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## YALE LAW & POLICY REVIEW

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### The Mythology of the Three Liars and the Criminalization of Survival

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*There is nothing new about the legal system discounting the credibility of women, people of color, and people behind bars. Historically, the mythology of these three “liars” has given rise to evidentiary rules that equate female chastity with truthfulness, and Blackness (or its proxy—a criminal record) with dishonesty. Examples include the doctrine of prompt complaint and laws barring Black people from testifying against whites. In recent history, the law has steadily retreated from rules endorsing explicit bias. But disbelief based on race and gender bias persists even in unlikely places, such as progressive legislative reform.*

*This Article explores the problem of the “credibility discount” in New York’s Domestic Violence Survivors Justice Act (DVSJA). Passed in 2019, the DVSJA allows for reduced sentences for criminalized survivors of domestic violence whose abuse was a significant contributing factor to their offense. This groundbreaking law serves as a blueprint for reformers nationwide. But it also contains a pleading requirement that sanctions a presumption of incredibility: incarcerated survivors must corroborate their claims of abuse with documentary evidence from a purportedly more reliable source, such as*

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*the police, a doctor, or a third-party witness. Applicants facing this hurdle stand at the convergence of the three “liars”: they are disproportionately Black and brown women serving long prison sentences. Many of them never reported their abuse, and no one saw it happen.*

*By refusing to credit a survivor’s narrative standing alone, this trailblazing statute inadvertently reinforces a system of disbelief based on bias. It gives rise to epistemic injustice that disproportionately affects marginalized communities and undermines the law’s vital mission of freeing criminalized survivors. To effectively disrupt the abuse-to-prison pipeline, New York and other states must embrace a paradigm shift away from credibility discounting and towards belief through legislative amendment, judicial leniency, and trauma-informed advocacy. But in tandem with these reforms, we must continue to envision opportunities for community healing that lie beyond the criminal legal system.*

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INTRODUCTION

*“To tell a story and have it and the teller recognized and respected is still one of the best methods we have for overcoming trauma.”*

- Rebecca Solnit<sup>1</sup>

Katherine W. was charged with murder for allegedly killing her husband.<sup>2</sup> She was 49 and had never been arrested before. During initial interviews with her attorney, Katherine appeared to be severely traumatized. The lawyer slowly gained Katherine’s trust. He learned over the course of many interviews that Katherine’s husband had physically, sexually, and psychologically abused her throughout their 30-year marriage. While Katherine’s family had been aware of some of his

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1. Rebecca Solnit, *Cassandra Among the Creeps*, HARPER’S MAG. (Oct. 2014), <https://harpers.org/archive/2014/10/cassandra-among-the-creeps> [<https://perma.cc/F4QK-SCUQ>].

2. Case examples discussed without citation are either cases from my own practice, or cases I have learned about through conversations with defenders across New York State. Identifying information, including names and case details, has been changed to protect the privacy of the survivors whose stories are shared here.

behavior—including preventing her from seeking medical care and restricting her food intake—they had never witnessed the violence; he was careful to carry out physical beatings and sexual abuse in private. Katherine also never reported her husband's conduct to the police. It seemed futile: her husband was a beloved figure in their small, rural farming community, and besides, Katherine had been raised to believe that it was a wife's duty to serve her husband no matter the personal cost. Years of degrading abuse only reinforced her feelings of worthlessness. Believing that she was undeserving of help, she did not seek it.

The evidence in the case did not point to justification or another legal defense, so Katherine's lawyer began gathering mitigation evidence, hoping to secure a plea bargain. He was able to find two medical records where Katherine had disclosed abuse to her primary care physician. The first was from eight years before the homicide, where the doctor's notes indicated Katherine had reported that her husband raped her, causing a back injury. The second medical record, from just five months before the offense, stated that Katherine often asked her sons to protect her from her husband. Three experts also examined Katherine post-arrest. While they disagreed on whether she was mentally fit to stand trial, they all thought Katherine exhibited some degree of post-traumatic stress that could be explained by a history of abuse. Katherine ultimately pled guilty to manslaughter and received the maximum sentence: 25 years in prison.

In 2019, New York passed the Domestic Violence Survivors Justice Act (DVSJA),<sup>3</sup> groundbreaking sentencing reform legislation.<sup>4</sup> The law allows judges to drastically reduce the prison sentences of survivors who can demonstrate (a) that they were, "at the time of the offense . . . a victim of domestic violence subjected to substantial physical, sexual, or psychological abuse inflicted by a member of the same family or household"; (b) that "such abuse was a significant contributing factor" to the offense; and (c) that a sentence under the traditional sentencing range would be "unduly harsh," under all the circumstances.<sup>5</sup>

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3. See N.Y. CRIM. PROC. LAW § 440.47 (McKinney 2019); N.Y. PEN. LAW § 60.12 (McKinney 2019).

4. See generally Cynthia Feathers, *Domestic Violence Survivor-Defendants: New Hope for Humane and Just Outcomes*, N.Y. STATE BAR ASS'N J. (March 2020), [https://www.ils.ny.gov/files/Feathers.DVSJA\\_SBJ\\_March2020.pdf](https://www.ils.ny.gov/files/Feathers.DVSJA_SBJ_March2020.pdf) [<https://perma.cc/35CM-RR97>] (describing the legislation).

5. N.Y. PEN. LAW § 60.12(1) (McKinney 2019); N.Y. CRIM. PROC. LAW § 440.47(2)(e) (McKinney 2019). The Domestic Violence Survivors Justice Act (DVSJA) effectively alters sentencing ranges so that what is normally the minimum

The DVSJA is divided into two parts, dependent on the date of the offense: the first provides a framework for people whose offense occurred *after* the law was passed to seek alternative sentencing prospectively at their initial sentencing proceeding<sup>6</sup> (but not later).<sup>7</sup> The second part of the law provides a parallel—and more burdensome<sup>8</sup>—framework that operates retroactively, for people whose offense occurred *before* the law’s effective date to seek sentence reductions (August 12, 2019). The retroactive provision includes an evidentiary pleading requirement that

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sentence becomes the maximum possible. *See* N.Y. PEN. LAW § 60.12. (McKinney 2019). For instance, for a conviction for first-degree manslaughter in New York, a judge can sentence someone to anywhere between five and twenty-five years in prison. N.Y. PEN. LAW § 70.02(1)(a), 70.02(3)(a). (McKinney 2020). Under the DVSJA, the sentence range for first-degree manslaughter is between one and five years. N.Y. PEN. LAW § 60.12(2)(a) (McKinney 2019).

6. N.Y. PEN. LAW § 60.12 (McKinney 2019).
7. *See* N.Y. CRIM. PROC. LAW § 440.47(1)(a) (McKinney 2019). The temporal provision restricting retroactive resentencing under the DVSJA to people whose offenses predated the statute’s passage is deeply problematic. This limitation rests on several demonstrably untrue assumptions, including that survivors of domestic violence will always be sufficiently aware of their own status as survivors at the time of initial sentencing to communicate to counsel and the court the connection between their abuse and the offense; and that those survivors who do recognize this connection will be ready to discuss and explore it in court so close in time to their arrest and prosecution. On the contrary, it is often the case that survivors only identify their experiences as abuse with the passage of time, through therapeutic interventions, and/or by connecting with other survivors. Indeed, in interviews conducted by the Survivors Justice Project with people who have gone through the DVSJA resentencing process, many reported that they would not have had the emotional awareness nor capacity to speak about their experiences of domestic violence when they were first arrested, prosecuted, and sentenced. *See infra* Section III.B.2.
8. Notably, the statutory section governing prospective relief for criminalized survivors, P.L. 60.12, does not require applicants to submit two pieces of evidence corroborating their abuse history. In fact, the statute is silent on what showing the defense must make in order to obtain a DVSJA sentencing hearing at the initial sentencing beyond the initial eligibility requirements pertaining to offense date and charge. The absence of a gatekeeping mechanism for prospective applicants illustrates the credibility bias imposed upon people who have already been convicted and sentenced, a concept I will return to in the discussion of the “deceitful prisoner” in Section II.C.

does not exist for people seeking relief at their initial sentencing: before a survivor can get a resentencing hearing, they must submit two pieces of documentation corroborating the claim that they were a domestic violence victim at the time of the offense, subjected to substantial physical, sexual, or psychological abuse.<sup>9</sup> In other words, in order to have a judge consider reducing their sentence, they must first overcome a presumption that they are lying about their abuse.

When Katherine W. sought a sentence reduction under the DVSJA, she was denied a hearing. The court determined that she had not satisfied the corroboration requirement—that is, she had not overcome the presumption that she was lying about her abuse. To reach this conclusion, the court reasoned that none of the documents submitted—neither the medical records, the psychological evaluations, nor her public defender’s pre-sentencing memorandum—sufficiently corroborated her claim that she was a victim of domestic violence *at the time of the homicide*. According to the judge, the first medical record disclosing rape was too remote in time to show that Katherine was still a victim of domestic violence eight years later. This was despite the fact that she was continuously married to, and living with, her abuser during that period. The court found that the second medical record, describing how Katherine enlisted her sons for protection, failed to support a conclusion that the abuse was *substantial*. And the court rejected the psychiatrists’ reports because they relied on Katherine’s *self-reporting*, which the judge deemed self-interested and therefore unreliable. Katherine was given the chance to come back to court with more evidence supporting her claims of abuse, but the message was clear: your word alone is not credible.

Tara H.’s case also involved an attack on her partner. While under the influence of crack cocaine, Tara burned him with hot oil and stabbed him in the stomach. Tara pled guilty to attempted second-degree murder and received a sentence of 16 years. Seeking resentencing under the same New York law, Tara’s filing described her lifelong abuse, including severe physical and sexual abuse as a young child that led to struggles with substance use. She provided voluminous records from the family regulation system documenting early parental abuse, including an eerily similar episode when Tara’s mother burned her as a toddler.

Tara had more difficulty, though, finding paperwork to corroborate the abuse she experienced as an adult. As a Black woman who lived under constant state surveillance as a child, she had grown suspicious and fearful of authorities and thus never reported abuse by intimate partners. There

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9. N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2019).

were certainly no records of the psychological abuse inflicted on Tara by her boyfriend who was the complainant in her case—no records documenting how he had mocked her weight and the way she limped due to the burn scars on her feet caused by her mother; how he often laughed after startling her from behind, even after she explained how retraumatizing this was for her as a rape survivor; and how—on the day of the incident—he intentionally left her alone in their apartment for many hours, immobilized, without access to food. Tara’s boyfriend did, however, provide an affidavit in support of her resentencing, where he wholeheartedly supported her release (albeit downplaying some of his own behavior). Tara also had an affidavit from her sister, who described how the boyfriend’s behavior mirrored their father’s abuse toward their mother.

The judge refused to grant Tara an evidentiary hearing. The court’s analysis focused on the boyfriend’s intent, rather than the impact of his actions on Tara in the context of her cumulative traumatic history. The judge found that Tara’s account of the more recent emotional and psychological abuse from her boyfriend was insufficient: his behavior might be “inconsiderate,” even “boorish,” but there was nothing corroborating her claim that it was *substantial*, as the statute required.<sup>10</sup> The court’s decision meant that Tara could resubmit her application only if she could come up with more documentary proof. The writing was on the wall: standing alone,

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10. The court’s focus on the subjective intent of Tara’s boyfriend calls to mind the recent Supreme Court decision in *Counterman v. Colorado*, 600 U.S. 66 (2023), where a seven-Justice majority reversed a conviction for stalking on First Amendment grounds, holding that “the State must prove in true-threats cases that the defendant had some understanding of his statements’ threatening character.” *Id.* at 73. The minimum mens rea required for criminal liability, the Court said, is recklessness. *Id.* The wisdom of the Court’s decision to adopt a subjective, rather than objective, standard in that context is beyond the scope of this article. *See id.* at 106-21 (Barrett, J., dissenting); Mary Anne Franks, *How Stalking Became Free Speech: Counterman v. Colorado and the Supreme Court’s Continuing War on Women*, GEO. WASH. L. REV. ON THE DOCKET (Jul. 28, 2023), <https://www.gwlr.org/how-stalking-became-free-speech-counterman-v-colorado-and-the-supreme-courts-continuing-war-on-women> [<https://perma.cc/MDJ6-XX4U>]. But the question in *Counterman* was whether criminal liability should attach to a person’s actions, absent any evidence of the mens rea of the accused. The relevant question in the DVSJA context is the impact of the behavior on the applicant for resentencing in light of her cumulative experience, not the subjective intent of the perpetrator, who is not on trial. Accordingly, the court in Tara’s case was misguided in grafting a similar analysis onto a remedial sentencing statute.

Tara's own account of the trauma that had precipitated her offense was not enough.

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The DVSJA is one of the first statutes in the U.S. to recognize the role of domestic violence in mass incarceration. Though it offers sentencing relief for people of all genders, the DVSJA was specifically created to address the overincarceration of women, which increased by 834% between 1978 and 2015—double the rate of increase for men.<sup>11</sup> The DVSJA is a triumph of grassroots activism, tracing its roots to a remarkable public hearing held in 1985 within New York's only maximum security women's prison: Bedford Hills Correctional Facility. The Bedford Hills hearing was a historic event, marking the first time a legislative hearing was held inside a prison. Incarcerated survivors testified about their experience of abuse, and how numerous systems had failed them along the way. They described how the trauma they suffered eventually led to their arrest, prosecution, and punishment.<sup>12</sup> Fast forward more than 30 years to 2009, when the Coalition for Women Prisoners launched the legislative campaign for the DVSJA,<sup>13</sup> and

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11. See Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html) [<https://perma.cc/38VU-NZ49>].
  12. Video footage of the 1985 Bedford Hills hearing offers a glimpse of the incredible courage of survivors who shared their testimony, as well as the biases and presumptions they encountered in the process. See Bedford Hills Project, *1985 Bedford Hills Hearings*, YOUTUBE (May 3, 2021), <https://youtu.be/cG2f9bklu28> [<https://perma.cc/3TQC-D5JG>].
  13. The Correctional Association of New York (CANY) is an organization created in the mid-nineteenth century, designated by statute to monitor and oversee prison conditions in the state. See *Our Mission*, CORR. ASS'N N.Y., <https://www.correctionalassociation.org/our-mission> [<https://perma.cc/B4UJ-SMFT>]. In 1994, CANY founded the Women in Prison Project (WPP) to "focus on the unique experiences and difficulties facing the growing population of incarcerated women." *Our History*, CORR. ASS'N N.Y., <https://www.correctionalassociation.org/our-history> [<https://perma.cc/7LBV-MBPS>]. WPP then led the development of the Coalition for Women Prisoners, "a statewide alliance of over 500 individuals from over 100 organizations working toward improving the criminal justice system as it affects women offenders and their families." Off. of Just. Programs, *Coalition for Women Prisoners: Proposals for Reform*, U.S. DEP'T JUST., <https://www.ojp.gov/ncjrs/virtual-library/abstracts/coalitiation-women-prisoners-proposals-reform#:~:text=The%20Coalition%20for%20Women%20Prisoners,women%20offenders%20and%20their%20families>



to the creation in 2020 of the Survivors Justice Project to organize around implementing the law.<sup>14</sup> In short, the DVSJA is the culmination of decades of advocacy led primarily by women of color, many of whom are survivors of domestic violence who served lengthy prison sentences.<sup>15</sup>

The radical nature of this sentencing reform makes it a natural model for other states trying to address the harms of domestic abuse with compassion and community support, rather than long prison sentences.<sup>16</sup> Indeed, Connecticut, Louisiana, Oklahoma, and Oregon are some of the states where similar legislation is brewing. But there are flaws in the prototype. It is crucial that the DVSJA's strengths and not its weaknesses are replicated, and that the broader decarceration movement take heed of the law's shortcomings. By requiring documentary evidence corroborating that abuse occurred, this ostensibly progressive legislative reform perpetuates deeply sexist and racist assumptions about who we believe, and who is presumptively incredible.

As the cases above illustrate, the DVSJA inadvertently endorses the reflexive disbelief of women, people of color, and incarcerated people, embodied in the law's evidentiary gatekeeping requirement. To obtain a

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[<https://perma.cc/9TSX-XZG5>]. Starting in 2009, the Coalition for Women Prisoners emerged as the leading advocacy group involved in drafting and lobbying for passage of the DVSJA. *See DVSJA History*, SURVIVORS JUST. PROJECT, <https://www.sjpn.org/dvsja/history> [<https://perma.cc/4HWF-4CWV>].

14. The Survivors Justice Project (SJP), in partnership with the Women & Justice Project, *see* WOMEN & JUST. PROJECT, <https://womenandjusticeproject.org> [<https://perma.cc/P2AD-CKXX>], is an interdisciplinary collective of advocates, social workers, researchers, lawyers, and organizers—including both formerly and currently incarcerated women—whose goal is to ensure robust implementation of the DVSJA across New York State. *See* SURVIVORS JUST. PROJECT, <https://www.sjpn.org> [<https://perma.cc/YF8Y-9MTH>]; *see also* Kathy Boudin et al., *Movement-Based Participatory Inquiry: The Multi-Voiced Story of the Survivors Justice Project*, 11 Soc. SCIS. 129 (2022). The author is a member of SJP's Advisory Group.
15. *See generally DVSJA History*, *supra* note 13 (describing the history).
16. *See generally* LIZ KOMAR ET AL., SENTENCING REFORM FOR CRIMINALIZED SURVIVORS: LEARNING FROM NEW YORK'S DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (2023), <https://www.sentencingproject.org/reports/sentencing-reform-for-criminalized-survivors-learning-from-new-yorks-domestic-violence-survivors-justice-act> [<https://perma.cc/83LP-5TTF>] (offering an overview of lessons learned from the DVSJA, analyzing its procedural and substantive failures, and including a model statute for other jurisdictions seeking to replicate and improve upon New York's sentencing reform bill).

resentencing hearing under the DVSJA, applicants must first submit two pieces of evidence corroborating their allegations of abuse, one of which must be a court record, sworn eyewitness account, or another official document.<sup>17</sup> Survivors who lack this kind of external confirmation of the abuse they suffered will never get a resentencing hearing, let alone a shorter prison term. This presumption of incredibility severely thwarts the law's intended remedial effects and replicates the trauma of credibility discounting many survivors have already experienced. The DVSJA's evidentiary burden, which resurrects the doctrine of prompt complaint, is onerous, even compared to historical evidentiary requirements in prosecutions for rape. It also fixes an epistemological hierarchy that particularly disadvantages marginalized populations, who are even less likely to report their abuse.<sup>18</sup>

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17. N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2019).

18. Research on rates of disclosure of abuse has produced varying estimates, but there is a broad consensus that most domestic violence incidents go unreported. *See, e.g.*, Alexandra Thompson & Susannah N. Tapp, *Criminal Victimization*, U.S. DEPT. JUST. 5 (2023), <https://bjs.ojp.gov/content/pub/pdf/cv21.pdf> [<https://perma.cc/NK7A-AFRE>] (finding that, in 2020, 22.9% of rape/sexual assault victimizations were reported to police and 41.1% of incidents of domestic violence were reported to police). Black and brown women are less likely than white women to report abuse. *See* Andrea J. Ritchie, *Expanding Our Frame: Deepening Our Demands for Safety and Healing for Black Survivors of Sexual Violence*, NAT'L BLACK WOMENS JUST. INST. 7 (Feb. 2019), [https://docs.wixstatic.com/ugd/0c71ee\\_0430993a393840f7af620d34b8e4624e.pdf](https://docs.wixstatic.com/ugd/0c71ee_0430993a393840f7af620d34b8e4624e.pdf) [<https://perma.cc/NK7A-AFRE>] ("For every Black woman who reports her rape, at least fifteen do not."); Shaquita Tillman et al., *Shattering Silence: Exploring Barriers to Disclosure for African American Sexual Assault Survivors*, 11 TRAUMA, VIOLENCE, & ABUSE 59, 62 (2010) (collecting literature on disclosure patterns at the intersection of race and gender); Sarah E. Ullman & Henrietta H. Filipas, *Correlates of Formal and Informal Support Seeking in Sexual Assault Victims*, 16 J. INTERPERSONAL VIOLENCE 971, 1042 (2001) (positing that the internalization of negative stereotypes of Black women contributes to this group's reluctance to disclose abuse); *see also* Sarah R. Robinson et al., *A Systematic Review of Barriers to Formal Help Seeking for Adult Survivors of IPV in the United States, 2005-2019*, 22 TRAUMA, VIOLENCE, & ABUSE 1279, 1291 (2020). Sarah R. Robinson's et al.'s systematic review of peer-reviewed literature on barriers to seeking help for adult survivors of intimate partner violence in the United States between 2005 and 2019 extrapolated six primary barriers to reporting: (1) lack of awareness about IPV and available resources; (2) lack of accessible services; (3) feared consequences of disclosure, including safety concerns, loss of housing status,

To understand the roots of skepticism underlying the demand for corroboration, this article examines the DVSJA's evidentiary pleading requirement against the backdrop of three mythological tropes in the legal system (and society more broadly): the "incredible woman," the "mendacious person of color," and the "deceitful prisoner"<sup>19</sup>—identity-based stereotypes that often overlap and intersect with the communities represented by applicants seeking resentencing under the DVSJA.<sup>20</sup> This analysis is grounded in the theoretical framework of epistemic injustice, which examines the damage to marginalized groups when their lived experience is chronically devalued by the dominant culture.<sup>21</sup> The Article builds on the work of scholars such as Deborah Epstein and Lisa Goodman,<sup>22</sup>

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loss of children, and desire to protect partner from arrest; (4) lack of material resources, (5) personal barriers, such as shame, self-blame, and cultural norms; and (6) systemic failures, including the fear of not being believed. Robinson et al., *supra*, at 1279.

19. I use the word "prisoner" to describe this archetypal liar in an effort to highlight the stereotypes of amoral character and incredibility surrounding someone who has been accused and/or convicted of a crime. However, in my own analysis, I prefer person-first language, such as "incarcerated person" or "person accused of an offense." The dehumanizing connotations of "prisoner" and similar stigmatizing terms are, thankfully, becoming more and more disfavored. See Ctr. for NuLeadership on Urb. Sols., *An Open Letter to Our Friends on the Question of Language*, CREDIBLE MESSENGER CTR., <https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-Appropriate-Language.pdf> [<https://perma.cc/WP7Q-PASZ>] (underscoring the importance of person-first language in reconfiguring our thinking about human possibility and value).
20. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (providing the foundation for intersectionalist thinking and action in the feminist anti-violence movement).
21. See MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND ETHICS OF KNOWING* (2007).
22. Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399 (2019).

Kimberlé Crenshaw,<sup>23</sup> Leigh Goodmark,<sup>24</sup> Julia Simon-Kerr,<sup>25</sup> Deborah Tuerkheimer,<sup>26</sup> and Marilyn Yarbrough.<sup>27</sup> It also surveys the particular harms engendered by discounting the credibility of incarcerated survivors in the context of the DVSJA and similar reform efforts.

By examining the historical and theoretical framework of disbelief, the Article contextualizes how requiring survivors to prove their experience of abuse with external, documentary evidence functions as a legal presumption that they are lying. As a result, the DVSJA reinforces a well-established hierarchy favoring the imagined “perfect victim”—someone who, by virtue of race, class, gender identity, and sexual orientation, has easier access to, and trust in, the criminal legal system and government

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23. Crenshaw, *supra* note 20; Kimberlé Crenshaw, Opinion, *We Still Have Not Learned From Anita Hill's Testimony*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/opinion/anita-hill-clarence-thomas-brett-kavanaugh-christine-ford.html> [<https://perma.cc/D4NG-88X8>].
  24. LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023) [hereinafter GOODMARK, IMPERFECT VICTIMS]; LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018) [hereinafter GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE].
  25. Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179 (2023) [hereinafter Simon-Kerr, *Law's Credibility Problem*]; Julia Simon-Kerr, *Credibility in an Age of Algorithms*, 74 RUTGERS U. L. REV. 111 (2021) [hereinafter Simon-Kerr, *Credibility in an Age of Algorithms*]; Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017) [hereinafter Simon-Kerr, *Credibility by Proxy*]; Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008) [hereinafter Simon-Kerr, *Unchaste and Incredible*].
  26. DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS (2021) [hereinafter TUERKHEIMER, CREDIBLE]; Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146 (2019) [hereinafter Tuerkheimer, *Beyond #MeToo*]; Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017) [hereinafter Tuerkheimer, *Incredible Women*].
  27. 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 (2000).

record-keeping institutions in general (i.e., white, middle-class, cisgendered, heterosexual women).<sup>28</sup>

The DVSJA's corroboration requirement stacks the deck against the same marginalized communities who are disproportionately criminalized for conduct stemming from their experiences of domestic violence. The law's criteria for overcoming the presumption of mendacity further entrenches the misguided approaches of carceral feminism: that violence against women can be remedied by criminalization, and that survivors deserving support will place their trust in the apparatus of the state.

This Article proceeds in four parts. Part I describes the statutory framework and legislative purpose of the Domestic Violence Survivors Justice Act, with particular focus on the requirement that resentencing applicants must corroborate their claims of abuse at the pleading stage.

Part II sketches the historical backdrop of the "three liars" described above—women, people of color, and imprisoned people. Building on the concept of "credibility discounting," coined by Professor Deborah Tuerkheimer,<sup>29</sup> and explored by Professors Epstein and Goodman,<sup>30</sup> among others, this Section interrogates the discounting of survivor narratives that persists in even laudable reform efforts like the DVSJA, with comparisons

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28. See Lisa J. Long, *The Ideal Victim: A Critical Race Theory (CRT) Approach*, 27 INT'L REV. VICTIMOLOGY 322 (2021) (discussing intersectionality of gender and race in crime reporting rates for victims who are Black and mixed-race). Leigh Goodmark also explores the constructed identity of the "perfect victim" as someone who is "usually meek" and "passive," whose response to abuse is fear, rather than fighting back. See GOODMARK, IMPERFECT VICTIMS, *supra* note 24, at 9. A survivor's credibility, Goodmark observes, turns on whether she fits into this constructed category:

Some victimization claims are deemed more credible than others. Women who are abrasive and argumentative, who are aggressive towards their abusers for any reason (including self-defense), or who otherwise fail to conform to traditional female gender roles are imperfect victims. Sex workers are imperfect victims, as are lesbians and trans people. So are women of color, particularly Black women . . . Black women have never been seen as survivors or 'good' victims, but rather tools that the criminal legal system can use to punish Black men. Imperfect victims are more likely to be arrested. Once victimized women become criminal defendants, the opportunity to be seen as perfect victims all but vanishes.

*Id.* at 9-10 (internal quotation marks and citations omitted).

29. Tuerkheimer, *Incredible Women*, *supra* note 26, at 3.

30. See generally Epstein & Goodman, *supra* note 22.

drawn to other similarly motivated second-look statutes. Part III utilizes the case studies described above, as well as other survivor narratives drawn from my own clinical practice and from conversations with other survivors and advocates, to illustrate the challenges criminalized survivors face and the ways that a presumption of disbelief undermines the statute's remedial goals.

Part IV suggests a way forward that seeks to minimize, if not eliminate, the negative effects of credibility discounting for criminalized survivors. Specifically, the New York legislature should remove the corroboration requirement from the DVSJA, relying instead on the more lenient pleading requirements already in existence for post-conviction motions in New York; the legislature should also limit judicial discretion by codifying a presumption in favor of resentencing. Absent legislative amendment, courts should liberally construe the corroboration requirement, and advocates should aggressively pursue discovery. And judges should welcome expert testimony on credibility discounting and the phenomenon of underreporting. The state and the non-profit sector should also expand education for system actors about the dangers of epistemic injustice resulting from discounting the credibility of incarcerated survivors. With these improvements, the DVSJA and similar reforms across the country could provide relief to more survivors of domestic violence by allowing their cases to advance more easily to the fact-finding stage, where new narratives can emerge.

Ultimately, however, it is not enough to trade corroboration for other traditional courtroom tests of veracity, such as cross-examination and impeachment, which present their own race and gender equity problems. While sentencing reform for criminalized survivors is a necessary and useful tool in the near-term, there is a danger that such reforms may legitimize prosecution and punishment as an appropriate response to harm. Thus, incrementalist reform like the DVSJA must work in tandem with the abolitionist call to address domestic violence and its reverberating effects through non-carceral frameworks outside the criminal legal system.

## I. NEW YORK'S DOMESTIC VIOLENCE SURVIVORS' JUSTICE ACT

### *A. A Primer*

The DVSJA gives judges the discretion to issue significant sentencing reductions to people who can demonstrate that, (1) "at the time of the

offense,”<sup>31</sup> they were a victim of “substantial abuse,”<sup>32</sup> perpetrated by a member of their family or household (broadly defined);<sup>33</sup> (2) that the abuse

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31. The question of what it means to be a domestic violence victim “at the time of the offense” has generated extensive debate, with advocates arguing for a broader interpretation that incorporates a modern understanding of trauma’s long-term impact. See KOMAR ET AL., *supra* note 16, at 12; Abigail Van Buren, *The Need for Remedial Resentencing for Survivors of Domestic Violence: A Trauma-Informed Assessment of New York’s Domestic Violence Survivors Justice Act*, 60 AM. CRIM. L. REV. 1 (2022) (arguing that “at the time of the offense” encompasses the long-term effects of trauma); Alaina Richert, Note, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 MICH. L. REV. 315, 337-42 (2021) (arguing for a relational—not temporal—nexus requirement for the DVSJA and similar DV resentencing statutes). The DVSJA’s temporal language has received inconsistent treatment by the courts. On one end of the spectrum, an early decision granted relief to an applicant who had experienced childhood sexual abuse, which led to a substance use disorder as an adult, fueling a string of burglaries to feed his addiction. *People v. D.L.*, 147 N.Y.S.3d 335 (Cnty. Ct. 2021). However, more recent appellate decisions in New York have significantly narrowed the scope of the temporal nexus between abuse and offense. These courts agree that the offense need not take place *during* an episode of domestic violence, but they have adopted the prosecution’s position that the “abuse or abusive relationship must be ongoing” at the time the crime is committed. See *People v. Liz L.*, 201 N.Y.S.3d 514 (Sup. Ct. 2023); *People v. Fisher*, 200 N.Y.S.3d 494 (Sup. Ct. 2023); *People v. Williams*, 152 N.Y.S.3d 575, 575 (Sup. Ct. 2021). *But see* *People v. Brenda WW.*, 203 N.Y.S.3d 211 (Sup. Ct. 2023) (holding that a lengthy history of abuse “must be considered cumulatively” with evidence of less severe abuse immediately preceding the offense); *People v. Smith*, 132 N.Y.S.3d 251, 258 (Erie Cnty. Ct. 2020) (“What we know now, but did not in 1999, is how profoundly the trauma of sexual abuse and exploitation affects a victim’s behavior and choices, and how that trauma informs us and provides us with a new lens through which to view and assess a defendant’s criminal conduct.”).

A narrow temporal interpretation is unquestionably at odds with what we know about trauma and its long-term impact on a person’s mental and emotional health, particularly if they suffer from post-traumatic stress disorder. See Kavita Alejo, *Long-Term Physical and Mental Health Effects of Domestic Violence*, 2 THEMIS 82, 90-92 (2014); *see also* *People v. C.S.* (Westchester Cnty. Ct. 2023) (unpublished; decision on file with author) (distinguishing *Williams*, holding that applicant satisfied the temporal nexus requirement because she suffered from PTSD from abuse in the past, which was triggered at the time of the offense); Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*,

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94 J. CRIM. L. & CRIMINOLOGY 959, 971-72 (2004) (criticizing a transactional approach to domestic violence that is “characterized by a narrow temporal lens,” because it “obscure[s] defining aspects of battering: ongoing patterns of power and control are not addressed; nor is the full measure of injury that these patterns inflict redressed”). *See generally* ILSA EVANS, BATTLE-SCARS: LONG-TERM EFFECTS OF PRIOR DOMESTIC VIOLENCE (2007) (describing the long-term impacts of domestic violence). It remains unclear whether the New York Court of Appeals will lend clarity to this debate, or whether there is a possibility for legislative amendment to bring the law in line with modern scientific research about trauma.

32. “Substantial abuse” is not defined in the DVSJA nor elsewhere in the Criminal Procedure Law.
33. N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2019). The DVSJA borrows the following definition of “member of the same family or household” from the Family Law context, where it is defined as:

(a) persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another regardless of whether they still reside in the same household; (d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and (e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an “intimate relationship” include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an “intimate relationship.”

N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 2020).

Importantly, DVSJA relief is not limited to situations of intimate partner violence, as was its predecessor statute. It thus embraces the diverse array of familial or quasi-familial relationships that give rise to coercive control and domestic violence. For example, in *People v. J.S.* (Sup. Ct. N.Y. Cnty. 2021) (unpublished; on file with author), the court ordered a hearing on a post-conviction DVSJA motion alleging that the applicant had suffered abuse as an adolescent by the staff of a group home where he was living. The court granted a hearing, in part, based on the determination that the group home qualified as a “household” under the above definition, quoting from a 1970’s decision on zoning ordinances that found a group home to be the “functional and factual equivalent of a natural family.” *See id.* (citation omitted). Interestingly,



was a “significant contributing factor” to their offense; and (3) that a sentence under the standard guidelines is “unduly harsh.”

This reform is the second of its kind in the country, following a similar effort in Illinois that has been largely unsuccessful.<sup>34</sup> The DVSJA represents the culmination of a decade of legislative advocacy led by a coalition of currently and formerly incarcerated women, survivors of domestic violence, social workers, lawyers, and other advocates. That advocacy built on an even longer history of organizing by incarcerated survivors in New York. In 1985, incarcerated survivors of domestic violence testified about the link between their abuse and the harm they caused at a legislative hearing that was held at Bedford Hills Correctional Facility, New York’s only maximum-security prison for women. Almost 35 years later, the DVSJA became law.

As discussed earlier,<sup>35</sup> the DVSJA offers sentencing relief both prospectively and retroactively, depending on the date of the offense. If the offense occurred before the statute’s effective date—August 12, 2019—an otherwise eligible applicant can seek resentencing. If the offense happened after that date, a DVSJA-mitigated sentence is only available at the initial sentencing appearance, foreclosing post-conviction relief. Incarcerated survivors seeking a resentencing hearing face an evidentiary pleading requirement that does not exist for prospective applicants. The threshold

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*J.S.* does not consider the question of whether the abuser was a member of the same household or family to be part of the threshold determination of whether to grant a hearing. *Id.* at \*4. Nonetheless, the court’s reasoning illustrates an expansive range of possibilities for the kinds of guardianship and intimate relationships that might fall under the DVSJA’s purview.

34. In 2015, Illinois enacted the Domestic Violence Resentencing Act, 2015 Ill. Legis. Serv. P.A. 99-384 (S.B. 209). Like the DVSJA, the Illinois law was meant to reduce the prison sentences of survivors who could show a connection between their experience of domestic violence and their offense. However, due to judicial resistance and disputes over eligibility criteria, as of only four people have been resentenced under the law. Recent amendments to Illinois’ resentencing law went into effect on January 1, 2024, which will hopefully expand relief for survivors. *See* Ill. Legis. Serv. P.A. 103-403 (S.B. 2260); *see also* Annie Sweeney, *‘We Are Not Monsters’: Women in Illinois Prisons Who Allege They Were Victims of Domestic Violence See Their Struggle in Film*, CHICAGO TRIBUNE (June 19, 2022), <https://www.chicagotribune.com/news/criminal-justice/ct-logan-illinois-domestic-violence-law-failing-20220619-f5rgmikh7bf6de235nb5heglpy-story.html> [<https://perma.cc/88BU-ASFD>].

35. *See supra* Introduction.

requirements of the retroactive provision for post-conviction resentencing are the focus of this Article.<sup>36</sup>

*B. Motions for Post-Conviction Resentencing Under the DVSJA*

As an initial matter, to qualify for resentencing, in addition to the offense date pre-dating August 12, 2019, the applicant must be (1) in custody, serving a sentence of eight years or more; (2) a first- or second-felony offender; and (3) serving a sentence for one of the included offenses.<sup>37</sup> Once

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36. Measuring the efficacy of the prospective relief offered under the DVSJA for applicants seeking lower sentences at their initial sentencing is difficult, because the court system does not currently collect any data on these applications. Based on interviews with defense advocates doing DVSJA work at the trial level, however, it is clear that the process is fraught with challenges. Many survivors with pending criminal charges are not ready to discuss their history of abuse with their defense teams, and many advocates lack the awareness to recognize less obvious indications of domestic violence, or they lack the trauma-informed approach to interviewing and relationship-building that would make such disclosures more comfortable for their clients. As a result, prospective applicants can miss out on their only chance for DVSJA relief, since they will never be eligible for resentencing under the current law.

Where defenders do identify a case as a candidate for a DVSJA sentence at the front end, they often face resistance from prosecutors and judges. For instance, I have heard many reports about prosecutors threatening to withdraw a favorable plea offer (within traditional sentencing ranges) if the defense intends to seek a further-reduced sentence under the DVSJA after the plea is entered. Some district attorney offices condition a plea bargain on the waiver of any DVSJA sentencing hearing. Defense advocates also report that some judges will insist on disclosure of all mitigating evidence relevant to a DVSJA sentence at an early stage in the proceedings, a cart-before-the-horse process requiring an admission of guilt that may undermine the defense's trial strategy.

37. See N.Y. PENAL LAW § 60.12 (McKinney 2019). Section 60.12 created exclusions that bar eligibility if convicted of: Aggravated murder (N.Y. PENAL LAW § 125.26); Murder in the first degree (N.Y. PENAL LAW § 125.27); Murder in the second degree committed in the course of a second offense (N.Y. PENAL LAW § 125.25(5)); Terrorism (N.Y. PENAL LAW § 490); any offense requiring registration under the New York Sex Offender Registry Act (N.Y. CORRECT. LAW § 6-C); or any attempt or conspiracy to commit the above listed offenses. These exclusions are frustrating, particularly in light of the arbitrariness of the plea-bargaining process. Two cases with nearly indistinguishable facts can stand on either side of the eligibility line simply because one person opted to

initial eligibility is established, a court can grant the person permission to submit a motion for resentencing, seeking a hearing.

Next, at the second stage, a DVSJA application must include “at least two pieces of evidence corroborating the applicant’s claim that he or she was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the applicant.”<sup>38</sup> For the first piece of corroboration, the statute is very specific about the types of corroboration required:

At least one piece of evidence must be either a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection.<sup>39</sup>

The statute is more relaxed in terms of what kind of evidence can qualify as the second piece of corroboration, giving a non-exhaustive list of examples:

[L]ocal and state department of corrections records, a showing based in part on documentation prepared at or near the time of the commission of the offense or the prosecution thereof tending to support the person’s claim, or when there is verification of consultation with a licensed medical or mental health care provider, employee of a court acting within the scope of his or her employment, member of the clergy, attorney, social worker, or rape crisis counselor as defined in section forty-five hundred ten of the civil practice law and rules, or other advocate acting on behalf of an agency that assists victims of domestic violence for the purpose of assisting such person with domestic violence victim counseling or support.<sup>40</sup>

It bears repeating that the DVSJA’s evidentiary proffer occurs at the pleading stage. Thus, it goes to the plausibility of the claim, rather than the

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go to trial, and another pled guilty to a lesser (eligible) offense. Further adding to the arbitrariness of exclusions, second felony offenders are included, but second *violent* felony offenders are excluded (N.Y. PENAL LAW §§ 70.04, 70.06). It is unclear why a person’s prior felony being classified as violent or nonviolent should determine whether domestic violence should be taken into account in their current case.

38. N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2019); *see* N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 2020).

39. N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2019).

40. *Id.*

weight of the evidence at the merits stage. Placing so heavy a burden at that early point in the litigation begs the question: why such skepticism about claims of abuse?

*C. The Perceived Need for Corroborated Allegations of Abuse<sup>41</sup>*

The corroboration requirement was one of a number of concessions made during legislative negotiations.<sup>42</sup> Limited legislative history exists documenting concerns about how survivors would prove the abuse they experienced.<sup>43</sup> However, it is clear that prosecutors in New York, who vehemently opposed the law, feared a tidal wave of resentencing claims.<sup>44</sup> The argument went: without some gatekeeping mechanism, courts would be inundated with false claims of abuse by people looking for an easy get-

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41. Requiring corroboration to bolster otherwise dubious allegations is, of course, not limited to the context of sentencing reform for domestic violence survivors. At trial, the question of corroboration arises most frequently in connection with an inculpatory statement of the accused. At common law, the “*corpus delicti*” rule dictated that a confession was not admissible unless corroborated by independent evidence that the offense occurred. *See* JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* (James H. Chadbourn rev. 1976); *Smith v. United States*, 348 U.S. 147 (1954); *see also* *People v. Santiago*, 9 N.E.3d 870 (N.Y. 2014); N.Y. CRIM. PROC. LAW § 60.50. Notably, the corroborative evidence does not need to prove that the accused committed the crime—merely that it happened at all. *Santiago*, 9 N.E.3d at 875. While federal law has rejected a corroboration requirement for confessions in favor of a “trustworthiness” test, *see Smith*, 348 U.S. at 156-57; *Opper v. United States*, 348 U.S. 84, 93 (1954); *United States v. Calderon*, 348 U.S. 160, 167-69 (1954), the ostensible rationale for requiring corroboration of a confession is to guard against wrongful conviction.
  42. This understanding is based on my conversations with advocates involved with legislative negotiations.
  43. *See* A. 03974, New York State Assembly Session, at 11 (N.Y. Mar. 4, 2019) (statement of Assemb. Edward Ra) (“So in terms of proving the abuse. What—what is the procedure . . . for the victim of domestic violence? Does there have to be formal documentation, formal charges having been filed regarding the domestic violence? How do they go about proving they are a victim of domestic violence?”).
  44. Letter from Janet DiFiore, President, District Attorneys Association of the State of New York, to Sen. Ruth Hassell-Thompson and Assemb. Jeffrion Aubry (May 8, 2012) [hereinafter DAASNY Letter] (on file with author).

out-of-jail-free card. An initial evidentiary proffer would avoid an onslaught of frivolous litigation.

The District Attorneys Association of the State of New York (DAASNY) expressed concern that adjudicating post-conviction resentencing motions under the DVSJA “could prove burdensome and costly” for the judicial system:

Tasking the courts years after conviction with verifying allegations of past domestic abuse that were either never previously raised or consistently rejected by prosecutors, judges and juries can result in lengthy and difficult hearings. This is especially true where the judge hearing the resentencing application is not the judge who presided over the case and therefore, first must familiarize himself or herself with the entire record of the case.<sup>45</sup>

In other words, DAASNY took the position that it would be asking too much of the state trial courts to vet the veracity of a survivor’s allegations of abuse that dated back years or even decades. They viewed a robust pleading requirement as a way to ease this burden. As litigation began and prosecutors contested the sufficiency of survivors’ corroboration, a much different picture emerged.

## II. THE MYTHOLOGY OF THE THREE LIARS

*“Do not bring your negro[] to contradict me! A negro[] and a passionate woman are equal as to truth or falsehood; for neither thinks of what they say.”*

- Landon Carter<sup>46</sup>

*“How do you know when a prisoner is lying? When he opens his mouth.”*

- Ted Conover<sup>47</sup>

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45. *Id.*

46. “A Strange Dream This Day”; *An Excerpt from the Diary of Landon Carter (1776–1777)*, ENCYC. VA., <https://encyclopediavirginia.org/entries/a-strange-dream-this-day-an-excerpt-from-the-diary-of-landon-carter-1776-1777> [<https://perma.cc/2YSH-7TYC>].

47. Ted Conover, *All Prisoners Lie*, THE MOTH (Feb. 8, 2020), <https://themoth.org/stories/all-prisoners-lie> [<https://perma.cc/2TKV-RKNA>].

Our criminal legal system prides itself on figuring out who is telling the truth. Credibility determinations are the primary duty of the fact finder, whether judge or jury. Complex evidentiary rules regarding credibility regulate who is permitted to testify, the scope of that testimony on direct and cross examination, and the types of evidence admissible for the purposes of impeachment. Ostensibly, these rules are aimed at protecting the fairness of the fact-finding process. But the rules relating to credibility and testimonial capacity have evolved in relationship with a cultural hierarchy that prioritizes white, cis-gendered, heterosexual, and male voices and perspectives.

Accordingly, evidentiary rules concerning veracity are often predicated on racist and sexist assumptions and biases.<sup>48</sup> By privileging statuses and behaviors that conform to norms within a moral hierarchy established by the elite, these evidentiary rules reinforce the subjugation of marginalized members of society. This phenomenon has been described as “credibility discounting,” a term coined by Deborah Tuerkheimer to describe the “unwarranted failure to credit an assertion where this failure stems from prejudice.”<sup>49</sup>

The concept of credibility discounting emerged from a legal-philosophical phenomenon that Miranda Fricker’s calls “epistemic injustice,”<sup>50</sup> which encompasses two related harms. First, “testimonial injustice” refers to the harm caused by discrediting someone’s narrative based on their membership in a marginalized group—i.e., based on prejudice.<sup>51</sup> And “hermeneutical injustice” results from preventing socially oppressed groups from contributing to society’s collective knowledge or understanding.<sup>52</sup> Scholars have utilized the lenses of epistemic justice and

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48. See generally Simon-Kerr, *Credibility by Proxy*, *supra* note 25.

49. Tuerkheimer, *Incredible Women*, *supra* note 26, at 3; see also TUERKHEIMER, *CREDIBLE*, *supra* note 26.

50. FRICKER, *supra* note 21.

51. *Id.* at 1.

52. *Id.*; see S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1135-39 (2022) (offering a cogent overview of Fricker’s typology).

credibility discounting to examine inequities for people of color,<sup>53</sup> prisoners, and people accused of crimes<sup>54</sup> in specific institutional settings.<sup>55</sup>

This Article builds on that body of work by applying a similar lens to the systematic disbelief of incarcerated survivors of domestic violence in the context of ostensibly progressive sentencing reform. While many familiar problems of credibility discounting are present, they are exponentially compounded due to the intersection of the marginalized identities held by imprisoned survivors. And while the harm caused by this discounting is also familiar, the epistemic injustice is particularly troubling given that it occurs within an otherwise laudable exercise of anti-carceral reform.

The credibility discount embedded in New York's DVSJA has its roots in a long history of disbelieving women, people of color, and incarcerated individuals who speak out about their experiences of harm. In so doing, this legislation perpetuates the tropes of the unreliable female narrator, the unchaste Black rape complainant, and the scheming prisoner historically exemplified in the largely defunct rules of prompt outcry, corroboration in rape cases, and jury instructions in the absence of evidence corroborating sexual assault. In so doing, the DVSJA evokes what Reva Siegel has called "preservation-through-transformation," whereby legal reforms that

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53. See, e.g., Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133 (2012); Yxta Maya Murray, *FEMA Has Been a Nightmare: Epistemic Injustice in Puerto Rico*, 55 WILLAMETTE L. REV. 321 (2019); Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369 (2018) [hereinafter Gonzales Rose, *Racial Character Evidence*]; Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017) [hereinafter Gonzales Rose, *Toward a Critical Race Theory*]. Important scholarship addressed the same phenomenon for people of color, particularly Black women, even before the terms "epistemic injustice" and "credibility discounting" were coined. See, e.g., Yarbrough & Bennett, *supra* note 27; Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).
54. See, e.g., Jennifer Lackey, *False Confessions and Testimonial Injustice*, 110 J. CRIM. L. & CRIMINOLOGY 43 (2020). M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185 (2020).
55. Washington, *supra* note 52 (family regulation system); Tuerkheimer, *Incredible Women*, *supra* note 26 (law enforcement and campus administration responses in sexual-assault investigations); 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 (2004) (same).

ostensibly modernize a status regime actually reinforce social stratification.<sup>56</sup>

This Section will not attempt to summarize the extensive scholarship in this area, but rather offer a brief overview of how biases based on race, gender, and imprisonment have shaped the rules governing who is believable in the eyes of the law. Three predominant myths frame this historical overview: (1) the “incredible woman”; (2) the “mendacious person of color”; and (3) the “deceitful prisoner,” all of which intersect with great frequency. In particular, the trope of the incredible person of color has long existed alongside—and in conversation with—the image of the incredible woman, just as the concept of a prisoner is highly racialized.<sup>57</sup> In

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56. See Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (examining the legal reforms that abrogated the doctrine of marital chastisement in the domestic violence prosecutions).

57. This mythological triad, embodied by the Black female prisoner who is a criminalized survivor, is admittedly imperfect. Such strictly delineated categories risks replicating the essentialist framework of white, male heteropatriarchy. While the “three liars” identified here track the categories that most frequently intersect in the credibility discounting framework for incarcerated survivors, credibility discounting/epistemic injustice also operates to exclude many other marginalized groups, such as gay, queer, transgender, and nonbinary folks, immigrants and noncitizens, people struggling under poverty, and those who identify as disabled. Just like women, people of color, and incarcerated people, many additional “otherized” communities encounter widespread skepticism when the State is called upon to assess the veracity of their accounts. These groups also share similar motivations for choosing not to report abuse—including the very reasonable fear that they will not be believed. See, e.g., Katherine M. Cole, *She’s Crazy (To Think We’ll Believe Her): Credibility Discounting of Women with Mental Illness in the Era of #MeToo*, 22 GEO. J. GENDER & L. 173 (2020) (examining how anti-sexual-harassment laws discount the credibility of women with mental illness); ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (Penguin Random House 2016) (telling the story behind the famous case of *Buck v. Bell*, 274 U.S. 200 (1927), where the Court shamefully endorsed Virginia’s process for determining whether to sterilize an impoverished woman who had been labeled feeble-minded and morally corrupt); Emma Keith & Kate Gagliano, *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Crimes*, CTR. PUB. INTEGRITY (Aug. 24, 2018), <https://publicintegrity.org/politics/lack-of-trust-in-law-enforcement-hinders-reporting-of-lbgtq-crimes> [<https://perma.cc/9AG6-MNKD>]; James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. TRANSGENDER EQUAL. (2016),



all of these cases, doubts about the witness’s capacity for truthfulness is rooted in the myth of white/male supremacy. These intersectional credibility discounts have evolved from rules that overtly exclude to rules with implicit bias in practice. Nonetheless, the speaker’s identity, rather than the substance of their narrative, remains the central determining factor in credibility determinations, depriving marginalized populations of equal access to justice.

*A. The Incredible Woman*

*“Women . . . face a legal twilight zone; laws meant to protect them, compensate them, and deter further abuse often fail in application, because women telling stories of abuse . . . are simply not believed.”*

- Deborah Epstein & Lisa Goodman<sup>58</sup>

The DVSJA is gender-neutral on its face,<sup>59</sup> but the legislative history makes clear that the law was primarily motivated by concerns about the overcriminalization of women survivors.<sup>60</sup> The focus on women exposes the

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<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/U22R-YLST>] (57% of respondents said they were uncomfortable asking the police for help); Sarah E. Corsico, *Order of Protection or Deportation? How Civil Orders of Protection Entangle Non-Citizens and Their Families in the Immigration and Criminal Legal Systems, Creating the Harm That They Were Intended to Prevent*, 89 BROOK. L. REV. 295 (2023) (arguing that civil orders of protection for noncitizens experiencing abuse leave these individuals vulnerable to punishment); Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. TIMES (Jun. 3, 2018), <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html>.

58. Epstein & Goodman, *supra* note 22, at 403.
59. N.Y. PENAL LAW § 60.12(1) (McKinney 2019) (“[W]here a court is imposing sentence upon a *person* . . .”); N.Y. CRIM. PROC. LAW § 440.47(1)(a) (McKinney 2019) (“Such *person* must include in *his or her* request documentation proving that *she or he* is confined in an institution . . .”). Note that, as of February 2023, five men have been granted sentence reductions under the DVSJA.
60. Sponsor Memorandum from 2017-2018 S. Legis. Sess., S. 5116 (N.Y. 2017) (“Domestic violence and women’s incarceration are inextricably linked: 9 out of 10 incarcerated women have experienced severe physical or sexual violence in their lifetimes; 8 out of 10 experienced serious physical or sexual

gendered dimensions of the evidentiary burdens imposed, which must be understood in historical context.

### 1. Chastity and Credibility

*“It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.”*

- Missouri Supreme Court, *State v. Sibley* (1895)<sup>61</sup>

The tendency to disbelieve women is inextricably linked to the history of women’s sexual objectification and abuse, since a woman’s perceived chastity or sexual “purity” has long been considered indicative of her credibility.<sup>62</sup> This linkage has manifested in the legal system in a variety of rules pertaining to assessing a witness’ truthfulness.<sup>63</sup> Rules of impeachment, for instance that allowed the introduction of sexual history evidence “developed against a cultural background that equated a woman’s ‘honor,’ and thus her credibility, with her sexual virtue.”<sup>64</sup> Relatedly, the practice of admitting reputation or character evidence for impeachment

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violence during childhood; 75% suffered severe physical violence by an intimate partner during adulthood; and 37% were raped before their incarceration. Ninety-three percent of women convicted of killing an intimate partner were abused by an intimate partner in the past.”).

61. *State v. Sibley*, 33 S.W. 167 (Mo. 1895).

62. See Simon-Kerr, *Unchaste and Incredible*, *supra* note 25; Epstein & Goodman, *supra* note 22, at 406 (“[O]ur assessments of women’s personal trustworthiness suffer from skepticism rooted in perceptions of survivors’ apparent ‘inappropriate’ demeanor, prejudicial stereotypes regarding women’s false motives, and the longstanding cultural tendency to disbelieve women simply because they are women.”).

63. Beyond evidentiary rules pertaining to credibility, gender bias is pervasive in the courtroom more generally, as reflected in a study by the New York court system. *New York State Judicial Committee on Women in the Courts: Gender Survey 2020*, <https://www.nycourts.gov/LegacyPDFS/ip/womeninthecourts/Gender-Survey-2020.pdf> [<https://perma.cc/9H2K-F5LJ>] (female attorneys and litigants in the courtroom).

64. Simon-Kerr, *Unchaste and Incredible*, *supra* note 25, at 1854.

purposes was based on the “perception that reputation and credibility were indistinguishable, particularly for female witnesses.”<sup>65</sup>

Nowhere is the link between credibility and sexual virtue more apparent than in the treatment of women alleging sexual assault, and the evidentiary doctrines that evolved to silence them. The credibility discount is exponentially compounded for Black and brown women survivors, a critical issue explored more below.

## 2. Prompt Complaint, Corroboration, and Cautionary Instructions in Rape Cases

The pervasive culture of disbelieving female survivors in our legal system has manifested most strikingly in three interrelated evidentiary rules concerning cases of sexual assault. These are (1) the requirement of prompt complaint, (2) the need to corroborate allegations of sexual assault in order to bring charges, and (3) the practice of issuing instructions cautioning jurors against conviction in the absence of either corroboration or a prompt report of abuse.

Prompt complaint,<sup>66</sup> corroboration, and cautionary credibility instructions in rape trials have historically worked in tandem to reinforce a presumption of female incredibility.<sup>67</sup> Understanding how they interact requires unpacking the origins of each evidentiary doctrine. This Section offers an overview<sup>68</sup> of these doctrines, as well as some examples of how

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65. Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 179. Most jurisdictions have severely curtailed the use of reputation evidence for impeachment, with the exception of evidence of a witness’ character for truthfulness, as codified in Federal Rule of Evidence 608. *Id.* at 182-83.

66. This doctrine goes by several monikers, such as “prompt outcry,” “fresh complaint,” or “fresh outcry.” The term “fresh complaint” sometimes connotes reporting to someone other than law enforcement. *See id.* at 12-13.

67. *See generally* Anderson, *supra* note 55 (offering an excellent overview of the interaction between three modes of influencing a fact-finder); *see* Tuerkheimer, *Incredible Women*, *supra* note 26, at 21-25 (same, with additional analysis of how these doctrines evolved in the MPC).

68. For a thorough historical overview, I refer readers to Professor Michelle J. Anderson’s work, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, *supra* note 55. In addition, Professor Julia Simon-Kerr has written extensively on the link between conceptions of female chastity and a reputation for truthfulness, as well as the connections between race and

female narratives of abuse have continued to be systematically discredited even after the older evidentiary rules were largely rejected.

The requirement of prompt complaint traces its roots to the common-law “hue and cry” rule, under which victims of violent crimes were expected to immediately report the offense to the community, with the dual purpose of quickly apprehending the perpetrator and “dispel[ling] any suspicion that the victim had been somehow involved or complicit in the crime.”<sup>69</sup> Even after “hue and cry” was no longer required for most offenses, common law courts in England and the American colonies still required it in prosecutions for rape, based on the assumption that a virtuous woman would immediately report her rape. This rationale was explained by a thirteenth-century judge as follows:

When therefore a virgin has been so deflowered and overpowered against the peace of the lord the King forthwith and while the act is so fresh she ought repair with hue and cry to the neighboring vills and therefore display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of the dress, and so she ought to go to the provost of the hundred and to the searjeant of the lord the King and to the coroners and to the viscount and make her appeal at the first county court.<sup>70</sup>

This rationale reads as outdated, to put it mildly. Indeed, more than thirty years ago the New Jersey Supreme Court rejected the prompt outcry rule in

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gender as proxies for incredibility. In *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, *supra* note 25, Simon-Kerr traces how earlier impeachment rules allowing female credibility to be undermined by evidence of sexual unchastity gradually gave way to feminist reforms, such as rape shield laws, precluding the use of “promiscuity evidence” to prove untruthfulness. However, Simon-Kerr ultimately argues that modern courts have resurrected this linkage in rape cases where evidence of unchastity can be introduced to rebut the survivor’s allegation that they did not consent. *Id.* at 1886; *see also* Bennett L. Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 856 (2013) (arguing that rape shield laws, which attempt to bar a woman’s sexual history from the courtroom, in fact “legitimize[] the very chastity requirement [feminists] found so troubling”).

69. *State v. Hill*, 578 A.2d 370, 374 (N.J. 1990) (thoroughly reviewing the history of the “fresh complaint rule” at common law and in American jurisprudence); *see also* Anderson, *supra* note 55, at 953-56.
70. *See* Anderson, *supra* note 55, at 947 (quoting HENRICI DE BRACON, 2 DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 483 (Sir Travers Twiss trans., 1897)).

*State v. Hill*.<sup>71</sup> The rule's underlying assumption, the court reasoned, was that "only virgins who sustained grave physical harm should raise the hue and cry necessary to prosecute a rape by a stranger. That standard implicitly asserted that women who were not virgins, women who were raped by people they knew, women who did not sustain bloody physical injuries in the process of being raped, and women who kept silent about being raped after the attack . . . could not have their cases prosecuted."<sup>72</sup>

Nonetheless, adherence to the "hue and cry" rule in rape cases, even after it had been abandoned for other kinds of crimes, signaled that its purpose in rape prosecutions was not to facilitate the arrest of the offender, but as "a way to dispel suspicion that the victim had fabricated the charges."<sup>73</sup> As the eighteenth-century jurist Matthew Hale famously commented, "[r]ape is . . . an accusation easily to be made and hard to be proved, and harder to be defended by the party accused."<sup>74</sup>

With the evolution of evidentiary rules barring hearsay during the nineteenth-century, prompt complaint ceased to be a *necessary* element of the prosecution's case in chief, but it was still considered highly relevant to the complainant's credibility.<sup>75</sup> Indeed, the fact that a victim promptly reported the abuse remained admissible in the prosecution's case in chief—an exception to the evidentiary rule barring prior consistent statements.<sup>76</sup> And the absence of prompt outcry could be used to impeach the complainant.<sup>77</sup> Whether admitted as direct evidence or on cross-examination, the persistence of prompt complaint as probative evidence of

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71. *Hill*, 578 A.2d at 380-81.

72. *Id.* at 374.

73. *Id.* at 375.

74. M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 635 (1778).

75. Anderson, *supra* note 55, at 955-56; see also Erin Murphy & Stephen Schulhofer, *Recommendations to Strike the Current Procedural Provisions*, MODEL PENAL CODE § 213—Sexual Assault & Related Offense (Apr. 2013); Dawn M. DuBois, Note, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087, 1089-93 (1988) (examining how prompt complaint became relevant to credibility when the rules against hearsay barred its use as direct evidence that a rape occurred).

76. DuBois, *supra* note 75, at 1089-91 (discussing *Baccio v. People*, 41 N.Y. 265 (N.Y. 1869), a case endorsing "the presumption of falsehood derivable from concealment on the part of the female"). Notably, it was usually limited to the *fact* that a complaint was made, rather than the underlying details of the report.

77. *Id.* at 1092-95.

a woman's credibility relies on an "inference of recent fabrication in rape prosecutions"<sup>78</sup>—what New York's highest court called, in 1869, a "presumption of falsehood derivable from concealment on the part of the female."<sup>79</sup>

Why the presumption of falsehood for a rape complainant? The reasons given are myriad. First and foremost is the idea that the "normal" or "natural" reaction after sexual assault victimization is to report it. Other explanations center on ideas of shame surrounding promiscuity or simply a desire for vengeance. For example, the drafters of the 1980 Model Penal Code (MPC) surmised that a complainant might be pregnant and ashamed of having extra-marital sex, or may feel "bitterness at a relationship gone sour."<sup>80</sup> She also may be uncertain about consent and later become vindictive. According to the 1980 MPC commentary:

[t]he woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say 'no.' Her confusion at the time of the act may later resolve into non-consent... The deceptively simple notion of consent may obscure a tangled mesh of psychological complexity, ambiguous communication, and unconscious restriction of the event by the participants.<sup>81</sup>

Related to this idea of ambivalence or "psychological complexity," rape complainants have historically been suspected of suffering from some mental illness or "hysteria" that causes them to falsely report. Professor John Henry Wigmore notoriously argued that female rape complainants should undergo compulsory psychiatric testing, since their "psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions."<sup>82</sup>

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78. *Id.* at 1093.

79. *Baccio*, 41 N.Y. at 270.

80. *Hill*, 578 A.2d at 376 (quoting the 1980 MPC commentaries).

81. *Id.* (quoting MODEL PENAL CODE § 213.1 comment at 307 (1980)).

82. *Id.* (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 736 (James H. Chadbourn rev. 1976)). It is important to note the nexus commonly assumed to exist between mental disability, promiscuity, and an attendant lack of trustworthiness, which Professor Julia Simon-Kerr has explored in her work. *See supra* note 25. This triad is illustrated deplorably in the case of *Buck v. Bell*, 274 U.S. 200 (1927), in which Carrie Buck, a woman who was confined to

The theory behind prompt complaint thus “assigns unique probative value to the former silence of a woman who alleges rape,”<sup>83</sup> endorsing a presumption that women who do not report their abuse are lying about it.<sup>84</sup>

Unlike the doctrine of prompt complaint, the corroboration requirement for sexual assault cases did not exist in English common law.<sup>85</sup> A rape conviction in England and colonial America could be procured based on the testimony of the complainant alone. This has been explained, in part, by the fact that a rape complainant was deemed competent to give testimony under oath,<sup>86</sup> showing that only white women were considered potential victims of rape given testimonial exclusions for Black people in most cases.<sup>87</sup>

The demand for corroboration in rape trials first emerged in the United States in the nineteenth century, although courts frequently cited Lord Matthew Hale as the source of the corroboration rule, incorrectly

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Virginia’s State Colony for Epileptics and Feeble Minded, challenged Virginia’s efforts to force her to undergo sterilization. The Supreme Court ultimately endorsed Virginia’s procedure for assessing the necessity of forced sterilization, with Justice Holmes concluding that “[t]hree generations of imbeciles are enough.” *Id.* at 207. While the case is most often cited as a shameful example of patriarchal eugenics, and not for its relationship to female credibility, the unmistakable undercurrent in the decision is a discounting of Carrie Buck’s own experience. Her status as a woman, as a so-called “imbecile,” discredits the validity of her desire to have agency over her own reproductive decisions.

83. DuBois, *supra* note 75, at 1094.

84. See Tuerkheimer, *Incredible Women*, *supra* note 26, at 21-23; see also Anderson, *supra* note 55, at 955 (“The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to a relative or friend who naturally has the deepest interest in her welfare; and the absence of such disclosure tends to discredit her as a witness.” (quoting *State v. Neel*, 60 P. 510, 511 (Utah 1900)) (discussing the continuation of this misconception well into the 1980s); DuBois, *supra* note 75, at 1989-91 (discussing how New York’s highest court, in *Baccio*, 41 N.Y. at 268, held prompt complaint evidence to be “well settled,” musing that a victim’s failure to immediately report her abuse “would be strong evidence that her affirmation on the subject, when examined as a witness, was false”).

85. Anderson, *supra* note 55, at 955.

86. See *id.* at 955-56 (citing HALE, *supra* note 74).

87. See *infra* Section II(B)(2).

insinuating that it had always existed at common law.<sup>88</sup> New York has the dubious honor of being the first state to require corroboration for sexual assault allegations by statute in 1886.<sup>89</sup> That law read, “No conviction can be had for abduction, compulsory marriage, rape, or defilement upon the testimony of the female abducted, compelled or defiled, [if] unsupported by other evidence.”<sup>90</sup> After New York, many states began requiring corroboration of a complainant’s accusations of abuse in a rape prosecution,<sup>91</sup> though jurisdictions varied on whether the State was required to corroborate each element of the crime, including the identity of the perpetrator.<sup>92</sup> New York courts made the requirement even more stringent in the 1960s when neither the admission of an accused rapist<sup>93</sup> nor evidence of the complainant’s pregnancy<sup>94</sup> were deemed to be sufficient corroboration that rape occurred.

Just like the prompt complaint rule, requiring corroboration centered on the myth of the vindictive woman leveling false allegations of rape.<sup>95</sup> As an intermediate appellate court in New York explained in 1939, “[i]f it were not for the rule of corroboration, a defendant would be at the mercy of an untruthful, dishonest or vicious complainant.”<sup>96</sup> Corroboration and prompt complaint were thus closely linked. Indeed, in some cases “[a] prompt complaint . . . could function as corroborative evidence.”<sup>97</sup> The presence of one helped to make up for the absence of the other: “if a woman failed to complain promptly, she would be forgiven if she had evidence

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88. See Anderson, *supra* note 55, at 957.

89. See Murphy & Schulhofer, *supra* note 75, at 2; Anderson, *supra* note 55, at 965-67 (citation omitted).

90. Anderson, *supra* note 55, at 957 (quoting Act of June 15, 1886, ch. 663, § 283, 1886 N.Y. Laws 953 (emphasis added)).

91. See Anderson, *supra* note 55, at 957 (citations omitted).

92. See Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1368-70 (1972) (surveying the requirements across jurisdictions).

93. *People v. Perez*, 269 N.Y.S.2d 768, 769 (App. Div. 1966).

94. *Lore v. Smith*, 256 N.Y.S.2d 422, 425 (City Ct. 1965); *People v. Tashman*, 233 N.Y.S. 2d 744, 745 (Sup. Ct. 1962).

95. Tuerkheimer, *Incredible Women*, *supra* note 26, at 22-23.

96. *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (App. Div. 1939).

97. Anderson, *supra* note 55, at 957 (discussing *Davis v. State*, 48 S.E. 180 (Ga. 1904), which required corroboration in a rape prosecution and listed prompt outcry as one type of evidence that may qualify as such corroboration).



corroborating the rape. If a woman suffered a rape that produced no corroborative evidence, a prompt complaint itself might serve as the necessary legal corroboration.”<sup>98</sup>

Finally, perhaps the most egregious example of the credibility discount is a standard jury instruction on the prevalence of false accusations of rape and the need for vigilance in making credibility determinations in sexual assault cases—sometimes called the “Lord Hale instruction.”<sup>99</sup> Courts would warn juries to “evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.”<sup>100</sup>

These three restrictions—prompt complaint, corroboration, and cautionary instructions—have thus worked in tandem. The absence of prompt complaint amplified the need for corroboration, and without either, the jury would be urged to doubt the complainant’s credibility. All three existed in the first MPC adopted in 1962, which included the Lord Hale instruction.<sup>101</sup> It also codified the prompt complaint requirement as a stringent statute of limitations, requiring that no prosecution for sexual assault (or related offenses) could go forward unless the victim had reported it to authorities within three months of the incident.<sup>102</sup> And finally, the 1962 MPC endorsed a corroboration requirement for sex crimes, barring prosecution based on the “uncorroborated testimony of the alleged victim.”<sup>103</sup>

Due largely to pressure from feminist reformers, most states eliminated explicit credibility discounts for assault survivors in the 1970s and

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98. *Id.* at 954 (footnote omitted).

99. *Id.* at 959; *see also* Murphy & Schulhofer, *supra* note 75, at 15 (describing the instruction).

100. MODEL PENAL CODE § 213.6(5) (AM. L. INST., Official Draft and Revised Comments 1980); *see* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1134 (1986) (noting the widespread influence of the MPC provisions on the sexual assault statutes of many states).

101. *See* MODEL PENAL CODE §§ 213.6(5), 213.6(6) (AM. L. INST., Proposed Official Draft 1962).

102. MODEL PENAL CODE § 213.6(5) (AM. L. INST., Proposed Official Draft 1962) (“No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence . . .”).

103. *Id.* § 213.6(6).

1980s.<sup>104</sup> Some jurisdictions, however, maintained a version of these doctrines by statute or through case law.<sup>105</sup> Despite the evidentiary reforms motivated by the women's liberation movement, the MPC drafters showed a reluctance to treat rape complainants' credibility on a level playing field with other witnesses. These procedural rules in sexual assault cases, incorporated into the MPC in 1962, are still in effect in some states and in the most recent version of the MPC.<sup>106</sup>

In fact, it was not until the most recent revision process that the American Law Institute (ALI) recommended striking these provisions from the MPC.<sup>107</sup> In a 2013 Discussion Draft, Professors Stephen Schulhofer and Erin Murphy urged the rejection of these doctrines, concluding that they

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104. See Murphy & Schulhofer, *supra* note 75, at 12-18 (tracing the erosion and evolution of these rules in state and federal law).

105. Anderson, *supra* note 55, at 958 (collecting cases and concluding that by the early 1970s seven states still had a corroboration requirement for rape, while twenty-five states had rejected it); see also Note, *supra* note 92, at 1367-68 (surveying jurisdictional differences in corroboration requirements as they existed in the early 1970s and advocating for sexual assault prosecutions to be subject to the same corroboration rules as other criminal prosecutions); Murphy & Schulhofer, *supra* note 75, at 12-18.

106. The current MODEL PENAL CODE § 213.6 (2022) still includes the following provisions:

(4) Prompt Complaint. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

(5) Testimony of Complainants. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

107. See *American Law Institute Members Approve Model Penal Code on Sexual Assault, Drafted by Stephen Schulhofer and Erin Murphy*, NYU L. NEWS (Aug. 24, 2021), <https://www.law.nyu.edu/news/stephen-schulhofer-erin-murphy-model-penal-code-sexual-assault-ali-approval> [<https://perma.cc/3WF7-CGJH>].

“emerged from a cultural landscape in which the chief concern was the protection of chaste white women, and that sought safeguards against the perceived likelihood that women would lodge a false complaint.”<sup>108</sup> Murphy and Schulhofer’s recommendations emphasize “the lack of credible social-scientific evidence demonstrating that sexual-assault complainants falsify their allegations in notable numbers.”<sup>109</sup> To date, however, the ALI has not yet adopted these recommendations.

While the MPC has been slow to reform its approach to women’s credibility, and New York criminal law still adheres to several rules evincing outright skepticism of female veracity.<sup>110</sup> New York was actually among the first states to repeal its corroboration requirement in rape cases in 1974.<sup>111</sup> Interestingly, then-Governor Malcolm Wilson directly criticized the

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108. Murphy & Schulhofer, *supra* note 75, at 12.

109. *Id.* at 15. The recommendations cite empirical evidence debunking the historical misconceptions about untrustworthiness and a high rate of false reporting among sexual assault victims, the evolution of societal attitudes about sex and sexuality that reduce the likelihood of false reporting of sex outside marriage for fear of reputational harm, and the growing understanding that sexual assault complainants are subject to “scrutiny and skepticism,” undermining the assumption that rape accusations are easily made. *See id.*

110. Explicit credibility discounting has persisted in some respects. These include impeachment based on a witness’s criminal history, often a proxy for racial discounting, *see infra* Section II(C)(2), and the continued admissibility of evidence that a rape complainant promptly reported their assault. In New York, for instance, even though corroboration is no longer required to prosecute rape, evidence that a complainant disclosed a sexual assault relatively close in time to the incident is still considered probative of a rape victim’s credibility and is generally admissible as an exception to the hearsay rule. Likewise, prompt outcry evidence is admissible to rebut an assertion of recent fabrication. *See People v. Rosario*, 958 N.E.2d 93 (N.Y. 2011); *People v. McDaniel*, 611 N.E.2d 265 (N.Y. 1993); DuBois, *supra* note 75, at 1113-15 (arguing that the rule of prompt complaint prejudices both complainants and the accused and arguing for three alternative avenues for admitting rape complaint evidence). In addition to the temporal limitation, only the fact that a complaint was lodged—not its “accompanying details”—is admissible. *McDaniel*, 611 N.E.2d at 269.

111. *See* N.Y. PENAL LAW § 130.15 (McKinney 1974) (repealed 1974). In a nod to Freud’s study of hysteria, a carve-out remains for cases where the complainant suffers from a “mental defect, or mental incapacity”—these complainants still must corroborate their assault allegations. N.Y. PENAL LAW § 130.16 (McKinney 2024).

corroboration rule in a memorandum that would have been a valuable reference point during the DVSJA legislative negotiations. According to Governor Wilson:

[T]he implicit suggestion in the corroboration rule that the testimony of women, who are most often complainants in sex cases, is inherently suspect and should not be trusted without the support of the independent evidence, is without justification and contrary to our strong belief in the principle of equality for women in our society.<sup>112</sup>

If this was the position of New York's governor in 1975, how did a corroboration requirement reemerge nearly 50 years later, tucked into a feminist sentencing reform bill? In the intervening decades, did something change to make it more reasonable to assume that women would report their abuse, and corroboration would therefore be easier to come by? Examining this (false) assumption brings us to the alliance between anti-violence feminists and the growth of the carceral state.

### 3. Carceral Feminism and Credibility Discounting in the #MeToo Era

One explanation for the resurrection of the presumption that truthful survivors report their abuse stems from a belief that the modern legal system offers more protection for survivors than it did in the past: once the state condemns domestic violence—through orders of protection, removal of barriers to prosecuting rape cases, and the criminalization of spousal abuse—survivors should seek help through the legal system in greater numbers. The fundamental flaw here is the assumption that criminalizing domestic violence benefits its victims, particularly those from marginalized groups who have the least to gain from system involvement.<sup>113</sup>

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112. NEW YORK STATE LEGISLATIVE ANNUAL 371-72 (1974).

113. See DONNA COKER ET AL., *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 1-2* (2015), <https://www.aclu.org/publications/sexual-assault-domestic-violence-and-policing> [https://perma.cc/3FZK-WBPE] (analyzing ACLU survey on why domestic violence victims from different demographic groups do not seek police intervention); see also Corsico, *supra* note 57, at 314-15 (analyzing the dangers for non-citizens of seeking civil orders of protection, which may trigger harmful scrutiny by immigration authorities and the family regulation system).

These dynamics must be understood in the context of how the feminist reform movement of the 1960s and 1970s embraced and stoked a carceral response to domestic violence—a topic about which much has been written.<sup>114</sup> As the women’s liberation movement gained momentum, there was a push to define family violence as a public, rather than a private, problem. For many in the anti-violence movement, that meant one thing: activating the power of the state to arrest and prosecute abusers. The carceral feminist movement achieved a major milestone in 1994 with the passage of the Violence Against Women Act (VAWA). This federal law allocated vast financial resources to states to expand the criminal legal response to domestic violence and “created monetary incentives for antiviolence advocates to collaborate with law enforcement, committing the antiviolence movement more firmly to the criminal legal response.”<sup>115</sup>

The marriage between the feminist antiviolence movement and the carceral state has been widely criticized as centering the voices of white women to the detriment of the needs and concerns of Black and brown,<sup>116</sup> queer, and non-citizen survivors,<sup>117</sup> as well as other marginalized groups.

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114. *See, e.g.*, AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* (2021); Mimi E. Kim, *The Carceral Creep: Gender-Based Violence, Race, and the Expansion of the Punitive State, 1973-1983*, 67 SOC. PROBS. 251 (2019); EMILY L. THUMA, *ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE* (2019); Mimi E. Kim, *VAWA @ 20: The Mainstreaming of the Criminalization Critique: Reflections on VAWA 20 Years Later*, 18 CUNY L. REV. F. 52 (2014); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012); GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 24; LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2011).

115. GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 24, at 15.

116. *See, e.g.*, sources cited *supra* note 67.

117. Parallels between domestic violence sentencing reforms like the DVSJA and immigration relief statutes aiming to protect DV survivors are striking. A key component of VAWA is the self-petition, which allows non-citizen survivors to apply for legal permanent residency status for themselves and their children without involving their abuser in the process. *See* Monica Ramsy, *Beyond the U Visa and Carceral Feminist “Crimmigration”: Transforming the VAWA Self-Petition to Remedy Sexual Violence in Immigration Detention*, 45 N.Y.U. REV. L. & SOC. CHANGE 37, 58-62 (2021) (offering an overview of the self-petition process and its policy underpinnings). Another form of immigration relief created in the 2000 reauthorization of VAWA is the “U nonimmigrant status”—or “U visa”—which provides a potential path to legal status for applicants who cooperate with law enforcement in the investigation of

Critical to the anticarceral feminist position is the idea that a primarily criminal response to domestic violence assumes an abuse victim should—and does—seek protection from the criminal legal system, and that the outcomes available in that system are beneficial to victims.<sup>118</sup> But all too often the opposite is true, particularly for Black, indigenous, migrant, LGBTQ, and disabled survivors, for whom calling the police invites a perpetuation of the harm they have already experienced.<sup>119</sup> As Mariame Kaba and Andrea J. Ritchie have observed:

Survivors simply want the violence to end. They want safety and healing. They want the person who is hurting them to be transformed into someone who won't hurt them—or anyone else—again. For many survivors, police represent a threat of further violence and retaliation, and of criminalization—either of themselves or of someone they love. They understand that police involvement can lead to economic deprivation, deportation, involvement of the family regulation system, or simply loss of agency over the outcome. As a result, most survivors would rather do nothing about the violence they are experiencing—or take matters into their own hands—then involve a system that puts them at risk for receiving either no response, or a response that increases the violence in their lives.<sup>120</sup>

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domestic violence, sexual assault, trafficking, and other crimes. *See id.* at 56-58. This Article does not attempt to undertake an analysis of the significant similarities between how the VAWA self-petition and U visa and the DVSJA both endorse credibility discounting and cooperation with the carceral state. It is a worthy comparison, however, given the striking parallels that exemplify the reflexive doubt and racialized nature of carceral feminism. *See, e.g., id.*; Monika Batra Kashyap, *Heartless Immigration Law: Rubbing Salt into the Wounds of Immigrant Survivors of Domestic Violence*, 95 TUL. L. REV. 51 (2020); Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273 (2018); Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457 (2016).

118. *See* MARIAME KABA & ANDREA J. RITCHIE, *NO MORE POLICE: A CASE FOR ABOLITION* 75-85 (2022) (exploring the connections between underreporting of abuse and the myriad ways that police fail to protect survivors of domestic violence).

119. *Id.* at 78-85.

120. *Id.* at 82; *see also* Murphy & Schulhofer, *supra* note 75, at 9 (“When questioned, victims most commonly explained that they did not report either because they

With this understanding of survivors' needs, it is no surprise that domestic violence is largely unreported or under-reported.<sup>121</sup> But a survivor who seeks help outside of the criminal legal system—such as community-based responses grounded in transformative justice<sup>122</sup>—will generally lack the

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viewed the incident as a personal matter or that they feared reprisal. Other explanations included a fear of police bias, a desire to protect the offender, or a report to officials other than police.”).

121. See Murphy & Schulhofer, *supra* note 75, at 9 (collecting studies suggesting that only sixteen percent to thirty-six percent of sexual assaults are reported to police, and only fifty-eight percent of injured victims report assault to police).
122. See Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 219, 223-28 (2018) (analyzing women-of-color-led, abolitionist, transformative justice responses to violence); GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 24, at 75-99 (offering examples of community interventions and restorative processes for addressing domestic violence outside of the criminal legal system); see also ERIKA SASSON & CHARLENE ALLEN, *USING RESTORATIVE APPROACHES TO ADDRESS INTIMATE PARTNER VIOLENCE: A NEW YORK CITY BLUEPRINT*, 19-20 (2020), [https://www.innovatingjustice.org/sites/default/files/media/document/2021/Guide\\_RJBlueprint\\_01282020.pdf](https://www.innovatingjustice.org/sites/default/files/media/document/2021/Guide_RJBlueprint_01282020.pdf) [<https://perma.cc/Z8T4-HYBA>] (proposing a collaborative pilot program offering services and workshops to survivors who choose not to pursue solutions through the criminal legal system); Christina Hernandez Sherwood, *Restorative Justice for Survivors of Intimate Partner Violence*, HOPKINS BLOOMBERG PUB. HEALTH MAG. (Mar. 17, 2022), <https://magazine.jhsph.edu/2022/restorative-justice-survivors-intimate-partner-violence> [<https://perma.cc/DM5G-M46W>] (discussing research on survivor preference for restorative justice approaches to domestic violence); Leigh Goodmark, *Restorative Justice as Feminist Practice*, 1 INT'L J. RESTORATIVE JUST. 372, 380 (2018) (“Through restorative processes, conditions that are often associated with gender-based violence, including economic stress, community instability and individual histories of trauma, can be recognized and, through the infusion of community-based services, addressed, if not completely remedied.”); CREATIVE INTERVENTIONS, *CREATIVE INTERVENTIONS, TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE* (2012), <https://www.creative-interventions.org/wp-content/uploads/2020/10/CI-Toolkit-Final-ENTIRE-Aug-2020-new-cover.pdf> [<https://perma.cc/JRD3-3JUF>] (offering tools for community-based intervention to interpersonal violence).

kind of institutional records the DVSJA requires to find their narratives credible in the eyes of the law.<sup>123</sup>

The explosion of the #MeToo movement since 2017<sup>124</sup> has brought renewed attention to the pervasiveness of violence and harassment directed at women, but also to the persistence of credibility discounting. As Professors Epstein and Goodman have observed, while #MeToo “represents the beginning of a shift in cultural understanding and good will,” it has also helped to highlight the distinct, epistemic harm women experience by being constantly and reflexively doubted.<sup>125</sup>

This phenomenon is exemplified in the public debates that raged over the believability of Christine Blasey Ford, who accused then-Judge Kavanaugh of sexual assault during his 2018 Supreme Court confirmation hearings;<sup>126</sup> the backlash against Amber Heard, who was found liable in

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123. See Washington, *supra* note 52, at 1117-20 (cataloguing “[s]tereotypical [s]urvivor [n]arratives in the [c]riminal [l]egal [s]ystem”).

124. The #MeToo movement, a social movement against sexual abuse, sexual harassment, and rape culture, was founded in 2007 by Tarana Burke. It focused on providing healing and support to survivors. However, it gained exponential traction in 2017, when public accusations of abuse against high-profile men—leveled mostly by white women—brought a fervor of media attention to the epidemic of violence against women and the silencing of survivors. See, e.g., Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html> [<https://perma.cc/RYQ7-MV85>].

125. Epstein & Goodman, *supra* note 22, at 458-60 (advocating for “a credibility-discounting #MeToo movement”). See generally Aníbal Rosario-Lebrón, *Evidence’s #MeToo Moment*, 74 U. MIA. L. REV. 1 (2019) (analyzing the credibility discounting of survivors in the evidentiary doctrine of impeachment based on character for untruthfulness); Tuerkheimer, *Beyond #MeToo*, *supra* note 26 (arguing that the #MeToo movement’s emphasis on informal reporting has exposed the need to reengineer systems of formal reporting to combat systemic discrimination).

126. See, e.g., Lisa Boothe, *Christine Blasey Ford Has a Credibility Problem*, HILL (Oct. 3, 2018), <https://thehill.com/opinion/judiciary/409651-dr-fords-credibility-problem> [<https://perma.cc/8HKC-RLWQ>]; Linda Fairstein, *The ‘Corroboration’ Dodge: Christine Blasey Ford’s Allegation is Credible and Consistent; No One Else Needs to Remember*, N.Y. DAILY NEWS (Oct. 5, 2018), <https://www.nydailynews.com/opinion/ny-oped-corroboration-dodge-kavanaugh-ford-20181005-story.html> [<https://perma.cc/8C6R-D7CL>]; Ann C. McGinley, *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMP. RTS. & EMP. POL’Y J. 59 (2019).



2022 for defamation after publicly accusing her ex-husband, Johnny Depp, of domestic violence;<sup>127</sup> and the skepticism directed at the accusers of film producer Harvey Weinstein, despite the (mostly white) star power in their ranks.<sup>128</sup> This credibility backlash exemplifies the persistent epidemic of epistemic harm to women—even educated white women and celebrities.

But #MeToo was actually started in 2006, by Tarana Burke, a Black woman who wanted to uplift the voices of Black and brown women who were survivors of abuse.<sup>129</sup> The resurgence of the #MeToo movement in 2017, much like second-wave feminism, has been criticized for centering the voices of white women, while marginalizing women of color.<sup>130</sup> These

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127. See Jessica Winter, *The Johnny Depp-Amber Heard Trial Is Not as Complicated as You May Think*, NEW YORKER (May 23, 2022), <https://www.newyorker.com/culture/cultural-comment/the-johnny-depp-amber-heard-trial-is-not-as-complicated-as-you-may-think> [https://perma.cc/Z5SR-WFVU]; Constance Grady, *The Me Too Backlash Is Here*, VOX (June 2, 2022), <https://www.vox.com/culture/23150632/johnny-depp-amber-heard-trial-verdict-me-too-backlash> [https://perma.cc/3FR2-DSZU] (“Johnny Depp’s legal victory and the death of *Roe v. Wade* are part of the same toxic cultural movement.”).
128. See, e.g., Deborah Tuerkheimer, *The Credibility Discount: Why We Doubt Accusers and Protect Abusers*, LITERARY HUB (Sept. 30, 2021), <https://lithub.com/the-credibility-discount-why-we-doubt-accusers-and-protect-abusers> [https://perma.cc/HCX9-76X3].
129. See Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They’re Still Being Ignored*, WASH. POST (Nov. 9, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too> [https://perma.cc/3QG4-3H7N]; Sandra E. Garcia, *The Woman Who Created #MeToo Long before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/9JP9-Z4SH].
130. See, e.g., Burke, *supra* note 129; Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, YALE L.J.F. (June 18, 2018), [https://www.yalelawjournal.org/forum/what-about-ustoo#\\_ftnref1](https://www.yalelawjournal.org/forum/what-about-ustoo#_ftnref1) [https://perma.cc/GUW8-ABYB]; Alanna Vagianos, *The “Me Too” Campaign Was Created by a Black Woman 10 Years Ago*, HUFFINGTON POST (Oct. 17, 2017), [https://www.huffpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago\\_n\\_59e61a7fe4b02a215b336fee](https://www.huffpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago_n_59e61a7fe4b02a215b336fee) [https://perma.cc/NZ7F-T8FS] (discussing the “common problem [in which] [f]eminist movements are often whitewashed when they’re brought into mainstream conversations [while] [w]omen of color are often overlooked and left out of the very conversations they create”).

criticisms rightly denounce the movement's sublimation—consciously or not—of the voices of Black women in the conversation about sexual harassment and domestic violence, as well as its failure to recognize the unique experience of Black, indigenous, or other people of color (BIPOC) women survivors resulting from the intersectional nature of their marginalized identities.<sup>131</sup>

### *B. The Mendacious Person of Color*

Racial bias intersects with dynamics of gender bias for survivors of domestic violence, since women of color “live in the dangerous intersections of sexism, racism and other oppressions.”<sup>132</sup> This Section explores the dimensions of racialized credibility discounting and the intersectional harm experienced by BIPOC, especially women, who experience epistemic harm. This is not a comprehensive analysis of race-based credibility determinations, a task that has been ably undertaken in various forms.<sup>133</sup>

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131. Onwuachi-Willig, *supra* note 130; Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1823 (2021) (noting courts' failure to take into account “the intertwined and compounded nature of the racialized and sexualized abuses” experienced by women of color in discrimination claims). These critiques are based in the work of Kimberlé Crenshaw, a founder of Critical Race Theory, who created the framework of “intersectionality” to analyze how “the intersection of racism and sexism factors into Black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.” Crenshaw, *supra* note 20, at 1244; *see also* Kimberlé Crenshaw, Opinion, *How R. Kelly Got Away with It*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/opinion/r-kelly-conviction.html> [<https://perma.cc/RS3H-HRHN>] (noting that “people simply discounted the testimony of Black women and girls,” when then-Judge Thomas and R. Kelly were accused of abuse, and concluding that “racism and misogyny have converged to create a monstrous intersectional failure”); Crenshaw, *supra* note 23 (writing before Ford’s testimony at Kavanaugh’s appointment hearings and reflecting that “[w]e are still ignoring the unique vulnerability of Black women”).
132. *Dangerous Intersections*, INCITE!, <https://incite-national.org/dangerous-intersections> [<https://perma.cc/UDY7-PCN9>] (last visited Mar. 3, 2024).
133. *See, e.g.*, Gonzales Rose, *Racial Character Evidence*, *supra* note 53; Gonzales Rose, *Toward a Critical Race Theory*, *supra* note 53; Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450 (2016); Johnson, *supra* note 53; Chet K.W. Pager, *Blind Justice*,

Instead, this Section will provide a few illustrative examples of how the law has endorsed credibility discounting for BIPOC over the past four centuries, with a focus on the devaluing of Black female narratives—especially reports of sexual abuse.

In 1858, the confederate lawyer and politician Thomas Cobb famously wrote, “[t]he negro, as a general rule, is mendacious . . .”<sup>134</sup> Cobb’s comment exemplifies the pervasive racial stereotype, by no means limited to the confederacy, that BIPOC possess a natural tendency to lie.<sup>135</sup> This myth was part of a larger project of dehumanization that characterized BIPOC as inherently morally corrupt, in contrast to the moral purity of white Christianity. Equating whiteness with moral virtue and honesty fueled the myth of white supremacy that has been used to justify and maintain American slavery and BIPOC exploitation. At first, it was overt. The antebellum legal system excluded the testimony of Black people through a patchwork of rules concerning testimonial competency. Then, in the Jim Crow era, the exclusion came through “a reliance on race as a proxy for credibility.”<sup>136</sup> The trend has continued, more covertly, from the Civil Rights Movement to the present.

### 1. Pre-Civil War Competency Rules

Before the Civil War, people of color—free and enslaved—were generally prohibited from testifying against white people.<sup>137</sup> This

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*Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373 (2005); Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209 (1993); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978); Alfred Avins, *The Right to be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471 (1966).

134. THOMAS R. R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 133 (Univ. of Ga. Press reprint ed. 2012) (1858).

135. It bears noting that certain kinds of “whiteness” are ranked higher on a credibility scale than others. For instance, Evan Stark has written on the hierarchy of “respectable” versus “rough” women that implicates class standing, see EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 146-47 (2007), while Julia Simon-Kerr has written about the tautological relationship between social status and credibility, see Simon-Kerr, *Credibility by Proxy*, *supra* note 25.

136. Johnson, *supra* note 53, at 269.

137. Johnson, *supra* note 53, at 267-68; Morris, *supra* note 133, at 1209-10.

prohibition, sometimes codified by statute, was based either on the status of being a slave or explicitly on race.<sup>138</sup> Justifications for this exclusion included the belief that, as non-Christians, people of African descent were incapable of pledging an oath to God that they would testify truthfully.<sup>139</sup> Practically speaking, allowing Black people and other people of color to give evidence in court threatened to disrupt the broader power structures of white supremacy. The California Supreme Court gave voice to this concern in the famous case of *People v. Hall*,<sup>140</sup> where a Chinese man was categorized as a “negro” under a state statute prohibiting testimony by Black people. The Court stated:

The same rule which would admit [non-whites] to testify, would admit them to all equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.<sup>141</sup>

In the eighteenth century, colonial courts began to loosen prohibitions on the testimony of enslaved people, though not as part of any progressive reform. Rather, the change facilitated the punishment of enslaved insurrectionists when the prosecution needed the testimony of other enslaved people to secure convictions.<sup>142</sup>

Laws differed from state to state as to whether Black people could testify against other Black people, and whether such testimony was admissible in criminal versus civil cases, or in capital versus non-capital cases.<sup>143</sup>

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138. Johnson, *supra* note 53, at 267-68; Morris, *supra* note 133, at 1210. *But see* HIGGINBOTHAM, *supra* note 133, at 85 (discussing how some northern states, such as Massachusetts, did not explicitly bar testimony based on race).

139. *See* Morris, *supra* note 133, at 1211-13 (citing Sir Edward Coke’s view that “only a person who believed in a Christian God could take a valid oath, and therefore the only competent witness was a Christian”).

140. 4 Cal. 399 (1854).

141. *Id.* at 404.

142. Morris, *supra* note 133, at 1215.

143. *See* Johnson, *supra* note 53, at 267. Professor Thomas D. Morris offers a comprehensive survey of the various evidentiary rules regarding the testimony of enslaved people in the American colonies that evolved during the eighteenth and early nineteenth centuries, along with parallel changes in

While the colonies took slightly different approaches, an overarching narrative emerged: because Black people were deemed inherently less credible than whites, there had to be some way to verify their narratives for factfinders to rely on their testimony in a court of law. The two most common means of verification were by: (1) implementing of the “two-witness rule,” derived from the Book of Deuteronomy,<sup>144</sup> which insisted on corroboration, under oath, by at least two people;<sup>145</sup> and (2) requiring a showing of “pregnant circumstances,” or circumstantial evidence that tended to support the fact in question.<sup>146</sup>

While these credibility tests are often described separately, in many ways they are “functional equivalent[s]” in that they both impose a corroboration requirement.<sup>147</sup> An enslaved person’s testimony could be considered in court only if the testimony of another witness or “circumstantial evidence . . . len[t] credibility to the testimony . . .”<sup>148</sup> Notably, though these evidentiary rules were grounded in racist ideology,

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English law. Morris, *supra* note 133, at 1209-23. In addition to exploring the distinct nuances of corroboration requirements for the testimony of enslaved people in the various colonies, Morris also surveys the “complex effort to construct different layers of evidentiary rules depending upon the seriousness of the offense.” *Id.* at 1219.

144. Deuteronomy 19:15 (New International Version). The Book of Deuteronomy in the Old Testament states: “One witness is not enough to convict anyone accused of any crime or offense they may have committed. A matter must be established by the testimony of two or three witnesses.” *Id.*

145. The “two-witness rule” developed at common law as a requirement in prosecutions for treason and perjury, to guard against criminal liability based on unfounded accusations. See 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2040 (1978). Its application to prosecutions for treason was enshrined in the U.S. Constitution, see U.S. CONST., art. III, § 3, and is still codified in many statutes criminalizing perjury, such as N.Y. Penal Law 210.50, but is not rigidly applied, see *People v. Sabella*, 316 N.E.2d 569, 575 (N.Y. 1974) (describing the “so-called ‘two-witness rule’” as “a principle of ancient derivation which is generally conceded to have outlived its original rationale”), *overruled on other grounds by* *People v. Brown*, 353 N.E.2d 811 (N.Y. 1976).

146. “Pregnant circumstances” generally referred to some degree of circumstantial evidence corroborating a claim. See Morris, *supra* note 133, at 1215-17 (discussing the ambiguity around the strength of the circumstantial evidence denoted by the phrase “pregnant circumstances”).

147. *Id.* at 1215.

148. *Id.* at 1217.

they ostensibly protected the liberty interest of the accused. Requiring corroboration in the DVSJA resentencing context, on the other hand, serves no due process purpose; instead, it disadvantages the person whose liberty has already been stripped away.

## 2. Reconstruction & Jim Crow Discounting

After emancipation, federal legislation recognized the right of Black people to testify against whites.<sup>149</sup> States differed considerably, however, in enforcement, with many southern states retaining antebellum testimonial prohibitions.<sup>150</sup> But the right to testify without explicit corroboration requirements did not translate into unbiased assessments of the credibility of Black witnesses. As with many freedoms gained through Emancipation and during Reconstruction, recognition of the testimonial capacity of BIPOC was not the end of race-based credibility determinations in Jim Crow America.<sup>151</sup>

Indeed, cases from the century between the Civil War and the Civil Rights Movement are replete with examples of “race as a proxy for credibility.”<sup>152</sup> Professor Sheri Lynn Johnson observed more than twenty-five years ago that race-based discounting in the 20<sup>th</sup> century can be divided broadly into five categories: (1) confession law; (2) witness credibility determinations; (3) rape cases with Black defendants and white complainants and ample evidence of consensual sex; (4) prosecutorial misconduct cases; and (5) lynchings.

Johnson highlighted *Brown v. Mississippi*<sup>153</sup> and *Chambers v. Florida*,<sup>154</sup> two cases reviewed by the Supreme Court in 1936 and 1940, respectively, in which Black defendants confessed to crimes after being subjected to torture by the police.<sup>155</sup> In each case, the accused introduced evidence at

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149. Act of April 9, 1866, ch. 31 § 1, 14 Stat. 27, 27 (1866); 18 U.S.C. § 242 (1874); see Victor B. Howard, *The Black Testimony Controversy in Kentucky: 1866-1872*, 58 J. NEGRO HIST. 140, 140-41 (1973).

150. Carlin, *supra* note 133, at 455.

151. Johnson, *supra* note 53, at 268.

152. *Id.*

153. 297 U.S. 278 (1936).

154. 309 U.S. 227 (1940).

155. Johnson, *supra* note 53, at 269-70.

trial that the confession was coerced, but the juries voted to convict.<sup>156</sup> In *Chambers*, while Justice Black acknowledged the disparity in treatment of “the poor, the ignorant, the numerically weak, the friendless, and the powerless,” he stopped short of naming Blackness as a common trait of people disproportionately abused, coerced, and convicted.<sup>157</sup>

The Alabama case of the Scottsboro boys also offers an example of biased credibility determinations of Black people by white jurors that have long plagued the American legal system.<sup>158</sup> In that case, Haywood Patterson, one of the nine Black defendants accused of gang rape, was convicted by white juries in three separate trials.<sup>159</sup> Even after a white boy and one of the alleged rape victims—a white woman—recanted and admitted that another white woman had plotted to implicate the innocent Black teenagers, the jury still refused to believe that Patterson was innocent.<sup>160</sup>

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156. *Id.*

157. *See id.*

158. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 161-66 (tracing the history of competency laws from England to the American colonies to the United States, where being Black meant “a blanket disqualification from testifying in many states,” and where racism rooted in slavery led to the belief that Black people lacked personhood and thus were inherently untrustworthy); *see also* Gonzales Rose, *Toward A Critical Race Theory*, *supra* note 53, at 2245-49 (discussing race-based witness competency rules, which often excluded testimony from non-white people unless, for example, it was a Black person testifying against another Black person, and the functionality of those rules in upholding white supremacy); *see also* Carlin, *supra* note 133, at 454-58 (summarizing the various systems undermining Black credibility, from slavery to black codes, followed by state laws and case law barring testimony from freed Black people, making “[i]n a literal sense, white voices . . . the only voices of legal truth”).

159. Johnson, *supra* note 53, at 270.

160. *Id.* at 270-71. Even weak circumstantial evidence often trumped the credible testimony of Black people accused of crimes. *Id.* at 271. Johnson pointed to legal examples not only to illustrate the issues that the Supreme Court has addressed, but also to emphasize how pervasive these problems were and how likely it was for a case to evade review by a higher court. *Id.* Cases of consensual sex between a Black man and white woman, later mischaracterized as rape, also came to be a common legal trope, especially in the Jim Crow era. *Id.*; *see also* Tuerkheimer, *Incredible Women*, *supra* note 26, at 20-21 (naming “cases of white women alleging rape by black men” as the exception to the historical norm of rape complainants being disbelieved). These cases sometimes led to death sentences or life imprisonment. Johnson,

In cases involving prosecutorial misconduct, Professor Johnson identified two prevailing myths advanced by prosecutors to incite racially biased credibility determinations: that Black people are “inherently less trustworthy,” and that Black people are lying for each other.<sup>161</sup>

All too often, however, the common practice of lynching meant that a person of color accused of a crime never made it to the courthouse.<sup>162</sup> This legacy of epistemic injustice for Black, brown, and indigenous people has continued in an unbroken chain from Reconstruction to the present: from the attacks on Anita Hill’s credibility by the Senate Judiciary Committee, to the murder of Michael Brown and the ensuing extraordinary grand jury proceedings that led to no indictment, insidious disbelief and systemic racism have persisted in our legal system and beyond.

### 3. Black Women and the Intersectional Discount

*“There is a hierarchy when credibility issues arise in the courts. It is not only a simple hierarchy of men over women, but it is one where white women are found to be more credible than African American women.”*

- Marilyn Yarbrough and Crystal Bennett<sup>163</sup>

In the larger context of credibility discounting based on race, it is critical to shine a light on the particular epistemic harm experienced by Black and brown women who are survivors of abuse.

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*supra* note 53, at 271; *see* Epstein & Goodman, *supra* note 22, at 436 (“As many legal scholars have noted, American courts have a long history of discrediting African American witnesses on the basis of their blackness. Such discrediting can occur based on stereotypes that African Americans are less intelligent than are whites, or that they are untrustworthy and dishonest.”).

161. Johnson, *supra* note 53, at 274. Johnson supported this theory with at least eighteen cases in which such conduct occurred. *Id.* (citing C.R. McCorkle, Annotation, *Counsel’s Appeal in Criminal Cases to Racial, National, or Religious Prejudice as Ground for Mistrial, New Trial, or Reversal*, 45 A.L.R.2d 303 (1956)).

162. *Id.* (“Given the phenomenal prevalence of lynching of African Americans—by one conservative estimate, nearly 3500 lynchings between 1882 and 1968, and by another estimate, 5000 from 1859 to 1962—I am driven to the conclusion that the most egregious uses of race in the assessment of credibility were extraordinarily common.”).

163. Yarbrough & Bennett, *supra* note 27, at 634.



In 1855, a Black woman named Celia was put to death in Missouri for killing the man who had enslaved her. Celia's court-appointed attorneys argued that she had acted in self-defense: she was trying to fend off yet another sexual assault by her enslaver after enduring five years of abuse. The trial court refused to instruct the jury on self-defense, ruling that the justification defense was unavailable to Celia because she was a slave—as property, not a person, the law did not recognize her right to defend herself.<sup>164</sup>

Celia's story is one of countless examples of sexual assault being wielded as a weapon of oppression and control against women of color.<sup>165</sup> It evokes Mariame Kaba's observation that, "for centuries, Black women have had no selves to defend."<sup>166</sup> Women of color in our society still experience disproportionately higher rates of domestic violence. For example, a 2021 report by the New York City Mayor's Office found that Black women were more than twice as likely to be victims of domestic violence than white women.<sup>167</sup> And police-reported intimate partner violence is two to three times higher among Black and Hispanic women compared to white

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164. The University of Michigan's *Celia Project* offers a wealth of archival resources about Celia's case, as well as the broader history of sexual violence against Black women under slavery and after emancipation. See *The Celia Project*, <https://sites.lsa.umich.edu/celiaproject/> [https://perma.cc/2ZQY-M4M9] (last visited Mar. 8, 2024).

165. See generally RICHIE, *supra* note 114, at 23-63 (compiling a wealth of historical statistics and narrative accounts of violence against Black women, across a typology of abuse types).

166. MARIAME KABA, NO SELVES TO DEFEND: A LEGACY OF CRIMINALIZING WOMEN OF COLOR FOR SELF-DEFENSE 3 (2014), [https://noselves2defend.files.wordpress.com/2016/09/noselvestodefend\\_v5.pdf](https://noselves2defend.files.wordpress.com/2016/09/noselvestodefend_v5.pdf) [https://perma.cc/T6GN-DF96].

167. NYC Mayor's Office to End Gender-Based Violence, *2020 Report on the Intersection of Domestic Violence, Race/Ethnicity and Sex*, at 4 (2020), <https://www.nyc.gov/assets/ocdv/downloads/pdf/endgbv-intersection-report.pdf> [https://perma.cc/U67F-ENQH].

women,<sup>168</sup> a statistic even more striking considering an estimate that for every Black woman who reports rape, at least 15 Black women do not.<sup>169</sup>

The dehumanization of Black and brown female bodies—based, in part, on the “myth that they cannot really be raped”<sup>170</sup>—is inextricably linked with the discrediting of BIPOC women’s stories. As discussed above, female credibility in general has been linked historically to a woman’s perceived chastity or sexual virtue.<sup>171</sup> Women of color thus experience an even steeper credibility discount based on myths about their hypersexuality and moral depravity.<sup>172</sup> The bodies deemed least worthy of protection, in other words, belong to the people deemed least worthy of belief. And despite so much progress in the anti-racism and feminist movements, “we are still ignoring the unique vulnerability of black women,” including vulnerability to disbelief.<sup>173</sup>

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168. Sherry Lipsky, Raul Caetano, & Peter Roy-Byrne, *Racial and Ethnic Disparities in Police-Reported Intimate Partner Violence and Risk of Hospitalization Among Women*, NAT’L INST. HEALTH (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2757408/> [<https://perma.cc/Z9YQ-JBUL>]; see also Carolyn M. West and Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, National Online Resource Center on Violence Against Women, 109 (2013), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_SVAAWomenRevised.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf) [<https://perma.cc/D4HF-ALSH>] (noting high rates of victimization of Black women in a variety of categories).

169. National Center on Violence Against Women in the Black Community, *Black Women and Sexual Assault* (2018), <https://ujimacommunity.org/wp-content/uploads/2018/12/Ujima-Womens-Violence-Stats-v7.4-1.pdf> [<https://perma.cc/L8BU-SC7F>].

170. Yarbrough & Bennett, *supra* note 27, at 649; see also Kimberlé Crenshaw, Podcast: Intersectionality Matters, Episode 2 (“I Believe I Can Lie: R. Kelly (Still) In Denial”) (Mar. 8, 2019) (discussing the myth of Black women as “unrapeable”), <https://podcasts.apple.com/am/podcast/ep-2-i-believe-i-can-lie-r-kelly-still-in-denial/id1441348908?i=1000431416390>.

171. See Simon-Kerr, *Unchaste and Incredible*, *supra* note 25 at 1854; see also *supra*, Section II(A)(1).

172. Yarbrough & Bennett, *supra* note 27, at 635-640 (describing a series of negative stereotypes ascribed to Black women—“Mammy,” “Jezebel,” “Sapphire,” and “Cassandra”).

173. Crenshaw, *We Still Have Not Learned from Anita Hill’s Testimony*, *supra* note 23, at 17.

### C. *The Deceitful Prisoner*

#### 1. Myth or Not?

Our third mythological liar is the “deceitful prisoner.” The legal system has long cast a doubtful eye on the credibility of someone whose liberty hinges on their testimony.

Perhaps the clearest example is that a person accused of a crime is considered an “interested witness,” and juries are instructed that they “may . . . consider whether an interest in the outcome . . . affected the truthfulness of the witness’s testimony.”<sup>174</sup> Likewise, a cooperating witness who testifies in exchange for leniency from the prosecution may be impeached as less credible due to their self-interest, and the terms of any cooperation agreement must be disclosed to the defense.<sup>175</sup> The same is true for incarcerated witnesses—so-called “jailhouse informants”—whose frequently unreliable trial testimony has contributed to many wrongful convictions.<sup>176</sup>

Post-conviction litigation also showcases widespread skepticism about the truthfulness of the claims alleged by people who have already been convicted and sentenced. It is during these post-judgment collateral attacks,

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174. CJI2d[NY] 7.03 (Credibility—Interest/Lack of Interest); see *Reagan v. United States*, 157 U.S. 301, 310 (1895); *Portuondo v. Agard*, 529 U.S. 61, 72-73 (2000); *People v. Agosto*, 538 N.E.2d 340, 341-42 (N.Y. 1989). A court may not, however, charge the jury that a person accused of a crime possesses a “motive to lie” or a “deep personal interest” in the outcome, instructions that have been invalidated because they constitutionally undermine the presumption of innocence. *United States v. Gaines*, 457 F.3d 238, 247-50 (2d Cir. 2006); see also *United States v. Solano*, 966 F.3d 184, 197 (2d Cir. 2020).

175. See *Giglio v. United States*, 405 U.S. 150, 155 (1972); see *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

176. See generally Innocence Staff, *Informing injustice: The disturbing use of jailhouse informants*, THE INNOCENCE PROJECT (Mar. 6, 2019), <https://innocenceproject.org/informing-injustice/> [<https://perma.cc/676R-WYNN>]; see also The Honorable Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 HASTINGS L.J. 1381, 1385, 1431 (1996) (cataloguing some potential pitfalls of relying on the testimony of “converted criminals as witnesses,” and advising prosecutors that “an absence of corroboration will be fatal to your case”). A growing awareness of this phenomenon in the criminal justice community has sparked calls for greater prosecutorial transparency about the bargains struck with incarcerated informants.

where the relief sought is often release from prison (whether through outright vacatur or a sentence reduction), that credibility comes under heightened scrutiny. After all, it is difficult to imagine a more reasonable motive to fabricate than liberty itself. The “deceitful prisoner,” unlike its gender- and race-based counterparts, is a persona whose existence appears to be at least partially grounded in common sense. This raises the question: is the myth of the “deceitful prisoner” really a myth?

## 2. Prisoner as Proxy

Professor Simon-Kerr’s framework of “credibility by proxy” analyzes how one’s status as a prisoner—past or present—is in fact a proxy for judging the person to be morally corrupt, and therefore dishonest.<sup>177</sup> In turn, the presumption of dishonesty attached to a criminal record is rooted not in the possibility of self-serving lies to secure liberty, but in the racialized history of criminalization itself. A telling example is Federal Rule of Evidence 609, which explicitly permits impeachment based on prior convictions, allowing juries to consider a person’s criminal record when assessing their truthfulness.<sup>178</sup>

Rule 609 has been the subject of intense criticism and efforts at reform.<sup>179</sup> It ties a prior criminal record to future criminal propensity in a

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177. See Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 152.

178. FED. R. EVID. 609 (subject to limitations concerning the balancing of prejudice and probative value).

179. See, e.g., Anna Roberts & Julia Simon-Kerr, *Reforming Prior Conviction Impeachment: The Need for Reform*, 50 FORDHAM URB. L. J. 377 (2023) (describing the formation of the Prior Conviction Impeachment Reform Coalition, outlining the primary problems with FRE 609, and proposing a menu of reform proposals); Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 185-86 (criticizing FRE 609 and parallel state statutes for endorsing the “link between credibility, reputation, and criminality”); Simon-Kerr, *Credibility in an Age of Algorithms*, *supra* note 25, at 131-33 (same); Montré D. Carodine, *Keeping It Real: Reforming the “Untried Conviction” Impeachment Rule*, 69 MD. L. REV. 501 (2010) (exploring the relationship between plea bargaining and the use of FRE 609); Montré D. Carodine, “*The Mis-Characterization of the Negro*”: A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L. J. 521 (2009) (arguing that prior convictions are unreliable hearsay, and FRE 609 perpetuates racial bias); Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295 (1994) (“No provision of the Federal Rules of Evidence has

way that is “neither race-neutral nor class-neutral.”<sup>180</sup> Without any proven ability to predict lying, it dissuades many people accused of crimes from testifying in their own defense.<sup>181</sup> Professor Montré D. Carodine has analyzed the inverse relationship between the emergence of Rule 609 and the abandonment of the competency rules that prohibited testimony by Black people and those with a criminal record.<sup>182</sup> In other words, since the label of “prisoner” is highly racialized, the very fact that someone is incarcerated brings with it a tidal wave of credibility bias influenced by our nation’s history of enslaving, oppressing, and incarcerating people of color.<sup>183</sup>

As an extension of the institution of slavery, imprisonment itself thus serves as a form of “racial character evidence.”<sup>184</sup> That term was coined by Professor Jasmine B. Gonzales Rose to refer to “an instance in which

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sparked more controversy than Rule 609 . . . .”); Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 6 (1997) (calling Rule 609 impeachment “perhaps one of the most controversial in the law of evidence”).

180. Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2509 (2020); see also Gonzales Rose, *Toward A Critical Race Theory*, *supra* note 53, at 2271-72 (citing research showing that impeachment by prior conviction is generally interpreted by jurors as evidence of “criminal propensity rather than poor credibility,” and how Rule 609 disproportionately affects racial minorities); Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835 (2016).
181. See generally Roberts & Simon-Kerr, *Reforming Prior Conviction Impeachment*, *supra* note 181; Carodine, “*The Mis-Characterization of the Negro*,” *supra* note 181, at 525 (observing that Rule 609 “places a criminal defendant in a no-win situation. The defendant can remain silent and not testify—thus prejudicing him in the eyes of the jury for failing to tell his side of the story—or he can face certain prejudice by testifying and being impeached with his convictions”). Indeed, one study found that 62% of people without criminal records testified at trial, whereas only 45% of people with criminal records testified. See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 490 n.9 (2008).
182. Carodine, “*The Mis-Characterization of the Negro*,” *supra* note 181, at 546-47.
183. Roberts & Simon-Kerr, *Reforming Prior Conviction Impeachment*, *supra* note 181, at 392-95 (exploring how prior impeachment conviction compounds racial bias); Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1379 (2010) (“[R]ace is still a factor in credibility determinations.”).
184. See Gonzales Rose, *Racial Character Evidence*, *supra* note 53.

admitted evidence introduced ostensibly for non-character purposes aligns with or promotes reliance on racial stereotypes or bias . . . and has the effect of character evidence by suggesting something is more likely to have occurred based on the race of the subject.”<sup>185</sup> Thus, the testimony of an imprisoned person is less likely to be believed not only because they are self-serving in their quest for liberation, but also—and especially—because of the racialized nature of criminalization itself.

### 3. “Possibility Pleading” from Behind Bars

Interestingly, despite systemic distrust of the “deceitful prisoner,” standards for assessing pleadings of incarcerated people in the post-conviction context have been relatively liberal. In the 1940s, the Supreme Court reversed in two cases where incarcerated habeas corpus litigants had been denied a hearing.<sup>186</sup> In both instances, the Court stressed the need for a hearing to resolve material factual disputes; even where the allegations “may tax credulity,”<sup>187</sup> the Court emphasized the prisoner’s “right to be heard”:

Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government’s contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence.<sup>188</sup>

In 1962, the Court retreated slightly from this full-throated approach and endorsed a kind of plausibility test for post-conviction pleadings, calling for a hearing so long as existing evidence does not directly refute the claims of the incarcerated person.<sup>189</sup> In *Machibroda v. United States*, a man who had participated in a series of bank robberies testified against his co-defendant in exchange for a plea deal. He was sentenced to forty years in prison. More than two years later, he wrote to the court saying that the federal prosecutor in his case had promised a shorter sentence for his cooperation but had told

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185. *Id.* at 370 n.2.

186. *Waley v. Johnston*, 316 U.S. 101 (1942); *Walker v. Johnston*, 312 U.S. 275 (1941).

187. *Waley*, 316 U.S. at 104.

188. *Walker*, 312 U.S. at 287.

189. *Machibroda v. United States*, 368 U.S. 487 (1962).

him to keep it a secret from his attorney. After the prosecutor signed an affidavit denying these accusations, the lower court dismissed the post-conviction motion without a hearing, deeming Machibroda's allegations incredible not only because of the prosecutor's affidavit but also because he had taken so long to complain. The Supreme Court, however, reversed and ordered a hearing, stating that "the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible."<sup>190</sup> Nevertheless, the Court described the case as "not far from the line" and recognized that judges retain some discretion to "exercise their common sense" and dismiss allegations that are "vague, conclusory, or palpably incredible."<sup>191</sup>

New York largely adopted the Supreme Court's approach<sup>192</sup> to assessing the plausibility of post-conviction pleadings in 1971, when the state overhauled its Criminal Procedure Law. As part of that effort, New York codified the writ of *error coram nobis*, the common-law vehicle for collaterally attacking a conviction or sentence based on a factual error.<sup>193</sup>

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190. *Id.* at 496.

191. *Id.* at 495-96.

192. I do not attempt here to situate the DVSJA's pleading requirements within the larger discussion of the "plausibility pleading" regime under Federal Rules of Civil Procedure 12(b)(6) the Supreme Court adopted in *Bell Atlantic Corp. v. Twombly*, 330 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See, e.g., Joseph A. Seiner, *Plausible Harassment*, 54 U.C. DAVIS L. REV. 1295 (2021); Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015). It is worth noting, however, that the shift from "notice pleading" to "plausibility pleading" in the federal civil context raises parallel concerns to the DVSJA's pleading requirements, given the inequity of access to corroborative evidence. See Alexander A. Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 3-4; 32-35 (2012) (arguing against pleading standards that requires the petitioner to produce additional evidence beyond notice pleading where the petitioner has unequal access to the information).

193. See generally Note, *The Writ of Error Coram Nobis*, 37 HARV. L. REV. 744 (1924) (offering a useful overview of the writ in English common law and early American jurisprudence) [hereinafter Note on Coram Nobis]; see also Stanley Fuld, *The Writ of Error Coram Nobis*, 117 N.Y.L.J. 2122 (1947) (opinion piece published by New York Court of Appeals Associate Judge Fuld, tracing the resurrection of the writ of error coram nobis in American jurisprudence, and its expansion into the field of equity: "Not only did the American lawyers and American courts disinter the corpse, but they gave it a body and a shape which

Now in statute form, the *coram nobis* writ became a motion to vacate a conviction or sentence pursuant to Criminal Procedure Law (CPL) section 440—the same statutory section that is home to the resentencing provisions of the DVSJA.

In enacting CPL 440, the New York legislature set an ostensibly low bar for incarcerated people to receive a hearing. Citing *Machibroda* as the “currently recognized criterion . . . for the denial, without a hearing, of a post-judgement motion,”<sup>194</sup> it gave courts the discretion to deny post-conviction motions summarily, without a hearing, only when the allegations are utterly implausible or directly contradicted by available evidence.<sup>195</sup> Even then, however, the statute did not require dismissal, and the law encouraged courts to consider “all the circumstances attending the case” to determine if “there is no reasonable possibility that [the contradicted] allegation is true.”<sup>196</sup> These standards, still in effect today, apply to all post-conviction motions in New York, whether the claim is one alleging ineffective assistance of counsel, a plea induced by fraud or deception, or an illegal sentence.

Because the DVSJA was codified alongside the statutory descendants of *coram nobis* (CPL 440.10 and 440.20), the threshold procedures for obtaining a hearing for other post-conviction motions offer a striking comparison. The procedures and standards for other post-conviction motions in New York, set forth in section 440.30 of the Criminal Procedure Law, differ dramatically from the DVSJA’s threshold evidentiary demands in three main respects.

First, CPL 440.30 is far less onerous in terms of the type and volume of corroborating evidence required to get a hearing. It contemplates a situation where someone seeking post-conviction relief makes an allegation

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it had never before possessed.”). The common-law writ called on a court to reexamine a judgment based on “facts which were unknown to the court at the time of judgment and which were not inconsistent with the record.” Note on *Coram Nobis*, *supra*, at 744. A flexible writ, it was available in civil as well as criminal cases, providing the court of first instance—rather than an appellate court—with the opportunity to amend its prior determination in light of new facts. For instance, the writ was used where the accused pled guilty “in ignorance of the meaning of his plea,” “where he has been sentenced to punishment too severe in view of his minority,” or “where a confession has been obtained by duress.” *Id.* at 746-47 (citations omitted).

194. N.Y.S. Bill Jacket, L. 1970, ch. 0996, at 16.

195. N.Y. CRIM. PROC. LAW § 440.30(4)(d).

196. *Id.* § 440.30(4)(d)(ii).



of fact that is “unsupported by any other affidavit or evidence.”<sup>197</sup> In other words, the section is only triggered where there is literally no other support for the factual claim. Other than suggesting a witness affidavit as one possible kind of corroboration, this section does not specify the types of records or testimony that would qualify. CPL 440.30 stands in stark contrast to the DVSJA’s specific requirement that a resentencing application include at least one piece of corroboration for the resentencing applicant’s allegations of abuse that is “either a court record, pre-sentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection.”<sup>198</sup> Nor does the 440.30 language specifically require *two* pieces of corroboration. Indeed, even absent *any* corroboration, a court can still grant a hearing if the allegations are possibly true.

Second, even without any corroboration at all, courts can only deny a hearing on non-DVSJA post-conviction motions if they conclude that “there is no reasonable possibility the [factual] allegation is true,” taking into account “all the other circumstances attending the case.” This additional step might be called a possibility test. Even where the movant is unable to submit evidentiary support, the court still must vet the plausibility of their claims.<sup>199</sup>

It follows that for a court to deny a hearing under CPL 440.30(4)(d), it must find not only that the movant’s allegations are unsubstantiated, but that their claims are utterly implausible under the circumstances of the case. Put another way, a hearing is required where the allegations, “although improbable, are neither so incredible as a matter of law, nor so clearly refuted by the record.”<sup>200</sup>

Under CPL 440.30’s permissive standard, derived from the writ of error *coram nobis*, very few allegations of domestic abuse would ever be

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197. *Id.* § 440.30(4)(d)(i).

198. *Id.* § 440.47(2)(c).

199. The choice of the word “possibility,” instead of “probability,” echoes the constitutional harmless error standard once articulated in *Fahy v. Connecticut*, 375 U.S. 85 (1963), under which reversal is required if there is a “reasonable possibility” that the outcome of the trial would have been different but for the constitutional violation. For context on the evolution of the Supreme Court’s harmless error doctrine, including the “harmless beyond a reasonable doubt” standard that followed *Fahy* in *Chapman v. California*, 386 U.S. 18 (1967), I suggest John M. Graebe, *The Riddle of Harmless Error Revisited*, 54 *Hou. L. Rev.* 59 (2016).

200. *People v. Bagley*, 244 N.E.2d 880, 880 (N.Y. 1969).

summarily denied for lack of corroboration. It is widely known that domestic violence often occurs behind closed doors, in secret, and the shame and fear it can engender—among other factors—often discourage survivors from reporting their abuse even to friends and family, let alone to authorities. If a court were to consider the phenomenon of underreporting as part of “all the other circumstances attending the case,” then almost no claim of domestic violence would ever be deemed untrue beyond a reasonable possibility, warranting summary denial at the pre-hearing stage under CPL 440.30. Even if seemingly “improbable,” how could any allegation of domestic abuse be “so incredible as a matter of law” or “so clearly refuted by the record” that it would foreclose a hearing? One of the great tragedies of domestic violence is its ubiquity and, therefore, its supreme plausibility at the pleading stage, even without any corroboration.

Third, summary denial under this section is discretionary—CPL 440.30(4) dictates when a court *may* deny a hearing, not when it *must*. Accordingly, even without corroboration, and *even if* the claims appear implausible, CPL 440.30 still empowers courts to grant a hearing. This additional discretion further distinguishes CPL 440.30 from the DVSJA’s hard and fast threshold requirements. Thus, paradoxically, a reading of the plain text makes it seem easier to get into court on a motion to vacate a conviction than a motion to reduce a sentence under the DVSJA.

But in practice, credibility bias affects post-conviction determinations even under the more permissive standard. And CPL § 440.30’s “possibility pleading” requirement raises the important question of “possible to whom?” Whether a credibility determination warrants a hearing or can be decided “on the papers” raises fundamental questions of the role of bias in assessing truthfulness. The case law interpreting CPL § 440.30’s corroboration section bears this out, showing an inconsistent application of the post-conviction pleading standard.

Notably, the legislative history of CPL 440.30(4)(d) itself cites two cases that arguably contradict each other regarding the need for corroboration.<sup>201</sup> First, the revision committee cited *Machibroda*, which, as discussed earlier, illustrates the more permissive approach: a hearing should be granted when there are controverted issues of fact, even if the version put forth by the incarcerated petitioner seems “improbable.”<sup>202</sup> But the other case cited

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201. Memorandum in Support and Explanation of Proposed Criminal Procedure Law, N.Y. Commission on Revision of the Penal Law and Criminal Code (March, 1970), at 11.

202. *Machibroda v. United States*, 368 U.S. 487, 496 (1962).

in CPL 440's legislative history is *People v. White*.<sup>203</sup> There, New York's highest court held that a man sentenced to life imprisonment for grand larceny was not entitled to a hearing on his claim that he had been promised a sentence of seven years. Finding the claim implausible, the court stated:

Bare allegations not confirmed by the recorded facts and contrary to the conduct of the defendant and his attorney, are insufficient in law to warrant the granting of a hearing. The defendant is not entitled to a hearing on charges lacking factual support. Due process does not require a court to accept every sworn allegation as true. *Many sworn allegations are palpably untrue, not improbable or unbelievable, but untrue.*<sup>204</sup>

The dissent in *White*, however, would have ordered a hearing, finding the majority's decision "impossible . . . to reconcile . . . with controlling precedents," since none of the petitioner's claims were conclusively disproven by the record.<sup>205</sup>

This tension reveals that New York's post-conviction pleading requirements were ambivalent from inception. Over 50 years later, the New York Court of Appeals still struggles with who to believe and when. As recently as 2009, the court split in a similar fashion, where the case turned on two affidavits by a single witness that were "contradictory in a crucial respect."<sup>206</sup> Tellingly, in both *White* and the recent case of *People v. Samandarov*,<sup>207</sup> the Court of Appeals' summary finding favored the allegations of law enforcement over the incarcerated petitioner, even where there were clear factual disputes.

Nevertheless, despite the history of skepticism towards allegations brought by imprisoned people, the DVSJA stands alone in New York as the only type of post-conviction claim that *requires* corroborated pleadings—

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203. *People v. White*, 132 N.E.2d 880 (N.Y. 1956).

204. *Id.* at 883 (emphasis added).

205. *Id.* at 884 (Desmond, J., dissenting). In *People v. Bagley*, 244 N.E.2d 880 (N.Y. 1969), decided a decade after *White*, the pleading pendulum swung back again in the more liberal direction, with the court ruling that a hearing was wrongly denied based on claims of plea induced by fraud: "[a]ppellant's allegations, although improbable, are neither so incredible as a matter of law, nor so clearly refuted by the record, that he is not entitled to a hearing." *Id.* at 880.

206. *People v. Samandarov*, 920 N.E.2d 930, 937 (N.Y. 2009) (Lippman, J., dissenting).

207. *Id.*

further evidence that the disproportionate harm to Black and brown women survivors is no coincidence.

### III. THREE LIARS (TRY TO) WALK INTO A COURTROOM

The passage of sentencing reforms like New York's DVSJA is a cause for celebration. It demonstrates meaningful progress in recognizing the reverberations of trauma: how hurt people hurt people. But the success of a law like the DVSJA depends on the criminal legal system listening to survivors with compassion, fairness, and an understanding of the struggles faced by victims of abuse. Interrupting the trauma of long-term incarceration for survivors requires us to reevaluate who we believe and why, what proof we demand and when, and how our deeply ingrained biases shape those determinations. Unfortunately, the DVSJA falls short. By introducing a heightened pleading standard for post-conviction resentencing claims, the DVSJA doubles down on stereotypes that ultimately limit its effectiveness, engendering re-traumatization and endorsing the exclusion of the groups most impacted by domestic violence.

The DVSJA sets the stage for the convergence of the three mythological liars described above, since incarcerated survivors stand at the intersection of these figures: the woman, the person of color, and the incarcerated person. Against the backdrop of reflexive disbelief experienced by our three mythological liars, there is an almost insurmountable credibility discount for incarcerated survivors. All DVSJA resentencing applicants are incarcerated; most are women; and many are women of color.<sup>208</sup> As a result,

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208. See Angela Browne, Brenda Miller & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J. OF L. & PSYCH, 301-322 (1999) (providing the most recent available empirical evidence on the experiences of incarcerated women, especially women of color, with intimate-partner violence); *Fast Facts: Preventing Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html> [<https://perma.cc/TC62-3PHU>] (studies estimate that 25% of women and 10% of men in the United States have experienced severe intimate partner violence in the community at large); *Fast Facts: Preventing Child Abuse & Neglect*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html> [<https://perma.cc/2JQL-8BFH>] (about 14% of children in the United States experience child abuse each year); America Counts Staff, *New York State Population Topped 20 Million in 2020*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/new-york->

historical credibility discounting for each of these overlapping groups becomes magnified and compounded for people seeking lower sentences under the law.

The result is a dramatic illustration of “testimonial injustice”—where “credibility assessment[s] result[] from prejudice.”<sup>209</sup> This Part examines the specific harms engendered by credibility discounts embedded in the DVSJA and similar sentencing reform efforts—to individual survivors, to the criminal legal system, and to the reform movements on the ground. I argue that there are three areas of harm: (1) individual harm: DVSJA applicants and other survivors are retraumatized by the experience of yet again being told their stories are unworthy of belief; (2) policy failure: the legislative purpose is thwarted since fewer survivors obtain the intended sentencing relief; and (3) systemic harm: perpetuating the credibility discount for historically oppressed groups endorses those stereotypes—particularly when the endorsement comes within a remedial statute lauded by criminal justice reformers. This Part addresses each of these harms in turn, drawing from the case studies discussed earlier, additional experience from my own

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population-change-between-census-decade.html#:~:text=Population%20(up%207.4%25%20to%20331.4,or%20More%20Races%2010.2%25 [https://perma.cc/WZC7-DQ7D] (statewide statistics on racial makeup of population in 2020 census); NYS 2020 prison statistics on file with author. To be sure, a large number of survivors in prison are white, and many do not identify as women, and the sentences of these survivors are no less worthy of a “second look,” but the statistics speak for themselves. In New York, 94% of people incarcerated in women’s prisons report that they have experienced physical or sexual violence in their lifetimes; 82% were severely abused as children; and 75% have suffered serious abuse by an intimate partner as adults. These numbers are significantly higher than rates of abuse in the broader community. And women of color represent a starkly higher percentage of New York’s prison population than they do in the greater community: approximately 40% of people caged in women’s prisons are people of color, compared to about 12% in the state at large. Given the higher rates of incarceration for people of color, and high correlation between women who have experienced domestic violence and incarceration, it is unsurprising that, at the time the DVSJA went into effect, 54% of the women who met the initial eligibility criteria for resentencing were women of color.

209. Tuerkheimer, *Incredible Women*, *supra* note 26, at 42 (discussing FRICKER, *supra* note 21).

practice, as well as the experience of survivors and their partner-advocates across New York.<sup>210</sup>

*A. The Floodgates Problem that Wasn't*

Before turning to the harms wrought by structures grounded in disbelief, it is important to return to why we have a corroboration requirement in the first place. What was the purported purpose of requiring documentary proof of abuse to unlock the courthouse door? As discussed above, legislators heard the concerns of the District Attorneys Association of New York (DAASNY) that passing the DVSJA would create “a strong incentive for every violent offender to claim that he or she was subjected to some form of domestic abuse in order to receive a more lenient sentence.”<sup>211</sup>

DAASNY was particularly concerned about the risk of fabrication in the resentencing context. First, prosecutors decried the absence of a requirement that a DVSJA resentencing applicant had raised domestic-violence-related defenses at trial, “when the factual basis of the claim could be fully and fairly evaluated.”<sup>212</sup> DAASNY claimed that, by seeking resentencing, such a “defense” could be “raised years later when critical witnesses and evidence may no longer be available,” without imposing any “requirement of due diligence or preservation of evidence.”<sup>213</sup> And without a statute of limitations for seeking resentencing, prosecutors worried they would be placed “at an unfair disadvantage” trying to “investigate [a] defendant’s belated assertions.”<sup>214</sup> The result, DAASNY claimed, would be “burdensome and costly” proceedings in the courts: “Tasking the courts years after conviction with verifying allegations of past domestic abuse that were either never previously raised or consistently rejected by prosecutors, judges and juries can result in lengthy and difficult hearings.”<sup>215</sup>

Now, almost five years after the DVSJA went into effect, it is clear that concerns about overwhelming the courts were unfounded. The specter of

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210. *See infra* Section III.B.1 (describing the work of the Survivors Justice Project gathering narratives and feedback on the resentencing process from both successful and unsuccessful applicants).

211. DAASNY Letter, *supra* note 44, at 2.

212. *Id.* at 3.

213. *Id.*

214. *Id.*

215. *Id.* at 4.

an unmanageable number of resentencing motions has not materialized. Notably, only 487 people incarcerated in women's prisons were originally identified as *potentially* eligible for resentencing under the DVSJA, based on the preliminary criteria (currently incarcerated, with a sentence of at least eight years, and a qualifying crime and predicate status). The number of potentially eligible people in men's prisons in New York was well above 11,000.<sup>216</sup>

While there is no way to know how many of these nearly 12,000 people are survivors of domestic violence and would otherwise meet the DVSJA's substantive criteria, we do know that a large number of incarcerated people report having experienced domestic violence in the past. One survey found that over 16% of incarcerated men reported abuse prior to incarceration.<sup>217</sup> Rates are much higher among incarcerated women: "one study found that 86 percent report having experienced sexual violence in their lifetime; 77 percent report partner violence; and 60 percent report caregiver violence. Other studies have found even higher rates."<sup>218</sup>

Given the high rates of prior abuse among people in prison, especially women, one might expect a tidal wave of DVSJA applications, but thus far the effect on the court system has been underwhelming. According to data gathered by the Survivors Justice Project,<sup>219</sup> over the course of the nearly five years since the DVSJA went into effect, only 174 resentencing applications have been filed. Of that group, 59 people have had their

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216. These numbers were generated in 2019 by the New York State Department of Corrections and Community Supervision, at the request of the Center for Appellate Litigation.

217. *Prior Abuse Reported by Inmates and Probationers*, NAT'L PREA RES. CTR. 3 (2016), [https://also-chicago.org/also\\_site/wp-content/uploads/2016/03/Prior-Abuse-Reported-by-Inmates-and-Probationers\\_March-2016.pdf](https://also-chicago.org/also_site/wp-content/uploads/2016/03/Prior-Abuse-Reported-by-Inmates-and-Probationers_March-2016.pdf) [<https://perma.cc/6DPC-KV42>].

218. Sentencing Reform for Criminalized Survivors: Learning from New York's Domestic Violence Survivors Justice Act, SENTENCING PROJ. & SURVIVORS JUST. PROJ. 5 (Apr. 2023), <https://www.sentencingproject.org/app/uploads/2024/02/Sentencing-Reform-for-Criminalized-Survivors.pdf> [<https://perma.cc/TA6Y-KPFX>] (citing studies).

219. The Survivors Justice Project ("SJP") is the only entity, to the author's knowledge, tracking data related to the DVSJA's implementation in the state of New York. The Office of Court Administration, the agency in charge of the state court system, does not maintain data concerning DVSJA applications for resentencing or for mitigated sentencing after plea or guilty verdict at the first appearance. The data reflected here was gathered from DVSJA resentencing applications filed between August 2019 and April 2024.

sentences reduced (90% of whom are women; 68% of whom are people of color), and not all of them expressly under the DVSJA.<sup>220</sup> Of the 174 applications filed, courts have denied 66 of them (almost 38%) (52% women; 71% BIPOC). And of those 66 denials, 29 are known to have been denied after a hearing, while 34 (over half) were summarily denied “on the papers”—i.e., an evidentiary hearing was not held. Of the summary denials, 38% are women and 71% are BIPOC.<sup>221</sup>

It could be argued that the relatively low number of DVSJA applications, and the relatively high rate of summary denials, demonstrate that the corroboration requirement is working: frivolous claims are either being deterred altogether or weeded out at the pleading stage. But there is no evidence to support this reading of the numbers. To the contrary, cases like Katherine’s and Tara’s, among others, suggest that the presumption of incredibility plays an outsized role in keeping potentially meritorious cases out of court. The corroboration requirement also likely exerts a chilling effect on potential applicants who lack documentary evidence and never seek relief, since they know their word alone will be deemed incredible.

The system should not shy away from more resentencing applications. Even if the volume of motions were to increase marginally, the minimal additional administrative cost would be a worthwhile investment towards effectuating more meaningful reform. As with any ameliorative statute or decision, it should be expected that there will be an uptick in filings seeking relief after it comes into effect.<sup>222</sup> More likely, the floodgates argument is a proxy for prosecutors’ greater underlying concern—that going back to review older convictions and assess claims of abuse would be a nuisance for the prosecution, not the courts.

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220. Based on SJP data, in some cases, an alternative disposition was negotiated following the filing of the DVSJA motion, such as vacatur and repleader to a lesser charge, or a sentence reduction under a different legal theory.

221. To date, SJP has been able to gather data on 63 of the 66 DVSJA resentencing denials. Reasons for denial in the three outstanding cases may slightly affect the percentages reflected here. It is also important to note that gender and race identifiers are based on classifications made by the prison system, which do not necessarily align with how the applicants’ themselves identify. Percentages have been rounded to the nearest percentage point.

222. *See, e.g.*, *People v. Catu*, 825 N.E.2d 1081 (N.Y. 2005) (resulting in numerous appeals and resentencings based on the original sentencing court’s failure to pronounce post-release supervision time as part of original sentence); *People v. Rudolph*, 997 N.E.2d 457 (N.Y. 2013) (giving rise to a surge of claims regarding sentencing judges’ failure to state reasons for rejecting youthful-offender treatment).



*B. The Damage of the Discount*

The American legal system—like western culture more broadly—is committed to the “doubting game,” which Peter Elbow defines as the “disciplined practice of trying to be as skeptical and analytic as possible with every idea we encounter.”<sup>223</sup> But the refusal to start from a place of belief, when told of abuse, inflicts significant psycho-emotional harm on the teller.<sup>224</sup> For incarcerated survivors seeking resentencing, this harm is compounded by the credibility discounts they have experienced at every stage of their criminal case. Skepticism and gaslighting by legal institutions, such as police, prosecutors, and judges, too often replicate the systematic dismissal of a survivor’s experience carried out by domestic abusers.<sup>225</sup>

Epstein and Goodman differentiate between two distinct types of injuries caused by institutions that discount the credibility of survivor narratives: (1) “psychic injury,” that is, harm to the survivor’s mental health, and (2) harms arising from the obstacles to accessing justice and safety.<sup>226</sup> While this analysis focused on survivors seeking protection through civil orders of protection or in custody cases in family court, these categories of harms also provide a useful framework for examining the effects of the credibility discount for incarcerated survivors seeking to mitigate punishment for offenses connected to their abuse.

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223. Peter Elbow, *The Believing Game or Methodological Believing*, J. ASSEMBLY FOR EXPANDED PERSPS. ON LEARNING, Winter 2008-2009 at 1, 2. Elbow advocates, instead (or in addition), for playing the “believing game,” which is “the disciplined practice of trying to be as welcoming or accepting as possible to every idea we encounter, not just listening to views different from our own and holding back from arguing with them, not just trying to restate them without bias . . . but actually *trying* to believe them.” *Id.* at 2. Elbow argues that starting from a place of belief in a position or experience different from, or even diametrically opposed to, our own can expose flaws in our thinking and expand our capacity for understanding in ways that rhetorical skepticism alone cannot. *See id.* at 1-2.

224. *See* START BY BELIEVING, <https://startbybelieving.org/about> [<https://perma.cc/MTQ6-GUJF>] (last visited Apr. 21, 2024) (“Start by Believing is the global campaign to transform the way we respond to sexual assault.” The campaign attempts to “‘flips the script’ on the message victims have historically received from professional and support people, which is ‘How do I know you’re not lying?’”).

225. *See* Epstein & Goodman, *supra* note 22, at 447.

226. *See id.*

### 1. Individual Harm: Retraumatization

*“When our official bodies of justice and law enforcement effectively collaborate in the same patterns utilized by perpetrators of abuse, survivors may be even more likely to doubt their own abilities to perceive reality and understand their own lives.”<sup>227</sup>*

- Deborah Epstein & Lisa Goodman

The first type of harm—psychic injury—manifests acutely at several stages of the resentencing process: when the prosecutor opposes and/or the court denies a hearing based on purportedly insufficient corroboration; at the hearing stage when the prosecution continues to engage in myth-based credibility attacks; and even in the aftermath of a successful resentencing, since the experience of invalidation can continue to frustrate healing in the longer term. Epstein and Goodman identify three manifestations of psychological harm in survivors caused by reflexive institutional disbelief: a sense of (1) powerlessness and futility; (2) personal worthlessness; and (3) self-doubt.<sup>228</sup> All of these dynamics operate in the context of criminalized survivors who report abuse connected to their underlying criminal case.

Some qualitative data is available thanks to the Survivors Justice Project’s efforts to connect with people who have gone through the DVSJA resentencing process.<sup>229</sup> Responses from currently and formerly incarcerated survivors reflect dynamics similar to those documented when DV victims interact with the legal system as complainants (e.g., seeking an order of protection or pressing charges against an abuser). Feelings of futility and self-doubt came through in many survivors’ skepticism about whether they would even be eligible for resentencing. In spring 2022, at a convening of survivors who were successfully released under the DVSJA, nearly every person shared that, initially, they doubted that the law would apply to them. One survivor, who was imprisoned at age sixteen for killing

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227. *Id.* at 451.

228. *Id.* at 449.

229. See *Domestic Violence Survivors Justice Act: Resource Guide*, SURVIVORS JUST. PROJ. 13 (2021) [hereinafter *DVSJA Resource Guide*], <https://www.sjpnny.org/dvsja-resource-guide> [https://perma.cc/FD8E-SL8A] (“There’s a lot of women I talk to who are trying this and they don’t believe they are victims. Who are like ‘No, no, no, they’re not going to believe me, no one is going to believe me,’ and they’re too ashamed and scared.”); Boudin et al., *supra* note 14, at 3.

her abuser, explained her viewpoint before she applied for resentencing: “At first, I wasn’t even sure the law applied to me, and I was so discouraged from having lost a number of appeals that I was afraid of feeling false hope.”<sup>230</sup>

Self-doubt rears its head again after the application is submitted if the prosecution objects to a hearing based on insufficient corroboration of the abuse. This is especially true when prosecutors maintain this position even after interviewing the applicant. For example, in one case, a district attorney’s office in New York City opposed a hearing even when there was video surveillance footage of the abuser attacking and strangling the DVSJA applicant, Anthony R., on the night of the incident that led to his arrest. The prosecution argued that a single attack by the abuser caught on tape was not enough to corroborate claims that the abuse was “substantial” or that it was more than an isolated incident.

Anthony had been abused by several intimate partners but never reported the abuse to police for a variety of identity-based reasons. As a gay, Latino man who identifies as “femme,” he feared law enforcement would not believe him—a common sentiment among members of the LGBTQ community.<sup>231</sup> Gaslighting by his abusers had also made him believe that

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230. Boudin et al., *supra* note 14, at 11 (quoting Patrice Smith).

231. A research review published in 2015 by the Williams Institute at UCLA summarized the following research on reluctance to report abuse to law enforcement among members of the LGBTQ community:

According to the most recent NCAVP report, 55.4% of LGBTQ and HIV-affected survivors in their study reported experiences of IPV to the police. A number of studies found that LGBT people did not believe police to be helpful in addressing cases of IPV. This may be related to findings that LGBT people have reported experiencing discrimination and harassment by law enforcement officers. Finneran and Stephenson recently conducted a study of gay and bisexual men’s perceptions of the effectiveness of law enforcement in addressing intimate partner violence. They found that 59.0% of those individuals surveyed believed police would be less helpful towards gay and bisexual men than heterosexual women in cases of IPV, and individuals who had recently experienced physical IPV were more likely to view police as less helpful.

Taylor N.T. Brown & Jody L. Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People: A Review of Existing Research*, WILLIAMS INST. 19 (Nov. 2015) (citations omitted), <https://williamsinstitute.law.ucla.edu/wp->

the violence and coercion they perpetrated were actually his fault—if he weren't so “mouthy,” he would have avoided the abuse. So he stayed silent.

Right after his boyfriend's strangulation attempt was caught on video, Anthony went to tell his roommate what had happened. Incensed, the roommate ran out of the apartment to chase after the abusive boyfriend, telling Anthony to follow. He did, grabbing two knives on the way out the door. Anthony arrived in the street to find his boyfriend and his roommate attacking each other. After a lifetime of abuse dating back to childhood—including being locked in an attic by his homophobic family, bullied and beaten up for being “flamboyant,” sexually exploited by a teacher in high school, and beaten and psychologically manipulated by intimate partners—Anthony lost control and started stabbing, striking both his roommate and his boyfriend. The boyfriend suffered seventeen stab wounds and would die in the hospital weeks later.

The pain and heartbreak Anthony's offense caused is unimaginable, and the remorse Anthony felt was immediate and long-lasting. But on the night of his arrest, Anthony did not disclose to police the full extent of the trauma he had suffered, and he minimized his boyfriend's abusive behavior. Anthony's reasons were complicated. He was ashamed of his actions, and he did not want to cast aspersions on the boyfriend he had just hurt. Anthony was also scared of what would happen if he told police about the abuse. At that point, he had no idea that his boyfriend was seriously injured; Anthony thought there was every possibility that his partner would punish him if he talked to the police. Anthony also distrusted police in general. In his Puerto Rican family and in the gay community, going to the police in private matters was never viewed as a safe or helpful solution. Accordingly, there was almost no paper trail in official records documenting the lifelong abuse he had endured.

Ultimately, Anthony pleaded guilty to first-degree manslaughter and was sentenced to twenty years in prison. Not a day goes by that he does not regret his actions and mourn the loss of life he caused. A sentencing reduction in Anthony's case would seem to be exactly the relief contemplated by the DVSJA, but the prosecution initially opposed Anthony's DVSJA resentencing application. Despite the video evidence of the domestic violence assault minutes before the homicide, and despite a psychological evaluation that documented decades of abuse, the DA's office suspected Anthony was exaggerating his domestic violence history. If it had really been so traumatic, why had he not told the police the full story as soon as he

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content/uploads/IPV-Sexual-Abuse-Among-LGBT-Nov-2015.pdf  
[<https://perma.cc/4T92-XXWD>].

was arrested? Why had he never called 911 in the past after his boyfriend forced him to have sex, beat him, and strangled him? The prosecution insisted on interviewing Anthony so they could judge his credibility for themselves. During that interview, the DA's office attempted to tread lightly, but their skepticism was evident to Anthony. He was asked to recall specific instances of abuse in detail. His reasons for minimizing the abuse post-arrest were held to intense scrutiny. The interview ended up feeling like a second interrogation and left him retraumatized.

After many months of deliberation, the prosecution in Anthony's case ultimately consented to resentencing under the DVSJA. But the wound of the DA's disbelief was yet another institutional invalidation of his experience that reinforced his long-ingrained distrust of police and prosecutors. Anthony's case illustrates how, even in cases that are ultimately successful, subjecting survivors to an endless gauntlet of doubt confirms longstanding distrust of government systems, particularly for marginalized groups who already have good reason to distrust them.

Finally, the DVSJA hearing itself and its aftermath can inflict significant damage. Many survivors describe the hearing as feeling like a retrial, though the statute does not disturb the conviction and is only meant to arrive at a more appropriate punishment.<sup>232</sup> This phenomenon is exemplified in one of the earliest cases under the DVSJA, where a woman named Lillian T. was denied resentencing.<sup>233</sup>

Convicted in 2004 as an accomplice to the murder of her abusive boyfriend, Lillian had served most of her a sentence of 20 years-to-life when she sought resentencing under the DVSJA. Lillian's credibility figured centrally in the case: her testimony was the only evidence of the physical, sexual, and psychological abuse she had experienced. The defense argued that she lacked corroboration because her boyfriend had threatened to rape and kill her daughters if she reported the abuse. She also feared that reporting him would only make the abuse worse. Lillian testified that the one time she called the police after a beating, the officer who responded scoffed at her injuries and made no arrests, so she never called the police again.

After more than two days of testimony about her abuse, including intensive cross-examination, Lillian's application was denied. The judge found her testimony incredible, reasoning that she had testified falsely at

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232. See *DVSJA Resource Guide*, *supra* note 230, at 42 ("Although the DVSJA hearing is not supposed to be a re-trial of your original case, unfortunately it may feel like that.").

233. Unpublished decision on file with the author.

her trial by denying her guilt, and that other aspects of her hearing testimony—unrelated to the abuse itself—were contradicted by a number of witnesses.<sup>234</sup>

The court was not swayed by the corroborating testimony of the psychologist, who opined at the DVSJA hearing that Lillian had been the victim of severe domestic violence and that her belated disclosure could be readily understood under the circumstances. In the court's view, Lillian's "level of deception" was "substantial," and the value of the expert's opinion was therefore diminished, since it was "necessarily based upon information provided to [the psychologist] by the defendant."

Lillian's case illustrates how a DVSJA hearing can subject a survivor to vicious credibility attacks, especially when it is the first time they have felt empowered to share their entire narrative. Even with an expert who can provide context and clinical explanations for why the survivor provided incomplete or false information in the past, if the primary source of the opinion is the survivor herself, the expert's conclusions may be discounted as unworthy of belief.

Survivors' doubts about being worthy of mercy are compounded in a system defined by a rigid victim/offender dichotomy. For incarcerated survivors who have internalized the label of "offender," the experience of being systematically disbelieved—even by a reformist statute—makes it even more difficult to identify as a victim of abuse. As Monica Szlekovics, a formerly incarcerated survivor, and current Project Coordinator for the Survivors Justice Project, has written:

I had a great deal of difficulty meshing the victim and perpetrator inside of me together. The dichotomy created by the language, i.e., victim or perpetrator, made it extremely difficult. In me, the victim and the perpetrator were undeniably intertwined. To deny one part was to deny the other, and our current criminal justice system actively reinforces ideas of what it is to be a victim or a perpetrator, while it negates the fact that many individuals entering the penal system are both.<sup>235</sup>

In a system only just beginning to reckon with the connections between trauma and criminal behavior, it is no wonder that people who have been

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234. The court's decision is unpublished, but on file with the author.

235. Monica Szlekovics, *The Language of Restorative Justice: Negating and Reinforcing the Power of Simplistic Dichotomies 3* (2009) (M.A. thesis, Marymount Manhattan Campus of Bedford Hills Correctional Facility) (on file with author).

arrested, prosecuted, and punished will internalize the label of “offender” over “victim.”

## 2. Policy Harm: Decarceration Interrupted

In addition to the psychic harm to individuals wrought by the DVSJA’s credibility discount, the statute’s perpetuation of disbelief sabotages the law’s underlying purpose of decarcerating criminalized survivors. This policy failure produces what Epstein and Goodman call “harms related to access to justice and safety,”<sup>236</sup> the mitigation of which, ironically, were central to the legislative purpose behind the DVJSA.

This harm manifests in three primary ways: first, the corroboration requirement restricts access to the courts, particularly for survivors from marginalized groups; second, credibility discounting at the hearing stage continues to stack the deck against survivors; and third, the specter of these harms creates a chilling effect, dissuading people from coming forward with DVSJA motions to begin with.

Requiring a survivor to corroborate her pleaded allegations of abuse with documentary evidence is the clearest example of the DVSJA’s self-sabotage, since this requirement has the potential to exclude large swaths of survivors from resentencing eligibility. To understand why it can be so difficult to proffer sufficient corroboration under the DVSJA, it is helpful to revisit the statutory text, which demands that the first piece of corroboration must be “either a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection”<sup>237</sup>—a remarkably narrow list of exhaustive options. The law, in short, requires one to find a “witness” to the abuse who is willing to provide an affidavit, or to locate supporting documentation from a government or social service agency—no easy task. Neither option accounts for survivors’ reluctance to report abuse for numerous reasons. It also ignores the reality that domestic violence frequently occurs “behind closed doors,” making witness affidavits challenging to obtain.

These problems are compounded in older cases, where many years, even decades, have passed since the traumatic events that significantly contributed to the crime. In such situations, records have often been lost, misplaced, or purged according to document retention policies. Likewise, the passage of time impacts the ability to obtain affidavits from witnesses

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236. Epstein & Goodman, *supra* note 22, at 451-53.

237. N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2019).

to the abuse, who could have moved away, died, or, for myriad reasons, have difficulty remembering what they observed.

The story of Katherine W.,<sup>238</sup> illustrates a classic example of a survivor being afraid to report abuse to authorities—both because she feared violent reprisal from her husband, and because she doubted that she would be believed in their small, rural town. That Katherine had the courage to disclose some of her husband’s abuse to her doctor on two occasions is remarkable under the circumstances, especially because her husband systematically forbade her from seeking medical treatment. Nonetheless, the DVSJA court denied Katherine’s petition, finding that one instance of outcry that pre-dated the homicide by eight years was too far removed in time, whereas the more recent complaint was too vague as to the abuse. If the courthouse doors are closed to someone like Katherine, who else is being denied a hearing, or deciding never to apply?

Historically, a survivor’s reluctance to report has been understood through the gendered framework of fear—usually, a female survivor’s fear of her male abuser or of doubts cast by law enforcement. But a parallel and often overlooked reluctance exists for people of color, non-citizens, queer and gender non-conforming people, and people with disabilities.<sup>239</sup> Disbelief for these groups is similarly grounded in testimonial injustice and credibility discounting rooted in white male supremacy.

Take Tara, for example—the survivor discussed in the introduction who was denied a hearing despite the victim in her case supporting her release. As a Black woman who had negative experiences with the family regulation system and the police as a child, Tara was conditioned not to seek assistance from the very institutions the DVSJA endorses as legitimate record-keepers. When Tara recounted the psychological abuse and degradation she experienced from her partner, placed in context against the backdrop of her prior experience, the court dismissed her account as describing merely “boorish” behavior, but not “substantial abuse.”<sup>240</sup> This kind of judicial invalidation is an example of testimonial injustice. And the invalidation of Tara’s experience as a Black woman enduring constant verbal abuse and neglect (corroborated by her sister’s affidavit) exemplifies hermeneutical

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238. *See supra* Introduction.

239. *See, e.g.*, ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 1-3 (2017); RITCHIE, *supra* note 114, at 118-23 (discussing the social and systemic dynamics leading to Black women’s sexual victimization and the lack of responsive services for Black female survivors); discussion and sources cited *supra* note 57.

240. The decision is unpublished, on file with the author.



injustice. In other words, the court simultaneously “discredit[ed] [her] status as a knower” and excluded Tara, as a “socially marginalized knower[],” from “contributing to collective knowledge production.”<sup>241</sup> Tara’s case thus demonstrates how the legal system discredits both a survivor’s narrative and the seriousness of the harm they endured.<sup>242</sup>

In other cases where records (or witnesses) were once available to corroborate abuse claims, the logistical challenge of locating them years after the fact can prove insurmountable. In Anthony R.’s case, his legal team was initially unable to find documentary support for a horrific incident that occurred over a year before his crime (and over eleven years before the DVSJA application was filed), when Anthony was partially blinded by his boyfriend. The legal team tried to locate emergency room records and documents from the rehabilitation center where he spent months in therapy after having global reconstructive surgery on his eye. Although Anthony had told doctors his eye injury was an accident, his lawyers hoped medical records might contain some forgotten admission that it was his boyfriend who had perpetrated the assault. But none of the hospitals in the area of the incident had records dating back more than 10 years, and the rehabilitation center could only confirm that he had been a patient. They had long ago purged their treatment notes. Without such documentation, the prosecution argued that Anthony’s claim about the blinding incident was a recent fabrication.

Prosecutors are aware of the challenges presented in older cases by records lost and faded memories. Indeed, these logistical hurdles featured prominently in DA opposition to the DVSJA’s passage, which focused on the burden on prosecutors and judges. It simply became a zero-sum decision: By placing a heavy pleading burden so explicitly on survivors, prosecutors were alleviated of their burden of refuting allegations of abuse. This approach is deeply problematic. Not only does it contradict the spirit of the law—in favor of decarcerating survivors—but it fundamentally misapprehends the balance of power and disproportionate access to

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241. Washington, *supra* note 52, at 1137-38.

242. See Epstein & Goodman, *supra* note 22, at 418 (“[S]urvivors often frame their courtroom stories in a way that fails to fit the expectations of most judges, and even of the law itself: what may feel to victims like the most insidious and intimate brand of abuse can come across to legal gatekeepers as something that really doesn’t count as abuse at all.”); see also TURKHEIMER, CREDIBLE, *supra* note 26, at 10 (“Credibility entails much more than belief in the truth of the allegation. For an allegation to be deemed credible, we must also believe that the conduct it describes is blameworthy, and that it’s worthy of our concern.”).

resources. If there are records to be had, they are often in the control of law enforcement.

Indeed, one of the obstacles to satisfying the DVSJA's evidentiary requirements is the difficulty of obtaining relevant law enforcement records from district attorneys or the court system. New York was one of the last states to pass criminal-discovery reform in 2019, the same year the DVSJA was passed. Open-file discovery, already common practice in a majority of states, now requires that prosecutors in New York turn over evidence to the accused before they decide whether to plead guilty.<sup>243</sup> Since not a single case eligible for a retroactive sentence reduction under the DVSJA was prosecuted after discovery reform in New York, access to government case files often depends on the discretion of a given prosecutor's office and can present an insurmountable burden.

The case of D.M. illustrates the challenges of records access. D.M., who was coerced by her abuser to help carry out a robbery, cooperated with the prosecution for more than a year and eventually testified against her abuser before two grand juries. When D.M. stopped cooperating due to threats by the abuser's family to harm her and her baby, the DA reneged on the initial plea agreement. D.M. was sentenced to ten years in prison.

To support her resentencing motion, D.M.'s defense team made a motion to obtain excerpts from the grand jury proceeding containing her testimony, believing they would corroborate her claims that he physically and emotionally abused her. The prosecution opposed the request based on grand jury secrecy, and a judge denied the motion. D.M. was denied access to her own testimony. While the court finally ruled that the transcript could be reviewed *in camera* to assess its corroborative value, this decision meant that the defense became the only party without access to the records, which naturally limited their ability to contextualize or explain any inconsistencies or omissions.

Before discovery reform in New York, the defense was always at a severe evidentiary disadvantage, forcing risk-averse plea determinations due to a lack of information. In the DVSJA context, the defense is also at a disadvantage, and the myriad challenges of satisfying the law's pleading requirements have impacted the number of people who can have their cases heard. While it is not always possible to determine the basis for denials, as discussed above, almost one-half of unsuccessful DVSJA resentencing applications filed as of March 2024 were denied before the hearing stage. There is no telling how many more applications were never even filed due to the chilling effect of the threshold evidentiary burden. "But how could I

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243. N.Y. CRIM. PROC. LAW § 245 (McKinney 2019).

prove it?” and “I didn’t think it would apply to me” echo ominously even among the survivors who were brave enough to try.

### 3. Systemic Harm: Endorsing the Discount

The DVSJA has the potential to influence a tidal wave of reformist legislation across the country, as the first significant sentencing reform law for incarcerated survivors in the United States. This process is already underway. In recent years, several states, including California,<sup>244</sup> Illinois,<sup>245</sup>

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244. See CAL. PENAL CODE § 1473.5 (West 2013); CAL. PENAL CODE § 4801 (West 2018); CAL. PENAL CODE § 1172.1 (West 2024) (allowing resentencing on a wide array of grounds, and requiring the court to consider “if the defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence, if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense”); CAL. PENAL CODE at § 1172.1(a)(5) (West 2024).

245. See 735 ILL. COMP. STAT. 5 / 2-1401 (West 2024). Under the Illinois law, there is no explicit requirement that pleadings be corroborated by documentary evidence of abuse. However, the initial pleading requirements are greater than the DVSJA’s. To obtain a hearing, a petitioner must demonstrate four factors by a preponderance of the evidence: (1) she was convicted of a “forcible felony”; (2) her participation in the offense was related to previously having been a victim of domestic violence or gender-based violence; (3) there is substantial evidence of domestic violence or gender-based violence that was not presented at the original sentencing; and (4) that evidence is material and noncumulative to other evidence offered at the sentencing hearing, and is of such a conclusive character that it would likely change the original sentence imposed. *Id.* As of January 2024, only four survivors have been resentenced under the Illinois Domestic Violence Resentencing Act, three of which were on consent of the Cooke County State Attorney’s Office.

Louisiana,<sup>246</sup> Oklahoma,<sup>247</sup> Oregon,<sup>248</sup> Ohio,<sup>249</sup> and Washington,<sup>250</sup> have acknowledged the need to revisit certain criminal convictions, advancing a body of statutes known as “second look” laws.<sup>251</sup> Most, but not all, of these laws acknowledge the criminalization of survivors of trauma and domestic violence. Others apply to juveniles serving long sentences, including Ohio’s

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246. S.B. 215, 49th Leg., Reg. Sess. (La. 2023). The Justice for Survivors Act made headway in the Louisiana’s 2023 legislative session but was ultimately deferred due to stalled negotiations. *Justice for Survivors Act*, PROMISE OF JUST. INITIATIVE, <https://promiseofjustice.org/jsa> [<https://perma.cc/E6ZK-X9L2>].

247. An Oklahoma bill modeled on the DVSJA fizzled in 2023 after lawmakers stripped it of the retroactive provisions. Trista Vaughn, *Advocates Vow Return of Abuse Survivor Bill that Died During Regular Session*, VNN, <https://app.verifiednews.network/articles/share/2992> [<https://perma.cc/E33R-D6TE>] (June 3, 2023). It has recently been reintroduced under a different name, the Oklahoma Survivor’s Act, and advocates are hopeful that it will be passed in the 2024 legislative session. John Dobberstein, *Bill Filed to Help Criminalized Survivors of Domestic Violence in Oklahoma*, BROKEN ARROW SENTINEL (Jan. 28, 2024), <https://basentinel.com/bill-filed-to-help-criminalized-survivors-of-domestic-violence-in-oklahoma> [<https://perma.cc/Y6GN-CDMF>]; *We Applaud the OK Senate’s Passage of SB 1470*, OK SURVIVOR JUST. COAL., <https://oksurvivorjusticecoalition.org/f/we-applaud-the-ok-senates-passage-of-sb-1470> [<https://perma.cc/RQS9-ZKMP>].

248. See H.B. 2825, 81st Leg. Assemb., Reg. Sess. (Or. 2021); Ben Botkin, *Lawmakers Consider Proposal to Lighten Sentences Against Domestic Violence Survivors*, OR. CAPITAL CHRON. (Feb. 6, 2023), <https://oregoncapitalchronicle.com/2023/02/06/lawmakers-consider-proposal-to-lighten-sentences-against-domestic-violence-survivors> [<https://perma.cc/H5S8-QSWZ>]. While Oregon has not yet passed its proposed “second look” bill, the language is similar to the DVSJA. However, it does not include a corroboration requirement. In determining mitigation the court would be tasked with considering whether: (a) the applicant was subjected to physical, sexual or psychological abuse by an intimate partner or a family or household member; (b) the abuse was a significant contributing factor to the criminal behavior; and (c) sentencing the applicant to a presumptive or mandatory sentence would be unduly harsh in light of the circumstances of the crime, the circumstances of the applicant, and the abuse they suffered. H.B. 2825, 81st Leg. Assemb., Reg. Sess. (Or. 2021).

249. OHIO REV. CODE ANN. § 60 (West 2022).

250. WASH. REV. CODE ANN. § 36.27.130 (West 2020).

251. *A Second Look at Injustice*, SENT’G PROJECT 4 (2021).

Civil Rule 60(B)(5),<sup>252</sup> a 1970 civil rule that Ohio Justice and Policy Center's Beyond Guilt Project creatively repurposed to advocate for the release of people serving long sentences.<sup>253</sup>

Comparing the DVSJA to similar “second look” statutes across the country reveals the regressive nature of the DVSJA's evidentiary requirements. While other remedial sentencing statutes contain factors limiting eligibility, the DVSJA is the only such statute that requires a person to provide corroboration as a threshold to even being heard in court.<sup>254</sup> For instance, Washington's second-look statute conditions a hearing on a showing that applicants were sentenced for a felony offense.<sup>255</sup>

Imposing on survivors a presumption of incredibility, and subjecting them to a higher pleading standard than other post-conviction litigants, reinforces the misogynistic and racist stereotypes that have persisted in evidence law for centuries. Under the DVSJA's resentencing requirements, unless a third party can attest to the abuse, the applicant must offer proof that they reported abuse to a government actor or treatment provider, such as a police officer, a doctor, a social worker in a domestic violence shelter, or a judge.<sup>256</sup> As discussed above, in this sense the DVSJA's corroboration requirement closely parallels the rule of prompt outcry<sup>257</sup>—the message conveyed is that if you did not report your abuse when it happened, then you are presumed to be lying.

Advocates for doing away with the rules concerning corroboration and prompt complaint in rape prosecutions already fought this fight—and

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252. See OHIO REV. CODE ANN. § 60 (West 2022). “The fifth ground of Rule 60(B), ‘any other reason justifying relief from the operation of the judgment,’ must be brought within a reasonable time, but the provision is not limited by the one-year time limit governing the first three grounds under Rule 60(B). The fifth ground, based upon Federal Rule 60(b)(6), is intended as a catch-all provision. The provision reflects the inherent power of a court to relieve a person from the unjust operation of a judgment.”

253. See *Beyond Guilt*, OJPC, <https://ohiojpc.org/our-work/beyond-guilt> [<https://perma.cc/U5G6-EBE8>].

254. Illinois' law is a potential exception. See Ill. Legis. Serv. P.A. 103-403 (S.B. 2260). While the statute itself does not list types of evidence required to obtain a hearing, it fixes a preponderance-of-the-evidence standard at the pleading stage in reference to the factors the applicant must prove. See *id.*

255. See, e.g., WASH. REV. CODE ANN. § 36.27.130 (West 2020).

256. N.Y. CRIM. PROC. LAW § 440.47(2)(c).

257. See *supra* Section II (A)(2).

mostly won<sup>258</sup>—and their arguments are equally applicable in the context of sentencing mitigation for criminalized survivors. These doctrines are based on antiquated myths that women, people of color, and people with criminal convictions are predisposed to falsehood. They also assume that promptly reporting abuse is synonymous with credibility, ignoring extensive empirical evidence that most survivors do not report their abuse, and that abuse often does not result in visible physical injury (particularly for psychological/emotional abuse).

The DVSJA's corroboration requirement favors a fictional "perfect" victim<sup>259</sup> who promptly and consistently reports abuse to police, doctors, and family members. As a result, it further stigmatizes survivors from communities less likely to engage with the authorities, including people of color, LGBTQ folks, non-citizens, and people with prior involvement with the criminal legal system.<sup>260</sup>

In Miranda Fricker's lexicon of epistemology, the DVSJA offers the promise of hermeneutical justice due to its grassroots origins—the way it changed the sentencing scheme was informed in large part by the experiences of incarcerated survivors. But, by endorsing the credibility discount for marginalized groups, the law not only sanctions the silencing of these survivors, but also misses an opportunity to alter the landscape of our collective knowledge of abuse and trauma.

Reflecting on the 1985 legislative hearing at the Bedford Hills prison, the voices of the women who told their stories nearly 40 years ago reverberate in the law's most significant changes: the DVSJA applies to third-party victims and to cases of coercion or duress, not only fighting back against an abuser; it includes (some) violent crimes, like second-degree murder; and it allows for relief even when the trauma history is one of several factors at play in an offense. No doubt, these statutory provisions are hermeneutical victories, hard-fought and hard-won. In these ways, the

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258. *Id.*

259. Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 BROOK. L. REV. 1319 (2021-2022); GOODMARK, IMPERFECT VICTIMS, *supra* note 24 (analyzing the failure of state intervention in intimate partner violence, sexual assault, and trafficking, particular for women of color and gender-queer individuals).

260. In a recent decision from an intermediate appellate court in New York, the appeals court granted DVSJA relief to a woman with a lengthy criminal history, but not without noting that she was "not a perfect victim in any respect" and that "her own violent conduct" made the decision a "close call." *People v. Brenda WW.*, 203 N.Y.S.3d 211, 219 (N.Y. App. Div. 2023).

DVSJA validates and reflects the experiences of survivors who fall outside the “perfect victim” norm.

But the DVSJA fails to honor the knowledge of survivors when it comes to whose narratives are worthy of our collective belief. Without a foundational understanding informed by the lived experience of survivors, system actors remain emboldened to interpret credibility through the lenses of established power structures and hierarchies that favor trust in law enforcement over hard-learned self-reliance, fear over anger, and linear narrative over storylines splintered by trauma. In other words, the perpetuation of testimonial injustice in the DVSJA frustrates the development of collective knowledge. This epistemological Catch-22 undermines the true purpose of the survivor-led reform movement.

#### IV. WHERE DO WE GO FROM HERE?

How do we redress—or at least minimize—the epistemic harms inflicted on criminalized survivors? Is it even possible to right these wrongs within the criminal legal system, relying on an adversarial framework to get to the “truth” of the underlying abuse someone experienced, and its role in their offense? This Part explores how we can approach these questions, with some suggestions along the way.

Several practical lessons emerge from the experience of implementing the DVSJA’s corroboration requirement in New York. Hopefully, these can benefit New York in the future, as well as other jurisdictions contemplating similar sentencing reforms for incarcerated survivors. Primarily, the New York legislature should abolish the corroboration requirement and create a presumption in favor of resentencing, if the statute’s first two elements are proven. Courts should also interpret the corroboration requirement liberally, permit expert testimony on credibility bias and the phenomenon of underreporting abuse, and allow open discovery in DVSJA resentencing cases. Moreover, advocates should aggressively seek disclosure of documentary evidence in the control of the prosecution. And the system should educate courts, prosecutors, and defenders on credibility discounting, using a trauma-informed approach.

##### *A. Abolish the Corroboration Requirement (and Interpret it Liberally in the Meantime)*

The first, and most straightforward, fix is legislative: to excise from the DVSJA and similar reforms a requirement of corroborating evidence. Without such a requirement, a survivor’s testimony about their abuse could

be sufficient on its own to satisfy the burden of proof for resentencing. This change is not seismic; it simply puts survivors on the same evidentiary footing as any other applicant seeking post-conviction relief. As discussed above,<sup>261</sup> New York's pre-existing pleading requirements governing motions for post-conviction relief give courts the option to grant a hearing based on uncorroborated allegations alone.<sup>262</sup> Judges have the discretion to deny a hearing where the applicant's factual allegations are unsupported by other evidence so long as "there is no reasonable possibility that such allegation[s] [are] true."<sup>263</sup> Accordingly, courts can grant a motion based on the applicant's allegations alone if such a reasonable possibility does exist. The same standard should apply to allegations of abuse made by DVSJA applicants. Furthermore, jettisoning the corroboration requirement for survivors of sexual assault and other forms of physical and psychological violence is consistent with laws dropping the corroboration requirement in rape prosecutions,<sup>264</sup> and, more recently, recommendations to excise the prompt outcry requirement from the MPC.<sup>265</sup> The DVSJA's corroboration requirement is anachronistic, and it must go.

Fears that such an amendment would open the floodgates are misguided. First, leveling the playing field at the pleading stage need not affect the evidentiary burden at a hearing.<sup>266</sup> Moreover, if a deluge of resentencing applications *were* to result from lifting the onerous corroboration requirement, this is not necessarily a bad thing. If conditioning relief on proffering documentation of abuse is excluding worthy candidates, then eliminating the corroboration hurdle would better effectuate the statutory purpose. Given the high rates of domestic violence histories among women in prison,<sup>267</sup> increasing the number of applications

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261. *See supra*, Section II(C)(3).

262. *See* N.Y. CRIM. PROC. LAW § 440.30(4)(d).

263. *See id.*

264. *See supra* Section II(A)(2).

265. *See id.*

266. Several New York courts have held that DVSJA resentencing applicants must prove their entitlement by a preponderance of the evidence. *See, e.g.*, *People v. T.P.*, 188 N.Y.S.3d 842, 845 (N.Y. App. Div. 2023); *People v. Addimando*, 152 N.Y.S.3d 33, 38 (N.Y. App. Div. 2021); *People v. B.N.*, 192 N.Y.S.3d 445, 454-55 (Sup. Ct. Cayuga Cnty. 2023). This is the same standard applied in other post-conviction motions in New York. *See People v. Richard*, 548 N.Y.S.2d 659 (N.Y. App. Div. 1989).

267. *See supra* note 60.



should be viewed as a mark of success for legislation whose goal is to reduce egregiously long prison sentences for criminalized survivors. More resentencing motions is a bad thing only if we lack faith in the court system's ability to fairly adjudicate them.

Absent legislative amendment, courts can and should liberally interpret the DVSJA's corroboration requirement. A lenient approach to pleadings would recognize the challenges survivors face in reporting their abuse, while preventing frivolous claims from moving forward. In adopting a liberal interpretation, courts should keep in mind several key tenets, all of which have been applied in some cases:

- (1) A liberal interpretation of the corroboration requirement is consistent with New York law addressing corroboration in other contexts;<sup>268</sup>
- (2) Corroboration that relies on a survivor's self-reporting is acceptable and, indeed, contemplated by the statute, which explicitly lists record types that necessarily rely on the survivor's account of their own experience;<sup>269</sup>

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268. For example, hearsay statements by a child relating to abuse or neglect are admissible in child protective proceedings to prove abuse or neglect so long as they are sufficiently corroborated. *In re Victoria P. (Victor P.)*, 994 N.Y.S.2d 409, 411 (N.Y. App. Div. 2014). Corroboration in this context is defined to mean "[a]ny other evidence tending to support the reliability of the previous statements." *In re Christina F.*, 548 N.E.2d 1294, 1296 (1989) (quoting Family Ct. Act. § 1046(a)(vi)) (emphasis added). Notably, in finding the corroboration sufficient for a DVSJA hearing in *People v. Coles*, a New York intermediate appellate court cited two cases from the child neglect context in support of its finding. 158 N.Y.S.3d 611, 612 (N.Y. App. Div. 2022) (citing *Matter of David M. (Sonia M.-C.)*, 989 N.Y.S.2d 511, 513-14 (N.Y. App. Div. 2014) and *Matter of Samuel S. v. Dayawathie R.*, 880 N.Y.S.2d 685, 687 (N.Y. App. Div. 2009)). And in *People v. M.O.* (Sup. Ct. Bronx Cnty. 2020) (unpublished; on file with author), a Bronx County trial court also suggested that the DVSJA corroboration requirement is even less burdensome than the admissibility test for evidence corroborating accomplice liability. *Id.* at \*2-3 (analogy to accomplice liability corroboration was "[t]oo constricted a view" in the DVSJA context, where "the same concern about the risk of a wrongful conviction simply does not apply").

269. Information in a pre-sentence report, for instance, most often relies on the Probation Department's interview with the person facing sentencing. Likewise, a social service record, hospital record, or "verification of consultation" with a "medical or mental health provider, . . . member of the

(3) Evidence that was created during the pendency of the criminal case, or in preparation for the resentencing application, is already contemplated by the statute,<sup>270</sup>

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clergy, attorney, social worker, or rape crisis counselor” will all necessarily rely on the survivor’s reporting. *See* N.Y. CRIM. PROC. LAW § 440.47(2)(c).

Importantly, the only appellate division to date addressing the DVSJA’s corroboration requirement is *Coles*, 158 N.Y.S.3d. There, the intermediate appellate court reversed the summary denial of Ms. Coles’ DVSJA resentencing application, holding that she had met the threshold burden by submitting affidavits from her sister and mother, as well as a transcription of her post-arrest interrogation. Though absent from the decision, it is notable that the affidavits in that case recounted telephone conversations Ms. Coles’ family members had had with her, wherein she had disclosed aspects of the coercive control she was experiencing. Thus, both the affidavits and the interrogation transcript constituted corroborative evidence based on Ms. Coles’ own reporting. *See also* *People v. Fisher*, 200 N.Y.S.3d 494, 496-97 (N.Y. App. Div. 2023) (affirming denial of resentencing but acknowledging that the applicant met the corroboration requirement by submitting documents that all relied on her reports of abuse: pre-sentence report, psychological evaluation, and applicant’s own affidavit); *People v. S.S.*, 192 N.Y.S.3d 477, \*6-7 (Sup. Ct. N.Y. Cnty. 2023) (Conviser, J.) (granting DVSJA resentencing after a hearing where the court found the applicant’s testimony credible overall, despite the fact that her reports of sexual abuse “were not supported by corroborating evidence from outside sources,” and her testimony about the offense itself was contradicted by the court file and therefore not entirely credited).

270. Again, the statute’s list of acceptable forms of corroboration is replete with examples of records generated post-arrest, and the statutory text even states: “Other evidence may include . . . a showing based in part on documentation prepared at or near the time of the commission of the offense or the prosecution thereof tending to support the person’s claim.” N.Y. CRIM. PROC. LAW § 440.47(2)(c). *See Coles*, 158 N.Y.S.3d (hearing warranted based on corroborative evidence that was created in the course of prosecuting the applicant, or in preparation for the resentencing application); *People v. Burns* (Sup. Ct. Suffolk Cnty. 2020) (unpublished; on file with author) (granting resentencing hearing based on pre-sentence report, domestic incident report, statements to law enforcement alleging abuse, sentencing minutes, and clemency petition); *People v. M.O.* (Sup. Ct. Bronx Cnty. 2020) (unpublished; on file with author) (granting hearing based, in part, on affidavit from counselor at Rikers Island jail and statement by trial attorney that applicant had bruised face at arraignment).

(4) The proffered evidence need not corroborate every aspect of the abuse allegations, including the “substantial” nature of the abuse;<sup>271</sup>

(5) The evidence need not corroborate recent instances of abuse, if the temporal nexus is otherwise met by the applicant’s allegations;<sup>272</sup> and

(6) Credibility determinations are inappropriate at the pleading stage; any factual inconsistencies apparent in the pleadings should be resolved at a hearing.<sup>273</sup>

Counsel arguing for a less stringent interpretation of the corroboration requirement can employ these arguments to urge courts to err on the side of granting fact-finding hearings.

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271. *See, e.g.,* *People v. J.F.* (Sup. Ct. Kings Cnty. 2021) (unpublished; on file with author) (holding that the DVSJA “does not require that the mandated ‘one piece’ of a certain type of evidence corroborate the entire claim or even any particular element of it”).

272. Katherine W.’s case helps illustrate this point. While her report of sexual assault pre-dated her offense by seven years, Katherine’s marriage to her abuser was ongoing at the time of the offense. Accordingly, the corroboration plus her allegations of continuing abuse should have been sufficient, even under the narrow rule some courts have adopted that the abuse or abusive relationship must be “ongoing” at the time of the offense for the applicant to be worthy of a reduced sentence. *See People v. Williams*, 152 N.Y.S.3d 575, 576 (N.Y. App. Div. 2021). Moreover, where the narrow *Williams* standard is not met, counsel may be able to argue that the *effects* of the abuse are ongoing at the time of the offense, an allegation which, coupled with corroboration of prior abuse, should be sufficient to be granted a fact-finding hearing on the connection between abuse and offense. *See, e.g.,* *People v. C.S.* (Sup. Ct. Westchester Cnty. 2023) (unpublished) (finding applicant was the victim of substantial abuse years prior to the offense, which manifested in post-traumatic stress disorder (PTSD), and that PTSD was a likely contributing factor—though not a significant one—in her commission of the offense).

273. *See People v. M.O.* (Sup. Ct. Bronx Cnty. 2020) (unpublished), at \*4 (“The People have referred the Court to various statements made by the defendant that she was not subject to abuse from the victim. Such statements do not defeat the defendant’s entitlement to a hearing, but instead give rise to the kind of material issue of fact that is best resolved at an evidentiary hearing.”).

*B. Create a Presumption in Favor of Resentencing*

To take legislative amendment a step further, an evidentiary burden shift at the hearing stage would better effectuate the DVSJA's legislative purpose: eliminating the discretionary third element—that the original sentence was unduly harsh—and creating a rebuttable presumption in favor of resentencing if the applicant meets their burden as to the first two elements. If someone can demonstrate by a preponderance of the evidence that they were a victim of substantial domestic abuse, and that their abuse was a significant factor in their offense, the burden of proof should shift to the prosecution to demonstrate why resentencing would be otherwise inappropriate.<sup>274</sup>

One example of this kind of presumption in a remedial sentencing statute is in New York's 2004 Drug Law Reform Act (DLRA),<sup>275</sup> an effort to mitigate the damage wrought by the state's draconian Rockefeller Drug Laws passed in 1973.<sup>276</sup> While the DLRA has been criticized as not going far

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274. Such a presumption is not without precedent. A rebuttable presumption in favor of resentencing was enacted in California's Second Look statute. *See* CAL. PENAL CODE § 1172.1(b)(2) ("There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant currently poses unreasonable risk of danger to public safety."). That statute requires courts to consider, among other factors, an applicant's history of trauma and domestic violence. *Id.* at § 1172.1(a)(5); *see supra* note 244. A presumption in favor of resentencing for people aging in prison was also included in a bill introduced to Congress by Senator Cory Booker in 2019 and then again in 2022. The Second Look Act would create a rebuttable presumption of release from federal prison for petitioners who are 50 years of age or older and have served at least 10 years in prison. *See* S.2146—116<sup>th</sup> Congress: Second Look Act of 2019, <https://www.congress.gov/bill/116th-congress/senate-bill/2146?r=6&s=1>; S.5193—117<sup>th</sup> Congress: Second Look Act of 2022, <https://www.govtrack.us/congress/bills/117/s5193>. The Sentencing Project has also recommended a rebuttable presumption of resentencing for anyone who has served 10 years in prison. *THE SENTENCING PROJECT, A SECOND LOOK AT INJUSTICE 5* (2022).

275. Drug Law Reform Act of 2004, 2004 N.Y. Laws, ch. 738 § 23.

276. *See generally* Julilly Kohler-Hausmann, "The Attila the Hun Law": New York's Rockefeller Drug Laws and the Making of a Punitive State, 44 J. Soc. HIST. 71 (2010) (describing the negative effects of the Rockefeller Drug Laws on drug users and the state's role in effectively responding to harm). *See also* NYCLU, *Legislative Memo: NYCLU Strongly Supports Reform of Rockefeller Drug Laws*, <https://www.nyclu.org/en/legislation/legislative-memo-nyclu-strongly-supports-reform-rockefeller-drug-laws> [<https://perma.cc/A4G3-5ZDE>].

enough to ameliorate the devastation of mass incarceration caused by the War on Drugs,<sup>277</sup> it succeeded in not placing the burden on the applicant seeking relief to show that they were deserving of a lower sentence.<sup>278</sup> Rather, if the applicant demonstrated that their drug conviction and sentence made them eligible for resentencing, the DLRA dictates that, after considering “all relevant circumstances,” a court “shall” issue a lower sentence “*unless substantial justice dictates that the application should be denied.*”<sup>279</sup>

Grafted onto the DVSJA, a similar burden shift would mean that the prosecution, not the defense, would bear the burden of proving that the original sentence is *not* unduly harsh under all the circumstances. This change would still vest judges with the discretion to deny resentencing where substantial abuse significantly contributed to the offense, but the presumption would be in favor of a mitigated sentence.

*C. Does the DVSJA’s Corroboration Requirement Violate Equal Protection?*

Litigators disinclined to wait on legislative action might contemplate a constitutional route: challenging the validity of the DVSJA’s corroboration requirement by asserting a disparate impact claim under the Equal Protection Clause. For the reasons that follow, such a claim is unlikely to succeed on its own. However, it may be a useful tool in advocating for a liberal approach to discovery and credibility determinations in the DVSJA context.<sup>280</sup>

Professor Tuerkheimer sets forth the contours of a similar equal protection argument when survivors of sexual assault are disbelieved by law enforcement.<sup>281</sup> An equal protection claim, she writes, could be “premised on the insight that, when rape victims confront a law enforcement regime predisposed to dismiss their complaints, they are

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277. *See, e.g.,* Jim Parsons, et al., *End of an Era? The Impact of Drug Law Reform in New York City*, VERA INST. JUST. 21 (2015).

278. *See* *People v. Beasley*, 850 N.Y.S.2d 140, 141 (N.Y. App. Div. 2008) (reversing denial of DRLA resentencing where trial court “erred in placing the burden on the defendant to demonstrate that resentencing should be granted as a matter of ‘substantial justice.’”).

279. *Supra* note 275.

280. *See infra* Section IV(C).

281. Tuerkheimer, *Incredible Women*, *supra* note 26, at 7-8.

effectively denied the protective resources of the state.”<sup>282</sup> The corollary argument for the DVSJA would be that the heightened evidentiary burden has a disparate impact based on gender and race: since female, non-binary, and Black and brown survivors are less likely to report abuse, they are also less likely to possess the type of documentary support required by the statute.

An equal protection challenge to the DVSJA poses significant challenges, however. Litigants would need to show a discriminatory purpose—that is, that the legislature intended for these protected classes to have a harder time obtaining relief under the law.<sup>283</sup> The DVSJA’s legislative history is silent on the motivation behind the corroboration requirement, but the overall concerns that prosecutors expressed over the bill focused on the administrative burden on district attorneys and the courts; credibility discounting for non-male, non-white survivors is the subtext.<sup>284</sup>

In framing a discriminatory purpose argument, advocates could cite the historical context for requiring corroboration, which—as this Article contends<sup>285</sup>—is steeped in race and gender bias. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court made clear that not only “contemporary statements of decisionmakers” are relevant to an inquiry into discriminatory intent; rather, it can also be shown through “the historical background of the challenged decision, the specific antecedent events, [and] departures from procedural norms.”<sup>286</sup> However, the *Arlington Heights* approach is often disfavored in disparate impact claims, particularly where the challenged state action is the passage of a statute relating to criminal procedure.<sup>287</sup> Accordingly, an equal

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282. *Id.* at 8.

283. *See* *Washington v. Davis*, 426 U.S. 242 (1976) (holding that laws that were not adopted to further a racially discriminatory purpose do not violate the Equal Protection Clause, even when they present racially discriminatory impacts).

284. *See* DAASNY Letter, *supra* note 44, at 4 (“a retroactivity provision of this nature could prove burdensome and costly” by “[t]asking the courts years after conviction with verifying allegations of past domestic abuse that were either never previously raised or consistently rejected by prosecutors, judges and juries,” resulting in “lengthy and difficult hearings”).

285. *See supra* Part II.

286. *Vill. of Arlington Heights v. Metro. Hous. Dev’t Corp.*, 429 U.S. 252, 253 (1977).

287. *See* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1265-67 (2018) (lamenting the Supreme Court’s inconsistent and often outcome-determinative application *Arlington Heights* to discover

protection challenge to the DVSJA's pleading requirements seems unlikely to succeed. Nonetheless, the equal protection framework is a useful tool for litigators arguing for a liberal approach to the corroboration requirement.

*D. The Need for Open Discovery*

Even if an equal protection claim is unlikely to succeed, calling attention to the statute's disparate impact could serve another important purpose: obtaining discovery from entities that may possess evidence supporting the applicant's allegations of abuse. Many DVSJA applicants seeking to satisfy the corroboration requirement have been thwarted in their attempts to obtain records in the control of state agencies. In D.M.'s case, for instance, the court denied a request to obtain the transcripts from a grand jury proceeding where D.M. had testified against her abuser, citing confidentiality rules around grand jury proceedings. In another case from upstate New York, a judge refused to grant a subpoena for documentation that defense counsel had reason to believe would contain references to his client's childhood abuse, citing the voluminous nature of more than a decade of foster care records. The Department of Social Services, which oversees that county's foster care program, also opposed disclosure on the grounds of statutory confidentiality protections—even though the records pertained to the DVSJA applicant himself.

The most frequent resistance to disclosure comes from district attorney's offices and police departments, who often refuse to turn over past domestic incident reports, witness statements, video footage, or other records that may be relevant to an abuse narrative. Without a statutory discovery obligation, prosecutors can deny defense counsel's requests outright, sometimes claiming that their offices have already reviewed the files and determined they do not contain corroboration of domestic violence. Judges can also be reluctant to order disclosure unless the defense can proffer a specific basis and identify the files they believe contain evidence of abuse.

The challenge for DVSJA applicants is exacerbated by the historically limited pretrial discovery rules in New York, under which almost no evidence was turned over to the defense prior to trial, resulting in very little discovery in the vast majority of cases resolved by guilty plea. The state did not pass discovery reform until 2019 (in the same legislative session as the DVSJA), joining 46 other states in requiring prosecutors to turn over

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discriminatory intent, especially in challenges to criminal procedure statutes, and arguing for a return to the *Arlington Heights* approach).

substantially more evidence to the defense earlier in the proceedings and establishing timelines for disclosure.<sup>288</sup> Prior to 2019, that decision was made nearly blind—hence why New York’s former statute was called the “blindfold” law.<sup>289</sup> Since discovery reform coincided with passage of the DVSJA—in the same legislative session—almost no cases eligible for DVSJA resentencing would have been prosecuted under the open discovery rules. Therefore, the case documents that are readily available to post-conviction DVSJA counsel—such as the court file and trial counsel’s files (if counsel retained their files)—will often contain no police reports, no witness statements, no medical records, and no videos or detectives’ notes from interrogations.

Against this backdrop, to review files in the possession of police and prosecution, the defense’s best option is to submit a request under New York’s Freedom of Information Law (FOIL).<sup>290</sup> Getting a FOIL response can take months, however, and the responding government agency may refuse to release some or all of the materials based on statutory exemptions to disclosure.<sup>291</sup> Litigating the applicability of those exceptions on appeal can result in FOIL battles dragging out for months and even years. Further, it is

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288. N.Y. CRIM. PROC. LAW § 245. Amendments to the discovery statute passed in 2022 walked back some of the gains of the reform, but open discovery remains substantially unchanged.

289. See Donna Lieberman, D. & Isabelle Kirshner, *Take Off the Blindfold: Reform New York Discovery Law*, NYCLU (March 11, 2019), <https://www.nyclu.org/en/publications/take-blindfold-reform-ny-discovery-law-commentary> [<https://perma.cc/57MR-59CK>]; see also Beth Schwartapfel, *Defendants Kept in the Dark About Evidence, Until It’s Too Late*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?bblinkid=56384536&bbemailid=4645020&bbejrid=34726352> [<https://perma.cc/85HG-482X>].

290. N.Y. PUB. OFF. LAW § 87.

291. See N.Y. PUB. OFF. LAW § 87(2). Grounds for exemption include: if disclosure “would constitute an unwarranted invasion of privacy,” see *id.* §87(2)(b), and if the records were “compiled for law enforcement purposes,” and disclosure would interfere with ongoing law enforcement investigations or judicial proceedings, see *id.* §87(2)(e)(i); see also Nick Reisman, *Advocates: State Government Needs Better Response to Open Records Requests*, SPECTRUM NEWS 1, (Dec. 2, 2020), <https://spectrumlocalnews.com/nys/rochester/ny-state-of-politics/2020/12/02/advocates--government-needs-better-response-to-open-records-requests> [<https://perma.cc/E6W7-6RML>] (reporting on campaign urging NY Committee on Open Government to address delays and agency non-compliance under FOIL).



well known in the advocacy and journalism communities that when law enforcement and other public agencies do release case records under FOIL, they are often heavily redacted and difficult to decipher.

Given these myriad obstacles, courts must step in to mitigate the discovery challenges for DVSJA applicants. Judges' discretionary subpoena power<sup>292</sup> should be liberally employed in this context, where the statute sets a high evidentiary bar, yet gives no entitlement to discovery in DVSJA cases. Requests for judicial subpoenas should not be required to be overly detailed in the date range of the records sought or the factual basis for believing they contain evidence of abuse. For instance, a DVSJA applicant's recollection that she mentioned abuse in a proffer session with the District Attorney's office should be sufficient to justify disclosure of the prosecution's notes. Likewise, an indication in a pre-sentence report that the applicant told a probation interviewer that they were abused while in foster care should be a sufficient basis for a subpoena for the entirety of their foster care records (subject to appropriate redactions). Nor should date ranges be overly restricted. Even if an incident of abuse occurred when the DVSJA applicant was eight years old, they may not have disclosed the abuse until much later, or a case worker may have discussed the abuse with them years later and made notes to that effect. Requiring the applicant to specify exactly when these conversations occurred places an unfair burden on a survivor, whose ability to recall details or to recount memories in a linear fashion may be impaired by their experience of trauma.<sup>293</sup>

Moreover, neither initial vetting by the prosecution nor *in camera* review by the judge is an acceptable substitute for disclosure to the defense.

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292. See N.Y. CRIM. PROC. LAW § 2302.

293. Research has established that “domestic violence often results in neurological and psychological trauma, both of which can affect a survivor’s comprehension and memory.” As a result, survivors’ stories are more likely to appear “internally inconsistent and therefore implausible,” and/or “externally consistent”—i.e., they do not comport with common understandings of “how we believe the world works.” Epstein & Goodman, *Discounting Women*, *supra* note 22, at 405-406; see also BATTERED WOMEN’S JUSTICE PROJECT, MYTHS AND MISCONCEPTIONS: CRIMINALIZED SURVIVORS 5 (2023) (“Trauma can impact a survivor’s ability to tell a story in a linear fashion” and can affect the “ability to access memories immediately after the triggering event”); JILL LAURIE GOODMAN & DORCHEN A. LEIDHOLT, EDs., *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 171 (2011) (“Minimization, denial, and memory loss, all symptoms of psychological trauma, can make it extremely difficult to elicit information necessary to understand whether the exploiter’s conduct rises to the level of actionable trafficking.”).

The DVSJA applicants themselves, together with their defense team, have the full picture of the history of abuse, which may be cumulative and complex. A judge or prosecutor reviewing a record lacks the comprehensive knowledge of the case to determine whether a piece of information may in fact serve as corroboration of abuse. This is especially true in cases involving coercive control,<sup>294</sup> where factual details supporting the psychological abuse are highly case-specific and could be easily missed by parties unfamiliar with the nuanced dynamics of the coercive relationship.<sup>295</sup>

Defense counsel seeking discovery from the prosecution, or disclosure of records from other entities, should feel empowered to take an assertive approach. It is crucial to educate judges about the inequities of the DVSJA's evidentiary burden—for any applicant, and particularly for clients who, by

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294. Coercive control is an insidious form of interpersonal abuse that has defined as “an ongoing pattern of domination by which male abusive partners primarily interweave repeated physical and sexual violence with intimidation, sexual degradation, isolation and control..” Evan Stark, *Representing Battered Women: Coercive Control and the Defense of Liberty*, at 7 (2012) (paper prepared for Violence Against Women: Complex Realities and New Issues in a Changing World, Les Presses de l'Université du Québec); see also EVAN STARK, COERCIVE CONTROL, *supra* note 135. The perpetrator's “main goal is to restrict the other person's liberties” by isolating the victim from friends and family, surveilling their activities, and subjecting them to financial and emotional control, all under implied or explicit threat of violence or other forms of retribution. Marieh Tanha, Connie J.A. Beck, Aurelio José Figueredo, & Chitra Raghavan, *Sex Differences in Intimate Partner Violence and the Use of Coercive Control as a Motivational Factor for Intimate Partner Violence*, 25 J. INTERPERSONAL VIOLENCE 1836, 1837 (2010). The New York Statewide DVSJA Defender Task Force has created a guide to coercive control in the DVSJA context. ALAN ROSENTHAL & CHRISTIANA WIERSCHEM, AN INTRODUCTORY GUIDE TO COERCIVE CONTROL FOR THE DVSJA ATTORNEY: COERCIVE CONTROL IS DOMESTIC VIOLENCE (2023). Coercive control has been criminalized in the U.K., as well as several U.S. states. See Carrie N. Baker, *A New Frontier in Domestic Violence Prevention: Coercive Control Bans*, MS. MAGAZINE (Nov. 11, 2020), <https://msmagazine.com/2020/11/11/coercive-control-hawaii-california-domestic-violence/> [<https://perma.cc/R5L6-CK98>].

295. See generally EVAN STARK, COERCIVE CONTROL, *supra* note 135 (documenting numerous examples of the fact-specific ways in which abusers use coercion to manipulate victims and strip their autonomy).

virtue of their race, gender, or other marginalized identity,<sup>296</sup> are even less likely to report abuse. Counsel can point out the disparate pleading requirements for DVSJA applicants in comparison to other people seeking post-conviction relief under Criminal Procedure Law § 440. The heightened pleading burden can also be analogized to a statutory manifestation of the credibility discount enshrined in the doctrines of prompt complaint and the corroboration requirement for allegations of rape—both of which have been widely criticized and increasingly purged from criminal procedure.

Counsel should also individualize their subpoena requests to consider the client's relevant characteristics and background. For instance, in the case of D.M., who sought access to her grand jury transcripts describing her domestic violence, that testimony may have been the only occasion where she disclosed the abuse. As a woman of color, and a single mother struggling to maintain access to government benefits, she feared that law enforcement would not believe her, would be unable to protect her, or would separate her from her child or jeopardize her ability to support her family if she were to report the danger she faced. Only when threatened with lengthy incarceration if she did not cooperate with law enforcement did D.M. finally feel compelled to share her experience of abuse.

Each subpoena request should be individually tailored, depending on the client's personal experiences and the individualized need for the records at issue. To craft the most compelling argument for disclosure, it is critical for counsel to develop a close and trusting relationship with the client so as to understand both their personal reasons for non-disclosure or partial disclosure. Collaboration with social workers and mitigation specialists can be especially valuable to counsel in this respect. Even if judges deny these subpoenas, creating a robust and nuanced record documenting the need for access to records sets the stage for appeal, and raises systemic awareness of the inequities of the DVSJA's evidentiary burden.

*E. Allow Expert Testimony on Credibility Bias and Failure to Report Abuse*

Equally important to granting the defense liberal access to documentary evidence is permitting DVSJA applicants to introduce expert

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296. Here it is important to note that factors such as disability or immigration status could be equally relevant to a survivor's reluctance to disclose their experiences of abuse. The framing of the records request must be individually tailored to each client's circumstances.

testimony at the hearing itself. Experts—such as psychologists, social workers, other mental health professionals, and case workers—can play a crucial role in educating courts (and prosecutors) about many of the ostensibly counter-intuitive dynamics of domestic violence.

Relevant to the discussion here is the phenomenon of survivors' reluctance to report abuse, or to tell an inconsistent or confusing narrative when reporting does occur. This testimony can be pivotal in cases where there may be sufficient evidence to meet the initial corroboration requirement, but other evidentiary issues pose challenges for the defense's case, such as time gaps in the survivor's disclosures, or contradictory and/or partial accounts disclosed at various times. Experts should also be permitted to testify regarding credibility discounting as one of the primary reasons for low reporting rates. Such testimony provides historical and clinical context for why a survivor would reasonably doubt that they would be believed. And it may raise awareness for judges and prosecutors about their own credibility biases.

#### *F. Educate System Stakeholders on Credibility Discounting*

Absent legislative or judicial intervention to invalidate the corroboration requirement, the epidemic of credibility discounting in DV sentencing reform should be addressed by educating system key stakeholders about the epistemic injustice of credibility discounting, both when survivors report harm they have experienced, and when they face prosecution for crimes stemming from their abuse. It is clear from five years of DVSJA litigation in New York that many prosecutors, judges, and defenders could benefit from a deeper understanding of the reasons why survivors tend not to report abuse, minimize abuse if they do report it, and/or offer contradictory versions of events, all of which are frequently explained by their experience of trauma.

Continuing legal education courses that center the lived experiences of survivors are key to bridging the gap. States can also designate certain judges, prosecutors, and defenders to specialize in these cases after undergoing a certification process that includes training on credibility discounting and epistemic harm to survivors. Of course, offering professional development programs could entail considerable costs, but it is an essential price to pay to effectively implement meaningful decarceration for survivors.

## V. TOWARDS AN ABOLITIONIST PARADIGM

The most common question I am asked about the DVSJA is, “why are these survivors being prosecuted in the first place?” The question speaks to one of the core criticisms of the DVSJA: that it does not go far enough and in fact endorses the prosecution and punishment of domestic violence victims by seeking incremental reform.

As articulated by the abolitionist advocacy group Survived & Punished, “the DVSJA legitimizes the carceral system we’re trying to dismantle, and in some instances may expand it.”<sup>297</sup> No doubt the DVSJA and similar reforms offer limited relief. Shortening a survivor’s sentence, without vacating the conviction or preventing prosecution in the first place, arguably presumes that some punishment is warranted. Criminalized survivors are still caged, separated from their families, and forced to face enormous barriers to reentry when they eventually rejoin their communities.<sup>298</sup> From this vantage point, “[t]he law [] reaffirms that criminalization of survivors of domestic violence is appropriate—just for a shorter period of incarceration. It does not say that punishing survivors is illegitimate; it does not say that survival is an absolute defense to criminalization.”<sup>299</sup>

As Leigh Goodmark writes in *Imperfect Victims*:

the DVSJA is a reformist reform: it accepts the legitimacy of the criminal legal system by providing for shorter sentences rather than no punishment; it vests discretion to determine who should qualify for relief in judges and prosecutors, which increases their power; it creates a pathway to relief for a narrow category of people; and its passage serves as a “mission accomplished moment” that will make it more difficult to make change in the future.<sup>300</sup>

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297. SURVIVED & PUNISHED NEW YORK, PRESERVING PUNISHMENT POWER 11 (2020).

298. See Courtney Cross, Reentering Survivors: Invisible at the Intersection of the Criminal Legal System and the Domestic Violence Movement, 31 BERKELEY J. GENDER L. & JUST. 60 (2016); see also *People v. S.M.*, 150 N.Y.S.3d 562, 567 (N.Y. Co. Ct. 2021) (granting DVSJA resentencing and declining to impose parole, findings that community supervision imposes added burdens for survivors because it “mimic[s] the abusive relationships that domestic violence survivors experienced in their relationships prior to incarceration”).

299. *Id.*

300. GOODMARK, *IMPERFECT VICTIMS*, *supra* note 24, at 188 (internal quotation marks omitted).

This perspective poses a valuable question: does tinkering with the degree of punishment legitimize the punishment itself?

Another common critique is that the DVSJA endorses disproportionate discretionary power in a system predisposed to punishment.<sup>301</sup> Even without a corroboration requirement at the pleading stage, the DVSJA still gives judges, prosecutors, and police the power to “dismiss the victimization claims of imperfect victims” and to “blame victims who do not turn to the criminal legal system for assistance.”<sup>302</sup> Survivors granted a resentencing hearing nevertheless face credibility discounting based on biased assumptions about their trustworthiness when they get to court. And even when a judge finds that an applicant has satisfied the statute’s first two elements—that they suffered substantial abuse that was a significant contributing factor to their offense—the DVSJA still gives the court discretion to deny resentencing if the original sentence is deemed appropriate, under all the circumstances.<sup>303</sup>

These critiques should give us all pause to consider whether the process of tweaking a reform saps energy from the larger movement to reshape our criminal legal system. Undoubtedly, repealing the corroboration requirement will not solve the problem of epistemic injustice to criminalized survivors. That requires reimagining the larger societal response to harm—an ongoing liberatory project for transformative justice being undertaken by feminist abolitionists and advocates.<sup>304</sup>

But reform and abolition are not mutually exclusive undertakings. The DVSJA is an example of what Kaba and Ritchie call the “dual power approach”: a strategy “in which we simultaneously work against the carceral state and outside/without it, open[ing] up space for the kind of organizing and experimentation we need to create safer communities.”<sup>305</sup> Such reform offers a pragmatic avenue “to free people today using

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301. *See, e.g., id.* at 181; SURVIVED & PUNISHED NEW YORK, *supra* note 297, at 11.

302. GOODMARK, IMPERFECT VICTIMS, *supra* note 24, at 181.

303. My proposal to substitute this discretion with a rebuttable presumption in favor of resentencing is attempt shift that power balance. *See supra* Section IV(B).

304. *See, e.g.,* GOODMARK, IMPERFECT VICTIMS, *supra* note 24; Kaba & Ritchie, NO MORE POLICE, *supra* note 118; Derecka Purnell, BECOMING ABOLITIONISTS (2021); Leigh Goodmark, *Law and Justice are Not Always the Same: Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707 (2015); RICHIE, RICHIE, ARRESTED JUSTICE, *supra* note 114.

305. Kaba & Ritchie, NO MORE POLICE, *supra* note 118, at 245.

imperfect, even problematic, laws.”<sup>306</sup> Simply put, there is value in a both/and paradigm—amending the DVSJA to make it more equitable must be pursued in tandem with longer-term strategies to dismantle the carceral system altogether.<sup>307</sup>

#### CONCLUSION

Efforts to end the overincarceration of survivors of domestic violence are worthy of praise and replication—but not without critically examining their shortcomings. Implementation of the Domestic Violence Survivors Justice Act in New York has shined a spotlight on the compounded harm of reflexive disbelief historically visited on women, people of color, and imprisoned people. If this pioneering legislative effort is to serve as a blueprint for future reforms, corroboration should not be required for relief at any stage of the proceeding. Advocates, legislators, judges, and prosecutors must take an honest look at the damage wrought by a presumption of incredibility—in cases of abuse, the only available evidence is often the survivor’s own courageous account. System actors also must listen to survivors’ stories through a culturally competent and intersectional lens that accounts for centuries of trauma and oppression.

Amending evidentiary rules and interpreting existing rules liberally through a trauma-informed lens is a start. But ultimately, adjustments to the existing framework can only go so far. Relying on truth-seeking processes within the criminal legal system risk the perpetuation of the harmful mythologies that helped to give credibility discounting legitimacy in the first place. As so many survivors already recognize, true healing often lies outside the courtroom. There is ample reason for hope in the many alternative processes under development that seek to address harm and promote accountability by harnessing the power of community, rather than relying on systems of imprisonment and punishment. To get there, we must shift our cultural default away from doubt and towards belief.

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306. GOODMARK, *IMPERFECT VICTIMS*, *supra* note 24, at 188.

307. *See id.* (“Ultimately, the abolitionist feminist position should be to free people today using imperfect, even problematic, laws, while simultaneously working in the short term to address their shortcomings and expand their reach and in the long term to dismantle the criminal legal system altogether.”).