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Rape Trauma, the State, and the Art of Tracey Emin

Yxta Maya Murray*

Prosecutors use rape trauma syndrome evidence at rape trials to explain victims’ “counterintuitive” behaviors and demeanors, such as their late reporting, rape denials, returns to the scenes of their attacks, and lack of emotional affect. Courts and experts, in instructions and testimony, usually describe victim reticence as a product of shame or trauma. But feminist critics of Rape Trauma Syndrome evidence posit that the syndrome is based on incomplete evidence because most rapes are unreported. Furthermore, they object to its condescending, sexist, and colonial construction of rape victims and their emotions.

In this Essay, I respond to feminist critics by studying the work of Tracey Emin. Emin is an English-Turkish artist who suffered an unreported rape at the age of thirteen and who has been commenting on that rape through her art ever since. Expanding and innovating upon the work of law and humanities scholars, I apply the insights found in art—or, what I describe as artifacts, with a deliberate play on words—to rape law. Through my study of her art, I show how the complexities of Emin’s reactions to rape challenge the simplistic and often confusing stories that prosecutors, experts, and courts tell about victims during trials. Emin’s art demonstrates that she harbors suspicions of the state, a skepticism based in part on her failure to correspond to “real rape” victim stereotypes. Her artistic critique, which includes audacious acts of what I deem worldbuilding and imaginary justice, adds much needed insight into problems of the Rape Trauma Syndrome model. From these insights, I make

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suggestions for rape law reform and adumbrate constitutional challenges to U.S. and English handling of rape cases.

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American and British feminists are torn on how to use expert testimony on Rape Trauma Syndrome (RTS) in criminal and civil trials to support claims of sexual violation. Introduced as a subset of Posttraumatic Stress Disorder in 1974 by researchers Ann W. Burgess and Lynda L. Holmstrom, RTS describes victims’ reactions to their rapes. These responses include everything from expressive grief, terror, and apparent equanimity to silence and denial. In U.S. and English rape trials, RTS evidence may be used by prosecutors to explain some victims’ so-called “counterintuitive” behaviors, meaning a victim’s failure to report her rape, lying to the police about her attack, refusing to name her attacker, exhibiting emotional “flatness,” and returning to the scene.


3. Some jurisdictions, however, forbid using RTS evidence altogether. See, e.g., State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982) (deeming rape trauma syndrome evidence inadmissible, as it invades the province of the jury). See also infra note 50.

4. See, e.g., State v. Kinney, 762 A.2d 833, 840 (Vt. 2000) (“It is not unusual for victims to delay in reporting a rape, especially if the attacker is an acquaintance.”).

5. See, e.g., People v. Whitehead, 142 A.D.2d 745, 746 (N.Y. App. Div. 1988) (finding that the lower court did not abuse its discretion in permitting the expert witness to testify that RTS could cause a victim to deny having been raped).

6. See, e.g., People v. Taylor, 553 N.E.2d 131, 132, 138–39 (1990) (holding that “expert testimony explaining that a rape victim who knows her assailant is more fearful of disclosing his name to the police” was relevant in explaining the complainant’s initial reticence to name her attacker). See also the discussion of Taylor, infra note 63. For other uses, see State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982) (RTS used to disprove consent); People v. Hall, 412 S.E.2d 883, 884, 891 (N.C. 1991) (RTS used as corroborating evidence of rape).
of her assault.\textsuperscript{8} RTS has proven helpful in securing convictions in cases where juries might otherwise have acquitted because they subscribed to rape myths that create the expectation that victims immediately report and always react to their assaults with extreme and obvious grief.\textsuperscript{9} Thus, RTS’s use in rape trials has gained the approval of some feminist scholars and advocates, particularly because it educates juries about the reality of victim reporting and postrape behavior and demeanor.\textsuperscript{10}

However, other feminist critics respond that RTS is an outmoded construct that pathologizes victims, especially through its advocates’ use of the term “syndrome”\textsuperscript{11} and the overzealous portrayal of rape victims as sufferers of “dependence, low self-esteem, learned helplessness, and other personality deficits” by professionals working on woman abuse.\textsuperscript{12} Feminists also object that RTS is a fabrication built on the experience of a small number of privileged women. These scholars note that most rapes are not reported (and thus most victims’ responses do not become available for study),\textsuperscript{13} and

\begin{itemize}
\item \textsuperscript{7} See, e.g., State v. Robinson, 431 N.W.2d 165, 168, 171–72 (Wis. 1988) (finding that the court of appeals did not err where it permitted expert testimony regarding rape victims’ emotional “flat[ness]” to rebut defendant’s suggestion that the victim was, in fact, not raped).
\item \textsuperscript{8} See, e.g., Terrio v. McDonough, 450 N.E.2d 190, 198 (Mass. App. Ct. 1983) (finding no error in admitting expert testimony that “it would ‘not necessarily’ be remarkable for a rape victim to return to the scene with her attacker” because such “specialized knowledge . . . held promises of assisting the jury in understanding the evidence”); see also infra notes 38, 71, 300, and 330.
\item \textsuperscript{9} See infra note 118.
\item \textsuperscript{10} See Kaarin Long et al., A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule Its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases, 31 HAMLINE J. PUB. L. & POL’Y 569, 651 (2010) (“The . . . state court system . . . should . . . permit the juror education about adult victims of sexual violence so that the jury’s verdict is based upon fact, not fiction.”); Aviva Orenstein, No Bad Men! A Feminist Analysis of Character Evidence in Rape Trials, 49 HASTINGS L.J. 663, 705–06 (1998) (arguing that RTS can “educate the fact-finder that there are many different potential reactions to the trauma of rape” and advocating its admission “even where the accused has not questioned the victim’s behavior in order to discredit her”).
\item \textsuperscript{11} See JENNIFER G. LONG, NAT’L DISTRICT ATTY’S ASS’N, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS 24 (2007), available at http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf (advising against using RTS to describe victim behavior because it “risks making jurors believe that the victim suffers from a pathology”). As Susan Stefan has written, “[R]ape trauma syndrome labels women’s rational attempts to . . . adapt to a violent world as symptoms of a disorder from which they should recover.” Susan Stefan, The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling and Law, 88 NW. U. L. REV. 1271, 1274 (1994).
\item \textsuperscript{13} Stefan, supra note 11, at 1334 (“‘Normal’ women . . . don’t report being raped at all.”).
\end{itemize}
complain that researchers of postrape reactions cling to a “Western” norm of trauma. Consequently, we have little information about the real range of postrape reactions.

Some feminist scholars attempt to reform the legal and medical limnings of victim responses by examining victims’ “post-assault disclosure experiences and reactions from friends, family, and service providers.” Others reject a “top-down” construction of trauma and coping, working to reframe the pathological trauma model into one reflecting “survivor-centered” epistemologies and describing victim reactions as acts of strength and resistance.

In this Essay, I offer suggestions that relate to the bulk of these criticisms. With respect to the concern that the wide spectrum of women’s reactions to rape remains undocumented, I propose that we broaden our source material when studying women and rape. I argue that we ought to study art and literature made by women who have been sexually assaulted, as the work made by such survivors delivers new perspectives on victims’ otherwise unpublished responses. My strategy of studying rape trauma through art is an extension of the work performed by law-and-literature and law-and-humanities scholars,

14. Sharon M. Wasco, Conceptualizing the Harm Done by Rape: Applications of Trauma Theory to Experiences of Sexual Assault, 4 Trauma Violence Abuse 309, 310 (2003) (“[W]omen of color or poor women may react to rape and other life events in unique ways; for example gender, class, ethnicity, and previous victimization experiences may influence whether sexual violence . . . shatters survivors’ assumptions of a just world or reinforces other beliefs about the world.”); see also id. at 314 (“[T]he [PTSD] framework might miss aspects of harm . . . among certain cultural groups.”).

15. See, e.g., Wasco, supra note 14, at 314 (“The harm done to minority groups may manifest, or be expressed, in ways that research has not yet captured.”). Other objections to the use of RTS at rape trials are that it shifts emphasis from the perpetrator to the victim, resulting in possible violations of rape shield laws and that defendants use RTS to show that the victim was in fact not raped. Davis, supra note 2, at 1513; see also Nicole Rosenberg Economou, Note, Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim, 42 Hastings L.J. 1143, 1165 (1991) (arguing that the defense should be excluded from using RTS “because it causes prejudice to the victim and can confuse the jury, which already has difficulty understanding a rape victim’s experience”). In this Essay, however, I will be focusing on feminist objections to the use of RTS to explain certain counterintuitive behaviors.

16. See Wasco, supra note 14, at 316 (noting stigma and blaming and doubting responses “may compound the harm of the assault itself”).

17. See Michelle Fine, Disruptive Voices: The Possibilities of Feminist Research 69 (1992) (noting that for some women “[r]esisting social institutions, withholding information, and preserving emotional invulnerability emerge[ ] as . . . strategies for maintaining control”); see also id. at 70 (considering constructions of reactions such as learned helplessness a product of a top-down interpretation of post-rape trauma).

18. See Mary E. Gilfus, The Price of the Ticket: A Survivor-Centered Appraisal of Trauma Theory, 5 Violence Against Women 1239 (1999) (describing survivor-centered epistemology as “oriented toward recognizing strengths as well as injuries,” “culturally inclusive,” “feminist,” and “build[ing] on the wisdom of victimization and survival that is part of women’s lives”).

19. See id. at 1253–55 (describing the implications of survivor-centered epistemology).
who seek to “humanize” law. As I will show, rape survivors’ art enriches the often impoverished and condescending tales of rape reaction told by courts. My “art and law” approach demonstrates the profits that law-and-humanities scholars have noted about this field of interdisciplinary studies. It gives voice and bears witness to the complex reactions that women have in the wake of sexual assault, and provides bountiful, previously unstudied insight that may be used in state reform.

My in-depth study of visual arts in connection with rape law is also, I believe, an innovation within this field. It constitutes an effort to incorporate art’s revelations of women’s buried experience—or, as I conceive of these details, artifacts—into legal understandings. This approach could be used to bring to light in law subterranean truths about abortion, sexual harassment, domestic violence, and other harms experienced by women.

Here, it enriches the jurisprudence on rape, as I will look to the work of English-Turkish multimedia artist Tracey Emin, who survived an unreported rape when she was thirteen, as well as other sexual onslaughts. As I will discuss, Emin’s mother, Pamela Cashin, did not report her rape. This may be because Cashin, an Anglo, was a racial outsider in her community, having had

20. See, e.g., RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION xii (1988) (allowing that the study of literature may “humanize the practice of law and the outlook of judges.”). For reviews of these schools, see IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES (1995); LAW AND THE HUMANITIES: AN INTRODUCTION (Austin Sarat et al. eds., 2009).

21. This method of examining rape reactions furthers my larger scholarly project, which is an extension of the schools of Law and Literature and Law and the Humanities. In a series of articles, I examine how literature and the visual arts may teach the law important lessons about the meanings, uses, and effects of violence, and may offer insights on how to use the law to create a more peaceful society. See Yxta Maya Murray, A Jurisprudence of Nonviolence, 9 CONN. PUB. INT. L.J. 65, 133 (2009) (advocating using storytelling to understand whether state actions are violent); Yxta Maya Murray, The Pedagogy of Violence, 20 S. CAL. INTERDISC. L.J. 537 (2011) (analyzing the fiction of Elfriede Jelinek to comprehend violence, and positing that Jelinek’s observations should influence tort law as it concerns gun manufacturers); Yxta Maya Murray, “You’re Changing the Categories”: Anglo-American Radical Feminism’s Constitutionalism in the Street, 9 HASTINGS RACE & POVERTY L.J. 454 (2012) (examining violent radical feminist protest and its influence on constitutional law); Yxta Maya Murray, Feminist Engagement and the Museum, 1 BRIT. J. AM. LEGAL STUD. 31 (2012) (considering the legal and ethical duties of the Tate Britain to provide images that nourish a peaceful feminist imaginary, in the connection with a 2011 installation of the work of sculptor Cathy Wilkes).

That I am characterizing my work as an innovation, however, should not be taken as a claim for wholesale invention. As noted in footnote 20, my work comes in the standing tradition of examining the schools of Law and Literature and Law and the Humanities. Other works that engage in legal/artistic analysis may be found in Alison Young, “Into the Blue”: The Image Written on Law, 13 YALE J.L. & HUMAN. 305 (2001) (analyzing the painting of Felix Gonzalez-Torres in limning H.I.V. in law and literature); Austin Sarat, Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter, 34 LAW & SOC’Y REV. 3 (2000) (examining the film The Sweet Hereafter to see the way law is mythologized); Kathryn Abrams & Hila Keren, Law in the Cultivation of Hope, 95 CALIF. L. REV. 319 (2007) (using the life of photographer Zana Briski to study “hope” in law). Using the visual arts as a lens for capturing the silenced realities of women, however, appears to be in its infancy as a legal method.
two children out of wedlock to a married Turkish man,22 and because Emin had been molested before.23 Emin’s work confirms that Cashin had good reason not to trust authorities to prosecute her biracial, already “sullied” daughter’s attacker.24 Emin’s response was to document her varied responses to her assaults through a number of different art media for several decades.25

My survey of Emin’s work helps demystify women’s responses to sexual assault and develop new legal responses. Currently, courts and experts describe women’s postrape reactions as “counterintuitive” maladies, evidence of “low self esteem,”26 and, most often, symptoms of “shame” and “guilt” or “fear” consistent with the “syndrome.”27 Emin’s art allows a reinterpretation of women’s postrape behaviors. Rather than signaling any kind of illness, Emin encourages us to fathom refractory victim responses as critiques of the state’s failure to deter and successfully prosecute rape.28

Further, Emin’s discursive judgment of the state encourages constructive legal reforms that remain obscured by the rhetoric of “syndromes” and “shame.” Looking deeper into Emin’s reports, we see that she expresses more than negative critiques of her community’s lethargy and failure to care about violence against women. Emin also does something positive: she carves out a space within which to construct her own trials, indeed, to create her own wholly realized justice systems. I call these artistic acts of worldbuilding. The discovery of Emin’s alternative legal world proves galvanizing for rape jurisprudence. Once we understand how Emin envisions disputes in her art, we can discern a similar pattern of trials in the testimonies and experiences of other “counterintuitively” behaving rape victims. The imaginary justice in which these women engage provides templates with which we might draft new rights and remedies that can repair the consequences of the state’s neglect of sexual assault.

As this RTS study depends on the work of an artist who has lived most of her life in London and Margate, England, I analyze how Emin’s work inspirits both U.S. and English approaches to sex crimes and victim reaction. After setting forth RTS’s use in U.S. and English courts in Part I, I review the feminist assessment of the “syndrome” in Part II. Part III sets forth the record of U.S. and English administrations of rape cases. Here, I review catastrophic

22. See infra text accompanying notes 196–200 (referring to a graph about Cashin that is footnoted with Patrick Elliot and Julian Schnabel’s book).
23. See infra text accompanying notes 201 and 202.
24. See infra text accompanying notes 201–77 (describing the community’s devaluation of Emin via Mad Tracey from Margate and Remembering 1963).
25. See infra Part IV, detailing Emin’s life and art.
26. Stefan, supra note 11, at 1300, 1320.
27. See discussion of Kinney accompanying infra note 62; see also discussion of Taylor, infra text accompanying note 63.
28. See infra Part IV.B.
U.S. and English statistics on “rape attrition,” that is, the well-publicized number of rapes that fail to translate into convictions. I also detail documented police and medical response team misconduct toward rape victims.

I dedicate Part IV to meditations on Emin’s art. I describe how her work, initially striking the observer as a noisy farrago of lamentations, may be interpreted instead as the development of an imaginary justice system that occupies the judicial space the state failed to fill. In this worldbuilding, Emin conducts her trials against her sexual abusers, community, and herself. The critique of the state implicit in these litigations sheds light upon “counterintuitive” postrape reactions. Emin’s work confirms that women have multifaceted responses to rape, which appear like confusing symptoms of a syndrome unless one realizes that women respond not only to their rapists but also to a state that does not adequately address their legal needs, as set forth in Part III.

This review sets the stage for Part V, where I consider the relevance of Emin’s trials and worldbuilding to rape jurisprudence. First, I reread the RTS cases in light of Emin’s revelations, divining sensible motives and rationales for behaviors deemed counterintuitive. I also note that, despite RTS advocates’ efforts to dash rape stereotypes, the skewed representation of victims in the cases inevitably succumbs to that mythology. The victims in the RTS cases prove particularly hesitant to report or otherwise behave “intuitively” where they, like Emin, do not conform to the “real rape victim” fiction.29

I next argue that Emin’s art highlights the creative justice work embedded in other rape victims’ reactions and, as such, offers paths to positive change. Having observed the imaginary justice that Emin creates in her artifacts, I draw parallels between her worldbuilding and that of other rape victims. I argue that the literature available on rape victims confirms that a wide range of other women also conduct internal trials and engage in critical worldbuilding during the periods of reticence that RTS advocates would otherwise describe as shamed stupors. As a majority of rapes go unreported,30 this means that many

29. That is, the woman “who . . . behav[es] cautiously and who stays where she is supposed to be—in a good neighborhood at a reasonable hour.” Aviva Orenstein, Special Issues Raised by Rape Trials, 76 FORDHAM L. REV. 1585, 1587 & n.9 (2007) (citing SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1987)); see also Susan Estrich, Rape, 95 YALE L.J. 1087, 1088 (1986) (“I learned . . . that I had ‘really’ been raped. Unlike, say, the woman who claimed she’d been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who . . . get what they deserve.”). The “real rape victim” stereotype bleeds racism when cut. See Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 599 (1990) (“Even after the Civil War, rape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature.”).

30. Kathleen Daly and Brigitte Bouhours estimate that 15–19 percent of rapes in the United States are reported. See Rape and Attrition, supra note 12, at 572. Britain’s HM Crown Prosecution Service Inspectorate estimates that 75–95 percent of rapes are never reported to the police in England and Wales. See WITHOUT CONSENT, supra note 12, at 8.
women bypass state action in favor of imaginary justice.31 My study of the justice schemes found in Emin’s and these women’s imaginary worlds urges changes to be made in the police, medical responder, prosecutor, public health/law enforcement outreach, and judicial treatment of rape cases. Victims’ worldbuilding also alerts us to a larger schism between women and the state than that revealed in courts’ descriptions of women’s shame. This abyss reveals a constitutional crisis that should raise equal protection concerns in the United States and supports claims under the British Human Rights Act of 1998.

I.

RAPE TRAUMA SYNDROME AND ITS USE IN RAPE TRIALS

A. Rape Trauma Syndrome Research in the United States and England

In 1974, American researchers Ann Burgess and Lynda Holmstrom coined RTS after studying the experiences of rape victims seeking aid at Boston City Hospital.32 They observed rape trauma occurring in two stages, the first being a period of extreme fear followed by a reorganizational interval characterized by more moderate emotional symptoms.33 During the acute stage, victims variably responded with extreme grief, anger, or even languor or lassitude.34 Victims also reported physical symptoms,35 nightmares, sleeplessness, phobias, and general emotional retreat.36 In addition, Burgess and Holmstrom, as well as other experts, observed that hesitation or refusal to press charges,37 lack of emotional affect, and returning to the scene of the crime were not uncommon reactions found among victims.38

31. See infra text accompanying notes 321–28 (examining the widespread practice of imaginary justice recounted by women in blogs and books).
32. Long et al., supra note 10, at 599.
33. Burgess & Holmstrom, supra note 1, at 982.
35. See id. at 911 (citing ANN WOLBERT BURGESS & LYNDALYTLE HOLMSTROM, RAPE: VICTIMS OF CRISIS 38-39 (1975)).
36. Id. at 912–13 (citing BURGESS & HOLMSTROM, supra note 35, at 44-45).
37. See id. at 911 (“‘The victim continually tries to block the thoughts of the assault from her mind’ in an attempt to begin reorganizing her life.”) (citing BURGESS & HOLMSTROM, supra note 35, at 40); see also, e.g., Rivera v. State, 840 P.2d 933, 938 (Wyo. 1992) (“[i]t is not unusual for . . . victims . . . not to report the sexual assaults and [to have] . . . feelings of shame and . . . feelings that the assault may have been caused by some conduct on their part, that is, it may have been their fault.”); id. (finding that the court of appeals did not err where it permitted expert testimony regarding rape victims’ emotional “flatness”).
38. See State v. Roles, 832 P.2d 311, 319 (Idaho Ct. App. 1992) (“Expert testimony to help explain unusual behavior by the victim following such an incident would be helpful to the trier of fact . . . . This testimony was helpful to explain the delay in reporting the incident and the delay in AB’s efforts to flee.”).
The most prominent researcher of RTS in England is Dr. Fiona Mason, a forensic psychiatrist at Saint Andrew’s Hospital Northampton. In Rape and Sexual Assault, an article cowritten with Jan Welch in the British Medical Journal, Mason and Welch describe the impact of rape as “profound,” and note that “[p]sychological reactions vary greatly, but overall people who experience rape are more likely to develop post-traumatic stress disorder than victims of any other crime.” They observe that “[i]n the early weeks after sexual assault most people . . . express a range of post-traumatic symptoms.” Mason and Welch estimate that half of all victims “recover from acute psychological effects” after about twelve weeks, but that symptoms “in many” persist for years. They also estimate that 17 percent of all victims “develop disabling mental health and social problems” such as depression, feelings of shame, and suicidal ideation.

In Rape, Myth and Reality: A Clinician’s Perspective, Mason describes the reasons behind victims’ delayed reporting, one of the most examined features of postrape reaction in rape trauma cases and literature:

It may be hard for a victim to do anything that reminds them of the circumstances of the assault and simple tasks may become impossible. However, some victims may find security in carrying on with daily routines, such as looking after their children or going to work. Some find it too hard to talk about what happened, and thus they may delay reporting the events and not tell anyone, even those who love them.

With respect to victim return, see Stefan, supra note 11, at 1329 (“In fact, there are a number of anecdotal reports of women returning to the scene of a rape as a gesture of defiance and refusal to surrender to fear.”); see also Terrio v. McDonough, 450 N.E.2d 190, 198 (Mass. App. Ct. 1983) (rape victims may return to scene with their attacker or feel safe in his company after the assault). But see Henson v. State, 535 N.E.2d 1189, 1191–93 (Ind. 1989) (returning to scene is inconsistent with RTS; defendant may put such evidence on if prosecution has put on own evidence of RTS).

Concerning the use of RTS in rape trials generally, see Emrich, supra note 34, at 916 (“The admissibility of expert testimony regarding Rape Trauma Syndrome falls into five categories: ‘fact-based testimony about the general behavior of rape victims,’ ‘fact-based testimony about the general diagnostic criteria of RTS,’ ‘testimony about victim’s behavior or symptomatology,’ ‘opinion testimony about the consistency of the victim’s behavior or symptoms with [RTS],’ and ‘opinion testimony that the victim suffers from [RTS].’”)

41. Id. at 1157.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
most. Many women blame themselves, and feel ashamed. Most of us would comfortably talk about being in a car crash, or being mugged, but how many of us would feel comfortable talking about having been raped?48

Overall, the psychological studies demonstrate that women suffer terribly after rape, but as of yet do not give precise descriptions of women’s emotional process beyond offering accounts of their disorganization, impairment, and shame. Though these studies are valuable and groundbreaking, the emphasis on victim derangement will turn out to be a weakness when the theory is used in RTS cases.

B. The Broad Use of RTS in U.S. Courts During Rape Trials

U.S. courts, following the findings of psychological researchers, have recognized RTS as a type of posttraumatic stress syndrome.49 Thus, where permissible,50 prosecutors proffer expert RTS testimony to prove that a rape

48. Id. at 118.
49. See State v. Kinney, 762 A.2d 833, 843 (Vt. 2000) (citing Note, “Lies, Damned Lies, and Statistics”: Psychological Syndrome Evidence in the Courtroom After Daubert, 71 IND. L.J. 753, 760–61 (1996) (“Rape trauma syndrome is professionally recognized as a type of post-traumatic stress disorder.”)); State v. Allewalt, 517 A.2d 741, 748 (Md. 1986) (“RTS is the terminology used by some for a PTSD subset in which the trauma is rape.”). However, rape trauma syndrome is not recognized by the Diagnostic and Statistical Manual of Mental Disorders. See Edgar Garcia-Rill & Erica Beecher-Monas, Gatekeeping Stress: The Science and Admissibility of Post-traumatic Stress Disorder, 24 U. ARK. LITTLE ROCK L. REV. 9, 30 (2001) (“There are so many syndromes out there in litigation land that one commentator calls such testimony the ‘abuse excuse’ and lumps battered woman syndrome, rape trauma syndrome, urban rage, and the battered child syndrome into this category. None of these syndromes are recognized by the DSM-IV.”).
50. Some courts hold that RTS cannot be used to prove that “a crime occurred.” See Long et al., supra note 10, at 636–38 (finding that RTS could be used only as corroboration); id. at 639 (“[T]he evidence cannot be offered to establish whether the victim is telling the truth.”) (citing State v. Alberico and State v. Marquez, 861 P.2d 192, 210 (N.M. 1993)); State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982) (“Rape trauma syndrome [sic] is not the type of scientific test that accurately and reliably determines whether a rape has occurred.”); State v. Taylor, 663 S.W.2d 235, 240 (Mo. 1984) (holding that the expert’s testimony “went too far in expressing his opinion that the victim suffered rape trauma syndrome as a consequence of the incident with the defendant” as it “was not his proper function”); People v. Gallagher, 547 A.2d 355, 358 (Pa. 1988) (finding that RTS was improper evidence to explain victim’s initial inability to identify defendant); People v. Bledsoe, 681 P.2d 291, 301 (Cal. 1984) (“[RTS is] not admissible to prove that the witness was raped.”).


Minnesota, Missouri, and Pennsylvania courts have held that the use of RTS for such purposes invades the province of the jury. See Saldana, 324 N.W.2d at 230 (“To allow such testimony would inevitably lead to a battle of experts that would invade the jury’s province of fact-finding and add confusion rather than clarity.”); Taylor, 663 S.W.2d at 241 (“[T]he prosecuting’s symptoms were consistent with a traumatic experience . . . But it goes beyond [the expert’s] qualifications to say that she was raped by defendant.”); Gallagher, 547 A.2d at 357 (“Determinations of credibility, however, are exclusively the province of the jury. We have consistently rejected expert testimony which encroaches on this vital jury question.”) (citations omitted); Long, supra note 11, at 19 (“[O]nly thirty-one states, the District of Columbia, the military, and federal jurisdictions have published cases
occurred and to explain victims’ “counterintuitive” behaviors, which the defense may use to suggest that the victim was not raped. Prosecutors rely on RTS evidence to explain “counterintuitive” behaviors in order to bolster the victim’s credibility and prove lack of consent. Experts do not testify as to the victim herself, but provide a general sketch of the symptoms of RTS. As noted, one of the classic counterintuitive responses experts have helped explain is late reporting.

A sample of the cases demonstrates that experts and courts often represent counterintuitive late reporting as a product of a victim’s fear or humiliation, an explanation that counteracts jurors’ preconceptions. For example, in State v. Kinney, the Vermont Supreme Court approved the use of expert RTS testimony to explain late reporting on the theory that otherwise the jury might be “at a loss” to understand such behavior. In Kinney, the defendant had abducted the victim from her home after attempting to purchase drugs from another member of the household. The defendant testified that the victim had offered to help him find some drugs to buy, and giggled when he threw her over his shoulder and carried her out of the house to his car. The victim stated that she objected continually to being removed from her home. Both sides agreed that the victim had later that evening taken drugs with the defendant and permitting the prosecution to introduce expert testimony on adult victim behavior. Significantly, Pennsylvania expressly prohibits the use of expert testimony to explain victim behavior. (citations omitted; see also State v. Huey, 699 P.2d 1290, 1294 (Ariz. 1985) (noting that the court “might have some difficulty in upholding the admissibility of rape trauma syndrome to prove the existence of a rape”).

51. See State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982) (approving the use of RTS to prove “that a forcible assault did take place”). Horne, Palmer, and Long are very instructive in the national jurisprudential uses of RTS. See Long et al., supra note 10, at 633–50.

52. See People v. Taylor, 552 N.E.2d 131, 138 (N.Y. 1990) (observing that RTS is relevant to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack); see also State v. Hall, 412 S.E.2d 883, 891 (N.C. 1992) (“[J]urors may not completely understand certain post-assault behavior patterns . . . . [T]estimony on post-traumatic stress syndrome may assist in corroborating the victim’s story, or it may help to explain delays in reporting the crime or to refute the defense of consent.”).

53. See Long, supra note 11, at 18 (“Prosecutors should not . . . seek assistance from an expert who has examined the victim or is currently providing treatment or counseling to the victim.”); Terrio v. McDonough, 450 N.E.2d 190, 198 (Mass. App. Ct. 1983) (“The testimony of Dr. Burgess was cast in tentative generalities, without regard to the incident or persons involved in this case.”).

54. State v. Kinney, 762 A.2d 833, 842 (Vt. 2000) (“We concur with the trial court that expert evidence of rape trauma syndrome and the associated typical behavior of adult rape victims is admissible to assist the jury in evaluating the evidence, and frequently to respond to defense claims that the victim’s behavior after the alleged rape was inconsistent with the claim that the rape occurred. As with child sexual abuse victims, the jury may be at a loss to understand the behavior of a rape victim.”).

55. Id.

56. Id. at 836.

57. Id. at 837.

58. Id.
his friends, though the victim explained that she did so because “she did not want defendant and his friends to think she was scared.” 59 The defendant then took the victim to his parents’ house and raped her in his bed; she fell asleep afterward, asking to be taken home the next morning. 60 The victim delayed in reporting to her boyfriend, and thus, presumably also to the police. 61 Acknowledging the victim’s passivity and failure to report as counterintuitive behaviors, the court admitted the testimony of an expert who asserted:

[V]ictims of rape are more likely to resist their attacker by making verbal protests than by struggling or screaming, and . . . victims are less likely to resist if force is used or threatened. Furthermore, . . . it is not unusual for victims to delay in reporting a rape, especially if the attacker is an acquaintance, and . . . a rape victim may be more likely to report to a friend first, rather than to someone with whom she is having an intimate relationship. This delay in reporting is related to the feelings of guilt and shame experienced due to the trauma of the rape. 62

Courts have also allowed the submission of RTS evidence that characterizes delayed reporting as a symptom of a victim’s terror of her assailant. In People v. Taylor, the New York Court of Appeals permitted RTS evidence, since it educated the jury that the victim’s “fear[]” of the rapist may have deterred her from identifying her assailant, 63 and this reaction may not be within the ordinary understanding of the jury. Specifically, the victim in Taylor had known her rapist “for years” before he raped her and sodomized her at gunpoint, after tricking her into meeting him near a deserted beach. 64 After

59. Id.
60. Id.
61. Id. at 843.
62. Id. at 840. For other incidents of courts and experts describing shame in the context of rape or sexual assault, see also, for example, Rivera v. State, 840 P.2d 933, 938 (Wyo. 1992) (“[I]t is not unusual for . . . victims . . . not to report the sexual assaults and . . . [have] feelings of shame and . . . feelings that the assault may have been caused by some conduct on their part, that is, it may have been their fault.”); State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982) (“Symptoms of rape trauma syndrome include . . . [a] sense of shame.”); Alphonso v. Charity Hosp. of La., 413 So. 2d 982, 986 (La. Ct. App. 1982) (discussing the emotional consequences of posttraumatic stress disorder and rape trauma syndrome); People v. Boyce, 1998 Mich. App. LEXIS 1015, at *8 (Mich. Ct. App. Oct. 6, 1998) (discussing expert testimony that postsexual assault can include feelings of shame); State v. Bunner, 234 Neb. 879, 888 (1990) (citing scholarship on rape trauma syndrome that lists guilt and shame as part of the syndrome); People v. Rodrigues, 2011 Cal. App. Unpub. LEXIS 3729, at *21–22 (Cal. Ct. App. May 18, 2011) (suggesting that women who suffer from rape trauma syndrome do not report their rapes because of their shame).
63. People v. Taylor, 552 N.E.2d 131, 138 (N.Y. 1990) (“[E]xpert testimony explaining that a rape victim who knows her assailant is more fearful of disclosing his name to the police and is in fact less likely to report the rape at all was relevant to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her. Behavior of this type is not within the ordinary understanding of the jury.”).
64. Id. at 282–83.
telling her mother about the attack, her mother called the police, but the victim told them twice that she did not know her attacker.65 Thus, RTS was used to explain her lie, though neither the court nor the expert went into much detail of the grounds for this assessment. Likewise, in Stevenson v. State, a Georgia court of appeal allowed expert testimony on rape reactions related to the victim’s alleged fear of the assailant. The court permitted a rape counselor to give evidence of typical rape victim behavior (though “syndrome” evidence was not permitted) since it showed that victims may delay reporting because they “may be scared or they may be experiencing trauma.”66 The Stevenson court appears to indicate that the victim in that case would have been scared of the defendant, who was her coworker, and with whom she had spent the evening consuming alcohol, marijuana, and cocaine.67

Further, prosecutors have used RTS evidence to explain why victims asked defendants to keep their rapes a secret. For instance, in Lessard v. State the married victim had drunk alcohol with the defendant, played “parlor games” with him, and loaned him money.68 After he told her that “if she ever wanted to hold her infant son again she would do what he wanted,” he forced her to perform fellatio on him and vaginally raped her three times, even though she had just had surgery on her cervix.69 Prosecutors submitted RTS evidence to explain that victims’ rape concealment is “very common [when there is a] threat of death because the person can be identified. The victim can identify the person who has assaulted her and she must protect herself, and in this case, her child and she would say anything, and it’s very, very common.”70

Prosecutors (or plaintiffs’ counsel) have also put on evidence of RTS to explain a victim’s return to the site of the attack. For example, in Terrio v. McDonough, the victim’s counsel used RTS testimony to explain why the victim returned to the scene of her rape to retrieve her belongings.71 In these cases, these behaviors are simply, if conflictingly,72 presented as being part of

65. Id. at 282.
67. Id. at 524.
69. Id. at 229.
70. Id. at 233.
71. Terrio v. McDonough, 450 N.E.2d 190, 198 (Mass. App. Ct. 1983) (using RTS to explain how rape victims may return to the scene with their attacker or feel safe in his company after the assault). It bears noting that Terrio is a civil case, but its use of RTS to explain victim return has been cited in People v. Bledsoe, 681 P.2d 291, 298 (Cal. 1984), McCleery v. City of Bakersfield, 216 Cal. Rptr. 852, 856–59 (Cal. App. 1985), and State v. Kinney, 762 A.2d 833, 842–43 (Vt. 2000).
72. Susan Stefan notes that some advocates of RTS describe rape victims as living in a state of “hypervigilance,” which presumably is contradicted by victim return to what has proven to be a dangerous place. Stefan, supra note 11, at 1304 (“The wariness and fear of women who have been raped is described with words like ‘hypervigilance’ and ‘exaggerated startle response.’”).
RTS symptomology, and not attributed to shame, terror, or any other specific emotional states.

RTS evidence has also been used to explain a victim’s emotional “flatness.” The prosecution used this strategy in State v. Robinson, when a rape victim was “uncommunicative” at a hospital.\(^\text{73}\) A version of it can also be found in Hilburn v. State, in which the victim was a Yupik Eskimo from Hooper Bay, Alaska, who did not exhibit hysteria.\(^\text{74}\) An expert who had “extensive contact”\(^\text{75}\) with native women did not testify that she suffered from RTS, but rather that her withdrawn behavior was consistent with native responses to trauma, including rape.\(^\text{76}\)

C. The English Legal System’s Use of RTS to Explain Counterintuitive Behaviors

While many courts in the United States have permitted the introduction of RTS at rape trials, the English justice system has, until very recently, proven hostile to such submissions. Indeed, English courts have long precluded psychological evidence on credibility generally. In R v. Robinson,\(^\text{77}\) “the leading English decision on expert evidence of credibility,”\(^\text{78}\) the court of appeal held that “the Crown cannot call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard that witness as reliable.”\(^\text{79}\)

\(^\text{73}\) State v. Robinson, 431 N.W.2d 165, 168 (Wis. 1988) (finding that the court of appeals did not err where it permitted expert testimony regarding rape victims’ emotional “flatness”).

\(^\text{74}\) Hilburn v. State, 765 P.2d 1382, 1385–86 (Alaska 1988) (“Dr. John Midthun . . . testified that he had extensive experience treating Yupik patients from villages . . . [and stated] that a Yupik Eskimo woman from a village who had experienced trauma would tend to be less emotional, more stoic, and less prone to hysterical reactions. He testified that when he examined E.L., she appeared to be quiet and subdued, exhausted, and emotionally drained.”).

\(^\text{75}\) Id.

\(^\text{76}\) Id. (“Dr. Midthun had extensive contact . . . with native women who had undergone trauma . . . [and] testified that E.L.’s withdrawn behavior was consistent with her having undergone a traumatic experience . . . . It is important to note that [he] did not say that E.L. . . . was suffering from ‘rape trauma syndrome.’”).


\(^\text{79}\) Robinson, 98 Cr. App. R. at 374.
English courts have also deemed late complaints inadmissible.\textsuperscript{80} However, the enactment of section 120(6) of the 2003 Criminal Justice Act has softened that rule to allow evidence of complaints made “when the matters stated were fresh in [the victim’s] memory.”\textsuperscript{81} This may allow “for a complaint which was made weeks or even months after the offence.”\textsuperscript{82} Nevertheless, legal scholar Carol Withey notes that “the CJA 2003 replaced the common law rules on adding recent complaints in sexual cases; the major difference being that the complaint no longer needs to be recent. However, the requirement that it be made as soon as could be reasonably expected does appear to retain some temporal test.”\textsuperscript{83} Thus, victims who do not complain during the direct aftermath of their assault cannot confidently expect to see their rapists brought to justice.

Low conviction rates have prompted discussion of admitting expert testimony on rape. Perhaps predictably, the British government found a scandal on its hands when reports emerged that the “conviction rate in cases ha[d]
fallen from a third of cases in 1977 to just 5.2 percent in 2004." The situation, however, has not improved drastically. In 2006, British ministers proposed allowing prosecutors to introduce “general expert evidence” on rape. This suggestion was later rejected, though, on the grounds that “general expert evidence [might] ‘expand’ into evidence about the specific complainant and give rise to a ‘battle of the experts.’” The Solicitor General then floated the possibility that juries might hear evidence other than through witnesses called by the prosecution, possibly by distributing “myth-busting packs” before trial. That suggestion, however, has faced some pushback from scholars such as Tony Ward. Presently no concrete plans exist to introduce such packs to juries, though they have been made available to judges in the last few years. Judges have also begun to receive special training on rape issues, in which they learn about Dr. Mason’s insights.

One English appeals court has refused to cast suspicion on a late complainant, explaining that a victim’s reticence to report is an expression of trauma and shame, rather than proof of mendacity. In the 2008 case of *R v. JD*, the defendant and the victim had known each other for about five years, and had lived together for a “significant proportion of that time.” The relationship, however, “deteriorated.” The defendant became “increasingly aggressive” in 2005, an emotional state aggravated by his alcohol abuse and financial problems. The victim testified that “in the period up to the 31st October 2005, the defendant forced her to have sexual intercourse, once in their bed, and once on a sofa.” In addition, she stated that sometime between October and

85. See Ward, supra note 78, at 95; see also Louise Ellison & Vanessa E. Munro, Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials, 49 BRIT. J. CRIMINOLOGY 363, 365 (2009) (explaining the function of general expert evidence).
86. See Ward, supra note 78, at 95.
88. Ward, supra note 78, at 95 (“[i]f such material is more or less overtly designed to make jurors more willing to convict, the absence of an opportunity for the defence to challenge it will raise difficult questions of fairness.”).
89. See R v. JD, [2008] EWCA (Crim) 2557, [9] (Eng.) available at http://www.bailii.org/ew/cases/EWCA/Crim/2008/2557.html (“The Solicitor General has also referred us to material which is made available to judges and recorders at the Judicial Studies Board seminars on trials in serious sexual cases. These include material relating to the psychological effects of serious sexual assaults collated by Dr. Fiona Mason, and the script of the lecture given . . . by His Honour Judge Peter Rook QC in May of this year.”).
92. Id.
93. Id.
94. Id.
December 2005, he abducted her and drove her off to a secluded place and raped her in his car. The final incident occurred on January 13, 2006, when “she was dragged upstairs, had her clothes forcefully removed and was then raped vaginally, orally, and anally. He then . . . inserted a deodorant can into her vagina. The incident only stopped when the complainant’s son returned home.” The defendant then left the home and went to a bar to drink. Later that evening, he returned and “there was an incident which resulted in the police being called.” The JD court did not specify what this incident entailed.

For some time, the victim kept her own counsel about the rape. When the police arrived at her home, she “made no allegations of any sexual assault on her.” The JD court described the atmosphere at the victim’s home as follows: “Well, what she said to you was that when the police were in her house there were quite a lot of them. They were joking and wandering about, and she just didn’t feel that she could speak to them.” But then, two days later, on January 15, the victim made a rape complaint to a police constable who came to her home to get her statement about what had happened on January 13.

The defendant relied, in part, upon the victim’s late reporting to cast doubt on the veracity of her claims. While the defendant contended he and the victim had consensual sex, he described that sex as being “vigorous.” He also admitted that been there had been “difficulties between him and the complainant; and he believed that the complainant had come to the conclusion that she wanted him to leave.” He alleged that the victim had made a false complaint of rape to get rid of him, and pointed to the victim’s failure to complain about the rapes on January 13. In addition, he noted the paucity of evidence supporting the crown’s charge; the only evidence was the victim’s son’s testimony that his mother had been very “distressed” on the night of January 13.

On appeal of his conviction, the defendant took issue with the trial judge’s instructions to the jury during the summation. The defendant complained: (1) that the court had impermissibly advocated against the defendant, and (2) that the court had described delayed complaints as common features of rape.

95. Id.
96. Id. at [3].
97. Id.
98. Id.
99. Id. at [6].
100. Id. at [3].
101. Id. at [4].
102. Id.
103. Id. at [13].
104. Id. at [4].
105. Id. at [5].
106. Id. at [6].
107. Id. at [7].
cases, which do not bear upon the victim’s credibility. The lower court had taken pains to explain that women often delay making their complaints because they are “ashamed.” The following quotation illustrates the overwhelming role that victim humiliation played in the judicial explanation of women’s reticence:

Very often, women who are raped within relationships feel ashamed of what’s happened. They themselves feel the shame. Although they have nothing to be ashamed about, because they are the victim, that’s the reaction. They feel ashamed of what’s happened. They are often too traumatised or embarrassed to tell anyone what’s going on, and a very serious aspect of the offence in those circumstances is that a woman feels trapped. She is, after all, in her own home, very often simply too ashamed and embarrassed to tell anyone that the person that she has brought into her home to share her life, be with her children, is now raping her. She won’t tell her neighbours, friends . . . even very close friends . . . children, still less the police, because of those factors which bring to bear.

While determining that the “judge went too far,” the JD court endorsed the trial court’s repeated and troubling emphasis on women’s abasement and upheld the conviction. The appeals court observed that the judge’s caution sounded like a “prosecution closing speech,” and noted that any jury dependence on Dr. Fiona Mason’s work on rape trauma proved impermissible, as she was not called as a witness. Despite this irregularity, the JD court held that the lower court’s comments about credibility and delayed complaints in rape cases were warranted because women may feel “[a]shame[d]” and “embarrass[ed]” after a rape. The JD court also took pains to buttress its own construction of rape victims’ reactions with Dr. Mason’s theories as well as those offered by His Honour Judge Peter Rook QC. The court cited a lecture where Rook stated:

Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response . . . . You may

108. Id. at [7]–[8].
109. Id. at [6].
110. Id.
111. Id. at [12].
112. Id.
113. Id. at [11].
114. Id. (“The fact that the trauma of rape can cause feelings of shame and guilt which might inhibit a woman from making a complaint about rape is sufficiently well known to justify a comment to that effect. The suggested direction in paragraph 9 above provides an example in very general terms of an appropriate form of directions which should be tailored to the facts of the case. In the present case, the judge was entitled to add to that general comment, the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner. He was also entitled to remind the jury of the way in which the complaint in fact emerged, as explained by the complainant herself.”).
think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint.115

Ultimately, the JD court determined that, while impermissibly prosecutorial, the lower court’s closing instructions did not constitute reversible error since the evidence was sufficient for conviction116: the defendant’s contention that the victim consented to sex proved so contrary to his admission that she “wanted him to leave” that the court determined that the guilty verdict was safe.117

The British press celebrated JD as a triumph of justice over stereotyping, emphasizing that women’s complaint-delaying “shame” should not be used to penalize them.118 As Vera Baird, the prosecutor in JD, told the Daily Mail:

This is an important advance. It is a rape myth that a victim of sexual assault will always scream for help as soon as she is able and if she does not, she must have made the whole thing up. The court has taken the opportunity to tackle this myth, on the basis that judges are better aware from their court experience that many reasons, including trauma, fear and shame may make a victim unable to complain for some time.119

After JD, Baird and other advocates submitted a draft of proposed jury instructions, to be given in rape jury trials where defendants cite victims’ late complaints in an attempt to undermine their credibility.120 The judiciary

115. Id. at [9].
116. See id. at [12]–[13].
   We therefore agree with the submission on behalf of the appellant that the judge went further than he should, at least in the absence of any balancing remarks to the appellant’s case. However, we have to determine whether or not the jury’s verdicts were safe. We have read the whole of the evidence given by the complainant and considered the account given by the appellant. The judge fully and fairly put the defence case in every other respect to the jury. The appellant really had no answer to the point that this case depended on the jury accepting that the complainant may have been willing to engage in, indeed, was encouraging, sexual activity whilst simultaneously wanting to get rid of him. Although not an impossible scenario, it was so unlikely that the jury must have rejected it. We are satisfied that these verdicts are safe.

Id. at [13].
117. Id.
119. Doughty, supra note 118.
120. The initiative has been promoted by Vera Baird, QC, the Solicitor-General, because of continuing concern that rape convictions in the UK remain the lowest in Europe. The idea of judicial directions has been developed over recent months, she told The Times. A small group, including psychiatrists, researchers and a “shadow jury,” had looked at what shaped influenced people’s views.
accepted and incorporated these instructions into the Judicial Studies Board Bench Book, which is a compendium of judicial comments and cautions to the jury.\textsuperscript{121} Inspired by Dr. Mason’s work,\textsuperscript{122} these cautions warn juries against stereotypes such as “[a] person who has been sexually assaulted reports it as soon as possible.”\textsuperscript{123} Judge Peter Rook, in a 2010 article, approved of the instructions given in \textit{JD} and permitted by the Bench Book, praising appeals court Judge Latham for acknowledging his advice that “the trauma of rape can cause feelings of shame and guilt” that can delay complaints.\textsuperscript{124}

The model jury instructions published in 2010 are similarly phrased when addressing stoicism and late reporting. For example, with respect to victim demeanor, a model instruction reads: “Any person who has been raped will have undergone trauma whether the defendant was known to her (or him) or not. It is impossible to predict how that individual will react . . . . Some will display obvious signs of distress, others will not.”\textsuperscript{125} The model instruction on delayed complaints reads: “[V]ictims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time.”\textsuperscript{126}

The \textit{JD} decision, the media reports, Rook’s lecture, and the jury instructions all emphasize a victim’s mental vulnerability. For instance, the jury instructions attribute victim stoicism to “trauma,” which is of course consistent with characterizing postrape reactions as symptoms of a syndrome. The same holds true with the explanation of a victim’s late complaint, which is attributed to trauma that expresses itself through “shame or fear or shock or confusion”


\textsuperscript{122} See id. at 356 n.646.

\textsuperscript{123} Id. at 356.

\textsuperscript{124} HH Judge Peter Rook Q.C. & Robert Ward, \textit{Permissible Judicial Comment in Rape Cases}, 4 \textit{CRIM. B.Q.} 6, 7 (2010), \url{http://www.criminalbar.enstar.net/83/records/36/2010%200125/4%20FINAL.PDF} (“The Court in \textit{Doody} acknowledged that it is sufficiently well-known that the trauma of rape can cause feelings of shame and guilt which might inhibit a woman from making a complaint, that a comment to that effect is justified.”).

\textsuperscript{125} \textit{BENCH BOOK}, supra note 121, at 357 (italics omitted).

\textsuperscript{126} Id. at 358 (italics omitted).
and which may lead a victim to delay her report of her attack. 127 No reasons beyond mental disorganization are ever given to explain victims’ reticence, such as their suspicions of the state, or their need to secure a trustworthy audience for their story.

In 2010, however, a set of recommendations concerning the very low rate of rape convictions and the administration of rape complaints arose less from a concern over victim shame or trauma than out of a realization that victim reticence may be a response to state inaction. Baroness Stern of Vauxhall, lecturer at the International Centre for Prison Studies, King’s College London, issued a “landmark review” reporting the results of a “five-month review of the treatment of rape victims,” wherein she “met some [victims] whose treatment by the authorities was appalling.” 128 Baroness Stern not only advocated that “[m]yths surrounding rape also needed to be dispelled,” 129 but set forth a set of recommendations based on the observation that women’s complaints were not adequately addressed. 130 These reforms would oblige members of the National Health Service, rather than the police, to conduct forensic examinations, and to give rape victims the right to a female doctor. 131 Baroness Stern emphasized that “[e]very victim of rape should be offered the support of a specialist adviser to help them to keep faith in the criminal justice system.” 132

Baroness Stern’s recommendations make explicit reference to women’s skepticism about the state in its handling of rape cases. Her assessment of the government’s failings intersects with other feminist analyses of the use of RTS in courts. These commentaries note that RTS, while useful in gaining convictions against defendants, overemphasize and distort women’s emotional responses to rape. 133 As we will see in the next Part, RTS also camouflages the role that the state has in inspiring the responses that the legal literature now describes as symptoms of self-loathing so intense that they amount to a disease.

127. See id. (italics omitted); Jennifer Temkin, “And Always Keep A-Hold of Nurse, for Fear of Finding Something Worse”: Challenging Rape Myths in the Courtrooms, 13 NEW CRIM. L. REV. 710, 728 (2010) (criticizing the sometimes difficult to follow, as well as voluntary, not mandatory, nature of the instructions).


129. Id.

130. Id.

131. Id.

132. Id.

133. See infra text accompanying notes 138–42 (addressing Stefan and Wasco’s arguments that rape trauma syndrome pathologizes women).
II.
THE FEMINIST CRITIQUE OF THE USE OF RAPE TRAUMA SYNDROME EVIDENCE IN RAPE TRIALS

Feminist legal theorists divide on the question of how to use RTS evidence in trials. Some advocate the use of this evidence as is, noting that educating juries about RTS can help obtain convictions, particularly where juries may be wary of rape claims in which victims report late, appear stoic after the rape, or return to the scene of their attack. Others call for a broader conception of rape victim reactions, one that will avoid focusing on women’s “counterintuitive” “pathology” in lieu of examining the behavior of the defendant and the social context within which the sexual assault occurred. Feminist critics also argue that RTS should encompass the reactions of a larger spectrum of women. Against this background, I argue that a construction of victim reactions that recognizes victim strength, coping, and skepticism is preferable to an emphasis on shame, since the rhetoric of shame eroticizes victims and distracts us from the real meaning of their “counterintuitive” behaviors.

Feminist critics of RTS argue that the “syndrome” language pathologizes women who are actually reacting rationally to a disbelieving society. U.S. legal scholar Susan Stefan is one of the most outspoken detractors of RTS on these grounds; she has noted that RTS replaces one set of myths with another that

134. As Kaarin Long, Caroline Palmer, and Sara G. Thome argue, “Jurors enter the courtroom burdened by myths and misconceptions about how victims of sexual assault should behave, and what type of victim experience is credible. . . . Jurors therefore require additional education in the form of general expert testimony to dispel myths and more fairly evaluate victim credibility.” See Long et al., supra note 10, at 571–72. Jennifer G. Long also submits that “experts in sexual and domestic violence should focus their testimony on descriptions of the myths surrounding sexual or domestic assaults, the dynamics of sexual or domestic assaults, and common victim behaviors.” See Long, supra note 11, at 20. Long observes that such evidence may be necessary in rape trials because “[l]eft without an explanation, a victim’s [counterintuitive] behavior often becomes compelling evidence to jurors that the victim lacks credibility.” Id. at 21. British legal scholar Tony Ward allows that the submission of evidence of “well-conducted empirical research to counter ‘rape myths’ or stereotypes on which the jury might otherwise rely . . . [may] exclude from its deliberations some assumptions about rape that might otherwise have led it [unjustly] to be sceptical of the defendant’s story.” See Ward, supra note 78, at 97. In addition, Dr. Louise Ellison, of the School of Law, University of Leeds, and Professor Vanessa E. Munro, law professor at the University of Nottingham, posit that the use of “general expert testimony” which is “not tied to a medical or psycho-pathological model . . . or profile-oriented,” but rather based on “generalized social science data” concerning rape reactions may beneficially “explain to jurors and judges that apparently problematic features of a complainant’s evidence are common and should not necessarily lead to the conclusion that the complainant is lying or unreliable.” Ellison & Munro, supra note 85, at 365, 380 (citing Ellison, supra note 80, at 239–68).

135. See infra text accompanying notes 139–42.

136. See discussion of Fine, Wasco, and Gifitis, infra text accompanying notes 141–49.

137. See infra text accompanying notes 363–65 (arguing for changes to language in jury instructions).
characterizes rape victims as sufferers of a mental disorder. In order to combat these effects, Stefan proposes offering evidence of rape reactions along with facts about the social and political context of rape, which would help explain women’s “counterintuitive” behaviors without pathologizing them. For example, when it comes to late reporting and victim stoicism and reticence, Stefan advocates that we allow evidence showing the oftentimes devastating consequences women face when they do report, such as incredulity from the authorities, hostility from their family, and stigma in their communities. Psychologist Sharon Wasco agrees with Stefan that RTS’s current configuration does not explain victim reactions because it ignores how victims react to a rape-doubting public. These scholars mark how the hesitation to expose oneself to accusations of falsehood or fault establishes why “[n]ormal’ women, defined as ‘typical’ women, don’t report being raped at all.” Stefan and Wasco also observe that victim nonreporting undermines the data used to describe the “syndrome.” They complain that RTS is built on a skewed and underrepresentative sample of rape victims: those who speak up. As Stefan writes, available “studies do not report or analyze the reactions of the vast majority of women and children who are raped and sexually abused,” as the “proportion of women who are raped and do not report has been estimated as varying between eighty percent and ninety percent.” Wasco builds upon this critique with her reckoning that the victim described by RTS is premised on a class- and race-privileged model: “The harm done to minority groups may manifest, or be expressed, in ways that research has not yet captured.” Other feminists concur that the scarcity of victim reporting creates race and class complications that RTS ignores. Dr. Michelle Fine, a professor of social psychology at the City University of New York, posits that the psychological model of treating rape victims is hierarchical and imbued with class- and race-privileged assumptions. In her book, Disruptive Voices: The

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138. Stefan, supra note 11, at 1276–77, 1323 (“While the major doctrinal question raised by these courts in attempting to decide whether to admit the testimony—whether introduction of such evidence was governed by the Frye rule or by the state equivalent of Rule 702 of the Federal Rules of Evidence—may have been resolved by the United States Supreme Court in Daubert v. Merrell Dow, fundamental questions about whether rape trauma syndrome evidence should be admitted remain unaddressed.”) (citations omitted).
139. Id. at 1333–34.
140. Id.
141. Wasco argues that we must “look beyond the act(s) of sexual violence to the cultural messages, relationship role expectations, and social norms that influence not only survivors’ pre-rape worldview but also their post-assault disclosure experiences and reactions from friends, family, and service providers.” Wasco, supra note 14, at 315–16 (discussing how stigma, blaming, and doubting responses “may compound the harm of the assault itself”).
142. Stefan, supra note 11, at 1333–34.
143. Id. at 1297–98.
144. See, e.g., Wasco, supra note 14, at 314.
Possibilities of Feminist Research, she observes that psychologists’ assumptions that victims will readily report, manifest intense surprise and grief, and rely on institutional support systems postrape do not account for poor women’s or women of color’s skepticism that the legal system will treat them fairly. Moreover, she shows how rape victims may withhold information in order to prevent their exposure to additional harm and to exercise some modicum of control.

Mary Gilfus, a professor of psychology at Simmons College, similarly argues that rape reaction models pathologize women and exclude the experience of many women, including women of color and poor women. She advises rebuilding the trauma model into one that considers “survivor-centered epistemologies” and describes victim reactions as acts of strength and resistance. Altogether, then, Gilfus, Wasco, Fine, and Stefan craft attacks on RTS that center on its incomplete foundations and race and class privilege.

To these critiques I add the following: courts persistently describe women’s reactions to rape in ways that highlight victim deviance and shame, and this practice has the obscuring effect of eroticizing rape victims. In literature and art, we may discern a long tradition of lingering over descriptions of shamed, sexually incontinent (that is, out-of-control) women. The erotic history of female disgrace can be tracked from tales of Mary Magdalene to Samuel

145. See Fine, Disruptive Voices, supra note 17, at 69 (“Trusting social institutions, maximizing interpersonal supports, and engaging in self-disclosure are strategies most appropriate for middle-class and affluent individuals whose interests are served by those institutions, whose social supports can multiply available resources and contacts, and for whom self-disclosure may in fact lead not only to personal change but also to structural change.”).

146. Id. (“Resisting social institutions, withholding information, and preserving emotional invulnerability emerge[s] [for some] as . . . strategies for maintaining control.”).

147. Gilfus, supra note 18, at 1242–43 (“Using a disease model may help if isolating a virus is the goal, but it may do more damage than good if the goal is to end women’s suffering and isolation in the face of a widespread social and political phenomenon.”).

148. Id. at 1239–53.

149. Id. at 1244–45. 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, 227 (2009) (“[T]he functions of individuals and community organizations are interdependent and . . . individuals have differential patterns of experiences given different ecological settings. Ecological settings consist of person constructs, which are individual characteristics such as race/ethnicity, gender, and beliefs and attitudes; events, which refer to the specific problem(s) that prompts an individual to need assistance and/or seek help, and instigates a community help-system network to respond; and environments, which include structural features of a community (e.g., resources), functional features (e.g., service delivery processes), as well as the attitudes and values of the community as a whole.”).

150. See, e.g., Debora Kuller Shuger, The Renaissance Bible: Scholarship, Sacrifice, and Subjectivity 168 (1994) (detailing medieval and Renaissance “portraits of Mary as a penitent anchorite” that emphasize her “unexpected sensual beauty . . . that occasionally descends into something that looks like hagioporn’”); Virginia Cox, The Prodigious Muse: Women’s Writing in Counter-Reformation Italy 73 (2011) (describing Magdalene’s role as a “mirror of lovely penitence” as “quasi-erotic”).
Richardson’s eighteenth-century epistolary novel *Clarissa* to the Bertolucci film *Last Tango in Paris*. The shamed rape victim in these narratives emerges as the perfect object of lust in her feminine regret and powerlessness, for shame, unlike rage, inspires helpless tears rather than self-defense.

In the legal cases, women’s abasement often appears more assumed than proved. One possible, if perhaps unconscious, motive that may drive experts and prosecutors to package recalcitrant rape victims as shamed, and why courts and juries may accept this characterization, is that it combines the pleasures of condescension and a certain brand of concupiscent imagery. Courts’ and experts’ troubling participation in an erotics of rape requires a rethinking of the language that we use when accounting for the motives of women who do not wish to speak to the state after their sexual assaults. As Sara Sharratt writes with such prescience when detailing the presentation of humiliated and traumatized rape victims in international tribunals on war crimes: “Shame and severe psychopathology take center stage[,] [creating an] allure and erotic charge.”

This erotic description creates more than dignitary harms, however. As I will urge after my reading of Tracey Emin’s work, the erotics of shame distract powerfully from the concentrated creative work that women perform when in retreat from the state. Rape victims’ “counterintuitive” or “syndrome”-driven silence and “flatness” turn out to create a haven wherein they critique the state and invent alternatives to the United States’ and England’s neglect of rape cases. As Emin’s art will help us see, some women after rape undergo private trials that bear both emotive and equitable qualities. That is, in their reticence, they imagine justice where it does not exist in the real world, a move they must

151. Samuel Richardson’s *Clarissa, or, the History of a Young Lady* (1748) is an epistolary novel about an aristocratic woman who dies out of shame after being raped. The eroticism in the novel has been much noted. See, e.g., Jocelyn Harris, *Grotesque, Classical and Pornographic Bodies in Clarissa*, in *NEW ESSAYS ON SAMUEL RICHARDSON* 111 (1996) (“Scenes of Clarissa’s distress especially invite [her rapist] Lovelace to read the text of her body pornographically, dissecting and gazing upon its different parts.”).

152. In *Last Tango*, Maria Schneider, the female lead, cried real tears when she performed the infamous “butter scene” with Marlon Brando. The film presented Schneider in an erotic light throughout the film, and her tears demonstrated that she was ashamed (in her words “humiliated”) and not consenting. See *Shocking Sex Scene Made Actress Weep*, WEST AUSTRALIAN (PERTH), Feb. 15, 2011, § AD4, at 2.

153. Sara Sharratt writes of trials in the International Criminal Tribunal for the Former Yugoslavia and the War Crimes Court in Bosnia and Herzegovina in *GENDER, SHAME AND SEXUAL VIOLENCE: THE VOICES OF WITNESSES AND COURT MEMBERS AT WAR CRIMES TRIBUNALS* 33 (2011). In the quote mentioned, Sharratt notes how the closed nature of rape trials exacerbates the “allure” and “erotic charge” that comes with the shame narrative. See also id. at 31 (“[S]exuality [is] the site of sin and shame for women [since the tales of Eve] . . . . Rape and sexual violence bring shame and dishonor to women, consonant with the notion prevalent though much of history of women’s supposed more lustful nature: she provokes male arousal and she is to be blamed for her sexual insatiable desires.”).
make in the absence of real justice. In the following Part, I will describe the United States’ and England’s ruinous treatment of women in rape cases, which will explain the complex and constructive reactions of women that are now hidden by the specter of their shame.

III. THE REALITY OF THE ADMINISTRATION OF RAPE CASES IN THE UNITED STATES AND ENGLAND, AND VICTIMS’ RESPONSES

As discussed, Rape Trauma Syndrome is often used in the United States to explain counterintuitive behaviors. In England, it is used to explain victim demeanor and late reporting. While courts and experts often explain these behaviors in terms of shame, terror of one’s rapist, and victim pathology, statistics demonstrate that women who are conscious of their governments’ handling of rape cases have considerable disincentives to report, reveal their emotions to state actors, and even possess the kind of “vigilance” that will cause them to steer clear of the sites of their rapes. Such disincentives include the real and perceived low rates of arrest and conviction, police skepticism, and the insensitivity of medical responders. These problems become particularly acute where the woman does not fit the profile of a “real” rape victim.

A. Low Conviction Rates, Inadequate Justice, and Medical System Responses to Rape Deter Victim Reporting in the United States

Rape victims in the United States may not report or may delay reporting their rapes because they have a realistic understanding of the limited likelihood of seeing justice. Scholarship delving into rape victims’ grasp of the justice system reveals that women perceive the low rates of trials and rape convictions in the United States. At least one study reports that “52% [of studied survivors] made comments that expressed concern with achieving substantive justice through the criminal justice process.”

Professors Kathleen Daly and Brigitte Bouhours provide strong empirical support for this concern. They studied seventy-five unique data sets of attrition studies, including “victimization surveys, police statistics, and court data from Australia, Canada, England and Wales, Scotland, and the United States from 1970 to 2005.” These studies identified rape attrition—that is, how rape cases were either not reported, dropped by police, not taken up by prosecutors, or lost at trial. Specifically, Daly and Bouhours used these records

154. Cf. Stefan, supra note 11, at 1304 (“The wariness and fear of women who have been raped is described with words like ‘hypervigilance’ and ‘exaggerated startle response.’”).
156. Rape and Attrition, supra note 12, at 565–66.
157. Id.
to study how police officers, prosecutors, and courts treated rape and sexual assault cases\textsuperscript{158} and determined that only 15 to 19 percent of rapes in the United States are reported.\textsuperscript{159} Of these cases, the authors note that “studies from the United States . . . show a stable pattern of high rates of attrition at the police and prosecution stages over two time periods (80 percent of cases dropped).”\textsuperscript{160}

A review of additional sources shows that other scholars, reporters, and advocates have found low U.S. reporting rates by victims alongside low rates of rape defendant arrests, convictions, and jail time. Daniel M. Murdock refers to Department of Justice statistics showing that “131,950 rapes occurred annually between the years of 1992 and 2000 in the United States . . . [with] only 36% actually reported . . . to police.”\textsuperscript{161} In 2005, Ian Ayres and Katharine K. Baker remarked that “[a]n arrest does not assure conviction,”\textsuperscript{162} and cited Joan McGregor for the proposition that “the likelihood of a rape complaint actually ending in conviction is generally estimated at 2 to 5 percent.”\textsuperscript{163} The most astonishing explanation of low conviction rates can be found on the website for the Rape, Abuse, and Incest National Network (“RAINN”).\textsuperscript{164} Citing to the National Center for Policy Analysis’s Crime and Punishment in America, a 1999 study, \textsuperscript{165} RAINN asserts:

If a rape is reported, there is a 50.8% chance of an arrest. If an arrest is made, there is an 80% chance of prosecution. If there was a prosecution, there is a 58% chance of a conviction. If there is a felony conviction, there is a 69% chance the convict will spend time in jail. So even in the 39% of attacks that are reported to the police, there is only a 16.3% chance the rapist will end up in prison. Factoring in unreported rapes, about 6% of rapists will ever spend a day in jail. 15 of 16 walk free.\textsuperscript{166}

Furthermore, even if their cases are taken up by prosecutors, U.S. rape victims complain that the investigations and prosecutions of their rapes cause inordinate suffering. The case against International Monetary Fund head Dominique Strauss-Kahn for the alleged assault of hotel worker Nafissatous Diallo highlights this experience, which has been termed the “second assault.”

\textsuperscript{158} Id. at 566.
\textsuperscript{159} Id. at 572.
\textsuperscript{160} Id. at 607.
\textsuperscript{163} Id.
\textsuperscript{164} RAINN’s website can be found at http://www.rainn.org/ (last visited Aug. 23, 2012).
\textsuperscript{165} Id.
As Yancey Martin and R. Marlene Powell describe, “[W]omen whose cases were prosecuted were less well off psychologically six months after the rape than were those whose cases were not prosecuted, attributing this result to the effects of an adversarial legal system that subjects rape victims to challenge and duress.”

Moreover, rape victims in the United States also face the prospect of police incredulity and inaction when considering how to deal with an attack. Rape crisis counselors report that police officers deflect rape victims who complain. As Shauna L. Maier writes, “Rape victims who do not seem to be ‘real’ victims to police, doctors, and nurses often face blame and stigmatizing responses . . . [I]t should be recognized that rape victims often have negative and traumatizing experiences with the legal system.” In addition, police may simply ignore rape victims. Widespread news reports recently publicized spectacular cases of police misconduct involving untested rape kits. Human Rights Watch estimates that there are between four to five hundred thousand untested rape kits sitting in evidence storage facilities and crime labs across the country. Thousands of women submit rape kits to the police and wait, only to have them stowed or thrown away.

167. Patricia Yancey Martin & R. Marlene Powell, Accounting for the “Second Assault”: Legal Organizations’ Framing of Rape Victims, 19 LAW & SOP. INQUIRY 853, 856 (1994); see also SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1987) (describing the legal culture of disbelief that greets nonconforming rape victims).

With respect to the Diallo debacle, see, for example, Jane E. Brody, The Twice-Victimized of Sexual Assault, N.Y. TIMES, Dec. 13, 2011, at D7 (“Prosecutors eventually dropped the case after concluding that Ms. Diallo had lied on her immigration form and about other matters, though not directly about the encounter with Mr. Strauss-Kahn.”).

168. Shana L. Maier, “I Have Heard Horrible Stories . . .”: Rape Victim Advocates’ Perceptions of the Re-victimization of Rape Victims by the Police and Medical System, 14 VIOLENCE AGAINST WOMEN 786, 787 (2008); see also id. at 789 (“However, although rape victims who had a rape victim advocate present were less likely to be treated negatively by the police, most victims reported they experienced distress after interaction with police (Campbell, 2006). One study conducted in Maryland found that 69% of 125 victims who were interviewed indicated that they would not file charges with the police, and almost half (46%) of those who did file charges expressed dissatisfaction with the police interview.”); see also Patricia A. Frazier & Beth Haney, Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives, 20 LAW & HUM. BEHAV. 607, 610 (1996) (describing a “qualitative study of police investigators’ perceptions of the legitimacy of rape cases,” which found “[b]ased on interviews with investigators and observations of their work,” that policy determined “whether a rape claim was ‘legitimate’ and/or ‘prosecutable’ . . . based on judgments regarding the victim’s credibility (e.g., prompt reporting, cooperativeness), evidence regarding consent (e.g., force, resistance), the seriousness of the offense (e.g., injuries, weapons), and victim characteristics (e.g., age, race, socioeconomic status)” (citing Rose V.M. & Randall S.C., The Impact of Investigator Perceptions of Victim Legitimacy on the Processing of Rape/Sexual Assault Cases, 5 SYMBOLIC INTERACTION 23, 23–36 (1982)).


170. See Eliminate the Rape Kit Backlog, HUMAN RIGHTS WATCH, http://www.kintera.org/c.nlWlgN2jwE/b.5706887/k.37FC/Eliminate_the_Rape_Kit_Backlog/siteapp/s/advocacy/ActionItem.aspx (last visited Aug. 23, 2012); see also Zain Shauk, More Rape Kits Than
Finally, victims who report a rape also suffer the disbelief of medical personnel. As Maier describes, “Similar to members of the law enforcement community, some members of the medical system also pass judgment on rape victims and engage in victim blaming questioning.” 171 In response to these problems, projects such as the Sexual Assault Nurse Examiner (“SANE”) training program have been established. SANE provides rape victims with medical responders who have been schooled in properly diagnosing and handling rape trauma. 172 While this measure has been revolutionary and oftentimes healing for victims, 173 the studies demonstrate that this has not been enough to boost victim confidence in the medical system. 174

B. Rape Attrition in England—Victim Responses to Low Conviction Rates, Police Misconduct, and Insufficient Medical Resources

Victim silence may plague England for the same reasons as the United States: women may expect low conviction rates as well as police and medical professionals’ inappropriate or inadequate response to their reports of rape. Daly and Bouhours note that rape statistics changed between an “early” period from 1970 to 1989 and a later period from 1990 to 2005, 175 in which more women began to report acquaintance rape, 176 but total reporting remained low—between 14 and 18 percent of all rapes. 177

Failures to report may be attributed to paltry English conviction rates for rapes, as noted above. 178 Daly and Bohours report that “England and Wales has a most unusual pattern of a high trial rate (69 percent) and a very low

171. Maier, supra note 168, at 796; see also Rebecca Campbell et al., Preventing the “Second Rape”: Rape Survivors’ Experiences with Community Service Providers, 16 J. INTERPERSONAL VIOLENCE 1239, 1250 (2001) (conducting a study of sexual assault victims and finding that “[a]lmost half of the victims who sought medical attention post assault found this contact to be healing (47%), but nearly one third experienced it as hurtful”).

172. Maier, supra note 168, at 790 (“The first Sexual Assault Nurse Examiner (SANE) program began in 1976 in Tennessee (Ledray, 1998), and as of January 2005, there were more than 400 SANE programs throughout the United States (SANE, Sexual Assault Response Team, 2005). The primary mission of a SANE program is to meet the needs of the sexual assault victim by providing immediate, compassionate, culturally sensitive, and comprehensive forensic evaluation and treatment by trained, professional nurse experts (Ledray, 1998, p. 28).”)

173. See Campbell et al., supra note 171, at 1250.

174. See id. (noting that nearly one-third of victims found that the medical attention they received was “hurtful”).

175. Rape and Attrition, supra note 12, at 568.

176. Id. at 573 (“[A]n increasing share of nontraditional rapes, which are more difficult to prove in court, are being reported to the police.”).

177. Id. at 572.

178. See Townsend, supra note 84 (describing a 5.2 percent conviction rate in 2004).
conviction rate at trial (29 percent).” Part I.C of this Essay details the highly publicized conviction rate, which *The Guardian* reported at 5.2 percent in 2004, a figure that includes all complaints made to the police. The resulting outcry was partially responsible for government action, resulting in the experiment with rape myth-busting packets and, ultimately, *JD*’s allowance of rape trauma syndrome evidence at rape trials.

Police misconduct and the legal system’s insensitivity to rape victims also contribute to high attrition and low reporting rates of rape in England. Studies of victims’ experiences with police in England reveal that they endure the same insensitivities reported in America. Scholar Carol Withey notes, “Women often withdraw their allegations because of the investigative process.” She cites investigative journalism undertaken by Britain’s Channel 4, wherein a former police officer, Nina Hobson, posed as a rape victim to test police responses to her complaints. Hobson ultimately found that the police demonstrated “a reluctance to believe complainants. Attitudes such as ‘she asked for it’ were prevalent amongst certain officers.” At the litigation stage, women’s

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179. *Rape and Attrition*, supra note 12, at 585.
180. *See Townsend*, supra note 84.
181. *Baroness Vivien Stern, The Stern Review* 43 (2009) (“The way the conviction rate figure for rape is calculated is unusual. Conviction rates are not published or even measured in this way for any other crime so it is very difficult to make a comparison. ‘Conviction rate’ usually describes the percentage of all the cases brought to court that end with the defendant being convicted. When dealing with rape the term has come to be used in a different way and describes the percentage of all the cases recorded by the police as a rape that end up with someone being convicted of rape. The figure arrived at is usually around six percent.”); *see also id.* at 45 (“It is clear to us that the way the six percent conviction rate figure has been able to dominate the public discourse on rape, without explanation, analysis and context, is extremely unhelpful. There is anecdotal evidence that it may well have discouraged some victims from reporting.”); Temkin, supra note 127, at 713 (“In 2007, . . . [t]he number of convictions for rape of a female in 2007 was 6.7 percent of the offenses recorded by the police in 2007–2008. The figures for 2008 show a slight improvement. . . . This figure is 6.9 percent of the number of recorded offenses in 2008–2009. Low conviction rates tend to discourage prosecutions, thus creating a vicious circle. More disappointing still is that negative accounts of the experience of rape complainants within the criminal justice system persist.”) (footnotes omitted).
182. *These are information sheets “busting” rape myths. See Ward, supra note 78, at 95 (citing Gammell).*
183. *See R v. JD, [2008] EWCA (Crim) 2557, at [12].
184. *Withey, supra note 80, at 57.
185. *Id.* at 74.
186. *Id.; see also Tara Conlan, Channel 4 Backs Dispatches in Police Row, MEDIA GUARDIAN* (May 10, 2007, 6:10 AM), http://www.guardian.co.uk/media/2007/may/10/channel4.broadcasting1 (“The undercover film . . . revealed that reports of sexual assault and rape are not being taken seriously, to the extent that one of [Hobson’s] colleagues said that if she was ever raped, she would not report it to the police.”); *Rachel Williams, Conviction Rates for Rape Remain Appallingly Low, GUARDIAN* (Mar. 26, 2009), http://www.guardian.co.uk/uk/2009/mar/27/rape-conviction-rates (“[T]he worst area for the attrition rate is during the police investigation, after the report of the crime but before any charge. Only a quarter of allegations end up in court. Home Office research found that the most common reasons charges were not brought were insufficient evidence— in 40% of cases—and the victim withdrawing her complaint, in 35% of cases.”).
suffering during the trial further deters them from pressing their claims through official channels.\textsuperscript{187}

England’s rape medical response initially appears superior to that of the United States, but remains an insufficient resource that deters women from reporting. Liz Kelly and Linda Regan, members of the Child and Woman Abuse Studies Unit of London Metropolitan University, cite Britain’s Sexual Assault Centres (“SAC”) with approval. The SAC’s “provide a high standard of comprehensive care to anyone who has experienced recent sexual assault”\textsuperscript{188} by providing forensic examinations and “plac[ing] emphasis on choice and options.”\textsuperscript{189} Feminists such as Withey also applaud the SACs.\textsuperscript{190} However, feminists remain concerned that not enough women know that these resources exist.\textsuperscript{191} As well they should: in 2007, the U.K.’s Equality and Human Rights Commission published a “map of gaps,” showing that one in four local authority areas provided “no specialised support service” in their area for women who experience violence.\textsuperscript{192}

\textbf{C. Reexamining Women’s Reluctance to Report in the Context of U.S. and English Rape Cases}

A review of this information on rape attrition allows us to examine victims’ “counterintuitive” behavior in a new light. The notion that terror or shame causes women to delay or fail to report rapes and to display emotional flatness and a lack of “vigilance”\textsuperscript{193} fails to account for many of the reasons

\begin{itemize}
  \item \textsuperscript{188} Liz Kelly & Linda Regan, Rape Crisis Network Europe, Good Practice in Medical Responses to Recently Reported Rape, Especially Forensic Examinations, 1, 1–15 (2003), available at http://www.rcne.com/downloads/RepsPubs/Forensic.pdf (describing “good practices,” and setting down basics for training); see also id. at 15 (describing Sexual Assault Centers, which “aim to provide a “high standard of comprehensive care,” noting SAC’s exist in the United States and the U.K., as well as Germany, Switzerland, and Australia).
  \item \textsuperscript{189} Id.
  \item \textsuperscript{190} Withey, supra note 80, at 73 (“Sexual assault referral centres (SARCs) have been positively evaluated in a Home Office study. The Home Office and Department of Health have also produced National Service Guidelines on Developing Sexual Assault Referral Centres recommending the establishment of SARCs across England and Wales. In 2004-06 the government has dedicated £4m to the further development of SARCs. Seven new SARCs will be opening in 2006. However, more women need to be aware that SARCs exist.”) (footnote omitted).
  \item \textsuperscript{191} Id.
  \item \textsuperscript{193} As noted in the footnotes above, rape victims are sometimes ascribed with possessing super vigilance, but in cases like Terrio are described as suffering from a syndrome that somehow explains their returns to the sites of their rapes. Compare Stefan, supra note 11, at 1304, with Terrio v. McDonough, 450 N.E.2d 190 (Mass. App. Ct. 1983).
\end{itemize}
why women would resist state or other official aid. Because victim skepticism of authorized responders does not find much expression in the cases, and because many women do not make their voices heard in the first place, greater study must be made of victims’ distrust of the state. To this end, the art of rape victims provides a font of untapped information on women’s distrust. Tracey Emin’s work emerges as a paramount expression of women’s doubts about the state and the complicated trials they endure after sexual assault.

IV. ARTIFACTS: THE LIFE AND WORK OF TRACEY EMIN

In order to address the impoverished legal depiction of rape victim response, I have begun to study art and literature made by rape victims, hoping to discern new insights into rape reactions. My research led me to the work of half-white, half-Turkish English artist Tracey Emin, whose quilted blankets, sculptures, neon signs, drawings, writings, and videos relentlessly address her unreported rape at the age of thirteen. In Emin, I found a subject as yet not much studied by legal scholars—the rape victim who never reports to the authorities. Emin does, however, report in her art.

In studying these reports or artifacts, I learned that women’s seemingly inscrutable reactions to sexual assault may themselves be very telling and are not counterintuitive or conventionally shame driven at all. Emin’s work makes sense: She does not unload a disorganized, irrational diatribe upon her audience. Rather, she conjures a coherent, if entirely imaginary justice system, complete with evidentiary submissions and vociferous argument and counterargument. The deep detail of her undertaking reveals that Emin engages in an ambitious artistic gesture known as “worldbuilding,” that is, the construction of a visionary cosmos noted for its exhaustive specificity. In this

194. Two cases that do recognize victim distrust involve children, and their suspicion of the police and authorities in both cases is explained away as products of anti-authority brainwashing by their rapists or more general befuddlement. See People v. Brandon, 52 Cal. Rptr. 3d 427 (Ct. App. 2006) (child prostitute brainwashed by sadistic pimp), review granted and opinion superseded, 154 P.3d 1001 (Cal. 2007); Scadden v. State, 732 P.2d 1036 (Wyo. 1987) (child enlisted in a cult of personality by abuser who was teacher did not trust authorities).

195. I did not invent this term. I first heard it from the writer Elizabeth Hand, who has written in literary, fantasy, and science fiction modes. See Rosanne Rabinowitz, The New Review: Interview with Elizabeth Hand, LAURAHIRD.COM, http://www.laurahird.com/newreview/elizabethandinterview.html (last visited Aug. 23, 2012) (“If you’re writing a fantasy novel or a science fiction novel, you need the time and space to do world-building or to build up the logical background of your Middle Earth or whatever it is.”). Worldbuilding describes the work of artists whose imaginative vision is so complete that they may be said to erect entire virtual societies. It is often used to describe the technique of fantasy writers or game developers. See id.; see also Joshua Mosqueira, World Building: From Paper to Polygons, in GAME DESIGN PERSPECTIVES 67 (2002) (“A game with a properly developed ‘world,’ one that provides the player with rich characters, contextual gameplay, and a motivating story, is a game that continues to exist long after the player stops playing. This is the magic that worldbuilding offers to designers.”). However, any artist who presides over an imaginary
comprehensive imaginary world, Emin conducts a series of trials—prosecutions of her attacker, her community, and herself.

In discovering these artistic litigations, I first wondered why Emin would conduct such insistent prosecutions and defenses. Ultimately, it dawned on me that she performed this work because the state had not. Her work contains both implicit and explicit criticisms of the state’s failure. By excavating Emin’s oeuvre—which depicts the physical details of the attack, her varied responses to it, and the gendered and raced social structures in which it took place—I came to understand three important aspects of victim reaction. First, women may exhibit manifold and even contradictory responses to a rape. Second, the reason that these multiple reactions seem counterintuitive is that the outside world does not understand that these reactions are directed not just at the woman’s rapist or herself, but also at her frequent ill treatment at the hands of her community, family, medical response team, and government. Third, women’s trials not only reflect negative critiques of the state, but also contain directions and models for positive legal change.

From this study, I have developed a hypothesis that agrees with and elaborates upon Stefan’s, Wasco’s, Fine’s, and Gilfus’s critiques of the use of RTS. In order to reorganize our pathologizing and patriarchal response to victim reaction as a “syndrome” solely rooted in “fear” or “shame,” we should reinterpret victims’ nonreporting, stoicism, and returns to the scene of the attack as both negative and constructive critiques of government treatment of rape. We should also remain aware that this interpretation of victims’ reactions may be all the more relevant in cases involving rapes that do not measure up to the “real rape” construct that is rooted in gender, class, and racial stereotypes.

In the following Sections, I set forth my analysis of Emin’s art, showing how it lambastes existing systems by replacing them with alternative, just worlds. Next, I examine how other rape victims share Emin’s practice of worldbuilding and consider how their and Emin’s examples offer affirmative examples of justice that should shape legal reform.

A. Tracey Emin’s Formative Years

Tracey Emin and her twin brother Paul were born in Croydon, England, on July 3, 1963.196 Her father, Envar Emin, was a Turkish Cypriot who was married to another woman when he began an affair with Emin’s mother,
Pamela Cashin. Envar maintained two separate households after the twins’ birth, and Emin spent the first three years of her life living in north London and making regular visits to Turkey. Envar settled in Margate, a seaside resort town east of London, buying up property that he turned into a hotel, which he called Hotel International. Cashin, Emin, and Paul all lived in Hotel International. They would spend three nights a week with Envar, who remained the rest of the week with his other family in London proper.

In her frailest youth, Emin became a repeated victim of sexual assault. At the age of ten Emin was sexually abused by a man named “Chris,” a lover of her mother’s who apparently resided at the Hotel International. At eleven, she was molested by a stranger she encountered at the beach. Then, at thirteen, she was raped by a Margate boy she names “Steve Worrell.” This assault took place on New Year’s Eve, as she was walking home alone from a local disco called Top Spot.

Emin responded to her rape by becoming promiscuous. She says that from the ages of thirteen to fifteen, she engaged in her “shagging years.” She worked in restaurants during this period, and frequented nightclubs, including Top Spot. She developed a reputation, and in 1978, when she was fifteen, she participated in a dance competition at a club in Margate. However, a host of men at the club, many of whom had been her lovers, harassed her off the floor. They repeatedly shouted “Slag!” at her until she left in tears.

Throughout this period, Emin’s school attendance record was scattershot at best. When she turned fifteen, social services employees identified her as a truant and required that she recommence her education. In 1982 she entered the Maidstone College of Art, graduating in 1986. She next matriculated to London’s Royal College of Art (“RCA”). During this stage of her education, she destroyed all the art she had made at Maidstone, “smashing it up with a sledge hammer in the courtyard of the college.”

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197. Id. at 17.
198. Id. at 18.
199. Id.
200. Id.
201. See id.; see also TRACEY EMIN, STRANGELAND 14 (2005) [hereinafter STRANGELAND]. Here, Emin says that she was so abused at the age of ten by “Chris,” her mother’s lover.
202. STRANGELAND, supra note 201, at 20–21.
203. Id. at 23–24.
204. TRACEY EMIN 20 YEARS, supra note 196, at 19.
205. Id. (“She describes the years between the ages of thirteen and fifteen as ‘my shagging years’ . . . . In Margate, she danced regularly at a disco called ‘Top Spot.’”).
206. See id.
207. See id.
208. Id. at 19 (“By the time she was fifteen, the social services had caught up with Tracey and she was obliged to return to school.”).
209. Id. at 21.
210. Id. at 22.
Emin’s experience at the RCA was terrible. Her worst experience occurred when she was chosen to participate in a group show from which she was subsequently excluded. When she came to the college to collect her rejected work, she “began vomiting blood in the gallery.” This reaction may have been due to an unplanned pregnancy that later resulted in an agonizing abortion, complete with her physician attempting to shame her out of the procedure\(^{211}\) and an unexpected stillbirth in a taxi.\(^{212}\) By February of 1992, she had had her second abortion.\(^{213}\)

Emin’s art career began to flourish when the artist Sarah Lucas befriended her. This was particularly lucky for Emin, who had begun to develop a reputation for swearing, alcoholism, and generally fractious behavior.\(^{214}\) She opened up a shop with Lucas, where they sold their handicrafts and art.\(^{215}\) Emin also began selling “subscriptions” that allowed people to invest in her “creative potential.”\(^ {216}\) Subscribers would get letters written by Emin.\(^{217}\)

Emin soon began to make what would prove to be signature pieces, and her career reached stratospheric heights. In 1993, she made an appliqué blanket, titled *Hotel International*, on which she recounted her experiences at the hotel in a fabric collage of words.\(^ {218}\) She also had her first show, titled *Tracey Emin: My Major Retrospective 1963–1993*.\(^ {219}\) Today, she is represented by Jay Jopling, who owns the famous art gallery White Cube in central London.\(^ {220}\) In 1998, her installation, *My Bed*, appeared in the Tate Museum’s 1999 Turner Prize exhibition.\(^ {221}\)

Emin made her personal life the central feature of her work, describing her rape and abortions and her reactions to the brutal nature of love in her appliqué blankets, poetry, essays, videos, and sculpture. She has become a celebrity in Britain, widely known for her antics, which often include drunken carousing.

\(^{211}\) See *id.* (describing the context of Emin’s first abortion).

\(^{212}\) Emin’s pregnancy was unexpected due to an earlier diagnosis of gonorrhea and infertility, and in her consultation for this first procedure she was shocked that she had conceived. See *Strangeland*, *supra* note 201, at 155. In the chapter “Abortion: How It Feels,” Emin recounts the agonizing side effects of her procedure. *Id.* at 158. I do not know why Emin had a stillbirth in a taxi after a hospital procedure. I can only guess that this happened because of a misjudgment on her physician’s part or some other malpractice.

\(^{213}\) See *Tracey Emin 20 Years*, *supra* note 196, at 23.

\(^{214}\) *Id.* Patrick Elliot describes her as the “underbelly” of the 1990’s “Cool Britannia” art scene. She was a constant fixture at private views and parties, often in an inebriated state and often avoided because of her intense, argumentative manner.

\(^{215}\) *Id.* at 23.

\(^{216}\) *Id.* at 24.

\(^{217}\) *Id.*

\(^{218}\) *Id.* at 25; see also *id.* Plate 1, *Hotel International* 1993.

\(^{219}\) *Id.*

\(^{220}\) See *id.* at 24 (detailing Jopling’s involvement in her career). White Cube’s website has information about Emin’s art that can be accessed at http://whitecube.com/artists/tracey_emin/.

\(^{221}\) See *Neal Brown, Tracey Emin* 97 (2006).
The most famous example of her acting out occurred in 1997, when she appeared on a BBC panel called “Is Painting Dead?” in a drunk and belligerent state and stalked off the set in a huff.222

B. Tracey Emin’s Art as a Reaction to Rape

Since the 1960s, Emin has worked in fabric, as well as video, photographs, collage and assemblage, monoprints, performance, installation, text, and neon. Her work very often references the sexual attacks that she suffered as a child and details disturbing adult sexual contacts. As Emin’s work accumulates through the years, her array of confessions assembles into an ornate capsule universe that reflects, critiques, and reconstructs the world in which her assaults took place.

At first, though, her creation just looks like a mess. Emin’s autobiographical writings and visual work together create a series of “jagged recollections”223 that leave the reader with the impression that Emin’s suffering has unhinged her. In her art, she issues relentless claims of abuse. But simultaneously she exults in her own sexuality, and at times narrates her tales of sexual victimhood with a sense of ambiguity. Sometimes, as a storyteller, she takes the point of view of the savaged, tender-years plaintiff. At other times, she portrays a sexual dialogue wherein she appears unharmed, happy, and even autonomously participating in dangerous sexual congress.

When I first examined Emin’s work, I regarded it as a cacophony of claims that were very much in accord with RTS experts’ descriptions of rape victims as being disorganized vectors of inappropriate emotion. Yet I finally realized her art contains a coherent theme. As a whole, Emin’s work constitutes a series of trials. She operates simultaneously as a witness, a prosecutor, a judge, and a punisher of her abusers and her society, as well as a prosecutor and defender of herself. Emin’s imaginary courthouse proves so intensely detailed that it comes complete with evidence, defendant confessions, and jury reactions. In its fullness, it harbors complaints about the real world and builds a viable alternative.

In the following Sections, I analyze a number of her pieces illustrating these litigious themes. The first details Emin’s trial of her abusers, including Chris and Steve Worrell. The second studies Emin’s trials of herself, which resound with self-accusations and defenses.

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222. See Tracey Emin on the Loose, YOUTUBE http://www.youtube.com/watch?v=HKKn2LOKXYE (last visited Aug. 23, 2012); see also Karen Wright, Maid of Margate, INDEPENDENT (May 23, 2005), http://www.independent.co.uk/news/people/profiles/maid-of-margate-491701.html (“Tracey lifted up her hip flask to take a sip. . . . [She] stood up and began to wrestle with her microphone. ‘I’m leaving!’ she announced and did. We were all left in stunned silence.”).

223. STRANGLAND, supra note 201. STRANGLAND is subtitled “The jagged recollections of a beautiful mind.”
1. The Trials of Her Abusers

   a. Emin’s Witness Testimony: Strangeland, Family Suite, Exploration of the Soul, Pure Evil, and The Things I Say No To

   In her art, Emin first lays down the foundations of her imaginary court by building a witness box and then stepping inside of it. As art critic Jennifer Doyle notes in *Art and the Dialectics of Desire*, Emin’s work is a “record of sexual damage.” While Doyle constructs Emin’s reportage as a “spectacle” that reveals the artist’s “lack[ of] emotional discipline,” I see works such as *Strangeland*, *Family Suite*, *Exploration of the Soul*, and *The Things I Say No To* as mimicking the half-raw, half-scripted performance that is witness testimony during a sexual abuse trial. In these texts, quilts, and neons, Emin relays her early experiences with sexual molestation and her later rape at thirteen.

   Emin’s early experience with sexual abuse at the hands of “Chris” forms an obsession about which she repeatedly testifies in her essays and visual art. Emin gives an emotionally incandescent declaration about this event in her 2005 book *Strangeland*, avouching “I could feel [Chris’s] hard, erect penis pressed into the small of my back and he was rubbing his hands across my chest. My tiny little chest, my bony little ribs. I was only ten.” She describes her feelings about this assault as such: “Now my body stank, every orifice oozing slime, every pore open and closing, every part of me bleeding.”

   Here, Emin makes notable use of handwriting and a signature, both of which render the document similar to evidence used in legal proceedings. With

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225. *Id.* at 111 (“Emin . . . offers herself to us as a spectacle of feminine abjection. The unavoidably personal character of responses to Emin is always already a problem in criticism: she draws us too close, her work lacks emotional discipline.”).
226. *Strangeland*, supra note 201, at 14. (“As I got older, I would watch him from the corner of my eye. His hand down his trousers, always fiddling with himself, always looking at me. Then I would wake up in the middle of the night and hear him having sex with Mum . . . . The world had become a sad and ugly place.”).
227. *Id.* at 16.
respect to the handwriting, she communicates her desire to remove any obstacle between herself and the facts about which she writes in order to convince the reader of these events’ authenticity. The autograph similarly impresses the reader: it resembles the requirement of signing an affidavit, which legal culture recognizes as a symbol of veracity.228

Emin continues witnessing and evidencing this abuse in her visual art, most notably in her series Family Suite, which comprises twenty monoprints Emin made in 1994. In their undone style these prints constitute an unmediated account of her nightmarish childhood. Monoprints are made by applying ink on a glass surface and laying a piece of paper over the surface.229 The artist forms a line drawing on the top of the paper; the pressure of the drawing implement picks up ink, creating a reversed image on the page.230 Mistakes cannot be erased, lending a stylistic roughness and immediacy to this work that matches the substance of Emin’s art.231 As with handwriting and signature in Strangeland, monoprinting’s direct relationship between the hand and the work adds to the reader’s sense of Family Suite’s unvarnished truth.

Chris stars in Family Suite. In these prints, Emin weaves her exploitation into ordinary domestic scenes. The first two images in the Suite, for example, are Mum Smoking, and a tie-wearing, briefcase-toting Dad. However, the third image entitled No Sleep is unquestionably disturbing. It shows a female figure in a bed, her head slopping to the side as a scratched-out figure grabs at her with claw-like hands. This may be read as an incident of abuse, presumably Chris, “destroying”232 her childhood at Hotel International.

The sixth and seventh drawings are titled Sex Man and Sex Man II. Both of these images show a naked man, the first with his head cropped off so that all the emphasis is on his erect penis. Sex Man II reveals a man laid out on a bedlike surface, resting on his elbow and staring out at the viewer. The image directly after Sex Man II is titled Mother and shows a scratchy Madonna figure bent over and playing with what appears to be a girl child. In context, No Sleep,

228. Randy V. Sabett, International Harmonization in Electronic Commerce and Electronic Data Interchange: A Proposed First Step Toward Signing on the Digital Dotted Line, 46 AM. U. L. REV. 511, 523 (1996) (“Handwritten signatures traditionally have served several legal purposes. For example, a written signature can be used as evidence, as a ceremonial function, as a designation of approval, and as a determination of authenticity.”).

229. See BROWN, supra note 221, at 16 (detailing the process of making a monoprint).

230. Id.

231. See id. (“Exclusion and not fitting in, difficulty, emotional pain and suffering, rank highly among the many themes of Emin’s work, their most spontaneous expression being seen in her monoprints, a large and important body of her work…these works [are] analogous to the unhearsed, firsthand accounts of someone reporting a catastrophic or shocking event—the denial, anger, fear, relief and confusion of a survivor.”).

and *Sex Man I* and *II* leave the impression that these drawings visually illustrate the crime Emin narrated in *Strangeland*.

Later drawings in *Family Suite* verify that *Suite* is Emin’s own testimony of her childhood abuse. *Big Dick, Small Girl* shows a long-haired child hanging off a huge phallus, as if off a ledge. *Night Death* depicts a female in a coffin or bed, with her eyes blacked out. A figure stands above her, brandishing another huge phallus.

Emin’s testimony of her sexual victimization continues with “Motherland,” an essay in *Strangeland*, and *Exploration of the Soul*, which is a text-based art work as well as a limited-edition book, made in 1994.

“In “Motherland,” Emin sets the scene: At eleven fifteen on New Year’s Eve, she left the Top Spot disco and walked along the seafront. Before the following passage, Emin takes care to name her attacker, a boy named “Steve Worrell”:

He pulled my skirt up. I began to worry. Everyone knew he had broken into girls before and I didn’t want it to happen to me. I said, “No, get off, please.”

He pulled me down the alley and pushed me to the ground. As I lay on my back worrying about my new blue coat, he pushed his fingers up between my legs—and rammed himself into me.

I was crying. His lips were pressed against mine but I was motionless, like a small corpse. He grunted and I knew it was over. He got up, I just lay there on the ground, my tights round my ankles. The clock was striking twelve.

As he walked away, he turned and said, “I’ve always wanted to do it to you. I like your mouth.”

In *Exploration of the Soul*, Emin focuses on the aftermath of her assault. *Exploration* is a multimedia form of text-art consisting of a series of handwritten pages and two photographs. Each of the handwritten pages is framed separately. As in the case of Emin’s use of handwriting in

233. See discussion of *Strangeland*, supra text accompanying notes 226–28. For another accusation, see *Weird Sex*, in *Tracey Emin Works 1963–2006*, at 153 (Honey Laurd ed., 2002) (“I’m going to get you, you Cunt / You Bastard / And when I do, the Whole World Will / Know, That you destroyed my childhood.”) [hereinafter *Tracey Emin Works*]. For an image of *Sex Man II*, see Appendix, Figure 1.

234. *Family Suite* can be seen in *Tracey Emin 20 Years*, supra note 196, at Section 7. *Big Dick, Small Girl* and *Night Death* are included in the suite.

235. See *Brown*, supra note 221, at 60.

236. *Id.* at 60–61.

237. *Id.* at 23–24.
“Motherland,” Emin’s deployment of hand ductus238 here impresses on the reader the raw truth of the witness’s testimony:

I just lay there - on the ground - my tights around my ankles [. . .] I went home and told Mum
I’M NOT A VIRGIN -
But it seemed like she already knew-
she didn’t call the police or make a fuss -
She just gently washed the stains and dirt
out of my coat - and every thing
carried on as ever - as though nothing had happened at all.239

Emin never forgot this event, frequently returning to it in her art. An equally disturbing testament about this crime appears in her 2002 embroidered blanket, Pure Evil.240 This textile reveals two indistinct figures—one with a penis—grappling. The figures are rendered in black embroidery against a beige and taupe cloth background. Beneath the image Emin embroiders in red thread:

“You fucked my mouth—smashed / my head against the wall / I was 13—And you were Nothing / BUT PURE EVIL.”241 Emin embroiders the text in Pure Evil in the same rude handwriting style that signals greater authenticity, and her imagery is sketchy and hastily done, like notes taken directly after an incident. Like the best evidence, this style speaks of a first impression of a recent event.

Emin gives a more matter-of-fact deposition of her rape in Tracey Emin CV: Cunt Vernacular, a video work based on the idea of a curriculum vitae. In this work, Emin presents a taped recitation of the highlights and lowlights of her life, describing her conception, falling in love for the first time, and how she was “raped down an alley”242 in 1977. Emin states that after this rape, she “[s]pent six months avoiding men at all cost. Breasts grew, pubic hair became thicker, period started, hair underneath my arms sprouted.”243 The images shown during this recital are of her apartment.244 As curator Elizabeth Manchester observes:

In contrast to Emin’s emotionally-charged words, the view of her living quarters offered in the video is surprisingly ordinary. Piles of

238. Hand ductus is another, more technical word for handwriting. See ROSEMARY SASSOON, THE ART AND SCIENCE OF HANDWRITING 39 (1993) (“Handwriting is a combination of the visible trace of a hand movement while the pen is on the paper and the invisible trace of the movements when the pen is not in contact with the paper. Together this is called the ductus of writing, a paleographic term.”).
239. BROWN, supra note 221, at 67.
240. Tracey Emin Works, supra note 233, at 15.
241. Id.
242. Id. at 147.
243. Id. at 146.
244. Id. at 147.
post, papers and other detritus such as clothes have an anonymous feel. Bills in foreign currency and half-unpacked suitcases indicate travel. Pots of undeveloped films could be snapshots or professional material. The mess covering this apartment suggests an inhabitant who has recently been too busy (or lazy) to pick up her compact discs and put them back in their cases, hang up her clothes or do her paperwork. Looking around Emin’s flat is redeemed from feeling voyeuristic by the rawness of the text she narrates, which creates some strange juxtapositions.\(^\text{245}\)

In CV, as in Strangeland, Family Suite, and Pure Evil, Emin swears to the truth of her accusation in her choice of medium. Strangeland and Pure Evil look handwritten. In Family Suite, as noted, she uses monoprinting to lend the impression of an immediate, “unrehearsed, firsthand account[].”\(^\text{246}\) In CV, Emin bases her work on a curriculum vitae, which is traditionally a listing of verifiable life events and accompanied her resume with deposition-like footage of her everyday life, indicating that she wants the viewer to know that these things really occurred.

b. The Defendant’s Perspective and Confessions: Beautiful Child and Fuck Off and Die You Slag

Emin’s next act of worldbuilding consists of conjuring the defendant. In her work, the offender sometimes appears as Steve Worrell, sometimes as Chris, and sometimes is enlarged to cover the unfeeling society whirling around her. In some pieces these criminals confess to their offenses (be it rape or child abuse or hate or neglect), and in others they make self-incriminating statements. The international community viewing Emin’s art becomes the jury. Such viewers can write off these statements as evidence of Emin’s damaged lack of discipline,\(^\text{247}\) or grow infuriated at this evidence of crime.

The most blatant defendant disclosures appear in Strangeland, the monoprint Beautiful Child,\(^\text{248}\) and the neon piece Fuck Off and Die You Slag.\(^\text{249}\) In Strangeland, Emin telegraphs Steve Worrell’s comment after her rape: “I’ve always wanted to do it to you. I like your mouth.”\(^\text{250}\) Then, in Beautiful Child, we can hear the title’s words uttered by Emin’s abuser (Sex Man, that is, Chris, we imagine) as he molested her.\(^\text{251}\) The image, which contains no text, is of a


\(^{246}\) See BROWN, supra note 221, at 16.

\(^{247}\) See DOYLE, supra note 225.

\(^{248}\) BROWN, supra note 221, at 28.

\(^{249}\) TRACEY EMIN WORKS, supra note 233, at 29.

\(^{250}\) See STRANDELAND, supra note 201, at 24.

\(^{251}\) BROWN, supra note 221, at 28.
girl child, without breasts and with a line or blindfold over her eyes. She stands on a square; at her feet is a huge penis, erect and pointing up toward her. As in the case of Family Suite, the monoprinting and its rough style serve to aid authenticity. The method of making the work and its sketchy appearance do not speak of artifice but rather immediacy and raw honesty.

The neon piece Fuck Off and Die You Slag, crafted in bright orange, pink, and blue, also speaks from an offender’s point of view. While Emin built the work out of neon tubing, she renders the words in the style of handwriting, conveying the same impressions of directness, fresh report, and candor. The tone of Slag seems to be directed against Emin, as the word is a misogynist slur in Britain. Moreover, the piece depicts Emin as older than the ten-year-old who is the subject of molestation in Beautiful Child, since “slag” connotes an adult, sexually promiscuous woman. Who is the offender making this party admission, and what does it convey? Perhaps it is Steve Worrell, who continues to degrade Emin and thereby inculpate himself. But an equally valid reading regards Emin as expanding the offender beyond Steve and Chris and into the larger Margate society.

To understand that Slag incriminates more people than Steve and Chris, we must consider what Emin suffered after Steve Worrell raped her. Emin’s video Why I Never Became a Dancer provides context. Here, Emin tells the story of her 1978 attempt to return to Top Spot (the site of her rape) to dance in a competition. Having gone through the restorative period of “shagging years” as a response to her rape, she developed a bad name in town. This reputation manifested at the Top Spot disco contest, when she was hounded off the floor during her dance routine. The men at the club, most of whom she had slept with and were “less than human,” screamed “slag” at her. She fled, humiliated.

252. Id.
253. Id.
254. TRACEY EMIN WORKS, supra note 233, at 29.
255. Id.
257. The federal rule on party admissions “allows a party’s adversary to introduce into evidence over a hearsay objection both the party’s own words and statements attributable to the party.” Ann Bowen Poulin, Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?, 87 MINN. L. REV. 401, 405 (2002).
258. BROWN, supra note 221, at 78 (containing transcript).
259. See TRACEY EMIN WORKS, supra note 233, at 19.
260. Id. In another work, Why I Never Became a Dancer, BROWN, supra note 221, at 78, Emin describes the “shagging years” she entered after the age of thirteen. She says she began having sex with men around Margate to verify her status as “an innocent” engaging in a “wild escape.” Id. at 79.
261. BROWN, supra note 221, at 78 (containing transcript).
Dancer reveals that the Margate community failed to help Emin vindicate her rape as she grew older and more articulate about what had happened to her. After Steve raped her, the community wrote her off as damaged goods, isolating, insulting, and preying upon her. *Fuck Off and Die You Slag*, when located next to *Dancer*, directly incriminates Margate, proving that the community abused and disenfranchised her.

Emin’s art delivers confessions from her abusers, scornful lovers, and neighbors. Her attackers, her family (in the entire context of *Family Suite*), and her community become the defendants making overly revealing admissions on the stand. As such, *Beautiful Child* and, most particularly, *Fuck Off and Die You Slag* insinuate that Emin’s offenders were not limited to Stephen Worrell and Chris. Emin offers this evidence to the jury of the world. Moreover, further study of Emin’s art deepens the impression that Emin accuses larger society of committing offenses against her.

c. The Prosecutor: *Strangeland*, *Why I Never Became a Dancer*, and *The Last Thing I Said to You Was Don’t Leave Me Here*

Emin continues developing an imaginary court by standing in as a prosecutor. In certain pieces, she not only presents evidence of her abuses, but also indicts those who victimized her. One of her most powerful acts in her art is to name these men specifically in *Strangeland* and her video, *Why I Never Became a Dancer*. In *Strangeland*, as noted above, Emin names her mother’s lover, Chris, who abused her by “press[ing]” “his hard, erect penis” against the “small of [her] back” and “rubbing his hands across [her] chest” when she “was only ten.” In *Strangeland*, too, she indicts the man who raped her at the age of thirteen, “Steve Worrell.” And in the aforementioned *Why I Never Became a Dancer*, she names her former, “less than human” lovers who shouted her off the dance floor with the epithet “slag,” saying “Shane, Eddy, Tony, Doug, Richard—this one’s for you.” Though she does not provide these men’s last names, it is quite possible that this naming would have some local impact in Margate. *Dancer*, along with the Chris and Steve stories in *Strangeland*, plainly reveals her role as a prosecutor giving evidence, making charges, and asking the audience to judge them.

262. *Id.* at 79 (“SLAG SLAG SLAG / a gang of blokes, most of whom I’d had sex with / . . . Were chanting.”).
263. *Id.*
265. See id. at 23–24.
266. See *Brown*, supra note 221, at 78–79 (describing her shagging years when she had sex with men who were “less than human” and explaining how Emin reencountered these “blokes” at Top Spot during her dancing competition, and they shouted “slag” at her).
267. *Id.*
The Last Thing I Said to You Was Don’t Leave Me Here also shows Emin levying an accusation, although the person she is accusing and judging is less clear. The work is an Epson print photograph.268 In it, Emin is nude, with her back to a corner; the walls she faces are made of scabby, whitewashed wood boards; she squats on an unclean wood floor.269 Her prosecutorial accusation is—*you left me here like this, corralled and stripped bare. She is abject, lonely, empty, desolate, and defenseless. Her work reacts not only to her abusers but also to her family and those in her community and government who would not help her when she was being hurt.*270

d. The Jury: MAD Tracey from Margate and Remembering 1963 (The New Black)

Emin renders her imaginary court complete with juries who sometimes find for her and sometimes against her. In *Beautiful Child* and *Slag*, the art audience constitutes the possibly sympathetic gallery who will determine guilt and innocence. But in other works, Emin admits the jeering voices of the Margate community who judged her an unconvincing child victim who later became a “slag,” and so was always beyond real-world, official protection. In so doing, Emin reveals the injustices that compelled her to conduct these fantasy trials in the first place.

For instance, in the monoprint *MAD Tracey from Margate*,271 Emin speaks in the voices of the disbelieving Margate community. This particular assembled body would prevent her from winning the trial whose outcome seemed more certain after *Beautiful Child, Strangeland*, and *Fuck Off and Die You Slag*. In *MAD Tracey*, Emin shows herself as the Margate community sees her. She depicts a clock tower, a road, and what may be a seaside carnival; the central feature of the fair is a Ferris wheel, and at the bottom of the image is scrawled *MAD TRACEY / FROM MARGATE / EVERY BODIZE BEEN THERE*.272 Thus, Emin’s fellow Margatians view her as a well-ridden fun fair, who cannot be raped, because “everybody’s already been there.”

Seen alongside this work, Emin’s appliqué blanket *Remembering 1963 (The New Black)*273 offers up racist reasons for the jury’s bias against her. *Remembering 1963* evokes the prejudice that Emin and her brother and Cashin experienced in Margate as, respectively, mixed-race children and the lover of a
Turkish man.\textsuperscript{274} There was at least one incident, which Emin recounted in interviews,\textsuperscript{275} where Cashin was spat at and called a racial epithet. Emin quotes this slur in \textit{Remembering 1963}. Other quotes appear in the work, such as “Oh what lovely little mulatto babies,” and the children’s questions to their mother: “Mummy we asked what is a WOG?”\textsuperscript{276} Though it is not clear from Emin’s interview whether Emin actually saw neighbors abusing Cashin, or even had been born when Cashin was spat upon,\textsuperscript{277} Emin’s art accuses the racist Margate body of isolating Emin and her family. When read along with \textit{MAD Tracey} and other works like \textit{Slag}, the art-viewing jury (sitting in judgment of the jury of Margate) begins to doubt the Margate verdict. They harbor deep dread that Emin’s 1960s–1970s Margate jury of her peers classified her as the unrapeable Mad Tracey and a slag because she was a defenseless racial minority daughter of an outsider mother.

2. The Trial of Tracey Emin Herself

\textit{a. The Prosecutor:} Super Drunk Bitch, As Always, Drunk Cow, Sexy Stupid Fuckhead, and Always Glad to See You

In Emin’s alternative world, she allows a countersuit in her supreme court. But what is she charging herself with? A review of her quilts and embroideries \textit{Super Drunk Bitch, As Always,} and \textit{Drunk Cow,} the monoprint \textit{Sexy Stupid Fuckhead} and the pamphlet \textit{Always Glad to See You,} reveals that Emin accuses herself of disorderliness, alcoholism, repulsiveness, stupidity, and possibly also indicts herself for her two abortions. In these works, we can discern the self-blame much discussed by the courts and legal experts.\textsuperscript{278} And yet this shame bears little resemblance to the one so simply described in \textit{R v. JD} and the U.S. decisions.

Although Emin indicts herself as an abject loser in some of her work, she reserves her most damning accusation for her fellow Margatians, who not only abandoned her but also taught her to hate herself. \textit{Super Drunk Bitch} is a

\begin{footnotes}
\footnotetext{274}{See supra text accompanying notes 197. For an image of \textit{Remembering 1963 (The New Black)}, see Appendix, Figure 4.}
\footnotetext{276}{The answer given in \textit{Remembering 1963} is “Western oriental Gentleman.” \textit{TRACEY EMIN WORKS, supra} note 233, at 75.
\footnotetext{277}{See Jeffries, supra note 275 (noting that Cashin was accosted by a racist neighbor “in the 60s”).
\footnotetext{278}{See, e.g., \textit{State v. Kinney}, 762 A.2d 833, 842 (Vt. 2000); \textit{R v. JD}, [2008] EWCA (Crim) 2557, [9]–[13] (Eng.); see also supra note 62 (list of cases invoking shame).}
\end{footnotes}
stitched blanket, mostly done in white-on-white appliqué and embroidery executed in the same outsider style as the other fabric pieces. Here, Emin speaks in her own, self-abnegating voice as well as the voices of those who have rejected her. First, Emin accuses herself of being a “STUPID SUPER DRUNK BITCH” who “RUINED EVERYTHING / AGAIN AND AGAIN.” Then, from her voice, she complains, “MY NAME IS WALKING HELL” resolves to “GIVE UP CRYING” and orders someone to “LEAVE ME ALONE.” While Emin is trying to get out of the horrible situation—which is never specified; it could be her rapes, her unsuccessful relationships, her abortions—she quotes the chorus of people who have simultaneously abused her and rejected her: “SO WHATS YOUR NAME LITTLE GIRL”; “IS THAT WHY YOU HAVE NO FRIENDS”; “SHE HAS TO GO HOME / GET HER OUT.” The work flickers between these perspectives—giving the impression of a maddening stridor of rejection and self-hatred—but also indicates that Emin’s self-abuse is undifferentiated from that of her abusers. It may be that both she and those who hurt her agree that she is a “drunk” and “ruined” “bitch.” Yet from the entire body of her work, it seems evident that Emin’s enemies taught her to regard herself in just that light.

From this perspective, Emin’s works As Always and Drunk Cow demonstrate the artist’s absorption of Margate’s grim lessons. Both consist of white-on-white embroideries on cloth. As Always contains only text, which repeats the word “Sorry,” six times, once scratched out. It also presents the coda, “BELIEVE ME I AM AS ALWAYS.” While As Always conveys the voice of the artist, Drunk Cow again reveals Emin traveling between the perspective of her abuser and herself. It shows a scrawled image of a figure in a fetal position, over which float the words Stupid Drunk Cow / Drunk Stupid Bitch. Another work, the monoprint Sexy Stupid Fuckhead, adds to the weight of this ambiguous, perspective-shifting self-hatred. The monoprint contains no text, showing only the figure of a female nude with her head scratched out in violent, crosshatched strokes.

In these pieces, Emin accuses herself of being unlovable, reckless, and worthless. With these accusations, she also engages in self-flagellation. The voices of her abusers have invaded her and at some points fuse with her own,

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279. Tracey Emin 20 Years, supra note 196, plate 53. For an image of Super Drunk Bitch, see Appendix, Figure 2.
280. Id.
281. Id.
282. Id.
283. Tracey Emin Works, supra note 233, at 262–63.
284. Id.
285. Id. at 263.
286. Id. at 267.
287. Id.
speaking of her crimes at the same time that she appears to be punishing herself for them.

b. Self-Defense: Strangeland, Fantastic to Feel Beautiful Again, and My Cunt Is Wet with Fear

In her self-built judiciary, Emin is not only her own prosecution; she is her own defense counsel. She aptly rebuts the charges that she is from “hell,” sexually abject, predated upon, and helpless. She does so by declaring her own ability to consent to problematic sex, her experiences of sexual pleasures, and her artistic supremacy.

In “Motherland,” the essay in Strangeland, Emin describes an abusive seaside encounter with “some other kids” and a strange man who molested her when she “wasn’t yet twelve.” Strikingly, Emin refuses to offer this event as merely another in a series of degradations, but rather presents it as an incident that proves her own early ability to counteract atrocity with self-possession, pride in her femininity, and rebellious humor:

Some other kids were playing close by. They had a giant rubber ring . . . . And then, to my amazement, they beckoned me over. Me, I thought. They’re calling me!

I splashed my way over to them . . . . And as I hoisted myself out of the water and up on to the rubber ring, one of them said, “See? I told you she was a boy.”

“Are you a boy or a girl?” one of the other kids said.

“A girl,” I said. “I’m a girl.”

There were about six of them. They pushed me through the centre of the ring and bundled on top of me. Below the water, I could hear them chanting, “Boy, boy, boy, boy.”

[Later,] [i]n tears, I pulled myself along the now empty beach, my feet dragging through the sand. A voice said, “What’s wrong, little girl?”

It came from a big, brown hairy man. . . . He told me I was beautiful. He gently covered the whole of my body with tiny golden grains of sand. And in the water, he ran his hands all over me. He said I was like a tiny mermaid, and, for me, he was like a giant bear. And I pulled at his willy until a giant spray of white covered my limbs.

I wasn’t yet twelve, but I knew it could feel lovely to be a girl.

Was it really that lovely? Are we to read this essay as Emin’s admission that she was not abused at all? Perhaps. But in the context of her other work,

288. Id. at 398 (Super Drunk Bitch).
289. STRANGE LAND, supra note 201, at 21.
290. Id. at 20–21.
Emin’s storytelling also testifies that even at this young age—or, at least, in her adult hindsight—she was able to resist status as a victim by discerning the affirming parts of that abuse.

Likewise, in 1997’s *Fantastic to Feel Beautiful Again*,291 in which she sketched the title’s statement out of pale blue neon, Emin affirms her ability to come out of her mire of self-doubt and pain. A year after making *Fantastic*, she moved from describing her ascendance from despair to explaining her capacity to flourish in ambivalence, which may be seen as an embrace of the world in which she lives. This is the message of 1998’s similarly eponymous, glowing white neon *My Cunt Is Wet with Fear*,292 a startling, vulgar, and exciting “handwritten” work depicting her rebellious sexuality that may still thrive in the face of difficult and even terrifying emotions.293

Just as Emin’s self-prosecution is ambiguous, wavering between her own perspectives and the perspective of her abusers, Emin’s self-defense can also crosshatch with contradictory elements. This effect appears in the now-famous photograph, *I’ve Got It All*,294 which depicts Emin sitting on the floor, wearing a patterned dress, with her legs spread wide.295 She is busy at work either scooping up a mound of pound coins and bills into her vagina or catching them as they spill out, jackpot style: the effect is to communicate either that her sex is a commodity, or that she has goods and values flowing freely from her body, or both. Similarly, *Tracey Fucking Emin*,296 a photography print of Emin’s self-portrait, with the title scrawled at the bottom, depicts Emin open mouthed, her flashing hair obscuring her eyes, as she dances either in a drunken, disorganized daze that signals her own danger or in an orgy of furious, powerful self-congratulation. The work exists both as a complaint about Emin’s antics and as a strong affirmation of her existence.

This complex reply, in the end, wins the day. The depiction of her self-indictments is rendered in white-on-white, while many of her self-celebrations strike the observer with their vivid hues. This color scheme offers a clue that her retreats into self-condemnation are lackluster, anemic episodes that do not hold up to the vibrancy of her self-defense.

c. A Reading of Tracey Emin’s Trials

If all of these readings together—the self-condemnation and affirmation, the self-abuse and self-protection, the contradictory ventriloquisms—seem

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291. *Id.* at 342.
292. *Id.* at 205. For an image of *My Cunt Is Wet with Fear*, see Appendix, Figure 5.
295. *Id.*
296. BROWN, *supra* note 221, at 71.
jumbled and incoherent, it is only because Emin’s work is misunderstood. As noted above, Emin speaks in multiple voices because she responds to many people, not only her abusers. One may read this manifold reaction as a series of trials that she conducts in a self-made world. She offers evidence. She also prosecute, defends, convicts, and sentences her molesters, her hapless mother, and the society that stood by and let her rape and its aftermath happen. She additionally prosecutes, punishes, and defends herself.

As to the trial of herself, Emin engages in a complex, perspective-shifting self-abuse in her work possibly out of genuine shame, but more importantly to reflect and critique the loathing that she reads from the silence, inaction, and lack of feeling that society exhibited in reaction to her rape. Emin prosecutes her abusers for the same reasons that this layered self-criticism blossomed in the first place. She administers these trials because her mother, Cashin, did not report her attack, perhaps because Cashin believed that their class, her daughter’s race, and Emin’s previous experiences with sex abuse would provoke only apathy from the community.

Part III’s review of the administration of rape cases in the United States and England provides ample grounds for suspecting that Cashin committed this omission because she did not believe that the state would do anything about her daughter’s assault. If Cashin were even a minimally savvy reader of the legal landscape, she would have harbored this skepticism about the state’s willingness to prosecute rape cases. In other words, Emin prosecutes and defends in acts of imaginary justice because the state did not, and would not, and someone had to.

Thus, Emin’s worldbuilding creates courts that critique the real justice system. This is a far grander and more instructive enterprise than the covering silence that court descriptions of shame evoke. The next questions, for the purposes of addressing the needs of the wider community of rape victims, are how these revelations influence our reading of the RTS cases, whether women other than Emin also engage in imaginary trials, and, if they do, what do women’s critical worldbuilding efforts mean for real justice?

V.
THE CRITICAL WORLDBUILDING OF RAPE VICTIMS AND ITS RELEVANCE TO LEGAL REFORM

Emin’s work signals rape victims’ disaffection with the state and performs two key services to those studying the legal treatment of rape. First, it shows how victims distrust the state. In the initial Section of this Part, I reconsider the RTS cases in light of Emin’s art and explain how Emin’s eloquent resentment encourages a rereading of victim recalcitrance as shrewd, sophisticated expressions of skepticism rather than symptoms of pathology.
Second, Emin’s worldbuilding response to state neglect prompts us to understand victims’ silences as productive spaces, rather than impotent and anarchic fugues. Emin reacts to state neglect through the creation of imaginary justice systems complete with testimony, evidence, and judgment. In the next Section of this Part, I show how Emin’s worldbuilding opens our eyes to how other rape victims’ “counterintuitive” behaviors may be read as retreats into their own detailed, changeling justice systems. I demonstrate this by a new reading of the available literature on rape victims and their stories. These narratives, analyzed in light of Emin’s disclosures, convey how many rape victims conduct their own private rape trials, which they perform in their minds and also on their bodies.

This creative response not only gives rape victims avenues to critique the state, but also provides models for legal and constitutional reforms. Looking inside these worlds in the third Section of this Part, I find basic fixes that need to take place among the police, medical responders, prosecutors, public health/law enforcement outreach agents, and the judiciary. This worldbuilding also reveals a deep schism between women and the state. As I will show in the fourth Section of this Part, this abyss between women and the justice system should create equal protection claims in the United States (though it probably does not) and does support human rights actions in England.

A. How Emin’s Work Explains “Counterintuitive” Behaviors

Prosecutors submitting RTS evidence in trials seek to explain counterintuitive conduct, and through this prism, courts translate the motives behind late reporting as shame and fear. Victim stoicism or lack of vigilance is characterized as a side effect of trauma that destroys the victim’s ability to express her feelings in an appropriate way. Moreover, victim return has not been adequately explained by the courts or experts, except to say that it does happen. Tracey Emin’s work, together with the previously cited legal authority, sheds different light on these features of rape trauma syndrome.

While sometimes victim silence (that is, lack of reporting and emotional “flatness”) may indeed result from a victim’s shock, terror, and perhaps the shame detailed by Dr. Mason and the courts, Emin’s artifacts and the RTS cases encourage a reading of victim behaviors as expressions of distrust of the state. Specifically, victims who do not conform to the “real rape victim” standard often exhibit RTS symptoms. It is these victims who have the most cause to regard the state with suspicion, since they know that their claims of sexual violation will likely not be believed.

297. See State v. Kinney, 762 A.2d 833, 840 (Vt. 2000); R v. JD, [2008] EWCA (Crim) 2557, [9]–[13] (Eng.); see also supra note 62 (list of cases invoking shame); supra Mason discussion at notes 47–48.
The “real rape victim” standard borrows from Susan Estrich’s famous delineation of “real rape,” that is, violent and armed stranger rape of an often racially privileged, sexually inexperienced victim, whose attack is more likely to be taken seriously by authorities. A “real rape victim” is an innocent who is raped in this way and who reacts with certain “intuitive” behaviors, such as extreme and candid grief, instant and copious reporting, and emotional vigilance: the last of which is usually expected to take a form such as avoiding the site of the rape. Thus, the index of victim reactions that is now constructed as RTS can be understood as occurring in two stages. The first is the context of the rape itself, which then influences the second stage, the victim’s response to that rape.

Both Emin’s art and the cases shed light on how rape victims who do not qualify as “real rape victims” are likely to exhibit certain behaviors in the second stage. These behaviors will be deemed counterintuitive and shameful but may more appropriately be interpreted as the complicated reaction of a woman who suspects that she will not be believed when she makes her complaint— particularly when attrition rates are high to begin with.

Emin conforms in some respects to the “perfect” rape victim, as she was a child and a virgin when she was raped at the age of thirteen. However, she also deviates from this profile by virtue of her mixed ethnicity and nontraditional family. Her mother was alienated from the Margate community because she had a love affair with a married Turkish man and had two biracial children out of wedlock. Emin, as we know from her interviews and Remembering 1963, was a product of that union. This was one strike against her: the “real rape victim” construct excludes women of color from credibility, as Estrich herself has noted. Moreover, Emin’s status as a racial outcast compounded with her previous molestations and solo late-night outing on the evening of her rape. All of these factors, which she details in Strangeland, Exploration of the Soul, and

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298. See generally Estrich, supra note 29.

299. Stefan, supra note 11, at 1304 (“The wariness and fear of women who have been raped is described with words like ‘hypervigilance’ and ‘exaggerated startle response.’”).

300. See Henson v. State, 535 N.E.2d 1189, 1192 (Ind. 1989) (using rape trauma syndrome to discredit a victim who returned to the scene of her rape on the same evening; her behavior was deemed inconsistent with that of a person who had suffered a traumatic rape.).

301. See Rape and Attrition, supra note 12, at 572–73 (“Why, on average, do 86 percent of victims not report rape and sexual assault to the police? The reasons given by victims . . . are . . . not thinking that others will view it as rape; fearing that others will disbelieve or blame her . . . fearing or distrusting the police and court processes; [and] fearing threats or further attacks by the offender or his family and friends.”) (citation omitted).

302. We can see this history in Emin’s autobiographical materials, where she recounts her mother being spat on and cursed with racist epithets. Emin’s appliqué blanket Remembering 1963, with its damning quotes, also tells this tale. See supra text accompanying notes 275–76.

303. Estrich, supra note 29, at 1130; see also Harris, supra note 29.
Cunt Vernacular, made her an unbelievable or worthless rape victim to the police.

Similarly, most of the women at the heart of the non- or late-reporting RTS cases do not conform to “real rape” victimhood because they took drugs or drank, flirted with the defendant, went to a remote location to meet the defendant, or had a previous relationship with him. In light of the high rates of rape attrition, fear of heartless police interrogations or medical exams, and neglected rape testing kits, women who are not considered “real rape” victims may have good reasons to refrain from reporting, delay reporting, lie about who raped them, or ask their rapists not to tell anyone about their assaults. At the very least, we see why they may brood about this decision for some time. These silent victims—along with women who do conform to “real rape victim” stereotypes—may also simultaneously exhibit other postrape reactions that society does not expect, such as contradictory emotions, almost self-loathing, stoicism, and lack of vigilance.

Just as the RTS cases do not account well for victim silence, they also confusingly recite emotional flatness and lack of vigilance as aspects of trauma pathology. Emin gives a fuller account of these states, revealing their footing in a form of skepticism that encourages emotional withdrawal and self-help. With respect to stoicism, Emin’s Strangeland conveys a kind of mocking “flatness” when she interprets her experience with the “hairy man” at the beach as “lovely”; she portrays lack of affect as well when she bluntly conveys the details of her rape in Cunt Vernacular. In these works stoicism emerges as a coping technique as well as an expression of Emin’s character, which is sometimes bitterly funny. Though she has been sexually victimized, she has not shorn herself of her individual outlook or gallows humor.

304. In State v. Kinney, the victim took drugs with the defendant, giggled when he dragged her out of the house, and fell asleep in his bed after he raped her. She delayed reporting the crime. See supra text accompanying notes 57–61. In People v. Taylor, while the victim was raped at gunpoint, the defendant was well known to her; he had tricked her into meeting him in a remote beachside location. She also delayed reporting the incident. See supra text accompanying notes 64–65. In Stevenson v. State, another late reporting case, the victim spent the evening consuming drugs and alcohol with her rapist, who was also her coworker. See supra text accompanying note 67. And in Lessard v. State, the married victim had consumed intoxicants with the defendant, played parlor games with him, and loaned him money. She asked the defendant not to say anything. See supra text accompanying notes 68–70. In JD, the landmark British case on late reporting and RTS, the victim had known the defendant for about five years and had lived with him for a “significant proportion of that time.” See supra text accompanying notes 91–94.

305. See, e.g., Antonia Hoyle, We Kept Our Rapes Secret, DAILY MAIL (Mar. 28, 2012, 5:44 PM), http://www.dailymail.co.uk/femail/article-2121849/We-kept-rapes-secret-One-attacked-date-Another-husband-A-family-friend-Not-felt-talk-police-Here-finally-speak-out.html. This article gives an account of several women who were raped and never spoke about it. One woman, Becky John, was a fifteen-year-old virgin who had agreed to sleep in a separate room in a nineteen-year-old boy’s flat for fun. He raped her, and she felt as if it were “her fault.”
Once we understand Emin’s occasional lack of affect as a gesture of skeptical self-protection, we can understand the behavior of the women in the RTS cases. These rape victims react with complex *sang froid* that can be interpreted as critiques of the state rather than symptoms of illness. Emotional “flatness,” for example, can be discerned as victim resistance to the “second assault.” In *State v. Robinson*, the victim who was raped by a former lover and appeared “uncommunicative” at the hospital may have been so frightened she could not speak—but another reading may be that she distrusted hospital workers to treat her with the tenderness and sensitivity that she needed, particularly in light of the fact that this was not a stranger rape case. And in *Hilburn*, the “native woman” victim may not have appeared “hysterical” because she was trying to defend herself against the white establishment.

Emin and some of the women in the RTS cases also share a lack of vigilance that coheres with their independent ideas of justice. Seemingly reckless acts like returning to the site of a rape can be attempts to achieve a personal sense of redemption. According to Emin’s telling in *Why I Never Became a Dancer*, her experience being “fuck[ed]” by men who were “less than human” gives her the loser’s license to reconquer the site of her rape—the best club in town, Top Spot—on her own terms. She depicts herself attempting to retake the field by participating in the disco championship. Alas, this effort fails.

Similarly, the women in the RTS cases also try to recapture their castles (that is, the site that the enemy has occupied by raping the victim) through self-help gestures that convey their qualms about state assistance. This can be seen, for instance, in the civil case *Terrio v. McDonough*, which has proven influential in criminal cases. There, the victim had previously been involved with the defendant and had purchased him liquor that evening. She drank it with him in his room, and then he raped her. Afterwards, she fled but later returned to retrieve her belongings. The plaintiff’s expert testified, confusingly, and apparently without further comment, that “it [was] ‘not necessarily’ [a] remarkable for a rape victim to return to the scene with her attacker or to feel safe in his company after the event.” As Emin teaches us, there is a more coherent explanation for victim return. In the case of *Terrio*, the victim’s return to the scene of her rape to retrieve her bag appears to be a pragmatic decision not to get raped and robbed, too—because if no one is going to believe her story, she’d better buck society’s expectations and just get her things herself.

Beyond explaining “counterintuitive” behaviors, Emin’s art also confides another complicated, and indeed productive emotion that emanates from her

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307. *See supra* text accompanying note 74.
309. *Id.* at 198.
distrust. In opinions like *R v. JD* and *Kinney*, courts and experts usually describe this feeling as shame, a designation that I have shown has erotic meanings. But in Emin’s hands this mood resembles tangled versions of the fury, grief, or alienation from her community and government that makes her ripe for imaginary justice. What were the victims in cases like *JD* and *Kinney* doing in those periods of silence, Emin’s work prompts us to ask. Thrillingly, Emin teaches us that the word shame itself, with its connotations of irrational self-abnegation, may not adequately express a process that resembles her own critical worldbuilding. Indeed, the focus of courts and experts on shame proves so erotically enchanting that it diverts attention from what, on closer examination, emerges as a creative and productive frame of mind.

In the following Section, I first make the case that rape victims conduct imaginary justice proceedings and build worlds that prove just as intense, intricate, and full of physical evidence as Emin’s. These worlds provide guides to legal reform. Women’s private disputes provide direction for improving state responses to rape that will help alleviate female distrust. Rape victim worldbuilding also harbors constitutional significance, since it illustrates that women choose to separate from the state in favor of orchestrating detailed private trials.

**B. Other Rape Victims Also Engage in Trials and Worldbuilding**

If Emin’s worldbuilding is a response to rape, then such labors of imaginary justice should be detectable in the wider terrain of sexual assault. The RTS courts’ focus on shame masks this process, but an examination of the literature on rape reveals that victims imagine justice and build worlds that present themselves in all the fullness of Emin’s art. Emin manufactures copious physical evidence through her embroideries, handwritings, and videos, which convey the multiple voices of witnesses, prosecutors, defendants, and juries. Rape victims in interviews and studies reveal that they also create physical records of what happened to them and imaginatively house the voices of prosecutors, defense counsels, and witnesses.

Rape victims make and submit evidence of the crimes they endured to “prove that they are not invisible.” However, this evidence is not the evidence traditionally recognized by courts, but rather is a reinvention of the self that reclaims the victim’s space and identity in the wake of sexual assault. While Emin performs this task through “authentic” handwriting, signatures, CVs, and crude monoprints, many other women leave these traces by performing mortifications on the body. Rape victims cut themselves, leaving

scars, abuse alcohol and drugs. They become anorexic. They gain weight. Suicide, of course, is the most extreme physical evidence of their rapes. Women also manifest their rapes by dressing differently. They cut their hair. Some arrange their homes in new ways, such as by hoarding, or relentlessly cleaning. These household arrangements resemble expressive


312. M ATT A T K I N S O N, R E S U R R E C T I O N A F T E R R A P E: A G U I D E T O T R A N S F O R M I N G F R O M V I C T I M T O S U R V I V O R 42 (2008) ("Some therapists would create a treatment plan that suggests the issues to be addressed in therapy are, obviously, anxiety, depression, substance abuse, and sexual assault. [But] . . . I would propose that rape, or perhaps childhood sexual abuse, is the core treatment issue, and that the rest are likely symptoms of it rather than a collection of other additional issues."); Karen Bachar & Mary Koss, Rape, in 1 ENCYCLOPEDIA OF WOMEN AND GENDER: SEX SIMILARITIES AND DIFFERENCES AND THE IMPACT OF SOCIETY ON GENDER 896 (2002) (citing studies that found that after sexual assault "the odds of both alcohol abuse and drug use were [significantly] increased, even among women with no previous use or assault history"); LINDA E. LEDRAY, RECOVERING FROM RAPE 96 (1994) ("[S]tudies show that 3 to 27 percent of rape survivors [make a suicide attempt or "gesture"]").

313. See, e.g., Susan Wagner, Eating Disorder Treatment Stories: Four Cases, in EATING DISORDERS: A REFERENCE SOURCEBOOK 107 (Raymond Lemberg & Leigh Cohn eds., 1999) ("Her body-image problems had a lot to do with the rape at age 14. Tracy did come to feel and express her reactions to that trauma 

314. V. Jill Kempthorne, Sexual Abuse and Sexual Assault of Adolescents, in FORENSIC EMERGENCY MEDICINE 145 (Jonathan S. Olshaker et al. eds., 2007) ("Adolescents with a history of sexual abuse may present with eating disorders . . . . This includes not only excess weight loss but also excess weight gain as a means of distancing themselves from the perpetrator.").

315. Mary P. Koss & Laura Boeschen, Rape Trauma Syndrome, in 3 W O M E N ' S S T U D I E S ENCYCLOPEDIA 1184 (Helen Tierney ed., 1999) (citing a study finding that almost one in five women in a community had attempted suicide); LEDRAY, supra note 312, at 96 ("[S]uicidal thoughts or attempts may be a way of expressing your most intense feelings of despair when other means of communication have been unsuccessful.").


318. R O B I N Z A S I O, T H E H O A R D E R I N Y O U: H O W T O L I V E A H A P P I E R, H E A L T H I E R, UNCLUTTERED LIFE 143 (2011) ("Joan . . . had been raped in her home by an intruder . . . we were able to identify how her hoarding behaviors were connected to the attack.").

curatorial decisions that represent these women’s sexual assaults. In cases of victim return, they attempt to retake their neighborhoods and old haunts by simultaneously erasing and reenacting their original dispossession. Instead of indicating madness or lack of care, these practices make visible exhibits of rape where other evidence may not exist or remain disregarded by authorities.320

Rape victims also describe engaging in mental practices that echo the trials that Emin dramatizes in her art. Again, these exercises remain most evident in books and blogs about rape victims, rather than the cases that focus on syndromes and shame. On searching through libraries, we find that women’s witness testimonies about rapes fill entire volumes.321 Here, they describe the details of their rapes322 and their fury.323 They speak in their rapists’ voices.324 They make prosecutorial accusations, while also interrogating and even blaming themselves.325 And they defend themselves.326

and I have lost lots of weight.”); see also id. at 519 (“I vacuum my floor on my hands and knees so I can be sure that every speck is up.”) (quoting Kelly from Australia, who, when asked to give a current profile of herself as a rape survivor, emphasizes her obsession with cleaning).

320. Regarding ubiquitous official blindness to “proof,” see, for example, Beverly J. Ross, Does Diversity in Legal Scholarship Make a Difference? A Look at the Law of Rape, 100 DICK. L. REV. 795, 817 (1996) (“A woman making an assessment, often within a few seconds and always under extreme stress, about whether physical resistance is more likely to result in escape or serious injury should be excused if she concludes that something less than utmost resistance might yield the greatest benefit. Until recently, however, courts simply did not address this issue, and many assumed that a lack of serious injury provided strong evidence of consent.”).


322. These stories abound in books and websites. See, e.g., PIERCE-BAKER, supra note 321, at 186 (“I did whatever he wanted me to do as far as I could.”) (story of Harriet); Fading Away, Personal Testimony, DANCING IN THE DARKNESS (Apr. 4, 2006), http://dancinginthedarkness.com/darkbook.php (“[H]e pinned me against the floor and took my clothes off . . . .”).

323. See, e.g., PIERCE-BAKER, supra note 321, at 48 (“It was unlike me to vent anger.”).

324. WARSHAW, supra note 317, at 16 (“He said, ‘Don’t tell me you didn’t like that.’”); id. at 128 (“He said, ‘I just want to talk to you . . . . You’re the best woman I ever met.’”); id. at 37 (“[H]e said, ‘I am sorry, Donna.’”).

325. PATRICIA WEISER EASTEAL, VOICES OF THE SURVIVORS: POWERFUL AND MOVING STORIES FROM SURVIVORS OF SEXUAL ASSAULT 73 (1994) (“The man that raped me was once jailed for a gang rape . . . . to start with I blamed myself. I realise now that I was not to blame at all, but looking back I should have reported it and regret not doing so.”); Katie Dieringer, Campus Injustice: A Story of Predatory Rape at Georgetown University, CLERY CTR. FOR SECURITY ON CAMPUS, http://www.securityoncampus.org/index.php?option=com_content&view=article&id=186&Itemid=75 (last visited Aug. 24, 2012) (“[H]e drugged me and raped me . . . . it would take months for me to fully forgive myself. I [didn’t] fight[ at all.”]; see also Hoyle, supra note 305 (“He raped me repeatedly . . . . I was so naive.”); Chandra McMillan, Rape Victims Afraid – I Am One but I Am Not Frightened, (Oct. 5, 2008), http://www.dear cupid.org/question/rape-victims-afraid--i-am-one.html (“I realised I was stupid for doing all those things BUT THEY HAD NO RIGHT.”).

326. ATKINSON, supra note 312, at 301 (telling the story of Victoria, a rape survivor, who says “I am finally accepting that I am a good person.”); Hoyle, supra note 305, at 311 (“I’m stronger now, and look to the future with hope.”); Lisa Frank, Walking in the Darkness, Then Finding the Light, in SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE 123, 126 (2008) (“After I was raped, I went through a period of self-blame, like most rape victims. . . . I am very
As an illustration of these practices, consider the testimony of a woman who published her account of her unreported rape in *Surviving the Silence: Black Women's Stories of Rape*:

He hung out with the family, and finally he asked my mom if he could take me out. And I felt comfortable with him. I just wished that she hadn’t let me go out with him. You know? But how would she know? How would I know? . . . But I remember his first and last name. After the rape I started learning how to pull things in and store them—until my head filled up, and then I would blow up at people. My anger is real bad – phenomenal.

I really didn’t have anyone to talk to; that was the hardest part . . . I just turned into another person . . . . I just kind of shut down. I was real suicidal – real, real suicidal . . . .

My mom took me to a psychiatrist. Then . . . I got mad at the psychiatrist and walked out on him. Because I felt like no one had been there before to help me through the ordeal of rape . . . I had dealt with it all those years—by myself. So I felt like I could still deal with it; I was still alive and kicking. I felt, I don’t need nobody coming here and telling me what to do and what not to do. I just really had the attitude that *I can do anything.*

Here, in one short space, the woman creates evidence of the rape through suicidal ideation. She also makes accusations (the threat implicit in “I remember his first and last name”), levies blame (on him, her psychiatrist, and all those who had not helped her), engages in self-interrogation and contemplation (“How would I know?” and “my anger is real bad”) and finally offers a self-defense (“I can do anything.”).

As this and other examples demonstrate, women’s engagement in imaginative justice conforms to our wider meanings of the word “trial.” A trial signifies both a legal procedure and a difficult experience. More work on understanding women’s endurance of such trials should be accomplished by legal scholars, historians of female culture, art historians, and psychologists. It would be fascinating, for example, to discover what new meanings of due process or fairness we can glean from these emotional and cognitive processes. For the time being, the plain fact that Emin and other rape victims engage in worldbuilding gives us two opportunities. First, we can look into their imagined
worlds to see what changes should be made in public health/law enforcement outreach and police, medical, prosecutorial, and judicial contexts to increase women’s confidence in the justice system. Second, we can identify the constitutional dilemmas that grow from the deep suspicion rape victims feel about the official justice system, which forces them to content themselves with imaginary justice.

C. How Women’s Trials Can Improve Police, Medical, Prosecutorial, Public Health/Law Enforcement, and Judicial Responses to Rape

This Essay has examined Emin’s artifacts, RTS cases, statistics on attrition, and studies on the “second assault” and argued that rape trauma syndrome really is a collection of rational behaviors that women (particularly those who do not fit the “real rape victim” stereotype) exhibit because they know that (1) investigating police may not believe them; (2) medical personnel may not believe them; (3) their rape kits may be thrown away (in the case of the United States); (4) their rapist will likely not be convicted; and (5) if they are going to continue living in their community, they need to reclaim their space on their own terms.330

Emin’s worldbuilding, along with that of other rape victims, allows us to name these suspicions. These victims’ articulate and critical forms of imaginary justice also create guidance for future legal improvements. Several reforms spring immediately to mind in light of women’s anxieties about being believed. These reforms should improve police, medical, prosecutorial, public health/law enforcement outreach and the judicial practices that cultivate women’s distrust and obscure the real meaning of their reticence.

First, the United States and England must implement better police training to eliminate the police culture of rape skepticism.331 Borrowing from Emin’s MAD Tracey from Margate and Super Drunk Bitch, we can see that when confronted with a rape victim who does not conform to stereotypes, police are likely to brush her off because “everybody’s been there,”332 and “she has to go home/get her out.”333 Other rape victims also accuse the police of disbelieving them.334 This official skepticism causes women to craft private justice in their minds.

The medical community’s efforts to resolve the problem of responders mistreating rape victims have outpaced that of law enforcement. The United

330. While the first five factors relate specifically to late reporting, nonreporting, lying to police, or asking the attacker not to say anything about the rape, this last factor relates to the phenomenon where victims return to the scenes of their attacks.
331. See supra text accompanying notes 168–70 and 184–87.
332. See supra text accompanying note 272.
333. See supra text accompanying note 282.
334. See supra notes 168–70 and 184–87 (describing reports of police disbelief).
States has established SANE training programs, which provide a model that law enforcement should adapt and apply. SANE training requires nurses to engage in ongoing education about the emotional needs of rape victims, crisis intervention, suicide risk evaluation, the role of the local rape crisis center, victims’ fears about reporting and what it means to report in the local community, the follow-up needs of the rape victim, and diversity and cultural issues.335 Similarly, English and international rape response experts emphasize the value of attending to the social and cultural needs of rape reporters with compassion.336 Police officers who fail to abide by this adapted training—say, by “play[ing] down, misclassif[y]ing or ignor[ing] [rape] complaints”337—should obviously be relieved of their duties.

Second, trained medical responders must be made far more available to victims of sexual assault. Emin’s work suggests that the lack of response resources lead women to feel as if their “names [are] walking hell.”338 Moreover, medical responders often violate the rule against “leaving me here.”339 Other rape victim trials also contain testimony about ill treatment at the hands of untrained medical personnel340 who deter women from expressing themselves to physicians or obtaining solid evidentiary records of their rapes.

U.S. laws, however, do not create a positive right for ready access to trained medical responders. Though funding of sexual assault response resources appeared viable after the passage of the Violence Against Women Act (“VAWA”), VAWA did not achieve this promise.341 Unfortunately, unless


338. TRACEY EMIN WORKS, supra note 233, at 262–63.

339. Supra notes 268–70.

340. See supra note 171 (studies showing that medics express disbelief of rape victims’ stories).

positive rights to trained medical providers are established by the judiciary, the provision of adequate medical response to rape victims remains a legislative matter. 

In England and the larger U.K., feminists complain of a serious dearth of postrape resources. However, British law creates more positive rights to services than does U.S. law. Britain’s Equality Act of 2010 establishes a public sector equality duty to “advance equality of opportunity” for women. This duty applies to public authorities or those who exercise public functions. End Violence Against Women, a British organization, has argued that the public sector duty should lead to the creation of available specialist support services for women who experience violence. Leeds’ Support After Rape & Sexual Violence lobby similarly invokes this duty when criticizing the absence of services. However, as the above-mentioned Map of Gaps demonstrates, thus far the equality duty, like VAWA, has not fulfilled its potential for securing these resources. Emin’s and other women’s resorts to imaginary justice thus show the need to fill these gaps.

Third, the prosecutorial system needs improvement. In Emin’s artistic litigations, and in the private tribunals of other rape victims, we find a new model of justice. These tribunals guarantee women an open forum to exercise their voices. In these courts, women’s sexual behavior, dress, silence, and self-questioning emerges as evidence of the crime, not the counterintuitive madness described by the real-world judiciary.

It is difficult to imagine revising the trial system to correspond to these women’s models of justice without eroding the presumption of innocence. For

not secured a source of funding exclusively dedicated to supporting the basic infrastructure of services and interventions used in the response to sexual violence victims, such as crisis intervention, hospital and court accompaniment, and on-going assistance and advocacy after an assault.”); Symposium, The Impact of VAWA: Billions (Yes, with a B) for Prevention, Victim Services, Law Enforcement, Underserved Populations and the Courts, and Looking Ahead to VAWA IV, 11 GEO. J. GENDER & L. 571, 583–84 (2010) (“And so what’s the future? The future needs to include more funding for programs that are serving diverse communities, more emphasis on funding for language access, and some serious enforcement of language access laws. . . . Full access to the public benefits safety net should be provided to everybody who is a victim of crime who needs help surviving and overcoming rape, sexual assault, domestic violence, and other crimes.”).

342. See Map of Gaps, supra note 192.

343. The Equality Act creates the public sector duty at section 149. See Equality Act, 2010, c. 15, § 149 (Eng.), available at http://www.legislation.gov.uk/ukpga/2010/15/section/149. Equality of opportunity must be advanced for those who possess a “protected characteristic.” Id. § 149(1)(b). Sex is a protected characteristic. Id. § 149(7); see also id. § 4 (Eng.).

344. Id. § 149(1), (2).


347. See Map of Gaps, supra note 192.
example, we expect victims to experience stress from the adversarial system’s “challenge” and “duress.” And presenting women’s silence as proof of rape resists an old belief system that holds that silence weighs in favor of consent.

Yet, at the very least, prosecutors who treat rape reporters like defendants, and verbally abuse them during interviews, should be censured or fired, as this poses a powerful deterrent to reporting. The prosecutors in the Nafissatou Diallo example are a case in point. Prosecutors should be charged with a duty to enthusiastically take up rape cases even where victims do not conform to “real rape” stereotypes.

Fourth, the state needs to undo the damage caused when it deters rape reporting. Emin fills her world with her obstreperous, candid revelations. Rape victims’ self-created trials abound with intense descriptions of their experiences as well. The public health and law enforcement practice of public service messaging can help here, for we need more of these expressions, and not just

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348. See Martin & Powell, supra note 167.
349. Nancy Levit, Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory, 28 CARDOZO L. REV. 391, 424 (2006) (discussing the “antiquated notion[] . . . that silence can be considered tantamount to consent. . . .”).
350. See Jim Dwyer & Michael Wilson, One Revelation After Another Undercut Accuser’s Credibility, N.Y. TIMES, July 2, 2011, at A1 (detailing the collapse of the case against Dominique Strauss-Kahn for the rape of Nafissatou Diallo and reporting: “Meanwhile, as the interviews continued, the relationship grew more strained. During a meeting at the district attorney’s office on June 9, the woman wept as she was questioned closely after Mr. Thompson had left for another engagement. Her 15-year-old daughter, who was waiting outside, noticed that her mother was upset and called a relative to alert Mr. Thompson. The lawyer called the prosecutors and demanded an end to the questioning. He said on Friday that the daughter heard them shout, ‘Get out! Get out! Get out of here!’ at her mother. The authorities say there was no shouting.”).
351. Id.
352. A feminist understanding of this duty would find that it coheres with the duty articulated in STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARD 3-1.2(b)-(c) (3d ed. 1993), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfuncblk.html#1.2 (“The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. . . . The duty of the prosecutor is to seek justice, not merely to convict.”).
354. See, e.g., 2010 Conn. Acts 166 [PA 10-137] (requiring the Commissioner of Public Health to develop one public service announcement issued by the Department of Public Health through a television broadcast for the purpose of preventing teen dating and family violence); Adam M. Gershowitz, An Informational Approach to the Mass Imprisonment Problem, 40 ARIZ. ST. L.J., 47, 69 (2008) (describing public health campaigns to reduce skin cancer, breast cancer, and smoking through public service campaigns); Jef I. Richards, Politicizing Cigarette Advertising, 45 CATH. U. L. REV. 1147, 1186 n.191 (1996) (discussing the Minnesota Department of Public Health’s advertising initiative to discourage smoking among women).

Other state agencies also engage in public messaging, such as district attorneys’ offices and police departments. See, e.g., Tips and Resources, OFFICE DISTRICT ATT’Y, http://www.orangecountyda.com/home/index.asp?page=87 (last visited Aug. 24, 2012) (Orange County District Attorney’s Office multilingual PSA’s on domestic violence); Postfallspolice, Post Falls Police Department: Victim
in art galleries or in books of “rape stories.” Television and print public service announcements that communicate to women their right to refuse sex and report their assaults may help alleviate their alienation from the state. Tennessee’s 2010 “Men Can Stop Rape” campaign is an example of public service messaging that addresses rape, but a successful campaign must deal with women’s distrust and silence. Campaigns that combat “real rape” myths would also combat victim reticence. RAINN produces PSAs that combat rape myths and attempt to empower women, but I have not found a similarly ambitious state campaign.

In Britain, the Home Office has sponsored PSAs about rape, but at least one has been criticized for “stupid[ity]” because it showed a “half-naked woman.” Better public education could persuade women to speak out about their sexual assaults. Public service announcements that educated women about programs like SANE and England’s SAC’s, for example, would further encourage them to conduct in public their private trials.

Fifth, we must “eliminate the rape kit backlog,” as it not only poses a law enforcement debacle, but also deters women from reporting. Moreover, the failure of certain states in the United States to retain real-world evidence of rape makes the study of Emin’s handwritten, hastily sketched, and authentic-looking artifacts all the more poignant and necessary. It also shows why women inscribe evidence of their rapes on their bodies and their homes—so that some sign is left of what happened.

Human Rights Watch notes that when “New York City began to test every booked rape kit the arrest rate for rape skyrocketed from 40 percent to 70 percent of reported cases.” State laws like that in Illinois, which requires

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355. Men Can Stop Rape PSA Campaign Will Reach 3.6M Tennesseans, MEN CAN STOP RAPE (April 29, 2010), http://mencanstoprape.blogspot.com/2010/04/men-can-stop-rape-creates-psa-campaign.html. This campaign “emphasizes positive masculinity and enables men to utilize their strength to stand up and speak out against sexual violence.”

356. However, some public service announcements only compound the problems that these myths cause. See Caroline Heldman, Pennsylvania Public Service Announcement Blames Rape Victims, SOCIETY PAGES (Dec. 10, 2011, 8:33 PM), http://thesocietypages.org/socimages/2011/12/10/pennsylvania-public-service-announcement-blames-rape-victims/.


359. See Eliminate the Rape Kit Backlog, supra note 170.

360. See supra notes 311–19 (anorexia, hoarding, etc.).

361. See Eliminate the Rape Kit Backlog, supra note 170.
police departments to test rape kits, would help undo the damage that this negligence has inflicted on women’s confidence in the justice system.

Finally, we must change the language used by experts and courts when describing “counterintuitive” rape reactions. As noted, the trend of describing women’s behavior as counterintuitive products of shame eroticizes rape in trial. It also obscures the intense work that women perform when remaining silent. Describing women’s silence as evidence of shame may even hinder women’s understanding that they are engaging in important and creative processes. Like Emin’s critics, they may read their own thoughts as betraying a lack of discipline or as a record of emotional dysfunction. Thus, experts who testify and judges who give jury instructions should avoid using the word shame and describe victim reactions in terms of grief, fury, distrust, and alienation, as reflected in both Emin’s art and rape literature. This suggestion does not veer outside of the criminal evidentiary frame of reference. U.S. and English rape shield laws developed in direct response to the problem of women refusing to report their rapes because they did not trust the state to protect them from the second assault of the trial.

We also need to dig even deeper into women’s silence, for it contains constitutional dimensions. If women, in their muteness and their retreat, conduct their own personal trials and worldbuilding, this shows a deep schism between rape victims and the state. As noted, most rapes remain unreported. This means that most raped women’s distrust of the state grows so powerful that it compels them to seek justice in fantasy realms. I will argue that this divorce from the state gives us an opportunity to reconsider equal protection claims in the United States based on gender discrimination. I will also maintain that it does support claims under Britain’s 1998 Human Rights Act.

362. See Emma Graves Fitzsimmons, Illinois Law Requires Testing All Rape Kits to End Backlog, N.Y. TIMES, July 8, 2010, at A15 (“State officials and victims’ advocates said it is the first such law in the nation.”).

363. See supra note 224 (assessing Emin’s work as a record of “sexual damage”).

364. For cases discussing victim shame, see State v. Kinney, 762 A.2d 833 (Vt. 2000); R v. JD, [2008] EWCA (Crim) 2557 (Eng.). Dr. Fiona Mason also relies on this term. See supra notes 47 and 48; see also supra note 62.

365. Rape shield laws, “protect, i.e., shield, the complaining witness from being asked questions about her sexual history prior to the occurrence of the rape.” Klein, supra note 83, at 990. See also Dorn v. State, 590 S.W.2d 297, 299 (Ark. 1979) (“Another closely related justification for rape shield laws is that they will aid in crime prevention because victims . . . will be encouraged to report.”) (quoting Finney v. State, 385 N.E.2d 477 (Ind. App. 1979)); People v. Fontana, 232 P.3d. 1187, 1199 (Cal. 2010) (“[D]efendant’s inquiry would have violated . . . the state interest ‘to encourage reporting by limiting embarrassing trial inquiry into past sexual conduct.’”) (quoting Wood v. Alaska, 957 F.2d 1544, 1552 (9th Cir. 1992)); R v. A, [2001] UKHL 25 [10] (appeal taken from Eng.) (“The need to protect women from harassment in the witness box is fundamental.”).

366. See supra note 30.

367. See infra Part IV.D.1.
which creates rights to liberty, security, thought, and expression, and against torture and discrimination.\footnote{368 See infra text accompanying notes 410–33 (discussing human rights claims in England).}

\textbf{D. The Constitutional Implications of Rape Victims’ Distrust and Worldbuilding}

Emin’s work and other rape victims’ responses reveal two related reactions to sexual assault. In Emin’s work and the experience of rape victims in the literature, behaviors now generalized as rape trauma include expressions of distrust that women reasonably experience as a result of state mishandlings of rape cases. This distrust leads most rape victims—Daly and Bouhours estimate around 80 percent for the United States\footnote{369 This is a generous paraphrase. See Rape and Attrition, supra note 12 (noting that 15 to 19 percent of rapes in the United States are reported).} while the Crown Prosecution Service estimates at least 75 percent for England and Wales\footnote{370 Id. (The Crown Prosecution Service’s report).}—to reject the state in favor of inventing a mental courtroom wherein they adjudicate the harms committed against them. In the United States, this divorce between women and state protection should—but at this point, probably does not—give rise to an equal protection claim based on gender discrimination. In England and Wales, however, recognition of the schism between women and the state supports existing claims under the 1998 British Human Rights Act and paves the way for yet more.

\textit{1. Equal Protection in the United States}

Suspicion of the state and consequent worldbuilding appear to have little to do with the U.S. Constitution. So what if rape victims don’t trust the government? So what if they have fantasies of justice? Most people form an uneasy alliance with state power, as it both protects and controls us. And all people want their injuries answered for. Indeed, a careful study of equal protection jurisprudence advises that this evidence of rape victims’ severe disengagement from the state may not create constitutional problems. Nevertheless, as I will argue, an acknowledgment of rape victims’ skepticism and imaginary justice does create some opportunities for rights reform if we interpret the Constitution in light of the work of creative theorists such as Columbia law professor Kendall Thomas, and ensure that police and prosecutors are aware of women’s estrangement.

First, however, it must be acknowledged that an advocate making an equal protection claim under the Fourteenth Amendment of the U.S. Constitution faces manifold problems. In the United States, women are entitled to equal...
protection of the law.\textsuperscript{371} One need not be documented to enjoy these protections.\textsuperscript{372} Since most rape victims are women,\textsuperscript{373} the failure to guarantee state protection documented in this paper would appear to create a disparate impact on the female gender that deserves legal redress.\textsuperscript{374} Yet U.S. law provides no affirmative right to have the police or a prosecutor to take up one's case.\textsuperscript{375} It is true that a state may not selectively deny its protective services to disfavored minorities without violating the Equal Protection Clause.\textsuperscript{376}

\begin{itemize}
\item \textsuperscript{371} United States v. Virginia, 518 U.S. 515, 532 (1996) ("[T]he [Supreme] Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men).").
\item \textsuperscript{372} United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); Plyler v. Doe, 457 U.S. 202, 212 (1982) ("These provisions [of the Fourteenth Amendment] 'are universal in their application to all persons within the territorial jurisdiction.'") (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).
\item \textsuperscript{373} See Jill E. Daly, Gathering Dust on the Evidence Shelves of the United States – Rape Victims and Their Kits: Do Rape Victims Have Recourse Against State and Federal Criminal Justice Systems?, 25 WOMEN'S RTS. L. REP. 17, 33 n.163 (2003) ("[F]ive times as many women are raped as are men . . . . 1 of 6 U.S. women and 1 of 33 U.S. men have been victims of a completed or attempted rape.") (citing and quoting PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL WOMEN AGAINST VIOLENCE SURVEY 13–14 (Nov. 1998)). RAINN cites the U.S. Department of Justice’s 2003 National Crime Victimization Survey to support their assessment that in 2003, 9/10 of all victims of rape in the United States were women and girls. See Who Are the Victims?, RAINN, http://www.rainn.org/get-information/statistics/sexual-assault-victims (last visited Aug. 24, 2012).
\item \textsuperscript{374} This argument would be along the lines that state neglect of rape crime creates “effects upon women [that] are disproportionately adverse” and that “impact alone can unmask an invidious classification.” Pers. Adm’t of Mass. v. Feeney, 442 U.S. 256, 274–75 (1979).
\item \textsuperscript{375} See DeShaney v. Winnebago Cnty, Dep’t of Soc. Servs., 489 U.S. 189 (1989). In DeShaney, the Supreme Court held that the state does not have a duty to protect victims from abuse, even after hearing reports of such abuse, because no substantive due process right to protection from a private person exists. Id. at 195. But see Okin v. Vill. of Cornwall-On-Hudson Police Dep’t, 577 F.3d 415, 427–30 (2d Cir. 2009) (finding that state government officials’ repeated inaction created a danger, which encouraged a repeat abuser, and that a reasonable fact finder could conclude that officers’ conduct violated due process rights). A critique of Okin can be found in Doe v. Round Valley Unified School District, 2012 U.S. Dist. LEXIS 79436, at n. 3 (D. Ariz. June 7, 2012) ("[Okin] is doubtful under DeShaney."); see also United States v. Armstrong, 517 U.S. 456, 458 (1996) (showing that plaintiffs have no discrimination claim under equal protection without proof of racial animus and that similarly situated defendants of another race could have been prosecuted but were not); Karen Reynolds & Landie Landry, Procedural Issues, 41 AM. CRIM. L. REV. 973, 974 n.3 (2004) ("The high burden of proof for selective prosecution has rendered the claim virtually untenable.").
\item \textsuperscript{376} DeShaney, 489 U.S. at 197 n.3 (a state may not selectively “deny its protective services to certain disfavored minorities without violating the Equal Protection Clause”); Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) ("[W]hatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to . . . all . . . persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.").
\end{itemize}
However, this right appears to pivot on the unequal enforcement of statutes.\footnote{377} It does not seem to encompass the failure to expansively enforce a law regardless of the strength or weakness of a case whose success is measured in terms of a likely guilty verdict.\footnote{378} Under \textit{Personnel Administrator v. Feeney}, police officers’ and prosecutors’ active and documented shunning of victims could set the stage for an equal protection claim where there is ample evidence of gender bias,\footnote{379} but their aggressive questionings and rejections of victims may not qualify as proof of such animus.\footnote{380}

\footnote{377. \textit{Deshaney} framed such a right against unequal “den[ial of] protective services” in the context of \textit{Yick Wo v. Hopkins}, which addressed the unequal enforcement of a statute dealing with the siting of laundries. 489 U.S. at 197 n.3.}

\footnote{378. \textit{Id.}; see also Maximo Langer, \textit{Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure}, 33 AM. J. CRIM. L. 223, 281 (2006) (“The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.”) (quoting the American Bar Association Standards for Criminal Justice 3-3.9(b)).}

\footnote{379. Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (“[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”); see also \textit{id.} at 274 (“[I]mpact provides an ‘important starting point’ . . . but purposeful discrimination is ‘the condition that offends the Constitution.’”) (citations omitted); Navarro v. Block, 72 F.3d 712, 715 (9th Cir. 1995). \textit{Navarro} recognized the possibility of a 42 U.S.C. § 1983 claim for sex discrimination based on disparate treatment. There, a 911 dispatcher admitted that Los Angeles County had a practice of treating domestic violence less seriously than other violent offenses. The Ninth Circuit determined that the county’s custom of treating domestic violence 911 calls differently could give rise to an equal protection claim based on gender, but the absence of evidence of discriminatory intent or motive dashed the possibility of finding gender discrimination. \textit{Id.} at 717; see also \textit{Balistreri v. Pacifica Police Dep’t}, 901 F.2d 696 (9th Cir. 1990), where the Ninth Circuit found that a victim of domestic violence had alleged strong evidence of gender animus when the police failed to protect her because she was “carrying on.” \textit{Id.} at 701. The Supreme Court in \textit{DeShaney} rejected \textit{Balistreri} insofar as it created a due process claim recognizing a state duty to protect, but \textit{Balistreri’s} equal protection analysis appears unscathed. See \textit{DeShaney}, 489 U.S. at 197; see also Niji Jain, \textit{Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Clause}, 60 EMORY L.J. 1011, 1039–43 (2011) (using \textit{Balistreri} as a foundation for an argument that recognizes gender stereotyping as a form of gender bias in the context of police inaction in domestic violence cases). But see Lenora M. Lapidus, \textit{The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women}, 77 FORDHAM L. REV. 529, 534 n.28 (2008) (warning that most cases of police neglect of gendered violence will fail because of \textit{Feeney}).}

\footnote{380. In \textit{Balistreri}, the police officer indicated that the victim deserved a domestic beating, which the Ninth Circuit indicated could support a claim of gender bias. \textit{See Balistreri}, 901 F.2d at 701. However, in many cases rude, insensitive, and alienating questioning on the part of police officers or prosecutors may be deemed part of their job, as a way to test out the solidity of a case. And their refusals to investigate or prosecute could be seen as a reasonable refusal to expend resources on a problem case. \textit{See, e.g.}, Eligon, \textit{4 Victims of Sex Assault Tell of Treatment by Police}, \textit{supra} note 337}
Adding to the woes of this legal claim, as my analysis shows, is women’s almost *en masse* refusal to bring their complaints to the state. Disparate impact claims issue from state actors’ intentionally discriminatory enforcement of a facially neutral law, but how can we prove that state actors bore the requisite animus or even did anything wrong when rape victims do not approach them? There are no statutes forbidding prosecutors or police officers to pursue cases where victims do not conform to stereotypes. Perhaps, it might be argued, women simply forfeit their rights to justice because they are shy, prefer their privacy, or, to circle back to the rape trauma cases, are just ashamed. Indeed, my effort to explode the myth of female shame may take the exact wrong path. My focus on the intense, alienated, grief-struck, and creative response of the victims is precisely the opposite of what the courts call for in their equal protection jurisprudence: that body of law seeks a laserlike attention on state actors and what they do and think, not on the victims’ interior lives and how it informs their behavior.

Scholars such as Milli Kanani Hansen and Jill E. Daly have already written extensive critiques of the limitations on rape victims who seek constitutional redress for state failures to respond to rape. Focusing on the problems of the failure to test rape kits, they note that what’s “[m]issing” from constitutional claims for state neglect “is the requisite state action” and concede that success also requires evidence of purposeful discriminatory intent.

However, Daly has developed arguments for why state neglect should qualify as state action. In her article *Gathering Dust on the Evidentiary Shelves of the United States – Rape Victims and Their Kits*, she cites Justice Douglas’s concurrence in *Heart of Atlanta Motel Inc. v. United States*, noting that he (“Ms. Pressman . . . said the officers who interviewed her at the hospital had told her that because she had invited the man in, it would be a ‘he said, she said’ situation and that she did not have a case.”).

381. *Feeney*, 442 U.S. at 272, 274; *Navarro*, 72 F.3d at 715 (observing that an equal protection claim was stymied by a lack of evidence of gender bias).

382. *See Feeney*, 442 U.S. at 272, 274; *Navarro*, 72 F.3d at 715.


384. Daly, supra note 373. Other scholars have worked in this area as well. See, e.g., G. Kristian Miccio, With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of DeShaney, 29 COLUM. HUM. RTS. L. REV. 641, 645 (1998) (arguing that international instruments and the Violence Against Women Act should reconfigure equal protection and due process rights to protection after DeShaney).

385. *See Daly, supra* note 373, at 34; *see also* Hansen, supra note 383, at 984 (noting, in the context of state actors’ failures to test rape kits, the “unlikely event that a litigant could establish state inaction pervasive to state a claim”).

386. *See Daly, supra* note 373, at 34; *see also* Hansen, supra note 383, at 985 (“Proving discriminatory purpose . . . may be insurmountable given the variety of justifications given for the failure to process rape kits.”).
defined state action for Fourteenth Amendment purposes in light of language found in § 201(d) of the 1964 Civil Rights Act. At stake in *Heart of Atlanta* was whether Congress had authority to regulate racial discrimination by virtue of the Commerce Clause. Douglas found that the Fourteenth Amendment also provided authority to do so where state actors enforce discrimination and discerned significant similarity between Fourteenth Amendment and civil rights protections. He then looked to the definition of state action in section 201(d) of the Act, indicating that it was the same as that used for Fourteenth Amendment purposes. State action in the Act is defined as “discrimination or segregation [that is] . . . carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof.” Daly leverages Douglas’s analysis for rape victims seeking equal protection redress, contending that “the practices and customs of state criminal justice systems clearly discriminate against [them].” Since most rape victims are female, this constitutes impermissible gender discrimination. As Daly argues in the context of the rape kit debacle, “repeated choices not to process rape kits disproportionately impact women.”

What does female skepticism and imaginary justice add to this analysis? Daly’s argument that state neglect should qualify as state action rests on the observation that the state’s failure here is so consequential that it amounts to a commission, or an affirmative custom or practice. One way to demonstrate the significance of state neglect is to show the effect that it has, and women’s skeptical worldbuilding proves that the state’s customary inaction crushes and catalyzes rape victims’ lives as much as any commission.

In the service of an argument that state neglect amounts to state action, we may draw upon the work of Kendall Thomas. In the early 1990s, Thomas wrote of the frustrations caused by the state action doctrine when dealing with homophobic violence. In *Beyond the Privacy Principle*, Thomas argues that private homophobic violence should be deemed a violation of the Eighth Amendment for two reasons. First, then-legal antisodomy statutes...
“express[ed] the official ‘theory’ of homophobia; private acts of violence against gay men and lesbians ‘translate[d]’ that theory into brutal ‘practice.’”395 Second, Thomas shows that state officials failed to prosecute crimes of homophobic violence.396 Noting that “impoverished understandings” of the “regnant doctrine of state action” hijack a claim that private violence against gays and lesbians violates the Constitution,397 Thomas turns to the work of Michel Foucault. Foucault, Thomas notes, understood that power’s most critical dimension is its capacity to “produce; it produces reality, it produces domains of objects and rituals of truth.”398 Thomas argues that the state action requirement was present when private actors committed homophobic violence, because antisodomy statutes and state inaction encouraged it and produced it. Since power’s signal feature is its productivity, a more comprehensive understanding of “state action”—that is, an expression of state power—would be in its production of private homophobic violence.399

In regard to rape victims, state actors who fail to prosecute or investigate rape claims are also producers of women’s silence, skepticism, and alienation. State power, indeed, is so productive that it generates a female practice of worldbuilding that smacks of secession: in their minds and on their bodies, rape victims create an imaginary sovereignty wherein they might achieve justice.

Do women’s creative, if pained, rebellions sufficiently violate the values of the Fourteenth Amendment that they merit a new brand of constitutional protection? As I have shown, my study of rape jurisprudence counsels that the domestic and international legal community is more likely to answer women’s suffering when gratified by descriptions of ill, helpless, damaged, and shamed rape victims.400 The lesson of the rape trauma cases instructs canny—and envelope pushing—feminist advocates to frame an equal protection argument around the state’s Foucauldian production of women’s helplessness. But this

395. Id. at 1485.
396. Id. at 1483 (“State officials seem unwilling or unable to use the criminal justice system to reach crimes of homophobic violence.”).
397. Id. at 1484.
398. Id. at 1479 (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 194 (Alan Sheridan trans., 1977)).
399. Id. at 1484–85 (“[T]he doctrine can be understood as leaving open the substantive constitutional question whether the state’s own failure to control certain types of private conduct . . . violates the amendment.”). For another intriguing Foucauldian analysis of power’s productivity and state antigay bias, see Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 783 (1989) (“Suppose instead we began by asking not what is being prohibited, but what is being produced. Suppose we looked not to the negative aspects of the law—the interdiction by which it formally expresses itself—but at its positive aspect: the real effects that conformity with the law produces at the level of everyday lives and social practices.”).
400. See supra text accompanying notes 62 (late reporting attributed to shame), 66 (attributing symptoms to trauma), 71–72 (pragmatic recovery of property rendered as a symptom), and 124 (emphasizing shame).
construction of rape victims then recreates the problems posed by courts and experts who lavish attention on the erotic trope of the shamed woman.401

What is needed in this analysis, then, is an account of how the state has caused a crisis among U.S. women that inspires stalwart, worthwhile worldbuilding that also signals their dangerous withdrawal from the state. This account is supported by Emin’s work, wherein she confesses to both resisting and buckling beneath state or social power. Such a complex representation of rape victims’ response to state neglect recognizes their agency but does not ignore the tragedy that they, by retreating from the state, help reinforce discrimination against women. An account of this psychology refuses to cop to courts’ preferences for stories of deranged rape victims while also demonstrating, in Thomas’s and Foucault’s terms, the power of the state’s neglect. And if productive state power defines state action, then the state’s ability to produce and maintain discrimination against rape victims through its disregard could qualify as a state act.

The next problem with an equal protection claim is the requirement of proof that the discrimination was intentional.402 If the state can provide a gender-neutral reason for its inaction, then an equal protection claim will fail.403 Though in some cases there are smoking guns,404 many failures to investigate rapes or press charges could be ascribed to “legitimate noninvidious purposes” such as lack of evidence or resources.405 A number of scholars have already complained of the nearly insurmountable hurdle the discriminatory purpose requirement poses to equal protection claims.406

401. See discussion of the erotics of rape, supra text accompanying notes 150–53.
402. Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 276 (1979) (“The dispositive question, then, is whether the appellee has shown . . . a gender-based discriminatory purpose.”).
403. Id. at 279 (“‘Discriminatory purpose’ implies . . . . that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”).
404. See Maier, supra note 168 (“police . . . blame and stigmatize,
405. See Eligon, supra note 337 (“After she described what had happened, Ms. Pressman said, the detective told her, ‘Sounds like rough sex gone awry.’”).
406. Roy L. Brooks & Mary Jo Newborn, Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference? 82 CALIF. L. REV. 787, 805 (1994) (“Discriminatory intent is still rarely presumed from discriminatory effects. When, as is often the case in equal protection cases, the defendant is an institution of government, the plaintiff’s burden will often be nearly impossible to satisfy. The Supreme Court itself, in Personnel Administrator v. Feeney, has indicated just how difficult the plaintiff’s burden can be.”) (footnote omitted); Dana Page, Note, The Homicide by Child Abuse Conviction of Regina McKnight, 46 HOW. L.J. 363, 399 n.228 (2003).
My suggestions on educating police and prosecutors, as well as my analysis of women’s skepticism and worldbuilding, could combine here in a positive way. As I’ve discussed, government actors need to learn the realities of rape myths and rape reactions, but they should also be instructed on the alienating effects that state neglect has on women. To echo Emin, they need to know that the state’s failure to address rape causes women to become citizens of Strangeland, not the United States. If prosecutors and police were enlightened about the consequences of their heedlessness, then we could be sure that when they deflected rape victims they did so while aware that they aroused women’s contempt, skepticism, and aggrieved alienation. Certainly, an equal protection claim requires more than proof that a state actor merely knows that certain policies and attitudes discriminate against women. It requires purpose, that is, a finding that the state actor did what it did in part because of, not just in spite of its impact. But if we have proof that state actors perfunctorily brush off rape victims while conscious of their own colossally harmful effects on women, at what point can we say they continue do so out of a motivation to exclude women from state care? In some documented cases there is evidence that suggests that government actors actually intend to do this.

Nevertheless, the state of equal protection doctrine does not hold vast promise for recognizing these claims of discrimination. First, the chance of courts reconstructing the concept of state action seems limited, at best; the odds of courts incorporating subtle Foucauldian insights into constitutional law are even more remote. Further, as noted, even rude police rebuffs of rape victims can be easily interpreted as deflections of weak cases, not as evidence of animus against women.

Still, this study of possible constitutional claims highlights the way in which the state can produce discrimination in ways unseen and unsung. This analysis also raises the hope that police education can pave the way to a finding that this discrimination is, indeed, intentional. Perhaps most importantly, Thomas’s and Foucault’s observations about the resonance of state power

("Given the standard articulated in Feeney, it is virtually impossible to prevail on a gender-impact claim."); Serena J. Hoy, Interpreting Equal Protection: Congress, the Court, and the Civil Rights Act, 16 J.L. & Pol. 381, 386 (2000) (“The Court’s current approach makes it virtually impossible for plaintiffs to bring a constitutional challenge to facially neutral governmental acts disproportionately harming classes protected under the Fourteenth Amendment . . . .”).

407. See supra Part V.C (paragraph starting with “The medical community’s efforts to resolve the problem of responders . . . .”).

408. See Feeney, 442 U.S. at 279 (“Discriminatory purpose’ implies . . . that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”).

409. See Eligon, 4 Victims of Sex Assault Tell of Treatment by Police, supra note 337 (describing a late complainant’s report that a detective “snicker[ed]” at her).
reveals how state actors harm women deeply and directly, and how current constitutional doctrine deems itself powerless to change this.

2. Human Rights Law in England

English law provides far more hope for constitutional redress claims based on rape victims’ distrust and disengagement with the state. In England rights are understood differently than in the United States. England possesses no four-corners constitution, and English constitutionalism tracks Parliamentary power. But Parliament has set standards for rights that the current state treatment of rape violates. In 1998, it passed the Human Rights Act, which folds into English law the rights and freedoms established in the European Convention of Human Rights “so far as it is possible to do so.” Section 6 of the Act forbids public authorities to act in ways incompatible with Convention rights. These include a right against torture, and to “liberty and security”; freedom of thought, conscience, and religion; and freedom of expression. The Convention also creates the right to be free from discrimination on the basis of sex and race.

Legal precedent establishes that England’s track record for prosecuting rape cases violates the Human Rights Act. In 2003’s M.C. v. Bulgaria Judgment, the European Court of Human Rights determined that the Bulgarian prosecutorial policy of refusing to take up rape cases, except when

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410. HILARE BARNETT & ROBERT JAGO, CONSTITUTIONAL & ADMINISTRATIVE LAW 4 (2010) (“The United Kingdom appears to be almost unique in not having a constitution which is conveniently set out in a single written document.”).


415. Id. art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

416. Id. art. 5 (“Everyone has the right to liberty and security of person.”).

417. Id. art. 9.

418. Id. art. 10 (“This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”).

419. Id. art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

there was physical evidence of coercion, violated a fourteen-year-old’s right against torture under Section 3 and to a private life under Section 8 of the Convention. The Convention’s recognition of privacy and freedom from torture rights were interpreted as allocations of “sexual autonomy” that were dishonored by prosecutorial and police misconduct. In other words, the court established that under the Convention, the Bulgarian government had a positive obligation to protect girls, or possibly all females, against sexual violence through a vigorous prosecutorial and police policy of handling rape cases.

Since the British Human Rights Act recognizes Convention law, M.C.’s admonition applies to the English rape case debacles described in this Essay.

M.C., however, does not necessarily contain all the ingredients for human rights claims for rape victims. In M.C., we find many of the same facts in rape trauma cases, such as victim reticence and lack of vigilance. But the fact that the victim was extremely young proved a powerful fact for the Court.

421. Id. at 33 (“[W]hile in practice it may sometimes difficult to prove lack of consent in the absence of ‘direct’ proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the fact and decide on the basis of an assessment of all the surrounding circumstances.”); see also id. (“The Court thus finds that in the present case there has been a violation of the respondent State’s positive obligations under both Articles 3 and 8 of the Convention.”). Note that the Court referenced the Convention, which can be accessed at http://www.hri.org/docs/ECHR50.html (last visited Aug. 24, 2012).

422. M.C. v. Bulgaria, XII Eur. Ct. H.R. 30 (2003) (“[T]he Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy.”).

423. Joanne Conaghan, Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria, 13 FEMINIST LEGAL STUD. 145, 154 (2007) (“M.C. establishes that the positive duty here extends not just to putting in place the necessary measures, in the form of criminal laws proscribing rape, but also to ensuring that such laws are effectively applied and in practice work to secure the relevant rights.”).

424. See id. at 145 (writing of M.C. v. Bulgaria within the context of the passage of Britain’s Human Rights Act); Charlotte Skeet, Strengthening Women’s International Human Rights Norms, in BRITISH AND CANADIAN PERSPECTIVES ON INTERNATIONAL LAW 156 (2006) (“[T]he MC court asserted the positive duties incumbent on all states to enact provisions, and ensure they are used in practice, to investigate, prosecute, and punish rape. This further assertion is particularly pertinent to the UK. In the UK the level of reported rapes has risen but the number of prosecutions has fallen and some feminists are blaming the [Human Rights Act] for undermining efforts to improve the situation.”) (footnotes omitted).

425. M.C. v. Bulgaria, XII Eur. Ct. H.R. 30 (2003), at 5 (“The applicant submitted that during the next few days she had refused to talk to her mother about the incident. She had given no details and had not mentioned the second rape at all.”).

426. Id. at 8 (“The experts were asked . . . whether it was likely that the applicant would have spoken calmly with Ms T., the singer at the restaurant and then listened to music in the car, if she had just been raped and whether it was likely that several days after the alleged rape the applicant would have gone out with the person who had raped her.”).

427. Id. at 31 (“[T]he prosecutors did not devote any attention to the question whether the story proposed by P. and A. was credible, although some of their statements called for caution, such as the assertion that the applicant, 14 years old at the time, had started caressing A. minutes after having sex for the first time in her life with another man.”); see also id. at 33 (“The authorities may also be
and M.C. has been interpreted by at least one scholar as describing the human rights of children, not necessarily adults.\textsuperscript{428} Moreover, M.C. could be interpreted as walling off other rights claims such as those involving the rights to freedom of thought, expression, liberty and security, and those against discrimination.

An acknowledgement of rape victims’ worldbuilding strengthens the rights that M.C. created for three reasons. First, European feminists have expressed anxiety that the rights created by the Convention are a “false promise” because they will be used to secure protections for rapists, not for victims.\textsuperscript{429} Women’s suspicion, flight from state aid, and private trials, however, corroborate the M.C. court’s assessment that government inaction is a serious enough threat to deserve redress in the form of creating affirmative rights under the provisions that protect privacy and guard against torture.

Second, an acknowledgment of women’s suspicions of the state and consequent worldbuilding allows for an expansion of M.C.’s protections to adult women. M.C. could be read to apply only to juveniles on the ground that the government must pay special attention to the needs of children. Yet if adult rape victims’ relationships with the state prove so fractured that they resort to imaginary justice, this establishes a total dispossession of state protection that must be mended by M.C.’s recognition of positive rights.

Third, the dispossession revealed by worldbuilding indicates that more rights than those articulated in M.C. (those against torture and to privacy) remain at stake. If rape victims distrust the state to the degree that they choose private, largely mute, and imagined litigation over public enactments of justice, then state policies chill their abilities to speak and think freely in the wake of sexual assault. Articles 9\textsuperscript{430} and 10\textsuperscript{431} of the Convention and the Human Rights Act grant these rights. Moreover, women’s suspicions of the state reveal
discrimination that causes severe insecurities in their own safety, raising claims under Articles 5432 and 14.

CONCLUSION

Though psychologists and legal advocates developed and used RTS to educate the public about the complexity of women’s reactions postattack, and to improve the chances of obtaining convictions, RTS evidence needs to be stripped of its patriarchal assumptions that characterize women victims as sick, confused, and bewilderingly ashamed. It may be true, as the feminist Dr. Fiona Mason has said, that some women do experience feelings of self-blame and terror after a rape, but the erotic roots of this characterization should give us pause when repeating such descriptions at trial. Moreover, the multiplicity of emotions women endure after sexual violation has deep roots in women’s agency, autonomy, and consequent ability to criticize state institutions that treat them badly. RTS’s descriptions of victims do not account fully for women’s behaviors after sexual assaults, in part because of the dearth of reporting. In order to attend to the “second assault” of rape trials, and rape victims’ awareness of it, we need to expand our inquiry beyond the women who report sexual violence, whose responses to sexual violations have been interpreted through the language and expectations of a patriarchy that dissuades so many women from alerting authorities at the outset.

A review of the statistics on rape case attrition and women’s treatment at the hands of police and medical attendants demonstrates that women possess good reasons for their behaviors, particularly where they do not conform to the “real rape victim” stereotype. For this reason, I have turned to the frustrating, ugly, amazing, handcrafted, furious, and funny work of Tracey Emin. Emin reveals for us a more complete picture of rape reactions, one where the victim resists not only her rapist, but also an uncaring society. Moreover, she does so with vigorous and ample critiques. Her criticisms of the state’s and her community’s hard-heartedness are reflected in the RTS cases, where we see victims’ responses bearing the hallmarks of manifold reactions and distrust of the government and its responders.

However, Emin’s work teaches us about more than women’s distrust. Her skepticism inspires her to make what, at first glance, appears a rare gesture: she worldbuilds an entirely new system of justice, complete with evidentiary submissions and argumentative prosecutors, defense counsels, defendants, witnesses, and juries. Yet the expansive literature on and by rape victims shows that Emin is not alone in her worldbuilding. These women, too, express their

432. See supra note 416.
433. See supra note 419.
own longing for state recognition through the development of imaginary justice. And their courts are just as detailed and lively as Emin’s.

This worldbuilding needs far more study by psychologists and art historians. Yet even my legal interpretation of Emin’s artwork and the testimonies of women in rape literature convey substantial and constructive information. Looking through to these women’s imaginary worlds, we find guidelines for repairing the state mishandlings of rape and the processes of the police, medical system, prosecutors, state outreach services, and judiciary. Further, within the alienation that gives rise to these phantasms, we find building blocks that might restructure constitutional addresses of violence against women. Perhaps most importantly, women’s worldbuilding provides us with blueprints for reimagining a state whose inhabitants do not compound violence against women. Rather, Emin’s art and the testimony of rape victims counsels us to react to women’s harm by listening, respecting, responding, and trying to care.
APPENDIX

FIGURE 1: Sex Man II

FIGURE 2: Super Drunk Bitch

FIGURE 3: The Last Thing I Said Was Don’t Leave Me Here

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**FIGURE 4:** Remembering 1963 (The New Black)

![Figure 4: Remembering 1963 (The New Black)](image1)

**FIGURE 5:** My Cunt Is Wet with Fear

![Figure 5: My Cunt Is Wet with Fear](image2)