGBV VICTIMS' CHARACTER FOR TRUTHFULNESS

*I have lied, but I am not a liar.*²⁷⁹

Some commentators have suggested that a way to deal with the problems discussed could be to have no juries in SGBV cases.²⁸⁰ That proposal goes against the core values of our criminal justice system,²⁸¹ and it does not consider that these cases also play out in the civil arena²⁸² or that judges might be as ill-equipped to deal with the cases as jurors.²⁸³

A more sensible way to address the problems so far discussed would be to reform our evidentiary rules to shield victims from attacks about their character for truthfulness that play on patriarchal prejudices and discount women's credibility. In that way, our legal system would guarantee a fair redress of the harms inflicted on SGBV victims in an environment that would promote awareness and

²⁷⁷ See, e.g., Theodore L. Caputi et al., *Research Letter: Internet Searches for Sexual Harassment and Assault, Reporting, and Training Since the #MeToo Movement*, 179 J. INTERNAL MED. 258, 258–59 (2019).

²⁷⁸ See TASLITZ, *supra* note 21, at 6 (discussing how “[d]espite several decades of a renewed women’s movement and increasing attention to the problem of rape, judges and juries, continue to be skeptical”); see also *Last Week Tonight with John Oliver*, *supra* note 1 (discussing how this is not the first wave of awareness regarding SGBV).

²⁷⁹ *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H.R. Comm. on Oversight and Reform*, 116th Cong. 15 (2019) [hereinafter *Hearing with Michael Cohen*].

²⁸⁰ See, e.g., Julie Bindel, *Opinion, Juries Have No Place in Rape Trials. They Simply Can't be Trusted*, GUARDIAN (Nov. 21, 2018, 8:29 PM), <https://www.theguardian.com/commentisfree/2018/nov/21/juries-rape-trials-myths-justice>.

²⁸¹ See U.S. CONST. amend. VI.

²⁸² See Chalabi, *supra* note 264.

²⁸³ See, e.g., Montan, *supra* note 38, at 459–62.

transform our rape and credibility discounting culture, while improving the low victim favorable outcomes in SGBV cases. Adopting evidentiary rules that would prevent attorneys from impeaching victims with evidence of character for untruthfulness could ameliorate the revictimization of SGBV victims and foster fairer trials. It could also incentivize victims to come forward and change the culture around SGBV.²⁸⁴

A. *United States Landscape on the Use of Sexual and Gender-Based Violence Victims' Character for Untruthfulness Evidence*

Regulating fairly and effectively the impeachment of the character for truthfulness of a witness has historically proven to be a challenge because, as Michael Cohen so eloquently explained, lying does not make one a liar.²⁸⁵ Legal commentators have pointed out how the common law rule allowing evidence of the character for untruthfulness of a witness should not be allowed as its prejudicial effects outweigh any probative value this type of evidence could have in any of its forms.²⁸⁶ Research has questioned the common-sense notion that there is a unified trait for honesty (i.e., a character for truthfulness) and has shown the prejudicial effects of this type of impeachment in spite of limiting instructions.²⁸⁷ In fact, jurors and judges alike tend to overestimate or be over-persuaded by this type of evidence, leading them to misinterpret its import.²⁸⁸

Yet FRE 608 and FRE 609 allow for the admission of this type of evidence.²⁸⁹ This disconnect between the strong evidence that

²⁸⁴ The proposal in this Article is not intended to solve the problem of SGBV, nor does it claim that the judicial system is best equipped to do so. Its scope is more modest. It aims at removing barriers that hinder victims from redressing the harms they have suffered. The essential premise is that, as long as we address the problem through legal mechanisms, the redress available to victims should not be only achievable on paper but should be achievable in actuality.

²⁸⁵ *Hearing with Michael Cohen*, *supra* note 279, at 15; *see also* Gold, *supra* note 268, at 771–72.

²⁸⁶ *See, e.g.*, H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 827 (1993) (arguing that all forms of character evidence are highly prejudicial in all of the contexts, affecting both the judgments of judges and juries alike).

²⁸⁷ *See* Studebaker & Penrod, *supra* note 58, at 265–66.

²⁸⁸ Méndez, *California's New Law on Character Evidence*, *supra* note 36, at 1054.

²⁸⁹ *See* FED. R. EVD. 608, 609.

there is no such thing as a character for truthfulness that can be used to predict or determine whether a person is lying on a specific occasion²⁹⁰ and our insistence of using past events to ascertain the credibility of a witness²⁹¹ helps explain why we have so many issues with the impeachment of character for truthfulness in evidentiary law.²⁹² Historically, no type of evidence of character for truthfulness (i.e., opinion, reputation, conviction, and bad acts) has been exempted from this controversy or admitted consistently in one way.²⁹³

1. OPINION & REPUTATION EVIDENCE

Prior to the enactment of the FRE, evidence about the character for untruthfulness of a witness in the form of reputation was once considered to be unreliable hearsay.²⁹⁴ This type of evidence, in the form of opinion, was excluded under the belief that it “preempt[ed] the jury’s function as the final arbiter of fact.”²⁹⁵

However, today, opinion and reputation evidence are considered the most reliable types of evidence regarding a victim’s character for truthfulness, and their use is widely accepted because the safeguards in place are believed to guarantee the reliability of the generalizations based on this evidence.²⁹⁶ For instance, evidence in the

²⁹⁰ See Gold, *supra* note 268, at 771–72.

²⁹¹ See, e.g., FED. R. EVD. 608, 609.

²⁹² See, e.g., Lininger, *supra* note 241, at 1376; Tuerkheimer, *supra* note 21, at 28. Although evidence suggests that character for truthfulness/untruthfulness should not be admissible, in light of the resistance of the majority of jurisdictions to do so, this Article does not take such position. Instead, this Article puts forward a proposal that preserves jurisdictional reliance on this type of evidence but limits its prejudicial effects in the context of SGBV cases.

²⁹³ See, e.g., Charles H. Kanter & Richard Page, *Impeaching and Rehabilitating a Witness with Character Evidence: Reputation, Opinion, Specific Acts and Prior Convictions*, 9 U.C.D. L. REV. 319, 324 (1976); Donald H. Zeigler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003, UTAH L. REV. 635, 646–47 (2003).

²⁹⁴ Kanter & Page, *supra* note 293, at 324.

²⁹⁵ *Id.* at 327.

²⁹⁶ See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 179–86 (discussing how the use of character evidence for truthfulness evolved from notions of honor and reputation to today’s system; arguing that the current system is still premised on notions of status as to who is culturally considered credible and not in the seeking of mendacity).

form of reputation is based on a pool of people that know and believe a witness possesses a trait of untruthfulness, so it should be more reliable than evidence based on *one* witness' opinion.²⁹⁷ Similarly, evidence in the form of opinion is based on a larger data cluster as it requires the witness to base it on more than one act of untruthfulness.²⁹⁸ Moreover, the basis for a witness's testimony regarding reputation or opinion must be disclosed for the testimony to be admissible.²⁹⁹ This ensures the reliability of the evidence.

In sum, because of these safeguards, the likelihood of this evidence leading to a confusion of the issues is more limited, even in SGBV cases (in spite of the credibility biases rooted in patriarchy).³⁰⁰ In addition, this type of evidence is not as widely available as evidence of specific acts.³⁰¹ Moreover, it continues to be accepted by the majority of jurisdictions in the United States because of its apparent reliability³⁰² and the required disclosure of the bases for the opinion or reputation.³⁰³ Therefore, a proposal to limit its prejudicial effects in the context of SGBV cases should be narrow.

²⁹⁷ *Id.* at 178–79.

²⁹⁸ *Wilson v. City of Chicago*, 6 F.3d 1233, 1239 (7th Cir. 1993), *as modified on denial of reh'g* (Dec. 8, 1993) (“The telling of a lie not only cannot be equated to the possession of a reputation for untruthfulness, but does not by itself establish a character for untruthfulness, as the rule explicitly requires whether the form of the impeaching evidence is evidence of reputation or opinion evidence.”).

²⁹⁹ *See, e.g., Oregon v. Paniagua*, 341 P.3d 906, 910 (Or. Ct. App. 2014) (affirming the exclusion of witness testimony who used statements of others to form her opinion about the defendant and who did not testify to the frequency she interacted with the defendant that allowed her to form her opinion of him).

³⁰⁰ *See Méndez, V. Witnesses, supra* note 38, at 465 (“[U]nrestrained use of evidence on witness credibility may distract and confuse jurors about the substantive issues to be decided.”); *Simon-Kerr, Credibility by Proxy, supra* note 28, at 207 (“This focus on ‘worthiness of belief’ is intertwined with social hierarchies and related moral judgments that have shaped evidence jurisprudence. It has clear repercussions for witnesses whose race or gender or both trigger distrust or disapprobation.”).

³⁰¹ *See Simon-Kerr, Credibility by Proxy, supra* note 28, at 156 (“[I]n today’s atomistic society, people do not have discernable reputations for truthfulness or untruthfulness that can be accurately commented on in court.”).

³⁰² *Id.* at 186 (“Most states have gradually adopted the Federal Rules’ approach to impeachment.”).

³⁰³ *See, e.g., Oregon v. Paniagua*, 341 P.3d 906, 910 (Or. Ct. App. 2014) (holding that trial court did not abuse its discretion in excluding witness’s personal opinion about victim’s character for truthfulness to impeach victim’s testimony during assault trial when witness met victim four years prior to trial but had only

2. PRIOR CONVICTION EVIDENCE

The same could be said regarding prior convictions. Yet, impeachment by prior convictions requires more careful attention. Even though prior convictions are a subset of specific acts, they have historically been treated differently than prior acts of untruthfulness.³⁰⁴ The difference in treatment is due, in part, to the fact that impeachment by prior convictions developed as an impeachment tool later in time.³⁰⁵ Because being convicted of a crime historically made most people incompetent to testify, prior convictions had no use as an impeachment tool.³⁰⁶ Once that bar was removed, prior convictions became a previous bad act to be used to impeach the credibility of a witness.³⁰⁷ However, jurisdictions disagreed as to the scope of impeachment based on prior convictions.³⁰⁸

This disagreement persists today.³⁰⁹ Jurisdictions differ on whether only convictions of *crimen falsi* should be used to impeach, whether felonies should be used, how remote a conviction must be to be valid for impeachment, whether the impeachment should be subject to a prejudicial analysis under FRE 403, and whether the conviction must be automatically admitted or the court should have discretion on its admissibility.³¹⁰

The FRE provide that a prior felony conviction for a witness, other than the defendant, must be admitted if its probative value is *substantially* outweighed by its prejudicial effect.³¹¹ However, in a criminal case, a defendant's prior conviction must be admitted "if the probative value of the evidence outweighs its prejudicial effect."³¹² Yet, for *crimen falsi*, the evidence must be admitted with

seen her five or six times within the last year and indicated she had formed her opinion in part on having heard from others that victim had lied to them).

³⁰⁴ See Zeigler, *supra* note 293, at 646–47.

³⁰⁵ *Id.* at 639.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 639–40.

³⁰⁸ *Id.* at 640–41.

³⁰⁹ See Zeigler, *supra* note 293, at 662–66.

³¹⁰ See *id.*

³¹¹ FED. R. EVID. 609(a)(1)(A) (subjecting a felony conviction to the balancing test of FRE 403). FRE 403, in pertinent part states: "The court may exclude relevant evidence if its probative value is *substantially* outweighed by . . . unfair prejudice." FED. R. EVID. 403 (emphasis added).

³¹² FED. R. EVID. 609(a)(1)(B).

no further analysis.³¹³ Furthermore, there is a ten-year limitation on prior convictions evidence; for any older conviction the proponent of the evidence must provide written notice to the adverse party and prove that the evidence substantially outweighs the prejudicial effect.³¹⁴ The ease of admission of these types of character for untruthfulness evidence rests on the assumption that the act must be sufficiently extreme to be a crime and that it be an act that was proven beyond a reasonable doubt or admitted by the witness.³¹⁵ Therefore, the act should provide a reliable basis to judge the character of a person.³¹⁶

Nonetheless, this type of reliance does not help explain the divergent treatment between bad acts and prior convictions, such as the time limitation, the ability of bringing acts not related to honesty, the differences on being subject to a balancing test, the balancing test used, or the scope of the cross about the evidence.³¹⁷ In fact, scholars have been pushing for the realignment of the rules regarding impeachment with prior convictions and bad acts.³¹⁸ Some of that harmonizing has occurred.³¹⁹ However, there still exist some discrepancies that do not make much sense.³²⁰ For instance, attorneys are allowed to cross under FRE 608 on events that will not be permitted under FRE 609 and get into more detailed information about the events that should have less reliance than prior convictions.³²¹ Attorneys can also bring in convictions that have nothing to do with truthfulness, but cannot use bad acts that do not involve dishonesty.³²²

³¹³ See FED. R. EVID. 609(a)(2).

³¹⁴ FED. R. EVID. 609(b).

³¹⁵ See Gold, *supra* note 268, at 775.

³¹⁶ *Id.*

³¹⁷ Compare FED. R. EVID. 608, with FED. R. EVID. 609.

³¹⁸ Zeigler, *supra* note 293, at 678; Okun, *supra* note 35, at 548–59.

³¹⁹ See, e.g., Zeigler, *supra* note 293, at 670–71 (discussing the 1990 Amendments to FRE 609 and how the inconsistencies between 609(a) and 608(b) were slightly remedied).

³²⁰ See, e.g., *id.* at 671 (discussing the inconsistencies that remain after the 1990 Amendments to FRE 609).

³²¹ See FED. R. EVID. 608, 609.

³²² For example, under FRE 609, “courts permit [attorneys to ask about] the name of the crime, the date of the crime, and the sentence imposed,” but not to go into the conduct itself as in FRE 608. Compare FED. R. EVID. 609, with FED. R. EVID. 608; see also Roberts, *supra* note 36, at 1985. Furthermore, the Supreme

Because of the wide acceptance of prior convictions as character for untruthfulness evidence and its limited scope on cross-examination,³²³ a proposal for reform on the use of prior convictions evidence in the context of SGBV cases that is narrowly tailored to limit the prejudicial effects of such evidence is probably more likely to be adopted than a total overhaul of this evidentiary method. However, the jurisdictional divergence in terms of what type of prior convictions can be used and the standards used for admissibility highlights the need for a proposal that considers carefully the crimes covered, the balancing test to which prior convictions should be subjected, and its scope.

In addition, because of the lower reliability of this type of evidence *vis-à-vis* evidence in the form of opinion or reputation,³²⁴ this type of evidence could lead to confusing issues more easily and could be used to play into the biased narratives previously explained.³²⁵ Likewise, this type of evidence deserves more attention because evidence in this form could include issues that are not related to credibility (crimes other than *crimen falsi*)³²⁶ or be about crimes not actually committed because of pleading strategies.³²⁷ This evidence could also arise in more cases as it might be more readily available than opinion or reputation evidence.³²⁸ Thus, its

Court has held that attorneys cannot use convictions garnered in violation of the right to counsel as impeachment evidence. *Loper v. Beto*, 405 U.S. 473, 483 (1972); *see also* Roberts, *supra* note 36, at 1985–86.

³²³ *See* Gold, *supra* note 268, at 775; FED. R. EVID. 609.

³²⁴ *See* Gold, *supra* note 268, at 774.

³²⁵ *See* Montan, *supra* note 38, at 459–62. In fact, multiple scholars have advocated for the abolition of this rule. *See, e.g.*, Brian J. Foley, *Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science with Storytelling*, 43 TULSA L. REV. 397, 413 (2007); Roberts, *supra* note 36, at 2036; Ted Sampson-Jones, *Implicit Stereotyping As Unfair Prejudice in Evidence Law*, 83 U. CHI. L. REV. ONLINE 174, 189–89 (2017).

³²⁶ *See* FED. R. EVID. 609(a).

³²⁷ *See* Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1425–27 (2016) (discussing plea bargaining and how a guilty plea is not necessarily a complete admission to having committed a crime); Roberts, *supra* note 36, at 1993–94.

³²⁸ Evidence of a prior conviction is more readily available because a prior conviction is public record, whereas evidence of reputation or opinion requires a person to come to court and testify. *See* Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUSTICE (Nov. 17, 2015), <https://www.brennancenter.org/our-work/analysis->

use as a tool to impeach character for truthfulness in SGBV cases could have a greater effect. Consequently, the proposal to limit the prejudicial effects of character for untruthfulness evidence in the form of prior convictions, in the context of SGBV cases, should be more comprehensive than the reform of this evidence in the form of opinion or reputation.

3. PRIOR ACTS OF UNTRUTHFULNESS EVIDENCE

In the case of prior acts of untruthfulness, the reform should be even more extensive. As scholars have pointed out, “[o]f the four types of witness character evidence, misconduct evidence provides the weakest basis for making a generalization about truthfulness.”³²⁹ As discussed, a single act or multiple separate acts do not serve by themselves to predict whether a person would lie in a particular context.³³⁰ Moreover, specific acts are a type of evidence to which the witness might not be prepared to respond and explain because it could refer to events that are not memorable.³³¹ However, jurors tend to give great weight to evidence of prior bad acts.³³² It is for this reason that the admissibility of evidence of bad acts has been restricted since the Eighteenth Century.³³³ The main methods employed to restrict impeachment with bad acts have been (1) a total ban on questioning using this type of evidence, and (2) permitting questions on the matter during cross-examination, “but without recourse to rebuttal by extrinsic evidence if the witness denies the acts.”³³⁴

As explained, the FRE follow the second method. While FRE 608(b) allows the impeachment of witnesses with previous acts of untruthfulness, FRE 403 provides, in theory, a wall against using this evidence to impeach SGBV victims by excluding evidence

opinion/just-facts-many-americans-have-criminal-records-college-diplomas; Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 178–79.

³²⁹ Gold, *supra* note 268, at 774.

³³⁰ See Montan, *supra* note 38, at 459–62; Méndez, *V. Witnesses*, *supra* note 38, at 465–66.

³³¹ Gold, *supra* note 268, at 775.

³³² *Id.* at 775–76 (citing RICHARD E. NESBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENTS 45–46 (1980)).

³³³ Kanter, *supra* note 293, at 328–29.

³³⁴ *Id.* at 328.

whose probative value is substantially outweighed by unfair prejudice, confusing the issues, or misleading the jury.³³⁵ In practice, however, even if the effects of impeachment with collateral acts of untruthfulness could be unfairly prejudicial, confusing, or misleading to the jury because of the phenomenon of a woman's lack of credibility,³³⁶ the evidence is usually admitted because it is seen as relevant, and its probative value is not outweighed by the prejudicial effects.³³⁷ Thus, FRE 403 does not seem to serve as much of a safeguard to victims of SGBV.

Nor does FRE 611. As commentators have argued, even though FRE 611 grants the court the faculty to limit the interrogation of a witness to protect the witness from harassment or undue embarrassment,³³⁸ "the rule does not include any concrete language indicating what constitutes 'harassment or undue embarrassment,'" nor is there a solid body of case law expanding on the meaning of those terms.³³⁹ With no definition that would include the interplay of credibility biases for SGBV victims as embarrassment or harassment beyond what a witness would normally endure during cross-examination, the rule serves no protection from defense strategies predicated on the trustworthiness and plausibility biases.³⁴⁰ Moreover, when an attorney uses a recognized impeachment method, courts usually presume that FRE 611 is not applicable.³⁴¹

³³⁵ Rule 403 provides the following:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FED. R. EVID. 403.

³³⁶ See, e.g., Schafran, *supra* note 21, at 5.

³³⁷ A reason for that result is that judges participate also in the trustworthiness and plausibility biases that discount victims' credibility. See Schafran, *supra* note 21, at 9, 40; Gender Fairness Implementation Comm., *supra* note 131, at 337–40; St. Joan, *supra* note 131, at 265–66.

³³⁸ See FED. R. EVID. 611.

³³⁹ Lininger, *supra* note 241, at 1387.

³⁴⁰ See *supra* Part II.

³⁴¹ See Lininger, *supra* note 241, at 1387 (citing, *inter alia*, State v. Perolis, 398 S.E.2d 512, 517 (W. Va. 1990) ("no witness should be protected from the embarrassment of proper impeachment")).

In sum, these protections are insufficient for victims of SGBV in court and do not facilitate a fair trial in these types of cases. An easy solution would be to institute a total ban on impeachment using prior acts of untruthfulness. That would not only help in the impeachment of SGBV victims but would also address the problems in general with this type of evidence.³⁴² However, most states follow the federal scheme as pertaining to impeachment of a witness's credibility with specific acts.³⁴³ Therefore, such a solution does not seem like it would have many adherents.

More importantly, even the states that limit the use of bad acts for impeachment purposes do not have a complete ban on this type of evidence.³⁴⁴ Out of the nine states that limit evidence of specific acts of untruthfulness, eight states have chiseled a judicial exception for the introduction of such evidence to impeach victims in cases of sex crimes with a prior reporting of sexual misconduct not ending in conviction or a false accusation.³⁴⁵ This is irrespective of how the states treat other forms of evidence of untruthfulness. For example,

³⁴² See, e.g., Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 221 (proposing an abolition on the use of reputation, opinion, and prior bad act evidence for impeachment purposes).

³⁴³ *Id.* at 186.

³⁴⁴ See, e.g., LA. CODE EVID. art. 608(B) (“Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required.”).

³⁴⁵ See *infra* notes 346–53 and accompanying text.

Florida,³⁴⁶ Louisiana,³⁴⁷ and Massachusetts,³⁴⁸ which only admit evidence of character for truthfulness in the form of reputation and

³⁴⁶ FLA. STAT. §§ 90.609, 90.610 (2019). Florida courts have carved out exceptions to the admission of such evidence. *See, e.g.*, *Roebuck v. State*, 953 So. 2d 40, 42 (Fla. Dist. Ct. App. 2007) (reversing trial court because it did not allow the impeachment of the victim with an alleged false reporting incident based on section 90.405(2) of the Florida Statutes, which allows proof of specific incidents of conduct when offered to prove a particular trait of character; in this case, the “trait of character was that the witness may be inclined to lie about sexual incidents and charge people with those acts without justification.”); *Blue v. State*, 8 So. 3d 454, 455 (Fla. Dist. Ct. App. 2009) (holding that refusing to allow defendant to question victim about previous statements she had made and that would have provided proof that she had made false allegations against the defendant in the past, violated defendant’s right to a full cross-examination).

³⁴⁷ LA. CODE EVID. art. 608. Like Florida, Louisiana has also carved out exceptions to the admission of prior allegations. *See, e.g.*, *State v. Smith*, 743 So. 2d 199, 203–04 (La. Ct. App. 1999) (holding that a defendant may present evidence that a victim made prior false allegations regarding sexual activity for impeachment purposes); *State v. Freeman*, 970 So. 2d 621, 624–26 (La. Ct. App. 2007) (conducting a 403 analysis on the introduction of prior accusations and determining that the probative value of evidence that the victim had made prior accusations of kidnapping and rape against a person ultimately acquitted of such charges, was substantially outweighed by danger of unfair prejudice in subsequent aggravated rape prosecution as the prior acquittal did not establish that victim made a false accusation, there was no evidence that the victim ever retracted the prior allegation of abuse, and there was no independent witness to testify that the prior allegation was false).

³⁴⁸ The Massachusetts Guide to Evidence provides insight into the application of the state’s rule on character evidence and provides:

The Supreme Judicial Court has “chiseled” a narrow exception to the rule that the testimony of a witness may not be impeached with specific acts of prior misconduct, recognizing that in special circumstances (to date, only rape and sexual assault cases) the interest of justice would forbid its strict application. *Commonwealth v. LaVelle*, 414 Mass. at 151–152. In *Commonwealth v. Bohannon*, 376 Mass. 90, 94–96 (1978), the special circumstances warranting evidence of the prior accusations were that (1) the witness was the victim in the case on trial; (2) the victim/witness’s consent was the central issue at trial; (3) the victim/witness was the only Commonwealth witness on the issue of consent; (4) the victim/witness’s testimony was inconsistent and confused; and (5) there was a basis in independent third-party records for concluding that the victim/witness’s prior accusation of the same type of crime had been made and

prior convictions, have recognized an exception in the case of sexual crimes. Likewise, Alaska,³⁴⁹ Illinois,³⁵⁰ New Jersey,³⁵¹ Oregon,³⁵² and Texas,³⁵³ which have a broader recognition of reputation and prior conviction evidence, have also recognized such an exception.

was false. Not all of the Bohannon circumstances must be present for the exception to apply. Commonwealth v. Nichols, 37 Mass. App. Ct. 332, 337 (1994).

MASS. GUIDE EVID. 608 note to subsection (b).

³⁴⁹ ALASKA R. EVID. 608. Alaska courts have also carved out exceptions for prior false accusations. *See, e.g.*, Morgan v. State, 54 P.3d 332, 336 (Alaska Ct. App. 2002) (holding that “if the defendant proves that a complaining witness has made prior false accusations of sexual assault (under the rules explained in the next section of this opinion), the defendant is not limited to cross-examining the complaining witness concerning these prior accusations. Rather, the defendant can both cross-examine the complaining witness and present extrinsic evidence on this point.”).

³⁵⁰ ILL. R. EVID. 608. Likewise, Illinois has carved an exception. *See, e.g.*, State v. Visgar, 457 N.E.2d 1343, 1350 (Ill. App. Ct. 1983) (deciding that daughter’s prior allegation of sexual misconduct by defendant did not warrant a psychiatric examination where defendant had opportunity to attempt to impeach her during cross-examination with regard to such allegation); State v. Alexander, 452 N.E.2d 591, 595 (Ill. App. Ct. 1983) (holding that “[t]he trial court did not err in ruling that evidence of prior rape complaints by the victim are inadmissible where defendant was unable to *show that the prior complaints were unfounded*”) (emphasis added).

³⁵¹ N.J. R. EVID. 608. In addition to Alaska and Illinois, New Jersey has carved out exceptions in cases of sexual violence. *See, e.g.*, State v. Guenther, 854 A.2d 308, 324–25 (N.J. 2004) (recognizing in criminal cases an exception to the rule of evidence barring the admission of specific instances of conduct to attack a witness’s character for truthfulness that allow a defendant to introduce evidence that the victim has made a prior false criminal accusation when the credibility of the victims is the central issue in the case, and where the proof of the false accusation is not a diversion so that it would overshadow the trial of the charges itself). New Jersey has even included its exception in the text of the rule. *See* N.J. R. EVID. 608(b).

³⁵² OR. EVID. CODE § 608. Similarly, Oregon has an exception to its rule on the use of prior accusations. *See, e.g.*, State v. LeClair, 730 P.2d 609, 615 (Or. Ct. App. 1986) (concluding that the confrontation clause “requires that the court permit a defendant to cross-examine the complaining witness with other accusations she has made if 1) she has recanted them, 2) the accusations were false, or 3) there is some evidence that the victim has made prior false accusations that were false.”).

³⁵³ TEX. R. EVID. 608. In addition, Texas has carved an exception for prior false accusations. *See, e.g.*, Lopez v. State, 18 S.W.3d 220, 225–26 (Tex. Crim.

The justifications for allowing evidence of prior reporting without a conviction and false accusations to be admitted at trial vary from the right to confrontation,³⁵⁴ to the history of exceptions to the bar on character evidence,³⁵⁵ to courts' expansive interpretations of the evidentiary rules.³⁵⁶ There is an even greater variance amongst jurisdictions in terms of (1) whether to allow the use of extrinsic evidence to prove the existence of a prior bad act; (2) whether evidence of a prior non-conviction reported by third parties is admissible; (3) what the standard of admissibility should be regarding extrinsic evidence of prior non-conviction acts; (4) whether a hearing should be conducted to determine admissibility of extrinsic evidence; (5) whether it can be proven that the allegation of a prior bad act is false; (6) how remote the reported prior non-conviction can be from the crime charged; and (7) what the proper scope of extrinsic evidence used to prove the existence of a prior non-conviction bad act should be.³⁵⁷

The point of convergence, however, is the admission of a prior no-conviction reporting in cases of SGBV and no other types of cases,³⁵⁸ illustrating how the persistence of credibility discounting still drives and informs the decision-making process in admitting

App. 2000) (acknowledging that the confrontation clause may require allowing impeachment with prior false accusations).

³⁵⁴ See, e.g., *Lopez*, 18 S.W.3d at 225–26 (acknowledging that the confrontation clause may require allowing impeachment with prior false accusations, but declining to admit such evidence); *State v. Barber*, 766 P.2d 1288, 1290 (Kan. Ct. App. 1989) (explaining how evidence of prior false accusations are relevant to the defendant's confrontation rights, but declining to admit the alleged evidence because there was no indication of prior false accusations on behalf of the victim).

³⁵⁵ See e.g., *Morgan v. State*, 54 P.3d 332, 335 (Alaska Ct. App. 2002) (explaining that courts have allowed this type of evidence “consistent with the common-law doctrine that a party could present evidence of a witness's ‘corruption’—a term that encompassed evidence of (1) the witness's general willingness to lie under oath, (2) the witness's offer to give false testimony for money or other reward, (3) the witness's acknowledgement of having lied under oath on prior occasions, (4) the witness's attempt to bribe another witness, or (5) the witness's pattern of presenting false legal claims.”).

³⁵⁶ See, e.g., *Guenther*, 854 A.2d at 326.

³⁵⁷ See *Zeigler*, *supra* note 293, at 666–73.

³⁵⁸ A Westlaw search using the Boolean terms and connectors “‘prior false allegations’ /s credibility” shows that the exceptions are made in SGBV cases.

this type of evidence.³⁵⁹ Admitting this type of evidence does not incorporate an analysis of the inherent process of victims in recanting accusations and revising accounts.³⁶⁰ This failure ignores what we know about victims' processing of the aggression and uses the evidence of a prior no-conviction reporting to the detriment of the victim to show that she must be lying in the current instance. Such an admission disregards that there are many reasons that a victim's prior report resulted in a no-conviction, and that a prior report with a no-conviction does not automatically mean that the victim is lying.³⁶¹

Yet, the creation of exceptions to the admission of prior no-conviction reporting signals what might be truly relevant in specific acts of untruthfulness: whether the witness has lied in the past and has misused the judicial system in a similar context or in an analogous manner to the one in which she is currently a witness. This would not be to show the victim's propensity to lie, but to show some kind of *modus operandi* or pattern by the victim, or to prove the victim's bias or fabrication.³⁶² However, because of the way in which some of these prior victim reporting exceptions are formulated, in practice the exceptions do not necessarily address these arguably valid goals.³⁶³ Admitting a victim's prior no-conviction reporting without

³⁵⁹ See, e.g., *State v. Long*, 140 S.W.3d 27, 31 (Mo. 2004) (en banc) (“The current Missouri rule prohibiting extrinsic evidence of prior false allegations does not strike the appropriate balance. Therefore, a criminal defendant in Missouri may, in some cases, introduce extrinsic evidence of prior false allegations. This rule is not limited to sexual assault or rape cases.”).

³⁶⁰ See Scheppele, *supra* note 21, at 138–40.

³⁶¹ See, e.g., Tuerkheimer, *supra* note 21, at 30–33 (discussing how reported SGBV cases have been mishandled by police leading to no arrest and rape kits sitting on shelves never to be tested).

³⁶² See, e.g., *State v. Botelho*, 753 A.2d 343, 346 (R.I. 2000).

³⁶³ See *id.* (stating “that evidence of similar accusations by a complaining witness may be admissible to challenge the witness’s credibility. . . . The evidence may be admissible even when the allegations were never proven false or were never withdrawn. . . . [R]egardless of whether the accusations were made before or after those made in respect to a defendant.”) (internal citations omitted); *People v. Diaz*, 85 A.D.3d 1047, 1050 (N.Y. App. Div. 2013) (explaining that “[e]vidence of a complainant’s prior false allegations of rape or sexual abuse is admissible to impeach the complainant’s credibility [if the] defendant establishe[s] that the [prior] allegation may have been false[, and] . . . that the particulars of the complaints, the circumstances or manner of the alleged assaults, or the currency of the

further analysis, even in cases of false accusations, can be problematic. First, it goes against studies regarding a victim's process of coming forward.³⁶⁴ Blind admission of prior reports assumes that such a specific act, in and of itself, proves that the victim might be currently lying when we know that that might not be the case,³⁶⁵ especially in SGBV cases where recanting is a natural occurrence not always associated with untruthfulness.³⁶⁶ Second, not requiring a showing that the victim is currently misusing the judicial system, even in cases of prior false allegations, makes the relevancy of this evidence weak,³⁶⁷ especially in cases trying to prove pattern, bias, or fabrication. Moreover, it unduly prejudices the testimony of the victims as triers of fact can be over-persuaded by this type of evidence.³⁶⁸

One commentator, Kassandra Altantulkhuur, has focused on the admittance of these specific acts (i.e., prior no-conviction reporting).³⁶⁹ Altantulkhuur proposes requiring, in a separate hearing, "a defendant [who] seeks to use such information . . . to prove [that]

complaints were such as to suggest a pattern casting substantial doubt on the validity of the charges made by the complainant, it is error for the trial court to preclude evidence regarding the prior allegation.") (internal quotation marks and citations omitted); *Rayner v. Georgia*, 706 S.E.2d 205, 210 (Ga. Ct. App. 2011) (holding that "[e]vidence of prior false allegations of sexual misconduct is admissible to attack the witness's credibility and as substantive evidence in support of the argument that the charged offense did not occur. However, to protect the complaining witness from unfounded allegations that the witness has made similar false allegations in the past, before such evidence can be admitted, the trial court is required to make a threshold determination outside the jury's presence that a reasonable probability of falsity exists.") (internal quotation marks and citations omitted); *Blair v. State*, 877 N.E.2d 1225, 1233–34 (Ind. Ct. App. 2007) (noting that "[e]vidence of prior false accusations may be admitted only if 1) the complaining witness admits that she had made a prior false accusation of rape; or 2) the accusation is demonstrably false."); *Tibbs v. Allen*, 486 F. Supp. 2d 188, 196 (D. Mass. 2007) (observing that under Massachusetts law, evidence of an alleged rape victim's prior false allegations of rape is "admissible [] only when there is a pattern of prior false accusations; one false accusation does not a pattern make.").

³⁶⁴ See Scheppele, *supra* note 21, at 138–40.

³⁶⁵ See Okun, *supra* note 35, at 546–49, 565–66; Roberts, *supra* note 36, at 1996; Méndez, *California's New Law on Character Evidence*, *supra* note 36, at 1051–53; Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 208–209.

³⁶⁶ See Tuerkheimer, *supra* note 21, at 17–18.

³⁶⁷ See Johnson, *supra* note 21, at 372.

³⁶⁸ See, e.g., Gold, *supra* note 268, at 775–76.

³⁶⁹ Altantulkhuur, *supra* note 50, at 1097–99.

the prior accusation is demonstrably false.”³⁷⁰ Her proposal “would require defendants to show by clear, convincing, and substantial proof that the victim actually made a false accusation.”³⁷¹ Once that determination is made, the court should consider the prejudicial effect of allowing the evidence, barring admission of the no-conviction report if the court determines that the defendant is only trying to prove propensity.³⁷²

Although such a proposal would deal with the problems of allowing impeachment through a prior no-conviction reporting, it would distract the court from the real issue, which is the current accusation.³⁷³ It would also mean having a new trial within a trial, which would mean more resources, time, and money spent litigating this issue.³⁷⁴ While Altantukhuur’s proposal deals with some of the issues of specific acts of untruthfulness,³⁷⁵ it does not deal with all of them and ignores the type of specific acts of untruthfulness that can be introduced in more than eighty percent of jurisdictions; further demonstrating the need for a rule that is more comprehensive to protect victims of SGBV and facilitate the fair trial of these types of cases.

The need for a more comprehensive rule becomes more apparent when we consider the only jurisdiction in the United States that previously implemented a total bar on the use of prior acts of untruthfulness as impeachment evidence: California. Prior to 1982, California had a complete bar on the use of specific acts evidence in both criminal and civil cases.³⁷⁶ However in 1982, voters approved the *Right to Truth in Evidence Proposition* amendment to the California

³⁷⁰ *Id.* at 1120–21.

³⁷¹ *Id.* at 1121.

³⁷² *Id.* at 1121–22.

³⁷³ *See Montan, supra* note 38, at 460 (“One of the general dangers presented by specific-instance character evidence is the potential to confuse or distract the jury from the substantive issues being tried. Evidence of specific acts is usually not relevant to the issues being tried, which can create a danger of confusion for the jury.”).

³⁷⁴ *See id.* at 463.

³⁷⁵ *See generally, Altantukhuur, supra* note 50.

³⁷⁶ Miguel A. Méndez, *Comparing the Federal Rules of Evidence with the California Evidence Code-Proposition 8 and the Wisdom of Using Initiatives As A Rule-Making Device*, 36 SW. U. L. REV. 571, 577 (2008); Miguel A. Méndez, *Resurrecting California’s Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1008 (1992).

evidence rules to prevent the exclusion (with few exceptions) of relevant evidence in criminal proceedings.³⁷⁷ With the enactment of the amendment, the bar against the use of prior acts existed only in the civil context, while in the criminal setting the rules are even more liberal than their federal counterpart.³⁷⁸ As a result, California had fewer victims reporting crimes in categories such as sexual abuse and domestic violence.³⁷⁹ Rape crisis counselors stated under oath that they knew of victims who decided not to come forward because of the reform in the law.³⁸⁰ This information from California suggests a correlation between the use of character for untruthfulness impeachment strategies and under-reporting, under-prosecution, and under-conviction.³⁸¹ Moreover, the change in victim reporting after California's change in its evidentiary laws suggests that victims are less likely to come forward when the defendant can inquire into character for untruthfulness evidence.³⁸²

Like California, Tennessee has also distanced itself from the FRE in terms of the use of prior acts of untruthfulness as impeachment evidence. Although Tennessee does allow specific acts of untruthfulness to be used during impeachment, it allows this only after a hearing outside the presence of the jury to determine the factual basis and probative value of the prior act if the act was done within 10 years of the commencement of the current action.³⁸³ If the specific act is older than 10 years, the court is required to consider the

³⁷⁷ Friedland, *supra* note 242, at 5.

³⁷⁸ *Id.* at 7–8.

³⁷⁹ *See id.* at 27.

³⁸⁰ *Id.*

³⁸¹ Establishing a causal link between the under-adjudication in favor of victims and the use of prior acts of untruthfulness to impeach victims' character for untruthfulness is extremely difficult as there are many variables that cannot be controlled in a study. For example, it is difficult to compare jurisdictions that have more limited rules than the FRE, such as Alaska, Florida, Illinois, Louisiana, Massachusetts, New Jersey, Oregon, Tennessee, and Texas, with jurisdictions that have adopted FRE 608(b) because the existence of other rules and procedures that are different in those jurisdictions can affect the outcome, and therefore, impede the establishment of a causal link. Moreover, there is little to no point in only looking at statistics within jurisdictions that completely bar the use of prior acts because such a ban on prior bad acts evidence would apply, for the most part, across the board to all adjudications, not just in SGBV cases.

³⁸² Friedland, *supra* note 242, at 27, 29.

³⁸³ Rule 608 of the Tennessee Rules of Evidence, titled "Evidence of Character and Conduct of Witness," provides:

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- (a) **Opinion and Reputation Evidence of Character** – The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.
- (b) **Specific Instances of Conduct** – Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:
- (1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;
 - (2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
 - (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for

prejudicial effect of the evidence, as compared to the probative value.³⁸⁴ Although this safeguard is a great addition, it might not protect victims of SGBV effectively. The standard to allow the specific acts is whether it has probative value and a reasonable factual basis for the inquiry.³⁸⁵ While this standard is better than the current good faith basis usually employed to determine whether an attorney can question about a prior bad act,³⁸⁶ it is still a pretty low standard to meet, considering that socially, we overvalue prior acts of untruthfulness as predictors of character for truthfulness.³⁸⁷ Moreover, as discussed *supra* Part II, if judges do not have more particularized guidance on allowing that type of evidence in cases of SGBV, they will fail to see the need to exclude it, as they operate as the rest of society under the credibility biases associated with women and victims.³⁸⁸

In fact, case law applying Tennessee's Rule of Evidence 608 suggests that when more specific guidance is given to judges, issues

impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

(c) **Juvenile Conduct** – Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

TENN. R. EVID. 608.

³⁸⁴ TENN. R. EVID. 608(b)(2).

³⁸⁵ *Id.*

³⁸⁶ See *United States v. Nixon*, 777 F.2d 958, 970 (5th Cir. 1985); *United States v. Ruiz-Castro*, 92 F.3d 1519, 1528–29 (10th Cir. 1996).

³⁸⁷ See, e.g., Gold, *supra* note 268, at 775–76.

³⁸⁸ See, e.g., St. Joan, *supra* note 131, at 265–66.

related to the prejudicial effects of character evidence for truthfulness can be reduced.³⁸⁹ For example, in a rape case, the trial and the appellate court following Tennessee's Rule of Evidence 608 excluded evidence of the victim's bad checks and fraudulent conduct during marriage because the lower court found no reasonable basis for the questions and because of the remoteness of the conduct.³⁹⁰ Accordingly, a rule to better regulate the use of prior acts in cases of SGBV should include more specific standards rather than a good faith basis and FRE 403 and 611 protections.

In sum, the current landscape on the impeachment of character for truthfulness illustrates the need for a rule that protects SGBV victims during cross-examination. No state has such a protection. Moreover, as discussed, the limited protections against the prejudicial effects of evidence for untruthful character do not require evidence of a victim's untruthfulness to be related to current specific acts of misusing the judicial system, nor do the protections consider how attorneys use this evidence to argue cases predicated on the societal credibility discounting of SGBV victims.³⁹¹

B. *Proposed Rule for the Impeachment of SGBV Victims' Character for Truthfulness*

The proposal presented here attempts to fill the gaps in the FRE in a way that could help transform society's perception of women's credibility and SGBV victims. Considering that the majority of jurisdictions, in one way or another, follow the FRE,³⁹² the language used in the proposal is based on the language employed by the FRE. New language is italicized, while existing FRE language remains in plain typeface.

The Rule envisions three different balancing tests depending on the type of character for truthfulness evidence and lists concrete factors to aid courts in weighing the probative value of the character for untruthfulness evidence against its prejudicial effects, specifically in SGBV cases. It also provides for a hearing presided over by a

³⁸⁹ See, e.g., *State v. Manning*, No. 03C01-9501-CR-00012, 1998 WL 103317, at *14 (Tenn. Crim. App. Feb. 27, 1998).

³⁹⁰ *Id.*

³⁹¹ See *supra* Part II.

³⁹² See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 186.

separate judge when the evidence at issue is character for untruthfulness evidence in the form of specific instances. The proposed rule attempts to temper the prejudicial effects caused by credibility biases while balancing other considerations, such as a long-standing tradition of impeaching witnesses with evidence for untruthfulness, the constitutional protections in criminal cases, and judicial efficiency. This procedure would ensure that SGBV victims enjoy a more impartial trial, while preserving the core values of our criminal and probative systems.

Rule 101X. SCOPE; DEFINITIONS

* * *

(b) Definitions.

* * *

(7) *“sexual and gender-based violence cases”* refers to criminal or civil cases regarding intimate partner violence, sexual assault, rape, sexual harassment, and stealthing.

Rule 403X. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 608X. WITNESS’S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

(a) Reputation or Opinion Evidence.

A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about said character.

In cases involving sexual and gender-based violence, if the only testimony to support the character for untruthfulness of the victim is in the form of an opinion or reputation provided by the defendant,

the court may admit the evidence if it determines, following the factors enumerated in Rule 416X(b)(4), that the probative value of the evidence substantially outweighs its prejudicial effects.

Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Prior Convictions.

(1) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(a) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(i) must be admitted, subject to Rule 403X, in a civil case or in a criminal case in which the witness is not a defendant, *except as provided in (ii);*

(ii) in a civil or criminal sexual and gender-based violence case, the prior conviction of the victim must be admitted only after the court determines, following the factors enumerated in Rule 416X(b)(4) and any evidence of an incentive to plead, that the probative value of the evidence about the victim's character for untruthfulness is not outweighed or closely balanced by its prejudicial effect; and

(iii) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant;

(b) for any crime regardless of the punishment that, in the convicting jurisdiction, required proving—or the witness's admitting—a dishonest act or false statement, *the evidence:*

(i) must be admitted, subject to Rule 403X, in a civil case or in a criminal case except as provided in (ii); and

(ii) in a civil or criminal sexual and gender-based violence case, the prior conviction of the victim must be admitted only after the court determines, following the factors enumerated in Rule 416X(b)(4) and any evidence of an incentive to plead, that the probative value of the evidence about the victim's character for untruthfulness substantially outweighs its prejudicial effects.

(2) Limit on Using the Evidence After 5 Years. This subdivision (2) applies if more than 5 years have passed since the witness's con-

viction or release from confinement for it, whichever is later. Evidence of the conviction is admissible after the proponent gives the adverse party reasonable written notice of the intent to use it, so that the party has a fair opportunity to contest its use, only if:

(a) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect;

(b) *in a case of a victim's prior conviction in a sexual and gender-based violence case, after the court determines following the factors enumerated in Rule 416X(b)(4) that the probative value of the evidence is not outweighed or closely balanced by its prejudicial effect; and*

(c) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(3) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(a) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(b) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(4) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(5) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

(c) ***Prior Acts of Untruthfulness. (Specific Instances of Conduct)***

Except for a criminal conviction *under the special rules provided in section (b) of this rule*, extrinsic evidence is not admissible

to prove specific instances of a witness's conduct to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow the opposing party to inquire into such specific acts of untruthfulness if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

If the character for truthfulness being called into question is that of a victim in a sexual and gender-based violence case, the court must follow the procedure established in Rule 416X before allowing the impeachment with a prior act of untruthfulness.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness or untruthfulness.

Rule 416X. IMPEACHMENT OF SEXUAL AND GENDER-BASED VIOLENCE VICTIMS WITH PRIOR ACTS OF UNTRUTHFULNESS

(a) Requirement of a Hearing Presided Over by a Different Judge.

In any civil or criminal sexual and gender-based violence case, the defense may inquire into specific acts of untruthfulness of the victim, provided that the court in a hearing presided over by a separate judge or magistrate, determines, following the procedures set out in this rule, that the evidence about the victim's character for untruthfulness is not outweighed or is closely balanced by its prejudicial effect, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury.

(b) Procedure to Determine Admissibility.

(1) Motion. A defendant that intends to offer evidence about the character for untruthfulness of a sexual and gender-based violence victim, in the form of specific acts must:

1. *file a motion that specifically states the intention to use evidence in the form of specific acts to impeach the character for truthfulness of the victim, and lists and describes the specific acts of untruthfulness;*
2. *do so at least 14 days prior to the commencement of the trial, unless the court, for good cause, sets a different time before trial;*

i. in all civil cases, if the defendant does not file the motion within the period established, the defendant will waive the right to present such evidence;

ii. in all criminal cases, if the defendant does not file the motion before the commencement of the trial, the defendant must at least do so before the victim testifies; if not the defendant will waive his right to present such evidence, unless the Court determines that said evidence is of exculpatory nature;

3. serve the motion on all parties; and

4. notify the victim or, when appropriate, the victim's guardian or representative.

(2) Evidence to be Presented by the Defendant. The defendant can present evidence of the following:

1. the specific acts of untruthfulness;

2. how those specific acts are related to a claim that the victim is currently misusing the judicial system or has done so in the past;

3. the victim maliciously or falsely filed civil or criminal sexual and gender-based violence actions in the past;

4. the victim intends to cause harm to the defendant beyond the negative effects commonly associated with a judicial action by filing the current cause of action;

5. proof of the victim's character for untruthfulness; and

6. any other evidence that would make the use of specific acts of untruthfulness more reliable.

The use of extrinsic evidence is allowed. Such use of extrinsic evidence is exclusively for the purposes of the hearing under this Rule.

(3) Evidence to be Presented by the Victim or on the Victim's behalf. The prosecution, the plaintiff, or the Appointed Attorney can present evidence of the following:

1. the character for truthfulness of the victim;

2. the lack of evidence about the victim currently misusing the judicial system or having done so in the past;

3. the remoteness of the specific acts;

4. any evidence to rebut the veracity of the specific act of untruthfulness;

5. testimony explaining the recanting of charges; or

6. any other evidence that would make the use of specific acts of untruthfulness less reliable.

The use of extrinsic evidence is allowed. Such use of extrinsic evidence is exclusively for the purposes of the hearing under this Rule. The victim is not required to present any evidence in order for the court to make its determination.

(4) Factors to Consider. In making its determinations in (5) and (6), the court should consider the following factors:

- 1. amount and scope of the evidence of character for untruthfulness;*
- 2. how the evidence proves character for untruthfulness;*
- 3. how the evidence of character for untruthfulness is related to a claim that the victim is currently misusing the judicial system or has done so in the past;*
- 4. remoteness of the specific acts;*
- 5. evidence of the veracity or falsity of the acts, the opinion, or reputation;*
- 6. evidence of the victim maliciously or falsely filing civil or criminal sexual and gender-based violence actions in the past;*
- 7. evidence of the character for truthfulness of the victim;*
- 8. evidence explaining the recanting or presentation of previous allegations of sexual and gender-based violence; and*
- 9. any other evidence that would speak to the reliability of using the evidence to determine character for untruthfulness or truthfulness.*

(5) Probative Value Outweighed. After the hearing, if the court determines that the probative value of the evidence of the victim's untruthful character is closely balanced or outweighed by the unfair prejudice to the victim's testimony, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury or the judge, the court will issue a written order stating that any line of inquiry into those issues will not be allowed during the trial and the defense will be sanctioned if it disregards said order. In making such determination the court must balance the probative value of the evidence and its prejudicial effect considering the factors listed in Rule 416X(b)(4).

(6) Concerns Outweighed. After the hearing, if the Court determines that the probative value of the evidence of the victim's untruthful character is not closely balanced nor outweighed by the unfair prejudice to the victim's testimony, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury or

the judge, the court will issue an order stating which specific acts may be inquired into during cross-examination in the trial with the purpose of impeaching the victim's character for truthfulness. The scope of such cross-examination will be limited to the occurrence of the specific act in question. In making such determination the court must balance the probative value of the evidence and its prejudicial effect considering the factors listed in Rule 416X(b)(4).

(7) Appointment of Attorney Under Special Circumstances. In criminal cases, if the court understands that the interests of the victim are not being adequately represented by the State, or the victim's safety is in peril, the court may appoint an attorney to represent the victim during the hearing or the victim's testimony in trial. In all civil cases, if the court determines that self-representation could result in undue psychological burden to the victim or the victim's safety is in peril, the court may appoint an attorney to represent the victim during the hearing or the victim's testimony in trial.

(8) Sealed Hearing and Materials. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

C. Advisory Comments on the Rule

As can be inferred, the purpose of the Rule is to prevent attorneys from accessing credibility biases based on trustworthiness and plausibility and using them as part of their defense to discount the victim's testimony, while respecting the reliance jurisdictions grant to character evidence for untruthfulness. To do so, the Rule attempts to temper our knowledge of the phenomenon that evidence of character for untruthfulness is not a good predictor of a witness lying during a trial with the well-established practice of admitting this type of evidence in judicial proceedings, especially in SGBV cases. To balance all of the interests at stake, including the right of confrontation, the Rule envisions the use of three different standards which depend on the form of the evidence for character for untruthfulness and its perceived reliability as a predictor of a witness lying.

1. BALANCING TESTS

For evidence that is perceived to be most reliable—evidence in the form of reputation or opinion—for determining a witness’s character for untruthfulness,³⁹³ the standard would remain the one set forth in FRE 403. On the other hand, for categorically less reliable evidence, such as prior convictions and specific acts of untruthfulness,³⁹⁴ the proposed Rule establishes two different standards and instructs the court to take into account specific factors associated with SGBV cases, such as the inherent biases involved in these types of cases. These factors will aid the court in making a more accurate determination of the prejudicial effects of character for untruthfulness evidence in SGBV cases. The two different standards available for such an analysis also recognize that there is a diverse degree of perceived reliability of the various forms of character for untruthfulness evidence.³⁹⁵

For prior convictions other than *crimen falsi* and specific acts of untruthfulness, which have been categorized as the least reliable form of character evidence,³⁹⁶ the Rule provides a more stringent standard: impeachment with character for untruthfulness evidence is prohibited if the probative value of the evidence of the victim’s untruthful character is closely balanced or outweighed by the unfair prejudice to the victim’s testimony, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury or the judge. However, for prior convictions for *crimen falsi*, evidence in the form of opinion or reputation supported solely by the defendant, or prior convictions older than five years, the standard would be an intermediate balancing test as to whether the probative value substantially outweighs the prejudicial effects.

2. SEPARATE HEARING FOR DETERMINING IMPEACHMENT WITH PRIOR ACTS OF UNTRUTHFULNESS

³⁹³ See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 179–86 (discussing the use of reputation and opinion evidence over time and the reliance on such evidence).

³⁹⁴ See Gold, *supra* note 268, at 774.

³⁹⁵ Compare Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 179–86, with Gold, *supra* note 268, at 774.

³⁹⁶ See Gold, *supra* note 268, at 774.

In the case of specific acts, the Rule also requires a hearing presided over by a separate judge or magistrate. As discussed, prior acts of untruthfulness are the least reliable type of character for untruthfulness evidence but the most persuasive in leading a fact finder to think that a witness is lying.³⁹⁷ Thus, in order to balance the right of confrontation in criminal cases and the extended practice of relying on evidence of character for untruthfulness with specific act evidence's inherently prejudicial effects,³⁹⁸ the Rule contemplates both a hearing and a more stringent standard to determine whether this type of evidence should be admitted.

Contrary to the proceeding laid out in Tennessee's Rule of Evidence 608 or a *Daubert* hearing,³⁹⁹ the proposed Rule requires a hearing to be presided over by a judge other than the one that will be presiding over the underlying SGBV matter. This serves to better protect the impartiality of the court proceedings by shielding the parties from potential future biased adjudications and avoiding parties strategizing in response to their perception of the judge's rulings. As enumerated in proposed Rule 416X(b)(3)–(4), the hearing calls for the disclosure of evidence that the parties could present during the trial. Even if during the hearing the parties do not present evidence that could come up again, the totality of the separate proceeding could influence future rulings.

Triers of fact do not forget about evidence presented just because it has not been admitted into evidence.⁴⁰⁰ In fact, jurors tend to rationalize their judgments based on evidence excluded using the evidence admitted.⁴⁰¹ This integrative process is not exclusive to jurors, as judges are susceptible to it as well.⁴⁰² Considering the adverse effects this integrative process could have on both the defendant's case and the victim's testimony, the proposed Rule 416X breaks

³⁹⁷ *See id.*

³⁹⁸ *See supra* Part II.

³⁹⁹ *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–94 (1993) (explaining the factors a court must consider to determine if an expert is qualified before allowing him to testify).

⁴⁰⁰ *See Kassin & Sommers, supra* note 58, at 1053.

⁴⁰¹ *Id.*; *see also Studebaker & Penrod, supra* note 58, at 257.

⁴⁰² *See St. Joan, supra* note 131, at 282 (“Ample evidence indicates that many judges adopt the dominant cultural myths about domestic violence and fail to understand the common experiences of abused women. Some judges deeply resist evidence that could challenge their cultural beliefs about domestic violence.”).

away from the fiction that judges, contrary to jurors, would be able to compartmentalize the information and ignore the evidence that has not been admitted.

By having a different judge decide the admissibility of the evidence of specific acts of untruthfulness, the Rule seeks to preserve the impartiality and fairness needed for the decision-making process. Under the proposed Rule, the court, during the separate hearing, would hear any relevant extrinsic evidence. In order to avoid the trier of fact's rulings being unfairly influenced by the information presented at this previous admissibility hearing—while also protecting the privacy of the victim—the Rule requires that the hearing is conducted by a separate judge or magistrate and that the record, motions, and related materials be sealed.

This has the added benefit of preventing the parties from adapting their trial strategies to fit the parties' perception of the judge's disposition simply based on what the judge ruled at the preliminary admissibility hearing. For example, the parties will not have to decide whether to ask the judge to recuse himself because it appears that the evidence discussed during the hearing could influence his rulings during the trial. In that way, parties will not have to enter into a cost-benefit analysis about losing political capital with the judge by moving to recuse him. In addition, the parties will not have to consider how certain evidence that was not discussed during the hearing will play out in light of what transpired during the previous proceeding. The sealed nature of the preliminary admissibility hearing, as well as the use of a second, independent judge, allows the parties to maintain a clean slate with the actual trial judge.

These safeguards make the procedures in Rule 416X different from those under Tennessee's Rule of Evidence 608. Tennessee's Rule of Evidence 608 calls for a determination that “the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry.” Contrary to Rule 416X, this procedure does not entail presenting evidence that could not be introduced during the trial. Thus, the proposed Rule 416X protects the impartiality of the upcoming proceedings.

A similar reasoning explains the safeguards Rule 416X provides that are not available at a *Daubert* hearing,⁴⁰³ namely that a Rule

⁴⁰³ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592–93 (1993).

416X hearing must be presided over by a different judge. The purpose of a *Daubert* hearing is to determine whether the expert meets the requisite level of qualifications and that the testimony is based on reliable methodologies.⁴⁰⁴ In essence, a *Daubert* hearing can be compared to a more stringent *voir dire* of the witness that is removed from the presence of the jury to prevent misleading them. However, even if the court, contrary to Rule 416X, is never asked to hear evidence that is excluded from trial, parties could theoretically delve into matters that may later come up in trial during an expert's *voir dire*. Yet, what is being ascertained in the *Daubert* hearing is how to interpret facts that are already part of the record.⁴⁰⁵ On the other hand, the procedure of proposed Rule 416X seeks to determine if the evidence regarding the credibility of the witness who is providing relevant testimony should be admitted. As a result, the extent of what the court is doing in a *Daubert* hearing is vastly different from a Rule 416X hearing.

The *Daubert* hearing decides the admissibility of an expert's interpretation by looking at her qualifications and methodology.⁴⁰⁶ Once the court determines that an expert's interpretation of the facts should not be heard, that interpretation of the facts will have no bearing on the case.⁴⁰⁷ And if the expert testimony is admitted, the court essentially makes a determination that the testimony should be considered by the jury.⁴⁰⁸ This implies that there is no real issue of the judge's future rulings being unfairly colored by the hearing.

Rule 416X, in contrast, is looking at evidence that affects the credibility of a witness. The risk of contaminating the judge with evidence that could later be determined to have no bearing on the credibility of the witness is therefore always present and could affect either of the parties in unpredictable ways.⁴⁰⁹ This critical difference between the *Daubert* hearing and the hearing under Rule 416X warrants that the latter needs to be presided over by a different judge as opposed to the former, which does not necessarily need a separate judge.

⁴⁰⁴ *Id.* at 592–94.

⁴⁰⁵ *Id.* at 591–92.

⁴⁰⁶ *Id.* at 592–94.

⁴⁰⁷ *See id.* at 597.

⁴⁰⁸ *See id.* at 595.

⁴⁰⁹ *See* Epstein & Goodman, *supra* note 93, at 405 (noting how judges tend to disbelieve victims of SGBV).

3. REALIGNMENT OF ADMISSIBILITY OF PRIOR ACTS WITH ADMISSIBILITY OF PRIOR CONVICTIONS

The Rule also tries to harmonize impeachment by character for untruthfulness evidence using specific non-criminal untruthful acts with impeachment by prior convictions. As discussed, these are both technically specific acts, which only differ as to the criminality of the act and the prior judicial determination that the act has occurred.⁴¹⁰ For that reason, the proposed Rule employs a different balancing test for prior convictions because that type of specific acts evidence is generally perceived as more reliable than specific acts of non-criminal untruthfulness evidence.⁴¹¹ However, there is no reason to have two different standards regarding the time span required for admission or whether the evidence is subject to FRE 403 analysis. Accordingly, the proposed Rule departs from the FRE by subjecting all prior convictions for *crimen falsi* (in non-SGBV cases) to a FRE 403 analysis and by limiting the use of both prior acts of untruthfulness and prior convictions to a time limit of five years.

The Rule rejects the FRE's idea that prior acts of untruthfulness could be admissible irrespective of when they occurred, while prior convictions could be admissible only if they are not older than ten years.⁴¹² It is counterintuitive to limit impeachment with a prior conviction and not limit it as to a prior bad act whose criminality is less and to which the witness has no incentive of remembering.⁴¹³ Because of the lack of incentive to remember a non-serious, prior bad act,⁴¹⁴ the Rule limits its use to acts within the last five years, so that the witness could have a better memory when responding to the impeachment.

⁴¹⁰ Compare FED. R. EVID. 608(b), with FED. R. EVID. 609.

⁴¹¹ See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 179–86 (discussing the use of reputation and opinion evidence over time and the reliance on such evidence); Gold, *supra* note 268, at 774 (“Of the four types of witness evidence, [noncriminal] misconduct evidence provides the weakest basis for making a generalization about truthfulness.”).

⁴¹² Compare FED. R. EVID. 608, with FED. R. EVID. 609.

⁴¹³ Gold, *supra* note 268, at 775.

⁴¹⁴ *Id.*

4. COUNSEL FOR VICTIM

In addition, the proposed Rule provides for the appointment of a victim's counsel in cases in which the interests of the victim are not adequately represented. This addition of a possible trilateral process is based on the recognition that the objectives of prosecutors and victims diverge greatly in terms of the protection of victims' privacy, impeachment of victims, and standards for measuring the success of the case.⁴¹⁵ Professor Lininger poignantly describes these tensions by stating

prosecutors do not share victims' sense of urgency in protecting against disclosure of sensitive personal information. Prosecutors are generally very cautious about making evidentiary objections. They fear objections will signal to jurors that the government has something to hide. Another reason why prosecutors may forego valid objections is that by giving defense counsel wide leeway, prosecutors eliminate possible appellate grounds. Prosecutors have an ethical and constitutional obligation to disclose material that undermines the credibility of the prosecution's witnesses. Cynical prosecutors may believe that defense harassment of accusers is helpful because it may outrage the jury and increase the likelihood of conviction. Victims, on the other hand, have no ethical obligation to be forthright about their foibles, and they have a much stronger interest in privacy.

There is a second reason why the bilateral adversarial model inaccurately describes the relationship between prosecutors and victims: The government frequently impeaches accusers. . . . The convergence of "no drop" policies and stricter confrontation requirements make such impeachment far more likely than in the past.⁴¹⁶

⁴¹⁵ Lininger, *supra* note 241, at 1394.

⁴¹⁶ *Id.* at 1394–95. In addition to those reasons, Professor Lininger also adds that:

Considering these tensions, it is important that the victims have a mechanism to make sure that events that might have no bearing to the cause of action do not come up and that someone protects the victim from such inquiries.⁴¹⁷ We currently lack such a mechanism in SGBV cases, and the Rule seeks to correct that by providing counsel for the victim at the hearing and during the trial. Even if the hearing does serve as an incentive for the prosecution to defend the interests and privacy of the victim, the prosecutor might have a strategy that does not guarantee that victims would be protected from impeachment to her character for untruthfulness.⁴¹⁸ For that reason, the possibility of a trilateral process is of utmost importance if the system seeks to correct the problems of under-prosecution.⁴¹⁹ This representation should also extend to civil cases when the victims are

One final reason for the discordant relationship between the prosecutor and the accuser is the different standard by which the two groups measure the success of a prosecution. Prosecutors have a short-term perspective. They focus on the jury verdict and the length of the sentence. A guilty verdict and a long sentence mean that the prosecution has prevailed; an acquittal or a short sentence brings disappointment. Prosecutors have other ancillary concerns such as managing huge caseloads and maintaining good relationships with repeat players in criminal court, but their primary concern is the “scorecard” of convictions and jail time. The accuser, for her part, has a far different gauge for measuring the success of a prosecution. A prosecution is successful for the accuser if it facilitates her long-term emotional recovery, strengthens her sense of self-determination, and leaves open the possibility of rebuilding interpersonal relationships (perhaps even with the defendant). In addition, the victim hopes that the prosecution will improve – or at least not limit – the odds of success in parallel civil litigation; prosecutors are subject to ethical rules that prohibit them from taking actions to assist civil proceedings, and prosecutors typically regard parallel civil litigation as a nuisance that hinders the attainment of prosecutorial goals.

Id. at 1395–96.

⁴¹⁷ For example, a trilateral process could have helped Jennifer when she felt that the prosecutor was not interested in defending her interest. *See supra* Part I.

⁴¹⁸ *See* Lininger, *supra* note 241, at 1394–95.

⁴¹⁹ As Professor Lininger suggests, the trilateral process should be a possibility in every SGBV case and even more extensive than the processes proposed here. Lininger, *supra* note 241, at 1396.

proceeding pro se, as a way to level the playing field and avoid undue revictimization.

The Rule, however, does not protect against the revictimization that can happen due to the prosecution's impeachment of the victim because of no-drop prosecutions or declaration of the victim as a hostile witness.⁴²⁰ Rule 416X only operates when an opposing party impeaches an SGBV victim's character for truthfulness and in no other context. This would allow jurisdictions that believe no-drop prosecution rules are necessary to continue that practice.⁴²¹

5. NOTIFICATION REQUIREMENT

Further, the Rule attempts to make the proceedings as fair as possible by requiring the defendant to notify the prosecution or the victim of his intention to use evidence of specific acts of untruthfulness and list the acts intended to be used. Part of the problem with using specific acts of untruthfulness is that contrary to other forms of character for untruthfulness evidence, "to the extent that misconduct evidence is weak or even misleading, the witness [the victim] may be ill prepared to explain the defects of that evidence."⁴²² Giving the victim the opportunity to rebut the evidence puts the court in a better position to weigh the probative value of the evidence of character for untruthfulness against its prejudicial effects. In criminal cases, the Rule seeks to balance the right to confrontation with the notification requirement, by providing that the defendant has until the commencement of the trial to file the motion and notify the prosecution and the victim before waiving his right to use this evidence. Finally, as a corollary of the trilateral process, the Rule provides for the motion to be sent directly to the victim, this way the victim can decide whether to initiate the trilateral process.

In sum, the Rule respects the reliance our evidentiary system grants to character evidence for untruthfulness and the right of confrontation while making trials of SGBV cases fairer by preventing attorneys from accessing biased narratives about victims' lack of credibility and using them as part of their defense.

⁴²⁰ *Id.* at 1362.

⁴²¹ However, as Professor Lininger advocates, these jurisdictions should incorporate the trilateral process at least for proceedings in which the interests of the victims collide with those of the prosecution. *Id.* at 1395–96.

⁴²² Gold *supra*, note 268, at 775.

D. Proposed Rule for Impeachment in Action

Applying the Rule to Jennifer's case⁴²³ shows how the Rule could affect outcomes and shield the process from biases. In Jennifer's case, the evidence regarding the lies on Facebook, the loan application, the use of a married name, and the extra-marital pregnancy constitute prior acts of untruthfulness. Thus, the admissibility of such evidence would be a matter to be adjudicated during the separate hearing established in Rule 416X. However, the evidence of bias (divorce and future litigation), contradiction (Facebook posts not showing bad moments and car buying), perception (mental health and drug use), and lack of verification (no previous police reports and no reporting to friends or family) would not be subject to the hearing procedure established in Rule 416X as they are not specific acts of untruthfulness. That means that the defendant would be able to introduce that evidence subject to FRE 403X and FRE 608X.

When the court considers the evidence of Jennifer's prior acts under Rule 416X, it should conclude that all of the specific acts in Jennifer's case should be excluded. The defense has four acts to show that Jennifer has a character for untruthfulness. However, the court should not only consider the quantity of specific acts but how probative these acts are of the victim lying. In Jennifer's case, two of the four acts are inconsequential acts of untruthfulness related to social expectations that do not tell the court whether a person would lie in a judicial proceeding. For the most part, people do not air their problems on social media; rather, they portray the good aspects of their lives.⁴²⁴ It can be said that because people only portray the good aspects of their lives, it follows that they know others are doing the same.⁴²⁵

The same can be said about Jennifer using a married name when she was not legally married. This conduct may just reflect a desire

⁴²³ See *supra* Part I.

⁴²⁴ Helmut Appel et al., *The Interplay Between Facebook Use, Social Comparison, Envy, and Depression*, 9 CURRENT OPINION PSYCHOL. 44, 44 (2016) (stating that “[i]n [] Facebook profiles, users communicate abundant social comparison information conveying mainly positive self-portrayals.”).

⁴²⁵ See *id.*

to keep matters about one's love live private.⁴²⁶ Again, this is conduct that people would likely not attach much meaning to in terms of a person's character for untruthfulness, especially because unmarried people can struggle to find words to properly describe the specific contours of their relationships.⁴²⁷

In contrast, people would likely attach more meaning to someone's infidelity when assessing that person's character for untruthfulness.⁴²⁸ Common sense dictates that the average juror would probably think it is more deceitful to be unfaithful to a spouse than it is to lie on Facebook or lie about one's civil marital status. Yet, in Jennifer's case the conduct is not even that meaningful in terms of deceit because the alleged "infidelity" took place when the couple had already parted ways—conduct that people would find more acceptable because a relationship has effectively ended.⁴²⁹ Thus, this evidence should not be admissible to impeach Jennifer's character for truthfulness.

Consequently, the court in Jennifer's case has only one specific act of untruthfulness to consider: the loan application. This is an act that could speak to a person's character for untruthfulness and can lead a juror to think that a witness might lie in court. However, in order to admit the evidence for impeachment purposes, the court should examine the available extrinsic evidence and verify that there is some proof that such a specific act occurred. If it turns out that the

⁴²⁶ See Elizabeth Weil, *Unmarried Spouses Have a Way with Words*, N.Y. TIMES, (Jan. 4, 2013), <https://www.nytimes.com/2013/01/06/fashion/unmarried-spouses-have-a-way-with-words.html>.

⁴²⁷ *Id.*

⁴²⁸ Because infidelity inherently encompasses lying, common sense would dictate that a juror would attach more meaning to infidelity when assessing a witness's truthfulness. However, courts have routinely prohibited the introduction of this evidence as being more prejudicial than probative. See, e.g., *United States v. Thiongo*, 344 F.3d 55, 60 (1st Cir. 2003) ("Evidence Defendant bore the man's child while married to another does not appear to be relevant or probative of Defendant's truthfulness or untruthfulness."); *United States v. Stone*, 472 F.2d 909, 916 (5th Cir. 1973) ("Attempted impeachment of [witness] by proof of [marital] infidelity would have been impermissible.").

⁴²⁹ See generally Jessica Blankenship, *What Does and Does Not Count as Cheating*, THOUGHT CATALOG (Jan. 3, 2014), [https://thoughtcatalog.com/jessica-blankenship/2014/01/what-does-and-does-not-count-as-cheating/\(discussing-how-it-is-not-considered-cheating-to-move-on-when-partners-decide-to-go-\"on-a-break\"\)](https://thoughtcatalog.com/jessica-blankenship/2014/01/what-does-and-does-not-count-as-cheating/(discussing-how-it-is-not-considered-cheating-to-move-on-when-partners-decide-to-go-\).

defense has extrinsic evidence that gives it a reasonable basis to ask about the loan application, the court should also inquire as to the remoteness of the act. In this case, the loan application seems to be from six years prior to the current proceedings in Jennifer's case. The proposed Rule looks at evidence of acts older than five years with distrust. The weight of the evidence of distrust should be diminished by the lack of evidence regarding previous allegations of SGBV. Thus, the evidence of the loan application should be excluded as its probative value is at most, closely balanced by the unfair prejudice to the victim's testimony, and the Rule would require exclusion in such a close case.

It could have been different if there were prior criminal or administrative accusations of SGBV that were recanted or not proven; if those recanted or prior accusations could not be explained by Jennifer; if the prior act of untruthfulness was more recent; and if the defense had witnesses of reputation speaking of Jennifer's character for untruthfulness, then the court's conclusion about the admissibility of the loan application may have been different. The court probably would allow the impeachment of Jennifer with the loan application had those other factors been present. Nevertheless, the impeachment would be limited to show that Jennifer lied in the loan application. According to Rule 416X, the examination about that act should be limited to whether the witness engaged in the prior act of untruthfulness.

Therefore, in Jennifer's case none of the specific acts should be used to impeach her character for truthfulness. As a result, the defense would only be able to impeach her using the evidence of bias, contradiction, perception, and lack of verification. During the trial, some of that admissible evidence that exposes customary victim behavior would have been explained by Jennifer in her testimony or by expert witnesses. However, with the lack of evidence regarding specific acts of untruthfulness, the defense would have been precluded from accessing the biases discussed in Part II. This would prevent the defense from unfairly discounting Jennifer's credibility and in turn, would make the adjudication of Jennifer's case fairer and more accurate.

V. #EVERYDAYSEXISM: OBJECTIONS TO SPECIFIC IMPEACHMENT
RULES FOR SGBV VICTIMS

*Well, it's a tough thing going on. If you can be an exemplary person for 35 years, and then somebody comes and they say you did this or that, and they give three witnesses, and the three witnesses—at this point—do not corroborate what she was saying. It's a very scary situation where you're guilty until proven innocent. My whole life, my whole life I've heard you're innocent until proven guilty, but now you're guilty until proven innocent. That is a very, very difficult standard. . . . Well I say that it's a very scary time for young men in America when you can be guilty of something that you may not be guilty of.*⁴³⁰

Even if the proposal of this Article is a more sensible way to tackle some of the issues that victims of SGBV confront, potential detractors of the proposal would argue that it is not needed. They might argue that even if it is needed, it could create other problems such as curtailing the rights of defendants, it could lead to over-conviction of false accusations, and it could overburden the judicial system. Furthermore, detractors might criticize the proposal as not gender specific when it tries to attend to issues of SGBV, that it responds to an unfounded SGBV exceptionalism, or that it could be resolved by abolishing the use of character for untruthfulness evidence. However, these objections are meritless.

First, there is a serious problem with the adjudication of SGBV cases and victim's and women's credibility biases.⁴³¹ Some detractors might argue that if there is a problem it could be attended with

⁴³⁰ CNN, *President Trump: Scary Time for Young Men in America*, YOUTUBE (Oct. 2, 2018), <https://www.youtube.com/watch?v=qUEBZmuzYQM> (President Trump talking to reporters outside of the White House at 6:39–7:29); see also Monique Judge, Opinion, *When Donald Trump Says 'It's a Scary Time for Young Men in America,' He Means Young White Men*, ROOT (Oct. 2, 2018, 8:01 PM), <https://www.theroot.com/when-donald-trump-says-its-a-scary-time-for-young-men-i-1829479262>.

⁴³¹ See *supra* Part II.

instructions to the jurors.⁴³² Those instructions exist today.⁴³³ Most instructions tell jurors that just because a juror does not believe part of the testimony of a witness does not mean that the juror should not give credence to the rest of the witness's testimony.⁴³⁴ However, as discussed *supra* Part II, jurors are not able to compartmentalize evidence in that way.⁴³⁵ Even Professor Bennett Capers, a proponent of jury instructions, recognizes that rethinking the Rules of Evidence to cover functional evidence is consistent with the overall goals of the Rules.⁴³⁶

Regarding the other objections the Rule's detractors might have, they are not actual problems. But rather, except for the SGBV exceptionalism critique, they might be an extension of the biases discussed associated with these types of cases.

A. Defendants' Rights

Detractors might argue that the Rule erodes the right of confrontation of defendants in criminal cases and that it shifts the burden of proof, by automatically believing the victims' allegations.⁴³⁷ Yet,

⁴³² See Capers, *Evidence Without Rules*, *supra* note 29, at 898–900 (arguing for jury instructions that instruct jurors to disregard functional evidence considered by jurors, such as race and clothes); *but see* J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 95 (“The empirical research clearly demonstrates that instructions to disregard are ineffective in reducing the harm caused by inadmissible evidence and improper arguments.”).

⁴³³ See, e.g., PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 4.15 (3rd ed. 2016).

⁴³⁴ An example of this type of instruction is the following:

If you decide that a witness deliberately testified falsely about a material point, [that is, about a matter that could affect the outcome of this trial,] you may for that reason alone choose to disbelieve the rest of his or her testimony. But you are not required to do so. You should consider not only the deliberate falsehood but also all other factors bearing on the witness's credibility in deciding whether to believe other parts of [his] [her] testimony.

Id.

⁴³⁵ See Kassin & Sommers, *supra* note 58, at 1053.

⁴³⁶ Capers, *Evidence Without Rules*, *supra* note 29, at 900–01.

⁴³⁷ See Colb, *The Difference Between*, *supra* note 54 (arguing that prosecutors can oftentimes secure a conviction solely with eye-witness testimony and that “jurors [need] to presume innocence until they hear credible evidence proving guilt beyond a reasonable doubt.”); *see also* Sherry Colb, *What Does #BelieveWomen*

what the Rule intends to do is to make sure that the evidence used to impeach the victims is relevant. The Rule does not exclude evidence that has been shown to be relevant, even where the reliability of such evidence has been doubted. Because the Rule only excludes evidence that is not relevant, the right of confrontation of the defendant is not violated.

The defendant does not have a right to introduce evidence that is not relevant.⁴³⁸ Moreover, the Rule protects the right of confrontation by providing a hearing to elucidate the relevancy of evidence whose probative value has been called into question. Similarly, the defendant, as in Jennifer's case,⁴³⁹ still has at his disposal impeachment with evidence of bias, contradiction, perception, and lack of verification; focusing on the actual lies rather than on a witness's status as a liar.

Moreover, the argument that the Rule subverts the burden of proof by giving full credence to the victim and assuming the defendant is guilty unless proven otherwise is a fallacy.⁴⁴⁰ The Rule does no such a thing. Such an objection is based on some of the narratives associated with the "he said/she said" credibility bias.⁴⁴¹ The Rule merely requires the defendant to assert the relevancy of the evidence to be used to impeach the victim. The factors used for that determination do not assume that the victim is telling the truth about the events or that the defendant is guilty of the charges. What the Rule does is balance factors to ascertain whether the evidence could be

Mean?, YONKERS TRIB., (Nov.7, 2018, 1:45 PM), <https://www.yonkertribune.com/2018/11/what-does-believewomen-mean-by-sherry-f-corb>.

⁴³⁸ See, e.g., *Roundtree v. United States*, 581 A.2d 315, 321 (D.C. 1990) ("Because the Constitution does not require confrontation of witnesses with irrelevant evidence, the very applicability of the confrontation clause in this case depends on [the victim's] prior allegations being false. Under these circumstances, the confrontation clause does not prevent the trial court from weighing the [defendant's] offer of proof to determine its probative value to the trier of fact.") (internal quotation marks omitted); *State v. Brum*, 923 A.2d 1068, 1074–76 (N.H. 2007) (holding that defendant was not entitled to introduce extrinsic evidence of victim's prior allegations of sexual assault and that the limitation on cross-examination did not violate defendant's state constitutional right to confrontation).

⁴³⁹ See *supra* Part I.

⁴⁴⁰ See Corb, *The Difference Between*, *supra* note 54.

⁴⁴¹ See *id.*

used to show character for untruthfulness without confusing the jurors about the matter at trial. Therefore, the Rule does not violate any constitutional rights of the defendant.

B. *Over-Conviction of False Accusations*

Criticisms that the proposed Rule will result in over-convictions are also unwarranted. While the Rule is intended to correct the problem of under-conviction and under-adjudication in favor of victims,⁴⁴² that does not mean that the Rule will shift the balance to the opposite side to over-conviction. Even though the Rule does make it easier to obtain convictions, it does so in light of the current scheme that makes it extremely hard. Moreover, the Rule does not change any burden of proof or substantive elements of SGBV causes of actions. Consequently, there should be no shift to over-convictions.

This objection seems to be based more on biases about victims in SGBV cases lying or trying to advance future litigation in divorce or child custody and support cases.⁴⁴³ However, statistics contradict

⁴⁴² See *The Criminal Justice System: Statistics*, *supra* note 8.

⁴⁴³ See Scheppele, *supra* note 21, at 170 (explaining that women are perceived as liars when they revise their stories, despite revisionism being a part of the coping process); Trepiccione, *supra* note 240, at 1490–91 (discussing how battered mothers are oftentimes charged with neglect and lose custody of their children). Another reason that serves to explain the perception that victims in SGBV cases are lying is that victims do not usually conform their stories to the legal standards, which in turn leads to intensive fact-finding from law enforcement, attorneys, or judges leading them to think that victims are lying or fabricating facts. See Epstein & Goodman, *supra* note 93, at 418–19. As Professors Epstein and Goodman explain:

survivors often frame their courtroom stories in a way that fails to fit the expectations of most judges, and even of the law itself: what may feel to victims like the most insidious and intimate brand of abuse can come across to legal gatekeepers as something that really doesn't count as abuse at all.

The result is what philosophers call a serious “epistemic asymmetry” between marginally situated survivors and the judges who serve as their audience

It is often only after aggressive judicial questioning that survivors volunteer information about physical abuse or threats, and when they do, they may sound—to the judges, at any rate—less concerned about those aspects of their stories than about the day-to-day psychic harms they have endured. In this context,

these impressions. The prevalence of false reporting is low;⁴⁴⁴ it is estimated that false reporting lies between two and ten percent.⁴⁴⁵

For example, a study of eight communities in the United States found the rate of false reporting as seven percent.⁴⁴⁶ In another study of sexual assault cases, the reported rate of false reports was 5.9%.⁴⁴⁷ These statistics, combined with the low rates of adjudication,⁴⁴⁸ suggest that it is very unlikely that a rule that focuses only on the determination of relevancy of evidence for character for untruthfulness would have the effect of over-convicting defendants.

The Rule proposed in this Article attempts to better determine whether a victim truly has a character for untruthfulness. In other words, the Rule should serve to better identify the victims that are actually lying. Consequently, the problem of over-conviction should not be an issue because the Rule would actually try to help weed out the cases involving false allegations.

The potential argument that the proposed Rule would promote victims misusing allegations of SGBV to better their chances in separate future litigations is likewise unwarranted. The proposed Rule does not facilitate the conviction or adjudication of false allegations. Thus, there is no incentive to bring false charges because they would likely be barred by the proposed Rule.

the admission of physical abuse can sound to judges like something of an afterthought. Because so many judges do not understand survivors' frames for their experiences, they may suspect that women's too-little, too-late testimony about physical violence is either exaggerated or fabricated out of whole cloth; that they are adding it only after belatedly realizing that the law demands such facts.

Id.

⁴⁴⁴ *See, e.g., id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ KIMBERLY LONSWAY ET AL., FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT, NAT'L SEXUAL VIOLENCE RES. CTR. 2 (2009), <https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf>.

⁴⁴⁷ David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329 (2010).

⁴⁴⁸ *See The Criminal Justice System: Statistics, supra* note 8.

Furthermore, the outcome of an SGBV case has no bearing on the outcome of most divorce proceedings.⁴⁴⁹ Similarly, SGBV allegations have little effect in most alimony determinations.⁴⁵⁰ In terms of child custody and support cases, statistics show that victims of SGBV are actually more likely to *lose* custody after making assertions of violence against another.⁴⁵¹ In fact, in some states, bringing a case of SGBV against a spouse or a cohabitant could be used against the victim in custody determination based on the idea that the victim endangered the child by staying in the relationship and not reporting the violence.⁴⁵² However, some states have presumptions for joint custody that are enforced even in cases of intimate

⁴⁴⁹ First, with the advent of no-fault divorce, a great percentage of jurisdictions no longer consider fault in property division distribution unless the abuse was egregious. *See id.* Other states that still consider fault do so only if spousal abuse constitutes economic fault (i.e., the economic impact that the abuse may have had on medical bills or decreased ability to work), while other jurisdictions demand a connection between the abuse and some other factor. *Id.* Finally, some states consider spousal abuse as a relevant factor in and of itself. *Id.* Therefore, the argument that victims use SGBV cases to enhance their chances in divorce litigation ignores the multiarray of how fault plays into property division determinations. It also disregards that marriage rates continue to decrease. *See Marriage Rate in the United States from 1990 to 2017 (per 1,000 of population)*, STATISTA, <https://www.statista.com/statistics/195951/marriage-rate-in-the-united-states-since-1990/> (last visited Sept. 17, 2019). Likewise, the argument overlooks that there would only be an incentive to institute an SGBV case to affect the outcome of a divorce settlement in cases where the parties actually have substantial assets to divide, which might not be majority of cases. *See Stacy Francis, Money Stress Traps Many Women into Staying in Unhappy Marriages*, CNBC (Aug. 13, 2019), <https://www.cnbc.com/2019/08/13/money-stress-traps-many-women-into-staying-in-unhappy-marriages.html>.

⁴⁵⁰ *See* Mary Kay Kisthardt, *Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61, 68 (2008) (“With the advent of no-fault divorce, alimony [has] also lost its punitive rationale.”); *see also* THE HOUSE OF RUTH MD. DOMESTIC VIOLENCE LEGAL CLINIC ET AL., *DOMESTIC VIOLENCE CASES: HANDLING THEM EFFECTIVELY IN MARYLAND DISTRICT AND CIRCUIT COURTS* 144–45 (2019) (discussing how alimony awards in Maryland consider domestic violence, under the estrangement factor, because alimony is based on financial need and not punitive).

⁴⁵¹ Epstein & Goodman, *supra* note 93, at 431. Shockingly, abusive parents are more likely to seek sole custody and succeed at a rate of seventy percent. *10 Myths About Custody and Domestic Violence and How to Counter Them*, A.B.A. COMM’N ON DOMESTIC VIOLENCE, (2006), http://leadershipcouncil.org/docs/ABA_custody_myths.pdf.

⁴⁵² Aiken & Murphy, *supra* note 61, at 51.

partner violence.⁴⁵³ Thus, married or partnered women are actually disincentivized to allege SGBV allegations if the women are also planning on litigating any of these family law matters in the future.

C. *Burden to the Judicial System*

Regarding the potential objection to the proposed Rule that it burdens an already burdened system,⁴⁵⁴ the detractors would be justified in pointing out that requiring a separate hearing would increase the costs for the judicial system, the costs for the parties, and the time that it would take to resolve a matter. However, a cost-benefit analysis shows that the benefits of adopting the proposed Rule outweigh its costs. For instance, making sure that the system accounts for the patriarchal biases and attempts to correct those biases by delivering more accurate outcomes in cases of SGBV is an extremely valuable benefit. The under-prosecution of SGBV is a significant problem.⁴⁵⁵ Adopting the proposed Rule could help fix some of the problems associated with such under-prosecution and promote the notion that women and victims of this type of violence matter. Refusal to reform or start to fix some of these problems only reifies the issues of looking at victims of this type of violence as people who do not count.

⁴⁵³ Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 428 (2005).

⁴⁵⁴ See, e.g., Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015, 2:09 PM), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746> (“Civil suits . . . are piling up in some of the nation’s federal courts, leading to long delays in cases involving Social Security benefits, personal injury and civil rights, among others.”).

⁴⁵⁵ See *The Criminal Justice System: Statistics*, *supra* note 8. For example, under-prosecution of intimate partner violence can negatively impact the economy because women are not able to fully participate in the job market. See NAT’L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE, https://www.speakcdn.com/assets/2497/domestic_violence2.pdf (last visited Oct. 3, 2019). “Victims of intimate partner violence lose a total of 8,000,000 million days of paid work each year. . . . [In addition, i]ntimate partner violence is estimated to cost the US economy between \$5.8 billion and \$12.6 billion annually, up to 0.125% of the national gross domestic product.” *Id.*

Refusing to adopt the proposed Rule when the evidentiary system has adopted analogous rules in other contexts, such as with expert testimony,⁴⁵⁶ would confirm that this is a matter of gender oppression. The only reason that could explain the adoption of a rule in one context and not the other is the difference in whom is being protected. This discrepancy reveals the gender biases that pervade the legal system. Adopting this proposal would demonstrate a recognition that there is a need for reform in this area of our evidentiary law, just as the creation of *Daubert* hearings served to prove that there was a need for reform in the context of expert testimony.

On the other hand, the proposed Rule does not need to be adopted as a whole. Jurisdictions could adopt versions that are less burdensome. For example, a state could theoretically adopt a version of the proposed Rule that dispenses with the trilateral process. Or a state could adopt a version of the Rule that holds the preliminary admissibility hearing outside the presence of the jury but that does not require a separate judge to preside over the hearing. Another alternative could be to use the proposed Rule's standard for specific acts for untruthfulness of the victim but to forego the preliminary hearing. A fourth option could be to use the most stringent standard in the proposed Rule when assessing all forms of character for untruthfulness evidence, regardless of level of reliability.

However, as it stands today, the pervasiveness of the gender biases is so widespread⁴⁵⁷ that some level of precautions or safeguards is needed. Perhaps, as time passes, the biases in adjudicating these types of cases would naturally subside and the proposed safeguards would no longer be needed. In that case, the cost of implementing the Rule would be high initially but it could be reduced significantly as time passes and the biases fade. The Rule should achieve this in two ways. First, the proposed Rule itself serves as an educational tool to inform society of the existence of the biases discussed. Second, the safeguards put in place by the Rule should hopefully serve as a deterrent to defendants that would otherwise try to impeach victims with evidence that would not meet the established minimum

⁴⁵⁶ See, e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592–94 (1993) (establishing a procedure for determining whether an expert is qualified under FRE 702 to protect parties from the admission of expert testimony based on shoddy science).

⁴⁵⁷ See *supra* Part II.

standards of the Rule. As the application of the Rule becomes settled law, parties would likely start to understand when they can use specific acts of untruthfulness to impeach and when they cannot. This would lead to a decrease in costs of implementing the Rule over time and ultimately increase the efficiency of the judicial system.

Another way to reduce the monetary and procedural burdens of the Rule would be to have trained judges preside over the preliminary admissibility hearings for a regular, set period of time. Optimizing the processes of the Rule, as well as developing and improving them could be a way to reduce the overall costs of the Rule. Because the proposed Rule is so adaptable, the argument that such a Rule merely imposes burdens on the system is just another excuse to continue ignoring a problem that needs urgent attention.

D. *No Gender Specific Rule*

Detractors might also argue that the proposed Rule should not be drafted in gender-neutral language because the Rule is supposed to deal with a problem that disproportionately affects women.⁴⁵⁸ First, this seems to be a contradiction. Second, there is no reason to believe that the gender-neutral language could benefit men at the expense of women. Such objections overestimate the scope of the proposed Rule.

The Equal Protection Clause requires that the Rule be drafted in gender neutral terms, unless it is substantially related to a government interest.⁴⁵⁹ Because of the Equal Protection Clause, if the problem of impeachment using evidence of character for untruthfulness is to be addressed, it must be done in gender-neutral terms. That does not necessarily open the door to men to misuse the Rule in their favor. The gender-neutral language of the Rule does not mean that

⁴⁵⁸ See *Number of Rape or Sexual Assault Victims in the United States per Year from 2000 to 2017, by Gender*, *supra* note 2 (showing that women are more likely to be a victim of rape or sexual assault as compared to men).

⁴⁵⁹ See, e.g., *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 475–76 (1981). A law that makes a distinction based on sex will not be upheld as constitutional unless it is shown that the law furthers an important government interest by means that are substantially related to that interest. *See id.* (upholding a gender-based distinction in California statutory rape law that made men criminally liable for intercourse with a woman under eighteen but did not make women liable for intercourse under any circumstance because it helped to further the important state goal of preventing teenage pregnancies).

men could file false accusations to prevent accusations against them or that they could use the Rule to avoid being impeached for their own character for untruthfulness. The Rule, as discussed, does not change any of the protections for defendants or any of the other substantive rules regarding SGBV cases. Thus, there is no need to be preoccupied with the gender-neutral language of the rule.

In terms of the Rule being distorted by its applicability to both male and female victims, that argument ignores that male victims could be subjected to the same biases in the context of SGBV because of the phenomenon of feminization of victims.⁴⁶⁰ Similar to what happens to aggressors that are associated with male characteristics and perceived as more credible,⁴⁶¹ the feminization of victims leads to the association of male victims with the biases and stereotypes typically attributed to women.⁴⁶² A perfect example of this phenomenon is what happened to Nimrod Reitman, when he accused by his former graduate advisor, Professor Avital Ronell, of sexually harassing him.⁴⁶³ Reitman confronted the same types of attacks on his credibility that female victims are usually subjected to in the public forum and during trial.⁴⁶⁴

Consequently, male victims might also need to be protected under Rule 416X because of the feminization of victims that occurs in these types of cases even when the victim is a male.⁴⁶⁵ Thus, the

⁴⁶⁰ See Elizabeth J. Kramer, Note, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293, 308 (1998) (“[T]he feminization of men who have been forced into sexual ‘passivity’ could make male same-sex rape victims the object of prejudice normally reserved in our culture for women.”).

⁴⁶¹ See *supra* Section II.A.1.

⁴⁶² See María Victoria Carrera-Fernández et al., “*Blanditos, débiles y sumisos*”: *La feminización de las víctimas de bullying [Softie, Weak, and Submissive*”: *The Feminization of Bullying Victims*], Extr. (8) REVISTA DE ESTUDIOS E INVESTIGACIÓN EN PSICOLOGÍA Y EDUCACIÓN 40, 43 (2017) (Spain) (discussing the feminization of bullying victims); Kramer, *supra* note 460, at 308 (discussing how male same-sex rape victims are the object of prejudice reserved in our culture for women).

⁴⁶³ Zoe Greenberg, *What Happens to #MeToo When a Feminist is the Accused?*, N.Y. TIMES (Aug. 13, 2018), <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html>.

⁴⁶⁴ See *id.*

⁴⁶⁵ See Kramer, *supra* note 460, at 308.

critique of the gender-neutral language as a distortion or contradiction is not justified.

E. *SGBV Exceptionalism*

Finally, some detractors, based on Professor Erin R. Collins' idea of evidentiary domestic violence exceptionalism,⁴⁶⁶ might argue that this proposed Rule encourages a similar exceptionalism and perpetuates some of the associated harms. Specifically, Collins argues that many jurisdictions have enacted specialized evidence rules (i.e., character evidence exceptions, relaxed forfeiture by wrongdoing rule, and hearsay exceptions) predicated on the front-end prosecutorial differential approach,⁴⁶⁷ which disregards the lack of justifications to extend this exceptionalism to trials. She further illustrates that this evidentiary intervention is premised on a mistaken application of the already shaky battered woman syndrome defense and on the dominance feminism theory, which is not responsive to the particular needs of the parties involved.⁴⁶⁸ This practice compromises the integrity of the criminal justice system and reduces the efficacy of the interventions by inadvertently harming and discrediting the victims who do not support prosecution.⁴⁶⁹

However, the proposed Rule is not built on a shaky defense that is wrongly applied in cases beyond its original scope. Instead, the Rule is influenced by observations and analyses from various scholars as to how society discounts victims. Additionally, even if the analysis departs from the premise that the current rule serves to reinforce the subordination of women, the Rule does not remove choice from state actors.⁴⁷⁰ Rather the Rule directs state choice and tries to educate states as to the biases that have created problems.

Further, the proposed Rule does not perpetuate the harms of exceptionalism. As discussed, the use of character for untruthfulness evidence in and of itself compromises our adjudication system by searching for liars instead of lies.⁴⁷¹ The proposed Rule attempts to

⁴⁶⁶ Collins, *supra* note 260, at 414.

⁴⁶⁷ *Id.* at 412–14.

⁴⁶⁸ *See id.* at 408–10, 414.

⁴⁶⁹ *See id.* at 446–47, 452–55.

⁴⁷⁰ *See id.* at 408–10 (explaining how dominance feminism removes choice from reluctant state actors).

⁴⁷¹ *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 221.

correct this failure in SGBV cases where the negative effects of the current evidentiary rules seem to be most severe.⁴⁷² The proposed Rule is also not intended to be used against victims that do not wish to prosecute the offender. For that reason, the Rule is not intended to be used in cases of hostile witnesses, which is also why the Rule opens up the possibility of a trilateral process. The goal of the Rule is not to ease the prosecution of particular crimes, but rather to correct the imbalance of how we currently discount victims in SGBV cases. Although the natural result of the proposed reform is a better prosecution of the crime, better prosecution is not cause for a relaxation of the rules or special concessions during the trial.

Some might argue evidence of character for untruthfulness should be barred altogether.⁴⁷³ Yet, banning all character evidence does not remove that evidence from coming in through judicial action.⁴⁷⁴ In addition, reliance on this type of evidence is still very prevalent across the country.⁴⁷⁵ Because character evidence does not seem to be going anywhere anytime soon in our current systems, we have to focus instead on removing the credibility biases against SGBV victims.

#WOMENSREALITY: CONCLUSION

The #MeToo movement is accomplishing what sexual harassment law to date has not.

*This mass mobilization against sexual abuse, through an unprecedented wave of speaking out in conventional and social media, is eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims.*⁴⁷⁶

⁴⁷² See *supra* Part III.

⁴⁷³ See, e.g., Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 225.

⁴⁷⁴ See *supra* Section IV.A.3; see also Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1922 (2012) (explaining how courts oftentimes skip threshold inquiries about character evidence, allowing evidence that would otherwise be excluded in).

⁴⁷⁵ See, e.g., Hartley, *supra* note 21, at 540 (stating that common defense tactics include attacking the character of a victim).

⁴⁷⁶ Catharine A. MacKinnon, Opinion, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

As Catharine MacKinnon points out, the #MeToo movement is eroding the “disbelief and trivializing dehumanization” of SGBV victims.⁴⁷⁷ However, as this Article explains, our evidentiary system has systemic barriers that impede that erosion from flowing into our judicial proceedings.

Current evidentiary rules galvanize credibility biases against SGBV victims in trials via the introduction of evidence regarding the victims’ character for untruthfulness.⁴⁷⁸ Attorneys use this evidence, which in most cases is of low probative value,⁴⁷⁹ to discount SGBV victims. Even in jurisdictions where there are more stringent limitations on the use of character for untruthfulness evidence, courts carve out specific SGBV exceptions to their impeachment rules and allow this evidence to come in and be used to attack victims’ characters.⁴⁸⁰

This defense strategy correlates with the underreporting, under-conviction, and under-favorable adjudication of SGBV cases.⁴⁸¹ Our current rules, that should serve to guarantee the fairness of the judicial proceedings by discouraging the use of reprehensible tactics and protecting witnesses from undue harassment,⁴⁸² have proven to be insufficient to guarantee the redress of SGBV. “If we operate with norms of credibility that do not take into account the influence of background beliefs *and* of prejudice on our credibility judgments, there is a very real risk of committing epistemic injustice.”⁴⁸³ For that reason, this Article proposes amending the current evidentiary rules to prevent attorneys from using credibility biases associated with trustworthiness and plausibility against SGBV victims during trials.

The proposed Rule attempts to implement reform while still respecting the long-standing tradition of impeaching witnesses with evidence of character for untruthfulness. The Rule is drafted so that

⁴⁷⁷ *Id.*

⁴⁷⁸ *See supra* Part II.

⁴⁷⁹ *See* Gold, *supra* note 268, at 774.

⁴⁸⁰ *See, e.g., supra* notes 346–53 and accompanying text.

⁴⁸¹ *See The Criminal Justice System: Statistics, supra* note 8.

⁴⁸² Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 228 (1976).

⁴⁸³ Karen Jones, *The Politics of Credibility*, in *A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 158 (Louise Antony & Charlotte Witt eds., 2002) (emphasis added).

it follows constitutional mandates, avoids over-correction, and promotes judicial efficiency. As a result, the Rule provides for three different balancing tests depending on the type of character for untruthfulness evidence involved. The Rule lists concrete factors to aid the courts in weighing the probative value of the character for untruthfulness evidence against its prejudicial effects in the context of SGBV cases.

For evidence in the form of opinion or reputation by a witness other than the defendant, which is perceived by society to be the most reliable form of character for untruthfulness evidence,⁴⁸⁴ the balance remains the one set in FRE 403 (i.e., that the probative value is substantially outweighed by the prejudicial effects). However, for the less reliable types of evidence (i.e., prior convictions for crimes other than *crimen falsi* and specific acts of non-criminal untruthfulness),⁴⁸⁵ the Rule provides that impeachment with character for untruthfulness evidence would be prohibited if the probative value of the evidence of the victim's untruthful character is closely balanced or outweighed by the unfair prejudice to the victim's testimony, the confusion regarding the issues to be adjudicated, or the possibility of misleading the jury or the judge. Finally, for evidence in the form of prior convictions for *crimen falsi*, prior convictions older than five years, or opinion or reputation supported solely by the defendant, the Rule establishes that the balancing test would be whether the probative value substantially outweighs the prejudicial effects.

Additionally, where the evidence of character for untruthfulness is in the form of specific acts, the Rule requires a preliminary admissibility hearing presided over by a separate judge or magistrate. During that hearing or when the victim testifies at trial, if the interests of the victim are not being adequately represented, the Rule provides for the appointment of an independent counsel for the victim.

With these amendments to the current impeachment rules, attorneys should be prevented from accessing credibility biases during trial and discounting the testimony of witnesses. That, as a result, would ameliorate the revictimization of SGBV victims, foster fairer adjudications, and incentivize victims to come forward. This would slowly start correcting the problems of underreporting, under-conviction, and under-favorable adjudication of SGBV cases.

⁴⁸⁴ See Simon-Kerr, *Credibility by Proxy*, *supra* note 28, at 179–86.

⁴⁸⁵ See Gold, *supra* note 268, at 774.

“[T]he efficacy of the judicial decision-making process rests on the popular belief of judicial fairness.”⁴⁸⁶ Historically, our system has denied that fairness to women, especially when redressing violence targeted towards them.⁴⁸⁷ As Professor Anita Hill has pointed out, the changes our judicial system has experienced in the redressing of SGBV claims have come glacially slow.⁴⁸⁸ The proposal presented in this Article is hopefully one catalyst that would accelerate that glacially slow change.

⁴⁸⁶ Dolan, *supra* note 482, at 228.

⁴⁸⁷ *See supra* Part II.

⁴⁸⁸ *Last Week Tonight with John Oliver*, *supra* note 1.