



JUDICIAL LANGUAGE IN NEW JERSEY
SEXUAL VIOLENCE CASES

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I. INTRODUCTION

When actions can be characterized in multiple ways, description creates their meaning.¹ Judges’ language shapes an understanding of alleged actions and sets precedent, for better or worse.² They are subconsciously influenced by the same factors as all members of society when assessing victim credibility in a sexual violence case.³ Because “lay definitions of rape are . . . often considerably narrower than legal definitions,” reliance on cultural understandings of the offense can lead to “legally irrelevant factors” influencing judicial perception.⁴ Training on gender bias and rape myths aims to mitigate cultural conditioning and prevent it from impacting outcomes.

Judicial education has existed for decades and receives positive reviews from trainees but has been enhanced in New Jersey following several well-publicized cases. Judges John F. Russo, Jr., Marcia Silva,

1. Linda Coates et al., *Anomalous Language in Sexual Assault Trial Judgments*, 5 DISCOURSE & SOC’Y 189, 190 (1994).

2. See Women’s Legal Def. & Ed. Fund, *Raped or “Seduced”? How Language Helps Shape Our Response to Sexual Violence*, LEGAL MOMENTUM (June 2013), <https://www.legalmomentum.org/raped-or-seduced-how-language-helps-shape-our-response-sexual-violence>; Holly Boux, “If You Wouldn’t Have Been There That Night, None of This Would Have Happened to You”: Rape Myth Usage in the American Judiciary, 40 WOMEN’S RTS. L. REP. 237, 264 (2019).

3. See SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA 3–5 (James F. Hodgson & Debra S. Kelley eds., 2002) (visualizing an assessment of victim credibility in the criminal justice system).

4. NICOLA GAVEY, JUST SEX? THE CULTURAL SCAFFOLDING OF RAPE 55 (2005).

and James G. Troiano received backlash over comments in sexual assault cases.⁵ In addition to outcry among citizens and policymakers, public anger reached national and international news.⁶ The comments, detailed in Part IV, reignited public ire over bias benefitting defendants such as Brock Turner.⁷ A broader context of increased social awareness and media attention fed by the #MeToo movement surrounds this publicity.⁸

This atmosphere is relevant because this Note does not intend to cast blame but to highlight myth and bias as common challenges to justice. Comments directed toward victims⁹ and dismissive of harms illustrate how judicial language can help identify the influence of preexisting bias. A positive correlation between rape myth acceptance (“RMA”) and a tendency to acquit defendants of sexual assault charges suggests RMA

5. Andrew J. Goudsward, *“It Felt Very Personal:” State Judges Are Having a #MeToo Moment*, ASBURY PARK PRESS, Sept. 5, 2019, at A6.

6. *Id.*; Carly Baldwin, *After Rape Decision, Middlesex Senators Want Judge Silva Removed*, PATCH (July 8, 2019, 3:30 PM), <https://patch.com/new-jersey/eastbrunswick/middlesex-senators-want-controversial-judge-silva-removed>; see also, e.g., Luis Ferré-Sadurni & Sarah Maslin Nir, *Judge Gets Threats After Saying Teenager in Rape Case Was From “Good Family,”* N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/nyregion/judge-james-troiano.html>; *Teen Accused of Rape Deserves Leniency Because of His “Good Family,” Judge Says*, GUARDIAN (July 3, 2019, 11:51 AM), <https://www.theguardian.com/us-news/2019/jul/03/new-jersey-teen-judge-court-good-family>.

7. See EJ Dickson, *Why Are Judges So Concerned About the Future Potential of Rapists?*, ROLLING STONE (July 9, 2019, 3:01 PM), <https://www.rollingstone.com/culture/culture-features/judge-james-troiano-brock-turner-sexual-assault-855415> (likening Judge Troiano’s prioritization of defendant’s welfare over victim’s to the Turner case).

8. For a history of this movement, see *#MeToo: A Timeline of Events*, CHI. TRIB., <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html> (last updated Aug. 10, 2020); see also Lindsey Bartgis, *Male Sexual Assault Survivors in #MeToo*, ACTIVIST HIST. REV. (Jan. 12, 2018), <https://activisthistory.com/2018/01/12/male-sexual-assault-survivors-in-metoo>. Although the movement is widespread, criticism exists alongside praise. See, e.g., Alia E. Dastagir, *It’s Been Two Years Since the #MeToo Movement Exploded. Now What?*, USA TODAY (Sept. 30, 2019, 6:00 AM), <https://www.usatoday.com/story/news/nation/2019/09/30/me-too-movement-women-sexual-assault-harvey-weinstein-brett-kavanaugh/1966463001/> (reporting persistent obstacles and accusations of hyper-politicization).

9. Throughout this Note, the term “victim” describes one who was a target of sexual violence, in keeping with dominant research terminology. However, recent public discourse has “pushed for the consideration of a dialogue meant to empower those who have experienced sexual assault by referring to them as survivors rather than as victims.” Jessica Williamson & Kelly Serna, *Reconsidering Forced Labels: Outcomes of Sexual Assault Survivors Versus Victims (and Those Who Choose Neither)*, 24 VIOLENCE AGAINST WOMEN 668, 669 (2018). In a study on self-definition of men and women who had been the target of a sexual assault, some preferred neither label. *Id.* at 673 (“Of the 85 participants, 35 referred to themselves as survivors, 24 referred to themselves as victims, and 26 indicated that they thought of themselves as neither a victim nor a survivor.”).

can favor the accused.¹⁰ Much as developing awareness of implicit bias enables the holder to confront it,¹¹ consciously rejecting rape myths encourages judges to scrutinize facts more critically.¹²

Here, “sexual violence” encompasses all forms of rape and sexual assault, though no definition is universally accepted.¹³ This Note uses New Jersey’s criminal definition of sexual assault as a reference point. The law considers circumstances in which one “commits an act of sexual penetration with another person” against the other’s will to determine the degree of offense,¹⁴ with strict liability if the victim is under thirteen.¹⁵

Women and girls are disproportionately targeted with sexual violence, evidencing what Professor Sally Goldfarb calls a “gender gap” of violence.¹⁶ Because sexual violence is closely tied to gender, the relationship and related policy efforts are summarized in Part II. Part III describes prevalent myths. Though not all victims are female, this Note focuses on myths centering primarily around female victims and incorporating gender bias because these are most relevant to the recent comments, detailed in Part IV. Part V applies a similar analysis to that recommended in Part VI, which suggests closer study of judicial language in areas of law related to sexual violence to identify patterns which could be more specifically targeted in judicial education.

10. Meagen M. Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059, 1078 (2014).

11. See Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 18–19 (1995) (describing the impact of awareness on implicit cognition).

12. Martha R. Burt, *Rape Myths*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 26 (Andrea Parrot & Laurie Bechhofer eds., 1991), reprinted in CONFRONTING RAPE AND SEXUAL ASSAULT 129, 130 (Mary E. Odem & Jody Clay-Warner eds., 1998).

13. See *Sexual Assault / Rape*, WOMENSLAW, <https://www.womenslaw.org/about-abuse/forms-abuse/sexual-abuse-and-exploitation/sexual-assault-rape/basic-info> (last updated Feb. 17, 2017); Sharon G. Smith et al., *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release*, CTRS. FOR DISEASE CONTROL & PREVENTION 1 (Nov. 2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.

14. N.J. STAT. ANN. § 2C:14-2 (2020).

15. *Id.* at (a)(1).

16. Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 12–13 (2000).

II. GENDER BIAS: A BRIEF SUMMARY OF RELEVANT POLICY AND ADVOCACY

The higher prevalence of sexual violence against women than men in the United States continues. Across the country, The National Intimate Partner and Sexual Violence Survey's 2010–12 State Report estimated that 21.3% of women and 2.6% of men had suffered completed or attempted rape.¹⁷ Professor Goldfarb explains that gender bias and sexual violence are linked so that to treat the latter, actors must combat the former.¹⁸ Although the 1994 passage of the Violence Against Women Act (“VAWA”) created a federal remedy for civil rights violations and recognized persistent gender-based violence as a form of discrimination, she notes shortcomings of legal remedies in practice.¹⁹ “[F]ederal civil rights law traditionally ignored violence against women” due to “deeply ingrained intellectual and cultural attitudes toward private and public spheres.”²⁰ Six years after its passage, VAWA’s provision for victims of gender-based violence to sue their attackers was found unconstitutional because “crimes of [domestic] violence [were] not, in any sense of the phrase, economic,” defeating its Commerce Clause basis for authorization.²¹ Still, VAWA’s recognition of gender-motivated violent crimes as discriminatory remains a significant connection between gender bias and sexual violence.²²

Gender bias has been defined as “(1) stereotypical thinking about the nature and roles of women and men, (2) how society values women and what is perceived as women’s work and (3) myths and misconceptions about the social and economic realities of women’s and men’s lives.”²³ This Part addresses gender bias’s intersection with the courts and New Jersey’s efforts to combat it.

17. Smith et al., *supra* note 13, at 2–3 (including statistics on additional forms of sexual violence).

18. Goldfarb, *supra* note 16, at 15–17.

19. *Id.* at 17–18.

20. *Id.* at 85.

21. United States v. Morrison, 529 U.S. 598, 613 (2000).

22. Goldfarb, *supra* note 16, at 55–56. A recent opinion affirmed that sexual violence is motivated at least partly by gender-based animus. *Breest v. Haggis*, 115 N.Y.S.3d 322, 324 (N.Y. App. Div. 2019).

23. Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615, 618 (1998).

A. *Impact in the Courtroom*

Gender bias can taint judicial perception because judges are part of society and possess implicit bias.²⁴ Apart from Judge Russo's hearings and resulting public discipline, the New Jersey Supreme Court's Advisory Committee on Judicial Conduct ("ACJC") has published other complaints against gender-biased judicial behavior, from the sexual harassment allegations of law clerks²⁵ to reports within the past five years of offensive comments to both counsel²⁶ and parties.²⁷

Judge Russo's comments are original in content among those publicly heard by the ACJC, which receives and investigates complaints of judicial misconduct, advising the Supreme Court with disciplinary recommendations.²⁸ Information from investigations of judicial behavior remains confidential until "the ACJC decides that there is probable cause for the imposition of public discipline and issues a formal complaint" against a judge.²⁹ This means investigations of similar conduct may have taken place but resulted in dismissal or in private discipline.³⁰

24. For background on implicit bias, see generally Greenwald & Banaji, *supra* note 11.

25. Formal Complaint at 3, *In re Subryan*, No. ACJC 2004-101 (N.J. ACJC 2004), <https://www.njcourts.gov/attorneys/assets/acjc/SubryanComplaint.pdf?c=dzi> (including complaints of verbal harassment and forcible kissing). Judge Russo was similarly accused of sexual harassment. Kathleen Hopkins, *Judge Russo Sued by Attorneys Who Won Fox News Sex Harassment Suit*, ASBURY PARK PRESS (Mar. 14, 2019, 5:00 AM), <https://www.app.com/story/news/local/courts/2019/03/14/judge-john-russo-fox-news-meredith-watson-sexual-harassment-suit/3153694002/>; Bill Wichert, "Close Your Legs" Judge Loses Bid to Dodge Harassment Deal, LAW360 (June 8, 2020), <https://www.law360.com/articles/1280727/close-your-legs-judge-loses-bid-to-dodge-harassment-deal>.

26. Formal Complaint at 4–5, *In re Portelli*, No. ACJC 2015-093 (N.J. ACJC 2015), <https://www.njcourts.gov/attorneys/assets/acjc/PortelliComplaint.pdf?c=wkA> (quoting statement that counsel "[could not] come sit on [judge's] lap" after a child had, following remarks on counsel's physical appearance).

27. Formal Complaint at 2, *In re Rodriguez*, No. ACJC 2017-398 (N.J. ACJC 2018), <https://www.njcourts.gov/attorneys/assets/acjc/HectorRodriguezComplaint.pdf?c=dE6> (quoting judge's response to defendant asking if she owed anything: "Not that you can do in front of all these people, no."); Formal Complaint at 2, *In re Brister*, No. ACJC 2019-277 (N.J. ACJC 2019), <https://www.njcourts.gov/attorneys/assets/acjc/StevenBristerComplaint.pdf?c=YRp> (quoting judge "speak[ing] to [defendant] as a man, [be]cause [he was] a man as well," about "treat[ing women] as if you're holding a feather, just to let them know you're the man and you're in control" rather than going at them "like Mike Tyson"). Judge Brister has since apologized and received suspension for his comments. Presentment at 12–14, *In re Brister*, No. ACJC 2019-277 (N.J. ACJC 2020), <https://njcourts.gov/attorneys/assets/acjc/StevenBristerPresentment.pdf?c=wOR>.

28. *Judicial Complaint Review Process*, N.J. CTS., <https://www.njcourts.gov/attorneys/acjc/acjprocedures.html?lang=eng> (last visited Feb. 19, 2020).

29. *Advisory Committee on Judicial Conduct*, N.J. CTS., <https://www.njcourts.gov/attorneys/acjc.html?lang=eng> (last visited Feb. 19, 2020).

30. This is likely, given the ACJC's comments on Judge Silva. See *infra* text accompanying note 208.

B. Judicial Education as a Solution

Professor Goldfarb concludes that “[j]udicial adherence to the familiar stereotype of violence against women as quintessentially private has proven to be persistent, but it should not be allowed to prevail” lest victims be denied remedy and recognition of the impact on their lives.³¹ Through VAWA, Congress authorized grants for judicial training on gender-based violence to include content such as statistics and methods of conducting fair proceedings.³²

Legal Momentum, a prominent women’s rights organization and leading advocate for VAWA, designs such model judicial education programs, many of which are publicly available.³³ State and federal task forces on gender bias emerged from the advocacy of its National Judicial Education Program (“NJEP”),³⁴ analyzing prevalence and impact before recommending jurisdictional solutions. Nationwide, they recommended judicial education on sexual violence and related issues.³⁵ The task forces studying rape “uniformly recommended judicial education to familiarize judges with the substantial current data about the nature of the crime of rape; the psychology of offenders; the prevalence and seriousness of non-stranger rape; the long-term psychic injury to rape victims; and the effect of the judicial process on victims.”³⁶

Longtime NJEP Director Lynn Hecht Schafran summarizes the Federal Circuit Task Force recommendations, including improved procedures to file complaints against biased judges or court employees and ongoing judicial education.³⁷ She employs the Ninth Circuit task force’s term for a “two different worlds’ phenomenon” hindering the elimination of gender bias from court interactions: men and women, having different experiences, form “different views of [its] definition and

31. Goldfarb, *supra* note 16, at 87.

32. See 34 U.S.C. §§ 12371–72.

33. *Resource Library*, LEGAL MOMENTUM, https://www.legalmomentum.org/library?field_resource_type_tid=169 (last visited Aug. 10, 2020); LYNN HECHT SCHAFRAN ET AL., NAT’L JUD. EDUC. PROGRAM, UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT iii, xiii (1994); see *id.* at 1–2 (describing a judicial education curriculum designed by NJEP). For a history of Legal Momentum, founded in 1970 as The Women’s Legal Defense and Education Fund, see *History*, LEGAL MOMENTUM, <https://www.legalmomentum.org/about-us/history> (last visited Aug. 10, 2020).

34. Telephone Interview with Lynn Hecht Schafran, Dir., Nat’l Jud. Educ. Program (Jan. 22, 2020) [hereinafter Interview].

35. SCHAFRAN ET AL., *supra* note 33, at ix.

36. *Id.*

37. Schafran, *supra* note 23, at 636–37.

prevalence.”³⁸ Judicial training was designed to bring those two worlds together.

1. Investigating the Problem in New Jersey

In 1982, New Jersey’s Chief Justice Robert Wilentz created the New Jersey Supreme Court Task Force on Women in the Courts (“Task Force”) in response to Judge Marilyn Loftus’s request for a committee to study gender bias in New Jersey courts.³⁹ The first in the country, the Task Force inspired over forty more state and federal task forces.⁴⁰ Its work is carried on by the subsequent Supreme Court Committee on Women in the Courts (“Committee”).⁴¹ Their analyses of gender bias in the courtroom⁴² led to recommendations for judicial training and further research into how gender and race influence courtroom interactions.⁴³ The implementation committee’s 2007 survey revealed common perceptions of litigant treatment, among other effects,⁴⁴ over two decades after Judge Virginia Long informed the Judicial College that the Task Force had found areas of judicial decision-making impacted by gender-based myths.⁴⁵ In 2009, the Committee noted that “despite efforts over the past 25 years to address issues of bias in the courts, perceptions of bias persist,” promising to address them and “build trust and confidence in the courts.”⁴⁶

38. *Id.* at 629.

39. Interview, *supra* note 34; SUP. CT. COMM. ON WOMEN IN THE CTS., SURVEY ON PERCEPTIONS OF RACE AND GENDER IN THE COURTS 1 (2009) [hereinafter COMMITTEE SURVEY], https://www.njcourts.gov/public/assets/wic_report.pdf. Judge Loftus sought jurisdiction-specific information after an NJEP event emphasizing its importance. Interview, *supra* note 34.

40. Interview, *supra* note 34; Lynn Hecht Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN’S RTS. L. REP. 109, 111 (1986).

41. COMMITTEE SURVEY, *supra* note 39, at 1.

42. See Task Force on Women in the Cts., *The First Year Report of the New Jersey Supreme Court Task Force on Women in Courts—June 1984*, 9 WOMEN’S RTS. L. REP. 129, 172–74 (1986); TASK FORCE ON WOMEN IN THE CTS., THE SECOND REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS 100–02 (1986) [hereinafter SECOND REPORT], <https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/55649/w8721986.pdf?sequence=1&isAllowed=y>; SUP. CT. COMM. ON WOMEN IN THE CTS., REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON WOMEN IN THE COURTS 1994-1996 RULES CYCLE 1, 15–18 (1996), https://dspace.njstatelib.org/bitstream/handle/10929/55648/w8721996b_edited.pdf?sequence=1&isAllowed=y.

43. COMMITTEE SURVEY, *supra* note 39, at 34–35, 39 (describing surveyed lawyers’ observations).

44. *Id.* at 37.

45. SECOND REPORT, *supra* note 42, at 16.

46. COMMITTEE SURVEY, *supra* note 39, at vi.

2. Impact of Judicial Training

Judicial training designed by NJEP and state courts has included video depicting frequent courtroom treatment based on gender as well as incorporation of experts outside the legal field into judicial trainings.⁴⁷ Director Schafran emphasizes the importance of adapting any model NJEP curriculum to a local jurisdiction's laws and practice.⁴⁸ New Jersey training incorporated at least two NJEP programs in 2019.⁴⁹ Although training materials for New Jersey are not publicly available,⁵⁰ NJEP's model curriculums reveal some content.

Many judges who had previously attended NJEP trainings reported realizations about victims' experiences both during an attack and when later interacting with the justice system: prevalence of psychological trauma, possibility of sexual assault leaving no "serious, observable physical injuries," and victims' behavioral patterns.⁵¹ Judges also learned about offenders' mentality and implications for best practices to avoid jury bias or victim intimidation.⁵² The survey, coupled with conversations between judges and educators following trainings, paints an encouraging picture in which trainings help equip judges to avoid bias influencing their decisions.⁵³ Still, cultural conditioning contradicts judicial education.

III. MYTHS AND MISCONSTRUCTIONS

This Part reviews the concept of rape culture and explains the myths most relevant to the opinions analyzed in this Note. Martha R. Burt defines rape myths as "prejudicial, stereotyped, or false beliefs about rape, rape victims, or rapists" which "have the effect of denying that

47. See generally LYNN HECHT SCHAFRAN ET AL., NAT'L JUD. EDUC. PROGRAM, GENDER FAIRNESS STRATEGIES PROJECT: IMPLEMENTATION RESOURCES DIRECTORY (1998) (describing the substance of newly developed judicial trainings by states and advocacy organizations).

48. Interview, *supra* note 34.

49. Letter from Carol Baldwin Moody, President & Chief Exec. Officer, Legal Momentum, to Sally Goldfarb, Professor, Rutgers L. Sch. (Dec. 20, 2019) (on file with author) [hereinafter Letter]; see also *infra* notes 260–62 and accompanying text.

50. In response to an inquiry with the state courts, the author learned that training materials are not publicly available information under N.J. CT. R. 1:38-5.

51. NAT'L JUD. EDUC. PROGRAM, JUDGES TELL: WHAT I WISH I HAD KNOWN BEFORE I PRESIDED IN AN ADULT VICTIM SEXUAL ASSAULT CASE 1–2 (2015) [hereinafter JUDGES TELL], <https://www.legalmomentum.org/resources/judges-tell>.

52. *Id.* at 10–11, 19.

53. Interview, *supra* note 34.

many instances involving coercive sex are actually rapes.”⁵⁴ They pertain to impact on victims, victim response during and after an attack, perpetrator traits or motivations, prevalence of sexual violence, and blame-shifting from perpetrator to victim.⁵⁵ This Note examines myths that (1) blame the victim, (2) diminish the victim’s experience or trivialize the significance of sexual violence, and (3) absolve or mitigate an offender’s culpability.

A. Rape Culture

It is useful to first examine the background against which rape myths have persisted. Historically, sexual violence was treated by property law⁵⁶ and rape seen as “an unfortunate but inevitable by-product” of violent struggles between peoples.⁵⁷ #MeToo contributes to exposing what feminists have argued is a modern American “rape culture” which encourages or “supports the objectification of, and violent and sexual abuse of, women” through popular culture.⁵⁸ In a rape culture, “both men and women assume that sexual violence is a fact of life,” with women perceiving “a continuum of threatened violence that ranges from sexual remarks to sexual touching to rape itself.”⁵⁹ Scholars note impacts on women’s thoughts and behavior.⁶⁰

Continuous exposure to material “normaliz[ing] coercive and brutal sexuality” is hypothesized to increase RMA.⁶¹ Burt finds that “many Americans do indeed believe many rape myths” and those “attitudes are strongly connected to other deeply held and pervasive attitudes such as sex role stereotyping, distrust of the opposite sex . . . , and acceptance of

54. Burt, *supra* note 12, at 129.

55. *Id.* at 132–35, 138.

56. SUSAN BROWNMILLER, *AGAINST OUR WILL* 18 (1975) (detailing ancient property rights of men over women); Patricia L. N. Donat & John D’Emilio, *A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change*, 48 J. SOC. ISSUES 9 (1992), reprinted in *CONFRONTING RAPE AND SEXUAL ASSAULT* 35, 44 (Mary E. Odem & Jody Clay-Warner eds., 1998) (describing the American colonial concept of rape as a violation of men’s property).

57. BROWNMILLER, *supra* note 56, at 32 (rejecting rape as a “symptom” of war). *See also* Thomas Obel Hansen, *In Pursuit of Accountability During and After War*, 42 J. STRATEGIC STUD. 946, 955 (2019) (“Civilians are often deliberately targeted as part of the broader strategies of the warring parties, including large-scale sexual violence, forcible recruitment and displacement and other international crimes.”).

58. Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCH. 217, 219 (1980). Note that #MeToo also saw male victims come forward. *See, e.g.*, Bartgis, *supra* note 8.

59. *Preamble to TRANSFORMING A RAPE CULTURE* (Emilie Buchwald et al. eds., 1993).

60. *See, e.g.*, Donat & D’Emilio, *supra* note 56, at 41.

61. Burt, *supra* note 58, at 219.

interpersonal violence.”⁶² She considers rape “the logical and psychological extension of a dominant-submissive, competitive, sex role stereotyped culture,” noting that it is “only one of [excessive violence’s] modes of expression” in American life.⁶³ This dynamic between sex, violence, and power leads some to conclude that the concepts become culturally blurred together.⁶⁴

According to the theory of rape culture, such seemingly innocuous sources as fairytales or comedy films often romanticize relationships formed with an unhealthy amount of power or objectification.⁶⁵ Sometimes rape culture is subtly or explicitly incorporated into popular music under the guise of flirtatious dialogue,⁶⁶ video games with sexually violent scenarios,⁶⁷ or film through a joke centering around rape.⁶⁸ Some films even base their entire premise on a rape joke, expecting consumers to laugh at the expense of a man who fears becoming a victim in prison, for example.⁶⁹ Such fictional depictions are expected to elicit laughter at

62. *Id.* at 229. After reviewing thirty-seven North American studies, researchers hope improved measurement will advance an understanding of sexual violence. Eliana Suarez & Tahany M. Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25(11) J. INTERPERSONAL VIOLENCE 2010, 2018, 2026–28 (2010). RMA is tied to “other oppressive beliefs also resistant to change, such as racism, sexism, classism, [and] religious intolerance.” *Id.* at 2025–26.

63. Burt, *supra* note 58, at 229.

64. GAVEY, *supra* note 4, at 35.

65. Suzannah Weiss, *8 Gendered Relationship Tropes to Stop Romanticizing*, BUSTLE (Jan. 26, 2016), <https://www.bustle.com/articles/137823-8-gendered-relationship-tropes-to-stop-romanticizing> (examining film portrayal of stalking or refusal to accept rejection as romantic); Zerlina Maxwell, *Rape Culture Is Everywhere Our Children Can See—Watch Your Favorite Movies Prove It*, MIC (July 30, 2014), <https://www.mic.com/articles/94844/rape-culture-is-everywhere-our-children-can-see-watch-your-favorite-movies-prove-it> (describing depictions ranging from a children’s film to comedy).

66. Nicki Lisa Cole, *What is the Meaning of Rape Culture?*, THOUGHTCO., <https://www.thoughtco.com/rape-culture-definition-and-examples-4109257> (last updated Jan. 21, 2020) (describing cultural materials that “glamorize sexual coercion”).

67. *See, e.g.*, Malika Saada Saar, *Grand Theft Auto V and the Culture of Violence Against Women*, HUFFPOST, https://www.huffpost.com/entry/grand-theft-auto-v-and-the-culture-of-violence-against-women_b_6288528 (Dec. 9, 2014, 5:44 PM) (describing Grand Theft Auto V’s first-person depiction of purchasing a sex worker’s services and encouragement to subsequently murder her).

68. *See, e.g.*, Jeffrey Bloomer & Daniel Hubbard, *Is There Really a Rape Joke in Avengers: Age of Ultron? Let’s Watch the Scene for Ourselves*, SLATE (May 6, 2015, 2:58 PM), <https://slate.com/human-interest/2015/05/avengers-rape-joke-joss-whedons-age-of-ult-ron-prima-nocta-explained-video.html> (explaining Tony Stark’s joke about “reinstating prima nocta,” a Medieval lord’s supposed right to claim a woman’s virginity on her wedding night).

69. *See, e.g.*, Scott Meslow, *Why Hollywood Needs to Stop Treating Prison Rape as a Punchline*, WEEK (Mar. 6, 2015), <https://theweek.com/articles/542707/why-hollywood-needs-stop-treating-prison-rape-punchline> (describing the threat of men being raped as a comedic motif in “Get Hard”). In a similar vein, interpersonal violence is sometimes

realities faced by real victims in similar circumstances.⁷⁰ Far from a joke, men's real-life experience as victims forces them to confront denial, stigma, and difficulty accessing victim resources.⁷¹ Sexual violence is explicitly deemed acceptable or inevitable when threatened or actual rape is portrayed as humorous. Just as popular culture influences, it is formed with an audience in mind. So, rape culture is not only tolerated—it sells.

Symptoms of rape culture not only manifest in entertainment, but also in everyday language.⁷² Many pejorative phrases describe women who limit sexual contact or have an “excessive” sexuality,⁷³ evidencing contradictory ideals of female sexuality. Additionally, impactful curse words often embody the relationship between sex and power, used to assert among other things frustration, hatred, and subordination, whether or not the speaker is aware.⁷⁴

Another example is found in the words of Donald Trump, who secured the United States presidency in 2016, even after public release of a video in which he bragged about kissing women without permission and grabbing them “by the pussy.”⁷⁵ Just as popular culture that contributes to rape culture does not decrease sales, Trump's comments did not hurt his political campaign enough to stop many voters from supporting him.

While not every cultural influence perpetuates rape culture, the examples described above are among a number ranging from explicit

depicted as less significant, empowering, or comedic when women strike men rather than the other way around. See Jennifer O'Mahony, *Women: Hitting Your Man is Not Cute; It's Abuse*, TELEGRAPH (Mar. 15, 2013, 7:00 AM), <https://www.telegraph.co.uk/women/womens-life/9930142/Women-hitting-your-man-is-not-cute-its-abuse.html> (explaining why this trend perpetuates gender roles and a cycle of violence).

70. Men of any sexual orientation are raped both inside and outside prison. Gillian Mezey & Michael King, *The Effects of Sexual Assault on Men: A Survey of Twenty-Two Victims*, 19 PSYCH. MED. 205 (1989), reprinted in CONFRONTING RAPE AND SEXUAL ASSAULT 83, 86–87 (Mary E. Odem & Jody Clay-Warner eds., 1998).

71. See Bartgis, *supra* note 8; *An Impossible Standard: Part 2—Men as Survivors*, NJ COALITION AGAINST SEXUAL ASSAULT (Oct. 3, 2018), <https://njcasa.org/news/an-impossible-standard-part-2-men-as-survivors>. Other myths surround male victims of rape, often with homophobic or hyper-masculine premises. Bartgis, *supra* note 8. Sexuality or gender identity can increase stigma or place individuals at greater risk. *Id.*

72. Helen Benedict, *The Language of Rape*, in TRANSFORMING A RAPE CULTURE 101, 103–04 (Emilie Buchwald et al. eds., 1993) (describing how softened language in cultural material, journalism, and everyday speech results in a “language of rape”).

73. GAVEY, *supra* note 4, at 105.

74. See, e.g., Rachel Darnall, *Concerned About Rape Culture? Maybe It's Time to Break up with the F-Word*, MEDIUM (Jan. 20, 2017), <https://medium.com/i-digress/concerned-about-rape-culture-maybe-its-time-to-break-up-with-the-f-word-8315a6d638e1> (describing how “the F-Word” ties sex to power, punishment, or negative emotion).

75. For examples of his comments, see IB Times UK, *Trump's Sexist Remarks About Women*, YOUTUBE (Mar. 8, 2018), <https://www.youtube.com/watch?v=p4R-AI0Qgac>.

statements or actions degrading women to tacit acceptance of sexual violence.⁷⁶ Gender bias feeds into this system and influences the development of rape myths, such as the perception of rape as a primarily sexual rather than primarily power-driven act.⁷⁷

B. Framing and Victim-Blaming

Victim-blaming draws upon the target's past behavior, either immediately preceding sexual violence or over a lifetime. The victim's action or inaction during an assault are similarly scrutinized. So too are victims' subsequent responses, whether private or disclosed to others.

A victim's prior sexual or relationship history, sometimes with the defendant, have been taken to mean that a victim was more likely to have consented or lacked the right to withhold consent.⁷⁸ In fact, acquaintance rape is vastly more common than stranger rape.⁷⁹ However, the historically possession-framed perspective of relationships, in which one person had the perceived right to sexual relations with the other, continues to impact social understandings.⁸⁰

Victim status as a sex worker can also increase blame or decrease perceived severity of the offense. This is due to the myth that people "provi[ding] . . . any erotic labor service for financial gain"⁸¹ either are incapable of violation or possess fewer rights over their own bodies

76. Burt, *supra* note 12, at 136–38 (explaining how everyday interactions and cultural material contribute); Cole, *supra* note 66 (elaborating on cultural assumptions or myths and providing examples of rape culture).

77. Brownmiller asserts that rape is driven by power. BROWNMILLER, *supra* note 56, at 256. One researcher urges, however, that analysts should not discount the interplay of power and sexuality because altering deviant behavior related to the latter is the focus of offender treatment. Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 999–1000 (1993) (quoting Diana Scully, whose conclusions followed interviews with 114 incarcerated offenders).

78. GAVEY, *supra* note 4, at 35–37 (reviewing studies finding a high degree of RMA in the form of attitudes placing more responsibility upon victims of "acquaintance rape" than on victims of "stranger rape").

79. Sharon G. Smith et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report*, CTRS. FOR DISEASE CONTROL & PREVENTION 23–24 (Apr. 2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> (reporting state estimates among offenses against women at 36.5–61.7% for contact sexual violence by acquaintance and 57.8–94.3% for sexual coercion by current or former intimate partner; estimates for stranger offenders include 11.2–31.9% and 1.4%, respectively). For a more detailed breakdown, see *id.*

80. GAVEY, *supra* note 4, at 39 (finding inadequate attention to the issue of marital rape and reporting rape-endorsing comments from public officials).

81. Eric Sprankle et al., *The Role of Sex Work Stigma in Victim Blaming and Empathy of Sexual Assault Survivors*, 15 SEXUALITY RSCH. & SOC. POLY 242, 242 (2018).

compared to others.⁸² Akin to any aspect of identity, profession should not impact the fact that a person was assaulted, because that has nothing to do with the legal analysis of whether sexual violence was inflicted. Stigma “can have a profound impact on survivors of sexual assault” who sell erotic performances or intercourse.⁸³ Eric Sprankle, Katie Bloomquist, Cody Butcher, Neil Gleason, and Zoe Schaefer hypothesize that “rape myths may be perpetuating sexual assault against sex work communities as the realities of rape go unaddressed.”⁸⁴ They cite lower empathy and increased blame for victims of sexual violence who have engaged in sex work, as well as a myth that sex workers are “unrapeable.”⁸⁵

The myth that the victim “wanted it” relates to a notion that women derive pleasure from force or that the victim did in fact desire to be assaulted, despite assertions otherwise.⁸⁶ Clothing worn or behavior engaged in prior to an assault have been used to justify this assertion, although these are legally irrelevant.⁸⁷ This muddles the foundational understanding of offenses against persons by suggesting that a victim who “asked for it” is unworthy of justice.⁸⁸ It also encourages a search for justification or excuse for sexual violence. This is troubling particularly because the acts excused are often deliberately committed against the vulnerable.⁸⁹ Assumptions that victims somehow deserved the assault⁹⁰ are incompatible with a functioning justice system.

Another myth surrounding the female victim’s fault in her own attack is the concept of women as “sexual gatekeepers,” that it is

82. See Burt, *supra* note 12, at 133 (“Any group of women stereotyped as being sexually active outside of marriage, such as divorcées or prostitutes, or any women who frequent places associated with being sexually available, such as bars, run the risk of being dismissed as unworthy of the law’s protection or of sympathetic concern when they press a charge of rape.”); Kimberly Peterson, Note, *Victim Or Villain?: The Effects of Rape Culture and Rape Myths on Justice for Rape Victims*, 53 VAL. U. L. REV. 467, 473 n.38 (2019) (expanding upon the counterintuitive notion of profession impacting ability to withhold consent). One case exemplifying this effect can be seen in Tara Murtha, *Activists Campaign Against Philadelphia Judge Who Ruled Rape as Theft*, REWIRE NEWS (Oct. 30, 2013, 4:48 PM), <https://rewire.news/article/2013/10/30/activists-campaign-against-philadelphia-judge-who-ruled-rape-as-theft> (describing a case in which a judge reduced charges for gang raping a sex worker at gunpoint to “theft of services”).

83. Sprankle et. al., *supra* note 81, at 247.

84. *Id.* at 245.

85. *Id.*

86. Burt, *supra* note 12, at 133–34.

87. *Id.* at 135.

88. *Id.* at 133–35. Furthermore, definitions of “precipitant behavior” can be ambiguous. BROWN MILLER, *supra* note 56, at 354–55.

89. JODY RAPHAEL, *RAPE IS RAPE* 75–76 (2013).

90. Burt, *supra* note 12, at 134–35.

primarily a woman's responsibility to prevent unwanted sexual contact by a man.⁹¹ This is problematic because it relieves perpetrators of responsibility while blaming victims for failing to prevent an attack. The idea that men need a sexual outlet drives this assumption, which feeds into the myth of rape as a primarily sexual act committed by men who lack access to consensual sex, a supposition proven baseless.⁹² A "boys will be boys" acceptance of sexual violence as a side effect of "male bonding" or the idea that men lack control over their actions once aroused are even more unproductive.⁹³ This myth perpetuates tolerance of violent behavior as inevitable or natural and fuels victim blaming.

Despite the expectation, for example, that a real rape victim would try every means possible to physically resist and protest before or during rape, two surveys of female victims about their behavior during three stages of stranger and multiple-perpetrator rape revealed that such expectations are often not met for reasons such as self-preservation.⁹⁴ Along similar lines as the sexual gatekeepers concept, drinking alcohol prior to an assault tends to increase social blame for the victim but lessen it for the perpetrator.⁹⁵

After sexual assault, another myth assumes that, more often than not, women "crying rape" are not actually victims but instead hiding their own actions,⁹⁶ particularly in the context of an assault that does not fit the image of a "real" rape. This notion leads to premature conclusions that a victim is not truly a victim because she is lying,⁹⁷ which, although a possibility, is statistically improbable.⁹⁸ Those raped by an acquaintance tend to face questions about whether they had actually consented to the crime or scrutiny of their behavior for some level of victim responsibility; those whose attacks resemble a "real" rape often face scrutiny of their prior behavior, including questions about why they

91. Peterson, *supra* note 82, at 476–77.

92. Schafran, *supra* note 77, at 1002.

93. *Id.* at 1001; BROWNMILLER, *supra* note 56, at 194; Peterson, *supra* note 82, at 476 n.54.

94. Jessica Woodhams et al., *Behavior Displayed by Female Victims During Rapes Committed by Lone and Multiple Perpetrators*, 18 PSYCH. PUB. POL'Y & L. 415, 433–39 (2012). It has been suggested that women are socialized to be less direct and assertive in everyday life than expected to be in resisting a sexual assault. *Id.* at 441–42.

95. Schafran, *supra* note 77, at 1009–10.

96. See Burt, *supra* note 58, at 217.

97. See Peterson, *supra* note 82, at 475–76 & n.51. Director Schafran calls stereotypes about women as hysterical or lying a "red herring." Interview, *supra* note 34.

98. Peterson, *supra* note 82, at 475–76 & n.51 (citing estimates of false rape reports at 2–8%, comparable to any other crime). One researcher noted that an unfounded rape report rate of 5.8% in 2008 indicated no increase over the prior twelve years in false reporting. RAPHAEL, *supra* note 89, at 112.

had placed themselves into a situation where they were “looking for trouble.”⁹⁹

C. *Diminishing Victim’s Experience and the Trivialization of Sexual Violence*

The myth of real rape and related preconceptions of how a victim should act at various stages of an assault color fact analysis before it begins.¹⁰⁰ They accompany the stereotype of a stranger rape perpetrated under specific circumstances and discourage belief of victims whose stories do not conform with stereotypical rape.¹⁰¹ When victims’ stories or reactions do not conform with the typical picture entering jurors’ minds, for example, studies have indicated that those stories are believed at a lower rate.¹⁰²

A related hurdle of believability for victims comes from a belief that sexual assault is rare, accompanied by faulty logic: if rape is not committed often, and surely it is not, then it probably was not committed here. Burt suggested that an observer might form a “just world” hypothesis when confronted with an instance of sexual assault, “justify[ing] misfortune by attributing responsibility or fault to the victim” in order to “protect[] the believer from sensing his or her own vulnerability to similar coerced events.”¹⁰³ Inconclusive research exists on whether a judge’s gender can interact with this concept to impact case outcomes.¹⁰⁴

Disbelief or minimization of harm can also stem from the notion that sexual violence has little impact on victims, particularly if little physical injury results.¹⁰⁵ While some scholars consider this discourse largely changed,¹⁰⁶ recent judicial application of the myth of rape as separate from violence and, therefore, unlikely to cause real harm, suggests the notion has not disappeared. In reality, much trauma from sexual assault

99. Holly Jeanine Boux & Courtenay W. Daum, *At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge the “Real” Rape Myth in the Criminal Justice System*, 2015 U. ILL. J.L., TECH. & POL’Y 149, 157–58.

100. See Burt, *supra* note 12, at 130–31.

101. See *id.*

102. See Schafran, *supra* note 77, at 1024–25; see also Hildebrand & Najdowski, *supra* note 10, at 1077–79 (citing studies of correlating mock juror perceptions of victim blame and disbelief with RMA).

103. Burt, *supra* note 58, at 218.

104. See *infra* note 247.

105. See Burt, *supra* note 12, at 130, 132–33.

106. See GAVEY, *supra* note 4, at 182–83.

is invisible and presents similarly among victims of acquaintance and stranger rape.¹⁰⁷

An alternative expectation to minimal harm, suggested by some to be increasingly dominant in the lay understanding of sexual violence, is that victims invariably suffer devastating psychological trauma.¹⁰⁸ Two researchers describe a “trauma of rape” discourse which recognizes that sexual violence produces psychological trauma but which can imply that every victim suffers similarly.¹⁰⁹ They note assumptions that sexual violence is necessarily, rather than potentially, traumatic.¹¹⁰ When victims do not fit an idea of how such trauma manifests, especially by not displaying outward signs or seeking professional help, perceived credibility decreases.¹¹¹

Victims react differently during or after an attack and present varied coping levels.¹¹² Improved scientific understandings of the brain, which apply to victims of any type of traumatic experience, reveal that traumatic memories are stored and retrieved differently from ordinary ones.¹¹³ Whether due to memory lapse, coping mechanism, or less-than-expected trauma, lack of complaint about specific, expected harm does not indicate its absence or insignificance.¹¹⁴

Legal designations of “simple” rape miss the violence inherent in bodily violation.¹¹⁵ Unfortunately, RMA tends to diminish the perceived impact upon individual victims, regardless of where their experiences fall with respect to social expectations. Both an assumption that rape is trivial and an assumption that it will devastate victims to the point of being unable to carry on their lives normally create extreme standards

107. See Schafran, *supra* note 77, at 1020.

108. See Nicola Gavey & Johanna Schmidt, “Trauma of Rape” Discourse: A Double-Edged Template for Everyday Understandings of the Impact of Rape?, 17 VIOLENCE AGAINST WOMEN 433, 449 (2011).

109. *Id.* at 439.

110. *Id.*

111. See *id.* at 443 (describing how victims may be considered in denial when they do not suffer enduring trauma, as well as perceptions that it is inherently ever-lasting and life-altering). Gavey and Schmidt suggest that the concept of victims in denial “makes it possible for others to presume that they could harbor more knowledge about the psychological reality of a woman who has experienced rape than the woman herself.” *Id.* at 445.

112. *Id.* at 443–45; JUDGES TELL, *supra* note 51, at 9.

113. James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories*, TIME (Dec. 9, 2014, 1:33 PM), <https://time.com/3625414/rape-trauma-brain-memory>; Interview, *supra* note 34.

114. See Schafran, *supra* note 77, at 1018.

115. Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439, 445–46 (1993).

that many will not match. By failing to fit either image, they may lose credibility among those with higher RMA.

D. Bias Favoring Defendant

Much as myths impact a victim, they impact a defendant, but often with the opposite effect.¹¹⁶ The idea of a real rape goes hand in hand with an image of the real rapist, often presumed a stranger to the victim.¹¹⁷ This works in defendant's favor, especially when the two had some prior relationship.¹¹⁸ Defendants who do not conform to the image of a typical offender tend to benefit from other legally irrelevant factors. For example, that a defendant is intelligent and has a good family or promising future injects unnecessary pathos into consideration of whether defendant committed an offense.¹¹⁹ Defendants are often characterized positively, with emphasis on the alleged act's inconsistency with their ordinary nature.¹²⁰

Socially excusing behavior is another problem. Whereas drinking alcohol elevates the level of blame placed upon a victim, it tends to decrease perception of a perpetrator's responsibility.¹²¹ Similarly, the misconception of sexual assault as a passion-driven act rather than one which is calculated and power-driven, leads to an implied conclusion that the offender could not help it, a notion which has problematic impacts beyond the scope of this Note.¹²² Contrary to the notion of rape as a spontaneous crime of passion, research indicates that a large percentage of rapes by strangers and acquaintances alike are "planned and premeditated."¹²³ Many offenders deliberately target victims who are

116. This analysis excludes important exceptions, such as racial profiling of defendants and related myths, because they are not apparently relevant to the cases examined in Part V.

117. Burt, *supra* note 12, at 130.

118. *Id.* at 130–31.

119. See, e.g., Dickson, *supra* note 7 (referencing Judge Troiano's case and the Brock Turner decision); see *infra* Section IV.C.

120. Coates et al., *supra* note 1, at 195–96. This can be true even for those who plead guilty or are convicted. *Id.*

121. Schafran, *supra* note 77, at 1009–10.

122. Excusing men who "just can't help themselves" not only provides an illogical escape hatch in accountability, but also supports the premise that men are not responsible for their actions or incapable of resisting urges. Peterson, *supra* note 82, at 476 n.54. Burt, *supra* note 12, at 135–36, explains how these myths excuse the behavior of men who rape and purport disempowerment of men at large to prevent sexual violence. That disempowerment is problematic in itself, apart from implicitly shifting responsibility onto women to avoid sexual violence, both as a form of gender bias itself and as a categorical dismissal of men's conscience and free will.

123. Schafran, *supra* note 77, at 1006–07.

most vulnerable to attack, anticipating how they may escape liability.¹²⁴ Intoxicated persons are one example, but factors such as a target's youth¹²⁵ or disability¹²⁶ may also influence an offender's calculation.

Diana Scully and Joseph Marolla find that convicted rapists tend to deny that their actions constituted a crime or wrongful act, instead characterizing them as fulfilling victims' desires and claiming victims had enjoyed it.¹²⁷ Rapists may "use this culturally acquired vocabulary to justify their sexual violence."¹²⁸ When defendants are unlike a judge's mental profile of a rapist, testimony in which a defendant justifies or excuses sexually violent behavior paints a consensual picture.

E. Softened Language

One resource for judicial trainings elaborates upon the power of vocabulary in sexual violence cases. NJEP's *Raped or "Seduced"?* explains how softening the language used to describe sexual violence can diminish accurate perceptions of the victim's experience, particularly with substitution of "consensual" vocabulary for violent or neutral descriptions.¹²⁹

Upon analysis of 563 sexual assault judgments, Canadian scholars find that where the meaning of actions is ambiguous, "the language used to 'fit words to deeds' creates their meaning."¹³⁰ They note that "[s]exual assaults were often described as sexual events," with language "often more suitable to consensual acts."¹³¹ Use of softened language encourages

124. RAPHAEL, *supra* note 89, at 66–67.

125. See Smith et al., *supra* note 79, at 173 (estimating that 41.3% of female victims of completed rape were under age eighteen when first assaulted); Smith et al., *supra* note 13, at 4 (estimating that 81.3% of female and 70.8% of male victims of attempted or completed rape were under age twenty-five when first assaulted).

126. See ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, CRIME AGAINST PERSONS WITH DISABILITIES, 2008-2010 – STATISTICAL TABLES 7 (2011), <https://www.bjs.gov/content/pub/pdf/capd10st.pdf>.

127. Diana Scully & Joseph Marolla, "Riding the Bull at Gilley's": *Convicted Rapists Describe the Rewards of Rape*, 32 SOC. PROBS. 251 (1985), reprinted in CONFRONTING RAPE AND SEXUAL ASSAULT 109, 112 (Mary E. Odem & Jody Clay-Warner eds., 1998). Scully and Marolla analyze perpetrator quotes on their perceptions of committing rape, such as the one which inspired the article's title. See generally *id.*

128. *Id.* at 112.

129. Nat'l Jud. Educ. Program, *Raped or "Seduced"? How Language Helps Shape Our Response to Sexual Violence: PowerPoint Slides*, LEGAL MOMENTUM 5 (2013), <https://www.legalmomentum.org/raped-or-seduced-how-language-helps-shape-our-response-sexual-violence> [hereinafter *Raped or "Seduced"? Slides*].

130. Coates et al., *supra* note 1, at 190.

131. *Id.* at 191.

unconsciously viewing events through an offender's perspective¹³² and negates assaultiveness by accepting a non-violent narrative that instead employs erotic or affectionate language.¹³³ Further, actions are often described passively or nominally, depriving verbs of actors or victims.¹³⁴

Interestingly, this process can begin with the victim's own report because many victims characterize sexual violence as "forced intercourse" or use terms which similarly soften its severity, for various reasons.¹³⁵ Sometimes, they do not recognize or acknowledge the assault as sexual violence due to denial or lack of information.¹³⁶

Another proposed explanation is that "the interpretative repertoires available for describing sexual assault are limited to and therefore juxtapose stranger rape and consensual sex."¹³⁷ In other words, conceptual frames exist for consensual intercourse and for stereotypical rape. However, neither captures the broad area in between. Linda Coates, Janet Beavin Bavelas, and James Gibson conclude that "for lack of a well-developed repertoire for non-stranger rape, the language adopted [by courts] often fits consensual sex, which is the language of the perpetrator, not the victim."¹³⁸ The result is often "careless or euphemistic" language which misrepresents the nature of sexually violent acts by removing precision of language.¹³⁹

Well-intentioned or not, this harms the ability to accurately perceive the situation. Events become characterized by words used to describe them, whether by victim, society, or judge. Similar to and sometimes embodying rape myths, softened language works in defendants' favor.

IV. WHAT HAPPENED: RECENTLY PUBLICIZED

132. Benedict, *supra* note 72, at 104.

133. Coates et al., *supra* note 1, at 192–94. This includes terms like "[f]ondling" or "[e]ngag[ing] in sexual intercourse." *Id.* at 192.

134. *Id.* at 196. For example, judges might write that "there was advantage taken of a situation which presented itself" or "the struggle got into the bedroom." *Id.* (emphasis omitted).

135. See RAPHAEL, *supra* note 89, at 25.

136. *Id.* (describing resulting challenges to defining sexual violence for research purposes). *But see* Gavey & Schmidt, *supra* note 108, at 445 (cautioning against the presumption of researchers' superior understanding to victims' own).

137. Coates et al., *supra* note 1, at 197.

138. *Id.* at 197–98.

139. RAPHAEL, *supra* note 89, at 145–46; *see also* Boux, *supra* note 2, at 264 (providing examples of nationwide appellate decisions adhering to the idea of "rape as distinct from violence").

JUDGES' COMMENTS IN NEW JERSEY

Three examples follow, along with a brief summary of the New Jersey courts' response. Connections between the language and unconscious subscription to bias are clarified in Part V.

A. *Judge John F. Russo, Jr., Superior Court, Family Division*

An unrepresented plaintiff in *M.R. v. D.H.* alleged that defendant committed acts of domestic violence on March 24, 2016, including verbal threats, inappropriate comments to their child, and sexual assault.¹⁴⁰ Accordingly, plaintiff had received a temporary restraining order (“TRO”) and sought a final restraining order (“FRO”)¹⁴¹ in a hearing before Judge Russo which spanned three days: May 16, June 10, and June 16, 2016.¹⁴²

On May 16, Judge Russo stepped in during cross-examination to question plaintiff herself about the sexual assault in which she alleged “[d]efendant forced her to have sex with him against her will,” insisting that she “tell [the judge] what happened.”¹⁴³ Judge Russo later claimed he was acting upon belief that plaintiff was upset by defense counsel’s questions, which were aimed at establishing that “she’s more capable of asserting herself in a situation where she’s confronted by somebody with unwanted sexual advances” due to her “time as a[n exotic] dancer.”¹⁴⁴ The judge questioned plaintiff on whether she knew “how to stop somebody from having intercourse with [her]” and whether she tried to “block [her] body parts,” “close [her] legs,” escape, or get help.¹⁴⁵ Plaintiff spoke

140. Presentment at 5–7, *In re Russo*, No. ACJC 2017-225, ADVISORY COMM. ON JUD. CONDUCT (N.J. ACJC 2019) [hereinafter Presentment], <https://www.njcourts.gov/attorneys/assets/acjc/Russopresentment.pdf?c=NFD>. Plaintiff had also sought on April 18, 2016 to amend the TRO to include allegations of verbal threats made against her by defendant on April 2 and 8. *Id.* at 7.

141. A TRO provides initial protection against domestic violence by forbidding defendant from contacting plaintiff until a final determination of need for long-term protection in the form of an FRO. See N.J. STAT. ANN. § 2C:25-29 (2020). If granted, the FRO makes defendant’s restrictions on contacting or being near plaintiff permanent in New Jersey. *Id.* Predicate acts of domestic violence indicating need for an FRO include sexual assault, terroristic threats, harassment, etc. *Id.* at (a).

142. Presentment, *supra* note 140, at 6–7.

143. Amended Formal Complaint at 2, *In re Russo*, No. ACJC 2017-225 (N.J. ACJC 2019) [hereinafter Complaint], <https://njcourts.gov/attorneys/assets/acjc/RussoComplaint.pdf?c=O8n>.

144. *Id.* at 3; Presentment, *supra* note 140, at 7.

145. Presentment, *supra* note 140, at 7–9.

apologetically, emphasizing that she was “not pressing charges” and using matter-of-fact or softened terminology when pressed for details.¹⁴⁶

Throughout this encounter, Judge Russo seemed to “assum[e] the role of defense counsel” while inquiring into matters “irrelevant for purposes of addressing an application for an FRO.”¹⁴⁷ His focus shifted from defendant’s conduct to plaintiff’s while asking about the sexual assault.¹⁴⁸ He later asserted an intention to help plaintiff recount a traumatic event to establish force or coercion,¹⁴⁹ stating that he was only trying to help her “put something on the record,” because so far plaintiff’s “testimony was really just conclusory, didn’t include facts or details.”¹⁵⁰

However, Judge Russo’s comments to court staff, made in a “flippant tone of voice” after denying the FRO on June 16, 2016, undermine these claims.¹⁵¹ Only after confirming a mistaken understanding that he was no longer on record, he made light of the case and said: “as an exotic dancer, one would think [plaintiff] would know how to fend off unwanted sexual [contact].”¹⁵² Referencing “the sex stuff” after the parties departed, he drew laughter from staff about his ability to “talk about sex acts with a straight face,” even after one person in the room asked not to “re-live everything [the court employee] heard,” implying initial discomfort at the turn of conversation.¹⁵³ Judge Russo then shared incredulity at plaintiff’s continued pursuit of charges with an unidentified person that plaintiff had “thought she had [defendant],” commenting “Oh, my God, that was—was that great?”¹⁵⁴

The judge opined in his FRO denial that plaintiff “didn’t have an answer” to his questions about the sexual assault and that he “believe[d] her testimony was they had intercourse.”¹⁵⁵ He determined that plaintiff had fabricated the allegations, factoring her answers to legally irrelevant questions into a finding of incredible testimony.¹⁵⁶

146. Complaint, *supra* note 143, at 2 (quoting plaintiff’s statements that “we did have sex against my will” and that “he pulled my pants down, and that’s what happened”).

147. *Id.* at 4.

148. Presentment, *supra* note 140, at 11.

149. *Id.*

150. Jeannie O’Sullivan, *Judge Who Said “Close Your Legs” Says He Intended To Help*, LAW360 (Dec. 3, 2019, 10:28 PM EST), <https://www.law360.com/articles/1224712/judge-who-said-close-your-legs-says-he-intended-to-help>.

151. Presentment, *supra* note 140, at 11–12.

152. *Id.* at 13.

153. *Id.* at 12–14.

154. *Id.* at 14.

155. *Id.* at 10 n.8.

156. *Id.* at 11.

B. Judge Marcia Silva, Superior Court, Family Division

On August 30, 2018, Judge Silva denied juvenile waiver for trial in adult court of a defendant accused of sexually assaulting a twelve-year-old girl while he was sixteen and their two families shared a home.¹⁵⁷ Defendant, E.R.M., and victim were in a romantic relationship; when she returned from school one afternoon, defendant followed her inside, pushed her onto a bed, undressed her, grabbed her hands, and sexually assaulted her while wearing a condom.¹⁵⁸ Victim said “no” repeatedly, bit him, and asked him to stop.¹⁵⁹ After beginning to bleed from the attack, she succeeded in pushing him off and ran to a friend’s home.¹⁶⁰ The relationship ended, and criminal charges were filed when victim’s mother learned of the assault.¹⁶¹

The prosecutor sought waiver of defendant’s case into the Law Division for trial as an adult, addressing each statutory element¹⁶² and citing defendant’s ability to consider whether to “pursue the sexual encounter to completion” and “forethought to be prepared with a condom.”¹⁶³

Judge Silva was concerned over “the State’s utter dismissal of the juvenile’s statement, especially since the juvenile and victim were the only witnesses and there [wa]s little, if any, tangible evidence.”¹⁶⁴ She concluded that, even if victim’s testimony was true, the State alleged no injury to victim besides bleeding and loss of virginity, which Judge Silva did “not find to be especially serious harm in this case.”¹⁶⁵ She decided that E.R.M.’s use of a condom indicated no premeditation and that this was “not an especially heinous or cruel offense,” as defendant did not

157. *In re E.R.M.*, No. A-0533-18T4, 2019 WL 2495675, at *1 (N.J. Super. Ct. App. Div. June 17, 2019); see also *Statement of a Majority of the Advisory Committee on Judicial Conduct Concerning the Honorable Marcia Silva, Judge of the Superior Court*, N.J. CTS.: ADVISORY COMM. ON JUD. CONDUCT 1–2 (June 25, 2020) [hereinafter *Silva Majority*], <https://njcourts.gov/attorneys/assets/acjc/MarciaSilviaMajorityStatement.pdf?c=Uy0>.

158. *E.R.M.*, 2019 WL 2495675, at *1.

159. *Id.*

160. *Id.*

161. *Id.*

162. Unless juvenile waiver is sought and granted, minors are tried in Family Court. Judicial review of a prosecutor’s request for juvenile waiver must take certain statutory factors into consideration, and waiver is granted unless a prosecutor abused discretion in seeking it. See N.J. STAT. ANN. § 2A:4A-26.1(a), (c) (2020). Rather than assuming a factfinder’s role, the judge examines whether “[t]here is probable cause to believe that the juvenile committed a delinquent act which if committed by an adult would constitute” a list of acts, including sexual assault. *Id.* at (c)(2).

163. *E.R.M.*, 2019 WL 2495675, at *1.

164. *Id.* at *2.

165. *Id.* at *3.

“use[] extreme violence or a weapon against the victim in furtherance of the offense.”¹⁶⁶

C. *Judge James Troiano, Superior Court, Family Division*

Judge Troiano denied juvenile waiver in a case, *In re G.M.C.*, where defendant was accused of sexually assaulting victim after both sixteen-year-olds had consumed alcohol at a party.¹⁶⁷ Defendant engaged in what the judge termed “heavy petting” with victim, and while she was on a sofa, a group of boys smacked her buttocks so hard that handprints remained the following day.¹⁶⁸ They also sprayed her buttocks with Febreze.¹⁶⁹ Defendant and victim entered a closed off, darkened area away from the party.¹⁷⁰ Victim was “visibly drunk, her speech was slurred, and she stumbled as she walked.”¹⁷¹

Defendant videotaped the sexual assault that followed with his cell phone, then circulated the video among their peers and texted his friends in the following days, “[w]hen your first time having sex was rape.”¹⁷² One friend said the video, which had been deleted prior to the filing of criminal charges, showed victim’s head repeatedly hitting a wall during the assault.¹⁷³

When defendant emerged, his friends checked on victim, who was on the floor vomiting and needed to be driven home.¹⁷⁴ The next day, victim spoke to her mother about bruises on her body and torn clothing, which made victim fear that “sexual things had happened at the party.”¹⁷⁵ Over several months, victim learned of the video and its distribution, but at first, her priority was only to “put[] the episode behind her” and see the film destroyed; defendant continued to lie about the video’s existence until it was deleted at the instruction of law enforcement.¹⁷⁶

The prosecutor sought juvenile waiver, arguing that defendant’s behavior was “sophisticated and predatory[,] ‘calculated and cruel,’”

166. *Id.*

167. *In re G.M.C.*, No. A-0223-18T4, 2019 WL 2486221, at *1 (N.J. Super. Ct. App. Div. June 14, 2019); Ferré-Sadurní & Nir, *supra* note 6.

168. *G.M.C.*, 2019 WL 2486221, at *1.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at *1–2.

174. *Id.* at *1.

175. *Id.*

176. *Id.*

and finding criminal sophistication sufficient for elevation to adult criminal court.¹⁷⁷

In denying waiver, Judge Troiano explicitly alluded to “the traditional case of rape,”¹⁷⁸ indicating that victim seemed partly responsible for the assault and implying that she was lying because she had in fact wanted to go with defendant before the assault.¹⁷⁹ He emphasized that she was an “alleged victim,” noting that criminal charges were only filed once the video had been destroyed and that she did not immediately contact authorities or seek help after the assault.¹⁸⁰

After discussing the texts among defendant and his friends following the sexual assault, Judge Troiano determined that defendant was “just a 16-year-old kid saying stupid crap to his friends.”¹⁸¹ The messages, which the judge quoted in his verbal denial, included phrases such as “Boy, if I had a knife on me—on me when I—when I fucked her, I’d be the epitome of this show.”¹⁸² Calling this language “so childish, so stupid,” the judge implied it was nothing “out of the ordinary for a 16-year-old . . . to be saying to boys, to his friends” and denied any calculation, cruelty, sophistication, or predatory nature on defendant’s part.¹⁸³

Instead, Judge Troiano emphasized that defendant came from a “good family,” was “clearly a candidate . . . for a good college,” and participated in Eagle Scouts.¹⁸⁴ The judge thought that the prosecutor should have explained to victim and her family “the devastating effect a waiver would have on G.M.C.’s life.”¹⁸⁵ Judge Troiano more heavily valued these notions than the prosecutor’s consideration of all statutory factors in the waiver request.¹⁸⁶

D. The New Jersey Court System’s Response to the Judges’ Comments

The judiciary removed Judge Troiano at his own request,¹⁸⁷ removed Judge Russo after a series of hearings,¹⁸⁸ opted not to discipline Judge

177. *Id.* at *2.

178. *Id.*

179. *Id.* at *3.

180. *Id.*

181. *Id.*

182. *Id.* at *4.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at *5.

187. *Order - Superior Court Judge James G. Troiano Recall*, N.J. CTS.: NOTICES TO THE BAR (N.J. July 17, 2019), <https://www.njcourts.gov/notices/2019/n190717a.pdf?c=eDQ>.

188. *See Panel Assignment Order*, N.J. CTS.: ADVISORY COMM. ON JUD. CONDUCT (July 24, 2019), <https://www.njcourts.gov/attorneys/assets/acjc/Russopanelorder.pdf?c=sLa; Case>

Silva—though she will not be reappointed,¹⁸⁹ and committed to enhance judicial training on issues pertaining to sexual violence.¹⁹⁰ In a Directive on July 17, 2019 (“Directive”), Acting Administrative Director of the New Jersey Courts Judge Glenn A. Grant established a “Judiciary Enhanced Education and Training Initiative,” referencing the Judiciary’s “Mission Statement to ‘earn the respect and confidence of an informed public.’”¹⁹¹

On June 17, 2019, the Appellate Division reversed Judge Silva’s opinion and remanded to the Law Division because she substituted her judgment for the prosecutor’s, exceeding abuse of discretion review, and because the prosecutor had not abused discretion.¹⁹² The court noted that victim’s age made the offense statutory rape, rendering most of Judge Silva’s scrutiny unnecessary because probable cause existed that defendant had committed the offense.¹⁹³ The reversing opinion noted Judge Silva’s reliance upon recent Supreme Court case law discussing “the different workings of the adolescent mind” in her rejection of the prosecution’s assessment of defendant’s qualification for waiver¹⁹⁴ but did not find her reasoning persuasive. The Appellate Division found that the family court judge had minimized harm to a young victim and abused discretion by assessing whether “the offense warranted being addressed in adult court.”¹⁹⁵

The Appellate Division also reversed Judge Troiano’s denial of juvenile waiver in *G.M.C.*, admonishing the family judge’s consideration of defendant’s extracurriculars and college prospects and pointing out that these should no more work in defendant’s favor than lower grades should work against another hypothetical defendant, in order to show the irrationality.¹⁹⁶ The Appellate Division found that Judge Troiano had accepted the defense theory as though he had conducted a bench trial and

Management Order, N.J. CTS.: ADVISORY COMM. ON JUD. CONDUCT (Oct. 11, 2019), <https://www.njcourts.gov/attorneys/assets/acjc/RussoAdjournment.pdf?c=Prk>; *In re Russo*, 231 A.3d 563, 566 (N.J. 2020).

189. *Silva Majority*, *supra* note 157, at 4; Brent Johnson, *Murphy Won’t Re-Nominate N.J. Judge Who Made Controversial Comments in Sexual Assault Case*, N.J.COM (Nov. 18, 2020, 8:30 AM), <https://www.nj.com/politics/2020/11/murphy-wont-re-nominate-nj-judge-who-made-controversial-comments-in-sexual-assault-case.html>.

190. Glenn A. Grant, *Directive # 14-19 New Jersey Judiciary Enhanced Training and Education Initiative*, N.J. CTS. 1 (July 17, 2019) [hereinafter *Directive*], <https://www.njcourts.gov/notices/2019/n190717e.pdf>.

191. *Id.* at 1, 3.

192. *See In re E.R.M.*, No. A-0533-18T4, 2019 WL 2495675, at *4–5 (N.J. Super. Ct. App. Div. June 17, 2019).

193. *Id.*

194. *Id.* at *3.

195. *Id.* at *5.

196. *In re G.M.C.*, No. A-0223-18T4, 2019 WL 2486221, at *5 (N.J. Super. Ct. App. Div. June 14, 2019).

was acting as trier of fact.¹⁹⁷ Judge Troiano sympathized with defendant, emphasizing the impact that a waiver could have on defendant's life, and thereby exceeded the scope of judicial review by substituting his own judgment.¹⁹⁸

The ACJC filed a formal, public complaint against Judge Russo on August 21, 2018¹⁹⁹ and recommended his suspension on March 11, 2019, based largely upon aggravation of the counts against him for his treatment of plaintiff in the FRO case and refusal to acknowledge wrongdoing.²⁰⁰ The recommended discipline resulted from four total charges discussed in the Presentment; while not all of the counts are relevant to sexual violence, it should be noted that they compounded the case against him.²⁰¹ The ACJC determined that in addition to mistreating and potentially re-victimizing plaintiff in *M.R. v. D.H.*,²⁰² Judge Russo had pressed her for irrelevant information under New Jersey's governing Prevention of Domestic Violence Act and the sexual assault statute, emphasizing that the criminal code focuses only on "the assaultive conduct of the defendant" rather than the victim's behavior.²⁰³ The Supreme Court instituted proceedings against Judge Russo on July 9, 2019, which culminated in his removal from the bench.²⁰⁴

The following week, the court also terminated Judge Troiano's recall to judicial service at his own request and without further investigation.²⁰⁵ The ACJC held an informal hearing at which it declined by a majority to discipline Judge Silva, noting that "it was statutorily required that the Judge assess whether the prosecutor had shown that the harm suffered by the victim was above, beyond and in addition to the inherent harm associated with the act itself"; however, sources indicate that Governor Phil Murphy will not reappoint her for the 2021 term.²⁰⁶ Two factors heavily influenced the ACJC's decision not to discipline Judge Silva: her

197. *Id.*

198. *Id.* at *4–5.

199. Complaint, *supra* note 143, at 10.

200. Presentment, *supra* note 140, at 41–42.

201. *See id.* at 2–3.

202. *Id.* at 9.

203. *Id.* at 30, 33.

204. *In re Russo*, 231 A.3d 563, 566, 575 (N.J. 2020).

205. *Order - Superior Court Judge James G. Troiano Recall*, *supra* note 187.

206. *Silva Majority*, *supra* note 157, at 2–4 (finding that the judge's words were "inappropriate" but that she was obligated "to ascertain whether the prosecutor has shown that the sexual assault was particularly egregious beyond its inherent egregiousness"); *see also, e.g., Johnson*, *supra* note 189 (indicating that the judge will not be reappointed). The ACJC majority said Judge Silva "sacrificed sensitive and conciliatory language in favor of a more clinical, unemotional, perhaps even stoic legal evaluation of the statutory factors and the prosecutor's burden." *Silva Majority*, *supra* note 157, at 4.

recognition of the inappropriate word choice and the fact that her comments had been “an integral part of her statement of reasons for denying waiver rather than a gratuitously offensive comment unrelated to the judicial decision-making process.”²⁰⁷ The majority stated that the ACJC would ordinarily communicate these conclusions to the judge privately, issuing a public statement only because of “extensive publicity,” though a four-person dissent opined that a formal, public hearing would have built confidence in the Judiciary.²⁰⁸

V. ANALYSIS OF RECENT COMMENTS

Like jurors,²⁰⁹ judges are not immune to the influence of rape culture, making separation of subconscious RMA from sexual violence cases difficult.²¹⁰ This Part examines the judges’ invocations of rape myths, particularly that the victim wanted it, harm was mild, victim was partly responsible for the assault, and prosecution victimized defendant.

A. Judge Russo

Rather than focusing on defendant’s behavior during the assault, Judge Russo persistently questioned plaintiff’s responses. The ACJC noted the possibility of this revictimizing plaintiff and emphasized that it had “no legitimate or cognizable purpose within the construct of the [New Jersey Prevention of Domestic Violence Act].”²¹¹ Judge Russo’s FRO denial applied rape myth logic and focused on plaintiff’s softened language.

Plaintiff’s reluctance to speak of the attack may be tied to the idea of domestic violence, and in this case sexual assault, as a private harm inappropriate for public or judicial attention. Her use of softened language²¹² is common among victims recounting a traumatic assault.²¹³

207. *Silva Majority*, *supra* note 157.

208. *Id.* at 5; A. Matthew Boxer et al., *Dissenting Statement*, N.J. CTS.: ADVISORY COMM. ON JUD. CONDUCT (June 25, 2020), <https://njcourts.gov/attorneys/assets/acjc/MarciaSilviaDissentingStatement.pdf?c=9nx>.

209. Woodhams et al., *supra* note 94, at 422 (noting inconsistencies between mock jurors’ assumptions about rape and empirical findings about perpetrator behavior).

210. *See* JUDGES TELL, *supra* note 51, at 1–2.

211. Presentment, *supra* note 140, at 9.

212. Complaint, *supra* note 143, at 2 (“[Defendant and victim] had sex, but it was against [her] will . . . [defendant] pulled [her] pants down, and that’s what happened.”).

213. *Raped or “Seduced?” Slides*, *supra* note 129, at 35.

The judge construed what may have been a psychological defense mechanism as “testimony [that] they had intercourse.”²¹⁴

When asked by defense counsel whether she had worked as an exotic dancer, plaintiff “crumbled” and, in Judge Russo’s words, seemed to have “her . . . legs taken out from underneath her.”²¹⁵ If her fear was that her past work would hurt her credibility, it was well-founded. The judge’s remarks aligned with the misconception that “prostitutes cannot be raped.”²¹⁶ Though not a prostitute, plaintiff suffered similar prejudice. The judge’s statement that an exotic dancer should know how to prevent sexual contact evinces that plaintiff’s status as a sex worker subjected her to the myths that she wanted it and was the sexual gatekeeper.²¹⁷

This compounded with her prior sexual relationship with defendant to complete a myth-tainted picture into which intercourse fit, but not sexual assault. Plaintiff’s own use of softened language to describe the assault only solidified this impression.

B. Judge Silva

Judge Silva’s juvenile waiver denial adhered to the myth that harm to victim was minimal. The judge focused on victim and defendant’s former romantic relationship rather than the fact that sexual intercourse with a person under the age of consent is sexual assault by statutory definition. She seemed skeptical that victim was attacked at all and assumed that lack of reported drastic injury, coupled with an impression that the perpetrator had not “used extreme violence or a weapon,” meant victim had not in fact been a victim—or if she had, these were signs that no real harm had been done.²¹⁸ But because strict liability applied, the analysis was unnecessary—defendant had “insisted it was consensual,” thereby agreeing to involvement in some form of encounter.²¹⁹ Even so, Judge Silva was troubled by the prosecution’s rejection of defendant’s argument and disagreed that his actions indicated the offense was calculated.²²⁰ She adhered to the myth of rape as distinct from violence.

214. Panel Findings and Recommendation at 26, *In re Russo*, No. D-100-18 (082636) (N.J. Jan. 28, 2020) [hereinafter Findings], <https://www.njcourts.gov/attorneys/assets/acj/RussoPanelFinding.pdf?c=n6h>.

215. *Id.* at 29, 34.

216. Burt, *supra* note 12, at 133; *see also supra* notes 81–85 and accompanying text.

217. *See* Peterson, *supra* note 82, at 473 n.38, 476–77.

218. *In re E.R.M.*, No. A-0533-18T4, 2019 WL 2495675, at *3 (N.J. Super. Ct. App. Div. June 17, 2019).

219. *Id.* at *1, *4.

220. *Id.* at *2–3.

The overall result was defendant being viewed as a victim whose future is damaged by prosecution for something insignificant.

C. *Judge Troiano*

Judge Troiano employed numerous rape myths in G.M.C.'s juvenile waiver denial. One troubling aspect of the decision is his insistence that defendant's texts about wishing he had had a knife on him during the attack were harmless. The judge considered sharing violent sexual fantasies normal for sixteen-year-old boys.²²¹ Judge Troiano's impression that defendant was merely a "kid saying stupid crap to his friends"²²² encompasses much of what scholars call rape culture.²²³ Such logic implicitly or explicitly denies harm to victims, discounting violence and normalizing exceptional behavior with a "boys will be boys" attitude.²²⁴ An equally evident example of myth guiding judicial logic comes from Judge Troiano's reference to the "traditional" case of rape.²²⁵

The judge employed softened language to describe the interactions between victim and defendant, implying that victim wanted intercourse based upon prior behavior.²²⁶ He was skeptical of her status as a victim, considering her equally as responsible for the assault as defendant.²²⁷

The denial was probably influenced by the usual effect of alcohol consumption on judicial analysis of victim and defendant responsibility: defendant's was diminished as a teenager enjoying the fun, and victim's heightened as a girl who should have been more careful. Judge Troiano implied that she was crying rape only now because she was hiding something.²²⁸ Meanwhile, defendant was depicted as a victim of prosecution, whose college prospects and good family mitigated his behavior.²²⁹

221. The judge quoted G.M.C.'s texts: "Boy, if I had a knife on me—on me when I—when I fucked her, I'd be the epitome of this show.' I mean, . . . so childish, so stupid. But anything out of the ordinary for a 16-year-old . . . to be saying to boys, to his friends. And then, of course, he goes back to saying, 'I fucked her, not raped her. Calm down. If you have the video, get rid of it.'" *In re* G.M.C., No. A-0223-18T4, 2019 WL 2486221, at *4 (N.J. Super. Ct. App. Div. June 14, 2019). Note the benign perception of an expletive with violent connotations, both alongside the knife wish and in explanation to an apparently concerned audience. *See supra* notes 72–74 and accompanying text.

222. *G.M.C.*, 2019 WL 2486221, at *3.

223. *See supra* Section III.A.

224. *See supra* notes 92–93, 122 and accompanying text.

225. *G.M.C.*, 2019 WL 2486221, at *2.

226. *Id.* at *3.

227. *See id.*

228. *Id.*

229. *Id.* at *4.

D. Connecting the Dots

Dismissiveness of victim's harm, minimization of her objections' significance, and misconstruction of her experience contributed to each judge's sympathy for defendant,²³⁰ or even hostility toward victim.²³¹ This section examines some common misperceptions.

1. Distinctions Regarding Severity of Offense

Both juvenile cases use the myth that harm was minimal, and the FRO denial assumed that the victim suffered none. Judges Silva and Troiano scrutinized the severity of the assault. Such analysis is made difficult by the fact that victims' perceptions of severity and trauma may differ, even after similar attacks.²³² While assuming a massive level of trauma in the form of severe psychological harm may be detrimental, in that it minimizes the experience of victims who do not complain of such harm, it is similarly detrimental to presume that none was inflicted.²³³ That all cases involved acquaintance rape fed a presumption against severe trauma.

The Appellate Division in *E.R.M.* combatted the myths of no real harm to a victim who does not complain of severe impact on her life and of a stereotypical rape by condemning minimization of harm to the victim and rejecting the notion that the assault fell below a threshold of violence or heinousness rendering it worthy of trial in adult court.²³⁴ It combatted the crying rape myth by reversing an opinion that relied upon that myth. Additionally, the Appellate Division in *G.M.C.* condemned the myth of defendant as an otherwise good person for whom the offense is out of character.²³⁵ These reversals demonstrate a successful mechanism to combat bias below.

While the reversals clarify much about the family court's linguistic problems, it is worth noting that judicial review requires consideration of New Jersey Statute 2A:4A-26.1, which incorporates opportunities to consider, among other factors, the "nature and circumstances of the

230. *Id.* at *2–4; *In re E.R.M.*, No. A-0533-18T4, 2019 WL 2495675, at *3 (N.J. Super. Ct. App. Div. June 17, 2019).

231. Presentment, *supra* note 140, at 7–9.

232. See *supra* notes 107–115 and accompanying text.

233. See GAVEY, *supra* note 4, at 182–83 (articulating the challenge of incorporating diverse victim experiences, including lower levels or shorter duration of trauma into analysis of severity, without sacrificing hard-won "recognition of the traumatic potential of rape").

234. See *E.R.M.*, 2019 WL 2495675, at *5.

235. See *id.* at *3–4.

offense charged” in evaluating juvenile waiver requests.²³⁶ Though such statutorily given opportunities may not excuse RMA, they could contribute to judicial difficulty in avoiding myth application and to the ACJC’s hesitation to publicly hear complaints such as those brought against Judge Silva. It is beyond the scope of this Note to examine how often this consideration results in judges overstepping the abuse of discretion standard of review, assuming the fact-finder’s role, or minimizing victim’s harm.²³⁷ However, such questions may merit further study.

Whether and how to grade the severity of a sexual assault presents policy questions worth examining in theory, but answers are elusive. Victims experience varied levels of trauma, which some theorize could be partly because rape is inherently more traumatizing in some circumstances than in others.²³⁸ However, gradation cannot be productive if attempted with haste or prior assumptions. Victims’ trauma may be less impactful upon their lives, but this does not discount the violent nature of an assault. If measurements of severity as called for by Nicola Gavey are to be developed,²³⁹ it will be from further research and evolving discourse. Presently, assessing severity of sexually violent acts is like measuring without a uniformly accepted yard stick; no one has found a single tool which is always appropriate for the task. Importantly, grading violence based upon its impact risks punishing offenders based upon victims’ subjective perception rather than an action’s wrongfulness, thereby decreasing the social and legal import of violent actions themselves.

2. Focus on (In)Adequacy of Victim’s Objection

All three judges’ view that victim’s behavior was insufficient recalls the myth surrounding a real rape and stereotypical victim.²⁴⁰ Related is the myth-supported suspicion that victims were probably lying when their reports did not meet expectations.²⁴¹

A 2012 study conducted in the United Kingdom tallied victim responses to stranger rape and found that “[e]ven with a sample of potentially more myth-congruent rapes . . . 40% of victims did not report struggling,” empirically challenging the stereotype that all true victims

236. N.J. STAT. ANN. § 2A:4A-26.1(c)(3)(a) (2020).

237. See, e.g., *In re G.M.C.*, No. A-0223-18T4, 2019 WL 2486221, at *5 (N.J. Super. Ct. App. Div. June 14, 2019); *E.R.M.*, 2019 WL 2495675, at *5.

238. See GAVEY, *supra* note 4, at 229–231.

239. *Id.* at 182.

240. See *supra* notes 94–102 and accompanying text.

241. See *supra* notes 94–104 and accompanying text.

physically resist.²⁴² Interestingly, even when a single victim among the cases analyzed in this Note reported physically resisting, this made no apparent difference to the judge's analysis.²⁴³

In fact, New Jersey requires no additional element of physical force apart from penetration against the victim's will to constitute sexual assault, as emphasized by the three-judge panel which recommended Judge Russo's removal.²⁴⁴ Exploration of victim's behavior, beyond lack of consent or outright refusal, is based not in law but in social conditioning.²⁴⁵

3. Minimization of Victim's Experience

Deductions that harm was insignificant or that victim is at least partly to blame stem from RMA. Burt's just world hypothesis, in which listeners disbelieve or blame victims to maintain an understanding of society as generally good or safe,²⁴⁶ may account for some degree of deliberate self-distancing from victims. Director Schafran suggests this particularly applies to some women who want to "believe that the victim was raped because she engaged in behavior they think they would not engage in . . . [or] precisely because they engage in these behaviors . . . that these are not circumstances in which rape occurs."²⁴⁷

Plaintiff in Judge Russo's case was reluctant to give detail, and softened language contributed to his perception of non-existent harm. It is less possible to examine victims' language in the juvenile cases due to privacy protections, but each valued private, immediate resolution over criminal charges. Generally, victims' minimization or failure to complain about all aspects of expected harm may stem partly from socialization or

242. Woodhams et al., *supra* note 94, at 444 (analyzing data from victims of convicted offenders).

243. *In re* E.R.M., No. A-0533-18T4, 2019 WL 2495675, at *1 (N.J. Super. Ct. App. Div. June 17, 2019).

244. Findings, *supra* note 214, at 38, 69 (reiterating that victim had presented facts sufficient to allege a sexual assault without describing all aspects of the encounter, specifically what she did to resist).

245. *See supra* Section III.A.

246. Burt, *supra* note 58, at 218.

247. Schafran, *supra* note 77, at 1035. Some research has shown a greater tendency of women than men to blame the victim. Ronen Perry, Oren Gazal-Ayal & Chen Toubul, "He Said, She Said": *With a Twist*, 69 SMU L. REV. 3, 10 (2016). Non-experimental and observational studies on the impact of judges' gender on case outcomes yield mixed results. *Id.* at 12. This Note does not examine effects of gender, partly because small sample size makes comparison ineffective. Just as importantly, the author cannot within this Note give fair light to all implications of theoretically discovering gendered decision-making, much less offer an ideal solution.

acceptance of rape myths encouraging self-blame.²⁴⁸ A private-public distinction may also contribute.²⁴⁹

4. Excusing or Mitigating Defendant's Behavior

Judges in both juvenile waiver cases disregarded facts which might establish a “[d]egree of criminal sophistication exhibited by the juvenile” as required by statute.²⁵⁰ These include E.R.M.’s “forethought to be prepared with a condom”²⁵¹ and G.M.C.’s leading victim into an off-limits area at the party, recording the attack, then distributing the video while lying to victim about its existence.²⁵² Judge Russo similarly analyzed plaintiff’s behavior rather than defendant’s.²⁵³ Planning is not uncommon among offenders,²⁵⁴ but each judge turned legal questions away from defendant’s behavior to search for contributory fault on victim’s part.

VI. RECOMMENDATIONS: BROADER ANALYSIS OF JUDICIAL LANGUAGE IN NEW JERSEY SEXUAL VIOLENCE CASES

Existing remedies to combat the impact of rape myths on judicial analysis in New Jersey include appellate review, judicial education, and judicial discipline. Appellate review can correct biased decisions below, as with both juvenile waiver denials. Although judicial discipline does not result in altered outcomes for parties whose judge is the subject of a formal complaint, it remains a powerful tool for combatting employment of rape myths or similar biases, especially considering its close ties with public scrutiny. That judges are held accountable for bias is crucial to public trust and continued improvement of the justice system. Judicial discipline provides an opportunity to reprimand or educate judges. Finally, judicial education is meant to improve future performance by equipping judges with the best-known tools of analysis. The New Jersey Supreme Court’s response to the above cases aimed to correct bias and restore public trust.

248. See Burt, *supra* note 12, at 140.

249. See *supra* text accompanying note 20.

250. N.J. STAT. ANN. § 2A:4A-26.1(c)(3)(f) (2020).

251. *In re* E.R.M., No. A-0533-18T4, 2019 WL 2495675, at *1 (N.J. Super. Ct. App. Div. June 17, 2019).

252. *In re* G.M.C., No. A-0223-18T4, 2019 WL 2486221, at *1 (N.J. Super. Ct. App. Div. June 14, 2019).

253. See *infra* text accompanying notes 145–50.

254. Schafran, *supra* note 77, at 1006–07.

A. *Enhanced Training in New Jersey*

In the same week as the reversals, on the same date that the Supreme Court terminated Judge Troiano's recall and initiated formal removal proceedings against Judge Russo, the Supreme Court called for enhanced training. Judge Grant, on behalf of the Supreme Court, ordered the design and implementation of additional judicial education for state judges on sexual assault and domestic violence.²⁵⁵ In his statement on July 17, 2019, he emphasized a continued commitment to improve fairness of adjudication and to earn public confidence.²⁵⁶ The new mandatory training joins existent judicial education, including "courses on sexual assault and sexual violence, domestic violence, juvenile matters, and judicial ethics and demeanor."²⁵⁷ Its focus will be enhancing judges' training on "sexual assault, domestic violence, implicit bias and diversity."²⁵⁸ Interestingly, Judge Russo had received training on adjudicating domestic violence law as recently as five months before hearing *M.R. v. D.H.*²⁵⁹ Three judges' independent application of rape myths and gender-biased logic within a short period of time motivated the New Jersey Supreme Court to improve the effectiveness of trainings.

NJEP staff conducted two of five panels at the new training attended by New Jersey judges from all levels of court called for by Chief Justice Stuart Rabner.²⁶⁰ At the Gender Violence and Bias Summit on October 28, 2019, NJEP Director Schafran presented a training on *Stress, Trauma and the Brain: Implications for the Courts*, and Senior Attorney Jennifer Becker presented an NJEP curriculum, *Raped or "Seduced"?*

255. David Wildstein, *Judges Ordered to Attend Training Session on Sexual Assault, Domestic Violence*, N.J. GLOBE (July 17, 2019, 5:11 PM), <https://newjerseyglobe.com/judiciary/judges-ordered-to-attend-training-session-on-sexual-assault-domestic-violence>.

256. *Directive*, *supra* note 190, at 1, 3. His optimism seems well-founded. See Norma Juliet Wikler & Lynn Hecht Schafran, *Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States*, 12 WOMEN'S RTS. L. REP. 313, 361 (1991) (describing positive press reactions to efforts against gender bias, despite fears that publicity would lessen public trust of the judiciary).

257. *Directive*, *supra* note 190, at 2.

258. *Id.* at 1.

259. Presentment, *supra* note 140, at 9.

260. Letter, *supra* note 49; see also Stuart Rabner, *Statement of Chief Justice Stuart Rabner*, N.J. CTS. 3 (July 17, 2019), <https://njcourts.gov/host/pr/statementcj.pdf>.

*How Language Shapes Our Response to Sexual Violence.*²⁶¹ Judges' overall response seemed positive.²⁶²

The Directive had a similar impact to that intended in State Senator Corrado's failed bill, introduced on August 26, 2019, although the latter sought to establish a minimum of three hours for the new curriculum, with at least half that time devoted to issues surrounding sexual violence.²⁶³ Although there is no statutory minimum, the Directive ordered a "mandatory full-day educational conference," which surpassed the proposed requirement.²⁶⁴

The courts already aim to combat rape myths, which is important because their conscious rejection encourages more critical and accurate scrutiny of sexual violence allegations.²⁶⁵ Still, the subconscious nature of myth or bias constrains measurements of their application.²⁶⁶ Evolving circumstances, such as change in social attitudes, compound the difficulty.

Director Schafran says, "we can't *know* as we'd like to know" how effective training is because there is no system of measurement.²⁶⁷ However, NJEP regularly seeks participant evaluations of its programs, which have received positive reviews, and its *Judges Tell* lists some of many new understandings judges across the country gained from attending.²⁶⁸ Feedback provides anecdotal evidence of the training's impact, but a more detailed understanding of the myths and biases impacting judgments could serve multiple purposes. Most realistically, it

261. Letter, *supra* note 49. Director Schafran considers incorporation of neuroscience relating to trauma a useful advancement in judicial education, especially when scientists participate. Interview, *supra* note 34. She introduced the first such training for NJEP in 2000, and it was welcomed by participating judges. *Id.* For a brief scientific explanation, see James W. Hopper, *Why Many Rape Victims Don't Fight or Yell*, WASH. POST (June 23, 2015, 3:51 PM), <https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell>.

262. Interview, *supra* note 34.

263. S.B. 4077, 218th Leg. (N.J. 2019). This bill would have built upon existent state requirements for design and implementation of domestic violence education. See N.J. STAT. ANN. § 2C:25-20 (2020).

264. *Directive*, *supra* note 190, at 1.

265. Burt, *supra* note 12, at 130.

266. Although, surveys have been implemented to gauge pervasiveness of gender bias in courtroom interactions. See COMMITTEE SURVEY, *supra* note 39, at 1.

267. Interview, *supra* note 34.

268. JUDGES TELL, *supra* note 51, at 1–2. NJEP's programs had changed previously myth-based understandings, from the real rape stereotype to belief in widespread false allegations. *Id.* Occasionally, a judge reaches out with especially memorable praise. Interview, *supra* note 34. One judge called an early training in Oregon "the best educational program he had ever attended." *Id.* Another told of a case he presided over following training in which he said he would previously not have convicted defendant solely based upon the fact that victim lacked genital injury. *Id.*

could reveal areas of judicial reasoning in which specific myths are common. It could also identify any relationships between areas of law or victim status and influence of RMA. If such patterns exist, they might guide design of future trainings to inform specific types of adjudication.

B. Model Analyses of Courtroom Language

Overall, New Jersey's interviewing and courtroom procedures are increasingly trauma-informed, an asset because treating people as possible real victims rather than suspects can elicit more accurate information.²⁶⁹ Still, nationwide examples of judicial language, analyzed empirically in 2019, reveal rape myth logic in many state appellate decisions.²⁷⁰ Two models of analysis are useful for structuring future studies.

New England Law's Judicial Language Project, directed by Professors Judith Greenberg and Wendy Murphy, shows examples of judicial opinions' problematic language—conforming to gender bias or rape myths—and appropriate language—combatting or eliminating them—into a small database easily sorted by state.²⁷¹ Since 2005, students have submitted quotes from either category with a citation and explanation of why the language was problematic or helpful.²⁷² It is a useful model for organizing numerous cases.²⁷³

Boux's model sampled 2012 state appellate opinions.²⁷⁴ She gauged the percentage referencing eleven rape myths, revealing some were more

269. Interview, *supra* note 34.

270. Boux, *supra* note 2, at 267.

271. The author was impressed during the research process by the project's inclusion of both problematic and appropriate language examples. New England Law's collection and case-by-case analysis of judicial language on sexual violence is currently unavailable in full to the public, but the school is currently republishing online access to sample letters and language examples representative of this work. By analyzing helpful alongside troublesome treatment of sexual violence cases, the project provides a constructive model for in-depth research. See *Projects*, NEW ENG. L., <https://www.nesl.edu/practical-experiences/centers/center-for-law-and-social-responsibility/projects> (last visited Jan. 6, 2021) (describing the Judicial Language Program, a sub-project of the school's Women's and Children's Advocacy Project); Wendy J. Murphy, *The Need for Accurate Language in Penn State Coverage*, CRIME REP. (Nov. 23, 2011), <https://thecrimereport.org/2011/11/23/2011-11-murphy-blog-on-sex-terms/>; All in a Day, *The Judicial Language Project*, CBC, <https://www.cbc.ca/player/play/2689848216> (last visited Jan. 6, 2021).

272. See *Projects*, *supra* note 271.

273. See, e.g., *Judicial Language Project*, SEXUAL ASSAULT NETWORK, <http://www.sanottawa.com/projects/judicial-language-project> (last visited Nov. 19, 2020) (describing a Canadian project modeled after New England Law's).

274. Boux, *supra* note 2, at 256–57.

common than others.²⁷⁵ Among the most common was “the myth that distances rape from violence,” either mentioned or adhered to in twenty-nine percent of cases evaluated, and softened language portraying rape as intercourse.²⁷⁶ Nine myths were mentioned frequently enough to “present at [a] five percent threshold” for significance, five solely because opinions reinforced them.²⁷⁷

Boux’s approach efficiently measures prevalence of individual myths but would be most useful combined with the ability to screen by victim trait or case type to identify patterns. Also, delineating particularly problematic language, including phrases artificially reducing severity of victim experience,²⁷⁸ from that which strikes a neutral tone or challenges bias would be useful.²⁷⁹ The latter may be called “accountable language.”²⁸⁰

C. Further Study of Judicial Language in Sexual Violence Cases

More detailed study of judicial language used to address sexual violence in New Jersey could reveal common biases or specific patterns of myth acceptance but will tax resources. If the Committee or a similar organization designs such a study, law student assistance in exchange for pro bono hours or course credit could save time and money. The project might resemble the 1980s cooperation between the Task Force and the Rutgers Newark Women’s Law Clinic, in which students analyzed appellate decisions’ impact on women’s rights issues.²⁸¹

Boux’s recent examination of rape myth prevalence employs an empirical approach by surveying appellate cases from forty-four states, but under fifteen percent of New Jersey cases were examined to remain

275. *Id.* at 260, 266–67.

276. *Id.* at 260.

277. *Id.*

278. *Id.* at 264. Although this Note targets judicial language specifically, softened descriptions also gain support from other sources. *See, e.g., In re E.R.M.*, No. A-0533-18T4, 2019 WL 2495675, at *1 (N.J. Super. Ct. App. Div. June 17, 2019) (quoting prosecutor’s statement that E.R.M. considered “whether or not he wanted to pursue the sexual encounter to completion”); *In re G.M.C.*, No. A-0223-18T4, 2019 WL 2486221, at *2 (N.J. Super. Ct. App. Div. June 14, 2019) (including prosecutor’s statement that “[G.M.C.] engaged in vaginal intercourse with [victim]”); Complaint, *supra* note 143, at 2 (quoting plaintiff’s testimony that “[they] had sex, but it was against [her] will”).

279. *See supra* notes 271–73 and accompanying text.

280. *See* Phyllis B. Frank & Barry Goldstein, *The Importance of Using Accountable Language*, N.Y. MODEL FOR BATTERER PROGRAMS, <https://www.nymbp.org/accountable-language-the-importance-of-using> (last visited Aug. 10, 2020). Accountable language directly contrasts softened language. *See supra* Section III.E.

281. SECOND REPORT, *supra* note 42, at 54.

nationally proportional.²⁸² Thus, while the statistics yielded are useful for examining the overall influence of rape myths in state courts, they do not reflect New Jersey specifically. An isolated analysis of New Jersey cases would ensure that other states' potential variations in policy or rates of RMA do not impact results. Additionally, Boux's study merges civil and criminal cases without attention to whether some myths more frequently influence certain types of cases. For example, analysis could be categorized by such victim or defendant traits as gender, age, race, and prisoner status or by area of law to uncover connections between type of case or victim and RMA. Though this Note examines comments on sexual assault perpetrated against females by young, male acquaintances, other circumstances can similarly trigger myth and bias.

Further study should identify why or how often inappropriate factors enter determinations of guilt or innocence, severity of crime, and other considerations. Researchers might analyze cases from a period of one to two years, depending upon available sample size to ensure consistency in social attitudes and limit the sample size to a reasonable number of cases.

The results will be most useful if available to the public, or at least to researchers with special permission to examine them. This is especially true if the New Jersey conducts its own study through a body like the Committee, as it could build public confidence in a state already committed to eliminating bias. Omission of case identifiers, including judge or party names and geographic details, would make this more reasonable alongside the inclusion of cases otherwise shielded from public view.

Although New Jersey's laws are not necessarily at fault, it is possible for laws themselves to reinforce misperceptions or encourage judges to engage in analysis from a perspective implicitly or explicitly condoning them.²⁸³ Considering adequacy of victim's resistance, for example, is contrary to relevant existing law; the state merely requires that sexual contact be with someone under thirteen years of age or without consent to constitute sexual assault.²⁸⁴ Still, specific areas of adjudication may

282. Boux, *supra* note 2, at 268–70 (listing in Appendix B the proportion of cases examined per state and prevalence of rape myth use in each state).

283. *But see supra* text accompanying notes 236–37 (identifying at least one example of statutory invitation to analyze the “nature and circumstances” of a juvenile offense and the possible correlation with analysis beyond judicial review for potential future study). *See also supra* notes 206–07 and accompanying text (referencing the ACJC's determination that Judge Silva's comments merited no discipline, partly because they were integral to her decision-making in the juvenile waiver case, accepting that such analysis was necessary under New Jersey law).

284. N.J. STAT. ANN. § 2C:14-2(a)–(c) (2020). A disturbingly relevant comparison presents in an analysis of 563 Canadian sexual assault cases, where researchers found “no

benefit from more critical analysis, such as the juvenile waiver statute. An ideal study would not only identify areas of concern, but also reveal laws and judicial interpretation already combatting bias, allowing exploration of what causes successes as well as challenges.

VII. CONCLUSION

Changes in language will not necessarily bring about change in thought²⁸⁵ or reduce the actual impact of subconscious bias, even if becoming conscious of it can help. Laws represent cemented societal values, which judges must attempt to apply without bias, a challenging task. Judicial education helps. But if patterns appear specific to a statute or area of law, legislators might consider whether relevant laws themselves can be adjusted to deter RMA.

The objective of this Note has not been to assert that all defendants in a sexual violence trial are or should be presumed guilty but to provide sample deconstructions of language. Further study of which myths most commonly influence judicial reasoning may prove useful for design of future judicial education or for identifying which types of cases most frequently trigger bias.

instances in [the] sample where a clear verbal refusal from an adult was described as sufficient and appropriate resistance,” despite that under an amended law “unsupported belief about consent is no longer admissible as a defense.” Coates et al., *supra* note 1, at 195.

285. Although, some argue this is possible. *See, e.g.*, Benedict, *supra* note 72, at 104–05 (describing the potential for media usage of gender-neutral language to impact public attitudes toward rape); Frank & Goldstein, *supra* note 280 (emphasizing the importance of “accountable language” to meaningfully recognizing perpetrator agency).