
NOTES

CREDIBILITY & CHARACTER:

COMBATting EPISTEMIC INJUSTICE AGAINST SURVIVORS OF SEXUAL VIOLENCE

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ABSTRACT

In her viral victim impact statement and subsequent memoir, Know My Name, Chanel Miller described her experience as a survivor of sexual violence before, throughout, and after Brock Turner's trial. Turner's sentencing sparked nationwide outrage that caused legal reform in the name of benefitting survivors; however, the reforms did not bring about procedural change in how trials for sex crimes are conducted nor directly address the injustices Miller expressed. One such injustice is epistemic injustice, which enacts harm on a person's credibility, their perceived capacity to be deemed credible by others, and their ability to have their knowledge considered as legitimate by society. This Note argues that the evidentiary framework governing the admissibility of criminal defendants' and sex-offense victims' character testimony during trial furthers epistemic harm toward survivors. This Note proposes a reform that would combat the imbalances of existing character-bolstering evidence rules, lessening their potential to inflict epistemic harm. This Note carefully considers the ramifications of such reforms for marginalized groups, including both survivors and defendants. Lastly, this Note advocates for a future where our

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social and collective understanding about sexual violence is more inclusive and accurate, and where survivors can regain more of their agency—both inside and outside of the courtroom.

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Content Warning: This Note discusses sexual violence.

INTRODUCTION

Brock's defense attorney brought in four character witnesses. . . . The lineup included his best friend from adolescence, an ex-girlfriend, his high school swim coach, and high school French teacher. I took six years of French too, but it never occurred to me to bring Madame Jensen in to let you know I gave an excellent presentation on *Le Petit Prince*.¹

—Chanel Miller

After Stanford swimmer Brock Turner sexually assaulted then-unconscious Chanel Miller behind a fraternity house dumpster in 2015, Turner was convicted in a highly publicized criminal trial.² Despite having as close to a “perfect case” as a survivor of sexual violence could get—with two eyewitnesses and intact physical evidence³—Miller still watched in disbelief as former Judge Aaron Persky sentenced Turner to six months in county jail.⁴ Turner served three.⁵ Viewed as a prime example of privilege in action in the criminal legal system and a vivid manifestation of the judge's bias against women, Turner's sentence prompted such outrage and protest from local and national communities that voters successfully recalled former Judge Persky,⁶ and California passed a law

¹ CHANEL MILLER, *KNOW MY NAME* 193 (2019).

² See, e.g., Liam Stack, *In Stanford Rape Case, Brock Turner Blamed Drinking and Promiscuity*, N.Y. TIMES (June 8, 2016), <https://www.nytimes.com/2016/06/09/us/brock-turner-blamed-drinking-and-promiscuity-in-sexual-assault-at-stanford.html>; Palo Alto Online, *Behind The Headlines – Inside the Brock Turner Trial*, YOUTUBE (Mar. 25, 2016), <https://www.youtube.com/watch?v=H0jqfqAa8A>.

³ *Know My Name: A Memoir*, HARV. KENNEDY SCH., <https://www.hks.harvard.edu/faculty-research/library-research-services/collections/diversity-inclusion-belonging/know-my-name> [<https://perma.cc/BQR3-JBCR>] (last visited Sept. 4, 2025) (describing Miller's assault prosecution as “perfect case” due to presence of eyewitnesses, Turner's immediate attempt to flee, and secured physical evidence); *Author and Artist Chanel Miller will Close the 2020 ALA Midwinter Meeting & Exhibits in Philadelphia*, AM. LIBR. ASS'N (Nov. 21, 2019), <https://www.ala.org/news/2019/11/author-and-artist-chanel-miller-will-close-2020-ala-midwinter-meeting-exhibits> [<https://perma.cc/PF4Y-DKKP>] (agreeing with categorization of Miller's assault prosecution as “perfect case”).

⁴ MILLER, *supra* note 1, at 233-37.

⁵ Emanuella Grinberg & Catherine E. Shoichet, *Brock Turner Released from Jail After Serving 3 Months for Sexual Assault*, CNN, <https://www.cnn.com/2016/09/02/us/brock-turner-release-jail/index.html> [<https://perma.cc/Y28H-BJ4J>] (last updated Sept. 2, 2016, 8:52 PM EDT).

⁶ Richard Gonzales & Camila Domonoske, *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, NPR (June 5, 2018, 1:58 PM), <https://www.npr.org/sections/thetwo-way/2018/06/05/617071359/voters-are-deciding-whether-to-recall-aaron-persky-judge-who-sentenced-brock-tur> [<https://perma.cc/4LL7-CUMU>].

requiring a mandatory three-year minimum prison sentence for penetrating an unconscious or intoxicated person.⁷

Left feeling demoralized and voiceless after trial, Miller published her victim⁸ impact statement online,⁹ which immediately went viral.¹⁰ Several years later, Miller released her memoir *Know My Name*.¹¹ Miller's memoir contextualizes her life and powerfully highlights her story, her agency, and her humanity. The criminal trial process, however, did not. Chanel Miller's story indicts the criminal legal system as designed to fail survivors—and exposes evidence law as one of its conduits.

Particularly, Miller's reflections on her experiences as a layperson who had to encounter the criminal trial process reveal harms that evidentiary rules can enable for victims of sexual violence.¹² For example, the Federal Rules of Evidence ("FRE") Rule 404 charts an avenue for criminal defendants to humanize and contextualize themselves during trial by allowing defendants the opportunity to offer character-bolstering evidence. However, it does not offer

⁷ CAL. PENAL CODE § 289(d)-(e) (West 2025); Matt Ford, *How Brock Turner Changed California's Rape Laws*, ATLANTIC (Oct. 1, 2016), <https://www.theatlantic.com/news/archive/2016/10/california-law-brock-turner/502562/>.

⁸ Throughout this Note, I use both "survivor" and "victim" to refer to people who have experienced sexual violence. From this point forward, I will use "victim" in instances where court opinions, the Federal Rules of Evidence, or a proposed evidentiary reform use the term to label people who have experienced sexual violence. In all other contexts, I will use "survivor" to refer to people who have experienced sexual violence.

However, not everyone who has experienced sexual violence identifies as a survivor and may even critique the label. See S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1104 (2022) (citing Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1498-99 (2021)). When interacting with individuals who have experienced sexual violence, it is important to let the individual determine the language and framing used to describe their experience. Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 83 n.1 (2020) ("The best practice may be to follow the lead of the person who has experienced the violence, since the journey from victim to survivor is unique to each person.").

⁹ Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17 PM), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra> [<https://perma.cc/8CUC-JFSG>] (publishing statement Miller submitted to former Judge Persky during trial), reprinted in MILLER, *supra* note 1, at 339.

¹⁰ MILLER, *supra* note 1, at 245-52 (detailing how within first day of posting, Miller watched as her statement garnered millions of views and coverage from major news outlets).

¹¹ See generally *id.*

¹² Turner's case took place in California, where the state trial court applied California Evidence Code section 1102. CAL. EVID. CODE § 1102 (West 2025). Although there are some subtle differences between Federal Rules of Evidence 404(a)(2)(A) and section 1102, the differences do not impact the overall imbalance between character bolstering opportunities for the defendant and victim. Compare FED. R. EVID. 404(a)(2)(A) (allowing criminal defendants, but not victims, to offer evidence of any "pertinent trait"), with EVID. § 1102 (allowing criminal defendants, but not victims, to offer certain forms of character evidence to prove they acted "in conformity with such character or character trait").

that same avenue for survivors.¹³ Ultimately, survivors' diminished ability to bolster their character makes it more procedurally difficult for them to have their perspectives heard, considered, and valued during trial. This Note argues that, against an anti-survivor social backdrop, this procedural barrier increases the likelihood that a survivor's assault claim is unfairly disbelieved based on listeners' pre-existing structural prejudices against survivors, leading to epistemic injustice in the trial process.

Epistemic injustice enacts harm on a person's credibility, their perceived capacity to be deemed credible by others, and their ability to have their knowledge recognized as legitimate by society.¹⁴ Scholars and practitioners within philosophical,¹⁵ medical,¹⁶ and social¹⁷ disciplines have highlighted how epistemic injustice directly affects their ability to meet core obligations in their disciplines. They have argued that epistemic harm tangibly impacts how people are treated and what types of relief people receive; therefore, they have worked to alter practices and procedures within these disciplines to mitigate epistemic

¹³ FED. R. EVID. 404(a)(2).

¹⁴ MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 4-5 (2007).

¹⁵ See, e.g., *id.* at 6 (explaining impairment to collective understanding caused by epistemic injustice); JOSÉ MEDINA, *THE EPISTEMOLOGY OF RESISTANCE: GENDER AND RACIAL OPPRESSION, EPISTEMIC INJUSTICE, AND RESISTANT IMAGINATIONS* 3 (2013) (linking epistemic injustice to structural barriers that undermine knowledge practices); Rachel McKinnon, *Epistemic Injustice*, 11 *PHIL. COMPASS* 437, 438-39 (2016) (connecting epistemic injustice to structural patterns of credibility deficits shaped by social identity and power relations); Amy Allen, *Power/Knowledge/Resistance: Foucault and Epistemic Injustice*, in *THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE* 187, 187-93 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds., 2017) (exploring how epistemic injustice structures knowledge production and disciplinary exclusion).

¹⁶ See, e.g., Ian James Kidd & Havi Carel, *Epistemic Injustice and Illness*, 34 *J. APPLIED PHIL.* 172, 178 (2017) (examining epistemic injustice as applied to patient complaints and reporting medical consequences engendered by patient not being believed); Himani Bhakuni & Seye Abimbola, *Epistemic Injustice in Academic Global Health*, 9 *LANCET GLOB. HEALTH* e1465, e1469 (2021) ("[M]embers of the global health community often witness a cycle in which researchers assume that locals in marginalised areas and members of marginalised groups do not have the capacity to contribute to research, and thereby bypass such people's participation."); Celestin Okoroji, Tanya Mackay, Dan Robotham, Davino Beckford & Vanessa Pinfold, *Epistemic Injustice and Mental Health Research: A Pragmatic Approach to Working with Lived Experience Expertise*, *FRONTIERS PSYCHIATRY*, Mar. 28, 2023, at 1, 2 ("There are significant barriers to the creation and legitimization of lived experience knowledge and research paradigms led by mental health survivors and service users.").

¹⁷ See, e.g., Eunjung Lee et al., *Honoring the Voice of the Client in Clinical Social Work Practice: Negotiating with Epistemic Injustice*, 64 *SOC. WORK* 29, 29 (2019) (discussing how social workers, such as therapists, can impose professional and institutional power onto clients by pre-empting clients' lived experiences during clinical social work sessions); Eunjung Lee, *Fact Construction and Categorization in Assessment: Cultivating Epistemic Justice and Resistance in Social Work Assessment*, 96 *SOC. SERV. REV.* 534, 534 (2022) ("Assessment and case formulation[s] are essential aspects of social work practice.").

harm.¹⁸ Legal scholars, too, have argued that epistemic injustice is thoroughly relevant to the substance and procedures of institutions and legal systems.¹⁹ As this Note will detail, epistemic injustice pervasively and directly affects people who participate in the criminal legal system, especially at trial.

This Note contributes to the legal scholarly project on epistemic injustice and evidence law reform by arguing that the evidentiary framework governing the admissibility of criminal defendants' and sex-offense victims' character testimony during trial furthers epistemic harm toward survivors. Because sexual assault is unique in that a victim's testimony might be the only evidence of the crime presented at trial, many trials for sexual assault require zero-sum determinations of credibility relying almost entirely on character evidence (colloquially referred to as "he said, she said"). When criminal defendants introduce positive character evidence, that evidence inevitably has direct anti-victim implications. This Note will argue that, because the default jurist typically does not have a victim's knowledge, character bolstering afforded only to

¹⁸ See generally sources cited *supra* notes 15-17.

¹⁹ See, e.g., Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 253-55 (2018) (discussing how Supreme Court, a historically all-male body, has enacted epistemic injustices against women, including by upholding Illinois's denial of woman's right to practice law even though she passed bar exam); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021) (urging legal scholars to "take seriously the epistemological universe of today's left social movements"); Washington, *supra* note 8, at 1108 ("This Essay draws on the framework of epistemic injustice to explain and dismantle coercive knowledge production within the family regulation system."); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 399 (2019) (describing how systemic disbelief of women's abuse narratives undermines legal protections and perpetuates gendered power imbalances); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 13 (2017) (explaining how prejudice-driven credibility downgrades can produce epistemic injustice); Jasmine B. Gonzales Rose, *Critical Race Theory as Legal Epistemic Justice*, 104 B.U. L. REV. 1295, 1296 (2024) [hereinafter Gonzales Rose, *Critical Race Theory*] (arguing attacks on Critical Race Theory are a form of epistemic injustice because they amount to efforts to prevent spread of "knowledge about race, racism, and other systems of subordination"); Jasmine B. Gonzales Rose, *Race, Evidence, and Epistemic Injustice*, in PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 380, 380 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021) (examining how racist evidence and racialized credibility assessments produce epistemic injustice in legal proceedings); Anne E. Ralph, *Qualified Immunity, Legal Narrative, and the Denial of Knowledge*, 65 B.C. L. REV. 1317, 1318 (2024) (critiquing qualified immunity for producing epistemic injustice by excluding plaintiffs' knowledge and lived experiences from legal development); Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1136 (2012) (arguing that the domestic legal system has inflicted epistemic harms on indigenous peoples); Julian A. Burlando-Salazar, Note, *Preventing the Epistemic Harm of Testimonial Injustice in Law Witness Credibility Assessments*, 103 B.U. L. REV. 1245, 1249 (2023) (analyzing how evidentiary rules and courtroom practices enable testimonial injustice that harms marginalized witnesses).

defendants will provide the jury greater opportunity to channel anti-victim assumptions.

Therefore, I propose a novel reform to FRE 412 that would allow alleged victims to introduce positive character evidence in sex-offense cases after the defendant offers positive character evidence of a pertinent trait. This proposed reform should apply even if the alleged victim does not testify as a witness,²⁰ and even if the defendant does not first attack the alleged victim's character.²¹ Enacting this reform would combat the imbalances of existing character-bolstering evidence rules, lessening their potential to inflict epistemic harm. Ultimately, this reform would make the legal trial process more just for survivors of sexual violence, while still maintaining considerations that balance procedural justice for defendants accused of sexual violence.

This Note proceeds as follows. In Part I, I provide an overview of the Federal Rules of Evidence and explain the relevant Rules' history, purpose, and current implementation. I also detail epistemic injustice as a concept directly relevant to, and pervasive in, society, law, and criminal trials. In Part II, I demonstrate how the Rules as they currently stand are unjust—in particular, epistemically unjust—to survivors. In Part III, I propose a novel reform, an amendment to FRE 412, to address this issue, and I provide model language for my proposed amendment. I demonstrate how my proposed reform is consistent with the FRE's history and tradition, achieves its legislative intent, and furthers fair policy. I discuss this reform's drawbacks and limitations in implementation. Finally, I explain how this Note does not argue for reform to achieve longer or harsher sentences for criminal defendants during trial, nor does it seek to further mass incarceration. I show how the theory of justice undergirding this Note is not further entrenchment in carceral feminism or increasing prosecutorial efficacy, and I demonstrate how mitigating epistemic injustice for survivors at trial and combatting carceral feminism do not need to be mutually exclusive. Instead, I show that this reform is necessary to center survivors during a dehumanizing trial process and provide opportunities for survivor narratives to be legitimated within a formal legal setting, thus mitigating epistemic injustice.

I. FEDERAL RULES OF EVIDENCE & EPISTEMIC INJUSTICE

A. *Federal Rules of Evidence*

Before the Federal Rules of Evidence were created, evidence law was common law.²² Aiming to promote uniformity across states, the Supreme

²⁰ See FED. R. EVID. 608(a) (limiting character evidence for truthfulness to testifying witnesses).

²¹ *Contra* FED. R. EVID. 404(a)(2)(B) (permitting character evidence about an alleged victim only if the defendant introduces such evidence first).

²² GEORGE FISHER, EVIDENCE 3 (4th ed. 2023) (“Underlying almost all American evidence law is the common-law tradition, and the Federal Rules borrow heavily from that tradition.”).

Court's evidentiary advisory committee proposed the first set of rules in 1972.²³ Congress debated and amended the proposal and eventually codified the Federal Rules of Evidence in 1975.²⁴ Since 1975, the FRE has been amended several times, most recently in 2024.²⁵ Today, the FRE governs most federal judicial proceedings.²⁶ At the time of writing, "forty-five states and Puerto Rico have adopted or mimicked the FRE in whole, with some states even adopting additional evidentiary rules that have no federal counterpart."²⁷ The five states that have not adopted distinct evidence codes or codified their evidence law operate under similar evidence principles.²⁸ Because of the FRE's large influence on federal and state courts' evidence procedures and case outcomes,²⁹ this Note's chosen reform focuses on a proposed FRE amendment.

1. Character Evidence

a. *Ban on Character Evidence*

Derived from common law tradition, FRE 404 states: "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."³⁰ This means that evidence that a person has a propensity to act in a certain manner, such as being law-abiding, honest, or punctual, is typically not allowed as proof to show that a person acted in the same manner during the incident at issue.³¹ One particular concern FRE 404 addresses is that, although character evidence is relevant, it typically is not admissible because it can be highly prejudicial against the person testifying and can impede due process (particularly for defendants). As the Supreme Court reasoned in *Boyd v. United States*³² regarding a homicide defendant:

Proof of [prior robberies] only tended . . . to draw [jurors'] minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law However depraved in character, and however full of crime their past lives may have been, the

²³ WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 736 (8th ed. 2025).

²⁴ *Id.*

²⁵ *Federal Rules of Evidence*, U.S. CTS., <https://www.uscourts.gov/forms-rules/current-rules-practice-procedure/federal-rules-evidence> [<https://perma.cc/MX38-6TTR>] (last visited Sept. 4, 2025).

²⁶ FISHER, *supra* note 22, at 2.

²⁷ *Id.*

²⁸ These states are California, Kansas, Massachusetts, Missouri, and New York. *Id.* at 2-3.

²⁹ *See id.* at 2.

³⁰ FED. R. EVID. 404(a)(1).

³¹ *See id.*

³² 142 U.S. 450 (1892).

defendants were entitled to be tried upon competent evidence, and *only for the offense charged*.³³

Ensuring that evidence pertains only to the offense charged helps avoid adjudicating trials within trials and improves judicial efficiency. Despite this rule and its long-standing rationales, character evidence can still be admitted during trial under several exceptions.

b. *Exception One: Criminal Defendants and Victims*

For criminal defendants or victims, several exceptions apply. Firstly, a criminal defendant “may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted [under FRE 403], the prosecutor may offer evidence to rebut it”³⁴ in the form of reputation or opinion evidence.³⁵ This means that a defendant accused of sexual violence may offer the *pertinent* evidence that they are the type of person of high moral character who would never engage in sexual assault, as Brock Turner did.³⁶ Allowing only criminal defendants to open the inquiry into their character is a special dispensation to criminal defendants whose life and liberty are at hazard.³⁷

This exception is also justified by the rationale that character evidence tends to be unhelpful to litigants who bear substantial burdens of proof.³⁸ Criminal defendants, on the other hand, are not supposed to carry a substantial burden of proof; they are supposed to be acquitted so long as a jury has a reasonable doubt of guilt by the end of trial.³⁹ As the Supreme Court referenced in *Michelson v. United States*,⁴⁰ favorable general estimates of a defendant’s character may be enough to raise a reasonable doubt of guilt.⁴¹ Therefore, character evidence may be impactful for criminal defendants because such evidence alone can result in an acquittal, a hung jury, or a mistrial.⁴²

Additionally, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it and may also offer evidence of the defendant’s same trait.⁴³ That means that a

³³ *Id.* at 458 (emphasis added).

³⁴ FED. R. EVID. 404(a)(2)(A).

³⁵ FED. R. EVID. 405(a).

³⁶ See *People v. Turner*, No. H043709, 2018 WL 3751731, at *5 (Cal. Ct. App. Aug. 8, 2018) (discussing character witnesses’ testimony that described Turner as “respectful and courteous”); FED. R. EVID. 404(a)(2)(A).

³⁷ FED. R. EVID. 404 advisory committee’s note to 2006 amendment (explaining that criminal defendants may introduce character evidence to offset government’s structural advantages and evidentiary resources).

³⁸ FISHER, *supra* note 22, at 269.

³⁹ *Id.*

⁴⁰ 335 U.S. 469, 476 (1948).

⁴¹ *Id.*

⁴² FISHER, *supra* note 22, at 269 (“[S]uch evidence can be enough [for the criminal defendant] to win.”).

⁴³ FED. R. EVID. 404(a)(2)(B).

defendant accused of sexual violence may offer the *pertinent* evidence by explicitly positing that a victim is the type of person who would lie about sexual assault occurring or lie about sex being nonconsensual.⁴⁴ The prosecutor could then offer evidence that the victim is not the type of person who would lie about sexual assault and that the defendant is the type of person who has a tendency to lie.⁴⁵

c. *Exception Two: Witnesses*

Additionally, for witnesses who testify in civil or criminal cases, FRE 608 and 609 allow any party—including the party that called the witness—to attack the witness’s credibility.⁴⁶ For FRE 608 and 609 purposes, a defendant can be a witness. Under FRE 608, any party may attack a witness’s credibility by testimony about the witness’s reputation for having a “character for . . . untruthfulness, or by testimony in the form of an opinion about that character.”⁴⁷ For example, if a victim testifies at trial as a witness for the prosecution, the defense can bring in the victim’s high school teacher to testify that the victim had a reputation for being a liar around the school.⁴⁸ Reputation or opinion evidence of a witness’s truthful character is also admissible, but “only after the witness’s character for truthfulness has been attacked.”⁴⁹ Because witnesses contribute to the overall evidence that triers of fact must consider to decide a case justly, the triers must be able to accurately gauge a witness’s credibility to know how much weight to afford the facts that a given witness presents.⁵⁰

2. A Significant Exception Three: Sex Offense and Sexual Assault Cases

FRE 412 states that in civil or criminal proceedings involving alleged sexual misconduct, evidence offered to prove that a victim engaged in other sexual behavior or to prove a victim’s sexual predisposition is not admissible.⁵¹ FRE 412’s objective is to “safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See, e.g.,* FED. R. EVID. 608(a).

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *See FISHER supra* note 22, at 281-83. FRE 609 also allows evidence of a witness’s prior criminal conviction under certain circumstances to attack the witness’s character for truthfulness. FED. R. EVID. 609(a).

⁵¹ FED. R. EVID. 412(a). However, in non-homicide criminal cases, evidence of specific instances of a victim’s sexual behavior is admissible: (a) if it is offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; and (b) with respect to the person accused of sexual misconduct, if it is offered by the defendant to prove consent or if offered by the prosecutor. *Id.* at 412(b).

into the factfinding process.”⁵² The Advisory Committee noted its interest in “encourag[ing] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders,” which the rule achieved “[b]y affording victims protection in most instances.”⁵³

On July 9, 1995, three new FRE amendments went into effect: FRE 413, 414, and 415, which allowed prosecutors or civil plaintiffs to introduce evidence of a defendants’ prior sexual misconduct against them in a sexual assault case to establish an inference that the defendant has a propensity to commit such acts.⁵⁴ In passing these amendments, Congress treated sexual assault as an exceptional criminal category worthy of overcoming the FRE’s general prohibition on past instances of criminal conduct being admitted as character evidence.⁵⁵

Congressional proponents of these amendments relied on the assumption that sex offenders had a predisposition to repeat sex crimes and argued that “[i]n sex-related crimes, it can be particularly useful to demonstrate a propensity of the accused to commit similar prior offenses.”⁵⁶ Therefore, FRE 413-15 were “critical to the protection of the public from rapists and child molesters.”⁵⁷ Additionally, they argued these rules were necessary to battle credibility problems victims faced at trial⁵⁸ and would further encourage rape victims to come forward and tell their stories.⁵⁹ David J. Karp, a drafter of the Rules, supported the notion that FRE 413-15’s effect “put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as

⁵² FED. R. EVID. 412 advisory committee’s note to 1994 amendment.

⁵³ *Id.*

⁵⁴ FED. R. EVID. 413-15.

⁵⁵ *See* FED. R. EVID. 404; 140 CONG. REC. 15209 (1994) (statement of Rep. Jon Kyl).

⁵⁶ 140 CONG. REC. 15209 (1994) (statement of Rep. Jon Kyl); *id.* at 7817 (statement of Rep. Jon Kyl) (“Given what we know about the recidivist nature of sex offenders, you might think that the criminal justice system does all that it can to keep them in prison.”) (quoting Paul McNulty, former director of policy at the Department of Justice); *id.* (statement of Rep. Susan Molinari) (“The past conduct of a person with a history of rape . . . provides evidence that [they have] the combination of aggressive and sexual impulses that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses. A charge of rape . . . has greater plausibility against such a person.”); *id.* at 18929 (statement of Sen. Robert Dole) (“[W]hen someone is out there committing sex crime after sex crime . . . this evidence [of sexual propensity] should be admitted . . .”); *id.* at 23657 (statement of Sen. Orrin Hatch) (“Why should we not let the juries know . . . that [rapists] have a pattern and a series of acts that they have done that have amounted to rape . . .”). *See generally* Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961 (1998).

⁵⁷ 140 CONG. REC. 24799 (1994) (statement of Sen. Robert Dole).

⁵⁸ *See id.* at 23602-03 (statement of Rep. Susan Molinari) (expressing concern about consent and false accusation defenses prominent in sexual assault trials); *see also id.* at 15210 (statement of Rep. Jon Kyl) (“If the defendant has committed similar acts in the past, the claims of the victim are more likely to be considered truthful if there is substantiation of other assaults.”).

⁵⁹ *See id.* at 15210 (statement of Rep. Jon Kyl) (opining that survivors may be more willing to testify when aware that defendant’s prior misconduct will be revealed at trial).

other types of relevant evidence that are not subject to a special exclusionary rule.”⁶⁰

Fierce congressional opponents argued such rules would unfairly prejudice the defendant and unreasonably diminish existing constitutional protections for criminal defendants, thus disregarding the strong policy rationales undergirding the general exclusion of character evidence.⁶¹ Interest groups and legal scholars, including feminist scholars, critiqued the new reforms for undermining feminist efforts by reinforcing the myth that people who commit sexual violence are “brutish,” “sadistic,” “sex crazed deviant sociopaths,” who use extreme force and sadistic means to violate their victims—when in reality, many perpetrators are people survivors know, and sexual assaults often do not involve additional violence beyond the sexual assault itself.⁶² Opponents also expressed concerns that these proposed rules negatively cut against the due process rights criminal defendants are constitutionally required to receive.⁶³ However, despite the controversy around FRE 413-15, the new amendments were included in Section XXXII of the Violent Crime Control and Law Enforcement Act of 1994 and signed into law by President William J. Clinton.⁶⁴

This Section has explained how, in criminal cases for sexual assault, the interplay between different evidentiary rules concerning character evidence, witness impeachment, and sexual assault shapes the body of knowledge pertaining to the defendant’s and victim’s character that juries are allowed to hear. As the next Section explores, this knowledge’s inclusion or exclusion directly implicates epistemology and epistemic injustice.

B. *Epistemology & Epistemic Injustice*

Epistemology is a scholarly field that studies what knowledge is, how knowledge is formed, and who participates in knowledge formation.⁶⁵ Outside of scholarly study, epistemology is crucially and practically relevant to law—

⁶⁰ See *id.* at 23603 (statement of Rep. Susan Molinari).

⁶¹ See 139 CONG. REC. 27549 (1993) (statement of Sen. Joseph Biden) (noting that evidence of past acts “tends to . . . blind people to looking at the real facts before them and making an independent judgment”); JUD. CONF. OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51, 52-53 (1995) (describing widespread opposition to FRE 413-15 based on concerns they would admit prejudicial, unreliable evidence).

⁶² Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 129 (2001) (quoting Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 677-78 (1998)).

⁶³ See JUD. CONF. OF THE U.S., *supra* note 61.

⁶⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37 (1994) (enacting FRE 413-15).

⁶⁵ See David A. Truncellito, *Epistemology*, INTERNET ENCYC. PHIL., <https://iep.utm.edu/Epistemo/> [<https://perma.cc/5K3G-2DHR>] (last visited Sept. 4, 2025); Washington, *supra* note 8, at 1135.

especially evidence law. At its core, evidence law is about the limits legal actors place on the information juries hear.⁶⁶ Therefore, evidence law limits knowledge and interrogates why knowledge should be limited in court. When one interrogates why knowledge should be limited, they must fundamentally consider what wrongs may result if certain knowledge is offered or limited. For example, the FRE explicitly considers the wrongs that occur when a party offers certain relevant knowledge in a trial, such as causing unfair prejudice against a defendant.⁶⁷ But what about the implicit wrongs that occur when social prejudice limits knowledge?

Therein comes epistemic injustice. Epistemic injustice is fundamentally a “wrong done to someone specifically in their capacity as a knower.”⁶⁸ Epistemic injustice, as Miranda Fricker characterizes it, inflicts harm on a person’s credibility, their perceived capacity to be deemed credible by others, and their ability to have their knowledge considered legitimate by society.⁶⁹ Under Fricker’s framework, epistemic injustice can manifest as two sub-types: hermeneutical injustice and testimonial injustice.⁷⁰

1. Hermeneutical Injustice

Hermeneutical injustice is “the injustice of having some significant area of one’s social experience obscured from collective understanding” because of “structural identity prejudice in the collective hermeneutical resource.”⁷¹ Structural identity prejudice results in a gap in “collective interpretive resources,” which refers to a shared pool of knowledge, understanding, and frameworks a community uses to make sense of the world around them.⁷² In turn, this gap “puts someone at an unfair disadvantage when it comes to making sense of their social experiences.”⁷³

⁶⁶ FISHER, *supra* note 22, at 1 (introducing rationale behind informational limits on evidence).

⁶⁷ See FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

⁶⁸ FRICKER, *supra* note 14, at 1.

⁶⁹ *Id.* at 4-5. Although Fricker coined the term “epistemic injustice,” other scholars have documented how, before Fricker, Black feminists and feminists of color produced scholarship that could be categorized as epistemic injustice scholarship. See Washington, *supra* note 8, at 1134 & n.229 (citing PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 3 (2d ed. 2000) (explaining how Black women’s intellectual traditions have been suppressed and how Black feminist thought resists that erasure)); McKinnon, *supra* note 15, at 438 (critiquing how epistemic injustice scholarship marginalizes contributions from Black feminists and women of color, even while addressing issues of epistemic injustice).

⁷⁰ FRICKER, *supra* note 14, at 1.

⁷¹ *Id.* at 154, 162.

⁷² See *id.* at 1, 155.

⁷³ *Id.* at 1.

Epistemological frameworks are shaped by people with social power, which skews the hermeneutical framework in favor of those groups.⁷⁴ In the United States, hermeneutical injustice has historically, continually, and disproportionately harmed marginalized and subordinated communities, such as communities subjugated due to their race, class, gender, sexual orientation, military status, and more.⁷⁵ The collective interpretive resource's structural prejudice against marginalized and subordinated communities leads to collective misunderstanding and further marginalization of these communities.⁷⁶ Examples of collective misunderstanding include the historical framing of "rape in marriage as non-rape, post-natal depression as hysteria, [and] reluctance to work family-unfriendly hours as unprofessionalism."⁷⁷ Fricker's most prominent example of hermeneutical injustice concerns sexual harassment.

Before women collectively discussed, and eventually defined, sexual harassment, society lacked a shared understanding around unwanted sexual advances.⁷⁸ The collective interpretive resource generally framed sexual harassment as flirting.⁷⁹ Although individuals inherently knew what they had experienced, the collective "lack of proper understanding of women's experience of sexual harassment" created barriers to people being able to articulate and receive acknowledgment or remedy for their experiences.⁸⁰ Both the harasser and the harassed are cognitively affected by the lacking hermeneutical framework, but:

[T]he harasser's cognitive disablement is not a significant disadvantage to [them]. . . . By contrast, the [harassed's] cognitive disablement . . . prevents [the harassed] from understanding a significant patch of [their] own experience: that is, a patch of experience which it is strongly in [their] interests to understand, for without that understanding [they are] left deeply troubled, confused, and isolated, not to mention vulnerable to continued harassment. [The harassed's] hermeneutical disadvantage renders [them] unable to make sense of [their] ongoing mistreatment, and this in turn prevents [them] from protesting it, let alone securing effective measures to stop it.⁸¹

As a result, a knower/would-be speaker becomes unfairly excluded from participating in the spread of knowledge. In the case of sexual harassment, eventually feminist activists gathered, discussed, and developed a greater collective understanding around their experiences, which led to the coining of

⁷⁴ *Id.* at 148.

⁷⁵ *Id.*

⁷⁶ See Tuerkheimer, *supra* note 19, at 48-50.

⁷⁷ FRICKER, *supra* note 14, at 155.

⁷⁸ *Id.* Although Fricker's example focuses on women, people of all gender identities experience sexual harassment.

⁷⁹ *Id.* at 155.

⁸⁰ *Id.* at 151.

⁸¹ *Id.*

sexual harassment as a concept and term in mainstream society.⁸² As a direct result of this knowledge being incorporated into the collective interpretive resource, people can now file hostile work environment and quid pro quo claims under the Civil Rights Act of 1964.⁸³ This demonstrates that combatting epistemic injustice is not only integral to law but also a “precondition for legal justice.”⁸⁴

2. Testimonial Injustice

People who rely on the collective interpretive resource’s dominant knowledge will inevitably hold prejudices against individuals who are not well-represented within the collective interpretive resource. Hermeneutical injustice, then, can lead to testimonial injustice. Testimonial injustice refers to the injustice of a hearer’s prejudice causing the hearer to attribute less credibility to a speaker’s words than they normally would.⁸⁵ Additionally, a hearer may hold greater prejudice against an underprivileged speaker when the hearer compares them to a privileged speaker and grant the privileged speaker credibility excess—leading to an even greater credibility gap.⁸⁶ Testimonial injustice often unfolds in the criminal legal system, especially with witness testimony.

For example, consider the impact racial prejudice may have on a witness’s perceived credibility, as the Supreme Court acknowledged in *Peña-Rodriguez v. Colorado*.⁸⁷ Miguel Angel Peña-Rodriguez was convicted of unlawful sexual contact and harassment. After the trial, two jurors approached defense counsel and reported that, during deliberations, a third juror made racist statements about Peña-Rodriguez’s alibi witness, stating that he “did not find the petitioner’s alibi witness credible because, among other things, the witness was ‘an illegal.’”⁸⁸ In the Court’s analysis, the majority identified racial bias as “a familiar and recurring evil” that “implicates unique historical, constitutional, and institutional concerns.”⁸⁹ These concerns, “if left unaddressed, would risk systemic injury to the administration of justice.”⁹⁰ Thus, they held that where a juror makes a clear

⁸² *Id.* at 150-51. See generally CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1976) (describing impact of lack of public information, social awareness, formal data, and formal redress regarding sexual harassment and discrimination in the workplace).

⁸³ See MACKINNON, *supra* note 82, at 32-40; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2024).

⁸⁴ Gonzales Rose, *Critical Race Theory*, *supra* note 19, at 1305.

⁸⁵ FRICKER, *supra* note 14, at 1.

⁸⁶ See Jasmine B. Gonzales Rose, *A Critical Perspective on Testimonial Injustice: Interrogating Witnesses’ Credibility Excess in Criminal Trials*, 7 QUAESTIO FACTI 173, 181-84 (2024) (describing credibility gap exacerbated by different speakers’ relative levels of social privileges when compounded with hearer’s prejudices).

⁸⁷ 580 U.S. 206 (2017).

⁸⁸ *Id.* at 213.

⁸⁹ *Id.* at 224.

⁹⁰ *Id.*

statement indicating they relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires an exception to the rule that jurors cannot be impeached.⁹¹ This, the Court opined, was necessary to “ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.”⁹²

In *Peña-Rodriguez*, the defendant’s alibi witness was from a racial background that has historically been, and is still currently, marginalized and subordinated in the United States.⁹³ Because of the structural identity prejudice in the collective interpretive resource against Latine people, the juror (the hearer) held individual prejudice against the alibi witness’s (the speaker’s) knowledge and experiences.⁹⁴ The juror consequently attributed less credibility to the alibi witness’s words, which impacted how the juror decided Mr. Peña-Rodriguez’s guilt or innocence. This case not only resolidifies how epistemic justice is a precondition for legal justice but also exemplifies how surfacing epistemic injustice can impact much more than mere philosophical and scholarly endeavors. *Peña-Rodriguez* demonstrates how, as recently as 2017, surfacing epistemic injustice led to an actual, procedural legal reform in evidence law to make legal outcomes more just and democratic. Therefore, surfacing epistemic injustice to successfully achieve evidence law reform is a plausible and timely endeavor and is especially necessary in contexts pervaded by collective prejudice. Sexual violence cases are one such context. In the next Part, I detail how epistemic injustice is uniquely central in sexual violence contexts and how the FRE further facilitates epistemic injustice during trial.

⁹¹ *Id.*

⁹² *Id.*

⁹³ This historical social subordination is well documented in the law. *See, e.g.,* Mendez v. Westminster Sch. Dist., 64 F. Supp. 544 (S.D. Cal. 1946) (detailing racial exclusion of Mexican-American children from schools), *aff’d*, 161 F.2d 774 (9th Cir. 1947); Indep. Sch. Dist. v. Salvierra, 33 S.W.2d 790 (Tex. Civ. App. 1930) (upholding racial segregation for Mexican children in school); Lupe S. Salinas, *Linguaphobia, Language Rights, and the Right of Privacy*, 3 STAN. J.C.R. & C.L. 53, 63-65 (2007) (describing generally how language use restrictions oppress non-English speakers). Currently, we need not look further than the Trump administration’s blatantly racist rhetoric against Latine people to recognize this normalized subordination is alive and powerful. *See, e.g., Trump Rally Unleashes Racist, Degenerate, and Dangerous Attacks on Latinos*, VOTO LATINO (Oct. 28, 2024), <https://votolatino.org/media/press-releases/trump-rally-unleashes-racist-degenerate-and-dangerous-attacks-on-latinos/> [https://perma.cc/A43Z-XXVR].

⁹⁴ *See* FRICKER, *supra* note 14, at 14-21 (examining how identity power shapes testimonial exchanges, leading to credibility deficits that constitute epistemic injustice, particularly when rooted in prejudice).

II. EPISTEMIC INJUSTICE IN SEXUAL VIOLENCE CONTEXTS AND HOW FRE FURTHER FACILITATES IT DURING TRIAL

A. *A Harrowing Sexual Violence Landscape & How Epistemic Injustice Is Enmeshed Within It*

“Who is the victim?” a juror might wonder, and “are they credible?” Due to epistemic injustice, the lines between these two questions can blur or disappear. Epistemic injustice is a particularly crucial phenomenon to examine within sexual violence contexts because sexual violence allegations “are, and always have been, deeply intertwined with questions of credibility.”⁹⁵ And perceptions of credibility are inextricably linked to perceptions of the survivor’s character.⁹⁶

In this Section, I will trace and demonstrate the following: who a survivor is informs what prejudices people impute to their *character*, which then impacts how *credibly* the survivor is perceived. In turn, how credibly the survivor is perceived constrains their possible options and outcomes for meaningful redress.

1. Who Are Survivors?

We begin by examining who survivors are. Survivors can be anyone. However, a person’s social identities and experiences can make them more likely to be targeted. In the United States, research shows that survivors of sexual violence are significantly more likely to be women than men.⁹⁷ Survivors are more likely to be women of color—especially Indigenous⁹⁸ and Black women⁹⁹—than White women (although White women are more likely to officially report instances of assault).¹⁰⁰ Survivors are more likely to be women who have low income.¹⁰¹ Survivors are more likely to be people with

⁹⁵ Tuerkheimer, *supra* note 19, at 3.

⁹⁶ *Id.*

⁹⁷ Different sources state slightly varying reporting statistics, but generally, sexual assault occurring at higher rates to women is a well-documented consensus. See *Facts & Statistics: The Scope of the Problem*, RAINN, <https://www.rainn.org/statistics/scope-problem> [<https://perma.cc/6ABR-PKFQ>] (last visited Sept. 4, 2025).

⁹⁸ *Sexual Violence and Missing and Murdered Indigenous Women*, RAINN (Nov. 13, 2023), <https://web.archive.org/web/20250711090907/https://www.rainn.org/news/sexual-violence-and-missing-and-murdered-indigenous-women> [<https://perma.cc/344D-WPVV>].

⁹⁹ See Jameta Nicole Barlow, *Black Women, the Forgotten Survivors of Sexual Assault*, AM. PSYCH. ASS’N (Feb. 1, 2020), <https://www.apa.org/topics/sexual-assault-harassment/black-women-sexual-violence> [<https://perma.cc/4WJR-8TG6>].

¹⁰⁰ *Survivors of Color—Prevalence Rates*, END RAPE ON CAMPUS, <https://endrapeoncampus.org/centering-margins/survivors-of-color/survivors-of-color-prevalence-rates/> [<https://perma.cc/AE54-PLK3>] (last visited Sept. 4, 2025) (citing *Office for Victims of Crime*, U.S. DOJ, https://web.archive.org/web/20250128005442/https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forged/sexual_numbers.html).

¹⁰¹ JL Heinze, *Economics as a Factor in Sexual Violence*, NAT’L SEXUAL VIOLENCE RES. CTR. (May 4, 2021), <https://www.nsvrc.org/blogs/economics-factor-sexual-violence> [<https://perma.cc/Q5FG-D9TK>].

disabilities.¹⁰² Survivors are more likely to be people who are incarcerated.¹⁰³ Survivors are more likely to be people who are LGBTQIA+—especially people who are transgender, genderqueer, gender questioning, or nonbinary.¹⁰⁴ Survivors are most likely to be trans women of color.¹⁰⁵ All aforementioned groups are communities that have historically been unequally treated, structurally discriminated against, and systematically dehumanized in the United States, making these groups vulnerable to a credibility deficit.¹⁰⁶

2. The Collective Interpretive Resource: What Are the Dominant Character Narratives Surrounding Survivors?

Both social and legal collective interpretive resources contain a deeply entrenched history of stigmatization, stereotyping, dehumanization, and disbelief that stain survivors' characters. First, U.S. society has a historically and structurally ingrained inclination to justify perpetrators' actions and misunderstand sexual assault as invited conduct.¹⁰⁷ For example, women survivors face a several-centuries-long history of being discredited and disbelieved, accused of weaponizing their oppressed status to claim false victimhood.¹⁰⁸ Mainstream U.S. narratives have habitually and overwhelmingly

¹⁰² Sexual violence against people with disabilities—who are three times more likely than nondisabled people to experience serious crime such as rape and sexual assault—is often regarded as a “silent epidemic,” as people with disabilities are often overlooked within and outside of reproductive justice, rights, and health circles. Vilissa Thompson, Nora Ellman & Rebecca Cokley, *Sexual Violence and the Disability Community*, CTR. FOR AM. PROGRESS (Feb. 12, 2021), <https://www.americanprogress.org/article/sexual-violence-disability-community/> (citing *Bureau of Justice Statistics*, U.S. DOJ, <https://bjs.ojp.gov/>).

¹⁰³ See OFF. OF JUST. PROGRAMS, U.S. DOJ, NCJ 308553, *SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2019-2020—STATISTICAL TABLES 7* fig.2 (2024).

¹⁰⁴ See, e.g., *Sexual Orientation & Sexual Violence*, RAINN, <https://web.archive.org/web/20250711091836/https://rainn.org/articles/sexual-orientation-sexual-violence> [<https://perma.cc/9XU5-J2ZV>] (last visited Sept. 4, 2025) (finding high rates of sexual victimization of gender diverse people); Heather Tillewein et al., *Silencing the Rainbow: Prevalence of LGBTQ+ Students Who Do Not Report Sexual Violence*, 20 INT'L J. ENV'T RSCH. & PUB. HEALTH 1, 2 (2023) (emphasizing disproportionality of sexual violence toward LGBTQ+ students).

¹⁰⁵ See NAT'L SEXUAL VIOLENCE RES. CTR., *SEXUAL VIOLENCE & TRANSGENDER/NON-BINARY COMMUNITIES 1* (2019) (reporting almost half of all transgender people being sexually assaulted at some point in their lives, with rates even higher for trans people of color).

¹⁰⁶ See Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 29-30 (2018) (exploring how stereotypes and tropes embolden perpetrators of sexual harm in the workplace).

¹⁰⁷ *What Were You Wearing Exhibit*, DOVE CTR., <https://dovecenter.org/what-were-you-wearing-exhibit/> [<https://perma.cc/2774-H3GT>] (last visited Sept. 4, 2025).

¹⁰⁸ See, e.g., Tuerkheimer, *supra* note 19, at 8-13; Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335, 1336-38 (2010); see also Jodie Murphy-Oikonen, Karen McQueen, Ainsley Miller, Lori Chambers & Alexa Hiebert, *Unfounded Sexual Assault: Women's Experiences of Not Being Believed by*

depicted women survivors as complicit in their own assault—through their clothing, their “flirtatious” behavior, their intoxication, or their careless disregard for extra safety precautions, to name a few.¹⁰⁹ The most common narratives, though, are directly tied to portrayals of a survivor’s character.

When mainstream U.S. narratives have recognized sexual violence for what it is, its stock portrayal requires the “perfect victim:” a young, White, upper-middle class, heterosexual, cisgender, vulnerable woman with a perfectly chaste moral character that is beyond reproach.¹¹⁰ For people whose identities are not represented in the “perfect victim” category, their situation becomes even more fraught. For example, pervasive and dehumanizing racial stereotypes, which “carry an incredible force in shaping societal attitudes,” compound forces that raise doubt toward and stunt sympathy for women of color survivors.¹¹¹ Deeply racist, sexist, and harmful stereotypes related to character traits impute sexual availability on non-White survivors’ characters. These stereotypes include, but are not limited to:

- the hyper-sexually seducing, submissive, morally dubious East Asian woman;¹¹²
- the “chronically promiscuous,” adultified Black girl or unchaste and untruthful Black woman;¹¹³

the Police, 37 J. INTERPERSONAL VIOLENCE NP8916, NP8932-34 (2022) (discussing how police conduct in investigations and interrogations in sexual assault cases lead to women of diverse backgrounds not being believed).

¹⁰⁹ See Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2285-93 (2020) (“Victim blaming is a well-documented psychological phenomenon. . . . [that] is especially pronounced when it comes to blaming victims of sexual assault.”); Laura Niemi & Liane Young, *Blaming the Victim in the Case of Rape*, 25 PSYCH. INQUIRY 230, 230 (2014) (reporting on numerous studies that demonstrate people judge victims of rape more harshly relative to victims of nonsexual crimes); DOVE CTR., *supra* note 107.

¹¹⁰ See Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 83, 86-87 (2008) (describing qualities of the “paradigmatic victim”); Karen Yao, Note, “*A Vast Crevice*”: *Older Asian Women’s Untold Experience with Sexual Violence*, 105 B.U. L. REV. 1075, 1097-1102 (2025) (noting white-centric feminism’s reliance on carceral punishment).

¹¹¹ See Catilin Ramiro, *After Atlanta: Revisiting the Legal System’s Deadly Stereotypes of Asian American Women*, 29 ASIAN AM. L.J. 90, 92 (2022).

¹¹² See Stewart Chang, *Feminism in Yellowface*, 38 HARV. J.L. & GENDER 235, 237, 243-45 (2015); SUSIE LAN CASSEL, *THE HYPERSEXUALIZATION OF ASIAN WOMEN IN AMERICA: FROM STEREOTYPE TO MASSACRE* 20 (2021), https://www.csusm.edu/apidafsa/documents/hypersexualization_asianwomen_april2021_readonly.pdf [<https://perma.cc/W8ZX-97XV>]; see also Yao, *supra* note 110, at 1089-92 (“[T]he ‘Dragon Lady’ stereotype . . . casts Asian women as hypersexual, exotic, and manipulative . . .”).

¹¹³ Darci E. Burrell, *Myth, Stereotype and the Rape of Black Women*, 4 UCLA WOMEN’S L.J. 87, 89, 93 (1993) (“In the past, judges warned jurors that the general presumption of chastity given to white women was not to be applied to African-American women.”); Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1470 (1992) (“Because Black women were not expected to be chaste, similarly, they were unlikely to tell the truth.”).

- the “lurid, savage and sexually available,” regalia-donning Native woman;¹¹⁴ and
- the sultry, fierce-tempered, and “spicy” Latina woman.¹¹⁵

Appalling homophobic, transphobic, and queerphobic stereotypes are embedded, too, such as:

- the deviant queer spreading diseases through their insatiable sexual appetite;¹¹⁶ and
- the predator disguising themselves as a trans woman bent on trapping straight men into sex with their performative hyper-femininity or performing womanhood in order to sneak into women’s spaces.¹¹⁷

Thus, the more intersecting identities a survivor embodies from groups that have been historically marginalized and subordinated, the more dehumanizing contexts that are available in the collective interpretive resource to impute onto

¹¹⁴ See Sophie Croisy, *Fighting Colonial Violence in “Indian Country”: Deconstructing Racist Sexual Stereotypes of Native American Women in American Popular Culture and History*, 5 ANGLES 1, 4 (2017).

¹¹⁵ Schultz, *supra* note 106, at 29; Anais Rivero, *Why the “Hot and Spicy” Stereotype of Latina Women Needs to End*, AFFINITY (May 19, 2017), <https://affinitymagazine.us/2017/05/19/why-the-hot-and-spicy-stereotype-of-latina-women-needs-to-end/> [<https://perma.cc/PWX7-8DYN>]. Although these stereotypes show up most frequently in media, its impact on the collective hermeneutical resource has legal implications:

Black women have been subjected to sexual and labor exploitation for centuries, dating back to slavery. . . . For example, stereotypes portray Black women as wanton and lascivious, Latinas as sexy and “spicy,” Asian women as exotic and submissive, and Muslim women as meek and oppressed—images that invite unwanted sexual advances at work and elsewhere. Women of color also face persistent nonsexual negative stereotypes, including images of the “angry Black woman” or dangerous Muslim terrorist who refuse to submit to proper (male) authority; Black women are also further stereotyped as unqualified and incompetent. These ideas further foster sex- and race-based harassment and marginalization on the job.

Schultz, *supra* note 106, at 29-30 (footnotes omitted).

¹¹⁶ See Annalisa Anzani, Laura Siboni, Louis Lindley, M. Paz Galupo & Antonio Prunas, *From Abstinence to Deviance: Sexual Stereotypes Associated with Transgender and Nonbinary Individuals*, 21 SEXUALITY RSCH. & SOC. POL’Y 27, 28 (2024) (detailing historic and current harmful stereotypes of transgender and gender-nonconforming people); Meredith G. F. Worden, *Queer Identities in the 21st Century: Reclamation and Stigma*, 49 CURRENT OP. PSYCH. at 2 (2023) (noting pervasive stereotype of queer men and women as hypersexual); *Understanding Sexual Orientation and Homosexuality*, AM. PSYCH. ASS’N (Oct. 29, 2008), <https://www.apa.org/topics/lgbtq/orientation> [<https://perma.cc/8386-36WV>] (“The association of HIV/AIDS with gay and bisexual men and the inaccurate belief that some people held that all gay and bisexual men were infected served to further stigmatize lesbian, gay, and bisexual people.”).

¹¹⁷ For a captivating analysis of the history and modern weaponization of this dehumanizing portrayal of trans women, see ContraPoints, *J.K. Rowling*, YOUTUBE (Jan. 26, 2021), https://www.youtube.com/watch?v=7gDKbT_l2us; and ContraPoints, *Are Traps Gay?*, YOUTUBE (Jan. 16, 2019), <https://www.youtube.com/watch?v=PbBzhqJK3bg>.

a survivor's character.¹¹⁸ In turn, when survivors share about their experience being sexually assaulted, they are more likely to experience testimonial injustice and lower perceived credibility in two ways: (1) because of these dehumanizing portrayals of sub-moral character, survivors are more likely to be outside a person's realm of empathy and are generally attributed less credibility; and (2) because these portrayals directly imply a default, sexually-inclined character, people assume that the survivor either invited the sexual misconduct or was complicit in their own assault, causing the survivor's specific claims regarding sexual assault to be perceived less credibly.¹¹⁹

However, people do not have to be from historically marginalized and subordinated groups to be negatively impacted by these narratives. Because the collective interpretive resource around sexual violence is an accumulation of these narratives, people's perceptions of survivors who do not fall into the mainstream narrative around sexual violence may suffer a credibility discount, too. For example, if a cisgender man is sexually assaulted by a woman or another man, he faces social structural prejudices that men cannot be assaulted, which can prevent him from recognizing his own experience and subject him to hermeneutical injustice.¹²⁰ Furthermore, social structural prejudices can cause him to stay silent about the assault from fear of the stigma of being deemed weak or unmasculine.¹²¹ If he does report the assault, social structural prejudices can then cause hearers to not categorize the woman's violent behavior as assault, making the man's assault claim less credible and subjecting him to testimonial injustice.

As a result, sexual assault accusers of all kinds are subject to epistemic violence. They face the social structural prejudices that are ingrained in the collective interpretive resource—prejudices that tend toward justifying perpetrators' actions and misunderstanding sexual assault as invited conduct. They are less likely to have the language and tools to make sense of their experiences or discuss them at all (hermeneutical injustice). They then suffer a credibility discount due to existing narratives that implicate survivors' character and are less likely to be believed by hearers who have been influenced by these mainstream prejudices (testimonial injustice). Most pertinent to this Note is how these social structural prejudices are reflected in the legal landscape.

As Deborah Tuerkheimer highlights, U.S. law has “long embodied a stance of overt suspicion” toward sexual assault accusers.¹²² The legal response to sexual assault has historically and continually been shaped by entrenched disbelief of people who level sexual assault accusations—with one exception:

¹¹⁸ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-51 (1991).

¹¹⁹ See FRICKER, *supra* note 14, at 1.

¹²⁰ See *Get the Facts About Sexual Violence Against Men & Boys*, RAINN, <https://rainn.org/articles/sexual-assault-men-and-boys> [https://perma.cc/55WP-SWEN] (last visited Sept. 4, 2025).

¹²¹ *Id.*

¹²² Tuerkheimer, *supra* note 19, at 21.

cases of White women alleging rape by Black men.¹²³ This legal response is unfounded, given that false accusations for sexual violence comprise an overwhelming minority of total reports.¹²⁴ Default legal disbelief against survivors is reflected in previously existing laws and legal requirements, such as:

- statutes requiring corroborative evidence to the victim's account to "shield defendants from 'untruthful, dishonest, or vicious' accusers;"¹²⁵
- statutes requiring prompt disclosure of the incident, legitimating the logic that the "natural instinct of a female thus outraged and injured" causes her to disclose the incident at the earliest opportunity to someone and bolstering the misinformed idea that "the absence of such a disclosure tends to discredit her as a witness";¹²⁶ and
- judges mandating jury instructions to warn the jury about the danger of wrongly convicting a defendant and "examine the testimony of the female person . . . with caution."¹²⁷

Baked-in assumptions about a survivor's character (such as being "vicious" or "naturally disclosing") undergird these laws and legal practices, which impacts how credibly a survivor is perceived by fact finders. Before recent revisions on its sexual assault provisions, the Model Penal Code also included a corroboration requirement, a rigid prompt outcry rule, and cautionary jury instructions, which reflect legal mistrust of sexual assault accusers.¹²⁸ Though many of these rules have been abolished, their long-standing effects and underlying assumptions about survivors' character have led to informal legal impositions that further discount survivors' credibility.¹²⁹ Therefore, character and credibility are inextricably intertwined in legal determinations of sexual

¹²³ *Id.* at 21-22 (citing DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 297 (1970)); Jennifer Wiggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 104-05 (1983).

¹²⁴ NAT'L SEXUAL VIOLENCE RSCH. CTR., FALSE REPORTING 2-3 (2012). This is not to discount that false reporting does occasionally occur and can have serious adverse consequences to the accused. However, given the survivor-unfriendly social reception ingrained in our milieu, incentives for reporting are typically vastly outweighed by the negative consequences a potential survivor experiences for reporting.

¹²⁵ Tuerkheimer, *supra* note 19, at 9-10 & nn.42-47, 22.

¹²⁶ *Id.* at 23 (citing Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 953-55 (2004) (quoting *State v. Neel*, 60 P. 510, 511 (Utah 1900))).

¹²⁷ *Id.* (citing *People v. Rincon-Pineda*, 538 P.2d 247, 253-56 (Cal. 1975); *Hardin v. State*, 840 A.2d 1217, 1223-24 (Del. 2003)).

¹²⁸ *Id.* at 23-24; MODEL PENAL CODE § 213.6 cmt. at 412-28 (AM. LAW INST., Official Draft and Revised Comments 1980).

¹²⁹ See Tuerkheimer, *supra* note 19, at 25-41.

assault, which results in the survivor experiencing testimonial injustice both inside and outside the courtroom.

3. The Credibility Deficit's Impact on Criminal Sexual Assault Prosecutions

Survivors are not oblivious to this reality. Survivors weigh how people will treat them and their credibility, which informs what they choose to do after the assault. As a result, most survivors never report their experiences at all.¹³⁰ The possible actions a survivor can take against a perpetrator include (but are not limited to): nothing, speaking out against the perpetrator in their community, practicing restorative justice with the perpetrator, reporting the perpetrator to non-law enforcement authorities (such as college administrators or employers), pursuing a civil case, or pursuing criminal prosecution.¹³¹ Though most survivors of sexual violence never see the inside of a courtroom,¹³² this subsection focuses on the epistemic injustice faced by the subset of survivors who choose to pursue criminal prosecution or are forced to take part in a prosecutor's case.

If a survivor becomes involved in a criminal prosecution, they are continually exposed to a risk of testimonial injustice throughout multiple stages. During the reporting stage, law enforcement officers must deem the survivor as credible to take action, collect evidence, and preserve evidence. At the prosecution stage, prosecutors must also deem the survivor as credible to choose whether to pursue the case. Then we get to trial. Once at trial, evidence law creates a legal framework where considerations about the defendant's and victim's character are allowed for the express purpose of determining their credibility. As I detail in the next Section, evidentiary frameworks enmeshed with character and credibility determinations exacerbate epistemic injustice for survivors.

B. *The Issue: How FRE 404 Facilitates Epistemic Injustice*

FRE 404 charts an avenue for criminal defendants to humanize themselves by providing the opportunity to offer character-bolstering evidence of a pertinent trait, while withholding that same avenue from the prosecution.¹³³ Although the victim in a criminal case is not an official party to the case, the entire case turns on whether the victim's allegation is deemed credible. Notably missing in these

¹³⁰ *Statistics: The Criminal Justice System*, RAINN, <https://rainn.org/statistics/criminal-justice-system> [<https://perma.cc/2JPH-MY68>] (last visited Sept. 4, 2025) (noting only one in three victims report sexual assault to law enforcement); see Rachael Goodman-Williams, Jessica Volz & Kathryn Fishwick, *Reasons for Not Reporting Among Sexual Assault Survivors Who Seek Medical Forensic Exams: A Qualitative Analysis*, 39 J. INTERPERSONAL VIOLENCE 1905, 1907 (2023).

¹³¹ See, e.g., Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 325-26 (2020) (detailing how survivors, particularly from overpoliced communities, denounce participation in criminal legal system).

¹³² RAINN, *supra* note 130.

¹³³ See FED. R. EVID. 404(a)(2)(A).

evidence rules is an opportunity for alleged victims to bolster their own character (without testifying as a witness).¹³⁴ When recounting the four character witnesses Turner called, Miller contends:

Their platitudes did not come as a surprise. What I wondered was, in a trial meant to examine facts, why hours were set aside to shower him in accolades. His history included his childhood, education, summer jobs, sweet relationships. My history was blackouts one through five. My character was just as much on trial as his character; my behavior, my composure, my likability, were also being evaluated. But there was nothing to suggest that I was a person extracted from a full life, surrounded by people who cared about me.¹³⁵

Miller's powerful recall reveals an underlying truth in the logic that applies to sexual assault cases when a criminal defendant bolsters their character. When a defendant offers evidence of a pertinent trait in sexual assault cases, the pertinent trait they seek to prove is typically that they are not the kind of person who would commit a sexual assault.¹³⁶ Because of the unique nature of sexual assault cases, where the only evidence is often a survivor's own testimony, character evidence becomes much more influential in the total scope of evidence available than it is in nearly all other crimes and can even be the entire basis of adjudication.¹³⁷ Therefore, when a defendant brings in evidence to prove that they are not the kind of person who would commit a sexual assault, they are implicitly—but directly—asserting that the survivor is the kind of person who lies about sexual assault. Therefore, as the evidentiary rules stand, a survivor's character is already, and just as much, on trial, too.¹³⁸

Yet, the survivor does not have the opportunity to contextualize their character nearly as deeply as the defendant can and does not have an avenue to direct the evidence process regarding their character. Because survivors are technically nonparties to the case, the prosecution possesses the evidentiary tools that determine the adjudication of their claim. When evidence law excludes the opportunity for survivors to bolster their character, it disparately impacts survivors because many survivors begin trial from an already disadvantaged position¹³⁹—a disadvantage that stems from a collective interpretive resource

¹³⁴ See FED. R. EVID. 404, 412. However, if the survivor testifies, their character can be bolstered—but only for truthfulness as a witness and only after their character for truthfulness has been attacked. FED. R. EVID. 608(a).

¹³⁵ MILLER, *supra* note 1, at 193.

¹³⁶ *Id.*

¹³⁷ See Kim Thuy Seelinger, Helene Silverberg & Robin Mejia, *The Investigation and Prosecution of Sexual Violence* 56 (May 1, 2011) (unpublished manuscript), <https://humanrights.berkeley.edu/publications/investigation-and-prosecution-sexual-violence-0/> [<https://perma.cc/HC6A-XH98>].

¹³⁸ See, e.g., *People v. Turner*, No. H043709, 2018 WL 3751731, at *5 (Cal. Ct. App. Aug. 8, 2018).

¹³⁹ See *supra* Section II.A. (exploring how social narratives and legal rules create credibility deficits for survivors).

containing a deeply entrenched history of stigmatization, stereotyping, and dehumanization discrediting survivors' characters. Additionally, as discussed previously, culturally ingrained inclinations to humanize and sympathize with perpetrators remain rampant.¹⁴⁰

Ultimately, this disproportionate opportunity to bolster character procedurally enshrines testimonial injustice against survivors. Testimonial injustice occurs because the jury receives the opportunity to hear the defendant's positive character evidence and not the victim's. When, during trial, the only person who gets to initiate positive character is the defendant,¹⁴¹ fact finders only get to consider evidence that increases the defendant's credibility. That inevitably subjects the victim's initial claim—that the victim was assaulted by the defendant—to prejudice, as their credibility can only decrease as the defendant's increases. Therefore, the FRE procedurally enshrines testimonial injustice as the default experience for survivors to begin at trial.

Without an evidentiary tool that offers survivors the opportunity to bolster their character, survivors can only hope that individual judges and juries have enough empathy to deem their humanity, their lives, and the life-altering consequences of being assaulted as being equally important as defendants' without reminder.

This hope alone is unpromising, as a survivor faces a disproportionately daunting social narrative to battle—even before a defendant contextualizes their own humanity via character bolstering. As Miller laments:

When a victim does go for help, she is seen as attacking the assailant. These are separate; seeking aid is her primary motive, his fallout is a secondary effect. But we are taught, if you speak, something bad happens to him. You will be blamed for every job he doesn't get, every game he doesn't play. His family, friends, community, team, will unleash hell on you, are you sure you want that? We force her to think hard about what this will mean for his life, even though he never considered what his actions would do to her. Inherently the victim is outnumbered. She is the sole object of his sexual aggression, expected to single-handedly undo all of their staunch beliefs, backed by years of amiable stories.¹⁴²

Outnumbered, then, is where survivors start—even if they are believed. Thus, FRE 404's character-bolstering provision can unfairly favor defendants—especially those who have been well-represented as credible within mainstream American sympathies and the collective interpretive resource: elite, cisgender, straight, able-bodied White men such as Turner.¹⁴³ As Miller feared, former Judge Persky's sympathies had the potential to be shaped by the context that:

¹⁴⁰ See NAT'L SEXUAL VIOLENCE RSCH. CTR., *supra* note 124, at 1.

¹⁴¹ FED. R. EVID. 404(a)(2)(B).

¹⁴² MILLER, *supra* note 1, at 287-88.

¹⁴³ *Id.* at 235 (critiquing former Judge Persky's praise of Turner as "above and beyond what normal law-abiding people do" in Turner's sentencing hearing, despite overwhelming evidence that Turner raped Miller); Sam Levin, *Stanford Sexual Assault: Read the Full Text*

Brock had a sister my age. The French teacher had three daughters, the swim coach had a daughter and two sons, all close to my age. But it was no help to me that they had girlfriends and sisters and daughters. Somehow I was different, cast outside their range of empathy. In that courtroom, my identity had been reduced to something in the category of “other.”¹⁴⁴

Miller’s intuition was spot-on. While justifying his reasoning for Turner’s lenient sentence, former Judge Persky explained:

[T]he adverse collateral consequences on the defendant’s life resulting from the felony conviction . . . are severe [for Turner and his community]. . . . I think that he will not be a danger to others. . . . The character letters suggest that up to this point he complied with social and legal norms sort of above and beyond what normal law-abiding people do. . . . I find another factor reasonably related to the sentencing decision is the character evidence—provided both at trial and in connection with this sentencing hearing—the character evidence with respect to Mr. Turner’s past up until the point of the incident.¹⁴⁵

Turner, then, got to have his whole life contextualized under character evidence rules and considered by the jury and judge. Miller did not. Contextualizing Turner as a whole person, with a whole life, directly influenced his legal outcome.¹⁴⁶ Although this Note focuses on Turner’s case, devaluing survivors’ experiences while empathizing with perpetrators is a social and legal phenomenon that repeatedly occurs nationwide.¹⁴⁷

As Part III will discuss, this Note takes the position that longer sentences do not equate to justice; however, Turner’s short sentencing serves as a useful indicator of the credibility discount Miller (a public-school-attending, middle-income, Asian American woman) received when her experiences were compared to Turner’s (a private-school-attending, elite, high-income, White man).¹⁴⁸ The legal system is still rooted and steeped in structural prejudices (such as White supremacy¹⁴⁹), as predominately White, cis, straight, able-bodied men with middle to high income constitute a disproportionate number of

of the Judge’s Controversial Decision, GUARDIAN (June 24, 2016), <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky> [https://perma.cc/2BFZ-ERZU]; Aysa Gray, *The Bias of ‘Professionalism’ Standards*, STAN. SOC. INNOVATION REV. (June 4, 2019), https://ssir.org/articles/entry/the_bias_of_professionalism_standards [https://perma.cc/33GE-5953].

¹⁴⁴ MILLER, *supra* note 1, at 195.

¹⁴⁵ Levin, *supra* note 143.

¹⁴⁶ *See id.*

¹⁴⁷ *See* RAINN, *supra* note 130.

¹⁴⁸ *See* FRICKER, *supra* note 14, at 86-89.

¹⁴⁹ *See, e.g.*, Erika Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. SOC. JUST. 1, 2-3 (2018); Louis Menand, *The Supreme Court Case that Enshrined White Supremacy in Law*, NEW YORKER (Jan. 28, 2019), <https://www.newyorker.com/magazine/2019/02/04/the-supreme-court-case-that-enshrined-white-supremacy-in-law> [https://perma.cc/Q3TU-Y73C].

American judges and juries¹⁵⁰ (and, not to mention, have penned a disproportionate share of our laws).¹⁵¹

Therefore, the majority of sexual violence survivors get few opportunities to have their voices heard at trial by people who acknowledge, consider, or understand the full diversity of potential survivors' lived experiences. Thus, while we wait for calcified social understandings about historically marginalized people to erode from the collective hermeneutical resource, I propose a FRE 412 reform to directly redress disproportionate character bolstering.

III. EVENING THE SCALES: AN FRE AMENDMENT AND JUSTIFICATIONS

To decrease the epistemic injustice that survivors experience during the criminal trial process, the Federal Rules of Evidence must be reformed. FRE 412 (which exclusively deals with "sex offenses") should be amended to also allow alleged victims to introduce character evidence in sex-offense cases *after* the defendant introduces positive evidence of the defendant's pertinent trait. This reform should apply even if the alleged victim does not testify as a witness,¹⁵² and even if the defendant does not first attack the alleged victim's character.¹⁵³

A. FRE 412: Model Language & Its Implementation

Although FRE 412 is, by its current implementation, a shield to prevent evidence against the victim from coming into trial, my proposed amendment utilizes FRE 412 as a sword to introduce new evidence in favor of the victim. The proposed amendment is placed in FRE 412 because 412 specifically focuses on the admissibility of evidence pertaining to the *victim* of alleged sexual misconduct.¹⁵⁴ The proposed amendment is as follows:

Rule 412. Sex-Offense Cases: The Victim

(a) In a criminal proceeding involving alleged sexual misconduct, a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, an alleged victim may allow the prosecution to offer evidence of the alleged victim's pertinent trait. If the prosecution's evidence is admitted, the defendant may offer evidence to rebut it.

(b) Prohibited uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

¹⁵⁰ See *Diversity on the Bench*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts/diversity-bench> [<https://perma.cc/65JN-A6KM>] (last visited Sept. 4, 2025). Not to mention, people who hold some of the most powerful legal and government positions such as Clarence Thomas, Brett Kavanaugh, and Donald Trump have all been publicly accused of sexual harassment or sexual assault.

¹⁵¹ See Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1423, 1423 (2021).

¹⁵² See FED. R. EVID. 608.

¹⁵³ See FED. R. EVID. 404(a)(2)(B).

¹⁵⁴ FED. R. EVID. 412.

- (1) evidence offered to prove that a victim engaged in other sexual behavior; or
 - (2) evidence offered to prove a victim's sexual predisposition
 - (c) Exceptions.
- [The remainder of FRE 412 as it currently is in September 2025.]

B. *Legal Justifications*

1. Consistent with Precedent

This proposed reform would be consistent with precedent. There are well-settled historical rationales prohibiting general character evidence due to its risk of unfair prejudice, but the FRE has always treated criminal cases differently. Look no further than FRE 404, which codifies avenues for character evidence of criminal defendants *and victims* to be admitted during trial.¹⁵⁵ In 2000, Congress amended FRE 404 to allow defendants to offer evidence of an alleged victim's (bad) character—even if the defendant has not put their own character in issue.¹⁵⁶ They amended this rule even though there were no historical corresponding principles in common law; thus, introducing FRE amendments pertaining to victim character evidence to balance risks for procedural unfairness between parties in criminal trials is not only plausible, but has already been done before.

Additionally, FRE 413-15 demonstrates that sexual assault can and has been treated differently than other criminal offenses in evidence law.¹⁵⁷ FRE 413-15 allows prosecutors and civil plaintiffs the opportunity to introduce any relevant evidence of the defendant's other acts of sexual assault or child molestation.¹⁵⁸ Those three rules are some of the only exceptions to FRE 404's ban on allowing specific past actions to be introduced as evidence to prove "the defendant's propensity to commit sexual assault or child molestation."¹⁵⁹ Although these rules' "enactment by Congress was heatedly contested" for the due process implications on defendants,¹⁶⁰ the rules demonstrate a historic exceptionalism in the FRE's attitude toward addressing cases involving sexual violence.

Furthermore, as demonstrated in *Peña-Rodriguez*, the Supreme Court has also detailed its strong interest in combatting prejudice in jurors when assessing the credibility of witness testimony.¹⁶¹ Failing to ensure procedural protections were in place to address this, the Court noted, "would risk systemic injury to the

¹⁵⁵ FED. R. EVID. 404(a)(2)(B).

¹⁵⁶ *Id.* advisory committee's note to 2000 amendment.

¹⁵⁷ *See* FED. R. EVID. 412-15.

¹⁵⁸ *See* FED. R. EVID. 413-15.

¹⁵⁹ FISHER, *supra* note 22, at 232.

¹⁶⁰ Rosanna Cavallaro, *Federal Rules of Evidence 413-415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINALITY 31, 34-35 (2007).

¹⁶¹ *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 213 (2017).

administration of justice.”¹⁶² Similarly, affording more equitable bolstering opportunities for survivors would be consistent with the Court’s “promise of equal treatment under the law that is so central to functioning democracy.”¹⁶³

2. Achieves Legislative Intent

The Advisory Committee explicitly notes that FRE 412 “aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public discourse of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”¹⁶⁴ Allowing survivors to bolster their character gives them a more meaningful opportunity to safeguard themselves against sexual stereotyping—not by proving a perfectly-chaste sexual history, but by affording the survivor an opportunity to influence the narrative around the assault by contextualizing themselves as a whole person and not a silent victim.¹⁶⁵

The Advisory Committee further explains the rationale behind FRE 412: “[b]y affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”¹⁶⁶ As many survivors fear having their character scrutinized, besmirched, and compared to the defendant’s in a trial without having any control over the process, this reform would further Rule 412’s purported legislative intent by mitigating a potential barrier that deters survivors from pursuing litigation against their perpetrators.¹⁶⁷ Thus, this reform is directly aligned with the Advisory Committee’s goal to encourage survivors to institute and participate in litigation against their perpetrators.¹⁶⁸

3. Furthers Fair Policy

Furthermore, this reform would increase procedural fairness because it directly redresses the disproportionate character-bolstering opportunities during trial between the defendant and the survivor. In sexual assault cases, under this proposed FRE 412 amendment, victims can bring in positive character evidence to help prove a pertinent trait, such as evidence that they are not the kind of person who would lie about being a victim of this crime. Unlike FRE 608, which requires a victim to testify as a witness for their character for truthfulness to be bolstered,¹⁶⁹ victims would be able to bring character of a pertinent trait—including truthfulness—without requiring a victim’s character to be attacked first, and without requiring the victim to testify.

¹⁶² *Id.* at 224.

¹⁶³ *Id.*

¹⁶⁴ FED. R. EVID. 412 advisory committee’s note to 1994 amendment.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ FED. R. EVID. 608.

Furthermore, this reform would lead to more just outcomes for more survivors at trial—not only those who have identities linked to historical privileges that afford them credibility. As Kimberlé Crenshaw contends when describing how the marriage fraud provisions of the Immigration and Nationality Act placed women of color under “double subordination”¹⁷⁰:

Where systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.¹⁷¹

Within Crenshaw’s framework, it is essential that any proposed evidence law reform carefully examine and address intersectional subordination. This proposed FRE 412 amendment directly serves to combat the stigmatization, stereotypes, and dehumanization that survivors with multiple, intersecting identities face. It aims to empower each survivor with the ability to convey their character in ways that resist historically subordinating narratives. Thus, amending FRE 412 would be a reform that furthers equity in evidence law.

C. Addressing Counterarguments

1. Why Not a 404 Reform Instead?

Perhaps reforming FRE 404 to not allow the 404(a)(2)(B) exception to apply to defendants in sex-offense crimes better redresses the disproportionate character bolstering between a defendant and a survivor. Survivors may question why a defendant’s past character is even relevant to show that a defendant is not the type of person who would commit sexual violence. This kind of binary thinking may actively thwart survivors’ attempts to receive just outcomes and further social tendencies to sympathize with perpetrators. As feminist scholars noted when FRE 413-15 were passed, assumptions that perpetrators are mostly strangers, sadistic, and brutish prevent people from accurately understanding sexual violence.¹⁷² As Miller exemplifies:

During trial, the jury was forced to pick; is [Turner] wholesome or monstrous. But I never questioned that any of what they said about him was true. In fact I need you to know it was all true. The friendly guy who helps you move and assists senior citizens in the pool is the same guy who assaulted me. One person can be capable of both. Society often fails to wrap its head around the fact that these truths often coexist, they are not mutually exclusive. Bad qualities can hide inside a good person. That’s the terrifying part.¹⁷³

¹⁷⁰ Crenshaw, *supra* note 118, at 1247.

¹⁷¹ *Id.* at 1246 (footnote omitted).

¹⁷² Wells & Elliott Motley, *supra* note 62, at 129.

¹⁷³ MILLER, *supra* note 1, at 194.

Miller's pragmatic truth-telling directly exposes the sometimes shaky policy rationales undergirding the assumptions we make in evidence law—notably, around relevance and probative value. However, the long-standing rationale to maintain procedural fairness for criminal defendants maintains a strong interest in allowing defendants to bring in character evidence. The mercy rule¹⁷⁴ shows us that the risk of unfair prejudice increases when criminal defendants are not allowed to bring their case how they want. This agency is important as criminal defendants risk losing a fundamental right: their life or liberty.¹⁷⁵ The extent of criminal defendants' true agency within the FRE matrix may be contested, but removing one of the few FRE options affording criminal defendants more agency would certainly be less fair to criminal defendants.

2. Risk of Unfair Prejudice to Defendant

As stated above, any evidence law reform must be cautiously considered in case it increases procedural unfairness for the criminal defendant. If FRE 412 already focuses on the *inadmissibility* of the victim's prior acts,¹⁷⁶ then do the rules not already adequately redress the stigma and disadvantage survivors of sexual violence face at trial? And layered onto FRE 412, if FRE 413-15 focus on the *admissibility* of a defendant's prior acts,¹⁷⁷ then do the rules place the survivor in a more advantageous position over the defendant?

This risk, although important to acknowledge, is minimal in practice. First, this reform would not take effect until *after* the defendant chooses to bring positive character evidence of a pertinent trait, thus "opening the door" to character-bolstering evidence overall, so a victim's opportunity to bring character-bolstering evidence would not overshadow a defendant's opportunity. Second, limiting character evidence to criminal defendants was supported by the rationale that, when a prosecutor begins the inquiry into a defendant's character and offers evidence of bad character, an asymmetric risk of unfair prejudice for the defendant emerges, which implicates due process.¹⁷⁸ However, when the accused offers evidence of his good character, there is little risk of unfair prejudice to the prosecution.¹⁷⁹ Thus, evidence of good character has historically not raised the same degree of concern regarding unfair prejudice as evidence of bad character and prior criminal acts.

Additionally, when a defendant is allowed to bring evidence of the victim's bad character, the prosecution faces a real risk of unfair prejudice. As Judge Kleinfeld noted in his *United States v. James*¹⁸⁰ dissent, even when one is convinced about a defendant's guilt, a jury could choose to deny the law's

¹⁷⁴ See FED. R. EVID. 404 advisory committee's note to 2006 amendment.

¹⁷⁵ See FISHER, *supra* note 22, at 161.

¹⁷⁶ See FED. R. EVID. 412.

¹⁷⁷ See FED. R. EVID. 413-15.

¹⁷⁸ *Boyd v. United States*, 142 U.S. 450, 458 (1892).

¹⁷⁹ See FISHER, *supra* note 22, at 269.

¹⁸⁰ 169 F.3d 1210 (9th Cir. 1999) (en banc) (Kleinfeld, J., dissenting).

protection against an unsavory victim.¹⁸¹ The defendant can not only implicate a victim's bad character through evidence of the defendant's good character, but can also explicitly attack a victim's bad character under FRE 404. Therefore, allowing avenues for victims to offer evidence of their good character mitigates the risk that the law's protection will fail victims.

3. The Elephant (White-Centric Carceral Feminism) in the Room

Due to the highly publicized nature of Miller's trial, and the mainstream understanding at the time that Turner's short sentence was a miscarriage of justice, several major actions occurred. Firstly, California passed a mandatory three-year minimum prison sentence for penetrating an unconscious or intoxicated person.¹⁸² This Note explicitly denounces mandatory minimums as a blanket solution for justice. Secondly, former Judge Persky was recalled.¹⁸³ Although Miller's supporters and sympathizers celebrated former Judge Persky's recall at the time, scholars have since traced the unintended effects of Persky's recall.

One study found that, following Persky's recall, judges across the district increased both the length of sentences and guilty verdicts due to fear of recall—particularly in crimes not related to sexual assault, and particularly for defendants of color.¹⁸⁴ These unintended consequences raise serious racial and legal injustices and risk activism for survivors enmeshing with carceral feminism.¹⁸⁵ This demonstrates why, as a solution for racial and survivor justice, pushes for heightened sentencing objectives must be scrutinized and denounced.

However, justice for survivors does not necessarily mean longer sentences or more incarceration.¹⁸⁶ As one scholar notes:

¹⁸¹ *Id.* at 1216-17.

¹⁸² CAL. PENAL CODE § 289(d) (West 2025).

¹⁸³ Gonzales & Domonoske, *supra* note 6.

¹⁸⁴ Jeannie Suk Gersen, *Revising the Brock Turner Case*, NEW YORKER (Mar. 29, 2023), <https://www.newyorker.com/news/our-columnists/revisiting-the-brock-turner-case> [<https://perma.cc/SC69-J78N>]. Suk reports:

[The study] found that, immediately after the public announcement of the Persky-recall campaign, judges began imposing sentences that were roughly thirty per cent longer on average, across the board. Those increases maintained preëxisting racial disparities. In other words, even though the Persky-recall campaign aimed to raise consciousness about white privilege, the additional years in prison were disproportionately imposed on Black and Hispanic people. And, even though the campaign focussed on sexual assault, the study found that the increased sentence lengths were primarily driven by nonsexual crimes, and possibly by nonviolent crimes.

Id. (discussing Sanford C. Gordon & Sidak Yntiso, *Incentive Effects of Recall Elections: Evidence from Criminal Sentencing in California Courts*, 84 J. POL. 1947 (2022)).

¹⁸⁵ *See id.*

¹⁸⁶ *See* Bazelon & Green, *supra* note 131, at 325-26 (detailing how survivors, particularly from overpoliced communities, denounce participation in criminal legal system).

[Persky's] sentencing was improper not because of leniency measured by length or lack of carceral punishment, but because they did not adequately respond to California's sentencing objectives, were not victim centered, and failed to hold defendants accountable through any potentially restorative approach. . . . [Miller] wanted Turner to know that he had caused her pain, to take responsibility, and to get help, but a protracted court battle and the consequent denigration of [Miller] by Turner's legal team demonstrated his inability to recognize wrongdoing, making the ultimate sentence feel woefully incongruous.¹⁸⁷

The denigration of character against the victim in court is precisely what this Note's reform seeks to combat. This FRE proposal provides a clear path for a survivor to direct that process in court, while not mandating mass incarceration or longer sentencing outcomes.

However, a potential unintended consequence to this proposed reform is important to consider: would this proposed FRE 412 amendment risk hearers giving alleged victims from historically privileged groups more credibility, while increasing prejudice against defendants from historically stigmatized groups, leading to epistemic injustice for the defendants? Take, for example, the long history of White women accusing Black men of rape being the only exception to the general disbelief against survivors.¹⁸⁸ Given the historical pervasiveness of this phenomenon being intentionally weaponized as a tool for racial subjugation,¹⁸⁹ this is a wholly valid concern.

This may be where a truly effective solution requires a vision of change beyond just what FRE can offer—one that necessitates antiracism education and alternative justice paths to the criminal legal system.¹⁹⁰ However, insofar as people are already at trial, situated in the FRE or a state analog, mitigating epistemic injustice for survivors at trial and combatting carceral feminism do not need to be mutually exclusive. Ultimately, the purpose underlying this proposed reform is not to achieve harsher and longer sentences for perpetrators, or to promote criminal prosecution as the only viable option for getting redress or justice for survivors. The purpose of this reform is to mitigate epistemic injustice insofar as the evidentiary rules exacerbate it for survivors during trial. For

¹⁸⁷ *Recent Election, California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369, 1374-75 (2019) (footnotes omitted).

¹⁸⁸ See Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1346 (2010).

¹⁸⁹ See, e.g., *Emmett Till's Accuser Admits She Lied*, EQUAL JUST. INIT. (Jan. 31, 2017), <https://ejj.org/news/emmett-till-accuser-admits-she-lied/> [<https://perma.cc/3V4W-A6US>]; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600-01 (1990); Devon M. Sayers, Sara Weisfeldt & Emma Tucker, *White Woman Who Wrongfully Accused 'Groveland Four' of Rape in Jim Crow-Era South Dies at 92*, CNN (July 31, 2024, 5:16 PM), <https://www.cnn.com/2024/07/31/us/groveland-four-jim-crow-exonerated/index.html> [<https://perma.cc/8NXH-9DQ8>]; Ellis Cose, *The Saga of the Scottsboro Boys*, ACLU (July 30, 2020), <https://www.aclu.org/news/racial-justice/the-saga-of-the-scottsboro-boys> [<https://perma.cc/8PBD-3QT8>].

¹⁹⁰ See, e.g., Bazelon & Green, *supra* note 131, at 325-26.

survivors who decide to go to trial or are roped into a criminal prosecution, safeguarding them from further epistemic harm is crucial to the accurate adjudication and assessments of guilt or innocence.

Thus, this reform is valuable because it mitigates epistemic injustice in the legal setting by inviting survivors to formally share their knowledge. If survivors choose to take it, this rule then allows the possibility for fact finders to consider and legitimate their experiences in a formal legal setting. It can combat the current pervasive assumptions about sexual assault from continuing without challenge—regardless of the sentencing outcome. Over time, as survivors continue to bring their knowledge into the courtroom setting, the legal collective interpretive resource can expand to encompass the nuances for survivors' stories and can challenge collective preconceived notions of credibility and character as they relate to sexual assault for both survivors and defendants in the legal context. This will allow a more accurate calibration of the realities around sexual assault for participants to take place in the legal system over time, such as the debunking of perpetrator stereotyping that was advocated by feminist scholars during debates over the rape shield laws.¹⁹¹ As more survivors' knowledge becomes included in the collective interpretive resource, more accurate judgments of credibility can occur for defendants and victims alike, resulting in less epistemic injustice overall.

D. *Centering Survivors' Agency*

Lastly, I propose this FRE 412 amendment because affording agency to survivors is essential after survivors have experienced major trauma.¹⁹² Supporting survivors by affording them agency is invaluable because being sexually violated often causes survivors to lose a significant sense of agency.¹⁹³ They have lost the agency to dictate who touches their bodies. They have lost the agency to schedule their lives in predictable ways because of the lingering effects of post-traumatic stress disorder.¹⁹⁴ If they are forced by a defendant to go to trial, as Miller was, then they have lost the agency to keep their sexual lives private and secure. On top of all the agency they have lost, many survivors are

¹⁹¹ See Wells & Elliott Motley, *supra* note 62, at 129.

¹⁹² See Stephanie Pappas, *How to Support Patients Who Have Experienced Sexual Assault*, AM. PSYCH. ASS'N (Sept. 1, 2022), <https://www.apa.org/monitor/2022/09/sexual-assault-patients> [https://perma.cc/JMR9-E8PU].

¹⁹³ See *id.* During my 1L summer, I interned at the Boston Area Rape Crisis Center's ("BARCC") legal immigration department, serving survivors who had experienced sexual violence and had an immigration status that made them vulnerable to further abuse. During BARCC's new employee introductory training, BARCC's trainers repeatedly emphasized that giving survivors options (without infusing our own biases into the decisions we present them, unless the survivor explicitly asks for our opinion) is crucial to slowly rebuilding survivors' sense of agency.

¹⁹⁴ See Jessica Keith & Chris Skidmore, *Sexual Assault Experienced as an Adult*, U.S. DEP'T OF VETERANS AFFS., https://www.ptsd.va.gov/professional/treat/type/sexual_assault_adult.asp [https://perma.cc/D8MD-4PXV] (last visited Sept. 4, 2025).

then revictimized in the courtroom as they watch their perpetrator deny committing the very violence that has upended their entire lives—and implicate their character and credibility in the process.¹⁹⁵

Thus, the vitality of this Note's proposed reform of FRE 412 grows out of the ability to afford survivors the choice—not the obligation—to introduce their character at trial. By doing so, it offers survivors the agency to limn their lives. Amending FRE 412 would not only allow survivors to have a greater impact on the narratives around their character and to bolster their perceived credibility at trial, but would also powerfully signal to survivors that they, at the very least, have the agency to articulate who they are.

CONCLUSION

This Note has shown that the very mechanisms that prevent accountability for sexual assault perpetrators rely on epistemic injustice. After a survivor experiences sexual assault, they must not only face the trauma of having their bodily autonomy violated, but also repeatedly risk facing epistemic injustice. Survivors face an insurmountable, centuries-old collective interpretive resource that inclines toward justifying perpetrators' actions and misunderstanding sexual assault as invited conduct, thus causing them to experience hermeneutical injustice. Then, if survivors choose to share their account of what happened, they face individual prejudices people may have and risk facing attacks on their credibility and character, thus causing them to experience testimonial injustice.

If they end up at trial, epistemic injustice is then thrust upon survivors again, as they are forced to operate within an evidentiary framework that only allows survivors to share evidence of their character after the defendant explicitly chooses to discredit it by directly attacking the victim's character for truthfulness as a witness or attacking the victim's character of a pertinent trait. Thus, the legal collective interpretive resource continues to devalue and exclude survivors' experiences from formal consideration in adjudication.

Meanwhile, throughout this entire process—from the assault to the end of trial—a survivor's agency increasingly diminishes. By amending FRE 412 to allow victims to bring in character evidence of pertinent traits after defendants bolster their own character, victims at trial will—at the very least—have the agency to articulate *who they are*.

¹⁹⁵ See MILLER, *supra* note 1, at 348-51.

For people who have been minimized, dehumanized and objectified for who they are by social default, this agentic power can be formidable.

Your character is not what caused your hurts to happen. You are not a statistic or a stereotype, so when they minimize you, dehumanize you, objectify you, you must push back with your whole weight, with your lifetime of experiences. To the faceless, the ones who remain anonymous. We each have a name. You have taught me to be proud of mine.¹⁹⁶

—Chanel Miller, *Know My Name*

¹⁹⁶ *Id.* at 337.