

## **Victims' Rights Compel Action to Counteract Judges' and Juries' Common Misperceptions About Sexual Assault Victims' Behaviors<sup>1</sup>**

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Sexual violence—which includes rape and other forms of sexual assault<sup>2</sup>—is a “significant social and health problem” in this country.<sup>3</sup> Despite its prevalence, few crimes of sexual violence are reported to law enforcement and even fewer are charged and criminally prosecuted.<sup>4</sup> A significant barrier that victims of sexual violence face in reporting and participating meaningfully in the justice process is the existence of widespread misconceptions—often referred to as “rape myths”—held by the public about victims, perpetrators, and the nature of the crimes.<sup>5</sup> These rape myths—which include misperceptions about who is “rapeable” and how a victim of “real” rape behaves before, during, and after a sexual assault—“inform public perceptions of rape and rape victims[,] including the perceptions of police, prosecutors, judges, jurors, and rape victims.”<sup>6</sup> The pervasiveness of these myths creates a conflict between how many people assume victims “should” behave and the ways in which victims actually behave. This conflict impacts every stage of our justice process, including prosecutors’ determinations of whether and how to present a case; judicial determinations regarding the admissibility of rape-shield evidence, defendants’ release, and restitution; and juries’ assessments of a victim’s credibility and consent.<sup>7</sup> This *Bulletin* identifies many of the most common rape myths, provides evidence to debunk those myths, and explains how victims’ rights compel the submission of explanatory information to educate judges and juries about the reasons victims engage in what might otherwise be perceived as “counterintuitive” behaviors.

### **I. Understanding and Countering Common Myths Regarding Victims' Behaviors**

The prevalence of sexual and domestic violence myths causes the public to search for reasons to doubt, rather than reasons to believe, allegations of a domestic or sexual assault. This doubt often is fueled by a focus on the victim’s behavior both during and after the assault, which laypeople—who generally are inexperienced and uneducated about common victim responses to trauma—may find puzzling. Frequently, the public’s

\* View NCVLI's other legal publications at [https://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/professional\\_resources/ncvli\\_library/](https://law.lclark.edu/centers/national_crime_victim_law_institute/professional_resources/ncvli_library/)

expectations of how a victim ‘should’ behave conflicts with the way victims actually behave.<sup>8</sup>

Consistent with widely held rape myths, members of the public—including judges and juries—typically expect victims of sexual assault to scream or forcefully resist their attackers, to report the assault immediately, and to avoid contact with their attackers after the assault; but many victims’ behaviors do not conform to these assumptions.<sup>9</sup> “When this [perceptual conflict] occurs, the public perceives a victim’s behavior as ‘counterintuitive,’ and, therefore, compelling evidence of her lack of credibility.”<sup>10</sup> Left without the proper context in which to evaluate a victim’s behaviors, the public’s perceptions of

‘[these behaviors] are easily transformed into reasons to doubt the victim’s account of the assault.’ . . . In other words, when societal expectations regarding the attack are not met, the victim’s behavior is often re-examined to fit within another scenario that makes more sense.<sup>11</sup>

To help judges and juries appreciate and understand the variability of victims’ responses to a sexual assault, it is important to educate all system participants that “there is nothing normative about being sexually victimized, [and] there cannot be a ‘normal’ reaction to such a traumatic event.”<sup>12</sup> Judges and juries need to understand that “[v]ictims are caught between societal expectations and personal feelings in an attempt to cope with the experience. Victims

typically try to normalize the situation because it is outside the realm of ‘normal’ understanding.”<sup>13</sup> It is also important to specifically address common survivor behaviors that are likely to be perceived as “counterintuitive” because the behaviors do not conform to the public’s assumptions about how sexual assault victims should behave.

#### A. *Delayed reporting.*

[I]t is important to educate all system participants that “there is nothing normative about being sexually victimized, [and] there cannot be a ‘normal’ reaction to such a traumatic event.”

Many people believe that a “real” victim promptly reports the assault to authorities.<sup>14</sup> This rape myth, known as the “prompt complaint” requirement, has deep historical roots.<sup>15</sup> In reality, “many sexual assault victims never report offences, and . . . many more will delay reporting, often for significant periods.”<sup>16</sup>

Many victims choose to not report or wait some period of time before reporting, for a variety of reasons, including: (1) confusion, guilt, and shock about the assault; (2) not immediately recognizing the assault as rape;<sup>17</sup> (3) fear of retaliation;<sup>18</sup> (4) fear of being disbelieved or blamed;<sup>19</sup> (5) fear of public exposure and loss of privacy;<sup>20</sup> (6) fear of being treated badly by the criminal justice system;<sup>21</sup> (7) denial or suppression;<sup>22</sup> and (8) psychogenic amnesia.<sup>23</sup>

#### B. *Lack of physical resistance.*

Historically, rape law required that victims prove that they had physically resisted their attacker.<sup>24</sup> And even though

the law no longer requires resistance, the public, including jurors, still consider physical resistance and injuries as the hallmarks of ‘real rape.’ This mindset

seriously undermines the judicial process because it is commonplace for rape victims to not offer physical resistance.<sup>25</sup>

Victims may not offer physical resistance for any number of reasons, including that: (1) they experience “tonic immobility[.]” wherein they freeze in response to certain kinds of threats;<sup>26</sup> (2) they experience dissociation, a mental state associated with extreme passivity;<sup>27</sup> (3) they determine not to resist for different reasons, including to avoid additional physical injury or death or to protect someone else;<sup>28</sup> and (4) there is little opportunity to fight as the assault happens quickly and is often perpetrated by someone known to the victim.<sup>29</sup>

### C. *Post-assault contact with the perpetrator.*

Another rape myth is that victims of “real” rape would never initiate or maintain contact with their attacker after the assault. But it is not unusual for victims to initiate or maintain post-assault contact with perpetrators, particularly where the perpetrator was known to the victim before the assault, as a way to take control of and try to understand and normalize what happened to them.<sup>30</sup>

In sum, contrary to some of the most common and pervasive rape myths, many of victims’ most “counterintuitive” behaviors are in fact “consistent with an attempt to deny the rape, maintain a belief in normalcy, and regain control of one’s life.”<sup>31</sup> Educating judges and juries about these common behaviors to prevent them from concluding that a victim is not credible in her accusation of rape simply because she exhibits these behaviors is critical to ensuring

victims’ access to justice.

## II. Victims’ Rights Compel the Introduction of Explanatory Information About Victim Behaviors in Justice Proceedings

Victims have a fundamental right to access justice,<sup>32</sup> which together with their rights to fairness, dignity, and respect,<sup>33</sup> privacy,<sup>34</sup> and protection,<sup>35</sup> compel offering information during the justice process to educate judges and juries about common victim behaviors that they may otherwise perceive to be “counterintuitive.”<sup>36</sup> Judges and juries need an “accurate context in which to evaluate victim behavior so that . . . [they] do not misjudge certain conduct as evidence of a victim’s dishonesty and incredibility.”<sup>37</sup> If judges and jurors form conclusions about victims’ credibility or entitlement to legal protections and rights based on rape myths, these victims are denied fair adjudication of those matters.<sup>38</sup>

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Although introduction of this information is critical during trial, there are a myriad of other procedural moments when introduction of explanatory information may also be necessary. A determination that the introduction of a victim’s sexual history is appropriate—

either through the misapplication of rape shield or through the workings of one of the exceptions to the rule—can directly implicate the victim’s rights, including the rights to privacy and protection.<sup>39</sup> For example, the admission of information regarding the victim’s post-assault contact with the perpetrator can undermine the victim’s privacy and fairness rights. And the misuse of that information by juries and judges can also implicate these same rights.<sup>40</sup>

Providing contextual information about common victim responses to sexual assault might also

be critical at release hearings and restitution hearings. With respect to release hearings,<sup>41</sup> the judge may underestimate the victim's fear of defendant—and the level of threat to the victim if defendant is released—if the judge is made aware that the victim initiated or maintained post-assault contact with the perpetrator, but is not provided additional contextual information to combat the perception that this behavior is “counterintuitive.” With regard to restitution determinations, without a proper understanding of the nature and effects of sexual assault, a judge may fail to include a myriad of appropriate expenses in a victim's restitution award.<sup>42</sup>

Explanatory information may be offered by way of having the victim provide additional information or by the use of expert evidence.<sup>43</sup>

Many courts have sanctioned the use of expert testimony as a permissible way to prevent jurors from misjudging the victim based upon the jurors' misperceptions about sexual assault.<sup>44</sup>

Rape myths fundamentally undermine sexual assault victims' access to justice.

Victims' rights require that victims' behaviors be understood by judges and juries, and that this understanding be based on accurate information about the nature of the crimes and their effects on victims.

Rape myths fundamentally undermine sexual assault victims' access to justice.

reported being raped also reported that an intimate partner had perpetrated the rape. Tara N. Richards & Lauren Restivo, *Sexual Victimization Among Intimates, in Sexual Victimization*, at 69 (Tara N. Richards & Catherine D. Marcum, eds., Sage Publications, Inc. 2015). Although the populations and misperceptions overlap, addressing the misperceptions held about domestic violence victim behaviors is the topic of a separate *Bulletin*, see Nat'l Crime Victim Law Inst., *Victims' Rights Compel Action to Counteract Judges' and Juries' Common Misperceptions About Domestic Violence Victims' Behaviors*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), June 2014. Also, although the focus of this *Bulletin* is the common misperceptions about adult sexual assault victims' behaviors, it bears noting that the at least half of all sexual assault victims are children. See Dean G. Kilpatrick, *Rape and Sexual Assault*, National Violence Against Women Prevention Research Ctr., at 8 (2000), available at <https://www.musc.edu/vawprevention/research/sa.shtml> (describing the National Women's Study and its conclusion that “rape in America is a tragedy of youth,” with 29 percent of all forcible rapes having

occurred when the victim was less than 11-years-old, another 32 percent when the victim was between the ages of 11-17, and slightly more than 22 percent between the ages of 18-24); Lawrence A. Greenfeld, Bureau of Justice Statistics, U.S. Dep't of Justice, *An Analysis of Data on Rape and Sexual Assault: Sex Offenses and Offenders*, at 11 (1997), available at <http://www.bjs.gov/content/pub/pdf/SOO.PDF> (reporting that in 1991 in three states that participated in the National Incident-Based Reporting System, 15 percent of sexual assault and rape victims were less than 12 years old and 29 percent were between the ages of 12 and 17).

For ease of reference, feminine pronouns are used in this *Bulletin* when referring to victims of sexual violence and masculine pronouns are used when referring to perpetrators of violence. This language choice is based upon studies by the U.S. Department of Justice indicating that a large majority of sexual assault victims are female, and a large majority of perpetrators are male. See Jennifer L. Truman, Bureau of Justice Statistics, U.S. Dep't of Justice, *National Crime Victimization Survey: Criminal Victimization Survey, 2010*, at 9 (2011), available at <http://www.bjs.gov/content/pub/pdf/cv10.pdf>; Shannan M. Catalano, Bureau of Justice Statistics, U.S. Dep't of Justice, *National Crime Victimization Survey: Criminal Victimization Survey, 2003*, at 7-9 (2004), available at <http://www.bjs.gov/content/pub/pdf/cv03.pdf>. The language choice should not detract from the understanding that women perpetrate sexual violence and men are victimized by it, and that all victims deserve access to justice and to the services they need.

<sup>1</sup> This *Bulletin* addresses common misperceptions held about adult sexual assault victims' behaviors and offers strategies to educate judges and juries about the behaviors of these victims that are commonly perceived as “counterintuitive.” The public also holds many misperceptions with respect to domestic violence victims' behaviors. Notably, there is overlap between these victim groups. For example, studies measuring the prevalence of sexual violence between intimate partners have suggested that 40 to 50 percent of battered women also experience sexual assault, and that 62 percent of adult women who

<sup>2</sup> Rape is one type of sexual assault. See Nat'l Inst. of Justice, U.S. Dep't of Justice, *Rape and Sexual Violence*, available at <http://www.nij.gov/topics/crime/rape-sexual-violence/Pages/welcome.aspx>. Recognizing that there are jurisdiction-specific differences in legal definitions, for simplicity, the terms "rape" and "sexual assault" are used interchangeably throughout this *Bulletin*.

<sup>3</sup> Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey*, at 1 (Jan. 2006), available at <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf>. See also Rebecca Campbell, et al., *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes: A Multisite Replication Study*, Violence Against Women 1, 2 (explaining that "[s]exual violence is a pervasive social problem: national epidemiological data indicate that 18% to 25% of women are raped or sexually assaulted in their adult lifetimes"); Staff of S. Comm. on the Judiciary, *Violence Against Women: The Increase Of Rape In America 1990*, 102d Cong. 1 (1991) (describing the "rape epidemic" in this country); Diana E. H. Russell & Rebecca M. Bolen, *The Epidemic of Rape and Child Sexual Abuse in the United States* (Sage Publications, Inc. 2000), at 8 (concluding that there is an epidemic of rape and child sexual abuse in this country, defining "epidemic" to mean "widely prevalent"); Nat'l Crime Victim Law Inst., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Testimony*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Sept. 2011, at 1, 8 n.7, available at <https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify> (describing that rape affects hundreds of thousands of victims each year, but explaining that "[t]he statistical data on the number of sexual assault crimes varies depending on the methodology of the study, the way the crimes are defined, the time period studied, and the population studied[,] and citing sources concluding that anywhere from 300,000 to over 800,000 adult women were raped in a given year).

<sup>4</sup> See, e.g., *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases*, Hearing Before the Subcomm. on Crime and Drugs, S. Comm. on the Judiciary, 111th Cong. 27 (2010) (statement of Dean G. Kilpatrick), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64687/pdf/CHRG-111shrg64687.pdf> (observing that "most of the [rape] cases—in fact, over 80 percent of the cases still go unreported"); Tjaden & Thoennes, *supra* note 3, at 33 (finding that "only 19.1 percent of the women and 12.9 percent of the men who were raped since their 18th birthday said their rape was reported to the police"); Patricia L. Fanflick, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, Special Topics Series, Nat'l Dist. Attorneys Ass'n, at 1 (2007) (describing "[r]ape and other forms

of sexual victimization" as "among the most severe and underreported crimes in the United States"); Campbell, *supra* note 3, at 2 (citations omitted) (noting that "[d]espite the alarming prevalence of this crime, most sexual assault victims do not report to law enforcement, and of those incidents that are reported, the vast majority will not be prosecuted").

<sup>5</sup> See Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 Colum. J. Gender & L. 1, 14-15 (2011) (internal quotations omitted) (explaining that "[t]he term rape myth refers not to a single belief but to a related collection of myths that include the belief that a rape victim wanted or deserved to be victimized and the belief that a victim is at fault if she is raped").

<sup>6</sup> Nat'l Crime Victim Law Inst., *Rape Victims' Access to Justice: Understanding and Combatting Pervasive Rape Myths*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Apr. 2014, at 1, available at <https://law.lclark.edu/live/files/16725-ncvliwawrape-victims-access-to> [hereinafter Nat'l Crime Victim Law Inst., *Rape Victims' Access to Justice*].

<sup>7</sup> Although this *Bulletin* focuses on how to counteract judges' and juries' common misperceptions about sexual assault victims' behaviors, those misperceptions are also shared by other justice system participants, including police officers and prosecutors. See Nat'l Crime Victim Law Inst., *Rape Victims' Access to Justice*, *supra* note 6, at 3 (explaining that "if victims choose to report, they may feel blamed or be made to feel somehow responsible for the attack by police or prosecutors who are expecting facts that conform to the 'real rape' paradigm or present a 'perfect' rape victim. Indeed one study found that 87 percent of victims experienced some form of secondary victimization after being interviewed by police."). Because of the critical nature of the gatekeeping role held by police and prosecutors—who, for example, are responsible for making investigatory and charging decisions—it is equally important to work to educate these individuals regarding the nature and impact of rape myths.

<sup>8</sup> Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual Assault and Domestic Violence Prosecutions*, Special Topics Series, Nat'l Dist. Attorneys Ass'n, at 1 (2007), available at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).

<sup>9</sup> This *Bulletin* focuses on rape myths that cause the public to view victims who engage in certain behaviors during and after sexual assaults as having diminished credibility. Although outside the scope of this *Bulletin*, it is important to acknowledge other common rape myths that have deep historical roots and continue to reflect and inform public opinion regarding who is "rapeable" and the contours

of “real rape.” See Nat’l Crime Victim Law Inst., *Rape Victims’ Access to Justice*, *supra* note 6, at 2 (omitting internal citations) (explaining that “[d]espite the passage of rape reforms, evidence reveals that public perception about who is ‘rapeable’ has remained relatively static, with concepts of victim-blaming remaining in the forefront of the public’s (and, by extension, law enforcement’s, prospective jurors’, judges’, and even victims’) minds . . . [and] although there is no longer an explicit chastity requirement, the victim’s reputation and sexual history, particularly with the defendant, continues to be viewed as evidence that the victim is more blameworthy or less likely to have been raped. Similarly, other factors that are perceived as correlating to a victim’s sexuality, such as the victim’s use of alcohol and the victim’s dress, are seen as external indicators that the victim ‘wanted’ or ‘asked for’ the sexual contact, and therefore is not credible in her assertion of rape.”); *Rape in America: A Report to the Nation*, National Victim Center, Crime Victims Research and Treatment Ctr., at 4 (1992) [hereinafter *Rape in America*], available at <http://www.victimsofcrime.org/docs/Reports%20and%20Studies/rape-in-america.pdf?sfvrsn=0> (concluding from the findings of two nationwide studies that the vast majority of rapes are perpetrated by someone known to the victim).

<sup>10</sup> Long, *supra* note 8, at 1.

<sup>11</sup> Fanflick, *supra* note 4, at 9 (quoting Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, The Voice (The Nat’l Center for the Prosecution of Violence Against Women, Am. Prosecutors Research Inst.), 2006, available at [http://www.ndaa.org/pdf/the\\_voice\\_vol\\_1\\_no\\_4\\_2006.pdf](http://www.ndaa.org/pdf/the_voice_vol_1_no_4_2006.pdf)).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Victims “engage in ‘fairly extensive coping efforts in managing the assault[,]’” and these coping efforts are influenced by factors such as “life experiences, developmental level, spiritual beliefs, social support systems, content and intensity of the event and genetic disposition[.]” *Id.* at 7.

<sup>14</sup> See Nat’l Crime Victim Law Inst., *Rape Victims’ Access to Justice*, *supra* note 6, at 2.

<sup>15</sup> See *id.*

<sup>16</sup> Louise Ellison & Vanessa E. Munro, *Reaction to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility*, 49 *Brit. J. of Criminology* 202, 203 (2009). See also Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 *St. John’s L. Rev.* 979, 1013 (1993)

(emphasis in original) (observing that “data from numerous sources demonstrate that *rape is rarely reported to anyone, and women who do report the crime often wait days, weeks, months, or even years before confiding in a family member, a friend or a rape crisis counselor, much less going to the police*”).

<sup>17</sup> See Dean G. Kilpatrick, et al., Nat’l Crime Victims Research and Treatment Center, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, at 47-48 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>; Schafran, *supra* note 16, at 1014 (reporting that many victims “did not realize that forced sex is rape even when the victim knows the rapist or when the forced acts are other than penile-vaginal penetration”). A rape victim’s inability or unwillingness to recognize the assault as a rape—despite the fact that it fits the legal requirements of rape—may be a coping mechanism that helps the victim perceive the event as a less significant stressor. Fanflick, *supra* note 4, at 12 (describing the results of studies that revealed that a majority of “unacknowledged rape victims”—defined as women who experienced sexual assault that would legally qualify as rape but who do not conceptualize themselves as rape victims—were acquainted with and had previous sexual contact with the assailant).

<sup>18</sup> See Kilpatrick, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, *supra* note 17, at 47-48; Schafran, *supra* note 16, at 1015.

<sup>19</sup> See Schafran, *supra* note 16, at 1015 (citing the *Rape in America* study for the statistic that “69% of rape victims were somewhat or extremely concerned about people thinking that the rape was their fault or that they were responsible”). See also Rebecca Campbell et al., *An Ecological Model of the Impact of Sexual Assault on Women’s Mental Health*, 10 *Trauma, Violence, & Abuse* 225, 226 (2009) (internal citation omitted) (explaining that “[s]exual assault does not occur in social and cultural isolation: we live in a rapeprone culture that propagates messages that victims are to blame for the assault, that they caused it and indeed deserve it. Victims are faced with negotiating postassault help seeking and ultimately, their pathway to recovery, within multiple hostile environments. If survivors turn to their family and friends for social support, how will they react, as they too have been inundated with these cultural messages? If victims turn to formal systems, such as the legal, medical, and mental health systems, they may face disbelief, blame, and refusals of help instead of assistance.”).

<sup>20</sup> See Brett Jarad Berlin, Comment, *Revealing the Constitutional Infirmities of the “Crime Victims Protection Act,” Florida’s New Privacy Statute for Sexual Assault Victims*, 23 *Fla. St. U. L. Rev.* 513, 520 (1995) (explaining that “studies indicate that rape victims allege they would

be far more willing and likely to come forward, report the crime, and assist the authorities as necessary, if statutorily enforced anonymity were available or dependable”); Schafran, *supra* note 16, at 1015 (citing the *Rape in America* study for the statistics that “71% of victims were somewhat or extremely concerned about their family’s knowing that they had been sexually assaulted; 68% were worried about people outside their families knowing; and 50% were worried about their names being made public by the news media”); Kilpatrick, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, *supra* note 17, at 47-48 (describing that “50% or more [of victims] endorsed responses related to not wanting family or others to know about the rape”).

<sup>21</sup> See Kilpatrick, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, *supra* note 17, at 47 (describing that “a third or more of participants . . . indicated that the main reason they did not report the incident was because they did not know how to report or because they feared they would be treated badly by police, lawyers, or other parts of the criminal justice system”); Schafran, *supra* note 16, at 1016 (explaining that “[a] significant percentage of victims fear that if they report the rape they will be humiliated and blamed by everyone in the criminal justice system from the police to the jurors”).

<sup>22</sup> See Schafran, *supra* note 16, at 1017 (explaining that “denial of all or part of the assault or that it was a rape is an extremely common response” and that “[t]he phenomenon of ‘denial’ makes some victims deny at first that they knew the rapist and later acknowledge that they did”).

<sup>23</sup> See *id.* (explaining that “[s]ome victims completely block any memory of the assault from their minds and do not report until the memory returns because they did not ‘know’ that anything happened to them. Other victims may lose partial memory”). See also David Lisak, *The Neurobiology of Trauma*, at 3 (unpublished article, 2002), available at <http://id3464.securedata.net/nowldef/html/njep/dvd/pdf/neurobiology.pdf> (explaining that the “characteristics of traumatic memory are not the consequence of conscious choice or resistance. Rather, they are the consequence of the radically altered neurochemical environment in which the memories were encoded.”).

<sup>24</sup> Nat’l Crime Victim Law Inst., *Rape Victims’ Access to Justice*, *supra* note 6, at 1-2, and n.11 (quoting Anne M. Coughlin, *Sex and Guilt*, 84 V. La. L. Rev. 1, 14 (1998)) (internal quotations omitted) (“Up until the latter part of this century, courts in all jurisdictions held that intercourse was nonconsensual where there was evidence that the woman physically resisted the man’s sexual proposals. In its most rigorous form, this definition of ‘nonconsensual’ required proof that the woman had offered her ‘utmost’ or ‘earnest’ physical resistance to her attacker.”).

<sup>25</sup> Nat’l Judicial Educ. Program, Legal Momentum, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case*, at 7 (2010), available at [http://victimsofcrime.org/docs/nat-conf-2013/judges-tell-8-15-12\\_handout.pdf?sfvrsn=2](http://victimsofcrime.org/docs/nat-conf-2013/judges-tell-8-15-12_handout.pdf?sfvrsn=2).

<sup>26</sup> Research demonstrates “that some women respond to [a sexual assault] by exhibiting a physiological response characterized by involuntary immobility or freezing[.]” which “is loosely characterized by the feeling of being paralyzed or ‘frozen’ during the attack, accompanied by an inability to physically resist or call for help”; this response has been analogized to “what is known as tonic immobility[.] . . . a temporary catatonic-like state, marked by the presence of profound and reversible motor inhibition, suppressed vocal behavior, Parkinsonian-like tremors in the extremities, attenuated responsiveness to stimulation, periods of eye closure, changes in respiration, heart rate and body temperature, muscle hypertonicity (muscle spasms), mydriasis (pupil dilation) and waxy flexibility[.]” Tiffany Fuse et al., *Factor Structure of the Tonic Immobility Scale in Female Sexual Assault Survivors: An Exploratory and Confirmatory Factor Analysis*, 21 J. of Anxiety Disorders 265, 266-67 (2007) (internal citations omitted). Tonic immobility is generally understood as “an innate and evolutionarily adaptive component of an organism’s defensive reaction, or ‘fight or flight’ response.” *Id.* at 267. See also Kathryn L. Humphreys, et al., *Tonic Immobility in Childhood Sexual Abuse Survivors and Its Relationship to Posttraumatic Stress Symptomatology*, 25 J. of Interpersonal Violence 358, 358 (explaining that “[p]ast research has shown that 37% to 52% of sexual assault survivors report experiencing a set of peritraumatic responses, which include gross motor inhibition, analgesia, and fixed or unfocused staring. This response set closely resembles a set of unconditioned responses, collectively known as Tonic Immobility.”); Brian P. Marx et al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors*, 15 Clinical Psychol.: Sci. and Prac. 74, 78 (2008) (noting that 37 percent of rape survivors reported some paralysis during the sexual assault); Grace Galliano et al., *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates*, 8 J. of Interpersonal Violence 107, 108, 111 (1993) (emphasis in original) (describing tonic immobility as an “unlearned state of profound motor inhibition typically elicited by a high fear situation that involves threat and/or restraint” and reporting that “a substantial percentage of [the study] sample (37 per cent) clearly reported the experience of being immobile or paralysed during the assault”); Schafran, *supra* note 16, at 990 (explaining that some victims do not resist “because they are literally frozen with fright”); Nat’l Judicial Educ. Program, *Judges Tell*, *supra* note 25, at 7.

<sup>27</sup> See Schafran, *supra* note 16, at 990 (explaining that for

some victims of rape, “the psychic stress is so extreme that they disassociate during the rape, saying later that they felt it was a terrible dream, or that it was if the attack were happening to their body and they were watching it from the outside”).

<sup>28</sup> See *id.* at 990-91 (explaining that the “lingering demand for evidence of physical resistance reflects a lack of awareness of how rape usually happens and of the dangerousness of resistance. . . . Even when no force is used beyond the intimidation factor of a man’s greater size and/or strength, women experience great fear and indeed often fear for their lives[,]” and reporting that the *Rape in America* study found that “almost half (49%) of the victims reported fearing death or serious physical injury during the attack, although few sustained actual physical injuries”).

<sup>29</sup> See *id.* at 991. See also *Rape in America*, *supra* note 9, at 4 (describing the results of two studies demonstrating that the vast majority of rapes are perpetrated by someone known to the victim, including a husband or ex-husband, a father or step-father, a boyfriend or ex-boyfriend, or other relatives or non-relatives, such as friends and neighbors); Kilpatrick, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, *supra* note 17, at 30-31 (describing findings of studies on rape, including that the majority of forcible, as well as drug-facilitated and incapacitated rapes, were perpetrated by people known to the victims).

<sup>30</sup> See Nat’l Judicial Educ. Program, *Judges Tell*, *supra* note 25, at 8; Fanflick, *supra* note 4, at 13 (describing research concluding “that a majority of rape victims maintained a relationship with their attacker and some continued to have sex with the perpetrator after the event”). In fact, at least one study has shown that “a large percentage of unacknowledged rape victims continued to have sex with the perpetrator, which supports the notion that not defining the sexual assault as a rape may lead to future victimization.” Fanflick, *supra* note 4, at 13.

<sup>31</sup> Schafran, *supra* note 16, at 1017.

<sup>32</sup> Courts recognize the fundamental nature of the right of all people to access the courts. See, e.g., *Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) (“Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment.”); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right). See also Nat’l Crime Victim Law Inst., *Rape Victims’ Access to Justice*, *supra* note 6, at 3 (internal citation omitted) (“‘Access to justice’ is about each individual’s access to courts, as well as the availability of remedies for violations of rights. Studies have revealed that rape myths impact reporting, documenting that

survivors are less likely to report a rape if it does not meet characteristics of the ‘real rape’ paradigm, such as the use of a weapon, victim injury, and lack of prior relationship. This, in part, may be due to the survivors’ views about whether what happened to them was ‘real rape’ and their fear that police will not perceive the assault as a rape. Their fear may be founded, as research reveals that police officers are generally less likely to recommend charging rapists when the factual scenario deviates from that of the ‘real rape’ paradigm. Additionally, prosecutors are less likely to prosecute when victims do not meet the standard of the ‘ideal’ victim. When survivors choose not to report and when system actors are unwilling to pursue charges because of the impact of rape myths, victims’ ability to access available legal protections is diminished.”).

<sup>33</sup> The right to fairness, dignity, and respect includes the right to have one’s rights considered within the criminal justice system. Some combination of these broad rights is found in many jurisdictions nationwide. See, e.g., 18 U.S.C. § 3771(a)(8) (stating that crime victims have the “right to be treated with fairness and with respect for the victim’s dignity and privacy”); Ariz. Const. art. 2, § 2.1(A)(1) (treated with fairness, respect, and dignity); Cal. Penal Code § 679 (treated with dignity, respect, courtesy, and sensitivity); Colo. Rev. Stat. § 24-4.1-302.5(1)(a) (treated with fairness, respect, and dignity); Conn. Const. art. 1, § 8(b)(1) (treated with fairness and respect); Haw. Rev. Stat. § 801D-1 (treated with dignity, respect, courtesy, and sensitivity); Idaho Const. art. 1, § 22(1) (treated with fairness, respect, and dignity); Ill. Const. art. 1, § 8.1(a)(1) (treated with fairness and respect for victim’s dignity); Ind. Const. art. 1, § 13(b) (treated with fairness, dignity, and respect); Kan. Stat. Ann. § 74-7333(a)(1) (treated with courtesy, compassion, and respect for victim’s dignity); La. Const. art. I, § 25 (treated with fairness, dignity, and respect); Md. Const. Decl. of Rights art. 47(a) (treated with dignity, respect, and sensitivity); Mich. Const. art. I, § 24(1) (treated with fairness and respect for victim’s dignity); Miss. Const. art. 3, § 26A (treated with fairness, dignity, and respect); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(a) (treated with fairness and respect for victim’s dignity); N.J. Const. art. I, § 22 (treated with fairness, compassion, and respect); N.M. Const. art. II, § 24(A)(1) (treated with fairness and respect for victim’s dignity); Ohio Const. art. I, § 10a (accorded fairness, dignity, and respect); Okla. Const. art. II, § 34 (treated with fairness, respect, and dignity); Or. Const. art. I, § 42(1) (accorded due dignity and respect); Pa. Const. Stat. § 11.102(1) (treated with dignity, respect, courtesy, and sensitivity); R.I. Const. art. 1, § 23 (treated with dignity, respect, and sensitivity); S.C. Const. art. I, § 24(A)(1) (treated with fairness, respect, and dignity); Tenn. Code Ann. § 40-38-102(a)(1) (treated with dignity and compassion); Utah Const. art. I, § 28(1)(a) (treated with fairness, respect, and dignity); Vt. Stat. Ann. tit. 13, § 5303(a) (treated with dignity and respect); Va. Const. art. I, § 8-A (accorded fairness, dignity, and

respect); Wash. Const. art. 2, § 35 (accorded due dignity and respect); Wis. Const. art. I, § 9m (treated with fairness and dignity).

<sup>34</sup> See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (recognizing that “a right of personal privacy . . . does exist under the Constitution”); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (noting cases finding protected privacy interests include an “individual interest in avoiding disclosure of personal matters”); 18 U.S.C. § 3771(a)(8) (“A crime victim has . . . [t]he right to be treated with fairness and with respect for the victim’s dignity and privacy.”). Many state constitutions also guarantee the right to privacy. See Nat’l Crime Victim Law Inst., *Protecting Victims’ Privacy Rights: The Use of Pseudonyms in Civil Law Suits*, NCVLI Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), July 2011, at 2 n.10, available at <https://law.lclark.edu/live/files/11778-protecting-victims-privacy-rights-the-use-of> (listing 22 state constitutional provisions).

<sup>35</sup> See, e.g., 18 U.S.C. § 3771(a)(1) (providing crime victims with “[t]he right to be reasonably protected from the accused”); Alaska Const. art. 2, § 24; Conn. Const. art. 1, § 8(b)(3); Ill. Const. art. 1, § 8.1(a)(7); Mich. Const. art. I, § 24(1); Mo. Const. art. I, § 32(1)(6); N.M. Const. art. II, § 24(A)(3); Ohio Const. art. I, § 10a; S.C. Const. art. I, § 24(a)(6); Wis. Const. art. I, § 9m. Several other states provide victims with constitutional and statutory rights to be free from intimidation, harassment, or abuse. See, e.g., Ariz. Const. art. 2, § 2.1(A)(1); Okla. Const. art. II, § 34; Tenn. Const. art. I, § 35(2).

<sup>36</sup> Importantly, submission of such information is only aligned with victims’ rights when it is supported by the victim. Submission of this explanatory information contrary to the victim’s desires runs counter to the fundamental purpose of victims’ rights—i.e., victim agency. The importance of victim agency is rooted in the inherently out-of-control nature of a crime; when a person becomes a “victim,” he or she often feels robbed of control. See, e.g., Alan N. Young, *The Role of the Victim in the Criminal Process: A Literature Review—1989 to 1999*, at 11, Ottawa, Canada: Dep’t of Justice, Research and Statistics Div., available at [http://www.justice.gc.ca/eng/pi/rs/reprap/2000/rr00\\_vic20/rr00\\_vic20.pdf](http://www.justice.gc.ca/eng/pi/rs/reprap/2000/rr00_vic20/rr00_vic20.pdf); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 17 (1987) (explaining why giving victims input into the criminal justice system proceedings and providing them with information about the justice process helps to increase victims’ perceptions of control, decrease their feelings of helplessness, and reduce psychological distress). One key way in which victims may gain a sense of autonomy is through the choice of participation in the criminal justice process. See,

e.g., Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. of Traumatic Stress 159, 162-63 (2003) (discussing research that shows that victims’ “overall satisfaction with the criminal justice system was directly related to their sense of inclusion and empowerment” and victims who were given a chance to participate in the criminal justice process “appeared to have better mental health outcomes”); Pamela Tontodonato & Edna Erez, *Crime, Punishment, and Victim Distress*, 3 Int’l R. of Victimology 33, 36 (1994) (observing that research indicates that “[v]ictim participation in the criminal justice process reduces feelings of alienation developed when victims believe that they have neither control over, nor ‘standing’ in, the process”); see also Dean G. Kilpatrick et al., *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, U.S. Dep’t. of Justice, Nat’l Inst. of Justice Res. in Brief (1998), available at <https://www.ncjrs.gov/pdffiles/173839.pdf> (finding that victims in states with strong victims’ rights protections were more satisfied with the criminal justice system than those in states with weaker victims’ rights protections).

<sup>37</sup> Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual Assault and Domestic Violence Prosecutions*, *supra* note 8, at 9.

<sup>38</sup> A number of courts have held or recognized that a defendant’s fair trial rights include the right to have the jury “fairly evaluate the evidence.” *Fryer v. State*, 693 So. 2d 1046, 1048 (Fla. Dist. Ct. App. 1997); see also *United States v. Van Hise*, No. S4 12 Cr. 847(PGG), 2013 WL 6877319, at \*13 (S.D.N.Y. Dec. 31, 2013) (internal quotations and citation omitted) (holding that “[s]ubstantial prejudice may be found where evidence admissible against jointly-tried co-defendants in some way affected the jury’s ability fairly and rationally to evaluate the evidence of . . . guilt”); *Lavin v. State*, 754 So.2d 784 (Fla. Dist. Ct. App. 2000) (holding that the prosecutor’s reference to the State Attorney’s Manual, which instructs all prosecutors to make sure that the innocent are not charged was obviously an expression of personal belief in defendant’s guilt that “compromised the jury’s ability to fairly evaluate the evidence and, in turn, [defendant]’s right to a fair trial”).

<sup>39</sup> See Nat’l Crime Victim Law Inst., *Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, NCVLI Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Sept. 2010, at 1, available at <https://law.lclark.edu/live/files/11816-excluding-evidence-of-specific-sexual-acts-between> (describing that, in addition to rape shield laws, “there may also be federal or state victims’ rights laws that favor excluding the evidence. For instance, under the federal Crime Victims’ Rights Act, victims have the right to be treated with fairness, and with respect for their dignity and privacy. Many states have constitutional or statutory protections extending the same rights to victims.”).

<sup>40</sup> See Shen, *supra* note 5, at 25 (explaining that “[r]ape myths have real-world consequences for the administration of the justice system. A study that followed up on actual jurors found that juror evaluations were significantly influenced by the [common] patterns of blame attribution . . . . Subsequent research with mock jurors has confirmed the widespread presence of rape myths in juror decisionmaking.”).

<sup>41</sup> See Greenfeld, *supra* note 1, at 13 (describing data showing that in studied cases about 3 percent of all defendants charged with rape were not eligible for release, 48 percent were eligible for release and were in fact released pending disposition of the case, and the rest of the defendants had bail set but were unable to post sufficient collateral to secure release).

<sup>42</sup> See Nat’l Crime Victim Law Inst., *Ensuring Full Restitution for Crime Victims: Polyvictims as a Case Study in Overcoming Causation Challenges*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), July 2013, at 2, available at <https://law.lclark.edu/live/files/15101-ensuring-full-restitution-for-crime-victims> (citations omitted) (describing that a number of federal statutes and “[e]very state provide[] for restitution to victims of crime[,]” and that “full restitution is the appropriate outcome as it is consistent with the aims of restitution”); Nat’l Crime Victim Law Inst., *Future Expenses: A Necessary Component of Restitution*, NCVLI Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), May 2014, at 1, available at <https://law.lclark.edu/live/files/17049-future-expenses--a-necessary-component-of> (emphasis in original) (explaining that examples of “[f]uture losses that should be factored into a restitution award include . . . losses to future income, and future medical and counseling costs[,]” and that “[o]rdering restitution for such future expenses not only helps restore the victim but helps to ensure that defendants ‘confront concretely, and take responsibility for, the entire harm resulting from their acts’”).

<sup>43</sup> See Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual Assault and Domestic Violence Prosecutions*, *supra* note 8, at 33 (explaining that, from a prosecutor’s perspective, “[t]he decision to introduce expert testimony should be based on more than just the law of a particular jurisdiction. . . . First, prosecutors should decide whether expert testimony is the most effective method of explaining a victim’s behavior in a particular case. In some cases, the victim will be able to best articulate the reasons for her behavior. One example might be a case where a victim did not flee from a sexual or physical assault out of fear. The victim’s testimony itself may provide a common-sense explanation that is far more compelling than abstract expert testimony.”).

<sup>44</sup> As one court has explained in the context of evidence regarding the significance of whether a sexual assault victim has made a “prompt complaint”:

expert testimony assists the jury . . . because it is helpful to the jury in determining what effect should be given to the victim’s delay in reporting the crime. The lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims. For many years, the law has assumed that a prompt report of a sexual assault renders it more likely that the crime was committed. Likewise, the failure to make a prompt report in certain cases is admissible as evidence that a sexual assault did not occur. Expert testimony that challenges or explains these assumptions is valuable information which the jury should hear and consider in its search for the truth.

*People v. Hampton*, 746 P.2d 947, 952 (Colo. 1987), abrogated on other grounds by *People v. Shreck*, 22 P.3d 68, 82 (Colo. 2001). See also *State v. Obeta*, 796 N.W.2d 282, 292-93 (Minn. 2011) (observing that a “majority of state appellate courts that have considered this issue have allowed some form of expert-opinion evidence that describes typical counterintuitive behaviors exhibited by adult victims of sexual assault” and concluding that “the mental and physical reactions of an adult sexual-assault victim may lie outside the common understanding of an average juror. In a case such as this one, where consent is disputed, expert testimony on the typicality of delayed reporting, lack of physical injuries, and submissive behavior by rape victims may be helpful to the jury because it could assist the jury in evaluating evidence in the case that is relevant to the issue of consent.”); *People v. Taylor*, 552 N.E.2d 131, 136 (N.Y. 1990) (holding that expert testimony was admissible to explain why the victim may have been initially unwilling to report that defendant had been the man who attacked her and why she had appeared calm after the attack, as “rape is a crime that is permeated by misconceptions” and “cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970’s, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror.”); *State v. Ciskie*, 751 P.2d 1165, 1171 (Wash. 1988) (holding that the trial court did not abuse its discretion in admitting the expert’s

testimony, as it was helpful to the jury in a case in which defendant, who was charged with raping his girlfriend four times over a period of approximately nine months, argued that the victim's behaviors in never reporting the rapes immediately after they occurred, in remaining in a relationship with defendant, and in failing to complain earlier to a doctor or to the police were inconsistent with the behavior of a rape victim, and finding that the expert's testimony helped to explain why victims often stay in abusive relationships, do not immediately report the rapes, and maintain contact with the perpetrator after the assaults); *but see Commonwealth v. Balodis*, 747 A.2d 341, 345 (Pa. 2000) (excluding expert testimony on the typicality of delayed reporting because "expert testimony as to the veracity of a particular class of people, of which the victim is a member, is inadmissible").

Because jurisdictions vary with respect to the legal tests applied in evaluating the admissibility of expert evidence in this context, it is important for practitioners to consult the particular tests employed in their jurisdictions. For more information, see Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual Assault and Domestic Violence Prosecutions*, *supra* note 8, at 19-40.

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