

SHE’S CRAZY (TO THINK WE’LL BELIEVE HER): CREDIBILITY DISCOUNTING OF WOMEN WITH MENTAL ILLNESS IN THE ERA OF #METOO

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ABSTRACT

“What? Don’t believe her. She’s crazy.” And often, we don’t. Women are frequently disbelieved just by virtue of being women, and “crazy” is a convenient, gendered shorthand to further discredit—regardless of whether or not the target of such “credibility discounting” actually experiences mental illness. These women are not, however, uniformly disbelieved in all aspects of their lives: Credibility discounting is particularly potent for those women with mental illness reporting sexual violence, either because we suspect that they are lying or we simply do not trust their perception of events.

This Note is the first analysis of credibility discounting at the juncture of gender, sexual violence, and mental illness. Credibility discounts operate throughout the course of litigation, from the decision whether to bring suit at all, the ability to win, and even to valuation of damages. Of course, not all claims of sexual violence have merit. But automatic assumptions that claims are false merely because of the accuser’s identity are no more just than the opposite conclusion.

Sexual harassment law in particular operates to discredit women living with mental illness. The “hostile environment” determination, at first glance, appears cabined into objective and subjective inquiries. In practice, however, women’s credibility is reflexively and pervasively discounted. Even though the objective standard is designed to be judged from the “perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances,’” the relevant circumstances have not been effectively extended to mental illness. This Note proposes adoption of a contextualized reasonableness standard that consciously incorporates mental illness and recognizes that mental illness and reasonableness are not mutually exclusive.

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INTRODUCTION

Imagine a woman who has been sexually assaulted. Or maybe she has been sexually harassed. Soon after, she begins noticing symptoms of an undiagnosed mental illness. She experiences bouts of depression and anxiety. She tells her psychiatrist she is having trouble distinguishing dreams from reality. Memories intrude on her daily thoughts, as does persistent fear and shame. She continues therapy and medication.

Eventually, she files suit. When she shows up at court, she is nervous, shaken, agitated. Maybe she seems a little crazy, a little off. She cannot remember all the specifics. Her story has idiosyncratic details that make her seem too sensitive—all he did was compliment her hair . . . was she too sensitive and emotional about everything else? Can she not take a joke? The alleged damages include emotional distress, and her psychiatric history is under scrutiny. Experts suggest possible diagnoses. Does a psychiatric label explain everything she says? She is frustrated—she knows what she says is true, but why will no one believe her? She starts to doubt herself.

The defendant's attorney voices everyone's doubts: Her trial testimony should not be believed. Either she is lying now, or the poor thing's original perceptions were mistaken, just the product of illness. Maybe the attorney is right.

This story is hypothetical but not implausible. Women's stories of sexual violence are time and again doubted and discredited. False reporting is rare (though difficult to measure, likely less than 5%), yet many incorrectly believe the prevalence of false reporting is much greater.¹ In one representative survey, almost 10% of respondents went so far as to "believe that in most of these cases nothing happened" and the accusers are "purposefully lying" or "misremembering or confused about what rises to the level of sexual harassment or assault."² Introducing mental illness only magnifies that disbelief.³

Questions of credibility are almost inevitably implicated by allegations of sexual violence. In the prototypical "he said, she said" credibility contest, one story is pitted against another, and the factfinder must choose the more credible storyteller. Women tend to lose.⁴ As a high-profile example, comedian Bill Cosby reportedly told some of his assault victims they would not be believed if they spoke out.⁵ Though Cosby was eventually convicted of three counts of aggravated indecent assault, it took over fifty years, a hung jury, sixty different women's accusations, and Cosby's own confession to using Quaaludes to "have sex with young women" before that happened.⁶

1. See Lisa Avalos, *The Chilling Effect: The Politics of Charging Rape Complainants with False Reporting*, 83 BROOK. L. REV. 807, 816–17 (2018). Many estimates of false reports include "unfounded" accusations or those that qualify as some lesser offense, muddying any precise determination of falsity. Jan Jordan, *Beyond Belief? Police, Rape and Women's Credibility*, 4 CRIM. JUST. 29, 35–36 (2004) (cited in Tuerkheimer, *infra* note 7, at 17 n.83).

2. *Measuring #MeToo: A National Study on Sexual Harassment and Assault*, STOP STREET HARASSMENT 1, 36 (2019), <http://www.stopstreetharassment.org/wp-content/uploads/2012/08/2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf> [hereinafter *Measuring #MeToo*].

3. See, e.g., Sandra Newman, *What Kind of Person Makes False Rape Accusations?*, QUARTZ (May 11, 2017), <https://qz.com/980766/the-truth-about-false-rape-accusations/> (referencing mental illness as a primary motivator of false reports).

4. Women are most often the accusers. About one in five women have been raped during their lives, while for men the rate is closer to one in seventy-one. *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf (last visited Jan. 31, 2021) (citing MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011)). When including attempted rape, the probability for women jumps up to 46%. See Diana E. H. Russell & Nancy Howell, *The Prevalence of Rape in the United States Revisited*, 8 SIGNS 688, 691–92 (1983). A 2019 study found that women are over twice as likely as men to experience verbal sexual harassment (76% versus 35%) and, likewise, almost twice as likely to report experiencing some form of sexual harassment and/or assault in their lifetime (81% versus 43%). *Measuring #MeToo*, *supra* note 2, at 10.

5. See Noreen Malone, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen*, CUT (July 26, 2015, 9:00 PM), <https://www.thecut.com/2015/07/bill-cosbys-accusers-speak-out.html>.

6. See Deborah Tuerkheimer, *The Deck Is Stacked Against Every Sexual Assault Victim in America. The Cosby Case Is No Different.*, SLATE (June 18, 2017, 12:24 PM), <https://slate.com/human-interest/2017/06/the-cosby-case-is-another-example-of-credibility-discounting-in-sexual-assault-cases.html>.

In her 2017 article conceptualizing women's experiences of disbelief when reporting sexual assault, Deborah Tuerkheimer coined the term "credibility discounting" to convey an "unwarranted failure to credit an assertion where this failure stems from prejudice."⁷ Both the storyteller and any interest in accuracy and accountability suffer.⁸ This prejudiced disbelief marks a failure of justice only recently receiving in-depth academic consideration. Tuerkheimer's framework has been extended to the experience of domestic violence and sexual harassment survivors as well as the evidentiary system in cases of sexual violence.⁹ Earlier iterations explored the credibility implications of psychiatric evidence in civil litigation, African American women cast as liars, and the stereotype of the female liar in sexual harassment suit.¹⁰ And yet the intersection of different discounted identities has largely been overlooked.¹¹

This Note introduces another element to Tuerkheimer's framework of sexual violence: mental illness.¹² It is the first critical look at the cumulative experience of womanhood, mental illness, and sexual violence, and how those stories and those who tell them are disbelieved in our justice system.¹³ This intersectional understanding is particularly important given the unique interplay between these

7. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017).

8. See Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL L. REV. 289, 293 (2020) ("Credibility discounting silences many survivors, who accurately predict the limited likelihood that they will be believed upon coming forward. This, in turn, diminishes the accountability of those who harass, creating a vicious, permission-giving cycle of abuse of women in the workplace.").

9. Epstein, *supra* note 8; Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 402 (2019); Aníbal Rosario-Lebrón, *Evidence's #MeToo Moment*, 74 U. MIAMI L. REV. 1, 30 (2019).

10. Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in Jones v. Clinton*, 31 U.C. DAVIS L. REV. 123, 127 (1997); Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 CARDOZO L. REV. 749, 791 (2009); Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 626 (2000).

11. With the notable exception of Yarbrough & Bennett, *supra* note 10.

12. This Note uses the term "sexual violence" to refer to sexual assault and harassment. "Mental illness" is used as an umbrella term referring to a wide range of mental health conditions and assumptions. The term "mental illness" in the aggregate is divorced from the experiences of the individual but here is used to reflect societal assumptions about what living with a mental illness means for someone's credibility.

13. This Note primarily focuses on cis-gendered women and those perceived as such, though men, trans, and gender-nonconforming folk may also be victims of sexual violence (and, for that matter, anyone may be a perpetrator). Further academic research is needed, particularly for LGBTQ and other marginalized groups whose credibility is uniquely discounted in the context of sexual violence. Derogatory stereotypes toward marginalized groups do not stop at women, and "[i]f we examine stereotypes of historically powerless groups such as women, African Americans, or poor/working-class people, they often are associated with attributes related to poor truth-telling in particular: things like over-emotionality, lack of logical thinking, inferior intelligence, being on the make, etc." Epstein & Goodman, *supra* note 9, at 433 (quoting MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 1, 32 (2007)).

three experiences.¹⁴ The analysis of credibility discounting explores both the rhetoric of calling women crazy as well as the implications for those actually living with mental illness. This Note argues that, within the life cycle of litigation, credibility discounting appears at every stage. Even in the case of sexual harassment, where the factfinder's personal biases may appear cabined into objective and subjective inquiries, the credibility of women is automatically and pervasively discounted.

Part I outlines the theory of credibility discounting and the intersection between gender, mental illness, and sexual violence. The phenomenon of distrust in sexual violence reports is well-documented.¹⁵ Even outside the context of sexual violence, women are systematically disbelieved at rates much higher than men.¹⁶ This Part explores the cultural association of women as "crazy" and the power of mental illness to discredit them. It then weaves together the incredible, crazy woman and the impossible situation she finds herself in when reporting sexual violence.

Parts II and III represent the novel contributions of this Note to the literature and the perfect storm of credibility discounting at the intersection of gender, mental illness, and sexual violence. Part II surveys how this "triple discounting" operates in the course of legal action, whether criminal or civil. In particular, this Part considers (i) the decision whether to bring a case at all or to raise a particular claim that could expose the plaintiff to invasive scrutiny of her psychiatric history, (ii) her ability to win a "he said, she said" credibility contest, and (iii) if she wins a civil suit, the discounting of any damages award.¹⁷

Finally, Part III juxtaposes the treatment of workplace sexual harassment claims under Title VII with other sexual violence suits. While at first, sexual harassment may appear less susceptible to credibility discounting because the trier of fact applies both a subjective and objective inquiry,¹⁸ in practice, however, women with mental illness are the paradigmatic unreasonable man. Indeed, the subjective prong permits disbelief in a woman's honesty, and the objective prong legitimizes more subtle discounting of women viewed as unreasonable. Courts should rework the sexual harassment reasonableness standard. When assessing the objective reasonableness of sexual harassment suits from the "perspective of

14. See discussion *infra* Part I.

15. See Tuerkheimer, *supra* note 7, at 17–20.

16. See Epstein & Goodman, *supra* note 9, at 432–36.

17. The harm of credibility discounting extends beyond this limited analysis, where gatekeepers such as police and prosecutors discount women's credibility before they can get into court (discussed *infra* Part I.A) and other legal disputes such as custody determinations rely on fallible credibility determinations. It also does not reach the perpetrator who lives with mental illness, further complicating the relative credibility of plaintiff and defendant.

18. See Beth S. Frank, *Protecting the Privacy of Sexual Harassment Plaintiffs: The Psychotherapist-Patient Privilege and Recovery of Emotional Distress Damages Under the Civil Rights Act of 1991*, 79 WASH. U. L. Q. 639, 646–47 (2001) ("Instead of examining the mental injury suffered by the victim, Title VII focuses on the employer's conduct to determine whether it created an objectively hostile or abusive work environment and whether the plaintiff subjectively perceived a hostile work environment.").

a reasonable person in the plaintiff's position, considering 'all the circumstances,'" mental illness should be consciously incorporated into the relevant context.¹⁹

Of course, like any other actors in the legal system, not all women who complain of sexual assault or harassment are telling the truth.²⁰ But a history of mental illness no more guarantees that a woman did *not* experience sexual violence than it guarantees that she did.²¹ Losing this nuance when presenting mental health evidence risks unfairly and systematically prejudicing the factfinder against those women. The #MeToo movement sparked a wave of empathy and visibility surrounding sexual assault and harassment. Those with mental illness are particularly vulnerable and likely to be targeted. But these incredible women cannot achieve justice when the deck is stacked against them.

I. THE THEORETICAL FRAMEWORK OF CREDIBILITY DISCOUNTING

In her 2017 essay, *Incredible Women: Sexual Violence and the Credibility Discount*, Deborah Tuerkheimer coined the term "credibility discounting" to refer to an "unwarranted failure to credit an assertion where this failure stems from prejudice."²² Credibility discounting borrows philosophical ideas of epistemic injustice—both the injustice of disbelief, doubting someone's word because of some element of their identity (testimonial injustice), and the injustice of misunderstanding someone's experience (hermeneutical injustice).²³

19. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993)).

20. But as noted above, false reporting is rare. See *supra* notes 1–2 and accompanying text.

21. For example, the symptoms of post-traumatic stress disorder could be a double-edged sword: used to undermine witness credibility or as evidence of trauma.

22. Tuerkheimer, *supra* note 7, at 3.

23. See *id.* at 7. Epistemic injustice was advanced by Miranda Fricker in her book, *Epistemic Injustice: Power and the Ethics of Knowing*, *id.* at 41–42 (citing MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1, 32 (2007)), though she was not the first to articulate the concept, see, e.g., Linda Alcoff, *On Judging Epistemic Credibility: Is Social Identity Relevant?*, 29 PHIL. EXCHANGE, (1998-1999) at 74; Gayatri Chakravorty Spivak, *Can the Subaltern Speak?* in REFLECTIONS ON THE HISTORY OF AN IDEA CAN THE SUBALTERN SPEAK, 21, 42–44 (2010); see also Rachel McKinnon, *Epistemic Injustice*, 11 PHILOSOPHY COMPASS 437, 438 (2016) ("[T]here's a long history in black feminist thought, and other feminists of color, that should be seen as also working on issues of epistemic injustice.") (quoted in Tuerkheimer, *supra* note 7, at 41 n.240). Examples are helpful. As an illustration of testimonial injustice, Fricker told the story of Duwayne Brooks, a witness to his friend's murder but who was otherwise ignored by police investigators, at least in part due to racial bias. Miranda Fricker, *Epistemic Justice as a Condition of Political Freedom?*, 190 SYNTHÈSE 1317, 1325 (2013). As reported by the official inquiry, "the officers failed to concentrate upon Mr. Brooks and to follow up energetically the information which he gave them. Nobody suggested that he should be used in searches of the area, although he knew where the assailants had last been seen. Nobody appears properly to have tried to calm him, or to accept that what he said was true." *Id.* (emphasis added). As an example of hermeneutical injustice, imagine a scenario before the term "sexual harassment" was introduced in the 1970s. A woman who experienced sexual harassment may be unable to put those experiences into words, because women like her have been historically excluded from the conversation shaping those concepts.

This Part explores the threat of credibility discounting for women alleging sexual assault and harassment. The American legal system has a well-worn tradition of doubting these women's claims. Introducing mental illness into the equation—particularly where women are readily labeled “crazy”—further discredits women beyond any potentially rational justification.

A. THE INTERACTION BETWEEN SEXUAL VIOLENCE AND THE CREDIBILITY DISCOUNT

Credibility has dual parts: trustworthiness of the storyteller and that the story itself be plausible.²⁴ Both require judgments “very much rooted in the context of a given report.”²⁵ Tuerkheimer illustrates that a woman may be considered less trustworthy when reporting a sexual assault as opposed to theft, and the report's plausibility is likewise judged in the context of “preconceived notions of how a rape victim behaves or how rape is perpetrated.”²⁶ If the listener believes, for example, that acquaintance rape is morning-after regret or that revealing clothing is “asking for it,” a truthful report can look false.

Tuerkheimer warns that these dangers are compounded when trustworthiness and plausibility are conflated.²⁷ Doubt of either one can impede the other, creating a “two-way mutually reinforcing loop.”²⁸ That distrust sows further distrust, and the speaker's story becomes less and less credible.²⁹ Those in “suspect” social groups who report sexual violence “thus suffer a double disadvantage. They risk being doubly deauthorized as knowers on account of who they are and what they claim to know.”³⁰ Moreover, anyone whose story is in conflict receives some degree of “credibility surplus.”³¹

Women reporting assault or harassment are the prototypical example of this double discounting. First, the very fact that these are reports of sexual violence make plausibility suspect. Some law enforcement personnel, for example, openly

24. Tuerkheimer, *supra* note 7, at 13 (quoting KAREN JONES, *The Politics of Credibility, in A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 154–55 (Louise Antony & Charlotte Witt eds., 2002) (“It is a commonplace that the credibility we ascribe to reports should be a function of the trustworthiness of the testifier, or testifiers, and the plausibility of what they say in the light of what else we believe.”)).

25. Tuerkheimer, *supra* note 7, at 13.

26. *Id.*

27. *See id.* at 14. For an in-depth assessment of story plausibility and storyteller trustworthiness in the context of domestic violence, see Epstein & Goodman, *supra* note 9, at 406–37. Or, in the context of sexual harassment, see Epstein, *supra* note 8, at 295–316.

28. JONES, *supra* note 24, at 160 (quoted in Tuerkheimer, *supra* note 7, at 14 n.68).

29. *See* Tuerkheimer, *supra* note 7, at 14.

30. JONES, *supra* note 24, at 158 (quoted in Epstein & Goodman, *supra* note 9, at 437 n.167).

31. *See* Tuerkheimer, *supra* note 7, at 15 (citing Richard Foley, *Beliefs, Degrees of Belief, and the Lockean Thesis*, *DEGREES BELIEF* 37 (Franz Huber & Christoph Schmidt-Petri eds., 2009)). If there is a “credibility clash” where “[s]omebody is telling the truth and somebody else is lying . . . to say where the truth falls is *ipso facto* to point the finger of falsehood at the other.” Jennifer Lackey, *NORMS OF CREDIBILITY* 1 (Aug. 3, 2017) (unpublished manuscript) (on file with author) (cited in Tuerkheimer, *supra* note 7, at 15 n.70). Lackey has termed this a “credibility surplus.” Tuerkheimer, *supra* note 7, at 15 n.71.

express outsized distrust of rape accusations.³² One study found that, though there was significant variation, the average police officer believes over 50% of sexual assault allegations are false.³³ Other studies report similar patterns, with the notable enduring exception of white women accusing black men of assault.³⁴ In contrast, although available data is imperfect, research suggests only about 5% of sexual assault accusations are false.³⁵

Sexual harassment is also pervasive: Almost 90% of women have been harassed.³⁶ One in every three women experiences workplace sexual harassment, as do one in ten men.³⁷ Though there is no precise data on false reporting, personal risks such as shame, humiliation, retaliation, and blacklisting disincentivize most women from bringing fabricated claims.³⁸ And yet, almost a third of Americans believe that women making false claims is common in the workplace.³⁹ Likewise, the greatest gender-related workplace concern for men is women making false claims of sexual harassment and assault.⁴⁰

Second, women's "suspect" status can undermine perceived trustworthiness. Women are uniquely disbelieved: "[W]omen, more than men, are stereotyped

32. See Tuerkheimer, *supra* note 7, at 16–20.

33. See Lesley McMillan, *Police Officers' Perceptions of False Allegations of Rape*, 27 J. GENDER STUD. 9, 11–12 (2018).

34. See Tuerkheimer, *supra* note 7, at 16, 20–21 (citing Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008) (finding more than half of officers surveyed thought 10–50% of sexual assault accusations are lies); MARTIN D. SCHWARTZ, NATIONAL INSTITUTE OF JUSTICE VISITING FELLOWSHIP: POLICE INVESTIGATION OF RAPE—ROADBLOCKS AND SOLUTIONS 27 (Dec. 2010); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983)).

35. Claire E. Ferguson & John M. Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES SEXUAL BEHAV. 1185, 1189–90 (2015); see also Tuerkheimer, *supra* note 7, at 18–20 (citing Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335, 1336 (2010) (“[S]ignificant adherence to rape myths by the public, media, jurors, and the criminal legal system makes it practically impossible to unravel the highly layered ‘truth’ about false rape allegations.”)). Police determinations not to pursue a complaint, not guilty verdicts, or recanting of allegations muddy data on false reporting. See Tuerkheimer, *supra* note 7, at 17–18.

36. *Measuring #MeToo*, *supra* note 2, at 17.

37. *Id.* at 25.

38. See Elsie Mata, *Title VII Quid Pro Quo and Hostile Environment Sexual Harassment Claims: Changing the Legal Framework Courts Use to Determine Whether Challenged Conduct Is Unwelcome*, 34 U. MICH. J.L. REFORM 791, 819–20 (2001); see also Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y. U. L. REV. 1146, 1188–89 (2019). Three quarters of allegations of sexual harassment made to the EEOC in 2015 were ultimately dismissed or closed for administrative reasons. See Mona Chalabi, *Sexual Harassment at Work: More Than Half of Claims in US Result in No Charge*, GUARDIAN (July 22, 2016, 12:30 EDT), <https://www.theguardian.com/money/2016/jul/22/sexual-harassment-at-work-roger-ailles-fox-news>. However, unsubstantiated is far from false.

39. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RES. CTR. 3 (Apr. 4, 2018), <https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2018/04/Pew-Research-Center-Sexual-Harassment-Report-April-2018-FINAL.pdf>.

40. Kim Elsesser, *Of All the Gender Issues at Work, Men Are Most Concerned About False Harassment Claims from Women*, FORBES (Jan. 10, 2019, 3:41 PM EST), <https://www.forbes.com/sites/kimelsesser/2019/01/10/of-all-the-gender-issues-at-work-men-are-most-concerned-about-false-harassment-claims-from-women/>.

as liars even though men and women are equally adept at telling lies.”⁴¹ Both research participants as well as actual judges and juries view women as less credible witnesses and advocates.⁴² Thus, women reporting assault or harassment are particularly vulnerable to credibility discounting. They are not alone. People of color, those living in poverty, LGBTQ+ folk, and others are subject to stereotypes in line with double discounting. These stereotypes build on each other and undermine someone’s perceived trustworthiness.⁴³

Credibility discounting occurs in both the court system and the court of public opinion. In the case of sexual violence, “law and culture reciprocally influence understandings of what is and is not the crime of rape.”⁴⁴ Tuerkheimer outlines how, in sexual assault law, corroboration requirements,⁴⁵ “prompt outcry” rules,⁴⁶ and cautionary jury instructions⁴⁷ all reflect and perpetuate these assumptions that women reporting sexual violence are untrustworthy.⁴⁸ The Model Penal Code (MPC) incorporates all three provisions on grounds of the “the difficulty of defending against false accusation of a sexual offense.”⁴⁹

Though the MPC guidelines on sexual assault are under revision and many states have removed “rules of disbelief” from their books, Tuerkheimer demonstrates how credibility discounting continues to be enforced informally by law enforcement in the investigatory and prosecutorial stages.⁵⁰ Police mishandling of assault cases is widespread, particularly for women of color, immigrants, the

41. Yarbrough & Bennett, *supra* note 10, at 629.

42. Epstein & Goodman, *supra* note 9, at 435 (citing Jacklyn E. Nagle et al., *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 BEHAV. SCI. & L. 195, 195, 203 (2014)); *id.* at 435 (citing Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN’S STUD. 1, 61 (1996)); Rosario-Lebrón, *supra* note 9, at 32–33 (recounting study findings that jurors “(1) find female witnesses to be slightly less credible and persuasive than men; (2) are less likely to credit witnesses who use voice patterns regularly associated with women; and (3) perceive female attorneys as ‘shrill, irrational, and unpleasant’ for expressing the same emotions that, when expressed by male attorneys, are interpreted as appropriate”).

43. See Epstein & Goodman, *supra* note 9, at 436–37.

44. Tuerkheimer, *supra* note 7, at 4 n.9 (quoting Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 132 (1992)).

45. *Id.* at 22. New York’s 1886 special corroboration law purported to protect defendants from “untruthful, dishonest, or vicious” accusers. *Id.* (citing Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 957 (2004)).

46. See *id.* at 22–23. Tuerkheimer points to the Utah Supreme Court’s explanation in 1900 assuming delayed reporting was a sign of falsehood: “The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity . . . and the absence of such disclosure tends to discredit her as a witness.” See also Anderson, *supra* note 46, at 955 (quoting *State v. Neel*, 60 P. 510, 511 (Utah 1900) (“This sentiment remained prevalent until the early 1980s.”)).

47. As illustrated by one prototypical jury instruction, a rape charge “is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent . . . the law requires that you examine the testimony of the female person named in the information with caution.” Tuerkheimer, *supra* note 7, at 23 (quoting *People v. Rincon-Pineda*, 538 P.2d 247, 253 (Cal. 1975)).

48. *Id.* at 21–25.

49. *Id.* at 23–24 (quoting MODEL PENAL CODE § 213.6 cmt. at 428 (AM. LAW INST., Official Draft and Revised Comments 1980)).

50. See Tuerkheimer, *supra* note 7, at 24–25, 27–41.

LGBTQ+ community, those in poverty, and sex workers.⁵¹ Many officers “disbelieve victims who knew their assailants,” and a frequent concern is that accusations are just “revenge report[s]” or morning-after regret.⁵² Even those cases brought to prosecutors may never be charged. Though the legal threshold is only sufficient admissible evidence to support a conviction, in practice prosecutors decide whether jurors would probably convict, and the credibility of the victim necessarily enters into that equation.⁵³ Any of the prosecutor’s own skepticism is compounded by anticipated concern that jurors will not believe the victim.⁵⁴

Civil suits are also prone to “he said, she said” credibility battles, especially where corroborating evidence is limited.⁵⁵ Deborah Epstein and Lisa Goodman explain that discovery is curtailed, private investigators are expensive substitutes for the full investigatory power of the state, and, without a right to counsel, only those who can afford an attorney are represented.⁵⁶

Sexual assault victims know their credibility will be doubted and undermined, and as a direct result many never come forward.⁵⁷ Almost three out of every four sexual assaults are never reported.⁵⁸ One in five non-students who choose not to report do so because they believe “police would not or could not do anything to help,” a needless hurdle on top of fears of humiliation or retaliation.⁵⁹ The same is true for harassment. Many women choose never to report due to a well-grounded fear they will not be believed.⁶⁰

51. Tuerkheimer, *supra* note 7, at 31. See generally AM. CIV. LIBERTIES UNION, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING (Oct. 2015), <https://www.aclu.org/report/sexual-assault-domestic-violence-and-policing>.

52. Tuerkheimer, *supra* note 7, at 35 (quoting REBECCA CAMPBELL, ET AL., THE DETROIT SEXUAL ASSAULT KIT ACTION RESEARCH PROJECT, FINAL REPORT 115 (Nov. 9, 2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf>).

53. See *id.* at 37–38.

54. *Id.* at 36–41; see also *id.* at 38 n.220 (quoting Jennifer G. Long & Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, STRATEGIES: PROSECUTORS’ NEWSL. VIOLENCE AGAINST WOMEN, Apr. 2014, at 1, 4 (observing that “for many reasons, ranging from bias to resource shortages to concern about conviction rates, prosecutors weed out far too many cases because they wrongly believe they cannot win them”).

55. See Epstein & Goodman, *supra* note 9, at 404–05.

56. *Id.*

57. See Tuerkheimer, *supra* note 7, at 28 (“A majority of sexual assault victims preempt the deployment of credibility discounts by declining to relate the crime’s occurrence to law enforcement officials.”); see also Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS NEWSHOUR (Dec. 11, 2014), <http://www.pbs.org/newshour/rundown/fourfive-acts-campus-sexual-assault-go-unreported-police/> (quoting a lawyer for sexual assault victims’ rights attributing arrant underreporting largely to victims “know[ing] in our society that the only rapes that are taken seriously are those committed by strangers and are significantly violent”).

58. *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited June 28, 2020).

59. See Tuerkheimer, *supra* note 7, at 29 (quoting SOFI SINOZICH & LYNN LANGTON, U.S. DEP’T JUSTICE BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 9 (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>).

60. See Epstein, *supra* note 8, at 302. Barely a quarter of those who do report their harassment are taken seriously. *Id.*

These ideas are steeped in the public consciousness. Notably, even high-profile figures widely condemn and cast suspicion on accusers. Echoing the prompt outcry rule, President Trump tweeted that Dr. Christine Blasey Ford's assault allegations against then-Supreme Court nominee Brett Kavanaugh are incredible because "if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed."⁶¹ Research shows that this belief is widespread—that those who have been sexually harassed will immediately report—despite countervailing data that almost three-quarters of those who experience harassment will never report either formally or informally, let alone promptly.⁶² Moreover, while defending himself against seventeen accusations of sexual misconduct, Trump vowed: "Total fabrication. The events never happened. Never. All of these liars will be sued after the election is over."⁶³ Ironically, the only person sued was the (then-) President, after multiple accusers filed defamation suits against him.⁶⁴

Credibility discounting not only leads to injustice, but it also uniquely harms the individual accuser. Being able to share knowledge is "essential to human value," and those speakers unable to do so are robbed of something important.⁶⁵ Disbelieved, misunderstood, and silenced, "Objects do not speak. When they do, they are by then regarded as objects, not as humans, which is what it means to have credibility."⁶⁶ To be disbelieved is to be devalued, and we pile that harm on people who have already been hurt.

B. MENTAL ILLNESS AS A DISCOUNT TO WOMEN'S CREDIBILITY

The problem of disbelief is particularly salient for those living with mental illness. They are systematically doubted and distrusted throughout their day-to-day lives. This Subpart draws connections between these two realms of credibility discounting: mental illness and the discrediting of those reporting sexual violence. The power of mental illness to discredit is potent, and women are presumed "crazy" in a way that men are not. A woman with mental illness reporting sexual violence is the perfect storm.

61. Donald Trump (@realDonaldTrump), TWITTER (Sept. 21, 2018, 7:14 AM), <https://twitter.com/realDonaldTrump/status/1043126336473055235>.

62. See Epstein, *supra* note 8, at 299–301.

63. Ryan T. Beckwith, *President Trump Is Defending Kavanaugh the Same Way He Defended Himself and Other Men*, TIME, <https://time.com/5400582/brett-kavanaugh-donald-trump-sexual-misconduct/> (last updated Sept. 20, 2018, 9:46 AM ET).

64. *Id.*; Alison Durkee, *Supreme Court Shuts Down Stormy Daniels Lawsuit Against Trump—But Other Defamation Cases Still Alive*, FORBES (Feb. 21, 2021, 2:19 PM EST), <https://www.forbes.com/sites/alisondurkee/2021/02/22/supreme-court-shuts-down-stormy-daniels-lawsuit-against-trump-but-other-defamation-cases-still-alive/>.

65. Tuerkheimer, *supra* note 7, at 44 (quoting FRICKER, *supra* note 14, at 44).

66. *Id.* at 45 n.265 (quoting CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSE OF LIFE AND LAW 182 (1987)).

1. Labeling Women “Crazy” Irrespective of Any Mental Illness

Calling women crazy—that they do not know what they are talking about, or are otherwise emotionally unstable—is entrenched in the cultural subconscious. Mental illness is integrally tied to both (i) the nature of being a woman and (ii) assumptions around “women as liars . . . anchored by perennial beliefs that women’s minds are inherently unstable and inferior to men’s.”⁶⁷ With the close association of gender and emotions, mental illness persists as the quintessential “female malady,”⁶⁸ almost a “penalt[y] for *being* female.”⁶⁹

This is nothing new. From burning “witches” (retroactively suspected of displaying some sort of mental illness) to the over-representation of women in nineteenth-century asylums to the continued gender imbalance in mental health treatment today, a gendered pattern of mental illness appears throughout history.⁷⁰ “Hysteria” was never gender neutral, a term originating in the Greek word for womb.⁷¹ Female hysteria was a common medical diagnosis through the twentieth century, only scrubbed from the *Diagnostic and Statistical Manual of Mental Disorders* in 1980, and some argue that gendered hysteria continues to manifest itself in diagnoses of other conditions such as schizophrenia, borderline personality disorder, conversion disorder, and anxiety attacks.⁷² Women are prescribed psychiatric medication and diagnosed with illnesses such as anxiety, depression, and anorexia at rates dwarfing those of men.⁷³

How society has chosen to define mental illness excludes behaviors such as violence and drug abuse that would encompass more men.⁷⁴ Joan Busfield suggests this disparity is no unhappy accident: The “ready pathologising of women” aligns with social expectations that “[w]hat is appropriate for women is close to mental disorder,” while centering the norm for mental health around men.⁷⁵

Today, this disparity persists and is reinforced in popular culture. People still debate whether women are “too emotional” for political office or even to work in restaurant kitchens.⁷⁶ A 2019 survey found that 1 in 8 Americans believe men are

67. Stephanie R. Larson, *Survivors, Liars, and Unfit Minds: Rhetorical Impossibility and Rape Trauma Disclosure*, 33 HYPATIA 681, 691 (2018).

68. JENELL JOHNSON, AMERICAN LOBOTOMY: A RHETORICAL HISTORY 50 (2014).

69. PHYLLIS CHESLER, WOMEN AND MADNESS 161 (1972).

70. Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 593 (2003).

71. Carol S. North et al., *The Classification of Hysteria and Related Disorders: Historical and Phenomenological Considerations*, 5 BEHAV. SCI. 496, 498 (2015).

72. *See id.* at 498-501.

73. *See Korn, supra* note 70, at 595-96.

74. *See id.*

75. JOAN BUSFIELD, MEN, WOMEN, AND MADNESS, UNDERSTANDING GENDER AND MENTAL DISORDER 101 (1996).

76. One world-class chef expressed: “The real positive with men is that men can absorb pressure better, that’s the main difference, because they are not as emotional.” James Hansen, *Famously Emotional Chef Marco Pierre White Says Women Are Too Emotional in Kitchens*, EATER, <https://london.eater.com/2019/8/29/20838104/marco-pierre-white-chef-women-emotional-kitchen-nonsense> (last updated Aug. 30, 2019, 9:54 AM BST).

“better suited emotionally” for office.⁷⁷ And as one revealing example of this attitude, during Hillary Clinton’s 2016 presidential run, rapper T.I. said he would not vote for a woman, explaining:

Not to be sexist but I can’t vote for the leader of the free world to be a woman. Just because, every other position that exists, I think a woman could do well. But the president? It’s kinda like, I just know that women make rash decisions emotionally—they make very permanent, cemented decisions—and then later, it’s kind of like it didn’t happen, or they didn’t mean for it to happen. And I sure would hate to just set off a nuke.⁷⁸

Others may not be so brazen but still criticize the “wackiness” and “nutty” ideas of controversial female politicians.⁷⁹ Pop culture is also rife with references to the crazy woman trope, inadvertently shining a spotlight on casual use of the term that may not otherwise regularly be documented. The 2020 season of *The Bachelor* featured the song “I Want Crazy” for a date with a woman considered to be “the craziest contestant” of the show.⁸⁰ The television show *How I Met Your Mother* warned of “the crazy eyes” and plotted women on the “Crazy/Hot” scale, each forming the premise of an entire episode of the show.⁸¹ The CW’s *Crazy Ex-Girlfriend* bends and satirizes the trope, launching each episode with a song, a dance, and a quip directed at its own title, singing, “That’s a sexist term. The situation’s a little more nuanced than that.”⁸² Thus—whether real or fictional—women are pinned as crazy.

77. Anthony P. Carnevale et al., *May the Best Woman Win?: Education and Bias Against Women in American Politics*, GEO. CTR. ON EDUC. AND THE WORKFORCE 1, 7 (2019), https://cew.georgetown.edu/wp-content/uploads/Women_in_Politics.pdf.

78. Alex Needham, *TI Apologizes After Saying Female President Would ‘Make Rash Decisions’*, GUARDIAN (Oct. 13, 2015, 13:02 EDT), <https://www.theguardian.com/music/2015/oct/13/ti-vote-woman-president-hillary-clinton>.

79. See Karl Rove, *AOC Is the Gift That Keeps Giving*, WSJ (July 17, 2019, 6:56 PM ET), <https://www.wsj.com/articles/aoc-is-the-gift-that-keeps-giving-11563404196>.

80. Mary Jane, *Fans Think the ‘I Want Crazy’ Song Hunter Hayes Performed on The Bachelor Fit Victoria Well*, MONSTERS & CRITICS (Feb. 18, 2020, 5:38 PM ET), <https://www.monstersandcritics.com/tv/reality-tv/fans-think-the-i-want-crazy-song-hunter-hayes-performed-on-the-bachelor-fit-victoria-well/>.

81. See Harris O’Malley, *Men Really Need to Stop Calling Women Crazy*, WASH. POST. (July 9, 2014, 7:54 AM EDT), <https://www.washingtonpost.com/posteverything/wp/2014/07/09/men-really-need-to-stop-calling-women-crazy/>. For these episodes, see *How I Met Your Mother: Swarley* (CBS television broadcast Nov. 6, 2006) (warning men to stay away from women with “crazy eyes,” an indicator of future mental instability), and *How I Met Your Mother: How I Met Everyone Else* (CBS television broadcast Oct. 22, 2007) (graphically charting women’s hot-to-crazy ratio, where they are permitted to be crazy so long as they are equally hot).

82. See Maureen Lenker, *The Subversive Show with the Terrible Name*, BITCH MEDIA (Oct. 12, 2016, 11:13 AM), <https://www.bitchmedia.org/article/subversive-show-terrible-name/crazy-ex-girlfriend-satirizes-sexist-tropes-song-and-dance>.

2. The Power of Mental Illness to Discount Credibility

Mental illness is a powerful tool to discredit. As Catherine Prendergast spells out, “If people think you’re crazy, they don’t listen to you.”⁸³ Those experiencing mental illness may exhibit behavior that undermines their credibility.⁸⁴ For example, standard jury instructions on how to assess credibility highlight that it is important for a witness to “articulate strong and clear memories of the events they are relating” and “to have perceived—to have seen and heard—the events in question.”⁸⁵ Mental illness may inhibit one’s ability to meet that standard.⁸⁶ But, even “severe mental illness, at times even requiring hospitalization, does not equate with across-the-board ‘craziness’” that should automatically disqualify someone’s testimony.⁸⁷

Mental illness is highly stigmatized, and “the essential effect of stigma is to be discredited, and therefore dehumanized and disempowered.”⁸⁸ Those with less severe diagnoses or presentations are not immune: Stigma “may simply appear in a different form since these otherwise ‘normal’-appearing individuals may be assumed to lack self-control and self-restraint.”⁸⁹ These entrenched biases have sweeping consequences where the stigma of mental illness permeates our beliefs around what those labels mean.⁹⁰

In courtrooms, psychology is “often misunderstood by courts and juries alike” and can thus “create prejudice and confusion for the court and jury.”⁹¹ Those with mental illness may not be allowed to testify at all, whether because of legal standards presuming incapacity or, too often, because without cursory legal analysis courts “either assume without discussion that the testimony of witnesses with mental illnesses is not valuable, or because they are not willing to make accommodations necessary to enable this testimony to be taken.”⁹² A client’s own

83. Catherine J. Prendergast, *On the Rhetorics of Mental Disability*, in *TOWARDS A RHETORIC OF EVERYDAY LIFE: NEW DIRECTIONS IN RESEARCH ON WRITING, TEXT, AND DISCOURSE* 189, 203 (Martin Nystrand & John Duffy eds., 2003).

84. See Faith Hayman, *Mental Illness and the Credibility Crucible*, *ADVOCATE* 3–4 (Mar. 2016).

85. Epstein & Goodman, *supra* note 9, at 437.

86. *Id.*

87. Hayman, *supra* note 84, at 5.

88. Smith, *supra* note 10, at 809.

89. Smith, *supra* note 10, at 809 (citing STEPHEN P. HINSHAW, *THE MARK OF SHAME: STIGMA OF MENTAL ILLNESS AND AN AGENDA FOR CHANGE* 28–52, 155–56 (2007)).

90. Psychologist Stephen Hinshaw commented: “During the past decade a consensus has formed . . . that mental disorders are, in fact highly stigmatized, with far-reaching consequences.” STEPHEN P. HINSHAW, *THE MARK OF SHAME: STIGMA OF MENTAL ILLNESS AND AN AGENDA FOR CHANGE* 28–52, 140 (2007) (quoted in Smith, *supra* note 10, at 809).

91. See Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1375–76 (2005). For a recent story of a judge berating a victim of domestic violence for not appearing at her abuser’s trial, see Kate Briquet, *Judge Berates Domestic Violence Victim—and Then Sends Her to Jail*, *DAILY BEAST*, <https://www.thedailybeast.com/judge-berates-domestic-violence-victim-and-then-sends-her-to-jail> (last updated Apr. 13, 2017, 6:28 PM ET) (scolding, “You think you’re going to have anxiety now? You haven’t even seen anxiety”).

92. Kevin M. Cremin et al., *Ensuring a Fair Hearing for Litigants with Mental Illnesses: The Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings*, 17 J.L. & POL’Y 455, 459 (2009).

attorney may be less likely to believe or understand them.⁹³ When evidence is permitted, prejudices surrounding mental illness may impede accurate weighing of the facts.⁹⁴

Deirdre Smith outlines three rationales for the relevance of psychiatric evidence:

(1) to suggest an alternative cause of the plaintiff's alleged psychological injuries; (2) to impeach the plaintiff's credibility by asserting that a mental illness interferes with the plaintiff's ability to recount or to perceive events accurately; and (3) to reveal certain propensities that inform how the plaintiff likely acted with respect to the events at issue in the litigation.⁹⁵

These are certainly rational and legitimate justifications. But, beyond probative value, psychiatric evidence "poses a significant risk of unfair prejudice to the plaintiff in light of the persistent and pervasive stigmatizing effects of psychiatric diagnoses."⁹⁶ Rationale number two most closely tracks with credibility discounting, where "ability to recount or to perceive events accurately" reflects our two greatest concerns regarding the credibility of those with mental illness: (i) they are lying and (ii) they did not really know what was happening at the time (at least compared to some objective perception of events).⁹⁷ Part II will address in greater depth how the first and third justifications for the relevance of psychiatric evidence may also be tainted by credibility discounting.

A New York proceeding against the operator of an adult home, accused of exploiting the mentally ill residents, provides a powerful example of the injustice of equating mental illness with untrustworthiness. In questioning by the operator's attorney, he connected being mentally ill with being a "big liar," asking:

Q: Did you have any occasion before this to review records or talk to psychiatrists or anybody else regarding the mental health condition of Resident G?

93. See S.D. UNIFIED JUD. SYS.'S STATE COURT ADMIN.'S OFF., REPRESENTING A CLIENT WITH MENTAL ILLNESS: A SOUTH DAKOTA DEFENSE ATTORNEY'S GUIDE, https://ujs.sd.gov/uploads/docs/Mental_Illness_handbook.pdf (last visited Apr. 22, 2020). This prototypical attorney's guide for representing clients with mental illness explains: "Your client's mental illness may affect various aspects of his or her case, such as . . . [t]he reliability of your client's statements [and your] client's memory, ability to make decisions, reasoning, judgment, volition, and comprehension." *Id.* at 16.

94. Cremin, *supra* note 92, at 471; see Morris D. Bernstein, *Judging Witness Credibility: A Talmudic Perspective*, 5 RUTGERS J.L. & RELIGION 4, 53 (2003) (highlighting that the "danger in credibility determinations is that the finder of fact mechanically imposes a stock character type upon the witness. So the administrative law judge might, unbeknownst to herself, be making her determinations based upon a gallery of mental images of presumptively credible witnesses").

95. Smith, *supra* note 10, at 749.

96. *Id.* at 753.

97. See *id.* at 749.

A: No, I did not.

Q: Did you know if Resident G was just a big liar?

A: No.

Q: Okay. Well, did you check her records or talk to her psychiatrist to see whether one of the problems with her mental health is that she's a liar?

A: No.

Q: Okay. Resident E[,] does he have a mental health diagnosis? . . .

A: . . . He's schizophrenic

Q: Did you ask Resident E for consent to be able to review his mental health records?

A: No, I did not.

Q: Do you know how big a liar Resident E is? . . .⁹⁸

While many assume a history of mental illness should belie any ability to recount events credibly, clinical evidence indicates otherwise.⁹⁹ Diagnoses such as non-psychotic mood and anxiety disorders have “little or no impact” on ability to accurately perceive or recall past experiences.¹⁰⁰ Those mental illnesses that do have psychotic symptoms may have some effect.¹⁰¹ But even then, credibility is not affected in the way some may expect. Hallucinations and psychotic beliefs are usually specific, discrete, and thus distinguishable from other events.¹⁰² Likewise, people with mental illness are no more likely to lie habitually or display other manipulative behavior.¹⁰³ Whatever inferences are made from a diagnosis should be done with care given the substantial clinical evidence that mental health history does not predict one's ability to accurately recount information.¹⁰⁴ And yet, diagnoses carry a level of scientific merit that may mislead factfinders who overestimate the value of these labels.¹⁰⁵

98. Cremin, *supra* note 92, at 455–56.

99. *Id.* at 473; see also S. Maizel et al., *The Fitness of the Mental Patient to Be a Witness*, 20 MED. L. 85 (2001).

100. Cremin, *supra* note 92, at 475.

101. *See id.*

102. *Id.* at 476. An auditory hallucination may comprise a specific repeated sound. Likewise, tactile hallucinations can feel like skin crawling, and visual hallucinations are often odd lights or patterns isolated from other occurrences.

103. *See id.* at 477.

104. *Id.*

105. Smith, *supra* note 10, at 810.

3. The Interaction of Mental Illness and #MeToo

Women telling their story of sexual assault or harassment face a “double discounting” of their credibility. In addition to gender, social and political identities such as race, class, sexuality, ability, and others can act as a basis for credibility discounting or interact to deepen that disbelief.¹⁰⁶ Mental illness is one widespread example intimately tied to sexual abuse, where PTSD and other psychiatric disorders are common responses to trauma.¹⁰⁷ Just as gender—particularly in the context of reporting sexual assault or harassment—subjects the speaker to doubt, those with mental illness are less likely to be believed, whether because their honesty or perception of events is questioned. Even those with no mental illness may still be labeled as such or simply called “crazy” to usurp its power to disempower. Taken together, women with mental illness who have experienced assault or harassment are even more likely to have their credibility discounted. This “triple discounting” is pervasive.

As the #MeToo movement empowers women and other survivors to shed light on previously unheard-of stories of sexual violence, the media and perpetrators have employed the rhetoric of mental illness as a defensive tactic to discredit those women. This Part focuses on those stories.

Labeling women “crazy” is particularly salient when it is the word of the woman pitted against that of a man.¹⁰⁸ When Dr. Christine Blasey Ford came forward to accuse then-nominee (now U.S. Supreme Court Justice) Brett Kavanaugh of sexual assault, conservative website Grabiens News published the article “Something’s Wrong with Her,” erroneously quoting student reviews of a different professor Christine Ford.¹⁰⁹ The Drudge Report promptly shared the article, revealing a “desperation to portray Ford as crazy and deranged.”¹¹⁰ In their

106. See Yarbrough & Bennett, *supra* note 10, at 629.

107. See Laura P. Chen et al., *Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-Analysis*, 85 MAYO CLINIC PROCEEDINGS 618, 625 (2010).

108. See generally Sherronda J. Brown, *Brooklyn Nine-Nine Shows How to Discuss #MeToo in Pop Culture*, WEAR YOUR VOICE (Mar. 2, 2019), <https://wearyourvoicemag.com/entertainment-culture/brooklyn-nine-nine-me-too>. As one example from pop culture, in the police sitcom Brooklyn Nine-Nine’s #MeToo episode “He Said, She Said,” a man is hit with a golf club after an attempted sexual assault.

He explains that she “just flipped out . . . [b]ecause she’s crazy . . . I know we’re not supposed to say that about women, and I usually wouldn’t go there because I’m a huge advocate. I mean, I’m the kind of guy who thinks Katherine Bigelow should direct the next ‘Star Wars.’ I’ve said that out loud. To other men.” The writing here is not intended to be far-fetched or fantastic. Instead, the lines seem to mirror reality, where too often attempts to claim innocence involve discrediting women as insane or otherwise irrational.

Id.

109. Grabiens Staff, ‘Something’s Wrong with Her’: Christine Ford’s Students Savage Her in Reviews, GRABIENS NEWS (Sept. 17, 2018, 12:00 PM), <https://news.grabiens.com/story-somethings-wrong-her-christine-fords-students-savage-her-rev>.

110. Kathryn Augustine, *Stop Calling Women ‘Crazy’*, DAILY NW. (May 21, 2019), <https://dailynorthwestern.com/2019/05/21/opinion/augustine-stop-calling-women-crazy/>.

account, Ford was *confused* about the identity of her attacker and thus must be lying.¹¹¹ She was widely met by surprised commentary at the credibility of her testimony—particularly as compared to many observers’ low expectations—while conservative news media and the president continued to call her crazy or a liar.

The Harvey Weinstein trial is illustrative of the prototypical “he said, she said” sexual assault narrative. In early 2020, the influential Hollywood producer was found guilty of felony criminal sexual assault in the first degree and rape in the third degree.¹¹² While over 100 women came forward to publicly accuse Weinstein of sexual misconduct, the case ultimately focused on just six: the two women (Mariam Haley and Jessica Mann) who formed the basis of the charges as well as four others who testified as to Weinstein’s signature pattern of predatory behavior.¹¹³ Weinstein claimed the encounters were consensual, creating a case characterized as turning on a single question: “Do you believe the women?”¹¹⁴

The defense attacked the credibility of all of the complainants, raising questions about why they did not report the incident to police and remained in contact with Weinstein.¹¹⁵ The attack on Jessica Mann went further. Not only was her continued relationship with Weinstein put on the stand, but also her mental health. After a four-hour course of testimony and cross-examination accusing Mann of manipulating Weinstein, Mann had a panic attack and ended her cross examination.¹¹⁶ The next day, Weinstein’s defense asked Mann if she was ever diagnosed with “mixed depressed mood and anxiety disorder.”¹¹⁷ Mann acknowledged a “panic disorder” and some “suicidal thoughts,” as well as that she had been “depressed” and “engaged in self-harm.”¹¹⁸ Mann further denied being diagnosed with “borderline personality disorder” and—when asked, “Have you expressed anger?”—Mann snapped back, challenging, “Are you my psychiatrist?”¹¹⁹ Any potential diagnoses did not have direct relevance to proof she was raped. But, in the “he said, she said” context, even as here where there was

111. Rosario-Lebrón, *supra* note 9, at 30.

112. *Full Coverage: Harvey Weinstein Is Found Guilty of Rape*, N.Y. TIMES, <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html> (last updated July 14, 2020).

113. Amelia Schonbek, *The Complete List of Allegations Against Harvey Weinstein*, CUT (Jan. 6, 2020), <https://www.thecut.com/2020/01/harvey-weinstein-complete-list-allegations.html>.

114. Jan Ransom, *Key Question in Weinstein Trial: ‘Do You Believe the Women?’*, N.Y. TIMES, <https://www.nytimes.com/2020/02/06/nyregion/harvey-weinstein-rape-trial.html> (last updated Feb. 10, 2020).

115. Colin Dwyer, *Here’s What We’ve Learned So Far at Harvey Weinstein’s Trial*, NPR (Feb. 6, 2020, 12:29 PM ET), <https://www.npr.org/2020/02/06/802340962/heres-what-we-ve-learned-so-far-at-harvey-weinstein-s-trial>.

116. Lauren del Valle & Eric Levenson, *Harvey Weinstein Accuser Has a Panic Attack During Cross-Examination*, CNN, <https://www.cnn.com/2020/02/03/us/harvey-weinstein-trial-mann/index.html> (last updated Feb. 3, 2020, 10:23 PM ET).

117. Patricia Hurtado, *Weinstein Accuser: ‘I Want the Jury to Know He Is My Rapist’*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2020-02-04/weinstein-accuser-wants-the-jury-to-know-that-he-is-my-rapist> (last updated Feb. 4, 2020, 7:48 PM EST).

118. *Id.*

119. *Id.*

extensive corroborating testimony, Mann's mental health was used as a proxy for credibility, that Mann was "crazy" and thus untruthful, manipulating Weinstein for her career during the course of the relationship and now acting untruthfully in the course of her testimony.

Of course, those with mental illness may make false accusations that are unrelated to any underlying diagnosis. Or, severe psychosis may prompt false beliefs.¹²⁰ For example, in 2014, Robert Britton's fifty-year sentence for aggravated criminal assault was overturned, largely on evidence of his accuser's mental capacity.¹²¹ Several years prior to the alleged assault, Britton's accuser reported that a "nurse was throwing multiple babies out the window," that she had been burned while in the shower, and that her clothes had all been stolen and her furniture rearranged (all untrue).¹²² Less than two weeks before the alleged assault, she was again admitted to a hospital for increasing psychiatric symptoms that presented as hallucinations, delusions, and paranoia.¹²³ A jury ultimately agreed with the expert psychiatrist that she "wasn't able to interpret reality."¹²⁴

Where there is a risk of dishonest witness testimony, Britton's eighteen-year incarceration was a serious miscarriage of justice.¹²⁵ But the fact that Britton's accuser experienced severe psychosis does not automatically mean she was not assaulted. In fact, women with severe mental illness are almost six times more likely to be victims of sexual assault than the general female population.¹²⁶ This case is an extreme outlier. And yet, these biases—that women with mental illness are lying or hallucinating or paranoid—infect other cases and the testimony of other women, outsized from the actual incidence of false accusations. The intersection of gender, mental illness, and sexual violence is thus ripe for "triple discounting" of these women's credibility.

120. See Jessica Engle & William O'Donohue, *Pathways to False Allegations of Sexual Assault*, 12 J. FORENSIC PSYCH. PRAC. 97 (2012).

121. Maurice Possley, *Robert Britton*, NAT'L REGISTRY EXONERATIONS (Nov. 12, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4547>. Britton's accuser was born with cerebral palsy and suffered brain damage as an infant: "either mild retardation or right on the border of mental retardation;" seizures affecting her "memory, emotion, relation, self-control, and impulsivity;" and borderline personality disorder with psychotic symptoms that presented as hallucinations, delusions, or paranoia. *People v. Britton*, No. 1-11-3667, 2013 WL 3367138, at *7–8, 24 (Ill. App. Ct. June 28, 2013).

122. *People v. Britton*, No. 1-11-3667, 2013 WL 3367138, at *42 (Ill. App. Ct. June 28, 2013).

123. *Id.* at *46.

124. *Id.* at *43.

125. Outside of the question of his accuser's credibility, Britton's defense counsel provided a strikingly inadequate legal defense—in at least that sense, there was a clear miscarriage of justice. Dueling credibility discounts may have been in play during Britton's initial trial, pitting his race against her disability.

126. *40% of Women with Severe Mental Illness Are Victims of Rape or Attempted Rape*, UCL (Sept. 4, 2014), <https://www.ucl.ac.uk/news/2014/sep/40-women-severe-mental-illness-are-victims-rape-or-attempted-rape>.

II. TRIPLE DISCOUNTING IN PRACTICE: WOMEN WITH MENTAL ILLNESS REPORTING AND LITIGATING SEXUAL VIOLENCE

As demonstrated in Part I, gender, mental illness, and sexual violence have a long and sordid history that has left them inextricably entwined. To disentangle the three inevitably loses something, where merely stacking one suspect identity on top of the other may not capture the full effect.¹²⁷ Understanding the intersection between gender, mental illness, and sexual violence is critical to assess how these women experience the credibility discount and to better understand our biases. This Note pulls together often overlapping groups to critically examine how they operate together throughout the legal process—particularly where mental illness is easy to overlook and even easier to discount.

Credibility discounting operates throughout the life cycle of sexual violence litigation. It is not limited to only civil or only criminal court proceedings. In a novel contribution to the literature, this Part discusses three points at which credibility is discounted: (i) the decision whether to bring suit, (ii) ability to win, and (iii) damage determinations. The focus of this analysis is on discounting by fact-finders such as the judge or jury (as opposed to gatekeepers to the courtroom, such as law enforcement and prosecutors, discussed above in Part I.A).

A. DISCOURAGING POTENTIAL PLAINTIFFS FROM BRINGING SUIT AT ALL

The looming threat of credibility discounting weighs on the minds of potential plaintiffs deciding whether to pursue a claim. Women with mental illness experience credibility discounting throughout their lives.¹²⁸ They know what to expect. As a result, anticipating that their mental health history will be put under a microscope or maybe just not wanting to undergo the anxiety-inducing consequences, many women never pursue legal action.¹²⁹ Even if a case is brought, litigants may make strategic choices to exclude their mental health from the controversy. This could take a variety of forms: Plaintiffs could avoid alleging any sort of mental distress (and therefore not receive justice for the full extent of harm) or opt to constrain their cause of action to sex discrimination rather than include a claim of disability discrimination. Thus, there are an unknowable set of cases that will never get to court.

Compelled mental examinations, discussed in greater depth in Part II.C, illustrate the barriers that psychiatric scrutiny can pose. As one court explained, “If

127. Kimberlé Crenshaw first articulated the idea of intersectionality in the context of race and gender. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

128. See discussion *supra* Part I.B.2.

129. Therapeutic jurisprudence recognizes that the law can have therapeutic and anti-therapeutic consequences. A governing principle is that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness.” Michael L. Perlin et al., “*On Desolation Row*”: *The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, 24 TEX. J. ON C.L. & C.R. 59, 103–04 (2018).

the price of even having the opportunity to vindicate one's rights under Title VII in court necessarily included a six-hour-long forced psychological examination, many plaintiffs with viable cases might decline to pursue their claims."¹³⁰ Another court elaborated that permitting "mental examinations in every Title VII hostile work environment sexual harassment case would dissuade employees from [r]eporting . . . sexual harassment claims, . . . thereby undercutting the remedial effect intended by Congress in enacting Title VII."¹³¹ Many women may choose to stay silent rather than subject their mental health history to scrutiny in a suit they may never be able to win.

B. IMPAIRING PLAINTIFFS' ABILITY TO WIN

Credibility assessments are key to the fact-finding process. Especially in "he said, she said" credibility contests, the litigation outcome can hinge on witness credibility. Thus, women whose credibility is discounted by the factfinder are much less likely to prevail in court. Of course, mental health and witness demeanor are not entirely irrelevant. But, where those assessments are outsized from their unbiased relevance, the judicial process breaks down.

Evidence rules are designed to exclude such evidence that is more prejudicial than probative, but those systems do not always work.¹³² Criminal defendants have protections that allow certain evidence to come forward. Notably, criminal defendants have a right of cross-examination that extends to impeachment with relevant evidence "that might go to any *impairment or disability affecting the witness's credibility*."¹³³ But, "the mere fact that the State's testifying witness has in the recent past suffered or received treatment for a mental illness or disturbance does not, for this reason alone, cause this kind of evidence to become admissible impeachment evidence."¹³⁴ Instead, evidence of mental illness is proper to impeach witness credibility when "persistent disabling disturbance of his mental and/or emotional equilibrium, manifested through persistent maladjustment and more or less irrational, even bizarre behavior" could affect perception of the disputed events.¹³⁵

An example where evidence of prior mental illness was excluded illustrates the potential punch of certain prejudicial evidence. Hector Mario Gonzalez was convicted of indecency with a child and aggravated sexual assault of his stepdaughter where the court had excluded evidence of her mental state and prior threats against Gonzalez while being treated at a mental health facility.¹³⁶ Here, major

130. *Winstead v. Lafayette County Bd. of Cnty. Comm'rs*, 315 F.R.D. 612, 614 (2016).

131. *Id.* (quoting *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 531 (1988)).

132. For a comprehensive look at how credibility discounting is reinforced by the evidentiary system, see Rosario-Lebrón, *supra* note 9.

133. *Gonzalez v. State*, No. 05-09-00738-CR, 2010 WL 2817243, at *13 (Tex. App. July 20, 2010) (quoting *Virts v. State*, 739 S.W.2d 25, 29 (Tex. Crim. App. 1987)) (emphasis added).

134. *Id.* at *13–14 (quoting *Virts*, 739 S.W.2d at 30).

135. *Id.* at *14 (quoting *Virts*, 739 S.W.2d at 30).

136. *Id.*

depression disorder did not qualify as “persistent disabling disturbance” or otherwise “affect[] his perception of events.”¹³⁷ But others do, and those credibility determinations can be outcome-determinative.¹³⁸

The determination of whether mental illness “affected [someone’s] perception of events” or is otherwise manifested by “irrational” behavior is subject to stereotypes and biases about what a diagnosis may mean. Admitting that evidence puts it directly under the microscope. Especially in “he said, she said” credibility contests, mental illness can be heavily scrutinized. Credibility discounting may leach beyond limiting instructions or sow doubt and prejudice outsized from any probative value.¹³⁹

Women can try to fight these determinations, and corroborating evidence is a powerful tool to do so. After decades of tracking campus sexual abuse, Catharine MacKinnon noted: “[I]t typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person.”¹⁴⁰ Unfortunately, corroborating evidence is often unavailable.¹⁴¹ Even when it is, “credibility biases might diminish its value.”¹⁴² Impeachment of a victim as incredible risks irreparably tainting any evidence or witnesses associated with her.¹⁴³ In *Jenson*, discussed below in Part II.C, an entire class of women came forward against their employer, and yet the court still discounted their credibility and doubted their stories.¹⁴⁴ Winning “he said, she said” litigation can thus be an impossible task for women whose credibility is so discounted.

C. DISCOUNTING DAMAGES FOR PSYCHIATRIC INJURY

Winning a case—being told *we believe you*—is not the end. In a civil suit, the damages stage can be equally rife with credibility discounting. This discounting

137. *Id.* at *20–21; see also *Nobrega v. Commonwealth*, No. 0511-04-1, 2005 WL 1079527 (Ct. App. Va. May 10, 2005) (affirming the denial of a psychiatric evaluation of the victim of sexual abuse though it could have been “vital to defendant’s defense”).

138. See, e.g., *Wesley v. Campbell*, 779 F.3d 421, 432 (6th Cir. 2015) (“J.S.’s history of psychological problems supported an inference that he was a less reliable witness than a psychologically healthy child.”); *Boggs v. Collins*, 226 F.3d 728, 742 (6th Cir. 2000) (“[M]ental illness can indeed be relevant to a witness’s credibility.”); *Pascouau v. Martin Marietta Corp.*, 994 F. Supp. 1276, 1277–79 (D. Colo. 1998); *Sudtelgte v. Reno*, No. 90-1016-CV-W-6, 1994 WL 3406 (W.D. Mo. Jan. 3, 1994).

139. For example, jury instructions seem to be ineffective if they instruct, when evaluating credibility impeachment, that not believing one part of the testimony does not mean the jury cannot believe the rest. See Saul M. Kassir & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1053 (1997).

140. Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (quoted in Epstein & Goodman, *supra* note 9, at 433).

141. Epstein & Goodman, *supra* note 9, at 404.

142. Rosario-Lebrón, *supra* note 9, at 44.

143. *Id.*

144. *Jenson v. Eveleth Taconite Co.*, No. 5-88-163, 1996 U.S. Dist. LEXIS 17978 (D. Minn. Mar. 28, 1996).

primarily operates in three ways. First, alleging psychiatric harm can open the door to further prejudicial psychiatric evidence. Though technically only relevant for valuation of damages, the prejudicial effect may infect the rest of the case. Second, causation may be contested. Instead of the assault or harassment causing new or aggravated psychiatric symptoms, those symptoms were really the cause of the allegations and explain how the plaintiff misconstrued the defendant's innocuous behavior. Finally—where any psychiatric distress can be chalked up to pre-existing mental illness, or at least deflated by some amount—these causation disputes can manifest in a finding of no-liability or reduced damage valuation.

1. Alleging Damages for Psychiatric Injury Risks Infecting the Remainder of the Case

Victims of sexual assault or harassment frequently experience new or aggravated psychiatric symptoms. People who were victims of assault or harassment have an increased likelihood of developing anxiety disorders such as panic disorder and generalized anxiety disorder, post-traumatic stress disorder, somatoform disorders, depression, and others.¹⁴⁵ One survey of teenage girls who had been sexually assaulted found that within several months 80% had developed at least one mental health disorder, while 55% had developed two or more.¹⁴⁶

In tort, emotional or psychiatric harm may warrant recovery for “pure emotional harm” or “emotional distress.”¹⁴⁷ However, this is a gamble for plaintiffs because including psychiatric distress in the damages portion of a lawsuit risks exposing the plaintiff's psychiatric history to invasive review and distortion that can taint the credibility of the plaintiff throughout the lawsuit.

Plaintiffs may bring forward this evidence voluntarily to strengthen their case. For example, though psychological injury is no longer a requirement for sexual harassment claims, it is a supporting factor.¹⁴⁸ Evidence of mental distress can be helpful if used as proof of a hostile work environment. As explained in one harassment case, because “her PTSD and depression returned as a result of her alleged sexual harassment[,] [b]oth objectively and subjectively, then, there is a

145. See *Sexual Assault and Mental Health*, MENTAL HEALTH AM., <https://www.mhanational.org/sexual-assault-and-mental-health> (last visited Oct. 28, 2020); Margaret E. Johnson, “Avoiding Harm Otherwise”: Reframing Women Employees' Responses to the Harms of Sexual Harassment, 80 TEMP. L. REV. 743 (2007); THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 187 (2005); Jane Goodman-Delahunty & William E. Foote, *Compensation for Pain, Suffering, and Other Psychological Injuries: The Impact of Daubert on Employment Discrimination Claims*, 13 BEHAV. SCI. & L. 183, 188 (1995). See generally Ronner, *supra* note 10, at 134 (“Most sexual harassment offenses cause psychological harm.”).

146. Sophie Khadr et al., *Mental and Sexual Health Outcomes Following Sexual Assault in Adolescents: A Prospective Cohort Study*, 2 LANCET CHILD & ADOLESCENT HEALTH 654 (2018).

147. Smith, *supra* note 10, at 755–56.

148. *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993) (holding that a sexual harassment plaintiff need not suffer psychological injury in a Title VII action); see Ronner, *supra* note 10, at 134; Kent D. Streseman, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1288 (1995).

genuine issue of material fact as to whether Ms. Lyles was subjected to a severe or pervasive hostile work environment.”¹⁴⁹ Thus, mental illness was evidence of the harassment itself.

Even if a plaintiff does not wish to put her mental health on trial, under certain circumstances defendants may be able to compel mental examinations. Merely alleging some sort of emotional distress as compensatory damage does not justify a mental examination. Under Rule 35 of the Federal Rules of Civil Procedure, a plaintiff’s mental health must be “in controversy” and the defendant must show “good cause” for the examination.¹⁵⁰ Many courts have found examinations unwarranted in “garden-variety” sexual harassment suits.¹⁵¹ For example, supposed “hypersensitivity” to pornography in the workplace and the stress of a hostile work environment is insufficient.¹⁵² But alleging emotional distress or some mental injury *does* meet those requirements.¹⁵³ An allegation of a “specific mental or psychiatric injury or disorder” generally suffices,¹⁵⁴ though an order should not be done “automatically.”¹⁵⁵ Even where courts attempt to limit the relevance of such information to damage valuations (for example, where the psychiatric evidence is only relevant to the amount of harm), jury instructions can be ineffective.¹⁵⁶

2. Direction of Causation Between Sexual Violence and Psychiatric Injury May Be Disputed and Reversed

One common defense tactic is to dispute causation. That is, current or historical mental illness provides an alternative explanation for the alleged psychological

149. *Lyles v. District of Columbia*, 17 F. Supp. 3d 59, 69 (D.D.C. 2014) (internal citation omitted).

150. *See Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964) (establishing that the requirements of Federal Rule 35 are “not a mere formality”); *see also Flack v. Nutribullet, L.L.C.*, 333 F.R.D. 508, 513–14 (C.D. Cal. 2019); *Flores-Febus v. MVM, Inc.*, 299 F.R.D. 338, 340–41 (D.P.R. 2014).

151. *See Winstead v. Lafayette Cnty. Bd. of Cnty. Comm’rs*, 315 F.R.D. 612, 615 (N.D. Fla. 2016) (quoting *Turner v. Imperial Stores*, 161 F.R.D. 89, 97 (S.D. Cal. 1995)); *Bowen v. Parking Auth. of City of Camden*, 214 F.R.D. 188, 193 (D.N.J. 2003); *see also Vinson v. Superior Court*, 740 P.2d 404, 840 (Cal. 1987) (“A simple sexual harassment claim asking compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal would not normally create a controversy regarding the plaintiff’s mental state. To hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable proposition.”).

152. *See Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525 (M.D. Fla. 1988). Note that cases prior to the 1991 amendments to Title VII providing for punitive and compensatory damages had to meet slightly different standards under pendent state torts. *See U.S.C. § 1981a*.

153. *Schlagenhauf*, 379 U.S. at 119 (internal citations omitted); *see also Flack*, 333 F.R.D. at 513–14; *Flores-Febus*, 299 F.R.D. at 340; *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 553–54 (N.D. Ga. 2001); *Zabkowicz v. West Bend Co.*, 585 F. Supp. 635, 636 (E.D. Wis. 1984).

154. *See, e.g., Winstead*, 315 F.R.D. at 615; *see also Flores-Febus*, 299 F.R.D. at 340. Any “allegation of present, ongoing, or permanent mental injury or disorder” can also be important. *Bowen*, 214 F.R.D. at 195.

155. *See Winstead*, 315 F.R.D. at 615.

156. *See J. Alexander Tanford, The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 86–87 (1990) (outlining empirical research concluding “neither instructions to disregard nor limiting instructions were effective” and “admonishing jurors often provokes the *opposite* of the intended effect” (emphasis added)).

injury, rather than the defendant's conduct.¹⁵⁷ If a defendant can prove that the harm was inevitable—regardless of the defendant's conduct—then damages are mitigated or even eliminated.¹⁵⁸

Psychiatry does not have a settled view of causation easily translated into law.¹⁵⁹ As one psychiatrist commented: "Cause and effect relationships in psychiatry are more a product of speculation than scientific accuracy."¹⁶⁰ Because "psychiatry is itself value-laden . . . where an expert ties or bases a causation opinion and analysis on the criteria of a DSM diagnosis, jury determinations may reflect, unwittingly, the underlying value choices of that diagnosis."¹⁶¹ Commentators skeptical of these women's credibility take advantage of this uncertainty to warp the causation analysis, and some have even characterized the causation issue as a "trap" wherein "personality disorders may cause a person to interpret events in a distorted fashion and then seek to rationalize their own irrational or unreasonable behavior."¹⁶² That is, the alleged sexual violence did not cause psychiatric harm; instead, any symptoms of mental illness are merely evidence that the complained-of behavior never really occurred.

Difficulty determining causation thus opens the door to credibility discounting. In this context, latent bias against a diagnosis can manifest as a finding against the plaintiff on causation, slashing or nullifying the valuation of injury. *Pascouau v. Martin Marietta Corporation* illustrates many courts' concern that a disorder is the real cause of perceived harassment.¹⁶³ The court rejected a sexual harassment suit largely because of the plaintiff's history of mental illness, ignoring the expertise of Pascouau's psychiatrist that her current symptoms should be attributed to the harassment. The court dismissed the expert's opinion on the basis that the psychiatrist's "conclusion dismisses the profuse psychiatric history of the Plaintiff," as if to say historic mental illness necessarily controls the credibility of the plaintiff.¹⁶⁴ Instead, the court concluded that "the situation is reversed in that the disorders are causes of the allegations."¹⁶⁵ Rather than collect damages for mental injury caused by the harassment, the plaintiff was denied relief entirely.

Likewise, a misapplication of causation principles significantly curtailed damages in an infamous sexual harassment class action. The court in *Jenson v. Eveleth Taconite Company* refused to award full compensatory damages for the

157. Smith, *supra* note 10, at 755–56; *see also* JAMES J. McDONALD, JR. & FRANCINE B. KULICK, MENTAL AND EMOTIONAL INJURIES ON EMPLOYMENT LITIGATION, at xli (2d ed. 2001).

158. Smith, *supra* note 10, at 763; *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. K (Am. L. Inst., Proposed Final Draft No. 1 2005).

159. Smith, *supra* note 10, at 763–71.

160. *Id.* at 766–67 (quoting Eric H. Marcus, *Causation in Psychiatry: Realities and Speculations*, 1983 MED. TRIAL TECH. Q. 424, 428).

161. Smith, *supra* note 10, at 788.

162. Alexander D. del Russo & Jerome H. Poliacoff, *Mental Examinations in Federal Employment Litigation*, 78 FLA. BAR J. 60, 63 (2004).

163. 994 F. Supp. 1276 (D. Colo. 1998).

164. *Id.* at 1278–79.

165. *Id.* at 1279.

aggravation of plaintiffs' pre-existing conditions.¹⁶⁶ In its determination of individualized damage awards, the court—"misled by its erroneous application of principles of causation"—bluntly asserted, "[t]here's no accepted method for assigning weight to a particular stressor as a causative factor when [there is] more than one stressor," i.e. other emotional or psychiatric symptomatology.¹⁶⁷ For example, one plaintiff alleged that the workplace sexual harassment precipitated the development of PTSD.¹⁶⁸ Undergoing an exhaustive review of her mental health and personal history, the court concluded that prior speculation of psychosis, depression, bipolar disorder, and schizophrenia precluded a finding that the harassment caused a deterioration in her mental health.¹⁶⁹ Notably, the court disregarded contradictory expert testimony.¹⁷⁰ The court's causation analysis was condemned on appeal, but its error represents a larger problem when courts try to fix the direction of causation.¹⁷¹

3. Valuation of Psychiatric Damages May Be Discounted

Finally, compensatory damage awards for mental or psychological harm may be improperly discounted. Quantifying psychiatric injury can be extremely difficult and further complicated by apportionment to pre-existing conditions. The amount awarded is generally left to the discretion of the trier of fact and cannot be overturned absent passion or prejudice.¹⁷²

Where some preexisting condition makes the plaintiff particularly susceptible to injury (i.e. the "eggshell skull" plaintiff), the defendant is still liable for unforeseeable harm—but only the degree of exacerbation, not the entire injury.¹⁷³ Injury valuation may be disproportionately reduced for some plaintiffs with psychiatric conditions by improperly inflating the role of any pre-existing condition. When factfinders "find it difficult to believe a plaintiff's truthful description of their illness" and accordingly "evidence is discounted because he/she is 'too emotional' the measure of damages is also discounted and the true extent of suffering remains unacknowledged."¹⁷⁴

166. No. 5-88-163, 1996 U.S. Dist. LEXIS 17978, at *542 (D. Minn. Mar. 28, 1996).

167. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1295 n.11, 1297 (8th Cir. 1997). The court elaborated that "most of the claimants were subjected to outside stresses or trauma, or suffered from emotional problems, which could have had psychological impact and caused symptomatology." *Id.* at 1297.

168. *Jenson*, 1996 U.S. Dist. LEXIS 17978, at *124-93.

169. *Id.*

170. *Id.* at *145-55.

171. *Jenson*, 130 F.3d at 1292-95.

172. Kurtis A. Kemper, *Excessiveness or Adequacy of Damages for Wrongful Termination of At-Will Employee Under State Law*, 86 A.L.R. 5th 397, 397 (2014).

173. Smith, *supra* note 10, at 761. The "eggshell skull" rule for damages still applies in sexual harassment suits for pre-existing psychological conditions, even where courts have found the objective component of sexual harassment precludes application of the rule to liability, discussed *infra* Part III.A. *Id.* at 760-61 n.50; see, e.g., *Jenson*, 130 F.3d at 1294-95; *Poole v. Copland, Inc.*, 125 N.C. App. 235, 244 (N.C. Ct. App. 1997); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1155-57 (D. Kan. 2017).

174. Hayman, *supra* note 84, at 7-8.

If the causation of an injury is unclear (as discussed immediately above), apportionment among various causes reduces any compensation owed by the defendant and ultimately recoverable by the plaintiff.¹⁷⁵ If a defendant can prove that the harm was inevitable—regardless of their own conduct—then damages are mitigated or even eliminated.¹⁷⁶ Accurate apportionment of psychiatric harm can be more a guessing game than an exacting science.¹⁷⁷

Jenson, discussed immediately above, illustrates the dangers of apportionment.¹⁷⁸ Though overturned on appeal, employees' damages in a sexual harassment class action were improperly limited by attribution of plaintiffs' emotional injuries to prior life experiences and pre-existing mental illness.¹⁷⁹ The special master conducted an "exhaustive discussion of plaintiffs' personal backgrounds" in an apparent effort to demonstrate that the harm caused by the defendant was small compared to "past emotional harm caused by other emotional experiences."¹⁸⁰ Thus, even after plaintiffs win a civil suit, damages can be improperly reduced merely based on a history of mental health treatment or other record.

III. THE CASE OF TITLE VII SEXUAL HARASSMENT: THE UNREASONABLE PLAINTIFF

Sexual harassment is prohibited under Title VII of the Civil Rights Act where "conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment."¹⁸¹ As explained by the Supreme Court, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive."¹⁸²

This Part examines how meeting both the objective and subjective inquiries can pose a unique barrier for women with mental illness. Their credibility may be so discounted that their retelling of events is automatically unreasonable and cannot form the basis of an objective analysis. Likewise, their perception of events may fail the subjective inquiry if (i) the factfinder does not believe they are telling the truth or (ii) their mental illness prevents them from realizing behavior is harassment, aggravating the disproportionate sexual victimization of women living

175. Smith, *supra* note 10, at 755.

176. *Id.* at 760; see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. K (AM. L. INST., Proposed Final Draft No. 1, 2005).

177. See, e.g., *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 506–07 (1st Cir. 1996) (struggling to apportion damages for emotional distress in a sexual harassment suit where there were independent alternate causes beyond the defendant's behavior); *Carter v. Blakey*, No. 1:97CV00982, 1999 WL 1937226, at *4 (M.D.N.C. Sept. 1, 1999).

178. *Jenson v. Eveleth Taconite Co.*, No. 5-88-163, 1996 U.S. Dist. LEXIS 17978 (D. Minn. Mar. 28, 1996).

179. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1292–95 (8th Cir. 1997).

180. *Id.* at 1293.

181. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FACTS ABOUT SEXUAL HARASSMENT (2002), <https://www.eeoc.gov/fact-sheet/facts-about-sexual-harassment>.

182. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993)).

with mental illness. Finally, I propose an update to the reasonableness standard to better resolve these tensions.

A. OBJECTIVE INQUIRY

Under the objective prong of sexual harassment, “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”¹⁸³ Theoretically, whether a reasonable person would find an environment hostile is a completely separate question from whether this particular person subjectively found the environment to be hostile. In practice, however, the plaintiff is the primary witness and the basis from which factfinders view what is reasonable. Where mental illness is associated with unreasonableness, a plaintiff’s story is less likely to be considered representative of the “objective” person. This may sometimes be true. But, too often, whatever probative value exists is masking an unfairly prejudicial effect.

1. Title VII Does Not Protect the “Unreasonable” Plaintiff with Mental Illness

The eggshell skull rule entitles tort litigants to compensation even where their injuries are exacerbated by some pre-existing condition.¹⁸⁴ That is, defendants take plaintiffs as they find them. This rule applies in cases of mental—not just physical—injury. Discussed above in Part II.C, a plaintiff with some pre-existing mental illness may still recover damages for aggravation.

But courts have declined to extend the eggshell skull rule to liability (rather than damages) in sexual harassment cases where the plaintiff experiences mental illness, finding the objective component of the test to preclude such application.¹⁸⁵ In *Sudtelgte v. Reno*, the court held that, “[w]hen the Court [in *Harris v. Forklift*] ruled that ‘Title VII bars conduct that would seriously affect a reasonable person’s psychological well-being’ I believe it effectively disposed of claims based on abnormal sensitivity, whether or not the sensitivity was simply unusual or produced by mental illness.”¹⁸⁶ Where a victim of sexual assault experiences such psychiatric symptoms that they are not a “reasonable person” in the eyes of the court, those “particular disabilities” are not subject to Title VII.¹⁸⁷

183. *Harris*, 510 U.S. at 21 (1993).

184. For example, the eggshell skull rule has been applied in cases where a man died of a heart attack after his chest was bruised in a minor car accident, *Benn v. Thomas*, 512 N.W.2d 537 (Iowa 1994), and where a boy kicked another child in the shin across a classroom aisle, aggravating a microbial condition and resulting in the victim losing his entire leg, *Vosburg v. Putney*, 80 Wis. 523, 523 (1891).

185. *Smith*, *supra* note 10, at 760–61.

186. *Sudtelgte v. Reno*, No. 90-1016-CV-W-6, 1994 WL 3406, at *41–42 (W.D. Mo. Jan. 3, 1994) (quoting *Harris*, 510 U.S. at 22).

187. *Id.* at *42.

The objective standard aims to prevent Title VII from serving “as a vehicle for vindicating the petty slights suffered by the hypersensitive.”¹⁸⁸ Avoiding frivolous or mistaken claims (read: “unreasonable” or “crazy”) protects those defendants whose behavior is considered socially acceptable. Certainly, not all harassment victims are telling the truth or have experienced harassment that should necessarily rise to the level of a legal remedy.

Nevertheless, objectivity risks creating a false sense of neutrality and fairness. Applying a reasonableness standard entails some subjectivity on the part of the factfinder. No “reasonable person” is universal. The objective standard has been widely criticized along these lines, both in and out of the context of sexual harassment and mental illness.¹⁸⁹ In studies where participants judged whether a specific behavior is sexually harassing under an objective standard, participants’ own characteristics moderated the results rather than any unifying standard.¹⁹⁰

The image of the fabled reasonable person “render[s] invisible those who differ from the ‘average’ person it creates.”¹⁹¹ Traditionally a male standard, the de-gendered “reasonable man” conceals the exclusion of some groups and thus “reinforces the message that those who deviate from the norm are just that: deviants.”¹⁹² Despite the prevalence of mental illness, the mentally ill are certainly not encompassed by the reasonable person.

Because reasonableness is necessarily undefined, an objective standard fixates on the plaintiff’s reaction rather than the defendant’s conduct. Plaintiffs must then try to shoehorn themselves into the “reasonable victim.”¹⁹³ This can be an impossible fit for those with serious mental illness. However characterized, a “reasonableness standard” assures that the plaintiff will be attacked and that the battle will be focused on her behavior, her reactions, and her work performance—not on the alleged harasser’s conduct.¹⁹⁴

2. Mental Illness Makes Reasonable Claims Appear Unreasonable

The objective test legitimizes discounting the credibility of harassment victims. Rather than a factfinder saying, “I do not believe you [because you are psychotic or you are a woman or I do not think harassment is real],” this distrust can be reframed as “I do not believe a reasonable person would react as you have.”

188. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON *HARRIS V. FORKLIFT Sys., Inc.* (1999) (citing *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984)), <https://www.eeoc.gov/policy/docs/harris.html>.

189. See, e.g., Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151 (1994); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

190. Richard L. Wiener & T.C. Vardsveen, *The Objective Prong in Sexual Harassment: What Is the Standard?*, 42 L. & HUMAN BEHAVIOR 545 (2018).

191. Ehrenreich, *supra* note 189, at 1212–13.

192. *Id.* at 1213.

193. Dolkart, *supra* note 189, at 205.

194. *Id.*

Sudtelgte v. Reno illustrates courts' distrust in stories of sexual harassment that are voiced as affected by psychotic symptoms.¹⁹⁵ Note that, while the case is an early example, it is used here because of the court's willingness to be explicit about its attitudes toward mental illness, not that those attitudes have disappeared in the intervening years. Sudtelgte lost her Title VII case because the judge viewed her as unreliable. Made explicit, the judge found: "Plaintiff's current perceptions of present and past events are grossly unreliable, probably because of her mental illness."¹⁹⁶ So, while Sudtelgte subjectively experienced harassment, that subjective experience was so tainted by mental illness as to be objectively unreasonable. The court's opinion devoted extensive real estate to commentary on the unreliability and incredibility of the plaintiff. For example, the court responded to Sudtelgte's allegation of attempted assault¹⁹⁷ by highlighting that she "never reported this allegation to anyone" and adding ". . . this sexual incident—if it occurred—. . ."¹⁹⁸ In response to Sudtelgte's complaint of embarrassing, unauthorized photos, the court commented that the "significance of the incident is in *plaintiff's reaction*."¹⁹⁹ Though the objective component of whether a workplace is hostile theoretically should focus on the defendant's behavior, here the microscope was entirely focused on the plaintiff's mind.

There certainly was a scientific basis to question the reliability of Sudtelgte's perception of events. Her psychiatrist acknowledged, "all I can do is tell you what she tells me . . . I don't know how much was done to her and how much, you know, were delusional."²⁰⁰ But a need for due diligence in investigating claims does not necessarily mean the harassment never occurred and should be so easily dismissed. Many of Sudtelgte's claims appeared serious though they were glossed over by the court. These included an "attempt to rub her crotch"; a pattern of sexual jokes and comments; and a series of threatening and demeaning notes calling her a "slut," questioning her sexual orientation, and stating "I hate women."²⁰¹

These legitimate claims were buried under a mountain of more frivolous ones. Given her diagnosed paranoia, Sudtelgte perceived more innocuous behavior as harassment and lacked the judgment to exclude these incidents from her suit.²⁰² As a result, the credibility of all of her claims was irreparably tainted. Regardless of whether the court ultimately came to the correct decision, the derisive tone and blanket assumption that the plaintiff misperceived events suggest no one with

195. No. 90-1016-CV-W-6, 1994 WL 3406 (W.D. Mo. Jan. 3, 1994).

196. *Id.* at *1.

197. "Plaintiff claims that a priest 'physically approached' her in the chapel at the FBI Academy by moving his leg in between her legs and trying to rub her crotch." *Id.* at *2.

198. *Id.* at *2.

199. *Id.* at *2 (emphasis added).

200. *Id.* at *14.

201. *Id.* at *2-6.

202. *Id.* at *1-2. For example, she repeatedly bemoaned those coworkers asking to borrow her things or requesting she buy beer, further labeling those incidents harassment based solely on the gender of the parties involved. *Id.*

Sudtelgte's diagnosis and symptoms—whatever story they had to tell—could have received an unbiased trial.

Courts frequently discount credible claims by fixating on those that seem to be implausible delusions. *Jenson*, discussed above in Part II, is illustrative.²⁰³ Anderson testified that someone tried to kill her on the job.²⁰⁴ Unabashedly incredulous, the court found it “difficult to believe that a violent, premeditated attempt at homicide was not noticed by the other workmen, was not reported by someone, and was unknown to other members of the crew.”²⁰⁵ Going on to credit the incident to Anderson's history of mental illness, the court maintained that she was “suffering from hallucinations, dissociative episodes and delusions. Her charge is incredible, and, if not a fabrication, is a delusion.”²⁰⁶ The court's lengthy investigation of Anderson's less credible claims masked the validity of the suit as a whole. Overturning the lower court, the Eighth Circuit ultimately described the sexual harassment in *Jenson* as “egregious” under “[a]ny fair reading of the record.”²⁰⁷

Sudtelgte and Anderson are not alone. In *Pascouau v. Martin Marietta Corporation*, the sexual harassment claim was dismissed because plaintiff Pascouau was “not a credible witness.”²⁰⁸ Pascouau had been diagnosed with two psychiatric disorders: mixed personality disorder and recurring major depression, as well as some symptoms of borderline personality disorder. The court believed that the “incidents Plaintiff related were characterized by misinterpretations of events and interactions with fellow employees that were far more intense than would be interpreted by a reasonable person.”²⁰⁹ Once again, the objective reasonableness of a plaintiff's claims were discounted by mental illness and the effect of that illness (perceived or otherwise) on the subjective report.

B. SUBJECTIVE INQUIRY

Under the subjective prong, “if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.”²¹⁰ This analysis focuses on the plaintiff's perception of the harassment at the time it occurred.²¹¹ While this analysis is analytically separate from what is reasonable, biases pervade what factfinders believe to be true.

203. *Jenson v. Eveleth Taconite Co.*, No. 5-88-163, 1996 U.S. Dist. LEXIS 17978 (D. Minn. Mar. 28, 1996).

204. *Id.* at *165–67.

205. *Id.* at *166.

206. *Id.* at *166–67.

207. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1291 (8th Cir. 1997) (summarizing the evidence of sexually explicit graffiti, unwelcome touching, and comments that women belonged at home with their children).

208. 994 F. Supp. 1276, 1282 (D. Colo. 1998).

209. *Id.* at 1278–79.

210. *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993).

211. *See Hulsey v. Pride*, 367 F.3d 1238, 1248 (11th Cir. 2004).

First, plaintiffs who are deemed incredible and dishonest may fail the subjective test if the factfinder does not believe they are accurately reporting their subjective experience. Particularly where one witness subjectively perceives a workplace to be hostile while another did not, courts must make a credibility judgment.²¹² As discussed above in Part I, women more than men, as well as those with mental illness, risk being stereotyped as liars. Moreover, mental illness may affect a witness's demeanor in such a way as to suggest they are lying or otherwise unreliable.²¹³

As one example, a sexual harassment plaintiff "suffered hallucinations, disassociated periods, loss of temporal orientation, a tendency to overreact, delusions and difficulty in distinguishing between dreams and reality."²¹⁴ Her demeanor, including signs of "depression, shakiness, confusion and agitation," clearly damaged her credibility in the eyes of the court. Ultimately, her testimony was deemed "incredible, and, if not a fabrication, is a delusion."²¹⁵

Second, those with mental illness may be less likely to realize that behavior the "reasonable person" would consider harassment is in fact harassment. Sexual harassment itself is a stressor associated with certain increased psychiatric symptoms and coping mechanisms such as anger and self-doubt that could prevent a victim from perceiving the hostility of the workplace during the period of employment.²¹⁶ Epstein explains that "survivors develop a sense of self-doubt, as credibility discounting takes effect: 'They are twisting my story, casting doubt, maybe I didn't remember it right, maybe it didn't happen as I think it did. I must be crazy.'"²¹⁷

Though outside the scope of this Note, a stark example are those with intellectual disabilities who are sexually abused more than seven times as often as those without disabilities (twelve, for women) and yet may be less likely to subjectively perceive an environment as hostile.²¹⁸ *Saucier* is emblematic.²¹⁹ The trial court ruled that the plaintiff's "failure to timely report [the sexual harassment] to some level of authority

212. See Catherine M. Maraist, *Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required by Harris v. Forklift Systems, Inc.*, 57 LA. L. REV. 1343, 1356 (1997).

213. See *supra* Part III.A.2.; see also Epstein, *supra* note 8, at 305–07 (describing how common psychological reactions to trauma can affect survivor demeanor and thus damage credibility).

214. *Jenson v. Eveleth Taconite Co.*, No. 5-88-163, 1996 U.S. Dist. LEXIS 17978, at *128 (D. Minn. Mar. 28, 1996).

215. *Id.* at *125, 167.

216. See Maraist, *supra* note 212, at 1367–68; Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC. MENTAL HEALTH 89 (2011).

217. Epstein, *supra* note 8, at 323.

218. See Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (Jan. 8, 2018, 5:00 AM ET), <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>; cf. *Saucier v. McDonald's Rests. of Mont.*, 179 P.3d 481, 494–98 (Mont. 2008) (overturning the trial court's determination that a woman with an IQ of 57's failure to report sexual harassment by her boss at McDonald's was unreasonable and allowing redress where the plaintiff could not subjectively view the conduct as harassment).

219. *Saucier v. McDonald's Rests. of Mont.*, No. DV 03-0279, 2005 Mont. Dist. LEXIS 1814 (Mont. Dist. July 13, 2005), *rev'd on other grounds*, 179 P.3d 481 (Mont. 2008).

at McDonalds . . . is construed by this Court to be unreasonable,”²²⁰ despite her “extremely limited capacity” to appreciate the gravity of the conduct due to her severe mental disability.²²¹ There is a bitter irony where those with disabilities are much more likely to be targeted and yet less able to pursue their claims.

The Supreme Court’s rejection of “actual injury” in favor of a subjective test in many ways creates an easier standard for plaintiffs to satisfy. But those with mental illness must still overcome the pervasive discounting of their credibility.

C. RETHINKING THE REASONABLENESS STANDARD

Credibility discounting in the courtroom reflects entrenched societal attitudes toward gender, mental illness, and sexual violence. As a result, there is no easy solution to the problem of credibility discounting. This Note suggests some of what *can* be done within the judiciary or in the context of a single woman’s claim.

The sexual harassment reasonableness standard should be revamped to better represent what women with mental illness actually experience as hostile. The Supreme Court has dictated that the objective standard be judged from the “perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”²²² Those circumstances include “the social context in which [the] behavior occurs and is experienced by [the] target.”²²³ So, factors like race or gender may be relevant so far as they inform the social context of the harassment. The Court’s mandate, however, has not been effectively extended to mental illness.²²⁴ To many, psychiatric disorders are antithetical to reasonableness, so the divide between the two persists.

I propose consciously incorporating the harassment victim’s experience of mental illness into a contextualized reasonableness standard.²²⁵ Rather than divorcing what is reasonable from the experiences of real women, this standard situates the

220. *Id.* at *10.

221. *Saucier*, 179 P.3d at 487–88. Saucier’s neuropsychologist reported that “‘Saucier’s responses resulted in a Full Scale IQ of 57’ which ‘places her overall intellectual skills in the Extremely Low range of intellectual functioning or below the first percentile when compared to a group of her same aged peers.’” *Id.* at 485.

222. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998).

223. *Id.* The social context “may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993).

224. *See* Mata, *supra* note 38, at 809 (finding, after *Harris*, the “effect on the complainant’s psychological well-being would only be ‘relevant to determining whether the plaintiff [subjectively] found the environment abusive’”).

225. Others have advocated that the objective standard incorporates psychological context, particularly when psychological injury was still a required element of harassment claims. For example, the Massachusetts Superior Court adopted the “reasonable woman” standard in acknowledgement that “[t]he standards for assessing women’s psychological harm due to harassment must begin to reflect women’s sensitivity to behavior once condoned as acceptable.” Jane Goodman-Delahunty, *Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harassment Cases*, 5 PSYCHOL. PUB. POL’Y & L. 519, 528 (1999) (quoting *Bowman v. Heller*, Civ. A. No. 90-3269, 1993 WL 761159, at *8 (Mass. Super. July 9, 1993)) (internal citations omitted).

reasonable person in the shoes of the victim, with the perspective of how she experiences mental illness. Without converting the objective standard into a subjective one, this standard merely asks that mental illness and reasonableness not be treated as mutually exclusive. Unlike in the early 1990s, when scholars last proposed a similar contextualized standard (though omitting mental illness), today this contextualized reasonableness standard is little different than what the Supreme Court already requires by looking at “all the circumstances.”²²⁶ The standard just asks that mental illness be one of them—not excluded from the ambit of reasonableness. Ultimately, a greater focus on the victim’s perspective creates space for a diversity of experiences while shifting the spotlight toward the conduct of the harasser.²²⁷

Take, for example, a hypothetical woman who is experiencing anxiety and paranoia due to harassment at work. Maybe she reports symptoms of PTSD. Rather than discount her story as an exaggeration—merely a product of her own anxiety, not a reliable retelling in the mind of the “reasonable” person—the contextualized reasonableness standard asks the factfinder to avoid this impulse. This standard does *not* ask factfinders to automatically accept as true reports of harassment that are purely a delusion or otherwise false. Instead, factfinders should center the inquiry on the conduct of the alleged harasser and what is unreasonable given all the circumstances—including mental illness.

A contextualized standard resolves some of the problems created by the existence of a reasonableness requirement while conforming to existing Court guidelines. Commentators have suggested individualized or more tailored reasonableness standards in sexual harassment suits.²²⁸ For example, Sixth Circuit Judge Keith advised that courts adopt a “reasonable victim” or “reasonable woman” standard, and some courts took up the proposal.²²⁹ Scholars, however, have criticized the approach, largely for the implicit suggestion that not only is the reasonable woman different from the reasonable man but that, because the reasonable man remains the norm, women are marginalized as hypersensitive, prudish, and vulnerable.²³⁰ Others ask “which women?”²³¹—concerned that centering on the “reasonable woman” risks

226. *Oncale*, 523 U.S. at 81.

227. See Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 153 (1994) (“An individualized standard will also credit the diverse accounts of sexual harassment’s victims. This standard is sensitive to multiple perspectives.”).

228. See, e.g., Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 477–78, 482–83 (1997) (suggesting that defendants should be judged against a “respectful person” standard and outlining other proposals for the “reasonable person of the same gender as the victim,” the “reasonable person of the same gender and race or color as the plaintiff,” the “reasonable person with the defining traits of the accuser,” the “reasonable target,” and others); Dolkart, *supra* note 227, at 193–223 (advocating for an individualized standard or, in the alternative, a contextualized reasonableness standard).

229. *Rabidue v. Osceola Refin. Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting); see Dolkart, *supra* note 227, at 199–200 (citing *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991)).

230. See, e.g., Dolkart, *supra* note 227, at 200–04. Though there is evidence that gender affects how people perceive harassing conduct, pointing to the importance of context more generally. *Id.* at 186.

231. Lisa J. Bernt, *Finding the Right Jobs for the Reasonable Person in Employment Law*, 77 UMKC L. REV. 1, 6 n.35 (2008).

excluding the “reasonable woman of color,” “reasonable lesbian,” or “reasonable blue-collar woman.”²³²

Others suggest reasonableness should be abandoned in favor of a purely individualized inquiry.²³³ The rationale includes, first, that reasonableness is a flawed proxy for objectivity.²³⁴ Reasonableness is only given meaning from whatever the factfinder understands it to be. Second, some question why ideas from tort law—where reasonableness mediates norms of behavior and what does or does not merit compensation—are imported into sexual harassment law where the goal is equal employment opportunity even when there is no potential for financial relief.²³⁵ Similar criticism is raised where the dual objective-subjective standard is applied, not just in sexual harassment suits, but to self-defense and “mistaken belief in consent” criminal cases, questioning whether the “reasonableness test in *Harris* put[s] the victim on trial.”²³⁶ Finally, reasonableness is a particularly poor fit with sexual harassment law given ever-evolving social standards around what is reasonable while legal precedent remains rooted in the past.²³⁷

Mental illness, however, is much more likely to be cited as a reason *not* to have an individualized standard than as a reason we should. The reasonableness requirement has survived largely out of concern that employers should not be unfairly subjected to frivolous claims by idiosyncratic plaintiffs.²³⁸ While that fear is overblown, it is most salient as applied to women with mental illness considered inexorably unreasonable. Other areas of the law demonstrate similar patterns. For example, scholars advocating for a contextualized reasonableness standard for self-defense specifically carve out as irredeemably unreasonable the

232. Bernstein, *supra* note 228, at 473. These are far from the only criticisms of the standard. *See id.* at 472–77.

233. *See, e.g., id.* at 482–83; Dolkart, *supra* note 227, at 193–216.

234. *See* CATHARINE A. MACKINNON, *SEX EQUALITY* 891–92 (2d ed. 2007); Bernt, *supra* note 231.

235. *See* Bernt, *supra* note 231.

236. *See* MACKINNON, *supra* note 234, at 892. In criminal law, imperfect self-defense (where a defendant subjectively but unreasonably believes their actions to be necessary) may still mitigate any criminal penalties. No such flexibility exists for sexual harassment plaintiffs.

237. *See* Joan C. Williams et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 145 (2019). As one example, Williams recounts the 2000 sexual harassment suit *Brooks v. City of San Mateo*. *Id.* at 143. While working as 911 dispatchers, the defendant touched the plaintiff's stomach, commenting on its “softness and sexiness,” before she “forcefully pushed him away.” *Id.* Judge Kozinski speculated that the defendant “[p]erhaps [look] this as encouragement” before the defendant proceeded to reach under her sweater to fondle her bare breast. *Id.* The plaintiff again pushed the defendant away and told him he had “crossed the line,” though he merely responded that she did not have to worry about cheating on her husband because he would “do everything.” *Id.* Despite both the brazen nature of the harassment and corroboration by “at least” two other coworkers who experienced similar behavior, the Ninth Circuit ruled that the harassment was not sufficiently severe to trigger Title VII. *Id.*

238. *See* Bernt, *supra* note 231, at 6 (quoting MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 21 (2003)) (“The objective standard purportedly ‘eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.’”).

“reasonable delusional paranoid schizophrenic” or “reasonable sociopath.”²³⁹ But the “reasonable schizophrenic” is no oxymoron. Sure, paranoid delusions are unreasonable, but that does not mean the person always is. Given the ubiquitous discounting of women’s credibility who experience mental illness, an individualized standard may be a step too far for many courts. Instead, a contextualized reasonableness standard sits somewhere in the middle. A standard that consciously incorporates how women experience mental illness can best balance those concerns against the reality of the credibility discount.²⁴⁰

Although a contextualized standard has shortcomings, they are not insurmountable. Namely, the ability for factfinders to accurately contextualize someone else’s experience may be limited. We tend to be very bad at judging how we would react if in the position of someone who has been sexually harassed.²⁴¹ This is doubly true for our inability to understand how others experience mental illness. Those belonging to groups less likely to be victims of harassment are particularly poor judges of what is reasonable, a troubling phenomenon given the largely male demographic makeup of the judiciary.²⁴²

Educational efforts targeted at the judiciary and gatekeepers to the court system can help uproot those credibility discounts grounded in misunderstanding and better situate a woman’s mental illness in context.²⁴³ Epstein and Goodman suggest that training could help judges, police officers, and prosecutors better recognize how mental health is linked to sexual violence and how symptoms of mental illness may falsely implicate credibility. When doubt inevitably surfaces, these actors can be better equipped to probe for more facts and an understanding of the woman’s perspective rather than automatically discount credibility. Judges can confront credibility discounting head on, asking, for example:

239. See Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman*, 81 N.C. L. REV. 211, 293 (2002).

240. While some have proposed that a contextualized reasonableness standard be an affirmative defense rather than an element of sexual harassment, this approach has been foreclosed by the Court’s insistence on a dual objective-subjective standard. See Dolkart, *supra* note 227, at 193–216.

241. Research supports that actual victims of sexual harassment behave very different than those asked how they would respond in a research setting. See L. Camille Hébert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 736 (2007) (citing Louise F. Fitzgerald et al., *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 119 (1995)).

242. See *id.* at 736–37. In 2019, over 73% of the federal judiciary was male. Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/>. Even more concerning given the racial component of who is sexual harassed, almost 60% was both male and white. *Id.*; see Tanya K. Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER, RACE & JUST. 183, 184 (2000).

243. Epstein & Goodman, *supra* note 9, at 453–54. But, the effectiveness of judicial education on bias and sexual harassment in general is mixed. See Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 425–27 (2019); DEBORAH L. RHODE, CHARACTER: WHAT IT MEANS AND WHY IT MATTERS 90 (2019) (finding more hopeful evidence on the effectiveness of judicial education on racial bias).

One of the most basic things a judge has to do is to decide whose story to believe. In this case, like so many others, each of you is telling me a different story. Can you help me see the reasons I should credit, or believe, your side of the story, as well as the reasons I should not credit the story told by the other party?²⁴⁴

In that vein, Epstein and Goodman further propose that court watch programs be expanded to hold judges accountable for these efforts.²⁴⁵

Likewise, jury instructions should be crafted to directly address bias when applying a contextualized reasonableness standard. Model instructions to assess witness credibility ask jurors how the witness behaved while testifying, how well they were able to perceive events, and the accuracy of the witness's memory—all of which potentially implicate mental illness.²⁴⁶ Few instructions address mental illness explicitly, and those that do merely ask jurors to “avoid bias, conscious or unconscious, including bias based on . . . gender or disability.”²⁴⁷ Rather than tell jurors to avoid “unconscious bias” that they do not realize they have, more effective instructions should explain *why* credibility is unfairly implicated and how to counteract those beliefs.

These instructions could take on two distinct characters. First, generic instructions advising jurors to resist mental illness's general power to discredit could help combat the overarching stigma of mental illness, particularly in the context of sexual violence. Alternatively, more specific medical expertise could provide individualized insight into how this specific person and this specific mental illness may operate.

While these educational efforts are not a cure-all, they would make some meaningful impact on the credibility discount if factfinders are better able to understand the experiences of those with mental illness. The impact could be felt beyond the courtroom. Given that most cases never go to trial, a change in legal standards could have reverberating effects on settlement negotiations and the larger calculus of whether a woman is willing to bring a case at all. While the problems of credibility discounting cannot and should not be isolated to the judicial system, the courtroom is a good place to start.

CONCLUSION

*“A little bit nutty and a little bit slutty.”*²⁴⁸

Anita Hill's experience testifying in the Congressional confirmation hearings for Supreme Court Justice Clarence Thomas is often posited as a cautionary

244. Epstein & Goodman, *supra* note 9, at 456.

245. *Id.* at 457.

246. *See, e.g.*, Ninth Cir. Jury Instructions Comm., Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit 8 (2010 ed.).

247. *See, e.g.*, 6A Wash. Prac., Washington Pattern Jury Instructions—Civil WPI 360.02 (7th ed. 2019).

248. David Brock, *The Real Anita Hill*, 25 AM. SPECTATOR, Mar. 1992, at 18.

tale.²⁴⁹ There, the convergence of race, gender, unsubstantiated mental illness, and claims of sexual harassment undermined her credibility among Senators and the American people.²⁵⁰ Thomas' supporters maligned her credibility, branding her as "a little bit nutty and a little bit slutty."²⁵¹ Senate debate and news coverage pointedly speculated that Professor Hill suffered from delusions and erotomania that necessitated her account must be fabricated.²⁵² Their efforts succeeded.

We like to believe that almost thirty years later things have changed. But, once again, in 2018 a professor stood up and told Congress her story of sexual misconduct by a Supreme Court nominee and, once again, she was discredited and discounted.

There is a baffling irony that #MeToo has sparked a backlash toward the credibility of women.²⁵³ Evidence suggests that more people view sexual harassment as a problem today.²⁵⁴ But, a year into the #MeToo movement, the American public felt a greater distrust toward victims and further downplayed the gravity of sexual violence.²⁵⁵

Professor Ford remained silent for almost forty years, only speaking out after she felt her "civic responsibility" to "outweigh[] [her] anguish and terror."²⁵⁶ Her reluctance resonated with others, and the hashtag #WhyIDidntReport exploded on social media in response to her testimony. Efforts to discredit victims—where women continue not to be believed and their claims dismissed as lies—are effective in further silencing these women. Rather than listen, we inflict harm

249. See, e.g., Epstein & Goodman, *supra* note 9, at 401, 460 n.261; Smith, *supra* note 10, at 750–51.

250. According to polling, even more Americans doubted the accusations after Hill's testimony. Elizabeth Kolbert, *The Thomas Nomination; Most in National Survey Say Judge Is the More Believable*, N.Y. TIMES (Oct. 15, 1991), <https://www.nytimes.com/1991/10/15/us/the-thomas-nomination-most-in-national-survey-say-judge-is-the-more-believable.html>.

251. Brock, *supra* note 248.

252. See, e.g., Felicity Barringer, *The Thomas Nomination; Psychologists Try to Explain Why Thomas and Hill Offer Opposing Views*, N.Y. TIMES (Oct. 14, 1991), <https://www.nytimes.com/1991/10/14/us/thomas-nomination-psychologists-try-explain-why-thomas-hill-offer-opposing-views.html>.

253. Rosario-Lebrón, *supra* note 9, at 55.

254. Meredith Conroy, *Are Americans More Divided on #MeToo Issues?*, FIVETHIRTYEIGHT (Apr. 16, 2019, 6:01 AM), <https://fivethirtyeight.com/features/are-americans-more-divided-on-metoo-issues/>.

255. *After a Year of #MeToo, American Opinion Has Shifted Against Victims*, ECONOMIST (Oct. 15, 2018), <https://www.economist.com/graphic-detail/2018/10/15/after-a-year-of-metoo-american-opinion-has-shifted-against-victims>. The survey reported:

The share of American adults responding that men who sexually harassed women at work 20 years ago should keep their jobs has risen from 28% to 36%. The proportion who think that women who complain about sexual harassment cause more problems than they solve has grown from 29% to 31%. And 18% of Americans now think that false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished, compared with 13% . . .

Id.

256. Emma Brown, *California Professor Christine Blasey Ford, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018, 10:28 PM), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html.

(that you are powerless,²⁵⁷ worthless,²⁵⁸ and should doubt the truth of your own experience²⁵⁹) on those who try to tell the truth. Gaslighting women, convincing them they “must be crazy,” has particular power when society already tells them that they are.

This Note complicates the narrative of the woman violated by adding an even less credible and, frankly, much uglier boogey(wo)man: the woman living with mental illness. Despite her relative absence from academic scholarship, she is no anomaly. Almost a quarter of women have some mental illness, and just over one in twenty women live with a serious mental illness.²⁶⁰ Society says this woman might be delusional or paranoid or even just lying, and she is certainly not to be trusted.

Credibility discounting does not have an easy solution, but a first step is challenging those biased beliefs that unfairly discredit. Epstein and Goodman call for a “shift away from an automatic, uninformed disbelief of women’s stories—to begin, in other words, to distrust one’s own distrust.”²⁶¹ Likewise, Karen Jones proposes a “self-distrust rule”: Allowing “the presumption against . . . believing an apparently untrustworthy witness [to] be rebutted when it is reasonable to distrust one’s own distrust or [one’s own] judgments of implausibility.”²⁶²

This Note calls for a recognition of mental illness as another element in the discrediting of women’s stories of sexual assault and harassment. Distrusting one’s distrust demands that we ask not “what a plaintiff *should* experience, but what a plaintiff *does* experience.”²⁶³ Sexual harassment law offers one approach, recognizing that the objective, reasonable person does not always align with the subjective experience. In practice, however, both subjective and objective inquiries leave room for bias and prejudice. What is “reasonable” should be put in a context that consciously incorporates women’s experiences of mental illness.

Distrusting one’s distrust does not mean that all stories of sexual violence must be automatically believed.²⁶⁴ Instead, listeners need only remain open-minded and avoid the opposite reflex to automatically discredit those women and their stories.

257. See Epstein & Goodman, *supra* note 9, at 449 (“I have taken this enormous risk to share my most vulnerable experiences in public—and they can’t/won’t hear/see me. I can’t find the right words to make them help me. There is nothing I can do.”).

258. *Id.* (“Maybe they believe my story and still—if no one does anything in response to my story, then my experience must not have worth or merit. My pain doesn’t matter. I myself must have no value.”).

259. *Id.* (“They are twisting my story, casting doubt, maybe I didn’t remember it right, maybe it didn’t happen as I think it did. I must be crazy.”).

260. *Mental Illness*, NAT’L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> (last updated Jan. 2021).

261. Epstein & Goodman, *supra* note 9, at 454.

262. JONES, *supra* note 24, at 164 (quoted in Epstein & Goodman, *supra* note 9, at 454).

263. Hayman, *supra* note 84, at 7.

264. “The existence of mental illness in a complainant does not negate the possibility of her having been subjected to sexual harassment, nor does it prove that harassment occurred (e.g., in the case of posttraumatic stress disorder). Such nuances may be lost on the triers of fact, however; and even true facts regarding a complainant’s or defendant’s mental health may be presented in ways that unfairly prejudice one party’s side in a dispute.” Patricia R. Recupero, *The Notion of Truth and Our Evolving Understanding of Sexual Harassment*, 46 J. AM. ACAD. PSYCHIATRY & L. ONLINE 23, 28 (2018).

Even in cases where the factfinder eventually determines that a woman is incredible or her story is implausible, reevaluating unfair presumptions against these women's credibility takes a step closer toward greater social and procedural justice.

Women continue to come forward to tell their #MeToo stories. Many experience mental illness. #TimesUp that we start believing them.²⁶⁵

265. The Time's Up movement was born out of #MeToo to call for action against sexual assault and harassment in the workplace: "The clock has run out on sexual assault, harassment and inequality in the workplace. It's time to do something about it." TIME'S UP UK, <https://www.timesupuk.org/> (last visited Feb. 24, 2021).