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

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Prosecutors use “rape trauma syndrome” evidence at rape trials to explain victims’ “counterintuitive” behaviors and demeanors, such as late reporting, denying their rapes, returning to the scenes of their attacks, and lack of emotional affect. Courts and experts, in instructions and testimony, usually describe victim reticence as a product of “shame” or “trauma.” Feminist critics of R.T.S. evidence posit that it is based on incomplete evidence, because most rapes are unreported. Furthermore, they object to its condescending, sexist, and colonial construction of rape victims and their emotions.

In this Article, I respond to feminist critics by studying the work of Tracey Emin, a British-Turkish artist who suffered an unreported rape at the age of 13, who has been commenting on that rape through her art ever since. Expanding and innovating upon the work of law and humanities scholars, I apply the insights found in art – or, what I describe as “artifacts,” with a deliberate play on the word – to rape law. Through my study of the facts limned in art, I show how the complexities of Emin’s reactions to rape challenge the too-streamlined and often confusing stories of victims told by prosecutors, experts, and courts. Emin’s art demonstrates that she harbors suspicions of the state, a skepticism based in part on her failure to correspond to “real rape” victim stereotypes. Her critique adds much needed insight into problems of the R.T.S. model. Based on the lessons learned, I make suggestions for rape law reform, and for changes to be made to the administration of rape prosecutions in the U.S. and U.K.

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American and British feminists are torn on how to use expert testimony on Rape Trauma Syndrome (R.T.S.) in criminal and civil trials to prove sexual violation. Introduced as a subset of Post-Traumatic Stress Disorder in 1974 by researchers Ann W. Burgess and Linda L. Holmstrom, R.T.S. describes victims’ reactions to their rapes. These responses include everything from expressive grief, terror, and apparent equanimity to silence and denial. In U.S. and British rape trials, R.T.S. evidence may be used by prosecutors to explain some victims’ so-called “counterintuitive” behaviors, meaning a victim’s failure to report her rape, lying to the police about her attack, refusing to name her attacker, exhibiting emotional “flatness,” and returning to the scene of her assault. R.T.S. has proven invaluable in securing convictions in cases where juries might otherwise have acquitted due to their subscriptions to “rape myths” pronouncing that rape victims immediately report and always react to their assaults with extreme and obvious grief. Thus, R.T.S.’s use in rape trials has gained the approval of some feminist

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3 Some jurisdictions, however, forbid using R.T.S. evidence altogether. See, e.g., State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982) (deeming rape trauma syndrome inadmissible, as it invades the province of the jury). See also note 44, infra.
4 See, e.g., State v. Kinney, 762 A.2d 833, 840 (Vt. 2000). (“[I]t is not unusual for victims to delay in reporting a rape, especially if the attacker is an acquaintance.”).
7 See, e.g., State v. Robinson, 431 N.W.2d 165, 168 (Wis. 1988) (court of appeals upheld expert testimony regarding rape victims’ emotional “flatness.”)
scholars and advocates, particularly for its education of juries about the reality of victim reporting, post-rape behavior, and demeanor.9

However, other feminist critics respond that R.T.S. is an outmoded construct that pathologizes victims, especially through its advocates’ use of the term “syndrome,” 10 and courts’ too-enthusiastic construction of rape victims as sufferers of “dependence, low self-esteem, learned helplessness, and other personality deficits.”11 Feminists also object that R.T.S. is a fabrication built on the experience of a small number of privileged women. These scholars note that most rapes are not reported (and thus most victims’ responses do not become available for study),12 and complain that researchers of post-rape reactions cling to a “western” norm of trauma.13 Consequently, we have little information about the real range of post-rape reaction.14

9 See Kaarin Long, Caroline Palmer & Sara G. Thome, A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases, 31 Hamline J. Pub. L. & Pol'y 569, 651 (2010) (“The . . . state court system should . . . permit the juror education about adult victims of sexual violence so that the jury’s verdict is based upon fact, not fiction.”); Aviva Orenstein, No Bad Men! A Feminist Analysis of Character Evidence in Rape Trials, 49 Hastings L.J. 663, 705 (1998) (“R.T.S . . . educate[s] the fact-finder [about] many different potential reactions to the trauma of rape.”)


11 Stefan, supra note 10, at 1300-01.

12 Id. at 1333 (“Normal’ women. . . don't report being raped at all.”).

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

14 See, e.g., Wasco, id. at 314 (“The harm done to minority groups may manifest, or be expressed, in ways that research has not yet captured”)

Other objections to the use of R.T.S. at rape trials are that its use shifts emphasis from the perpetrator to the victim, resulting in possible violations of rape shield laws, as well as to defendant use of R.T.S. to show that the victim was in fact not raped. See, e.g., Kathryn M. Davis, Rape, Resurrection, and the Quest for Truth: The Law and Science of Rape Trauma Syndrome in Constitutional Balance With the Rights of the Accused, 49 Hastings L.J.
Some feminist scholars attempt to reform the legal and medical limning of victim responses by “look[ing] beyond the act(s) of sexual violence to the cultural messages, relationship role expectations, and social norms that influence not only survivors’ pre-rape worldviews but also their post-assault disclosure experiences and reactions from friends, family, and service providers.” Others reject a “top-down” construction of trauma and coping, working to reframe the pathological “trauma” model into one reflecting “survivor epistemologies” and describing victim reactions as acts of strength and resistance.

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

1511, 1513 (1998); Nicole Rosenberg Economous, Note, Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim, 42 Hastings L.J. 1143, 1165 (1991). In this article, however, I will be focusing on feminist objections to the use of R.T.S. to explain certain counterintuitive behaviors.

15 See Wasco, supra note 13 at 315-16 (stigma and blaming and doubting responses “may compound the harm of the assault itself.”)

16 See Michelle Fine, Disruptive Voices: The Possibilities of Feminist Research 69 (1992) Noting that “for some women “[r]esisting social institutions, withholding information, and preserving emotional invulnerability emerge[] as [] strategies for maintaining control.” See also id. at 70, where constructions of such reactions as learned helplessness are deemed by the author to be a product of a top-down interpretation of post-rape trauma.

17 Mary E. Gilfus, The Price of the Ticket A Survivor-Centered Appraisal of Trauma Theory, Violence Against Women November 1999 vol. 5 no. 11 1239.

18 Id. (Mary E. Gilfus) at 1238-1257.

19 See, e.g., Maria Aristodemou, Law and Literature: From Her to Eternity X [yxta, pin] (2000) (noting how the study of art may reveal law’s “artificial order.”); Richard Posner, Law and Literature: A Misunderstood Relation, xii (1988) (allowing that the study of literature may “humanize the practice of law and the outlook of judges.”). For reviews of these schools, see, e.g., Maria Aristodemou, Law and Literature: Journeys from Her to Eternity (2000); Martha Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and
will show, the complications that rape survivors’ art brings to the often streamlined, impoverished, and condescending tales of rape reaction told by courts demonstrates the profits that law and humanities scholars have noted about the interdisciplinary approach I am using here. It gives voice and bears witness to the complex reactions that women have in the wake of sexual assault, and provides bountiful, previously unstudied insight that may be used in state reform.

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


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

That I am characterizing my work as an innovation, however, should not be taken as a claim for wholesale invention. As noted in footnote 20, there is a standing tradition of examining law through the lens of the humanities. Other work that engages in legal/artistic analysis may is found in, e.g., Alison Young, Readings Legal Events: “Into the Blue:” The Image Written on Law, 13 Yale J. L. & the Human. 305 (2001) (analyzing the painting of Felix Gonzalez-Torres in limning H.I.V. in law and literature); Austin Sarat, Imagining the Law of the Father: Loss, Dread, and Mourning in the Sweet Hereafter, 34 Law & Soc’y Rev. 3 2000) (examining the film the Sweet Hereafter to see the way law is mythologized); Kathryn Abrams and Hila Keren, Law in the Cultivation of Hope, 95
Here, they will enrich the jurisprudence on rape, as I will look to the work of British-Turkish multimedia artist Tracey Emin, who survived an unreported rape when she was thirteen, as well as other sexual onslaughts. As I will show, Emin’s mother, Pamela Cashin, did not report her rape, possibly because the Anglo Cashin was a racial outsider in her community, having had two children out of wedlock to a married Turkish man, as well as because Emin had been molested before. Emin’s work confirms that Cashin had good reason not to trust authorities to prosecute her biracial, already “sullied” daughter’s attacker. Emin’s response was to document her varied responses to that assault through a number of different art mediums for several decades.

My survey of Emin’s work will help advance the task of constructing rape victim reactions less as pathologies than as strategies to cope with assaults. Emin’s art offers not only a highly nuanced redefinition of victim responses, but also, thrillingly, demonstrates that victim behavior that was previously coded as a “counterintuitive” malady, or evidence of “low self esteem”\(^\text{21}\) -- often described by courts as “shame” and “self-blame” or “fear”\(^\text{22}\) -- may be read as a critique of the state’s failure to deter and successfully prosecute rape as a crime.\(^\text{23}\)

As my R.T.S. studies depend on the work of an artist who has lived most of her life in London and Margate, England, I will analyze both U.S. and U.K. approaches to the uses of R.T.S. After setting forth R.T.S.’s use in U.S. and British courts in Section I, I will review the feminist assessment of it in Section II. Section III is dedicated to meditations on Emin’s art, and there I will describe how her work, initially striking the observer as a noisy farrago of

Calif. L. Rev. 319 (2007) (using the life of photographer Zana Briski to study “hope” in law). Using the visual arts as a lens for capturing the silenced realities of women, however, appears to be in its infancy as a legal method.
\(^{21}\) Stefan, \textit{supra} note 10, at fn 8.
\(^{22}\) See text accompanying notes 48-54, \textit{infra}.
\(^{23}\) See text accompanying notes 214-259 \textit{infra}.
lamentations, may be interpreted instead as the enactments of trials against her sexual abusers, as well as herself. I will submit that Emin conducts these adjudications in the judicial space the state failed to fill, and that her implicit critique of the state sheds light upon “counterintuitive” post rape reactions. Emin’s work confirms that women have faceted responses to rape, which appear confusing unless one realizes that women respond not only to their rapists but also to a state that does not adequately address the justice needs of rape victims – particularly if the victim does not conform to the “real rape victim” stereotype. 24

From my analysis of Emin’s work, I will move in Section IV to the reasons why women may not trust the state, and thus “counterintuitively” fail to report or otherwise react in tune with the rape victim stereotype. U.S. and British statistics on “rape attrition,” that is, the well-publicized number of rape complaints that fail to translate into convictions, provide one repulsion for women. Documented police and medical response team misconduct offers another. This review sets the stage for Section V, where I will reread Emin’s art, as well as the U.S. and British cases employing R.T.S. evidence; here, I show how victim responses may often be more coherently read as resistance to and critique of the state and its administration of rape cases than as evidence of pathology and shame.

I will conclude, in Section VI, that the lessons gleaned from studying the rape trauma cases in relationship to Emin’s art urge changes to be made in the government’s handling of rape

24 That is, the woman “who behav[es] cautiously and who stays where she is supposed to be - in a good neighborhood at a reasonable hour.” Aviva Orenstein, Ethics and Evidence V: The Use of Prejudicial Evidence: Special Issues Raised by Rape Trials, 76 Fordham L. Rev. 1585, 1587 & fn. 9 (2007) (citing Susan Estrich’s Real Rape (1987)). See also Susan Estrich, Rape, 95 Yale L.J. 1087, 1098 (1986) (“I learned. . . that I had "really" been raped. Unlike, say, the woman who claimed she’d been raped by a man she actually knew and was with voluntarily. Unlike, say, women who . . . get what they deserve.”). The “real rape victim” stereotype bleeds racism when cut. See Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 587 (1990) (“Even after the Civil War, rape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature.”)
cases. These artifacts and their lessons also warrant reforms to be made in the schooling of the police force about its obligations to women as well as the public educations of women about their rights. I will additionally argue that expert testimony and jury instructions regarding R.T.S. should reflect that women’s post-rape reactions issue at least as much from reasonable distrust of the state as from self-loathing so intense that it amount to disease.

I. Rape Trauma Syndrome and its use in rape trials

a) Rape Trauma Syndrome research in U.S. and Britain

U.S. courts, following the findings of psychological researchers, have recognized R.T.S as a type of post-traumatic stress syndrome. In 1974, American researchers Ann Burgess and Linda Holmstrom coined R.T.S. after studying the “experiences of rape victims presenting to Boston City Hospital.” They observed rape trauma occurring in two stages, an “acute stage of extreme fear,” and a “reorganizational” stage characterized by more moderate emotional symptoms. During the acute stage, victims variously responded with extreme grief, anger, or even languor or lassitude. Victims also reported physical symptoms, nightmares,


26 Long and Palmer, supra note 9 at 599.


28 Christopher Emrich, The Playboy Defense in Philadelphia: How Pennsylvania Continues to Thwart Fair and Effective Sexual Assault Prosecutions by Refusing to Admit Expert Testimony About Rape Trauma Syndrome, 6
sleeplessness, phobias, and general emotional retreat. In addition, Burgess and Holmstrom, as well as other experts, observed that hesitation or refusal to press charges, lack of emotional affect, and returning to the scene of the crime are not uncommon reactions found among victims.

The most prominent researcher of rape trauma syndrome in Britain is Dr. Fiona Mason, a forensic psychiatrist at Saint Andrew’s Hospital Northampton. In Rape and Sexual Assault, an article co-written with Jan Welch in the British Medical Journal, Mason describes the “impact” of rape as “profound,” and notes that “[p]sychological reactions vary greatly, but overall people who experience rape are more likely to develop post-traumatic stress disorder than victims of any other crime.” She observes that “in the early weeks after sexual assault” “most
people” “express a range of post-traumatic symptoms.”\textsuperscript{37} “[E]arly symptoms” include “anxiety, tearfulness, self blame and guilt, disbelief, physical revulsion and helplessness.”\textsuperscript{38} Dr. Mason estimates that half of all victims recover from “acute psychological effects” after about twelve weeks, but that symptoms “in many” persist “for years.”\textsuperscript{39} She also estimates that seventeen percent of all victims “develop disabling mental health and social problems”\textsuperscript{40} such as depression, feelings of shame, and suicidal ideation.\textsuperscript{41}

In \textit{Rape, myth and reality: A clinician’s perspective}, published in \textbf{Medicine, Science and the Law},\textsuperscript{42} Mason describes the reasons behind victim’s delayed reporting, one of the most examined features of post-rape reaction in rape trauma cases and literature:

It may be hard for a victim to do anything that reminds them of the circumstances of the assault and simple tasks may become impossible. However, some victims may find security in carrying on with daily routines, such as looking after their children or going to work. Some find it too hard to talk about what happened, and thus they may delay reporting the events and not tell anyone, even those who love them most. Many women blame themselves, and feel ashamed. Most of us would comfortably talk about being in a car crash, or being mugged, but how many of us would feel comfortable talking about having been raped?\textsuperscript{43}

b) How R.T.S is used in U.S. and British courts

\textsuperscript{37} Id.  
\textsuperscript{38} Id.  
\textsuperscript{39} Id.  
\textsuperscript{40} Id.  
\textsuperscript{41} Id.  
\textsuperscript{43} Id. Yxta, editors; \textit{Get pin cite please}. 
Where permissible, prosecutors proffer expert testimony to prove that a rape occurred, and to explain “counterintuitive” behaviors. In my analysis of the ways R.T.S. evidence may confusingly suggest that rape victims suffer from a pathology, I will focus on the “counterintuitive” cases, wherein victims’ late reporting, reticence, denials, uncommunicativeness, returns to the scenes of their rapes (“victim return”), and requests to their rapists to keep their rapes silent are attributed to “shame” or “terror” of the defendant, if they are plausibly explained at all.

Prosecutors put on evidence of R.T.S. to explain “counterintuitive” behaviors in order to bolster the victim’s credibility and prove lack of consent. The expert will not testify as to the

44 Some courts hold that R.T.S. cannot be used to prove that “a crime occurred.” See Long, Palmer, and Thorne, supra note 8 at 636-8. Id. at 639 (“[T]he evidence cannot be offered to establish whether the victim is telling the truth.”) (citing State v. Alberico and State v. Marquez, 861 P.2d 192, 210 (N.M. 1993). See also State v. Saldana 324 N.W.2d 227, 229-230 (Minn. 1982). (“[rape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred”). State v. Taylor 663 S.W.2d 235, 236-242(Mo. 1984); People v Gallagher, 547 A.2d 355, 357 (1988) (improper evidence of R.T.S. to explain victim’s initial inability to identify defendant); People v. Bledsoe, 203 Cal. Rptr. 450-460 (“[R.T.S. is] not admissible to prove that the witness was raped.”) Some courts require that the “defense raise[] the issue first.” Horne, Palmer and Long, supra note 9 at 639 (citing People v. Brown, 777 N.Y.S.2d 508, 510 (N.Y. App. Div. 2004).

45 Minnesota, Missouri, and Pennsylvania that the use of R.T.S. for such purposes invades the province of the jury. See Saldana, id., at 229-30; Taylor at 241 (“[T]he prosecutrix' symptoms were consistent with a traumatic experience . . . But it goes beyond [the expert’s] qualifications to say that she was raped by defendant."); State v Gallagherer, 547 A.2d 355 (Pa. 1988). See also State v. Huey, 145 Ariz. 59, 63, 699 P.2d 1290, 1294 (1985) (we "might have some difficulty in upholding the admissibility of rape trauma syndrome to prove the existence of rape"). See generally supra note 9, Jennifer G. Long, Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions 19 (American Prosecutors Research Institute, 2007).

46 People v. Taylor, 552 N.E.2d at 131 (R.T.S. “relevant to dispel misconceptions about rape reactions”) (victim exhibited a calm demeanor). See also State v. Hall 412 S.E.2d 883, 891 (1992) (“jurors may not completely understand certain post-assault behavior patterns . . . testimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent.”).
victim herself, but will provide a general sketch of the symptoms of R.T.S.\textsuperscript{47} As noted, one of the classic counterintuitive responses experts have helped explain is late reporting. A sample of the cases demonstrates that experts and courts often represent “counterintuitive” late reporting as a product of the victim’s fear or humiliation, which may flummox jurors’ expectations.

For example, in \textit{State v. Kinney}, Vermont\textsuperscript{48} approved the use of expert testimony on R.T.S. to explain late reporting on the theory that otherwise the jury might be “at a loss” to fathom such behavior.\textsuperscript{49} In \textit{Kinney}, the defendant had abducted the victim from her home after purchasing drugs from another member of the household.\textsuperscript{50} The defendant testified that the victim had offered to help him find some drugs to buy, and giggled when he threw her over his shoulder and carried her out of the house to his car. The victim stated that she objected continually to being removed from her home. Both sides agreed that the victim had later that evening taken drugs with the defendant and his friends, though the victim explained that she did so because “she did not want defendant and his friends to think she was scared.”\textsuperscript{51} The defendant then took the victim to his parent’s house, and raped her in his bed; she fell asleep afterward, asking to be taken home the next morning.\textsuperscript{52} The victim delayed in reporting to her

\textsuperscript{47} See Jennifer G. Long, \textit{supra} note 10 at 18: “Prosecutors should not . . . seek assistance from an expert who has examined the victim or is currently providing treatment or counseling to the victim.” \textit{See also Terrio v. McDonough}, 16 Mass. App. Ct. at 169 (“testimony of Dr. Burgess was cast in tentative generalities, without regard to the incident or persons involved in this case.”)

\textsuperscript{48} \textit{State v. Kinney}, 762 A.2d 833, 842 (2000) (“We concur with the trial court that expert evidence of rape trauma syndrome and the associated typical behavior of adult rape victims is admissible to assist the jury in evaluating the evidence, and frequently to respond to defense claims that the victim’s behavior after the alleged rape was inconsistent with the claim that the rape occurred. As with child sexual abuse victims, the jury may be at a loss to understand the behavior of a rape victim.”) \textit{See also id.} at 246 (testimony at trial concerning late reporting).

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.} at 241.

\textsuperscript{51} \textit{Id.} at 242.

\textsuperscript{52} \textit{Id.}
boyfriend, and thus, presumably also to the police.\textsuperscript{53} Acknowledging the victim’s passivity and failure to report as counterintuitive behaviors, the court approved of an expert who testified that victims of rape are more likely to resist their attacker by making verbal protests than by struggling or screaming, and that victims are less likely to resist if force is used or threatened. Furthermore, [the expert] said that it is not unusual for victims to delay in reporting a rape, especially if the attacker is an acquaintance, and that a rape victim may be more likely to report to a friend first, rather than to someone with whom she is having an intimate relationship. This delay in reporting is related to the feelings of guilt and shame experienced due to the trauma of the rape\textsuperscript{54}

Similarly, the Colorado Supreme Court in \textit{People v. Hampton} permitted evidence of R.T.S. to explain late reporting, which it attributed to the victim’s terror of her rapist, who frequented the bank where she worked.\textsuperscript{55} The \textit{Hampton} court also took care to note that rape victims may suffer from “self blame,”\textsuperscript{56} though it did not specify why the victim would blame herself.

In \textit{People v. Taylor}, the New York Court of Appeal permitted R.T.S. evidence for this purpose as well, since it educated the jury that the victim’s “fear[]” of the rapist may have deterred her from identifying her assailant,\textsuperscript{57} and this reaction may not be within the ordinary understanding of the jury. Specifically, the victim in \textit{Taylor} had known her rapist “for years,” before he raped her and sodomized her at gunpoint, after tricking her into meeting him near a deserted beach.\textsuperscript{58} After telling her mother about her attack, her mother called the police, but the

\textsuperscript{53} Id. 251.
\textsuperscript{54} Id. at 246.
\textsuperscript{55} \textit{People v. Hampton}, 746 P.2d 947, 952 (1987) (“The testimony of Wyka provided the jury with an explanation for the delay in reporting consistent with the victim’s testimony that she had been raped and that she had delayed reporting the rape until after the defendant stopped frequenting the bank because she was terrified of him.”)
\textsuperscript{56} Id. at 949.
\textsuperscript{57} \textit{People v. Taylor}, 75 N.Y.2d 277, 293 (1990) (“[E]xpert testimony explaining that a rape victim who knows her assailant is more fearful of disclosing his name to the police and is in fact less likely to report the rape at all was relevant to explain why the complainant may have been initially unwilling to report that the defendant had been the man who attacked her. Behavior of this type is not within the ordinary understanding of the jury.”)
\textsuperscript{58} Id. at 282.
victim told them twice that she did not know her attacker. R.T.S., thus, was used to explain her lie, though neither the court nor the expert went into much detail of their grounds for this assessment.

In Stephenson v. State, a Georgia court of appeal permitted expert testimony on rape reactions (though the court permitted a rape counselor to give evidence of typical rape victim behavior, “syndrome” evidence was not permitted) since it showed that a victim would delay reporting because they “may be scared or they may be experiencing trauma.” The Stephenson court appears to indicate that the victim in that case would have been scared of the defendant, who was her co-worker, and with whom she had spent the evening consuming alcohol, marijuana and cocaine.

Further, R.T.S. evidence has been used to explain why a victim asked the defendant to keep her rape secret in cases such as Lessard v. State. There, the married victim had drunk alcohol with the defendant, played “parlor games” with him, and loaned him money before he said “if she ever wanted to hold her infant son again she would do what he wanted,” then forced her to perform fellatio on him and vaginally raped her three times though she had just had surgery on her cervix. R.T.S. evidence was submitted to explain that victims who seek to conceal their rapes are “very common [when there is a] threat of death because the person can be identified. The victim can identify the person who has assaulted her and she must protect herself, and in this case, her child and she would say anything, and it's very, very common.”

59 Id.
61 Id. at 337.
63 Lessard at 233.
R.T.S. evidence has also been used to explain a victim’s denial of rape, for example, in
*People v. Whitehead*, a case bare of facts except that the “victim had told others she had not been
raped.”

Prosecutors (or plaintiffs’ counsel) have also put on evidence of R.T.S. to explain a
victim’s returning to the site of the attack, for example, in *Terrio v. McDonough*, where a victim
returned to the scene of her rape to retrieve her belongings. In these cases, these behaviors are
simply presented as being part of R.T.S. symptomology, and not attributed to shame, terror, or
any other specific emotional states.

R.T.S evidence has additionally been used to explain a victim’s emotional “flatness.”
This strategy was used in *State v. Robinson*, where the victim was raped by a former lover and
later “uncommunicative” at the hospital. As in *Terrio*, the symptom was not ascribed to any
particular stimulus, but presented simply as part of the R.T.S. package.

c) The use of R.T.S. evidence in British courts

While many courts in the United States have permitted the introduction R.T.S. at rape
trials, the British justice system has, until very recently, proven hostile to such submissions.
Indeed, British courts have long precluded psychological evidence on credibility generally. In *R*

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syndrome could cause a victim to deny having been raped, which is clearly relevant to the evidence defendant
presented to establish that the victim had told others she had not been raped.”)

explain how rape victims may return to scene with their attacker or feel safe in his company after the assault). It
bears noting that *Terrio* is a civil case, but its use of R.T.S. to explain victim return has been cited in *People v.
Bledsoe*, 36 Cal. 3d 247 (Cal. 1984), *McCleery v. City of Bakersfield*, 170 Cal. App. 3d 1059, 1069 (1985); and
*Kinney*, 171 Vt. at 250.

66 *State v. Robinson*, 431 N.W.2d 165, 168 (Wis. 1988) (court of appeals upheld expert testimony regarding rape
victims’ sometimes exhibiting emotional “flatness.”)
v. Robinson,\(^{	ext{67}}\) "the leading British decision on expert evidence of credibility,"\(^{	ext{68}}\) the court of appeal held that "the Crown cannot call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard that witness as reliable."\(^{	ext{69}}\) Furthermore, in British courts, late complaints have been deemed inadmissible.\(^{	ext{70}}\) However, through the enactment of section 120(7) of the 2003 Criminal Justice Act, that rule has been now been softened to require that complaints be made at the "the first reasonable opportunity. This possibly allows for a complaint which was made weeks or even months after the offence."\(^{	ext{71}}\) Nevertheless, British legal scholar Carol Withey notes that "the CJA 2003 replaced the common law rules on adducing recent complaints in sexual cases; the major difference being that the complaint no longer needs to be recent. However, the requirement that

\(^{67}\) R v Robinson (1994) 98 Cr App R 370 at 373.


\(^{69}\) Robinson, supra note 66 at 373.

\(^{70}\) Frances Gibb, Juries to be warned of rape victim 'myth,' The Times, November 26, 2007.

\(^{71}\) See Withey, id. at 54. See also Criminal Justice Act 2003, s. 120(7). Found at: http://www.legislation.gov.uk/ukpga/2003/44/section/120 http://www.legislation.gov.uk/ukpga/2003/44/section/120
it be made as soon as could be reasonably expected does appear to retain some temporal test. It could exclude complaints made months or even years after the rape.”

Perhaps predictably, in 2005, the British government found a scandal on its hands when it was reported that “the [rape] conviction rate dropped from 33 per cent of reported rapes in 1977 to 5.4 per cent in 2005” rising slightly to 5.7 in 2007. In response, in 2006, British ministers proposed allowing prosecutors to introduce “general expert evidence” on rape. This suggestion was later rejected, though, on the grounds that “general “expert evidence [might] 'expand' into evidence about the specific complainant and give rise to a 'battle of the experts.'” The Solicitor General then floated the possibility that juries might be given evidence other than through witnesses called by the prosecution, possibly via a distribution of “myth-busting packets” before trial. A great deal of pushback has greeted that suggestion, however, and, at present, there are no concrete plans to introduce such packs to juries, though they have been made available to judges in the last few years.

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72 Withey, 1 February 2007, [JCL 71 (54) at [yxta, get pin cite.] N.B. editors, Yxta, Withey cites the appropriate code to be 120(4), but this seems to be a mistype. See also Rape and Sexual Assault Education: Where is the Law?, 13 New Crim. L. Rev. 802 (2010) (on rape education, prevention, and rape myths).

73 Frances Gibb, supra note 70.


76 Id. (citing C. Gammell, ‘Juries to Be Made Aware of Rape Victim "Myth"’, Daily Telegraph, Nov. 27, 2007.). See also Frances Gibb, supra note 70.

77 Gibb, supra note 70 (“But the proposals have run into opposition from judges and lawyers who said that they would make little difference to the conviction rate.”)  Ward, supra note 74 at 95 (“[I]f such material is more or less overtly designed to make jurors more willing to convict, the absence of an opportunity for the defence to challenge it will raise difficult questions of fairness.”).

78 See R v Doody, [2008] EWCA Crim 2557 at section 9 [hereinafter Doody] (“The Solicitor General has also referred us to material which is made available to judges and recorders at the Judicial Studies Board seminars on trials in serious sexual cases. These include material relating to the psychological effects of serious sexual assaults..."
In 2008, the practice of casting suspicion on late complainants was judicially reversed in the case *R v. Doody*. There, the defendant and the victim had known each other for about five years, and had lived together for a “significant proportion of that time.” The relationship, however, “deteriorated.” Defendant became “increasingly aggressive” in 2005, an emotional state that he heightened with alcohol abuse, possibly because of financial problems. The victim testified that “in the period up to the 31st October 2005, the defendant forced her to have sexual intercourse, once in their bed, and once on a sofa.” In addition, on an occasion between October and December 2005, he abducted her and drove her off to a secluded place and raped her in his car. The final incident occurred on January 13, 2006, when “she was dragged upstairs, had her clothes forcefully removed and was then raped vaginally, orally and anally. He then . . . inserted a deodorant can into her vagina. The incident only stopped when the complainant’s son returned home.” The appellant then left the home and went to a bar to drink.

When the defendant returned, “there was an incident which resulted in the police being called.” The *Doody* court does not specify what this incident entailed. When the police arrived at the victim’s home, she “made no allegations of any sexual assault on her.” The *Doody* court described the atmosphere at the victim’s home as follows: “Well, what she said to you was that when the police were in her house there were quite a lot of them. They were joking and

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79 *Id.*
80 *Id.* at X. Editor, I am having trouble retrieving these pin cites from the *Doody* case. It is unpaginated in the bailii.org page.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
wandering about, and she just didn’t feel that she could speak to them.”\textsuperscript{88} Then, two days later, on January 15\textsuperscript{th}, the victim did make a rape complaint to one Police Constable Stephen, when Stephen came to her home to get her statement about what had happened on the 13\textsuperscript{th}.

Defendant, on questioning, claimed that the sex he had with the victim was consensual, though he described that sex as being “vigorous.”\textsuperscript{89} He also admitted that been there had been “difficulties between him and the complainant; and he believed that the complainant had “come to the conclusion that she wanted him to leave.”\textsuperscript{90} He said that he thought the victim had made a false complaint of rape to get rid of him. Moreover, he pivoted his defense on the fact that the victim had not complained about the rapes on January 13, and the paucity of evidence supporting the crown’s charge, but for the victim’s son’s testimony that his mother had been very “distressed” on the night of the 13\textsuperscript{th} and the apparent contradiction between the defendant’s assertions that the victim consented to sex on the very same night that she wanted him to “leave.”\textsuperscript{91}

At issue on appeal were the trial judge’s statements made during the summing up. The defendant issued two complaints about these statements: 1) that the court had impermissibly advocated against defendant, and 2) that the court described delayed complaints as common features of rape cases, which do not bear upon the victim’s credibility. The lower court took pains to explain that women often delay making their complaints because they are “ashamed:”

Very often, women who are raped within relationships feel ashamed of what's happened. They themselves feel the shame. Although they have nothing to be ashamed about, because they are the victim, that's the reaction. They feel ashamed of what's happened. They are often too traumatised or embarrassed to tell anyone what's going on, and a very serious aspect of the offence in those circumstances is that a woman feels trapped. She is, after all, in her own

\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
home, very often simply too ashamed and embarrassed to tell anyone that the person that she has brought into her home to share her life, be with her children, is now raping her. She won't tell her neighbours, friends... even very close friends...children, still less the police, because of those factors which bring to bear.

So it's against that background that you may wish to consider the question: why D didn't complain about being raped when it started. You were asked that question by Mr. Jackson. He made it a significant point in his speech, didn't he? He said: ask yourselves, use your commonsense. Why, when all these police are in the house, is she not saying: "Oh, by the way, he's been raping me for some time now"? Bear in mind how you would feel if you were in her situation about suddenly saying "Oh, by the way, I've been raped". This is where you use your commonsense and your experience of life in determining that question, because it's frequently said when women don't complain about rape: "well it's not true, because if it had been true they would have been straight down to the police station hammering on the door, saying "I've been raped". But you may think it doesn't work like that particularly if it's rape by someone you have loved, as D says, still care about, to an extent, in your home, where your children are living.

You say to yourselves: why didn't she complain? Well, what she said to you was that when the police were in her house there were quite a lot of them. They were joking and wandering about, and she just didn't feel that she could speak to them. But when P.C. Stephenson came along; you may think what she was saying there was something of a kindred spirit. There was a sympathetic ear here. A young policeman, on his own, and she felt she had to say something. And why? You may conclude it was as a result of the ferocity of that final attack. If what she has told you is true, it was a ferocious rape. She said at one stage she was being smothered and thought that she might not survive. That's how bad she thought it was. The prosecution says that's why she looked like she did when she saw Adam in the house, and that's what made her tell the police what was going on, because in spite of her feelings for Mr JD, and all that happened in the past, she was thinking that enough was enough.\footnote{Id.}

While the \textit{Doody} court on appeal determined that the "judge went too far," and sounded like a "prosecution's closing speech,"\footnote{Id.} it held that the judge’s comments about credibility and delayed complaints in rape cases were warranted. The court depended upon Dr. Fiona Mason’s work on rape trauma,\footnote{Id.} as well as on the script of a lecture given by His Honour Judge Peter Rook QC, wherein Rook stated "[e]xperience shows that people react differently to the trauma of \footnote{Id.}
a serious sexual assault. There is no one classic response. . . . You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint.”

In addition, the Doody court also referred to section 294 of the New South Wales Criminal Procedure Act which requires that, where evidence is put on “suggest[ing]” “the absence of a complaint” or a “delay . . . in making any such complaint,” a trial court must warn the jury that delayed complaints “do[,] not necessarily indicate that the allegation that the offence was committed is false.” Moreover, the court must “inform the jury that there may be good reason why a victim of a sexual assault may hesitate about the assault” and “must not warn the jury that delay in complaining is relevant to the victim’s credibility unless there is sufficient evidence to justify such a warning.”

The Doody court then determined that, though the lower court was impermissibly prosecutorial in its closing instructions, this did not constitute reversible error since the evidence was sufficient for conviction.

95 Id.
97 Doody.
98 Doody.
99 See Doody, id: “We therefore agree with the submission on behalf of the appellant that the judge went further than he should, at least in the absence of any balancing remarks to the appellant’s case. However, we have to determine whether or not the jury’s verdicts were safe. We have read the whole of the evidence given by the complainant and considered the account given by the appellant. The judge fully and fairly put the defence case in every other respect to the jury. The appellant really had no answer to the point that this case depended on the jury accepting that the complainant may have been willing to engage in, indeed, was encouraging, sexual activity whilst simultaneously wanting to get rid of him. Although not an impossible scenario, it was so unlikely that the jury must have rejected it. We are satisfied that these verdicts are safe.”
The British press celebrated *Doody* as a triumph of justice over stereotyping, emphasizing that women’s complaint-delaying “shame” should not be used to “penalize” them. As Vera Baird, the prosecutor in *Doody*, told the *Daily Mail*:

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

After *Doody*, Baird and other advocates submitted a draft of proposed jury instructions, to be given in rape jury trials where defendants attempt to undermine victims’ credibilities by citing their late complaints. These were accepted by the judiciary, and incorporated into the Judicial Studies Board Bench Book, which is a compendium of model instructions. Based upon another lecture given by Peter Rook, and also inspired by Dr. Mason’s work, these instructions warn juries against stereotypes such as “[a] person who has been sexually assaulted reports it as soon as possible.” Rook, in his lecture, approved of the instructions given in

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101 See Francis Gibb, *Beware rape myths, judges to tell jurors*, *The Times*, June 15, 2009 (“The initiative has been promoted by Vera Baird, QC, the Solicitor-General, because of continuing concern that rape convictions in the UK remain the lowest in Europe. The idea of judicial directions has been developed over recent months, Ms Baird told *The Times*. A small group, including psychiatrists, researchers and a ‘shadow jury’, had looked at what influenced people’s views. A second group, including judges, lawyers, Treasury counsel and Ms Baird, then drew up draft judicial directions to cover some half dozen of the main myths about rape. These have been seen by the Lord Chief Justice and are with the Judicial Studies Board, in charge of training judges and consultation between judges.”). [http://www.timesonline.co.uk/tol/news/uk/crime/article6499404.ece](http://www.timesonline.co.uk/tol/news/uk/crime/article6499404.ece)


103 *Id.* at 357.

104 *Id.* at 356 fn. 646.

105 *Id.* at 357.
Doody, praising Judge Latham’s instruction that “the trauma of rape can cause feelings of shame” that can “delay complaints.”

The model instructions that were published in 2010 are similarly premised when addressing stoicism and late reporting. For example, with respect to victim demeanor, a model instruction reads as follows:

You must decide whether you are sure the complainant did not consent to sexual intercourse with the defendant. That will require an assessment by you of the complainant’s evidence. I must emphasise that the assessment is for you to make. However, it is important that you do not bring to that assessment any preconceived views as to how a witness in a trial such as this should react to the experience. Any person who has been raped will have undergone trauma whether the defendant was known to her (or him) or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publicly about it in court. The experience of the courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every person has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness’ account. It all depends on the character and personality of the individual concerned.

The model instruction on delayed complaints reads thusly:

It has been said on behalf of the defendant that the fact the complainant did not report what had happened to her (him) as soon as possible makes it less likely that the complaint she (he) eventually made was true. Whether that is so in this particular case is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is matter for you to determine whether, in the case of this particular

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107 Bench Book at 358.
complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it. You need to consider what the complainant herself said about her experience and her reaction to it.  

The reader will notice that the Doody decision, the media reports, Rook’s lecture, and the jury instructions all emphasize victim mental vulnerability. In the case of victim stoicism, this is attributed to “trauma” in the jury instructions, which is of course in line with characterizing post-rape reactions as symptoms of a syndrome. The same holds true with the explanation of a victim’s late complaint, which is attributed to trauma that expresses itself through “shame or fear or shock or confusion,” and that may lead a victim to delay her report of her attack.

In 2010, however, a set of recommendations concerning the very low rate of rape convictions and the administration of rape complaints arose less from a concern over victim shame or confusion than out of a realization that victim reticence may be a response to state inaction. Baroness Stern of Vauxhall, lecturer at the International Centre for Prison Studies, King’s College London, issued a “landmark study” reporting the results of a “five-month review of the treatment of rape victims,” and wherein she “met some [victims] whose treatment by the authorities was appalling.” Baroness Stern not only advocated that “[m]yths surrounding rape also needed to be dispelled,” but set forth a set of recommendations based on the observation that women did not necessarily trust the government to adequately address their complaints: “Among the range of new measures published today is the immediate transfer from

108 Id.
109 Id. See also Jennifer Temkin, “And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse”: Challenging Rape Myths in the Courtrooms, 13 New Crim. L. R. 710 (2010) (criticizing the sometimes difficult to follow, as well as voluntary, not mandatory, nature of the instructions).
110 http://www.parliament.uk/biographies/vivien-stern/26518.
111 Robert Verkaik, Rape laws to be rewritten, Landmark review finds ‘shocking’ failures to investigate and prosecute effectively / Forensic medical evidence should be gathered by NHS, not police, ministers urged, The Independent, Mar. 15 (2010), http://www.independent.co.uk/news/uk/crime/britains-rape-laws-to-be-rewritten-1921407.html
112 Id.
the police to the NHS of forensic medical examination of rape victims, and the right for a victim
to choose a woman doctor. Every victim of rape should be offered the support of a specialist
adviser to help them to keep faith in the criminal justice system.”

II. The feminist critique of the use of Rape Trauma Syndrome evidence in rape trials

Feminist legal theorists divide on the question of how to use rape trauma syndrome
evidence in trials. Some advocate the use of this evidence as is, noting that educating juries
about rape trauma syndrome can help obtain convictions, particularly where juries may be wary
of rape claims where victims report late, appear stoic after the rape, or return to the scene of their
attack.

Yet the feminist critiques of R.T.S. are plentiful. U.S. legal scholar Susan Stefan is one
of the most outspoken detractors of R.T.S.’s use in the courtroom, noting that it replaces one set

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113 Id.
114 As Kaarin Long, Caroline Palmer and Sara G. Thome argue “[j]urors enter the courtroom burdened by myths and
misconceptions about how victims of sexual assault should behave, and what type of victim experience is credible. . .
. . . Jurors therefore require additional education in the form of general expert testimony to dispel myths and more
fairly evaluate victim credibility.” See A Distinction Without a Difference, supra note 9 at 571-2. Jennifer G. Long
also submits that “experts in sexual and domestic violence should focus their testimony on descriptions of the myths
surrounding sexual or domestic assaults, the dynamics of sexual or domestic assaults, and common victim
behaviors.” See Long, supra note 10 at 20. [this refers to Introducing Expert Testimony to Explain Victim Behavior
in Sexual and Domestic Violence Prosecutions]. Long observes that such evidence may be necessary in rape trials
“because . . . [l]eft without an explanation, a victim’s [counterintuitive] behavior often becomes compelling
evidence to jurors that the victim lacks credibility.” Id. at 21. British legal scholar Tony Ward allows that the
submission of evidence of “well-conducted empirical research to counter ‘rape myths’ or stereotypes on which the
jury might otherwise rely . . . [may] exclude from its deliberations some assumptions about rape that might
otherwise have led it [unjustly] to be sceptical of the defendant's story.” See Tony Ward, supra note 74 at 97. In
addition, Dr. Louise Ellison, of the School of Law, University of Leeds, and Professor Vanessa E. Munro, law
professor at the University of Nottingham, posit that the use of “general expert testimony” which is “not tied to a
medical or psycho-pathological model. . . or profile-orientated,” but rather based on “generalized social science data
concerning rape reactions” may beneficially “explain to jurors and judges that apparently problematic features of a
complainant's evidence are common and should not necessarily lead to the conclusion that the complainant is lying
or unreliable.” Louise Ellison & Vanessa E. Munro, Turning Mirrors Into Windows? Assessing the Impact of (Mock)
Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases’. 9 Int’l J. of
Evidence & Proof 239 2005)).
of myths with others that characterize rape victims as pathological sufferers of a disorder.\textsuperscript{115} In order to combat these effects of the use of R.T.S., Stefan proposes offering evidence of rape reactions along with facts about the social and political context of rape, which would help explain women’s “counterintuitive” behaviors without pathologizing them. For example, when it comes to late reporting and victim stoicism and reticence, Stefan advocates that we allow in evidence showing the oftentimes devastating consequences women face when they do report:

> Expert testimony may be needed to explain a woman's failure to report rape, not as a symptom, but in terms of the likelihood of disbelief by police, retaliation by the rapist, hostility of family and support network, and the stress caused by the judicial proceedings and stigma of being a public rape "victim." Expert testimony can educate the jury that the very fact of the rape myth that rapists are strangers who leap out of bushes makes women reluctant to report rape by a previously trusted friend or (especially) an authority figure with power over her. Women may fear disbelief, or they themselves may be shocked or confused about what happened, especially if the attack does not fit into any known social category. The rape may be conceived as a major problem to be resolved in an ongoing relationship, rather than a crime. Meanwhile, the women act publicly as though nothing had happened. An expert can emphasize to the jury the courage and strength it takes to report being raped, rather than the pathology that explains a delay in reporting. "Normal" women, defined as "typical" women, don't report being raped at all.\textsuperscript{116}

Furthermore, Stefan, as well as the feminist psychoanalyst Sharon M. Wasco, critiques R.T.S. as built on a skewed and underrepresentative sample of rape victims: Those who do report. As Stefan writes, “[available] studies do not report or analyze the reactions of the vast majority of women and children who are raped and sexually abused. The proportion of women who are raped and do not report it has been estimated as varying between eighty percent and

\textsuperscript{115} Stefan, \textit{supra} note 10, at 1279-80: “While the major doctrinal question raised by these courts in attempting to decide whether to admit the testimony - whether introduction of such evidence was governed by the \textit{Frye} rule or by the state equivalent of Rule 702 of the Federal Rules of Evidence may have been resolved by the United States Supreme Court in \textit{Daubert v. Merrell Dow}, fundamental questions about whether rape trauma syndrome evidence should be admitted remain unaddressed.”

\textsuperscript{116} \textit{Id.} [Text accompanying notes 329 (having some problems retrieving pin cites in this article on lexis).]
ninety percent.” Psychologist Wasco, who writes about R.T.S. as a therapeutic tool, agrees that the R.T.S. profile does not cover most victim responses to rape because they exclude an investigation into the social context of rape. In other words, R.T.S. does not attribute some rape reactions to victim’s mistreatment by the state or her community. Wasco also notes that the victim described by R.T.S. is premised on a class- and race-privileged model: “The harm done to minority groups may manifest, or be expressed, in ways that research has not yet captured.”

Dr. Michelle Fine, a professor of social psychology at the City University of New York, critiques the way that rape victims are constructed by psychoanalysts. Like Wasco, she argues that the psychological model of treating rape victims is hierarchical, and imbued with class and race-privileged assumptions. In her book, *Disruptive Voices: The Possibilities of Feminist Research*, she observes that psychologists’ assumptions that victims will readily report, manifest grief, and rely on institutional support systems post-rape obscure how poor women or women of color may not express the kinds of shock and mourning that white or otherwise privileged women might because they did not harbor expectations of fair treatment before their attack. Moreover, they may withhold information in order to prevent their exposure to additional harm, and also as a way of exercising some modicum of control. As such, she advocates that we upend this “top-down” construction of rape reaction. Mary Gilfus, a professor of psychology at

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117 Id. at notes 130.
118 Wasco argues that we must “look beyond the act(s) of sexual violence to the cultural messages, relationship role expectations, and social norms that influence not only survivors’ prerape worldviews but also their postassault disclosure experiences and reactions from friends, family, and service providers;”Wasco, *supra* note 13 at 315. See also id. at 316 (discussing how stigma and blaming and doubting responses “may compound the harm of the assault itself.”).
119 See, e.g., Wasco, *supra* note 13 at 314 (“The harm done to minority groups may manifest, or be expressed, in ways that research has not yet captured.”)
120 See *Disruptive Voices, supra* note 16 at 69: (“Trusting social institutions, maximizing interpersonal supports, and engaging in self-disclosure are strategies most appropriate for middle-class and affluent individuals whose interests are served by those institutions, whose social supports can multiple available resources and contacts and for whom self-disclosure may in fact lead not only to personal change but also to structural change.”
121 Id. (“Resisting social institutions, withholding information, and preserving emotional invulnerability emerge[s] [for some] [as] strategies for maintaining control.”)
Simmons College, similarly argues that rape reaction models pathologize women, and exclude the experience of many women, including women of color and poor women. She advises rebuilding the “pathological” “trauma” model into one that takes into consideration “survivor-centered epistemologies” and describes victim reactions as acts of strength and resistance.

What is being called for by feminists, then, is a broader conception of rape victim reactions, one that accounts for a larger spectrum of women (including non-reporters as well as non-privileged women), and that will avoid focusing on women’s “counterintuitive” “pathology” in lieu of examining the behavior of the defendant and the social context within which the sexual assault occurred. Moreover, a construction of victim reactions that recognizes victim strength and coping is by far preferred to the existing models of rape trauma.

To these critiques I would add the following: Insofar that existing models do explain victim behavior in fathomable ways, they inevitably describe women’s reactions as bizarre (again, “counterintuitive”) products of terror and confusion; there is also the distinct court, expert, and prosecutorial pattern of attributing reticence to victim “shame” – a “shame,” it must be said, that seems to be more assumed and less proven; nor have the causes and nuances of this

122 Mary E. Gilfus, *The Price of the Ticket: A Survivor-Centered Appraisal of Trauma Theory* 5 *Violence Against Women* 1238, 1243 (1999) (“Using a disease model may help if isolating a virus is the goal, but it may do more damage than good if the goal is to end women’s suffering and dislocation in the face of a widespread social and political phenomenon.”)

123 *Id.* at 1239.

124 *Id.* at 1238-1257. See also Rebecca Campbell, Emily Working, Gianna Cabral, *An Ecological Model of the Impact or Sexual Assault on Women’s Mental Health*, *Trauma Violence Abuse* 2009 10: 225, 227 (2009) (“[T]he functions of individuals and community organizations are interdependent and that individuals have differential patterns of experiences given different ecological settings. Ecological settings consist of person constructs, which are individual characteristics such as race/ethnicity, gender, and beliefs and attitudes; events, which refer to the specific problem(s) that prompts an individual to need assistance and/or seek help, and instigates a community help-system network to respond; and environments, which include structural features of a community (e.g., resources), functional features (e.g., service delivery processes), as well as the attitudes and values of the community as a whole.”).
shame been accurately articulated by the theory. Courts and experts, however, have not invented this manner of describing rape victims: The figure of the shamed, sexually incontinent (that is, out of control) women has a long and disturbing erotic history found from tales of Mary Magdalene to Samuel Richardson’s eighteenth century epistolary novel Clarissa to the Bertolucci film Last Tango in Paris. One possible, if unconscious, motive that may drive experts and prosecutors to package recalcitrant rape victims as shamed, and why courts and juries may accept this characterization, is because it combines the pleasures of condescension and a certain brand of concupiscent imagery. Courts’ and experts’ troubling participation in an erotics of rape requires a rethinking of the language that we use when accounting for the aims of women who do not wish to speak to the state after their sexual assaults. As Sara Sharratt writes with such prescience when detailing the presentation of humiliated and traumatized rape victims in international tribunals on war crimes: “Shame and severe psychopathology take center stage[,] [creating an] allure and erotic charge.”

125 See, e.g., Debora Kuller Shuger, The Renaissance Bible: Scholarship, Sacrifice and Subjectivity 168 (1994) (detailing medieval and Renaissance “portraits of Mary as a penitent anchorite” that emphasize her “unexpected sensual beauty . . . that occasionally descends into something that looks like hagioporn.”); Virginia Cox, The Prodigious Muse: Women’s Writing in Counter-Reformation Italy 73 (2011) (noting Magdalene’s role as a “mirror of lovely penitence” is “quasi-erotic.”).
126 Richardson’s Clarissa, or, History of a Young Lady (1748) is an epistolary novel about an aristocratic woman who dies out of shame after being raped. The eroticism in the novel has been much noted. See, e.g., Jocelyn Harris, Grotesque, Classical and Pornographic Bodies in Clarissa, in New Essays on Samuel Richardson 111 (1996) (“Scenes of Clarissa’s distress especially invite [her rapist] Lovelace to read the text of her body pornographically, dissecting and gazing upon its different parts.”).
127 In Last Tango, Maria Schneider, the female lead, cried real tears when she performed the infamous “butter scene” with Marlon Brando. Schneider was erotically presented throughout the film, and her tears demonstrated that she was ashamed (in her words ‘humiliated’) and not consenting. See Shocking Sex Scene Made Actress Weep, The West Australian (Perth) Feb. 15, 2011 at AD4 p. 2.
128 Sharratt writes of trials in the International Criminal Tribunal for the Former Yugoslavia and the War Crimes Court in Bosnia and Herzegovina in Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals 33 (2011). In the quote mentioned, Sharratt notes how the “allure” and “erotic charge” that comes with the shame narrative will be exacerbated by the closed nature of rape trials. See also id. at 31: “[S]exuality [is] . . . the site of sin and shame for women [since the tales of Eve] . . . Rape and sexual violence bring shame and dishonor to women, consonant with the notion prevalent though much of history of women’s supposed more lustful nature: she provokes male arousal and she is to be blamed for her sexual insatiable desires.”
In order to address these concerns, I have begun to study art and literature made by rape victims, hoping to discern new insights into rape reactions. My research led me to the work of half-white, half Turkish British artist Tracey Emin, whose quilted blankets, sculptures, neon signs, drawings, writings and videos often address her unreported rape at the age of thirteen. In Emin, I find a subject as yet not much studied by legal scholars – the rape victim who never reports to the authorities. Emin does, however, report in her art. In studying these “reports” or artifacts, I learned that women’s seemingly inscrutable reactions to sexual assault may themselves be very telling, and not counterintuitive or conventionally shame-driven at all. As I will posit in Section III of this article, I found Emin conducting a series of trials in her work – prosecutions of her attacker, her community, and herself.

In so discovering these artistic litigations, I first wondered why Emin would conduct such relentless prosecutions and defenses, until it finally dawned on me that she performed this work because the state had not. Her work contains both implicit and explicit criticisms of the state’s failure. By so excavating Emin’s oeuvre, which depicts the physical details of the attack, her varied responses to it, and the gendered and raced social structures in which it took place, I came to understand two important aspects of victim reaction: First, one woman may exhibit manifold and even contradictory responses to that rape. Second, the reason why these multiple reactions seem “counterintuitive” is that the outside world does not understand that these reactions are directed at more than the woman’s rapist or herself, but also at the woman’s oft ill treatment at the hands of her community, family, and medical response team, and government. From this study, I have developed a hypothesis that agrees with Stefan’s, Wasco’s, and Gilfus’s critiques of the use of R.T.S. and also elaborates upon them: In order to reorganize our pathologizing and patriarchal response to victim reaction as a “syndrome” rooted in “fear” or “shame,” we should
be open to reinterpreting victims’ non-reporting, stoicism, and returns to the scene of the attack as critiques of U.S. and British governments and their catastrophically bad records in handling rape. Further, I will posit that this interpretation may be all the more relevant in cases involving rapes that do not measure up to the “real rape” construct, one that is rooted in gender, class, and race stereotypes.

In the following sections, I will set forth my analysis of Emin’s art, and proceed to detail the U.S. and British statistics and studies that reflect why rape victims’ reactions may be borne out of reasonable distrust felt toward their governments, again, particularly where the facts of their cases contradict “real rape” constructs. I will then reconsider the R.T.S. cases, which I believe confirm this reading of women’s reactions. Afterwards, I will set forth my suggestions for state reforms that might work toward repairing the relationship between the rape victim and her community and state. I will also suggest means by which to amend the admission of rape trauma evidence in rape trials, including a rewrite of jury instructions that avoids the use of the word “shame” in this context.

III) Artifacts: The Life and Work of Tracey Emin

Tracey Emin and her twin brother Paul, were born in Croydon, England, on July 3, 1963.129 Her father, Envar Emin, was a Turkish Cypriot, and married to another woman when he began an affair with Emin’s mother, Pamela Cashin. Envar maintained two separate households after the twins’ birth, and Emin spent the first three years of her life living in north London, while

129 Patrick Elliot, *Becoming Tracey Emin*, in *Tracey Emin 20 Years* p 17-18 (2008) [hereinafter *Tracey Emin 20 Years*].
making regular visiting trips to Turkey.\textsuperscript{130} Envar settled in Margate, a seaside resort town east of London, buying up property that he turned into a hotel, which he branded Hotel International.\textsuperscript{131} Emin, Cashin, and Paul all lived in Hotel International, spending three nights a week with Envar, who spent the rest of the week with his other family in London proper.\textsuperscript{132}

At the age of ten Emin was sexually abused by a man, apparently someone who was staying at the Hotel International.\textsuperscript{133} In her book of autobiographical essays, \textit{Strangeland} (2005), Emin recounts a series of “jagged recollections”\textsuperscript{134} detailing this first abuser, “Chris,” a lover of her mother: “I could feel his hard, erect penis pressed into the small of my back and he was rubbing his hands across my chest. My tiny little chest, my bony little ribs. I was only ten.”\textsuperscript{135} She describes her feelings about this assault as such: “Now my body stank, every orifice oozing slime, every poor open and closing, every part of me bleeding.” She also writes, in hand script:

\begin{quote}
IM Going to GET YOU
YOU CUNT YOU
FUCKING BASTARD.
And when I do – The
Whole world will know
That you destroyed Part
Of my childhood.
\end{quote}

\textsuperscript{130} \textit{Id.} at 18.  
\textsuperscript{131} \textit{Id.}  
\textsuperscript{132} \textit{Id.}  
\textsuperscript{133} \textit{Id.}  
\textsuperscript{135} \textit{Strangeland} at 14. See also \textit{id}: “As I got older, I would watch him from the corner of my eye. His hand down his trousers, always fiddling with himself, always looking at me. Then I would wake up in the middle of the night and hear him having sex with Mom. . . . The world had become a sad and ugly place.”
Tracey Emin\textsuperscript{136}

The next years of her life were characterized by violence and sexual assault. In \textit{Strangeland} Emin describes a disturbing roughhousing session with her brother,\textsuperscript{137} and when she “wasn’t yet twelve,” an abusive seaside encounter with “some kids,” and a strange man:

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

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

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

“A girl,” I said. “I’m a girl.”

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

. . . .

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

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

I wasn’t yet twelve, but I knew it could feel lovely to be a girl.\textsuperscript{138}

At thirteen, Paul head-butted Emin and smashed in her front teeth.\textsuperscript{139} Then, later that year, she was raped. It occurred on New Year’s Eve, after she had gone to “Top Spot,” a disco

\begin{footnotes}
\item[136] \textit{Id.} at 16.
\item[137] \textit{Id.} at 9: “Paul took a flying leap across the room, slamming me on the bed. He rammed his foot between my legs and pushed against my minge. ‘Submit, submit.’ ‘Okay, okay. I do,’ I said. ‘Please, Paulas. You’re hurting me.’”
\item[138] \textit{Id.} at 20–21.
\item[139] The story about Paul is at \textit{id.} at 23: “I didn’t blame Paul for head-buttning me and smashing my other front tooth: I never smiled that much anyway.”
\end{footnotes}
for “over-sixteens.”  At eleven fifteen, she left the disco and walked along the sea-front. In the following passage, Emin takes care to name her attacker, a boy named “Steve Worrell:”

He pulled my skirt up. I began to worry. Everyone knew he had broken into girls before and I didn’t want it to happen to me. I said, “No, get off, please.”
He pulled me down the alley and pushed me to the ground. As I lay on my back worrying about my new blue coat, he pushed his fingers up between my legs – and rammed himself into me.
I was crying. His lips were pressed against mine but I was motionless, like a small corpse. He grunted and I knew it was over. He got up, I just lay there on the ground, my tights round my ankles. The clock was striking twelve.
As he walked away, he turned and said, “I’ve always wanted to do it to you. I like your mouth.”

Afterward, Emin found her way home, and told her mother what happened. Cashin did nothing: “She didn’t call the police of make any fuss. She just washed my coat and everything carried on as normal, as though nothing had happened. But for me, my childhood was over. I had become conscious of my physicality, aware of my presence and open to the ugly truths of the world.”

Emin’s response to the rape was to become promiscuous. She says that from the ages of thirteen to fifteen, she engaged in her “shagging years.” She worked in restaurants during this period, and frequented nightclubs, including Top Spot. She developed a reputation, and in 1978, when she was fifteen, she participated in a dance competition at a club in Margate, but was harassed off the floor by a host of men at the club, many of whom had been her lovers. They

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140 Id.
141 Id. at 24.
142 Id.
143 Tracey Emin 20 years at 19.
144 Id. (“She describes the years between the ages of thirteen and fifteen as ‘my shagging years.’ . . . In Margate, she danced regularly at a disco called ‘Top Spot.’”)
repeatedly shouted “slag” at her until she left in tears, an experienced that she later used as the basis for her video Why I never became a dancer.\textsuperscript{145}

Through this period, Emin’s school attendance record had been scattershot at best, but at fifteen social services employees had identified her as a truant and required that she re-commence her education. This is when she began to take classes in art,\textsuperscript{146} and in 1982 entered the Maidstone College of Art, graduating in 1986.\textsuperscript{147} In 1987, she entered the Royal College of Art in London; during this period of her education, she destroyed all the art she had made at Maidstone, “smashing it up with a sledge hammer in the courtyard of the college.”\textsuperscript{148}

Emin’s experience at the R.C.A. was profoundly bad; her worst experience occurred when she was first chosen, and then excluded for participation in a group show. When she came to the college to collect her now-rejected work, she began vomiting blood in the gallery, possibly because of an unplanned pregnancy that was later to result in one of her two abortions, which she has documented extensively in her art.\textsuperscript{149} In February of 1992, she had her second abortion.\textsuperscript{150}

Emin’s art career began to flourish when the artist Sarah Lucas befriended her. At this point, Emin developed a reputation for swearing, alcoholism, and general ungenial behavior.\textsuperscript{151} She opened up a shop with Lucas, where they sold their handicrafts and art,\textsuperscript{152} and Emin began selling “subscriptions” wherein people might invest in her “creative talent.”\textsuperscript{153} Subscribers would get letters written by Emin.

\begin{itemize}
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id. at 21.
\item \textsuperscript{148} Id. at 22.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id. at 23.
\item \textsuperscript{151} Id. Patrick Elliot describes her as the “underbelly” of the contemporary “Cool Britannia” art scene. See also id. at 25: “She was a constant fixture at private views and parties (often in an inebriated state and often avoided because of her intense, argumentative manner.”
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id. at 25.
\end{itemize}
In 1993, Emin made her first appliqué “blanket,” titled *Hotel International*, where she recounts her experiences there in a fabric collage of words. She also had her first show, titled *My Major Retrospective 1963-1993.* Since then, Emin’s art career has reached stratospheric heights. She is represented by Jay Jopling, who owns the famous art gallery White Cube in central London. In 1998, her installation, *My Bed,* represented her in the Tate Museum’s 1999 Turner Prize exhibition. Emin has made her personal life the central feature of her work, describing her rape and abortions and her reactions to the brutal nature of love in her appliqué blankets, poetry, essays, videos and sculpture. She has become a celebrity in England, widely known for her antics, which often include drunken carousing. The most famous example of her acting out occurred in 1997, when she appeared on a BBC panel called “Is Painting Dead?” in a drunk and belligerent state, stalking off the set in a huff.

a) Tracey Emin’s Art, and what it reveals about post-rape reactions

As stated, since the 1960’s, Emin has worked in fabric, as well as video, photographs, collage and assemblage, monoprints, performance, installation, text, and neon. Her work very often references the sexual attacks that she suffered as a child, and also details disturbing adult sexual contacts.

As is the case with her autobiographical writings, Emin’s visual work together creates a pastiche or series of jagged recollections. An initial review of her *oeuvre* leaves one with the

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154 *Id.*
155 White Cube’s web site has information about Emin’s art that can be accessed at http://www.whitecube.com/search/?q=tracey+emin.
157 [http://www.youtube.com/watch?v=HKNr2LOkXYE](http://www.youtube.com/watch?v=HKNr2LOkXYE) See also Karen Wright, *Maid of Margate: All that Effing and Blinding.* All that dirty washing aired in public, *Independent on Sunday,* May 22, 2005, [http://www.independent.co.uk/news/people/profiles/maid-of-margate-491701.html](http://www.independent.co.uk/news/people/profiles/maid-of-margate-491701.html) [no pin cite; just “first edition”] (“Tracey lifted up her hip flask to take a sip. . . . [she] stood up and began to wrestle with her microphone. I’m leaving!” she announced and did. We were all left in stunned silence.”).
impression that something awful has happened to this woman, and that she very much wants the world to know about it. But at the same time, Emin also exults in her own sexuality, and can narrate her tales of sexual victimhood with a sense of ambiguity. Sometimes, as a storyteller, she takes the point of view of the savaged, tender-years plaintiff, while at others – say in her recital of her encounter with the “hairy” man at the beach -- she tells of a sexual dialogue wherein she appears unharmed, happy, and possibly even autonomously choosing to participate. In studying Emin’s work, in fact, I found her speaking from a multiplicity of perspectives, such as that of a callow onlooker of the crimes that were committed against her, her sexual abuser, the punisher of herself as well as her attackers, and the defender of her own acts, life, and happiness.

Initially, Emin’s work appeared to me to be a discordant cacophony of claims, which were very much in accord with R.T.S. experts’ descriptions of rape victims as being disorganized and hysterical. Yet after several months of pondering her art, I realized that it had a coherent theme: As a whole, Emin’s work constitutes a series of trials. With respect to her sexual victimization, she operates simultaneously as a witness, a prosecutor, a judge, and a punisher of her abusers and her society, as well as a prosecutor and defender of herself.

In the following sections, I will analyze a number of her pieces that illustrate these themes. I will then contemplate what these artifacts may offer feminists who seek to expand their understanding of post-rape reactions.

i) The Trials of her Abusers

a) Emin as the Witness: *Family Suite, Exploration of the Soul, Pure Evil, Love Poem,* and *The Things I Say No To*
Emin bears witness to her own sexual victimization in her art. As art critic Jennifer Doyle notes in *Art and the Dialectics of Desire*, Emin’s work is a “record of sexual damage.” But while Doyle constructs Emin’s reportage as a “spectacle” that reveals the artist’s “lack[ ] of emotional discipline,” I see works such as *Family Suite, Exploration of the Soul, Love Poem,* and *The Things I Say No To* as possessing more of a relationship to the half-raw, half-scripted performance that is witness testimony during a sexual abuse trial: In these texts, quilts, and neons, Emin relays her early experiences with sexual molestation, and her later rape at thirteen.

*Family Suite* is a series of twenty monoprints Emin made in 1994. Monoprints are made by applying ink on a glass surface, over which is then laid a piece of paper. The artist forms a line drawing on the top of the paper; the pressure of the drawing implement picks up ink, creating a reversed image on the page. Mistakes cannot be erased, lending a roughness and immediacy to this work, which creates a nice matching between the style and substance of Emin’s art.

*Family Suite* details scenes from Emin’s family life, which appear to date from around the years when she lived in Hotel International and suffered some of the childhood sexual abuse described above. In these drawings, she reports on exploitation that was woven into ordinary

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159 *Id.* at 111: “Emin . . . offers herself to us as a spectacle of feminine abjection. The unavoidably personal character of responses to Mein is already a problem in criticism: She draws us too close, her work lacks emotional discipline.”
160 See Neal Brown, *supra* note 156 at 16, detailing the process.
161 *See id.*: “Exclusion and not fitting in, difficulty, emotional pain and suffering, rank highly among the many themes of Emin’s work, their most spontaneous expression being seen in her monoprints, a large and important body of her work . . . . these works [are] analogous to the unrehearsed, firsthand accounts of someone reporting a catastrophic or shocking event --- the denial, anger, fear, relief and confusion of a survivor.”
162 *See text accompanying notes* 143-145 *supra. See also Tracey Emin 20 years* at 18 (drawing a connection between *Family Suite* and her early experiences of child sexual abuse).
domestic scenes. The first two images in the Suit, for example, are of Mum Smoking, and a tie-wearing, briefcase-toting Dad. However, the third image, that titled No Sleep, is unquestionably disturbing: It shows a female figure in a bed, her head slopping to the side as a scratched-out figure grabs at her with claw-like hands. The sixth and seventh drawings are titled Sex Man and Sex Man II. Both of them show a naked man, the first with his head cropped off so that all emphasis is on his erect penis. Sex Man II reveals a man laid out on a bedlike surface, resting on his elbow, and staring out at the viewer. The image directly after Sex Man II is titled Mother, and shows a scratchy Madonna figure bent over and playing with what appears to be a girl child. In context, Sex Man I and II leave the impression that someone close to Emin subjected her to unreported, unprosecuted molestation within the home (as she describes the childhood-destroying abuse of “Chris,” in Strangeland). The realization that Family Suite is Emin’s own testimony of her childhood abuse is only verified by the later drawings Big Dick, Small Girl, which shows a long-haired child hanging off a huge phallus, as if off a ledge, and Night Death, which depicts a person in a coffin/bed, with her eyes blacked out, while a figure stands above her, brandishing another huge phallus.

163 See text accompanying notes 143-145, supra. For another accusation, see Weird Sex (2002) in Tracey Emin Works 1963-2006 at 153 (“I’m going to get you, you Cunt/ You Bastard/ And when I do, the Whole World Will/ Know. That you destroyed my childhood.”) [Hereinafter Tracey Emin Works].
164 Family Suite can be seen in Tracey Emin 20 Years at Section 7 (no page numbers). Big Dick, Small girl and Night Death are included in the suite.
Sex Man II, http://www.terminartors.com/artworkprofile/Emin_Tracey-Sex_Man_II_from_Family_Suite
See also Family Suite, in Tracey Emin 20 Years at [7] (no p numbers).
Emin’s “witnessing” of her sexual victimization continues with *Exploration of the Soul*, which is both a text-based art work as well as a limited-edition book, made in 1994. The text-art consists of a series of handwritten pages and two photographs; each of the handwritten pages is framed separately and details the events of her rape at the age of thirteen. As noted, she also tells this story in *Strangeland*. *Exploration of the Soul* repeats all the details that are recounted in *Strangeland*’s essay, *Motherland*. In *Exploration*, as in *Motherland*, she testifies that

*I just lay there - on the/ground - my tights around my ankles/ I went home and told Mum

I'M NOT A VIRGIN/But it seemed like she already knew/ she didn't call the police or make a fuss/She just gently washed the stains and dirt/out of my coat - and every thing/carried on as ever - as though nothing/had happened at all.*

Why did Emin’s mother react as if “nothing had happened?” It may be that Emin’s experiences with Chris/Sex Man, the “hairy” man, and possibly even Paul had disqualified her from “real rape victim” status, a theory I will address later, along with the issue of Emin’s mother’s racial exclusion in Margate. But whatever the reasons, Emin never forgot this event, obsessively returning to it in her art: An equally disturbing testament about this crime can be found in 2002’s embroidered blanket, titled *Pure Evil*, where two indistinct figures – but for one’s penis – grapple; the figures are rendered in black embroidery against a beige and taupe

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166 Neal Brown, *Tracey Emin* supra note 156 at 61.
167 *Supra* note 141-42.
169 *Tracey Emin Works*. Yxta, get pin
cloth background. Beneath the image Emin embroidered in red thread: “You fucked my mouth – smashed/ my head against the wall/ I was 13 – And you were Nothing/ BUT PURE EVIL.”  

Emin gives a more matter-of-fact witnessing of her rape in *Tracey Emin CV: Cunt Vernacular*, a video work based on the idea of a curriculum vitae; Emin replaced the C with Cunt and the V with Vernacular. It consists of her taped recitation of the high and lowlights of her life, which include her conception, falling in love for the first time, and how she was “raped down an alley” in “January 1977;” “Spent six months avoiding men at all costs. Breasts grew, pubic hair became thicker, period started, hair underneath my arms sprouted.” The images shown during this recital are of her apartment. As curator Elizabeth Manchester observes:

In contrast to Emin's emotionally-charged words, the view of her living quarters offered in the video is surprisingly ordinary. Piles of post, papers and other detritus such as clothes have an anonymous feel. Bills in foreign currency and half-unpacked suitcases indicate travel. Pots of undeveloped films could be snapshots or professional material. The mess covering this apartment suggests an inhabitant who has recently been too busy (or lazy) to pick up her compact discs and put them back in their cases, hang up her clothes or do her paperwork. Looking around Emin's flat is redeemed from feeling voyeuristic by the rawness of the text she narrates, which creates some strange juxtapositions.

In *CV*, as in *Family Suite*, Emin seems to be vouching for the truth of her accusation in her choice of mediums; in *Family Suite*, as noted, she uses monoprinting, which lends the impression of an immediate, “unrehearsed, firsthand account[].” *CV* – again, curriculum vitae being traditionally a listing of verifiable life events – is accompanied by the footage of Emin’s everyday life, and so also indicates that she wants the viewer to know that these things really occurred.

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170 *Id.*
171 *Id.* at 146. (”*Tracey Emin Works*”)  

b) The Defendant’s perspective, his confessions: *Beautiful Child; Fuck Off and Die You Slag.*

Emin’s art, while obsessed with her sexual victimization, does not just complain about her suffering from her own, witnessing perspective. She also takes the point of view of the offender, whom we can imagine either confessing on the stand about his views of women, or engaging in casual talk with her or one of his friends. The most blatant of these disclosures may be found in the monoprint *Beautiful Child* and the neon *Fuck off and Die You Slag.* In the former, we can hear the title’s words being uttered by Emin’s abuser (Sex Man, or Chris, we imagine) as he molested her. The image, which contains no text, is of a girl child, without breasts, with a line or blindfold over her eyes. She stands on a square; at her feet is a huge penis, erect and pointing up toward her. Emin, when interviewed in 1998, described her feelings about having such work displayed before a public that very often misunderstood her meaning:

> I had a lot of trouble with my drawings in America, because people thought they were paedophile drawings, or that I’d made them for a paedophile audience. . . . The drawings are of *me*, and it’s me coming to terms with those things in my life, not me trying to turn on some pervert to wank off over. The fact that I want people to look at the drawings is that I want people to confront what I’ve had to confront – what other people have.

The second work that speaks from an offender’s point of view is the neon piece *Fuck off and Die you Slag,* crafted in bright orange, pink, and blue. The tone of this statement seems to be directed against Emin, as “slag” is a misogynist slur in Britain. Moreover, Emin, as receiver of this abuse, appears to have grown older than the ten-year-old that is the subject of molestation
in *Beautiful Child*, as “slag” connotes an adult, sexually promiscuous woman. Emin herself notes that in the years following her rape at thirteen, she entered the aforementioned “shagging years,” wherein she had sex with many men in Margate.\(^{178}\) That she developed a reputation for promiscuity in her small town, and suffered as a result of it, is the subject of her video work *Why I never became a dancer*, wherein she explains that “by the time I was fifteen, I’d had them all . . . the reasons why these men wanted to fuck me – a girl of fourteen/ Was because they weren’t men/ They were less/ Less than human.”\(^\text{179}\) Within this background in mind, “*fuck off and die you slag*” strikes the reader as a quotation from either her rapist, a townsperson, or a former lover, who are reacting either to Emin’s existence or sexual behavior – the latter which was itself catalyzed by her sexual violation at ten and thirteen. If it is true, as Sharon Wasco says, that rape is a “process,”\(^\text{180}\) we may see Emin’s rape stayed with her, formed her reputation, and was a “process” that continued to hurt her; here, the evidence is given in the “defendant’s” own voice – but the defendant is arguably enlarged beyond her molester and rapist, to encompass the lovers that she took to cope with her assaults, or possibly her neighbors who disdained her.

Emin’s art, then, delivers confessions from her abusers, scornful lovers, and (potentially) neighbors. Her attackers, her family (in the entire context of *Family Suite*) and her community become the accused to whom she reacts. As such, *Beautiful Child* and, most particularly, *Fuck Off and Die You Slag* insinuate that there were more offenders against her than Stephen Worrell and Chris, an impression that will only deepen upon further study of Emin’s art, which I will attend to in the following sections.

\(^{178}\) See text accompanying note 143, *supra*.  

\(^{179}\) Transcript in Neal Brown, *supra* note 156 at 78. Note, however, that in *Strangeland*, Emin also tells this story, but here she only describes them as “pathetic,” not as sub-human. See *Motherland* in *Strangeland* at 44.  

\(^{180}\) Wasco, *supra* note 13 at 312.
c) The prosecutor: *Strangeland, Why I never became a dancer*, and *The last thing I said to you was don’t leave me here*

Emin does not just give evidence of her abuses, but also makes prosecutorial accusations against those who victimized her. One of her most powerful acts in her art is to name these men specifically, which she does in *Strangeland*, and her video, *Why I never became a dancer*. In *Strangeland*, as noted above, Emin names her mother’s lover, Chris, who abused her by “press[ing]” “his hard, erect penis” against the “small of [her] back” and “rubbing his hands across [her] chest” when she “was only ten.”181 In *Strangeland*, too, she indicts the man who raped her at the age of thirteen, “Steve Worrell.”182 And in aforementioned *Why I never became a dancer*, a video made in 1995, Emin describes her reaction to her rape – entering her “shagging years” -- when she developed a reputation for promiscuity. This reputation turned out to encourage men, often her one-time lovers, to heap yet more abuse on her.

In *Dancer*, Emin intersperses footage of Margate with herself dancing in a studio.183 In a voiceover, she describes leaving school at thirteen, and hanging out at the beach. Sex became a vocation for her: “It was something you could just do, and it was for free. Sex was something simple. You’d go to a pub, you’d walk home, have fish’n’chips, then sex; on a beach, down an alley, a green, a park, even a hotel.”184 At first, she felt this gave her “power,”185 allowed her to “defy gravity” and be “free.”186 At fifteen, she says, she’d “had them all,”187 the men she learned were “less than human;”188 she “stopped shagging.”189 She turned to dancing instead. This also

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181 *Strangeland* at 14.
182 *Id.* at 23-24.
183 *See Tracey Emin Works* at 197, 199.
184 Transcript at *Tracey Emin Works* at 194.
185 *Id.*
186 *Id.*
187 *Id.* at 196.
188 *Id.*
189 *Id.*
gave her the ability to defy gravity and be free. She began taking dance seriously, and entered contests. The story that serves as the heart of Dancer concerns her participation in “the local finals,” which she hoped would lead to “The British Disco Dance Championship, 1978.” But during her performance, a “gang of blokes, most of whom I’d sex with at some time or other” began “chanting ‘Slag!’” She ran off the dance floor, “crying; [she’d] lost it.” Later, she says, she felt herself free of them, and left Margate. She ends the video by naming the men who did this to her: “Shane, Eddy, Tony, Doug, Richard – this one’s for you.” Though she does not give their last names, it is quite possible that this naming would have some local impact in Margate. Her role as a prosecutor giving evidence, making charges, and asking the audience to judge them, is made plain.

Though it is less clear whom she is accusing and judging in The Last Thing I said to you was don’t leave me here, the viewer of this work also hears Emin making a charge. The work is an Epson print photograph, 134 x 107. In it, Emin is nude, with her back to a corner; the walls she faces are made of scabby, whitewashed wood boards; she squats on an unclean wood floor. Her prosecutorial accusation is – you left me here like this, corralled and stripped bare. She is abject, lonely, empty, desolate, and defenseless, and may be reacting not only to her abusers but also to her family and those in her community and government who would not help her when she was being hurt.

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\(^{190}\) Id.
\(^{191}\) Id. at 198.
\(^{192}\) Id.
\(^{193}\) Id.
\(^{194}\) Id.
\(^{195}\) Id.
\(^{196}\) Id.
\(^{197}\) Id. at 413.
\(^{198}\) Id. at 381.
d) The Jury: MAD Tracey from Margate, Remembering 1963 (the new black)

In the monoprint MAD Tracey from MARGATE (1997), Emin may speak in the voice not only of her sexual predators, but also of the uncaring Margate commonwealth: This is the “jury” who, indeed, may prevent her from being able to win the trial whose outcome seemed so sure in Why I never became a dancer. In MAD Tracey, she depicts a clock tower, a road, and what may be a seaside carnival; the central feature of the fair is a Ferris wheel, and at the bottom of the image is scrawled MAD TRACEY/ FROM MARGATE [SIC]/EVERY BODIEZ BEEN THERE. As Neal Brown writes, this drawing “draws attention to Emin’s having had a precocious sexuality, and implies an equivalence between her body and the ups and downs of a Margate funfair ride.” Seen alongside Beautiful Child and Fuck Off and Die You Slag, this monoprint may be read as a record of Emin’s identity in Margate – loose, ruined, and common.

200 Tracey Emin Works at 177.
201 Neal Brown, supra note 156 at 20.
Her status as a maligned outsider, moreover, was much enhanced by racism in her community. The appliquéd blanket *Remembering 1963 (The New Black)* details the prejudice that Emin, her brother, and Cashin experienced in Margate as, respectively, mixed-race children and the lover of a Turkish man. There was at least one incident during Emin’s childhood, which she has recounted in interviews,\(^\text{202}\) where Cashin was spat at and called a racial epithet, which is quoted in *Remembering 1963*, along with other quotes that appear to come from other neighbors, such as “Oh what lovely little mulatto babies,” and the children’s questions to their mother: “Mummy we asked what’s a WOG?”\(^\text{203}\)

\(^{202}\) See Something’s Wrong: Melanie McGrath on Tracey Emin, *Tate Magazine* 1 (year?)  
http://www.tate.org.uk/magazine/issue1/something.htm; Stuart Jeffries, You’ve seen the bed, now watch the movie: Tracey Emin is making her first film – and it’s going to be beautiful, *The Guardian* May 27, 2002.  

\(^{203}\) The answer given in *Remembering 1963* is “Western oriental Gentleman.”
Again, these works show us how Emin’s reactions to her sexual abuse scan different perspectives and targets. In addition, *Remembering 1963*, combined with the *Sex Man* series and the testimonies about Chris, may give us insights into the reasons for why Emin’s mother did not report her thirteen year old daughter’s rape: Cashin may have worried that, as a racial outsider, and a girl who had been previously molested before, Emin would not have been valued by either state actors or a jury called into decide whether she had been victimized.
ii) Tracey Emin on trial:

a) The Prosecutor: *Super Drunk Bitch, As Always, Drunk Cow, Sexy Stupid Fuckhead, and Always Glad to See you.*

Emin does not just stop with her trial and conviction of her abusers and community, however. Much of her work can also be read as a self-impeachment. But what is she charging herself with? A review of the quilts and embroideries *Super Drunk Bitch, As Always,* and *Drunk Cow,* as well as the monoprint *Sexy Stupid Fuckhead* and the pamphlet *Always Glad to See You,* she accuses herself of disorderliness, alcoholism, repulsiveness, and stupidity, and possibly also indicts herself for her two abortions. These “offenses” move beyond her reactions around the time and place of her rape, as well as of the abuse she suffered at the hands of “Chris” as a toddler, but they feel of a piece with her feelings of horror and rage that flow from those attacks. As in the case of *Why I never became a dancer* and *Exploration of the Soul,* these emotions may be read as part of the long term “process” of rape and sexual violation, which braids into the events and reactions that the woman will sustain in her future. Obviously, this characterization of rape reaction is far more complicated and long-ranging than the kind admitted by the courts. However, by the same token, if any “self-blame” is to be found in her art, it is in these works.

And yet this “shame” bears much more complexity than that described by cases addressing R.T.S.
Super Drunk Bitch (2005) is a stitched blanket, mostly done in white-on-white appliqué and embroidery.\textsuperscript{204} In words sprawled across the top third of the work, Emin appears to accuse herself of being a “\textit{STUPID SUPER DRUNK BITCH}” who “RUINED EVERYTHING/ AGAIN AND AGAIN.”\textsuperscript{205} Here, she speaks in her own, self-abnegating voice as well as the voices of those who have rejected her. From her own voice, she says: “\textit{MY NAME IS WALKING HELL},” and she also resolves to “\textit{GIVE UP CRYING}” while also ordering someone to “\textit{LEAVE ME ALONE}.” But at the same time that she is trying to get out of the horrible situation – which is never specified, it could be her rapes, her unsuccessful relationships, her abortions – she also quotes the chorus of people who have simultaneously abused her and rejected her: “\textit{SO WHATS YOUR NAME LITTLE GIRL;}” “\textit{IS THAT WHY YOU HAVE NO FRIENDS;}” “\textit{SHE HAS TO GO HOME/GET HER OUT;}” The work flickers between these perspectives, giving both the impression of a maddening stridor of rejection and self-hatred, but also indicates that Emin’s self-abuse is undifferentiated from that of her abusers; it may be that both she and those who hurt her agree that she is a “drunk” and “ruined” “bitch;” from the entire body of her work, it seems evident Emin’s enemies taught her to regard herself in just that light.

\textsuperscript{204} Tracey Emin 20 Years plate 53.
\textsuperscript{205} Id.
From this perspective, Emin’s work *As Always* (2005) and *Drunk Cow* (2005) appears like evidence of the artist’s absorption of these febrile lessons. Both also white-on-white embroideries on cloth, *As Always* contains only text, which repeats the word “Sorry,” six times, once scratched out, and possesses also, as a coda, BELIEVE ME I AM AS ALWAYS. While *As Always* seems to clearly convey the voice of the artist, *Drunk Cow* may be another incidence of the artist traveling between the perspective of her abuser and herself. It shows a scrawled image of a figure in a fetal position, over which float the words *Stupid Drunk Cow/ Drunk Stupid Bitch*. Another work, the monoprint *Sexy Stupid Fuckhead* (2005), adds to the weight of this

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206 Retrieved from http://www.bbc.co.uk/london/content/image_galleries/traceyemin_when_whitecube_gallery.shtml?8
207 *Tracey Emin Works* at 263.
208 *Id.* at 267.
ambiguous, perspective-shifting self-hatred; it contains no text but does show the figure of a female nude with her head scratched out in violent, cross-hatched strokes.

In these pieces, Emin is accusing herself of being unloveable, reckless, and worthless, and in so accusing, she also seems to be engaging in an act of self-flagellation. The voices of her abusers have invaded her and at some points fuse with her own, speaking of her crimes at the same time that she appears to be punishing herself for them.

b) Self Defense: *Fantastic to Feel Beautiful Again; My cunt is wet with fear*

Emin, however, also takes care to defend herself against these charges that she is from “hell,” sexually abject, predated upon, and helpless. She does so by declaring her own sexual pleasures and her artistic supremacy. In *Fantastic to Feel Beautiful Again* (1997),\(^{209}\) in which she forms the title’s statement out of pale blue neon, she affirms her ability to come out of her mire of self-doubt and pain. A year after making *Fantastic*, she moved from describing her ascendance from despair to naming her ability to flourish in ambivalence, which may be seen as an embrace of the world in which she lives. This is the message of 1998’s similarly eponymous, glowing white neon *My cunt is wet with fear*,\(^{210}\) a startling, vulgar, and exciting work depicting her rebellious sexuality that may still thrive in the face of difficult and even terrifying emotions.

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\(^{209}\) Id. at 342.
\(^{210}\) Id. at 205.
Emin devotes a good portion of her artistic expression to claiming her ability to survive her many traumas, in a kind of rejoinder to the depictions of degradation that we find in other parts of her œuvre. But just as Emin’s self-abuse is ambiguous, wavering between her own perspectives and the perspective of her abusers, Emin’s self-defense can also be interwoven with contradictory elements. This effect may be observed in the now-famous photograph, *I’ve Got It All*,\(^\text{212}\) which depicts Emin sitting on the floor, wearing a patterned dress, with her legs spread wide. She is busy at work either scooping up a mound of pound coins and bills into her vagina or catching them as they spill out, jackpot style: The effect is to communicate either (or both) the idea that her sex has become commodified, or that she has goods and values flowing freely

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\(^{211}\) Retrieved from http://www.flickr.com/photos/39026145@N00/3506390514

\(^{212}\) *Tracey Emin Works* at 235.
from her body. Similarly, *Tracey Fucking Emin,*\(^{213}\) a Cibrachrome photography print of Emin’s self-portrait, with the title scrawled at the bottom, we see Emin open-mouthed, her eyes obscured by her flashing hair, as she dances either in a drunken, disorganized daze that signals her own danger or in an orgy of furious, powerful self-congratulation – the work exists both as a complaint about Emin’s antics, and as a strong affirmation of her existence.

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To the extent that all of these readings together – the self-condemnation and affirmation, the self-abuse and self-protection, the contradictory ventriloquisms – seem jumbled and incoherent, that is only because Emin’s work is misunderstood. As I note above, Emin speaks in multiple voices because she responds to many people, not only her accusers. To repeat, this manifold reaction may be read as her conduction of a series of trials: She prosecutes, defends, convicts, sentences, andpunishes her abusers, her hapless mother, the society that stood by and let it happen, and she also prosecutes, punishes, and defends herself.

As to the latter trial of herself, it appears that Emin engaged in a complex, perspective-shifting “self-abuse” in her work possibly out of “shame” that she genuinely feels – or it may be that she is reflecting and critiquing the loathing that she reads from the silence, inaction, and unfeeling that were the social reactions to her rape. The fact that her “self-indictments” are in white-on-white while her self-celebrations are in vivid color may offer a clue that her retreats into self condemnation are lackluster, anemic episodes that do not hold up to the vibrancy of her self defense. As to the former prosecution, Emin is conducting these trials of her abusers – complete with prosecutorial and defense counsel and defendant voices – for the same reasons.

that this layered self-criticism blossomed in the first place. She administers these trials because her mother did not report her attack, perhaps because Cashin believed that due to their class, her daughter’s race, and Emin’s previous experiences with sex abuse, little would be done about that crime.

Moreover, there are ample grounds for believing that Cashin committed this omission because she did not believe that the state would do anything about her daughter’s rape. As I will show, a review of the law in Britain demonstrates that if Cashin was a minimally savvy reader of the legal landscape, she would have harbored such skepticism. In other words, Emin prosecutes and defends because the state did not, and would not, and someone had to.

Furthermore, a review of the administration of rape cases in the United States indicates that American women may whose “counterintuitive” behaviors are now coded as “shame” or “terror” reactions in the R.T.S. cases may also be read as reactions to, and critiques of, a negligent and uncaring State.

IV) The reality of the administration of rape cases in the U.S. and Britain, and victims’ responses

As discussed, Rape Trauma Syndrome is often used in the United States to explain counterintuitive behaviors. In Britain, it is used to explain demeanor and late reporting. While courts and experts often explain these behaviors in terms of “shame,” “terror” of one’s rapist, and victim pathology, statistics demonstrate that U.S. and British women who are conscious of their government’s address of rape will have considerable disincentives to report, reveal their emotions to state actors, and even possess the kind of “vigilance” that will keep them from revisiting the scenes of their rapes. These reasons are real and perceived low rates of arrest and
conviction, police insensitivity, and the insensitivity of medical responders, problems that
become particularly acute where the woman does not fit the profile of a “real” rape victim.

a) Reporting and conviction rates for rape in the United States and victim responses to
the justice system and medical responders.

Rape victims in the U.S. may not report or delay reporting because they have a realistic
understanding of the likelihood of seeing justice. Professors Kathleen Daly and Brigitte
Bouhours provide remarkable support for this concern: They studied seventy five unique data
sets of attrition studies, including “victimization surveys, police statistics, and court data
from” Australia, Canada, England and Wales, Scotland, and the United States from 1970 to
2005,” which would identify rape “attrition” – that is, how rape cases were either not
reported, dropped by police, not taken up by prosecutors, or lost at trial. Specifically, the authors
used these records to study “police, prosecutor, and court handling of rape and sexual assault
cases.” This research resulted in their 2010 article, Rape and Attrition in the Legal Process: A
Comparative Analysis of Five Countries, where they determined that only fifteen to nineteen
percent of rapes in the United States are reported. Of these cases, the authors note, “studies
from the United States . . . show a stable pattern of high rates of attrition at the police and
prosecution stages . . . (80 percent of cases dropped).”

Not specific to the United States, the authors also note that “[a]cross all time periods and
five countries, 60 percent are sentenced to incarceration, but we do not know what percentage
actually served time because studies do not report suspended or partially suspended

\[214\] Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries, 39 Crime & Just. 565
(2010). (Hereinafter Rape and Attrition).
\[215\] Id.
\[216\] Id.
\[217\] Id. at 565.
\[218\] Id. at 572.
\[219\] Id. at 607.
sentences.” In my own correspondence with Professor Daly, she took care to emphasize that this figure meant 60 percent of cases where there was a conviction, not just a report.

A review of additional sources shows that other scholars, reporters, and advocates have found low U.S. rates of reports by victims alongside low rates of rape defendant arrest, conviction, and jail time. Daniel M. Murdock notes Department of Justice statistics providing that “131,950 rapes occurred annually between the years of 1992 and 2000 in the United States . . . [with] only 36% actually reported the crime to police.” In 2005, Ian Ayres and Katharine K. Baker noted that “[a]n arrest does not assure conviction,” and cite Joan McGregor for the estimate "the likelihood of a rape complaint actually ending in conviction is generally estimated at 2 to 5 percent.”

The most astonishing cite for low conviction rates is found on the web site for the Rape, Abuse, and Incest National Network (RAINN). Citing the National Center for Policy Analysis’s Crime and Punishment in America, a 1999 study, RAINN asserts:

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

Scholarship delving into rape victims’ perception of the justice system reveal that women have absorbed these low rates: At least one study reports that “52% [of studied survivors] made

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220 Id. at 602-603.
221 Email from Kathleen Daly, April 18, 2011, on file with author.
224 Id.
225 Id.
226 Id.
comments that expressed concern with achieving substantive justice through the criminal justice process.”

Furthermore, even if their cases to are taken up by prosecutors and go to court, U.S. rape victims complain that the investigation and prosecution themselves cause inordinate suffering; this experience, which was highlighted in recent news in the case against International Monetary Fund head Dominique Strauss-Kahn for the alleged assault of hotel worker Nafissatous Diallo, has been termed the “second assault:” “[W]omen whose cases were prosecuted were less well off psychologically six months after the rape than were those whose cases were not prosecuted, attributing this result to the effects of an adversarial legal system that subjects rape victims to challenge and duress.”

However, these are not the only problems that may concern U.S. rape victims when considering how to deal with their attack. Rape crisis counselors also report police officers deflecting rape victims who complain. As Shauna L. Meier writes, “[r]ape victims who do not seem to be ‘real’ victims to police, doctors, and nurses often face blame and stigmatizing responses. . . . [I]t should be recognized that rape victims often have negative and traumatizing experiences with the legal system.” Or, they may simply be ignored: Women can be


229 Shana L. Meier, *I have heard terrible stories rape victim advocates’ perceptions of the re-victimization of rape victims by the police and medical systems*, 14 *Violence Against Women* 786, 787 (2008). See also id. at 787-88: “However, although rape victims who had a rape victim advocate present were less likely to be treated negatively by the police, most victims reported they experienced distress after interaction with police (Campbell, 2006). One study
additionally deterred from reporting because of spectacular cases of police misconduct involving untested rape kits, a catastrophe that has been recently publicized in widespread news reports.\textsuperscript{230} Human Rights Watch estimates that there are between four to five hundred thousand untested rape kits sitting in evidence storage facilities and crime labs across the country.\textsuperscript{231}

Finally, reporting victims may also suffer not only from police skepticism and inaction, but also at the hands of medical personnel: “Similar to members of the law enforcement community, some members of the medical system also pass judgment on rape victims and engage in victim blaming questioning.”\textsuperscript{232} In response to these problems, projects such as the Sexual Assault Nurse Examiner training program have been established; S.A.N.E. provides rape victims with medical responders who have been schooled in properly diagnosing and handling rape trauma.\textsuperscript{233} While this measure has been revolutionary and oftentimes healing\textsuperscript{234} for victims, the studies demonstrate that this has not been enough to boost victim confidence in the system.


\textsuperscript{232} Maier, \textit{supra} note 229 at 795-6. See also Rebecca Campbell, Sharon M. Wasco, Courtney E. Ahrens, Tracy Seif & Holly E. Barnes, Preventing the “Second Rape”: Rape Survivors’ Experiences With Community Service Providers, \textit{16 J. Interpers Violence} 1239, 1250 (2001) (conducting a study of sexual assault victims and finding that “Although half of the victims who sought medical attention post assault found this contact to be healing (47%), but nearly one third experienced it as hurtful.”).

\textsuperscript{233} Shauna L. Meier, \textit{supra} note 229, at 787 (“The first Sexual Assault Nurse Examiner (SANE) program began in 1976 in Tennessee (Ledray, 1998), and as of January 2005, there were more than 400 SANE programs throughout
b) British rape attrition and victim responses

Victim silence may be expected in Britain for the same reasons as the U.S.: The state of rape attrition appears to be quite dire in the U.K. Daly and Bouhours noted differences in statistics between an “early” period – 1978-1989 – and a later period – 1990-2005.\textsuperscript{235} They posited that although more women began to report acquaintance rape in the 1990’s,\textsuperscript{236} there remains a low rate of reporting, between 14-18 percent of all rapes.\textsuperscript{237} As discussed above, British conviction rates are quite low. Daly and Bonhours report that “England and Wales has a most unusual pattern of a high trial rate (69 percent) and a very low conviction rate at trial (29 percent).”\textsuperscript{238} Section I(c) of this article details the highly publicized conviction rate, which British newspapers reported at 5.4 percent in 2006 and 5.7 in 2007, a figure that includes all complaints made to the police.\textsuperscript{239} As noted, the resulting outcry was partially responsible for

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\textsuperscript{234} See Campbell, Wasco, Ahrens, Sefl and Barnes, \textit{supra} note 232, at 1250.

\textsuperscript{235} \textit{Rape and Attrition}, at 568.

\textsuperscript{236} \textit{Id.} at 573: “[A]n increasing share of nontraditional rapes, which are more difficult to prove in court, are being reported to the police.”

\textsuperscript{237} \textit{Id.} at 572.

\textsuperscript{238} \textit{Id.} at 585.

\textsuperscript{239} \textit{Supra} note 73. \textit{See also c.f.,} Richard Ford, \textit{All Victims Should have Specialist Advice, Says Stern Review}, \textit{The Times}, Mar. 15, 2010 [eds, yxta, please find pin cite]: “A review into the handling of rape complaints also says some victims may be being put off reporting attacks because of the often-quoted claim that only six per cent of rapes lead to a conviction. The review, conducted by Baroness Stern, said the figure is misleading because the 6 per cent figure is based on all complaints made to police, not all complaints brought to court, where almost 60 per cent of people charged with rape are subsequently convicted.”; Jennifer Temkin, \textit{And Always Keep A-Hold of Nurse}, \textit{supra} note 109 at 713 (“In 2007--2008, 11,648 offenses of rape of a female were recorded by the police. In 2007, 1,725 cases of rape of a female went for trial, of which thirty were not tried and 783 resulted in conviction. Hence, the vast majority of recorded offenses never reached the trial stage, and of those that did, under half resulted in conviction. In 2007, for every other violent or sexual offense, convictions exceeded acquittals at trial. Only in the case of rape of a female did acquittals exceed convictions: 54 percent of cases of rape of a female resulted in an acquittal. The number of convictions for rape of a female in 2007 was 6.7 percent of the offenses recorded by the police in 2007--2008. The figures for 2008 show a slight improvement: 12,165 rapes of a female were recorded by
government action, resulting in the experiment with rape busting packets and, ultimately, Doody’s allowance of rape trauma syndrome evidence at rape trials.\(^{240}\)

In addition, studies of British victims’ experiences with police reveal that they endure the same insensitivity that Americans report. Scholar Carol Withey notes “[w]omen often withdraw their allegations because of the investigative process,”\(^{241}\) and cites a Scottish study detailing police officers interviewing victims in an “unsympathetic” and “tactless manner.”\(^{242}\) The same study also noted that nineteen percent of victims reported being met with disbelief by the police, and others had to repeat their stories.\(^{243}\) Withey additionally cites investigative journalism undertaken by Britain’s Channel 4, wherein a former police officer, Nina Hobson, posed as a rape victim to test police responses to her complaints, finding “a reluctance to believe complainants. Attitudes such as ’she asked for it’ were prevalent amongst certain officers.”\(^{244}\)

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the police in England and Wales in 2008-2009. The total number of defendants sent for trial in 2008 was 1,714, of whom 1691 were actually tried. Of these, 848 were convicted. Thus just over 50 percent of those tried were convicted. This figure is 6.9 percent of the number of recorded offenses in 2008--2009. Low conviction rates tend to discourage prosecutions, thus creating a vicious circle. More disappointing still is that negative accounts of the experience of rape complainants within the criminal justice system persist.”).

\(^{240}\) Supra note 79-98.

\(^{241}\) Female Rape-an Ongoing Concern: Strategies for Improving Reporting and Conviction Levels, 1 February 2007, JCL 71 (54). Editors, need pin cite, which is not provided in Lexis.

\(^{242}\) Id. at fn 20: “Women often withdraw their allegations because of the investigative process. The Scottish Office Central Research Unit found that out of 40 victims of rape many were critical of their interaction with CID and female police officers. Interviews were conducted in an unsympathetic and tactless manner, and it was felt that officers were only interested in getting a conviction.”

\(^{243}\) Id.

\(^{244}\) Id. at fn 109. See also Tara Conlan, Channel 4 backs Dispatches in Police Row, Media Guardian, Thursday, May 10 (2006) http://www.guardian.co.uk/media/2007/may/10/channel4.broadcasting (“The undercover film ... revealed that reports of sexual assault and rape are not being taken seriously, to the extent that one of [Hobson’s] colleagues said that if she was ever raped, she would not report it to the police.”). See also Rachel Williams, Conviction rates for rape remains appallingly low, The Guardian, Friday 27, (March 2009), http://www.guardian.co.uk/uk/2009/mar/27/rape-conviction-rates (“[T]he worst area for the attrition rate is during the police investigation, after the report of the crime but before any charge. Only a quarter of allegations end up in court. Home Office research found that the most common reasons charges were not brought were insufficient evidence - in 40% of cases - and the victim withdrawing her complaint, in 35% of cases.”)
The British press has also highlighted the problem of women suffering during the rape trial itself.\textsuperscript{245}

I have not found extensive critiques of British medical responses, however. Liz Kelly and Linda Regan, members of the Child and Woman Abuse Studies Unit of London Metropolitan University, note that the U.K., like the United States, has trained certain medical workers in how to deal with rape victims. Their program is housed in the Sexual Assault Centres (SAC), which “aim to provide a high standard of comprehensive care to anyone who has experienced recent sexual assault.”\textsuperscript{246} The SAC’s conduct forensic examinations, and “place emphasis on choice and options.”\textsuperscript{247} I have not found commentary critical of medical responses to British rape victims; feminists such as Withey cite the SAC’s with approval.\textsuperscript{248} However, she is concerned that not enough British women know that SAC’s “exist.”\textsuperscript{249}

V) Bringing it all together: Rape victim reaction as a critique of the state

\textsuperscript{245} See Adam Fresco, Court ordeal deters rape complaints, says victim Melissa Harrison, The Times, Jun. 14, 2009, http://www.timesonline.co.uk/tol/news/uk/crime/article6499301.ece (“Describing her experience in court, [a rape victim] said: “Even though I gave evidence from behind a screen, the cross-examination knocked me for six. The defence made me out to be an alcoholic and a liar. I’m sure it is this fear of being treated like a criminal in the witness box that prevents more women from reporting rape.””).

\textsuperscript{246} Liz Kelly and Linda Regan, Good Practice in Medical Responses to Recently Reported Rape, Especially Forensic Examinations, Rape Crisis Network Europe 1, 16 (2003). http://www.rcne.com/downloads/RepsPubs/Forensic.pdf

\textsuperscript{247} Id.

\textsuperscript{248} Withey, supra note 70, at [pin cite]: “Sexual assault referral centres (SARCs) have been positively evaluated in a Home Office study.99 The Home Office and Department of Health have also produced National Service Guidelines on Developing Sexual Assault Referral Centres recommending the establishment of SARCs across England and Wales. In 2004-06 the government has dedicated £4m to the further development of SARCs. Seven new SARCs will be opening in 2006. However, more women need to be aware that SARCs exist.”

\textsuperscript{249} Id.
Prosecutors submitting Rape Trauma Syndrome evidence in trials seek to explain counterintuitive conduct, and through this prism, courts translate the motives behind late reporting as “shame” and “fear,” and characterize victim stoicism or lack of vigilance as a side effect of trauma that destroys the victim’s ability to express her feelings in an appropriate way. Victim return, as far as I can see, has not been adequately explained by the courts or experts, except to say that it does happen.

Tracey Emin’s work, together with the legal opinions that I have cited, sheds different light on these features of “rape trauma syndrome.” While sometimes victim silence (that is, lack of reporting and emotional “flatness”) may indeed flow from a victim’s shock, terror, and perhaps the shame detailed by Dr. Mason and the courts, Emin’s artifacts and the R.T.S. cases also encourage a reading of victim behaviors as expressions of distrust of the state. Specifically, R.T.S. is often exhibited by victims who do not conform to the “real rape victim” standard, and it is these victims who have the most cause to regard the state with suspicion, since they know that there is an excellent chance their claims of sexual violation will not be believed.

The “real rape victim” standard borrows from Susan Estrich’s famous delineation of “real rape,” that is, violent and armed stranger rape of an often racially privileged, sexually inexperienced victim, whose attack is the most likely to be taken seriously by authorities. A “real rape victim” is an innocent who is raped in this way, and who also reacts with certain “intuitive” behaviors, such as extreme and candid grief, instant and copious reporting, and emotional vigilance, the last of which is usually expected to take the form of avoiding the site

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250 See Mason, supra note 143.
251 See note 24, supra.
252 Stefan, supra note 10 at 1304 (“The wariness and fear of women who have been raped is described with words like ‘hyper-vigilance’ and ‘exaggerated startle response.’”)
of the rape, among others. Thus, the index of victim reactions that is now constructed as Rape Trauma Syndrome can be understood as being compiled in two time stages, the first being the context of the rape itself, which then influences the second stage, being the victim’s response to that rape.

Both Emin’s art and the cases shed light on how rape victims who do not qualify as “real rape victims” are likely to exhibit behaviors in the second stage that will be deemed “counterintuitive” and “shame”-ful, but may be more appropriately fathomed as the complicated reaction of a woman who suspects that she will not be believed by the state or others when she makes her complaint – particularly when attrition rates are so high to begin with.

It must be said that Emin does conform in some respects to the “perfect” rape victim, in that she was a child and a virgin when she was raped at the age of thirteen. However, we can best understand Emin’s deviance from that standard if we consider the reaction of her mother, who, after all, was the one who really exhibited the “counterintuitive” behavior of not reporting. Cashin was alienated from the Margate community because she had a love affair with a married Turkish man, and had two bi-racial children out of wedlock. We can see this history, again, in Emin’s autobiographical materials, where she recounts her mother being spit on and cursed with

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253 See Henson v. State, 535 N.E.2d 1189, 1193 (1989). This is a case where Rape Trauma syndrome was used to discredit a victim who returned to the scene of her rape on the same evening; her behavior was deemed inconsistent with rape trauma. (“The record shows that Dr. Gover would have testified merely that some of J.O.’s behavior was inconsistent with that of a person who had suffered a traumatic rape.”)

254 See Rape and Attrition at 572: “Why, on average, do 86 percent of victims not report rape and sexual assault to the police? The reasons given by victims, often in combination, are not viewing the assault as rape or not thinking that others will view it as rape; fearing that others will disbelieve or blame her, including family members or friends; fearing or distrusting the police and court processes; fearing threats or further attacks by the offender or his family and friends; and having divided loyalties when reporting a family member or ex-partner (Kelly 2001, pp. 9-10; Lievore 2003). Because many victims are unsure about what to do or may blame themselves, they may delay their report to the police. The police, in turn, may interpret delay as a sign that the assault was not serious or that a victim is not being fully truthful. Young women's potential for victimization is high in social occasions in which alcohol or illegal drugs are used. These contexts heighten a risk of what is termed "acquaintance" rape, although the assaults may be viewed by victims, general members of society, and legal authorities as nontraditional forms, not as real rape.”
racist epithets,\textsuperscript{255} as well as her appliqué blanket \textit{Remembering 1963}, with its damning quotes.\textsuperscript{256} The “real rape victim” construct excludes women of color from credibility, as Estrich herself has noted.\textsuperscript{257} Furthermore, Cashin may have worried that Emin was not a marketable victim to prosecutors and juries, because she had already been molested,\textsuperscript{258} knew how “lovely” it was to “be a girl” with the man she masturbated at the seaside,\textsuperscript{259} and was out at a club after eleven p.m. when she was attacked.\textsuperscript{260} Thus, Cashin may have believed it was better to say nothing than subject her daughter to a disbelieving Margate police force and British prosecutor. Certainly, Margate’s later, hostile reactions to Emin (illustrated in \textit{Slag, MAD Tracey}, and \textit{I told you not to leave me here}) indicate that Cashin was right to worry about how her daughter would be treated.

Most of the women at the heart of the non- or late reporting R.T.S. cases similarly do not conform to “real rape” victimhood. In \textit{State v. Kinney}, the victim took drugs with the defendant, giggled when he dragged her out of the house, and fell asleep in his bed after he raped her.\textsuperscript{261} She delayed in reporting. In \textit{People v. Taylor}, while the victim was raped at gunpoint, the defendant was well known to her, and he had tricked her into meeting him in a remote beachside location.\textsuperscript{262} This also was a delayed reporting case. In \textit{Stephenson v. State}, another late reporting case, the victim had spent the evening consuming drugs and alcohol with her rapist, who was also her co-worker.\textsuperscript{263} And in \textit{Lessard v. State}, the married victim had consumed intoxicants with the defendant, as well as played parlor games with him and loaned him

\textsuperscript{255} \textit{Supra} note 202.
\textsuperscript{256} \textit{Supra} note 203.
\textsuperscript{257} Estrich, \textit{Real Rape}, supra note 24 at 1130. See also Harris, \textit{Race and Essentialism}, \textit{supra} note 22.
\textsuperscript{258} See note 135, \textit{supra}. See also note 136, \textit{supra}, wherein Emin recounts her violent and difficult relationship with her brother, another factor that may have marked Emin as an unmarketable victim to her mother, since Emin had experienced violent relationships from such a young age.
\textsuperscript{259} \textit{Supra} note 137.
\textsuperscript{260} \textit{Supra} note 140-141.
\textsuperscript{261} See text accompanying notes 48-53, \textit{supra}.
\textsuperscript{262} See text accompanying note 57-58, \textit{supra}.
\textsuperscript{263} See text accompanying note 60, \textit{supra}. 
money. She asked the defendant not to say anything. Furthermore, in *Doody*, the landmark British case on late reporting and R.T.S., the victim had known the defendant for about five years, and had lived with him for a “significant proportion of that time.”

If we can read a victim’s “counterintuitive” silence to be a code for a distrust of the state, then we may note that all of these women may have had good reason not to report, report late, lie about who raped them, and ask the defendant not to tell anyone he raped them. In light of the high rates of rape attrition, fear of heartless police interrogations or medical exams, and neglected rape testing kits, women who are not stranger raped or who drink or take drugs with their attackers may feel that it is hopeless to report their rapes to the state. At the very least, they may brood about this decision for some time.

These silent victims – along with women who *do* conform to “real rape” victim status -- may also simultaneously exhibit other post-rape reactions that society does not expect, such as contradictory emotions, not-quite self-loathing, stoicism and lack of vigilance.

Emin’s work gives us insight into this complex process: Through the trials that Emin conducts, and the ventriloquist voices that she assumes of prosecutor, victim, defense counsel, and defendant, we spy many moods of rage, fear, depression, anxiety, disgust, giddiness, bad temper, sexual avarice, freedom-seeking, insanity, alcoholism, disorganization, and even-keeled clarity. She reacts and rages against a number of people and institutions.

Emin also exhibits a mood courts have avidly described as “shame,” though she seems to express this state by speaking in the voices of heartless members of her community. Emin appears less self-ashamed than busy processing people’s perceptions of her, as well as her manifold emotions and injuries and hurts. Emin’s work (particularly in her volcanic and self-

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264 See text accompanying notes 62, *supra*.
265 See text accompanying note 80, *supra*. 
lacerating art that I have categorized as a prosecution of herself) opens our eyes to see the ways in which courts too readily resort to melodramatic and patronizing accounts of shame; the word *shame* itself, with its connotations of irrational self-blame, does not adequately express the ways in which women might be engaging in a highly textured process of hiding from the world under a cover of modesty, as well as dealing with the condemnations of a rape-disbelieving society by first absorbing and reflecting, and then critiquing and expelling those hostile influences in the performance of their own personal trials. Emin’s art as a whole, the intricacy of the emotions involved (but unstudied) in the cases, as well as the above noted erotic history of the shamed rape victim trope,\(^\text{266}\) press in favor of using a different grammar of “fury,” “grief,” and “alienation” to describe the inward-looking reticence exhibited by some rape survivors.

Just as the R.T.S. cases sloppily render victim silence, they also confusingly recite emotional flatness and lack of vigilance as aspects of trauma pathology; Emin gives a fuller account of these states. With respect to stoicism, Emin’s *Strangeland* conveys a kind of mocking “flatness” when she interprets her experience with the “hairy man” at the beach as “lovely;” lack of affect, too, is relayed when she bluntly conveys the details of her rape in *Cunt Vernacular*. In these works stoicism emerges as a coping technique as well as an expression of Emin’s character, which is sometimes bitterly funny. Though she has been sexually victimized, she hasn’t shorn herself of her individual outlook or sense of gallows humor, even though society might prefer her to do just that.

Additionally, *Why I never became a dancer* reveals the lack of vigilance deemed bizarre by courts: After her rape, Emin entered her “shagging years,” and she also returned regularly to Top Spot and other dance clubs similar to the site of her rape. Again, her “shagging years” appear to be a direct response to the rape, in order to rewrite it, as Emin says that they helped her

\(^{266}\) See text accompanying notes 125-128 *supra.*
defy gravity and feel free. Insofar as the “shagging years” may be related to a critique of the state, Emin certainly appears to be giving patriarchy and society the finger by acting in ways deemed unseemly by “sane” Margate.

Further, her return to Top Spot may be explained as the reasonable election made by a person who lives in a small town with limited social options, and who does not want to be exiled from the community after an attack. In other words, she critiques the state by trying to take ownership of public space, despite patriarchy’s robbing her of safety. She also attempted to rewrite, it seems, Top Spot’s meaning by making a Margate dance club the site of her triumph – but we know how that ended. As Susan Stefan notes, “[T]here are a number of anecdotal reports of women returning to the scene of a rape as a gesture of defiance and refusal to surrender to fear.”

Similarly, the women in the R.T.S. cases react with complex stoicism and lack of vigilance that may be interpreted as critiques of the state rather than symptoms of illness. Emotional “flatness,” for example, can be read as victim resistance to the “second assault.” In State v. Robinson, the victim who was raped by a former lover and “uncommunicative” at the hospital may have been so frightened she could not speak – but another reading may be that she distrusted hospital workers to treat her with the tenderness and sensitivity that she needed, particularly in light of the fact that this was not a stranger rape case.

Further, victim return, which is a violation of the “rule” of victim vigilance, may be seen in the civil case Terrio v. McDonough, which has proven influential in criminal cases. There, the victim had previously been involved with the defendant and had purchased him liquor that evening. She drank it with him in his room, and then he raped her. Afterwards, she fled, but

\[267\] Stefan, supra note 10, at fn 308.
\[268\] See note 65, supra.
then returned to retrieve her belongings. The plaintiff’s expert\textsuperscript{269} testified, confusingly, and apparently without further comment, that “it was ‘not necessarily’ [] remarkable for a rape victim to return to the scene with her attacker or to feel safe in his company after the event.”\textsuperscript{270} As we can see from Emin’s work, a more coherent explanations for victim return may be had; in the case of \textit{Terrio}, the victim’s return to the scene of her rape to get her bag was a pragmatic decision not to get raped \textit{and} robbed, too – and if no one is going to believe her story, she’d just better get her things herself.

As such, these readings of Emin’s work and the cases go far to confirm Susan Stefan’s argument that R.T.S. misguidedly pathologizes rational female behavior, and that “[e]xpert testimony may be needed to explain a woman's failure to report rape, not as a symptom, but in terms of the likelihood of disbelief by police, retaliation by the rapist, hostility of family and support network, and the stress caused by the judicial proceedings and stigma of being a public rape ‘victim.’”\textsuperscript{271}

The next question, then, is how the law should reflect these realities, which are obscured by the current use of R.T.S. evidence at rape trials.

VI) Suggested changes in the law

Thus far in this article, I have used Emin’s artifacts, R.T.S. cases, statistics on attrition, and studies on the “second assault” to build on the argument that rape trauma “syndrome” really is a collection of rational behaviors that women (particularly those who do not conform to the “real rape victim” stereotype) exhibit because they know that if they report:

1) they may be disbelieved by investigating police

\textsuperscript{269}See \textit{id.} and accompanying text.
\textsuperscript{270}\textit{Id.}
\textsuperscript{271}Stefan, \textit{supra} note 10 at [please get pin cite].
2) they may be disbelieved by medical personnel

3) their rape kits may be thrown away (in the case of the United States)

4) there is an excellent chance that their rapist may not be convicted and

5) so, if they're going to go on living in their community, they may need to reclaim their space on their own terms.  

My suggestions for where the law should go from here are twofold: First, the state should respond with reforms that address its inspiration of women’s distrust. Second, I will make suggestions that mend the language courts and experts currently use to describe women’s “counterintuitive” responses to rape.

A) Changes that address women’s distrust of the state

Four reforms spring immediately to mind when considering the changes that the state should make in light of women’s anxieties about being believed. First, there must be better police training in the U.S. and the U.K., to eliminate the police culture of rape skepticism. The medical community’s efforts to resolve the problem of responders retraumatizing rape victims has outpaced that of law enforcement. The U.S.’s establishment of S.A.N.E. training programs provide a model that should be adapted for and applied to law enforcement, as S.A.N.E. training requires nurses to engage in ongoing education in the emotional needs of rape victims and how to meet them, crisis intervention, suicide risk evaluation, the role of the local rape crisis center, victims’ fears about reporting and what it means to report in the local community, follow up needs of the rape victim, and diversity and cultural issues. Similarly, 

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272 While the first five factors relate specifically to late reporting, non reporting, lying to police, or asking the attacker not to say anything about the rape, this last factor relates to the phenomenon where victims return to the scenes of their attacks.

273 See text accompanying notes 229-231 and 241-244.

U.K. and international rape response experts emphasize the values of attending to the social and cultural needs of rape reporters with compassion. Police officers who failed to abide by this adapted training—say, by “play[ing] down, misclassif[y]ing or ignor[ing] [rape] complaints”—should obviously be relieved of their duties.

It is difficult to imagine revising the trial system that would address its injurious aspects in ways that would not deteriorate defendants’ rights, as victims experience stress from the adversarial system’s “challenge” and “duress.” Yet prosecutors who treat rape reporters like defendants, and verbally abuse them during interviews, should be censured or fired. Also, prosecutors should understand that it is within their ethical mission to enthusiastically take up rape cases even where victims do not conform to real rape stereotypes.

Third, the state needs to reach out to women to undo the damage wreaked by its role as a deterrent to rape reporting. Television and print public service messaging that communicates to women their right to consent to sex and report their assaults may help do this. The 2010


See text accompanying note 228, supra. (DSK citation).

See Jim Dwyer and Michael Wilson, One Revelation After Another Undercut Accuser’s Credibility, N.Y.T., July 2, 2011 at A1 (detailing the collapse of the case against Dominique Strauss-Kahn for the rape of Nafissatou Diallo) (“Meanwhile, as the interviews continued, the relationship grew more strained. During a meeting at the district attorney's office on June 9, the woman wept as she was questioned closely after Mr. Thompson had left for another engagement. Her 15-year-old daughter, who was waiting outside, noticed that her mother was upset and called a relative to alert Mr. Thompson. The lawyer called the prosecutors and demanded an end to the questioning. He said on Friday that the daughter heard them shout, 'Get out! Get out! Get out of here!' at her mother. The authorities say there was no shouting.”).
Tennessee “Men Can Stop Rape” campaign\textsuperscript{279} is an example of public service announcements that address rape, but to address the problems addressed in this paper, women, and the reasons for their silence, need to be the focus. Campaigns that combat “real rape” myths would also serve to address the problems of victim reticence.\textsuperscript{280} In the U.S., state agencies such as health departments,\textsuperscript{281} district attorney’s offices,\textsuperscript{282} police departments,\textsuperscript{283} and others commonly produce public service announcements. RAINN also produces PSA’s that combat rape myths and attempt to empower women, but I have not found a similarly ambitious state campaign.\textsuperscript{284} In Britain, the British Home Office has sponsored PSA’s about rape, but at least one has been criticized for exploiting women.\textsuperscript{285} Better public education is necessary to counteract the problems that dissuade women from speaking out about their sexual assaults. Public service announcements that also educated women about programs like S.A.N.E. and Britain’s S.A.C.’s would further encourage them to speak out when they have been assaulted.

Finally, we must, as Human Rights Watch advocates say, “eliminate the rape kit backlog,”\textsuperscript{286} as it not only poses a law enforcement debacle, but it also deters women from

\footnotesize{\textsuperscript{279} http://mencanstoprape.blogspot.com/2010/04/men-can-stop-rape-creates-psa-campaign.html. This campaign “emphasizes positive masculinity and enables men to utilize their strength to stand up and speak out against sexual violence.” Id.}


\textsuperscript{281} See, e.g., 2010 Conn. Acts, P.A. 137 (2010 HB 5246) (requiring the Commissioner of Public Health to develop one public service announcement issued by the Department of Public Health through a T.V. broadcast for the purpose of preventing teen dating and family violence).

\textsuperscript{282} See, e.g., the Orange County District Attorney’s Office multilingual PSA’s on domestic violence at http://www.orangecountyda.com/home/index.asp?page=87.

\textsuperscript{283} See a Post Falls, Idaho Police Department PSA on domestic violence at http://www.youtube.com/watch?v=ErhWqwfqjXY.

\textsuperscript{284} http://rainn.org/news-room/multimedia/psa-video


\textsuperscript{286} See \textit{Eliminate the Rape Kit Backlog}, supra note 231.}
reporting. HRW notes that when “New York City began to test every booked rape kit the arrest rate for rape skyrocketed from 40 percent to 70 percent of reported cases.”^287 State laws like that of Illinois,^288 which requires police department to test rape kits, would help undo the damage that this negligence has done on the confidence of women in the justice system.

B) Changes to the language used by experts and courts when describing rape reactions

As the foregoing has shown, prosecutors, experts, and courts that emphasize humiliation and terror as women’s reasons for their behaviors in rape trials fall short of explaining the causes of victim reticence. “Counterintuitive” post rape reactions could be broached with greater clarity by setting forth the reasons for victim behavior in expert testimony and jury instructions. Where appropriate, expert testimony would recount the exposure and anxiety some women endure during police questioning and medical testing, rebut rape myths, and also note that women may fear being disbelieved, particularly where they do not correspond to “real rape” stereotypes. To the extent women’s reticence may be attributed to a desire to shield one’s emotions from the community, “grief,” “fury,” and “alienation” are preferable terms than “shame,” as argued above.

With respect to jury instructions, a U.S. judge could advise the jury something along these lines:

As the expert noted, victims of rape are more likely to resist their attacker by making verbal protests than by struggling or screaming, and victims are less likely to resist if force is used or threatened. Furthermore, the expert reported that it is not unusual for victims to delay in reporting a rape, especially if the attacker is an acquaintance. *This delay in reporting may be related to a victim’s feelings of grief, fury, and alienation.*

^287 Id.
^288 See Emma Graves Fitzsimmons, *Illinois Law Requires Testing All Rape Kits to End Backlog*, *N.Y.T.*, Jul. 8, 2010 at A15 (“State officials and victims’ advocates said it is the first such law in the nation.”).
delay may also be caused by a victim’s distrust or fear that the police or others may not believe their claims that they were attacked. This feeling of distrust may be particularly acute among victims whose assaults do not conform to stereotypes about “real rape,” which usually revolves around a story involving an armed stranger attacking a woman with a very limited sexual, drug, and drinking history. Acquaintance rape does happen, and if the victim was ingesting drugs and alcohol, or returned to the scene of her attack, that does not lessen the offense committed against her. This evidence is not submitted to validate the complainant’s testimony, but rather provides a background against which you, the jury, may assess the relevance of the defense theory that the complainant’s conduct was not that which was typical or expected of a rape victim. 289

In Britain, in cases of late reporting, judges could instruct as follows:

It has been said on behalf of the defendant that the fact the complainant did not report what had happened to her (him) as soon as possible makes it less likely that the complaint she (he) eventually made was true. Whether that is so in this particular case is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who are conscious that stereotypes about rape may cause police, medical personnel, and members of the justice system to react to a victim’s charge with skepticism or even disbelief, may feel too disheartened to complain. Victims may also refrain from complaining out of feelings of fury, grief, and alienation. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is matter for you to determine whether, in the case of this particular complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it. You need to consider what the complainant herself said about her experience and her reaction to it. 290

My suggestions do not veer outside of the criminal evidentiary frame of reference:

Evidence law in rape trials have already been shaped by legislative and judicial recognition of victims’ anxieties about bringing their complaints to the state because of the possibility that they

289 These instructions borrow from Kinney, supra note 48. They also take from a civil battery case, Delia S. v. Torres, 134 Cal. App. 3d 471, 479 (1982) (“That testimony indicated that feelings of fear, shame and guilt, resulting in a failure to speak of or report the experience, are very common reactions for rape victims. Rather than "validating" Delia S.’s testimony, this evidence provided a background against which the jury could assess the relevance of the defense theory that her conduct was not that which was typical or expected of a rape victim.”).

290 These instructions borrow from Doody.
may be harmed by the prosecutorial process. To wit, rape shield laws in the U.S. and Britain have been developed in direct response to this problem, and courts addressing rape shields readily evoke the “second assault” in their descriptions of them.²⁹¹

²⁹¹ Rape shield laws, “protect, i.e., shield, the complaining witness from being asked questions about her sexual history prior to the occurrence of the rape.” Richard Klein, An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness, 41 Akron L. Rev. 981, 987 (2008). Lawmakers enact these laws out of recognition that “the victim may feel that she has been raped twice: once by the defendant and once by the criminal justice system.” Id. See also Dorn v. State, 267 Ark. 365, 369 (1979) (“[T]he rape shield statute was a rational attempt by the Legislature to protect the prosecutrix from harassment . . . . Another closely related justification for rape shield laws is that they will aid in crime prevention because victims, knowing that the statute protects them from the embarrassment of the introduction of evidence of previous sexual activity, will be encouraged to report.”) People v. Fontana, 49 Cal. 4th 351, 370 (2010) (defendant’s inquiry would have . . . the state interest . . . to encourage reporting by limiting embarrassing trial inquiry into past sexual conduct.” (quoting Wood v. Alaska, 957 F.2d 1544, 1552 (9th Cir. 1992)); State v. Manini, 38 Conn. App. 100, 121 (1994) (“Policies underlying this law include protecting the victim’s sexual privacy and shielding the victim from undue harassment, encouraging reports of sexual assault, and enabling the victim to testify in court with less fear of embarrassment.”); Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997) (“Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes.”); White v. State, 324 Md. 626, 634-5 (1991) (“Another reason to protect rape victims from harassment on the witness stand has been to encourage more victims to report the crimes and help bring rapists to justice.”); Goodson v. State, 566 So.2d 1142, 1149-50 (Miss.1990) (“The rule reflects recognition that the trial process at best is traumatic to the victim of sexual abuse. If she has reason to believe the most intimate details of her life are going to be bandied about the courtroom, many victims will decide the game is not worth the candle and decline to file a complaint.”); People v. Khan, 80 Mich. App. 605, 264 N.W.2d 360, 364 (1978) (“countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would . . . take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.”); Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363, 365 (1978) (“[R]ape shield laws are intended generally to protect the complaining witness, thereby encouraging the reporting and prosecution of rapes . . . .”); Finney v. State, 179 Ind. App. 316, 385 N.E.2d 477, 480 (1979) (A legitimate state policy for rape shield laws “is that they will aid in crime prevention because victims . . . will be encouraged to report rape offenses.”); V. Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 Col. L. Rev. 1, 54 (1977) (In addition to protecting the victim’s privacy and sparing her undue harassment, rape shield laws “encourage the victim to report the assault and assist in bringing the offender to justice by testifying against him in court. Insofar as the laws in fact increase the number of prosecutions, they support the government’s aim of deterring would-be rapists as well as its interest in going after actual suspects.”) (Footnote omitted)).

The British rape shield law, found in section 41 of the Youth Justice and Criminal Evidence Act of 1999, provides that “evidence cannot be adduced and cross-examination is not allowed about sexual behaviour, other than that occurring as part of the alleged events, unless it is relevant to an issue or rebutts evidence of sexual behaviour already adduced by the prosecution.” See http://www.legislation.gov.uk/ukpga/1999/23/contents; Withey, supra note 68, at fn. 69 (no page numbers in lexis article). Section 17 of the 1999 Act reflects the concern that women will not report because of the “harrowing” experience of offering witness in a rape trial. Id., [Withey article] text above fn 98. The law allows rape victims to testify with the “use of screens,” and permits the submission of “evidence-in-chief by live video link.” Id. “Finally, under [section] 34 of the YJCEA 1999 the accused is prevented from cross-examining the complainant in person.” Id. See also Liz Kelly and Linda Regan, Good Practice in Medical Responses to Recently Reported Rape, Especially Forensic Examinations, Rape Crisis Network, Europe supra note 252, at 61 http://www.rcne.com/downloads/RepsPubs/Forensic.pdf: “An explicit intention behind all rape ‘shield’ laws has been to remove impediments to reporting sexual crime, and the 1999 Act was no exception.”; Regina v a ON 17 May 2001[2001] UKHL 25 at section 10: (“The need to protect women from harassment in the witness box is fundamental.”).
It is strange, then, that cases dealing with rape trauma evidentiary issues are so devoid of this same recognition: That women may not report, or behave in other ways because of their distrust and pain at state treatment. Indeed, in my review of the cases, I have found only two cases that deal with a victim’s late or non-reporting and explain this reticence specifically as a product of the victim’s distrust of the state or of other authorities.

In Wyoming’s *Scadden v. State*, 292 29 year old high-school volleyball coach Byran Scadden was convicted of one count of second degree assault on a student and team member, 17-year-old M.B.S. During the trial, the prosecutor portrayed Scadden as “a highly influential authority figure who encouraged the victims to become dependent on him in an atmosphere of trust, and who then used this influence to impose his sexual will on those students.” Scadden had an active practice of choosing favorites from the volleyball team and subjecting them to a variety of molestations, or “games.” These girls, including the victim, were “comfortable” with this behavior, indicating “the enormous extent of his influence” over them.

An evidently cowed M.B.S., whom the Wyoming Supreme Court characterized as being “in large part controlled” by Scadden, delayed reporting her rape. At trial, the prosecutor brought on Detective Donna Reikens of the Cheyenne Police Department, an expert on “child sexual abuse,” who gave “general expert testimony” – a variant on Rape Trauma Syndrome evidence -- on why victims delay reports. Although Reikens testified about the age-old

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293 *Id.* at 1039.
294 *Id.* at 1043.
295 *Id.*
296 *Id.* at 1042.
297 *Id.* at 1046.
298 The Wyoming Supreme Court in *Scadden* emphasized that it was not deciding whether rape trauma syndrome was permissible, but it did hold that expert testimony on generalized victim reaction certainly was. “While the victims’ reactions about which she testified may be consistent with the behavior of one suffering from rape-trauma syndrome, her testimony was not rape-trauma-syndrome testimony. The difference is between generalized expert testimony about behaviors common to a class, and an evaluation of the actions of an individual complainant.” *Id.* at
theories of “guilt” and “fear”299 she also posited that “the biggest fear that any of the girls or children have is that they will not be believed.”300 Why exactly a victim would suspect that she would be called a liar was not specified, and, in fact, this seems curious when there was so much corroboration that the defendant had sexually acted out with numerous other girls on the team, and there was also another victim.301 While my reading of the case is that a victim like M.B.S. may not have believed that her claim would be credited because she deviated from the “real rape victim” profile – like the victims in Kinney and Lessard, she could have been accused of gamely frolicking with the defendant – the overwhelming impression left by the opinion is not that M.B.S. rationally suspected that State actors would reject her as a real victim, but that she believed so because Scadden had compromised her ability to think clearly, as he mentally “controlled” her.

This reading is supported by People v. Brandon, another child sex abuse case.302 Brandon was a pimp who brutally beat, raped, and forced one eleven year old and two seventeen year olds into prostitution.303 He made the victims fear that he would kill them and their families if they did not comply with his demands.304 At trial, one of the victims, Mamie D., said that she did not want to testify, emphasizing that “she was a mother . . . . and was afraid something could happen to her child. . . . Mamie discussed her fears for the first time on the day she was to testify.”305 Mamie eventually did testify, and the prosecutor also put on the testimony of two

1047. Wyoming has been listed by commentators as admitting evidence either identical to or similar to rape trauma syndrome evidence. See Stefan, supra note 10 at fn 260.
299 Scadden at 1045.
300 Id.
301 This was “K.S.” The jury, however, returned a not guilty verdict on charges relating to this victim. Id. at 1040.
302 145 Cal. App. 4th 1002 (2006), modified by People v. Brandon, 2006 Cal. App. LEXIS 2004 (Cal. App. 2d Dist., Dec. 20, 2006) (“Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III.B.6. and III.E., which are not relevant to this article”).
303 Id. at 1008-1017.
304 Id. at 1013.
305 Id. at 1021. Mamie was 17 years old when she first met the defendant. Id. at 1011.
experts, one Detective Keith Haight, who testified that in his experience working with prostitutes, it was not uncommon for prostitutes to be “uncooperative,” in part because “[p]rostitutes have been told repeatedly not to trust the police and often blame themselves for their victimization.”306 Another expert, Dr. Lois Lee, testified about a different kind of distrust these women may feel toward the police, being the fear of wrongful arrest: “Dr. Lee believed it was not uncommon for a prostitute to recant her prior statement or testimony due to fear or the belief that she might be arrested for something she may not have even done.”307 The court, on appeal, held that Dr. Lee’s testimony was permissible, because it may explain to jurors why a victim would change or recant her testimony.308 Detective Haight’s testimony does not appear to have been contested.

In ways that echo Scaddon, the Brandon court and its expert construct the victim’s distrust of the police as a product of her pimp’s brainwashing – which is certainly feasible considering the torture that he put her through. However, some scholars have noted that prostitutes may reasonably distrust the police on grounds other than their pimps’ propaganda.309 In any event, it is very striking that a victim’s non-reporting or recanting will only be explained in this context as a product of state distrust if she is very young and has been seasoned to doubt the police by a psychopathic sex broker. Here, Mamie’s reticence is not explained in terms of

306 Id. at 1018.
307 Id. at 1021.
308 Id. at 1029. The court also held that Dr. Lee’s testimony was not inadmissible “profile evidence.” Id. at 1029-30.
309 See Diane L. Martin, Organizing for Change: A Community Law Response to Police Misconduct, 4 Hastings Women’s L.J. 131 (1993) (“Police abuse of marginalized women, such as prostitutes, arises from and reproduces classic whore/madonna stereotyping, as the police distinguish “good girls” from “bad” and use and abuse prostitutes as valueless women, available for the provision of sexual services to them as well as to clients, without any claim to even minimal protection. Police hassling, for information or on general principle, is almost a constant in the lives of street prostitutes and has been documented in PCLS files. More dramatic complaints of extortion of sexual services by police officers are beginning to surface publicly in Toronto and elsewhere.”) [yxta, eds; I could not retrieve the Hastings piece from Lexis; I retrieved this quote from the reprinted article, 35 Osgood Hall Law Journal 836, 849 (1997) http://www.ohlj.ca/archive/articles/35_34_martin_kuszelewski.pdf.]
“shame,” but rather her confusion resulting from misinformation and a sadist’s beguilement. Similarly, in Scadden, the approved expert’s testimony that child victims fear being disbelieved is also joined with a portrayal of the victim as being overwhelmed by a defendant who enlisted her in a cult of personality.

Thus, whereas the rape shield cases have plentiful reflections on the “second assault” and women’s fears or distrusts of the prosecutorial process, in R.T.S. cases, this insight seems to have fallen beyond the pale of the recognized – particularly in cases involving adult victims. “Shame” “self-blame” disgust, confusion, and terror are the only given rationalizations for victim silence or recanting, while victim return goes mostly wholly unexplained.

Hopefully, the truths about women’s ambiguous feelings about the state, or their out-and-out distrust of it, which is reflected in Tracey Emin’s artifacts, and the scholarship I have cited, will allow us to further round out the explanations of women’s post-rape behavior, and in ways that do not stigmatize women as weak-willed or befuddledly disgraced.

VII) Conclusion

Though psychologists and legal advocates developed and use rape trauma syndrome to educate the public about the complexity of women’s reactions post-attack, and to better the chances of obtaining convictions, R.T.S. evidence needs to be stripped of its patriarchal assumptions that characterize women victims as sick, confused, and bewilderingly ashamed. It may be true, as the feminist Dr. Fiona Mason has said, that some women do experience feelings of self-blame and terror after a rape, but the erotic roots of this characterization should give us
pause when repeating such descriptions at trial. Moreover, the multiplicity of emotions that women endure after sexual violation bear deep roots in women’s agency, autonomy, and consequent ability to criticize state institutions that treat them badly. Rape trauma syndrome’s descriptions of victims, also, suffer from an incomplete source of information about women’s behaviors after sexual assaults, in part because of the dearth of reporting. In order to attend to the “second assault” in rape trials, and rape victim’s awareness of it, we need to expand our inquiry beyond the limited available subjects, whose responses to sexual violations have been interpreted in the language and expectations of a patriarchy that dissuades so many women from reporting at the outset.

It is for this reason that I have turned to these artifacts, being the frustrating, ugly, amazing, handcrafted, furious, and funny work of Tracey Emin. Emin reveals for us a more complete picture of rape reactions, one where the victim resists not only her rapist but also an uncaring society. Moreover, she does so with vigor and ample, various critiques. Her criticisms of the state’s and her community’s hard heartedness are reflected in the R.T.S. cases, where we may see victims’ responses bearing all the same hallmarks of manifold reaction and distrust of the government and its responders. A review of the statistics on rape case attrition and women’s treatment at the hands of police and medical attendants demonstrates that women possess good reasons for their behaviors, particularly where they do not conform to the “real rape victim” stereotype. At the very least, this resistance to the state and its sexism and racism should be reflected in these women’s rape trials, and provided as possible reasons for their reticence. But we may hope, also, that the articulation of these truths will also pave the way for a redeeming of the way in which the U.S. and British systems handle their rape cases, through public and police education, rape kit testing laws, and the retooling of the prosecutor’s role.