

FACE.

Families Advocating for Campus Equality

Trauma-Informed Theories Disguised as Evidence

“The great enemy of the truth is very often not the lie— deliberate, contrived and dishonest — but the myth — persistent, persuasive, and unrealistic.”

John F. Kennedy¹

I. The Evolution and Explosion of Trauma-Informed Theories

A. In the beginning.

In 1970 the first significant study of rape trauma symptoms was published² just as experts were beginning to recognize the exceptional psychological trauma suffered by rape victims.³ Earlier sentiment had discounted victims’ trauma, assuming it was related to the impact on a woman’s social identity, an injury that could be remedied by the justice system.⁴

The concept of “rape trauma syndrome” or “RTS” was introduced in 1974, in a survey of 92 rape victims’ self-reported symptoms.⁵ The study, which by design was limited to *forcible* rape victims, emphasized their feelings of helplessness and need for “self-preservation” during “life-threatening situations,”⁶

The crisis that results when a woman has been sexually assaulted is in the service of self-preservation. The victims in our sample felt that living was better than dying and that was the choice which had to be made. The victims’ reactions to the impending threat to their lives is the nucleus around which an adaptive pattern may be noted.⁷

¹ Kennedy Library & Museum Rededication Film (1993): Source of Quotation, “We Enjoy the Comfort of Opinion...” (1993): Source of Quotation, “We Enjoy the Comfort of Opinion...” Address by President John F. Kennedy Yale University Commencement, June 11, 1962 <https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/Kennedy-Library-Fast-Facts/Yale-University-Commencement-Address.aspx>

² Joanna Bourke, “Sexual Violence, Bodily Pain, and Trauma: A History, Theory,” Author Manuscript, 2012, at pp. 5-6 (PDF), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4001210/>, citing Sutherland, S., & Scherl, D. J. (1970). Patterns of response among victims of rape. *American Journal of Orthopsychiatry*, 40(3), 503-511. <https://psycnet.apa.org/doiLanding?doi=10.1111/j.1939-0025.1970.tb00708.x>

³ *Id.*, at pp. 5-6.

⁴ *Id.*, at pp. 13-14.

⁵ Burgess & Holmstrom, “Rape Trauma Syndrome,” 131 *Am. J. Psychiatry* 981, p. 981 (1974). Burgess was a nursing professor and Holmstrom a sociology professor at Boston College. The authors classified the rape victims’ experiences into stages rather than symptoms; first an acute phase with “a wide range of emotions” including sleeplessness, disorganization and fear, and second, nightmares, phobias, and attempts to “reorganize” one’s life. *Id.*, at p. 982.

⁶ *Id.*, at pp. 982, 985; Presumably due to narrower sexual assault definitions at the time, the study’s authors chose not to include sexual encounters involving “an inability to consent,” or “sexually stressful situations,” in which there was initial consent “that went beyond their expectations and ability to control.” *Id.*, at p. 981. Obviously, any incapacitation would make it a crime today.

⁷ *Id.*, at p. 985. Though the survey has been cited numerous times over the years, it has also been heavily criticized as methodologically unsound due to its various shortcomings which include: “definitional problems;” small sample size; absence of a control group; failure to distinguish between acquaintance and stranger rape; undefined terminology; and use of “biased” and “unrepresentative samples” which failed “to distinguish between victims of rapes, attempted rapes, and molestation.” Giannelli, “Rape Trauma Syndrome” *Faculty Publications*. Paper 346, p. 271 (1997) https://scholarlycommons.law.case.edu/faculty_publications/346/, citing Faigman, “Checking the

At the time “the most successful medical and legal narrative of rapetrauma [sic] ... came in the form of post-traumatic stress disorder or PTSD.”⁸ Novel concepts for the understanding and treatment of rape trauma and PTSD were introduced in 1992 with the publication of Judith Herman’s pioneering book *Trauma and Recovery*.⁹ Herman’s book also identified “terror,” “self-preservation,” and helplessness as principal precursors to trauma.¹⁰

Traumatic reactions occur when action is of no avail. When neither resistance nor escape is possible, the human system of self-defense becomes overwhelmed and disorganized. Each component of the ordinary response to danger, having lost its utility, tends to persist in an altered and exaggerated state long after the actual danger is over.¹¹

Thus, according to Herman, PTSD (and by extension rape trauma) was “the direct result of an encounter with an event that overwhelms one’s adaptive responses to life coupled with helplessness and terror.”¹² Herman surmised that the helplessness was caused by the individual’s recognition of the extreme danger faced and futility of any “efforts to protect himself or herself against the trauma.”¹³

B. Rape trauma proliferates as evidence.

Trauma-informed practices were originally developed as an appropriate and useful interview method meant to help counselors and law enforcement officials minimize victim re-traumatization and encourage reporting of sex offenses.¹⁴ Educating first responders, counselors, and interviewers about how rape victims might react to and process trauma was a first step in ensuring they were not reproached for decisions such as not having resisted their attacker or made a timely report.

The early 1990s saw a proliferation of rape trauma symptomology and its use as evidence that a rape had occurred. Researchers began to notice that expert testimony on the trauma reportedly suffered by rape victims was accruing “a broad range of symptoms and behaviors ... some of which [did] not appear to be based on research.”¹⁵ This ongoing expansion of rape symptomology was believed to be in response to the perceived need to defeat a defendant’s defenses of consent and counter “claims that a complainant’s behavior was inconsistent with having been raped.”¹⁶

Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings,” 70 Va. L. Rev. 1657, 1678-1680 (1984); Graham, “Rape Trauma Syndrome: Is It Probative Of Lack of Consent?” L. & Psych. Rev. 25, 41-42 (1989); see also O’Donohue et al, “Examining the Scientific Validity of Rape Trauma Syndrome,” Univ. of Nevada, *Psychiatry, Psychology and Law*, 2014, pp. 3-4, 6, for extensive criticism of the RTS concept and the fact that it is not “generally accepted by experts.”

⁸ Bourke at p. 16 (PDF).

⁹ Zaleski, Johnson & Klein, “Grounding Judith Herman’s Trauma Theory within Interpersonal Neuroscience and Evidence-Based Practice Modalities for Trauma Treatment,” *Smith College Studies in Social Work*, 86:4, p. 377 (2016) citing Judith Herman, *Trauma and Recovery*, BasicBooks [New York, N.Y.] at p. 92 (1992), <https://doi.org/10.1080/00377317.2016.1222110>.

¹⁰ *Id.*, at pp. 377-393.

¹¹ Herman, *supra*, note 9, at p. 92

¹² Zaleski, Johnson & Klein, *supra*, note 9, at p. 378.

¹³ *Id.*, at p. 379.

¹⁴ Russell Brand, “The Forensic Experiential Trauma Interview (FETI),” *Battered Women’s Justice Project*, (Mar. 2014) <https://www.bwjp.org/resource-center/resource-results/theforensic-experiential-trauma-interview-feti.html> (“developed the forensic experiential trauma interview as a way to interview victims without making them relive the assault.”).

¹⁵ Giannelli, Paul C., *Understanding Evidence 4th Ed.*, pp. 365-66 n. 247, Kindle Edition (Locations 16481-16497) (2014) quoting Frazier & Borgida, “Rape Trauma Syndrome: A Review of Case Law and Psychological Research,” 16 *Law & Hum. Behav.* 293, 304-305 (1992).

¹⁶ Frazier and Borgida, “Rape Trauma Syndrome: A Review of Case Law and Psychological Research,” 16 *Law & Hum. Behav.* 293, 304-305 (1992).

By 1992 researchers were cautioning:

If virtually any victim behavior is described as consistent with [rape trauma syndrome], the term soon will have little meaning. Indeed, some have argued that this already is the case.¹⁷

As predicted, more than two decades later the manifestations of trauma attributable to rape have mushroomed, into a cluster of symptoms believed to include “freezing” or “tonic immobility,” fragmentation of memories,¹⁸ and “counterintuitive” behavior such as engaging in conduct inconsistent with having been sexually assaulted.¹⁹ Today these presupposed rape trauma symptoms are integral to what is known as “trauma-informed” practices.²⁰

C. Infiltration of investigations.

While appropriate for interviewers, counselors and first-responders, “trauma-informed” practices have evolved into a tool routinely used at all stages of campus and criminal justice processes. For example, campus Title IX investigators not infrequently misapply trauma-informed theories to presume a complainant truthful and respondent culpable.²¹ Thus, in 2017 a California court found the school’s administrative process failed to afford the accused student a fair hearing when the Title IX investigator was “improperly permitted ... to base his evaluation on what [he] understood to be the ‘trauma-informed’ approach.”²²

Nevertheless, organizations such as End Violence Against Women International (EVAWI) have cultivated the ever-broadening range of rape trauma symptoms to instruct both campus and criminal investigators how to collect evidence, with the specific goals of proving the allegations true and anticipating and overcoming potential defenses. For example, to intercept a consent defense EVAWI’s training recommends investigators,

- “carefully seek and document evidence to establish that a sexual assault was committed against the victim’s will.”²³
- “strategize their investigation around the defense that is most likely to be raised,”²⁴ and
- “focus primarily on evidence to establish that force, threat, or fear was present.”²⁵

Requiring a criminal investigator to “strategize” and “focus” on the collection of evidence that disproves defenses undoubtedly violates professional investigator ethical codes demanding neutrality and the objective

¹⁷ *Id.*, at p. 305.

¹⁸ Porter, Stephen, and Birt, Angela R., “Is Traumatic Memory Special? A Comparison of Traumatic Memory Characteristics with Memory for Other Emotional Life Experiences,” *Applied Cognitive Psychology*, Appl. Cognit. Psychol. 15: S101-S117, p. S101 (2001).

¹⁹ EVAWI, Wilson, Lonsway, Archambault, *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims* at 25, End Violence Against Women International, November 2016, <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=842>

²⁰ Campbell, R., Shaw, J., & Fehler-Cabral, G., (in press), “Evaluation of a victim-centered, trauma-informed victim notification protocol for untested sexual assault kits (SAKs),” *Violence Against Women*. See also Shaw, J., Campbell, R., Cain, D., & Feeney, H., “Beyond surveys and scales: How rape myths manifest in sexual assault police records,” *Psychology of Violence; Campbell, Invited Talk: Bridging research & practice: A trauma-informed campus response to sexual violence*. Loyola University, Chicago, IL., (2014, May); Campbell, R., *Invited Talk. The neurobiology of sexual assault*. National Institute of Justice, Sexual Assault Policy Symposium, Washington, DC. (Sept. 2016).

²¹ Kaminer, Wendy, “Believe The Victim”? Maybe – But Protect The Rights Of The Accused, Too; *WBUR Boston* (Feb. 4, 2014), <http://cognoscenti.wbur.org/2014/02/04/campus-sexual-assault-wendy-kaminer>.

²² *Doe v. Regents of Univ. of Ca. (UCSB)*, No. RG16843940, *Notice of Order Awarding Attorneys’ Fees*, (Alameda Sup. Ct., April 18, 2018) at p. 3, citing “Order of 11/15/17” at p. 26.

²³ EVAWI, Archambault and Lonsway, *Law and Investigative Strategy: What Kind of Sexual Assault is This?* p. 11, July 2017, <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=39>

²⁴ *Id.*, at p. 13.

²⁵ *Id.*, at p. 15.

collection of evidence.²⁶ On campus, however, where there are no codes demanding neutrality, these policies flagrantly jeopardize truth-seeking. Any “investigator who is trying to anticipate and counter defense strategies in the course of his/her investigation is not acting as a neutral fact-finder.”²⁷

D. Infiltration of decision-making.

The promulgation and resulting misuse of trauma-informed policies has led decision-makers to engage in untoward presumptions about guilt and innocence. Undeniably antithetical to any fair and impartial adjudicatory process, this application is particularly problematic on college and university campuses where bias toward alleged victims is rampant and personnel not ethically bound to exercise objectivity.²⁸

Misuse of trauma-informed policies was evident in *Doe v. University of Mississippi*, in which the court found the school’s training materials caused decision-makers to make “an assumption ... that an assault occurred”:²⁹

(1) the training material “advises that a `lack of protest or resistance does not constitute consent, nor does silence,” (2) it “advise[s] the panel members that `victims' sometimes withhold facts and lie about details, question if they've truly been victimized, and `lie about anything that casts doubt on their account of the event,” and (3) it explains that “when Complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault.”³⁰

Trauma-informed training also can cause decision-makers to disregard exculpatory evidence. In *Doe v. Brown*, the tribunal discounted the complainant’s post-incident texts that portrayed the alleged incident as consensual; one decision-maker had reasoned that it was “beyond my degree of expertise to assess [the complainant]’s post-encounter conduct ... because of a possibility that it was a response to trauma.”³¹ The district court judge found this revealed a failure of Brown’s training, since “it appears what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence.”³²

Similarly, in *Sahm v. Miami University*, another district court judge found it “troubling” that the investigator discouraged a student from providing exculpatory testimony, advising her to use Google to learn how infrequently rape allegations were false³³ In *Doe v. Amherst*, an investigator failed to pursue the complainant’s text messages on the night of the incident that contradicted her story in multiple respects.³⁴ When confronted with the texts during a deposition, the school’s investigator explained that the texts she considered relevant

²⁶ National Association of Legal Investigators, “Relations With the Public,” Section 5, *Code of Ethics*, <https://nalionline.org/become-a-member/code-of-ethics/> (investigator “Will make all reporting based upon truth and fact and will only express honest opinions.”); Arthur S. Jr. Aubry, “Ethics for Investigators,” *Journal of Criminal Law and Criminology*, Vol. 53, Issue 2, p. 271 (1962) (“ethical investigator will maintain at all times a completely objective attitude and impersonal approach towards his investigative duties.”); J. Kevin Grant, *Ethics and Law Enforcement Journal: FBI Law Enforcement Bulletin*, Vol:71, Iss:12, pp. 11-14 (2002) <http://www.ncjrs.gov/App/publications/abstract.aspx?ID=198313> (“ethical mandates ... include acting impartially...”).

²⁷ Harris, Samantha, “University of Texas ‘Blueprint’ for Campus Police Raises Fairness Concerns,” *Foundation for Individual Rights in Education* (March 11, 2016) <https://www.thefire.org/university-of-texas-blueprint-for-campus-police-raises-fairness-concerns/>.

²⁸ *Doe v. Regents of Univ. of Ca. (UCSB)*, No. RG16843940, *Notice of Order Awarding Attorneys’ Fees* (Alameda Sup. Ct, Apr. 18, 2018) <https://kcjohnson.files.wordpress.com/2018/04/uscb-attorney-fees.pdf>.

²⁹ *Doe v. Univ. of Miss.*, No. 3:16-CV-63-DPJ-FKB, p. 20 (D. S.D. Miss., N.D. July 24, 2018) (using court-filed version July 24, 2018).

³⁰ *Id.*

³¹ *Doe v. Brown Univ.*, 210 F. Supp. 3d 310, 327 (D.R.I. 2016).

³² *Id.* at 342.

³³ *Sahm v. Miami University*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015).

³⁴ *Doe v. Amherst College*, 238 F. Supp. 3d 195, 202-203 (D. Mass. 2017).

were only those written after the complainant had come to believe she was sexually assaulted, presumably because texts before that time were “counterintuitive” victim behavior and tainted by her presumed trauma.³⁵

E. Trauma-informed theories minus trauma.

Despite the wide promulgation of trauma-informed policies, little or no attention has been paid to the fact that the research relied upon for identifying how traumatic behavior is manifested has been conducted in the context of “life-threatening” situations evoking “terror,” where an “impending threat to their lives” necessitated “self-preservation.” As an example, although EVAWI identifies multiple traumatic responses suffered by sexual assault complainants, there is a complete absence of any limiting factors or exploration of the conditions under which these various physiological responses may realistically occur.³⁶

II. Intersection of Rape Trauma and Alcohol-Induced Blackouts.

Assessment of claims that victim memories are “fragmented” or difficult to recall are further complicated by the fact that memory loss during sexual encounters could very well be the result of an alcohol-induced blackout rather than trauma. The “defining characteristic” of an alcohol-induced blackout “is that memory loss is permanent and cannot be recalled under any circumstances.”³⁷ Despite outward appearances, the brain simply does not form memories or transfer information “into long-term storage.”³⁸ A blackout causes memory to be impaired or even erased:

Alcohol’s effect on encoding may disrupt the processing of context for the formation of an episodic memory. Because the episode was encoded with faulty context, free recall of this memory may be particularly difficult or, depending on the degree of encoding impairment, even impossible, as in the case of en-bloc blackouts.³⁹

This phenomenon is particularly concerning in the case of an individual claiming non-consent because, if he/she were in a blackout state, the accused may have had no reason to be aware of this fact; the complainant may have outwardly appeared “relatively fine,” “conscious and awake,”⁴⁰ “talking and even driving”⁴¹ and engaging in other activities “ranging from conversations to intercourse.”⁴²

Blackouts represent episodes of amnesia, during which subjects are capable of participating even in salient, emotionally charged events—as well as more mundane events—that they later cannot remember.⁴³

³⁵ *Id.*

³⁶ EVAWI, Wilson, Lonsway, Archambault, *Understanding the Neurobiology of Trauma*, *supra*, note 19 (such as dissociation, “tonic” or “collapsed” immobility, and fragmentation of a victim’s memory due to the manner in which that memory was encoded.)

³⁷ Lee H, Roh S, Kim DJ., “Alcohol-Induced Blackout,” *International Journal of Environmental Research and Public Health*. 2009; 6(11): 2783-2792, 2785, doi:10.3390/ijerph6112783.

³⁸ White, Aaron M. Ph.D., “What Happened? Alcohol, Memory Blackouts, and the Brain,” *Published by NIH; National Inst. on Alcohol Abuse and Alcoholism*. Aaron M. White, Ph.D., is an assistant research professor in the Department of Psychiatry, Duke Univ. Med. Center. <http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm>

³⁹ Lee and Kim, “Alcohol-Induced Blackout,” *supra*, note 37, at p. 2787.

⁴⁰ Levin, Sammie, “Blacking Out: Why It’s More Dangerous Than You Think,” *Her Campus*, Feb 27, 2014 <http://www.hercampus.com/health/physical-health/blacking-out-why-it-s-more-dangerous-you-think>

⁴¹ Lee and Kim, “Alcohol-Induced Blackout,” *supra*, note 37, at p. 2783.

⁴² White, “What Happened? Alcohol, Memory Blackouts, and the Brain,” *supra*, note 38, at p. 1.

⁴³ *Id.*, at p. 2.

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Technically, the cause of a blackout is a “disruption of activity in the hippocampus, a brain region that plays a central role in the formation of new autobiographical memories.”⁴⁴ The mechanism is triggered by the individual’s consumption of a significant amount of alcohol over a limited period of time, and occurs “commonly” on college campuses due to “the excessive drinking habits of many college students.”⁴⁵

The college campus is one subculture where excessive drinking is tolerated, if not encouraged. In a survey of 772 undergraduates, approximately one-half of those that had ever consumed alcohol reported experiencing at least one blackout during their lives, and 40% experienced one the year before the survey.⁴⁶

Although susceptibility may vary, “blacking out always means you’ve drank too much.”⁴⁷ And women, who make up the vast majority of sexual misconduct complainants, are believed to be more susceptible to blackouts due to “well-known gender differences in physiological factors that affect alcohol distribution and metabolism, such as body weight, proportion of body fat, and levels of key enzymes.”⁴⁸

The fact that women may be “more susceptible than males to milder forms of alcohol-induced memory impairments”⁴⁹ is certainly relevant to the many cases in which a woman claims not to recall or to have difficulty recalling an alleged sexual interaction. Decision-makers frequently construe this as evidence the complainant was either too intoxicated to consent, or as discussed above, as a symptom of trauma. However, people in a blackout state have “participated in a wide range of events they do not remember, including participating in conversations and engaging in such significant activities as vandalism, unprotected intercourse, driving an automobile, and spending money.”⁵⁰

III. Deconstructing Traumatic Memories

“Our memories are constructive. They’re reconstructive. Memory works ... like a Wikipedia page: you can go in there and change it, but so can other people.”

*Professor Elizabeth Loftus*⁵¹

In a 2013 TED Talk, American cognitive psychologist and memory expert Elizabeth Loftus, explained,

Most people cherish their memories, know that they represent their identity, who they are, where they came from ... But I know from my work how much fiction is already in there. If I’ve learned anything from these decades of working on these problems, it’s this: just because somebody tells you something and they say it with confidence, just because they say it with lots of detail, just because they express emotion when they say it, it doesn’t mean that it really happened.⁵²

⁴⁴ *Id.*, at p. 1.

⁴⁵ *Id.*, at p. 3.

⁴⁶ Lee and Kim, “Alcohol-Induced Blackout,” *supra*, note 37, at p. 2786.

⁴⁷ Sifferlin, “Here’s Who’s Most Likely To Black Out While Drinking,” *Time*, Dec. 16, 2014, <http://time.com/3635960/drinking-blackout/>

⁴⁸ White, “What Happened? Alcohol, Memory Blackouts, and the Brain,” *supra*, note 38, at p. 3.

⁴⁹ *Id.*

⁵⁰ *Id.*; White, “What Happened? Alcohol, Memory Blackouts, and the Brain,” *supra*, note 38, at p. 6.

⁵¹ Elizabeth Loftus, *How Can Our Memories Be Manipulated?* October 13, 2017, WBUR News, NPR/TED Staff, <https://www.wbur.org/npr/557424726/elizabeth-loftus-how-can-our-memories-be-manipulated> .

⁵² Elizabeth Loftus, *How reliable is your memory?* TEDGlobal 2013, https://www.ted.com/talks/elizabeth_loftus_the_fiction_of_memory/transcript?language=en

A. Fragmented and inaccessible memories; “tenacious cultural memes.”

Many trauma-informed policies rely on the assumption “that emotional memories are ‘special,’” a myth that has proliferated in modern victims’ advocacy literature.⁵³ However, arguments that “people encode trauma memories in ways that make them difficult to retrieve coherently, such that they are “‘fractured’ in nature”⁵⁴ are merely a modern version of the discredited 1990’s recovered memory theories.⁵⁵

Retrospectively known as the ‘memory wars,’ many of us recall the infamous satanic daycare scandals of the 1980s and ’90s which precipitated an “intensely heated and controversial discourse” over the validity of “recovered memories” of childhood sexual abuse.⁵⁶ The concept of “recovered memories,” which was rooted in “early psychodynamic tradition,” insists that “aspects of stressful experiences are commonly ‘repressed’ and remain inaccessible in the recesses of the unconscious for lengthy periods of time.”⁵⁷

Claims, that emotional memories are different from other memories have been “debated in scientific and popular writings in ways that sparked outrage, controversy, and at points resembled “a religious war.”⁵⁸ Conversations about memory’s reliability are often fraught because they are “conflated with disputes about the credibility of individual accusers, victims, and witnesses.”⁵⁹ This certainly is true with issues surrounding allegations of rape and sexual assault, in which credibility is almost always an issue, and often is the only issue.

One of the more pernicious of these theories, that “trauma memory is fragmented and difficult to integrate with the person’s life story,”⁶⁰ has been discredited by research revealing that, although there may be a difference in how traumatic memories are retained, it’s not in the manner commonly believed. Recent methodologically sound studies have shown that retention of traumatic memories is based upon their significance,⁶¹ “central details” or “high priority information” is “often better retained in memory for emotional events compared to neutral events, whereas memory for peripheral details or those of a lower priority is worse for emotional events.”⁶²

In a 2001 study involving hundreds of accounts of traumatic experiences including rape, “[o]verall, traumatic memories were found to be ‘special’, but not in accordance with prominent fragmentation theories of trauma

⁵³ According to Shobe and Kihlstrom, traumatic memories are “difficult to retrieve” and encoded in a fragmented way, and Van der Kolk posited that “traumatic stress interferes with people’s ability to form a conscious, verbal narrative of the traumatic event.” Nash and Ost, *False and Distorted Memories* (Current Issues in Memory) (2017), p. 10, Chapter 2, (Mis) remembering negative emotional experiences, citing Shobe, K. K., & Kihlstrom, J. F., (1997) “Is traumatic memory special?” *Current Directions in Psychological Science*, 6, 70– 74; Van der Kolk, B. A. (1994) “The body keeps the score: Memory and the emerging psychobiology of posttraumatic stress,” *Harvard Review of Psychiatry*, 1, 253– 265 (2016-10-04).

⁵⁴ Nash, Robert A., and Ost, James, *False and Distorted Memories* (Current Issues in Memory) (2017), p. 10 (Chapter 2, “(Mis) remembering negative emotional experiences,” Jacinta M. Oulton and Melanie K. T. Takarangi.) (“some authors conceptualise [Posttraumatic stress disorder] as an autobiographical memory disorder, in which the trauma memory is fragmented and difficult to integrate with the person’s life story.” p. 10.) The various Chapters were “written by world experts on false and distorted memories.” Introduction p. 1.

⁵⁵ “For example, Van der Kolk (1994) proposes that traumatic stress interferes with people’s ability to form a conscious, verbal narrative of the traumatic event, but leads to unconscious remembering in the form of sensory-motor and emotional fragments.” Nash and Ost, *False and Distorted Memories*, Chapter 2, (Mis) remembering negative emotional experiences, *supra*, note 54, at p 10.

⁵⁶ Nash and Ost, *False and Distorted Memories*, *supra*, note 54, at p. 4 (Chapter 1 Introduction).

⁵⁷ Porter and Birt, “Is Traumatic Memory Special?” *supra*, note 18, at p. S101.

⁵⁸ Nash and Ost, *False and Distorted Memories*, *supra*, note 54, at p. 4 (Chapter 1 Introduction), citing Pezdek & Banks, 1996, p. xii.

⁵⁹ *Id.*

⁶⁰ *Id.*, at pp. 10-11.

⁶¹ *Id.*, at p. 10.

⁶² *Id.*, at pp. 12-13 (“central details are ... conceptually or temporally associated with an emotional stimulus (e.g., the weapon a perpetrator used), whereas peripheral details are items unrelated to emotional details (e.g., what a bystander was wearing).” p. 12

and memory.”⁶³ Researchers Stephen Porter and Angela R. Birt observed,

In fact, participants reported thinking about their traumatic experiences more often than their positive experiences a finding that casts doubt on the idea that aspects of trauma are inaccessible in narrative form.⁶⁴

Similarly, other research “indicates that high levels of real-life stress may *facilitate* rather than impair the quality of memory.”⁶⁵ In his book *Remembering Trauma*, Harvard psychology professor and trauma and memory expert Dr. Richard McNally cites research that shows how extreme stress may actually enhance the subsequent recall of life-threatening incidents.⁶⁶

In the book *False and Distorted Memories*, editors James Ost and Robert Nash found it, “highly troubling” that beliefs in the specialness of emotional memories “can receive very minimal support from the scientific literature and yet can continue to thrive as tenacious cultural memes.”⁶⁷ Even so, the editors acknowledged “that the process of challenging scientific myths can also often backfire, unintentionally bolstering those same myths further,” something we have seen today in the increasing vigor with which the victims advocate community proselytizes scientifically-unsupported victim trauma theories.⁶⁸

B. The malleability of memories; “social barometers, ideology, and attitudes.”

More significantly for the reliability of victim memories is that, although they may remain relatively intact for important details following a sexual assault, exposure to highly emotional or traumatic events also heightens a victim’s “susceptibility to *misinformation*.”⁶⁹ In fact, “the distorting effects” of post-event “misinformation may be more readily accepted when the event is highly negative compared to positive or neutral.”⁷⁰

when people experience intense emotion, social sharing often follows. People discuss emotional incidents with friends, relatives, therapists or even other victims, in group-based debriefing, for example. Because all of these factors can distort memory, it is clear that traumatic memories in the real world are susceptible to alteration over time.⁷¹

There is very little disagreement among the scientific community that memory distortion can result from social barometers, ideology, and attitudes.⁷² *False and Distorted Memories* cites “massive evidence” and “numerous examples where a change in remembering resulted from suggestive information provided by a social source.”⁷³

“Social identity theory” tells us that peoples’ self-esteem is dependent “on the groups with which they identify, predicting a tendency to misremember information about one’s own or relevant other groups in ways favorable

⁶³ Porter and Birt, “Is Traumatic Memory Special?” *supra*, note 18, at p. S111.

⁶⁴ *Id.*, at pp. S111-S112.

⁶⁵ *Id.*, at p. p. S102.

⁶⁶ McNally, Richard, President and Fellows of Harvard College, *Remembering Trauma*, at p. 180, Harvard University Press, (2005).

⁶⁷ Nash and Ost, *False and Distorted Memories*, *supra*, note 54, at p. 159.

⁶⁸ *Id.*

⁶⁹ *Id.*, at pp. 13-14 (emphasis added); Otgaar, Henry, and Howe, Mark L., *Finding the Truth in the Courtroom: Dealing with Deception, Lies, and Memories* (p. 65). Oxford University Press. Kindle Edition (2018) (emotionally valanced material is more likely to give rise to false memories than neutral material.)

⁷⁰ Nash and Ost, *False and Distorted Memories*, *supra*, note 54, at p. 14

⁷¹ *Id.*, at pp. 17-18 (citations omitted).

⁷² *Id.*, at p. 55 (citations omitted).

⁷³ *Id.*

to one's social identity;⁷⁴

people typically care more about agreeing with a friend and are therefore more likely to 'give up' their own remembered version of an event for the sake of maintaining the relationship.⁷⁵

More alarming, even inadvertent "misinformation may permanently alter ... original memory,"⁷⁶ an effect that is exacerbated by "the passage of time [which] increases the chance that eyewitnesses will adopt misinformation and that their memories will be altered."⁷⁷ In fact, the malleability of emotional memories is so great that even subjects who are knowingly forced to make up details, when questioned weeks later, incorporate those fictitious details into their story.⁷⁸

When investigators and decision-makers are taught to "start by believing," and a rape allegation alone is sufficient to convict the accused, the fact that highly emotional memories are acutely vulnerable to distortion renders many resulting convictions unreliable, particularly those with no corroborating evidence. Though the impact of distorted emotional memories may be diminished in a courtroom where discovery, rules of evidence, and expert testimony can facilitate assessment of the accuracy of a complainant's memory, on campus one must wonder, how equipped are college and university administrators to assess the complexity of the quality or reliability of a complainant's memory without courtroom tools?

C. "In the jaws of death;" freezing and tonic immobility

"Tonic immobility" is another purported symptom of rape trauma, also referred to as "freezing." Research has not shown this reaction in humans though it may occur in life-threatening situations when danger is "unconsciously perceived as overwhelming," causing helplessness and terror.⁷⁹ This application is consistent with studies showing small animals may "freeze" when they "find themselves literally in the jaws of death":

Tonic immobility's frequent precursors in prey animals—physical restraint combined with an imminent threat to life—do describe some instances of rape. But the conditions that lead to many sexual-assault complaints on college campuses—alcohol combined with miscommunication—do not fit this template.⁸⁰

As with other ostensible rape trauma symptoms, "freezing" is commonly alleged by complainants on campus, even when the alleged incident was neither terror-evoking, nor was there any indication the complainant was "in the jaws of death."

IV. Trauma-Informed Policies on Campus

Though terms like "rape trauma syndrome" are "very helpful in clinical and interviewing contexts to help understand the trauma process,"

⁷⁴ *Id.*, at p. 65 (citation omitted).

⁷⁵ *Id.*, at p. 60, citing Hope, Ost, Gabbert, Healey, & Lenton, 2008

⁷⁶ Otgaar and Howe, *Finding the Truth in the Courtroom*; *supra*, note 69, Kindle Edition p. 22.

⁷⁷ *Id.*, at p. 13.

⁷⁸ *Id.*, at p. 16.

⁷⁹ Zaleski, Johnson & Klein, *supra*, note 9, at p. 380, and p. 382, Table 1, Theory.

⁸⁰ Yoffe, Emily, "The Bad Science Behind Campus Response to Sexual Assault," *The Atlantic*, Sept. 8, 2017

<https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/>

they are not useful forensically, as they are not diagnostic of rape Furthermore, these terms do not have well-defined, scientifically proven symptoms. Therefore, they are not generally accepted among the community of psychologists and psychiatrists, and they are not included in the DSM-IV-TR.⁸¹

A. Frailty of memories and campus ideology.

Harvard law professor Janet Halley has ridiculed the trauma-informed training materials used at her university, noting they provide a “sixth grade level summary of selected neurobiological research” and are “100% aimed to convince them to believe complainants, precisely when they seem unreliable and incoherent.”⁸²

That trauma-informed theories on campus are used “precisely when [complainants] seem unreliable and incoherent” all but guarantees any sexual misconduct allegation involving alcohol or memory issues will be a perilous uphill battle for an accused student. On campus, where powerful ideology infuses the entire campus belief system, memory distortion or contamination would seem a foregone conclusion. KC Johnson and Stuart Taylor have described the impact of campus ideology in this context:

[T]he ideological regimes used on many campuses are designed more to stack the deck against accused students than to ensure a fair inquiry. The risk of injustice is enhanced by the fact that, to the best of our knowledge, no school discloses the contents of its training materials to accused students before commencing the disciplinary process. The contrast between this training regime and the instructions given by judges to jurors in criminal trials—most obviously, that they should presume defendants innocent until proven guilty—is stark.⁸³

As mentioned above, even “exposure to false or misleading post-event information can lead to confidently held false memories of having witnessed events that were never actually experienced.”⁸⁴ The “passage of time” between an alleged event and reporting, common on campus, “increases the chance that eyewitnesses will adopt misinformation and ... their memories will be altered”⁸⁵

In *Doe v. Brandeis University*, District Court Judge F. Dennis Saylor recognized these realities when he observed that “[h]uman memories are transient, and subject to substantial modifications and degradation over time,” and,

readily susceptible to such factors as hindsight bias (that is, the influence of one’s current perceptions, knowledge, and state of mind) and suggestibility (that is, the influence of suggestion, express and implicit, by others). ... It is possible that his sexual assault training had a suggestive effect on his memory, causing him to subconsciously reinterpret his memories.

Also, of particular concern in Title IX proceedings are complainant interviews conducted by campus ideologues who subscribe to myths about victim behavior, because,

⁸¹ Trowbridge, “The Admissibility of Expert Testimony in Washington,” *Seattle University Law Review*, Vol. 27:453, 521 (2003). According to Trowbridge, in contrast to “rape trauma syndrome,” diagnoses included in the DSM-IVTR are scientifically derived, well defined, and accepted in the scientific community.” (at 522.)

⁸² Halley, Janet, *Trading the Megaphone for the Gavel in Title IX Enforcement*, Harvard Law Review 128 Harv. L. Rev. F. 103, (Feb. 18, 2015). <https://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/>

⁸³ Johnson, KC, and Taylor, Stuart, Jr., “Why Campus Rape Tribunals Hand Down So Many ‘Guilty’ Verdicts,” *The Weekly Standard*, Nov. 9, 2017 <http://www.weeklystandard.com/why-campus-rape-tribunals-hand-down-so-many-guilty-verdicts/article/2010401>

⁸⁴ Nash and Ost, *False and Distorted Memories*, *supra*, note 54, at p. 71 (citations omitted).

⁸⁵ Otgaar and Howe, *Finding the Truth in the Courtroom*; *supra*, note 69, Kindle Edition p. 13.

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Interview settings in general have potential for normative influence/conformity, because there is ample opportunity for verbal and nonverbal feedback about the adequacy of what the interviewee remembers and for subsequent adaptation to such feedback.⁸⁶

In fact, interviews are especially powerful because,

False memories occur even after a few short and low-pressure interviews, and with each successive interview, they become richer, more compelling, and more likely to occur. It is therefore dangerously misleading to claim that the scientific data provide an “upper bound” on susceptibility to memory errors.⁸⁷

Finally, when “interviewers reinforce unsure or erroneous testimony, it has the potential of inflating witnesses’ confidence in their mistaken testimony and distorting their memories.”⁸⁸ Thus, even a thorough credibility assessment may not detect a distorted memory that is honestly held.

B. Overbroad application of trauma myths on campus.

Trauma-informed training is also particularly troublesome on campus because rape traumatology is broadly applied to any type of sexual intrusion without differentiating those likely to generate terror and the need for self-preservation from those that do not.⁸⁹ Campus officials’ misuse of these theories is exacerbated by expansive definitions of “sexual misconduct” that encompass scenarios such as those involving intoxicated (but not incapacitated) sex, technical violations of affirmative consent policies (i.e. Biden-like behavior), “unwanted touching of a sexual nature,” and consent given but later determined to be ineffective or regretted.

Despite these notable situational and definitional distinctions, trauma-informed training encourages campus Title IX officials to indiscriminately apply the same amalgam of symptoms to allegations that are neither criminal nor life-threatening, but more often conduct code violations unlikely to evoke trauma.

C. Courts criticize campus use of trauma-informed policies.

“Of course, when a case involves allegations of such appalling abuse it is important to give credence to potential victims, but to have blind faith in memory accounts is ill-advised.”⁹⁰

Julia Shaw, The Memory Illusion

“Believe the victim,” a common refrain by victims’ advocates that has now spread to the general population via #MeToo, further reinforces the misapplication of rape traumatology. The widespread use of victim-centered

⁸⁶ Nash and Ost, *False and Distorted Memories*, *supra*, note 54, at p. 60.

⁸⁷ Nash, Wade, Garrey, Loftus and Ost, “Misrepresentations and Flawed Logic About the Prevalence of False Memories,” *Applied Cognitive Psychology*, Appl. Cognit. Psychol. 31: 31–33, 31 (2017) October 14, 2016 (wileyonlinelibrary.com)

⁸⁸ Nash and Ost, *False and Distorted Memories*, *supra*, note 54, at pp. 78, 158

⁸⁹ EVAWI, Wilson, Lonsway, Archambault, *Understanding the Neurobiology of Trauma...* *supra*, note 19.

⁹⁰ Shaw, Julia, Dr., *The Memory Illusion; Remembering, Forgetting and the Science of False memory*, Chapter 9. “Tooky Pulled My Pants Down; Satan, sex, and science; Why we can falsely remember traumatic events,” Random House. Kindle Edition, Location 3258 of 4697 (2016). “Dr. Julia Shaw is a senior lecturer and researcher in the Department of Law and Social Sciences at London South Bank University, and is one of only a handful of experts in the world who conduct research on complex memory errors related to emotional personal events – so-called ‘rich false memories’.”

investigations in the college setting has given rise to numerous lawsuits by accused students.⁹¹ Many courts have found plausible allegations of gender bias in accused student complaints based on comments by school officials, outside pressure to find students responsible, news reports, internal communications, and the facts.⁹²

In *Doe v. Brandeis University*, District Court Judge F. Dennis Saylor said it was presumptuous to use victim trauma theories because “[w]hether someone is a “victim” is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning.”⁹³ Judge Saylor also criticized the school for making assumptions based on “unfair generalizations” of typical victim behavioral theories in order to explain why the complainant continued a relationship with Doe after the alleged assault:

but surely considerable caution should be exercised in applying that principle to make present-day judgments about past events. If neither partner perceived the conduct to be improper at the time, the potential for unfairness is acute where one partner changes his perception, in hindsight, nearly two years after the fact.

According to Eric Rosenberg, an Ohio lawyer who has represented numerous accused students:

“systemic bias” in training materials extends to essentially “mandating adjudicators shield accusers from exculpatory evidence” as it might “re-victimize the victim.” A state or federal judge, Rosenberg explains, “would undoubtedly find [that any] jury pool members who promise not to re-victimize a party who alleges an injury should be stricken for cause.”⁹⁴

In 2018 a California court awarded an accused student over \$30,000 in attorney’s fees against UC Santa Barbara, finding “an unacceptable risk of bias,” and because “the [disciplinary committee] improperly permitted [the Title IX investigator] to base his evaluation on what [he] understood to be a ‘trauma-informed’ approach.”⁹⁵

⁹¹ SAVE, *Victim-Centered Investigations: New Liability Risk for Colleges and Universities* (2016). <http://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf>

⁹² *Jacobson v Blaise* (SUNY Plattsburg) N.T. Supreme Ct., Appellate Div., Jan. 11, 2018; *Doe v. Regents of Univ. of Calif.*, 2:15-cv-02478-SVW-JEM (June 8, 2017, C. Dist. CA) (unreported) (university faced “local and national pressure” to discipline male students.); *Doe v. The Trustees of the U of Penn.*, Case 2:16-cv-05088-(E.D.Pa. Sept. 13, 2017) (reasonable inference of gender bias); *Doe v. Ohio State Univ.*, No. 2:16-CV-171, 2017 WL 951464, *15 (S.D. Ohio Mar. 10, 2017) (“pressure from Federal government motivated [his] discipline.”); *Doe v. Amherst Col.*, No. 3-15-3009 (MGM), 2017 WL 776410, *17 (D. Mass. Feb. 28, 2017) (“College responded differently to similar reports when the genders of the potential victims and aggressors were different.”); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 189 (D.R.I. 2016) (sufficiently alleged gender bias by University officials’ comments that male students were treated as “guilty, until proven innocent,” “operate[d] under the assumption that it’s always the ‘boy’s fault;” there was “overwhelming” gender bias in sexual misconduct; and the “culture of thinking” on the campus is that males are bad and females are victims.); *Saravanan v. Drexel University*, Dist. Court, ED Penn. 2017 - Case 2:17-cv-03409-MAK, (allegations indicate a possible culture of gender bias against males claiming sexual assault); *Collick v. William Paterson Univ.*, No. 16-471(KM)(JBC), 2016 WL 6824374, *12 (D.N.J. Nov. 17, 2016) (alleged OCR pressure caused defendant university to erroneously discipline plaintiff); *Prasad v. Cornell Univ.*, No.5:15-cv-322, 2016 WL 3212079, *16 (N.D.N.Y. Feb. 24, 2016) (“facts plausibly suggesting that considerations of his gender motivated Cornell’s actions.”); *Doe v. Bd. Of Regents of the Univ. Sys. of Ga.*, case no.1:15-cv-4079, Docket 40, pp. 9-10 (D.GA. 2015-16) (“two year old news reports” suggested defendant university’s “motive to discriminate on the basis of gender.”); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 768 (D. Md. 2015) (university possessed communications evidencing erroneous discipline was causally linked to university’s desire to demonstrate to DOE aggressive discipline of male students.); *John Doe v. Brandeis University*, No. 1:15-CV-11557 (D. Mass. March 26, 2015) (March 31, 2016); *Harris v. St. Joseph’s Univ.*, Civ. A. No. 13-3937, 2014 WL 12618076, at *2 n.3 (E.D. Pa. Nov. 26, 2014) (gender bias alleged due to university official’s statement to plaintiff’s father that the university had “adopted a policy favoring female accusers”).

⁹³ *John Doe v. Brandeis University*, Memorandum and Order on Defendant’s Motion to Dismiss, J. Saylor (March 31, 2016).

⁹⁴ Johnson and Taylor, “Why Campus Rape Tribunals Hand Down So Many ‘Guilty’ Verdicts,” *supra* note 83.

⁹⁵ *Doe v. Regents of Univ. of Cal.* (UCSB), No. RG16843940, *Order Awarding Attorneys’ Fees*, (Alameda Sup. Ct., Apr. 18, 2018).

V. Trauma-Informed Policies in the Courts

A. *Symptoms don't prove rape.*

The impact of unreliable memories is illustrated by *Innocence Project* figures that “approximately 29% of 347 wrongful convictions were based on memory aberrations such as false memories (*Innocence Project*, 2016).” Furthermore,

more than 350 innocent men and women have been exonerated by DNA evidence proving that they did not commit the crimes for which they were convicted. These cases reveal that eyewitness error, which can occur as the result of misinformation, is one of the leading causes of wrongful conviction and has played a role in approximately 70% of the DNA exonerations.⁹⁶

Nevertheless, victims’ advocates not only ask that victims’ inconsistencies or behavioral anomalies be disregarded, they propose interpreting them as evidence of psychological trauma. Illogically, this precludes any consideration of a complainant’s incongruous statements or inconsistent behavior as evidence, resulting in an irrefutable circular argument that the victim’s fragmented or lost memories are evidence of trauma, which in turn evidences that the alleged assault occurred.

B. *No rape trauma syndrome in the DSM-5.*

Though terms like “rape trauma syndrome” are “very helpful in clinical and interviewing contexts to help understand the trauma process,” “they are not useful forensically, as they are not diagnostic of rape,” nor are they “generally accepted among the community of psychologists and psychiatrists, and they are not included in the DSM-IV-TR.”⁹⁷

Rape trauma syndrome is being used in lawsuits and criminal proceedings despite the fact that “empirical evidence” shows it “is not generally accepted by the relevant scientific community.”⁹⁸ In his 2014 article William O’Donohue et al, recommended “no further use of this model in courts or in clinical practice” based on the fact that the study authors,

comprehensively evaluated RTS and determined that it is vague and imprecise, its evidential status is questionable, it is inconsistent with the most common sequelae of trauma, it ignores important mediating variables and it may not be culturally sensitive.⁹⁹

Unlike campus tribunals, most courts do not allow expert opinions on rape trauma syndrome to establish that the alleged victim was raped, or was suffering from rape trauma,¹⁰⁰ though a few courts have allowed such

⁹⁶ Otgaar and Howe, *Finding the Truth in the Courtroom*; *supra*, note 69, Kindle Edition p. 17.

⁹⁷ Trowbridge, “The Admissibility of Expert Testimony in Washington,” *Seattle University Law Review*, Vol. 27:453, 521 (2003). According to Trowbridge, in contrast to “rape trauma syndrome,” diagnoses included in the DSM-IVTR are scientifically derived, well defined, and accepted in the scientific community.” (at 522.)

⁹⁸ O’Donohue, “Examining the Scientific Validity of Rape Trauma Syndrome,” *supra*, note 7, at p. 1.

⁹⁹ *Id.*

¹⁰⁰ *United States v. Alzanki*, 54 F.3d 994, 1006 (1st Cir. 1995) (testimony based on general research and personal experience with victims that “behavioral response to the non-sexual abuse ... was consistent with the behavior of abuse victims generally.” (emphasis in original) *cert. denied*, 516 U.S. 1111, 116 S.Ct. 909 (1996); *State v. Roles*, 832 P.2d 311, 319, 122 ID 138 (1992) (“None of the experts testifying in this case gave an opinion that AB had been raped, or whether she was testifying truthfully.”); *People v. Bledsoe*, 36 Cal.3d 236, 248, 251 n. 14, 203 Cal.Rptr. 450 (1984); *State v. Taylor*, 663 S.W.2d 235, 239 (MO. 1984); *State v. Saldana*, 324 N.W.2d 227, 229, 230 (Minn. 1982) (“[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has

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evidence.¹⁰¹ Such testimony generally is excluded because it “goes beyond the limits of proper expert expression,”¹⁰² and “is likely to mislead the jury into inferring that such a classification reflects a scientific judgment that the witness was, in fact raped.”¹⁰³

Courts consistently prohibit testimony that might comment on or boost the credibility of an alleged victim.¹⁰⁴ Experts are similarly precluded from offering a diagnosis¹⁰⁵ or opinion regarding the specific complainant’s behaviors.¹⁰⁶ Some courts, however, allow experts to testify that the alleged victim’s “stress symptoms are consistent with, but not necessarily the result of, the account of the events.”¹⁰⁷ Courtroom experts are, however, permitted to describe the behavioral characteristics of rape trauma syndrome for defensive purposes,¹⁰⁸ and to “rebut widely-held misconceptions about the presumed behavior of sexual assault victims.”¹⁰⁹

The use of rape trauma syndrome for any purpose in court has been severely criticized. “Within the legal system, psychological theories and techniques must meet certain standards to be considered as evidence in court.”¹¹⁰ In determining whether a theory or treatment such as rape trauma syndrome is admissible, federal and some state courts use the Daubert Standard, which requires that the “testimony be based on sound reasoning or methodology” and “scientifically valid.” The judge considers whether the theory has been tested, “subjected to peer review and publication,” its “potential or known error rate,” the standards for its application, and whether it is “widely accepted within the relevant scientific community?” According to a 2014 article by psychologist William O’Donohue and his co authors, his article demonstrates “how RTS fails to meet all five of the factors.”¹¹¹

Other courts use the Frye standard, which “states that any novel scientific evidence must be established and generally accepted in its field before it can be presented in court.”¹¹² California has modified the Frye Standard to “require that the theory or technique ... satisfy three criteria”:

- (1) the theory or technique is established enough to have gained general acceptance in its field,
- (2) testimony about the theory or technique is given by a sufficiently qualified expert and (3)

occurred” and it “unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness.”); *Hutton v. State*, 663 A.2d 1289, 1301 (Md. 1995); see also, Gupta, Nina, “Disillusioning the Prosecution, The Unfilled Promise of Syndrome Evidence” *Law and Contemporary Problems*, Vol. 76:413 (2014) p. 423, citing Kenneth Winchester Gaines, “Rape trauma syndrome: Toward Proper Use in the Criminal Trial Context,” 20 AM. J. TRIAL ADVOC. 227, 228 (1997), at pp. 236-37.

¹⁰¹ *State v. Marks*, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (Kan. 1982) (expert testimony of rape-trauma syndrome admissible to prove rape occurred because “so-called ‘rape trauma syndrome’ is generally accepted to be a common reaction to sexual assault,” citing primarily victim advocacy literature in support.); *State v. Liddell*, 685 P.2d 918, 923 (1984) (“It remains up to the jury to determine whether the evidence is credible.”); *State v. Hester*, 760 P.2d 27, 31-32, 114 Idaho 688 (1988) (allowed to show child sexual abuse.)

¹⁰² *People v. Coleman*, 768 P.2d 32, 49 (Cal. 1989).

¹⁰³ *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. 1984).

¹⁰⁴ *State v. Brodniak*, 718 P.2d 322, 327-29 (Mont. 1982); See also *People v. Taylor*, 75 N.Y.2d 277, 552 N.Y.S.2d 883, 552 N.E.2d 131 (1990); Annotation, “Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome,” 42 A.L.R.4th 879 (1985).

¹⁰⁵ *Hutton v. State*, *supra*, note 100, at p. 1301 (holding that diagnostic testimony is inadmissible).]

¹⁰⁶ *State v. Robinson*, 431 N.W.2d 165, 172 (Wis. 1988) (expert testimony admissible when did not include expert’s opinion).]

¹⁰⁷ *State v. Roles*, 832 P.2d 311, 319, 122 Idaho 138 (1992).

¹⁰⁸ *State v. Huey*, 145 Ariz. 59, 62-63, 699 P.2d 1290 (1985) (“testimony centered more on general observations of stress than on a description of a unique psychological response and was admissible.”)

¹⁰⁹ Gupta, “Disillusioning the Prosecution,” *supra*, note 100, at p. 423, quoting Kenneth Winchester Gaines, Rape trauma syndrome: Toward Proper Use in the Criminal Trial Context, 20 AM. J. TRIAL ADVOC. 227, 228 (1997), at 235 (in turn citing (citing *Robinson*, 431 N.W.2d at 172-73).)

¹¹⁰ O’Donohue, “Examining the Scientific Validity of Rape Trauma Syndrome,” *supra*, note 7, at p. 13.

¹¹¹ *Id.*, at pp. 13-14.

¹¹² *Id.*, at p. 14.

proper scientific procedures have been used in the particular case under examination.¹¹³

Based on their comprehensive review of the literature on rape trauma syndrome, O'Donohue et al, concluded "RTS is a problematic construct in forensic settings due to a lack of supporting research evidence;"

RTS is not in the DSM- V, nor is it included in the International Classification of Diseases. In addition, it has not been adopted by any organization (e.g., the American Psychological or Psychiatric Associations). Because RTS is not a product of rigorous scientific research, there can be no scientifically qualified experts or proper scientific techniques that would qualify RTS to be used in expert testimony.¹¹⁴

C. Consent

Courts generally deny admission of evidence of "rape trauma syndrome" when it is offered by the complainant to prove lack of consent,¹¹⁵ though at least one court has permitted the prosecution to introduce testimony for this purpose.¹¹⁶ On the other hand, courts often permit the prosecution to introduce expert testimony of rape trauma syndrome when it is offered to disprove the defense claim of consent.¹¹⁷

D. Inconsistencies and Counterintuitive Behavior

Courts commonly allow expert testimony to explain an alleged rape victim's counterintuitive or seemingly inconsistent behavior¹¹⁸ such as a lack of resistance to the alleged assault,¹¹⁹ delay in or failure to file a report,¹²⁰ or a "calm demeanor after an attack."¹²¹ Such expert testimony can also be used to rehabilitate the victim after cross-examination by the defense,¹²² and explain inconsistencies in a victim's statements.¹²³

¹¹³ *Id.*

¹¹⁴ *Id.*, at pp. 13-14.

¹¹⁵ *People v. Bledsoe*, 36 Cal.3d 236, 248, 681 P.2d 291, 203 Cal.Rptr. 450 (1984) (prosecution introduced evidence to prove alleged victim was suffering from rape trauma syndrome when defense had not even alleged victim's behavior was inconsistent with having been raped.); *State v. Allewalt*, 517 A.2d 741, 751 (Md. 1986) (holding that evidence of post-traumatic stress disorder is admissible in a sexual-assault case to prove the victim's lack of consent where the expert did not explicitly refer to rape-trauma syndrome).

¹¹⁶ *State v. Huey*, 699 P.2d 1290, 1294 (Ariz. 1985) (en banc) (rape-trauma syndrome admissible to show lack of consent).

¹¹⁷ *State v. Marks*, 647 P. 2d 1292, 1299 (Kan. 1982). 249; *State v. Huey*, 699 P.2d 1290, 1294 (Ariz. 1985) (en banc) (holding that evidence of rape-trauma syndrome is admissible to show the victim's lack of consent in a sexual-assault case).

¹¹⁸ *State v. Roles*, 832 P.2d 311, 319 (Idaho Ct. App. 1992); *Commonwealth v. Mamay*, 553 N.E.2d 945, 951 (Mass. 1990) (to explain why a victim may return to the accused when there exists a previous trust relationship); *State v. Kinney*, 762 A.2d 833, 842 (Vt. 2000) (to explain the victim's counterintuitive behavior after the rape was admissible.); *State v. McCoy*, 366 S.E.2d 731, 737 (W. Va. 1988) (holding that expert testimony regarding symptoms consistent with rape-trauma syndrome is relevant and admissible to rehabilitate the victim, explain counterintuitive behavior.); *State v. Kinney*, 762 A.2d 833, 842 (Vt. 2000) (expert evidence of rape-trauma syndrome admissible to 'assist the jury in evaluating the evidence, and frequently to respond to defense claims that the victim's behavior after the alleged rape was inconsistent with the claim that the rape occurred.' "); *United States v. Simmons*, 470 F.3d 1115 (5th Cir. 2006) (rape trauma syndrome is admissible to explain inconsistent conduct.)

¹¹⁹ *Perez v. State*, 653 S.W.2d 878, 882 (Tex. Crim. App. 1983) (allowed to explain lack of resistance.)

¹²⁰ *State v. Roles*, 832 P.2d 311, 318 (Idaho Ct. App. 1992) (delay in reporting); *State v. Kinney*, 762 A.2d 833 (Vt. 2000) ("the expert generally described the symptoms of rape trauma syndrome and testified that it was not unusual for a rape victim to delay reporting a rape and fall asleep after the assault."); *Beauchamp v. City of Noblesville*, 320 F.3d 733, 745 (7th Cir. 2003) (failure to immediately notify police); *United States v. Smith*, 1998 U.S. App. LEXIS 5772 at *1-2 (6th Cir. 1998) (unpublished) (women often don't report immediately).

¹²¹ Giannelli, Paul C., *Understanding Evidence 4th Ed.*, *supra*, note 15, Kindle Ed. at p. 254.

¹²² *People v. Hampton*, 746 P.2d 947, 948-49 (Colo. 1987)

¹²³ *State v. Middleton* (1983) 294 Or. 427, 657 P.2d 1215, 1221 (inconsistent post incident statements allowed to be explained by typical victim behavior.)

It should be noted that a witness's failure to report a specific detail of the event is not as concerning as the reporting of contradictory details; the latter "tend[s] to have a very low accuracy rate."¹²⁴ This is because research suggests that contradictory details "are associated with an increased likelihood of memory error."¹²⁵ Nevertheless, as mentioned, courts allow testimony of "typical" victim behavior to explain inconsistencies in both conduct and statements.

VI. Conclusion

Clearly, the use of trauma-informed *interview* practices is an appropriate and useful method to elicit facts and encourage reporting by those who come forward as sexual assault victims. Just as clearly, introducing rape symptomology into campus disciplinary proceedings and courtrooms raises issues of objectivity and the quality and reliability of memories, and fosters preconceived beliefs in guilt or innocence.

The ubiquitous use of trauma-informed practices on campus to evaluate non-criminal, non-life-threatening sexual misconduct allegations is both unwarranted and indefensible. Unfortunately, victims' rights advocates frantically demand these practices be implemented in all stages of campus and criminal proceedings, ignoring the inappropriateness of their application. We, scientists, lawyers, judges and others concerned about fairness and due process, must resist this message, or one day we may find ourselves at the receiving end of such policies.

The default position to believe a victim without more, or trauma theories used to excuse behavior, should never be permitted to pervert investigations or the process of decision-making. In *Doe v. Brandeis University*, District Court Judge F. Dennis Saylor said it was presumptuous to use victim trauma theories before someone has been found to be a victim.¹²⁶

Whether someone is a victim, whether or to what extent that individual has suffered trauma, and whether such trauma has influenced that individual's behavior, are all questions of fact to be determined by decision-makers. When used as preconceived assumptions or to excuse inconsistent behavior, these trauma-informed myths compromise objectivity, create presumptions of guilt, and result in the exclusion of otherwise relevant evidence.

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¹²⁴ Otgaar and Howe, *Finding the Truth in the Courtroom*; *supra*, note 69, Kindle Edition pp. 33-34.

¹²⁵ *Id.*

¹²⁶ *John Doe v. Brandeis University, Memorandum and Order on Defendant's Motion to Dismiss*, J. Saylor (March 31, 2016).