Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability In Sex Trafficking Prosecutions

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Oberyn Martell: They don't hurt little girls in Dorne.
Cersei Lannister: Everywhere in the world, they hurt little girls.[1]

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1 *Game of Thrones*: *First of His Name* (HBO, 2014).

ABSTRACT

Sex trafficking thrives on intersectional inequality and reinforcing layers of vulnerability.[2] Sex trafficking exists on a continuum of sexualized violence, from microaggressive sexual harassment to macroaggressive gang rapes, all of which create vulnerability in the victim and perfect sovereignty in the perpetrator. Sexualized violence performs power, as it is raced, classed, and gendered. Power not only requires performance, but it necessitates repetitive reenactments of domination in order to normalize its compulsive and pathological nature. Lynchings, police shootings, gang rapes, and sex trafficking are all performances of power on vulnerable bodies through which power perfects itself. The same inequality that creates the necessary preconditions for vulnerability to violence in the first instance, also obfuscates or masks power's pathology and compulsivity in the investigative and adjudicative processes. By way of illustration, victim blaming renders the pathology of the perpetrator invisible because it removes accountability from the perpetrator and shifts blame onto the victim. Shifting blame onto the victim obfuscates or hides power's omnipresence, compulsiveness, and pathology. The victim blaming process is pervasive, systemic, and entrenched.

Without proper interventions, sex trafficking cases can become ritualized spectacle, where sexualized violence as well as its accompanying investigation and adjudication convince the factfinder of the pathology of the victim and the sovereignty of the perpetrator. The pathology that surrounds victims of sexualized violence adversely impacts their credibility and extends narratives about male entitlement to vulnerable bodies. The recent cases involving R. Kelly and Cyntoia Brown illustrate these points. In the case of singer, song writer Kelly, his videotaping sex with an underaged black female resulted in an acquittal.[3]

[2] *See* MIKE DOTTRIDGE, KIDS AS COMMODITIES? CHILD TRAFFICKING AND WHAT TO DO ABOUT IT 28 (2004) ("The principal reason why children, as well as adults, from particular communities end up being trafficked is the lack of alternative ways of earning a living for them and their families."); *see also* Amber Hollibaugh, *On the Street Where We Live*, 5 WOMEN'S REV. OF BOOKS 1, 1 (Jan. 1988) ("The bottom line for any woman in the sex trades is economics. However, a woman feels when she finally gets into the life, it always begins as survival—the rent, the kids, the drugs, pregnancy, financing an abortion, running away from home, being undocumented, having a 'bad' reputation, incest—it always starts at trying to get by.").

[3] REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 5 (2017) (arguing that the hypersexualization of black girls undermines the ability to see their claim to sexualized violence).

Similarly, Brown was 16 when she shot her 43-year-old white pedophile purchaser of sex.[4] Brown's race (black), however, rendered her childlike qualities, claims of innocence, and arguments involving self-defense invisible. Before receiving clemency, Brown received a life sentence. In both cases, the victims' race, class, and gender rendered them hypersexualized and their victimization invisible. In both cases, the victims were readily detectible for purposes of pathology, but not humanity. In both cases, the victims were raced as black and gendered as female. In both cases, neither victim was entitled to innocence or childhood. Both cases reflect an ongoing historical tendency to hypersexualize black females as a justification for their sexual exploitation.[5]

Both cases illustrate that problematic, often half-hearted, prosecutions and bias saturated jurors can result in an absence of charges and acquittals. This absence of accountability can license sexualized violence with impunity and repeat rituals of spectacle. Like failed adjudications involving police shootings of the societally vulnerable, lackluster sex trafficking adjudication can perform the same task as the violence itself— the exploitation and vilification of the victim, the overvalorization or hypervalorization of the assailants, and the reassurance of patriarchal order, entitlement, preeminence, vindication, safety, and security.[6]

Without proper interventions, sex trafficking investigations and prosecutions can become a stage for the performance of state sanctioned violence, further extending institutional racism, sexism, and classism. Traditional liberal approaches to sex trafficking prosecutions— namely intersectional indifference or the absence of race, class, and gender salience— become breeding grounds for implicit bias because they allow what goes unregulated in the "subconscious" to run rampant. As a corrective, intersectionality and feminist discourses can be strategically

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[4] Jonathan Garcia, *A Timeline of The Cyntoia Brown Case, Conviction and Successful Bid for Clemency*, THE TENNESSEAN, Dec. 18, 2018, https://www.tennessean.com/story/news/2018/12/11/cyntoia-brown-case-facts-story-timeline-2018/2276009002/.

[5] BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 32-33 (1981) (defining Jezebel as "the wanton, libidinous back woman whose easy ways excused white men's abuse of their slaves as sexual 'partners' and bearers of mulatto offspring").

[6] Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 U.M.K.C.L. REV. 567, 568 (2017).

deployed to reconceptualize sex trafficking in order to maximize litigation strategies, particularly the use of sex trafficking expert (STE) witnesses. Comprehensive use of STEs can mitigate the adjudicative process' complicity in and ratification of sexualized violence through operations of law.

INTRODUCTION

Power—as it is raced, classed, sexed, or gendered—is a compulsion that requires performance.[7] It is at once gratifying for perpetrators and agonizing for victims. The trick is to convince the victim (and the witnesses) that the perpetrator is entitled to pleasure and the victim is deserving of pain. It requires repetition, again and again.[8] Power necessitates vulnerability to control bodies and justifications to normalize pathology.[9] The adjudication surrounding the performance serves the same function as the underlying violence: The infliction of pain with impunity.

Sex trafficking and its adjudication provide paradigms for two points: (1) the creation of vulnerability for purposes of exploitation and (2) seamless justifications for compulsive pathological performance. As to the first point, and by way of illustration, citizenship, in the United States, has historically been used to create vulnerability for purposes of both labor and sexual exploitation, as in the case of chattel slavery.[10]

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[7] Take for example a comparison of rape and police shootings of societally vulnerable victims. Both are performances of power on vulnerable bodies. *See* Anthony P. Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997); Angela P. Harris, *Gender, Violence, Race and Criminal Justice*, 52 STAN. L. REV. 777 (2000).

[8] *See* JUDITH BUTLER, GENDER TROUBLE 6-7 (Linda J. Nicholson ed. Routlage 1990) (suggesting that gender, rather than being an essential trait of sexed bodies, is instead made "real" through repetitive social performance).

[9] Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (discussing the heteropatriarchal use of the law to simultaneously create vulnerability in the Black community and justify exploitation of Black people).

[10] I do not refer to sex trafficking as "slavery" for several reasons. Slavery in the United States was a pervasive societal practice ratified by law for over two hundred years and involved heinous brutality over an entire spectrum of people. The overuse of the term slavery is an effort to normalize the indelible brutality of chattel slavery. Using "slavery" to reference sex trafficking sets up a false moral, social, and political equivalency. As a result, I deliberately use "sex trafficking." Blanche Bong Cook, *Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (The "WHP")*, 31 YALE J.L. & FEMINISM 248 (forthcoming 2019).

Vulnerability is the lynchpin of exploitation. [11] Without citizenship, the enslaved had no access to the courts or police and were, therefore, prone to unbridled desire, particularly rape and the commercialized sex trade.[12] For a more contemporary example consider the capitalist model, where the means of production are privatized and the surplus is paid to owners. In sex trafficking, the laborers are the sex workers. The product is sex. The traffickers own the means of production and receive the surplus. Both examples illustrate the creation of vulnerability for purposes of exploitation.

As for the second point, sex trafficking, like most operations of power, necessitates justifications. These justifications render its compulsive and pathological nature invisible. As Michel Foucault states, "Power is tolerable only on the condition that it masks a substantial part of itself. Its success is proportional to an ability to hide its own mechanisms."[13] Victim blaming normalizes exploitation. It renders the pathology of the perpetrator invisible because it shifts blame from the perpetrator to the victim. Victim blaming is a fundamental precept of hegemony because it explains societal order as the fault of its victims. To

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[11] *See* ANDREW HURRELL & NGAIRE WOODS, INEQUALITY, GLOBALIZATION, AND WORLD POLITICS 205 (1999) (explaining that an exploitative transaction "is one that is actively entered into by the parties concerned, one whose terms are unfair when measured by the appropriate benchmark, and one whose unfairness results from an inequality of power between the exploiter and exploited. It is these three factors in combination that explain what is particularly objectionable about exploitation: it involves actively taking advantage of another agent's relative weakness when it is open to you to make a fair exchange instead.").

[12] In remarking on the scale of white masters raping enslaved blacks, Abraham Lincoln made the following empirical observation:

> In 1850 there were in the United States, 405,751, mulattoes. Very few of these are the offspring of whites and free blacks; nearly all have sprung from black slaves and white masters. In 1850 there were in the free states, 56,649 mulattoes; but for the most part they were not born there—they came from the slave States, ready made up. In the same year the slave States had 348,874 mulattoes all of home production. The proportion of free mulattoes to free blacks—the only colored classes in the free states—is much greater in the slave than in the free states. It is worthy of note too, that among the free states those which make the colored man the nearest to equal the white, have, proportionally the fewest mulattoes the least of amalgamation. In New Hampshire, the State which goes farthest towards equality between the races, there are just 184 Mulattoes while there are in Virginia—how many do you think? 79,775, being 23,126 more than in all the free States together.

Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857), teachingamericanhistory.org/library/document/speech-on-the-dred-scott-decision/.

[13] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 1: AN INTRODUCTION 86 (1990).

draw another illustrative analogy, sex trafficking cases can serve the same function as incidents involving police shooting societally vulnerable victims, for example Michael Brown. Brown was the eighteen-year-old black teen that white police officer Darren Wilson gunned down in in the streets of Ferguson, Missouri with impunity.[14] The failed prosecutions of both Wilson and sex trafficking cases can vilify the victims,[15] valorize the perpetrator, and provide necessary reassurance of (white) heteropatriarchal order, vindication, preeminence, and security.[16]

Lynchings, gang rapes, police shootings, sex trafficking, and the half-hearted adjudications of these cases are all rituals of spectacle: They convince the viewer to acknowledge and respect the perpetrator's entitlement and authority to inflict pain.[17] The following chart provides an illustrative visual of the dynamics of rituals of spectacle:

[14] It is helpful to compare the case of Michael Brown and failed prosecutions of rape victims. Brown was an eighteen-year-old black teen gunned down by Darren Wilson, an unindicted, police officer, in Ferguson, Missouri. Rachel Clarke & Mariano Castillo, *Michael Brown shooting: What Darren Wilson Told the Ferguson Grand Jury*, CNN, (Nov. 26, 2014, 11:32 AM), http://www.cnn.com/2014/11/25/justice/ferguson-grand-jury-documents/. Both Brown and un-vindicated rape victims become canvasses for the performance of power, are blamed for their victimization, and the adjudicative process ratifies their victimization and provides reassurance of order. *See* Cook, *supra* note 6, at 568.

[15] The use of the term "victim" to reference both male and female sex trafficking victims remains a highly controversial issue. Many activists, scholars, judges, and practitioners prefer to use the term "survivor," when referencing sex trafficking victims. I use the term "victim" to highlight, underscore, and bring into sharp relief the offensive, violative, and assaultive conduct that constitutes sex trafficking, which is not to argue or insinuate that victims are only victims or should be reduced to victimization alone. Rather, sex trafficking victims are clearly entitled to the entire spectrum, plethora, and panoply of human complexity, including resiliency and brilliance. The use of "victim" in this piece is meant to highlight the criminal behavior of the perpetrator. Sex trafficking victims are no more enveloped by victimization than burglary victims; however, burglary victims are entitled to identify themselves as "victims" (persons who have been aggrieved) without directly or indirectly questioning their agency. The operation of sex trafficking victims' "agency" is a major theme in this piece. This piece asserts that agency cannot be viewed outside the context of power. Moreover, a sex trafficking victim's victimization can be announced without calling into question her ability to exercise agency.

[16] Cook, *supra* note 6, at 568.

[17] Andrea Smith, *Michel Foucault on Power*, *in* BEYOND THE PALE: READING ETHICS FROM THE MARGINS 99, 104 (Stacey Floyd-Thomas & Miguel De La Torre eds., 2011).

RITUALS OF SPECTACLE

UNDERLYING VIOLENCE	Lynchings	Gang Rapes	Police Shootings	Sex Trafficking
Compulsion, performance, gratification, pathology	√	√	√	√
Gratifying (thrilling) for perpetrator, suffering for the victim	√	√	√	√
Involves identity and identity formation predicated on spectacle[18]	√	√	√	√
Vulnerability, justification, obfuscation	√	√	√	√
Both the performance and justification are gratifying because the justification reperforms the spectacle	√	√	√	√
Victim blaming normalizes the pathology by shifting blame and the gaze from perpetrator to victim	√	√	√	√
The justification obfuscates/hides the pathological compulsion, renders it invisible, elevates it above reproach, and places it beyond critique	√	√	√	√

[18] Joy James argues that the whole history of white supremacy and racial tyranny in the United States depends on the public spectacle of black bodies, from mobs to lynching to torture. See id. at 105. Like male identity, white identity is predicated on spectacle. Lynchings, rapes, police shootings, and sex trafficking as spectacle are instruments of persuasion and discursive strategies meant to perfect the power of the sovereign by humiliating, torturing, taunting, threatening, or otherwise oppressing victims in order to gratify the assailant's pathological need to feel preeminent and secure while simultaneously justifying these needs on the vulnerable body. Id.

The performance creates suffering and domination in the victim and pleasure and sovereignty in the perpetrator (the victim becomes footstool and the perpetrator becomes God)	√	√	√	√
Resistance by the victim escalates the force necessary to subdue the victim and may result in execution or punishment for resistance	√	√	√	√
ADJUDICATION				
Adjudication reperforms and affirms the spectacle	√	√	√	√
Vilify victims	√	√	√	√
Overvalorizes perpetrators	√	√	√	√
The trier weighs scales of value between perpetrator and victim reflected in the judgment				
Provides reassurance of (white) heteropatriarchal order, vindication, preeminence, and security	√	√	√	√
Spectacle coerces acknowledgment and respect for power	√	√	√	√
The prosecution of these rituals • hijacks the function of law to obfuscate the pathology • hides (white) heteropatriarchy's	√	√	√	√

compulsive desire to play and perform on vulnerable bodies • legitimizes the spectacle • creates social acceptance from the mob (spoken and subtle) • provides license for spectacle				

The chart above maps out the dynamics involved in rituals of spectacle – that is (1) performance on vulnerable bodies and (2) their obfuscating justifications. Without proper interventions, adjudications can replicate both (1) performance and (2) justification. Adjudications can perform state sanctioned violence and immunize the original offending conduct.

In sex trafficking cases, every aspect of ritualized spectacle is intersectional, meaning raced, classed, and gendered. In particular, intersectionality[19] determines the factfinder's perception of both the

[19] Intersectionality strategically focuses on inextricably linked and overlapping layers and vectors of identity, like race, class, gender, and sexual orientation. Intersectionality is culturally and politically operationalized by acknowledging the impossibility of isolating one vector of identity from another without disempowering non-white, non-male, non-wealthy, and non-normative sexual persons in society. Intersectionality recognizes that gender is not just a class phenomenon and that race is not a gender phenomenon, that class equality will not guarantee race or gender equality, or that gender equality will guarantee race equality; rather, material subordination as it is raced, classed, and gendered are imbricating vectors requiring the liberation of each strand in order to achieve true material equality. *See* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colo*r, 43 STAN. L. REV. 1241, 1241–42 (1991) (discussing the politicization of women as recognizing that violence against women is neither private nor aberrational, but social and systemic) (citing SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982) (arguing that battering is a means of maintaining women's subordinate position)). Throughout this piece, I use intersectionality as a reference to identity; however, I also use intersectionality to reference alienation and oppression that is specific to the ways in which race, class, and gender reinforce vulnerability for purposes of exploitation. Sexualized violence is the act of utilizing gender differentiations and sexualized force to reduce and marginalize by

victim and perpetrator. The perception of victims and perpetrators operates on a sliding scale of innocence and blame. The scale is inversely proportional between the victim and assailant where tremendous identification with the victim turns into less empathy for the perpetrator and vice versa. Victims and their assailants are mapped onto this spectrum based on who is judged credible and sympathetic— a determination that is always intersectional, meaning sympathy is raced, classed, and gendered.[20] Moreover, in sex trafficking cases, credibility, and believability are also inextricably linked to male entitlement to female bodies.

Although intersectional inequality is central to sex trafficking, sex trafficking prosecutions often proceed without an explicit and clear effort to deconstruct the operations of racism, classism, and sexism on the creation of vulnerability as well as its obfuscating justifications. When shoe-horning the rituals of spectacle into the legal elements of sex trafficking, prosecutors pay little, if any, attention to the impact of intersectionality on the case and controversy. Unfortunately, the typical treatment of sex trafficking prosecutions under liberal approaches to the law— namely indifference or the absence of race, class, or gender salience— can assist in replicating the patterns of inequality that already undergird and saturate the trade in vulnerable human flesh.[21]

The unwillingness or inability to address intersectional inequality allows vulnerability to persist because it eliminates the possibility of identifying and diagnosing the problem.[22] Inattention to intersectionality

disempowering and stripping the victims of their security and self-determination, in order to assert the power of masculinity and patriarchy.

[20] Jasmine Phillips, *Black Girls and the (Im)possibilities of A Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 UCLA L. REV. 1642, 1675 (2015); NANCY BURNS, FRAMING THE VICTIM: DOMESTIC VIOLENCE, MEDIA, AND SOCIAL PROBLEM 151 (1st ed. 2004).

[21] Elizabeth Beaumont, *Gender Justice v. The "Invisible Hand" of Gender Bias in Law and Society*, 31 HYPATIA J. FEM. PHIL. 668, 676 (2016) (arguing that gender neutrality perpetuates gender inequality). I often use "the flesh trade" to emphasize the corporeal fleshiness of trading and trafficking in human life.

[22] Contrary to popular belief, a "colorblind" worldview which attempts to ignore the realities of race-based inequalities actually perpetuates racism because "[w]hen race-related problems arise, colorblindness tends to individualize conflicts and shortcomings, rather than examining the larger picture with cultural differences, stereotypes, and values placed into context." Monica T. Williams, *Colorblind Ideology is a Form of Racism*, PSYCHOLOGY TODAY (Dec. 27, 2011), https://www.psychologytoday.com/us/blog/culturally-speaking/201112/colorblind-

robs the case and controversy of its greatly needed context. The context of intersectionality is critical to an understanding of both the victim's and perpetrator's action and inaction. Just as post-racialism perpetuates racism, gender neutrality promotes sexism. Left unregulated and untreated, implicit biases contribute to broad structural patterns of inequality within sex trafficking investigations and adjudications.[23] The refusal or inability to address intersectionality in sex trafficking cases leaves victims of sex trafficking invisible, vulnerable, and insufficiently protected by law.[24] When a systemic or structural approach to inequality is removed, victim blaming is all that is left. The absence of intersectionality and feminism in sex trafficking cases results in pathologizing victims.[25] When the prosecution ignores the systemic and structural nature of sex trafficking, triers will pathologize the victim and engage in victim blaming.

Optimal prosecution strategies in sex trafficking cases can ameliorate the impact of implicit and explicit bias during the course of adjudication by making race, class, and gender salient. Rather than allowing the reifications of inequality to persist by robbing corrective action of its vehicle—namely the ability to identify the problem—this article makes the case for using intersectionality and feminism to design litigation interventions that disrupt the replication of spectacle in operations of law. This article saturates the elements of proof in sex trafficking cases in the rituals of spectacle in order to provide the proper context to assess victim agency and credibility.[26] In addition, this article

ideology-is-form-racism. Likewise, a "gender-neutral" worldview actually perpetuates sexism; for example, one study found that individuals who believe they possess a "gender-blind" outlook were more likely to believe misogynistic, victim-blaming narratives regarding sexual assault and rape. *See* Stoll, et. al, *The Effects of Gender-Blind Sexism on Rape Myth Acceptance: Results From a Nationally Representative Study*, J. INTERPERS. VIOLENCE (2018).

[23] *Id.* at 676 (discussing SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 61, 4 (1989) (stating when law "treats more or less as equals those whom custom, workplace discrimination, and the still conventional division of labor within the family have made unequal," it is perpetuating injustice).

[24] *See, e.g.*, Crenshaw, *supra* note 9, at 1351–52 (describing the legitimating function of law as "an essential feature in the illusion of necessity because it embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable").

[25] Phillips, *supra* note 20, at 1656.

[26] The arguments used herein are applicable to state sex trafficking cases generally. However, I have situated this article in my areas of expertise: federal sex trafficking cases, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.

makes the case for the strategic deployment of sex trafficking expert (STE) witnesses to solidify the evidence and provide the proper context and frame in which to assess the victim's story and credibility. This intervention has the added yield of disrupting the law's complicity in sexualized violence and providing state sanction to spectacle; arresting the cultural narratives that are read onto women's bodies;[27] removing the taint of intersectional inequality from the evidence; reversing the pathological gaze from the body of victims and onto the conduct of defendants; and providing the proper context in which to evaluate the merits of the case.[28]

Available empirical evidence suggests that expert witnesses are grossly underutilized in federal sex trafficking cases.[29] To the extent that

[27] Crenshaw, *supra* note 19, at 1271.

[28] This article suggests prosecution strategies in sex trafficking cases using theoretical inventions grounded in intersectionality and feminist theories. In doing so, it answers Professor Crenshaw's call to minimize the risks of engaging the dominant discourse while simultaneously navigating them. *See* Crenshaw, *supra* note 9, at 1368–69 (1988) (stating "[t]hus, it might just be the case that oppression means 'being between a rock and a hard place'—that there are risks and dangers involved both in engaging in the dominant discourse and in failing to do so. What subordinated people need is an analysis which can inform them how the risks can be minimized, and how the rocks and the very hard places can be negotiated.").

[29] Available empirical data demonstrates that sex trafficking is severely under prosecuted and where it is prosecuted, federal prosecutors are underutilizing STEs. Accurate numbers of trafficking victims are highly contested due to the complexity of the crime and difficulty in identifying victims. Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. LEGIS. 17, 22 (2017). As a direct result, sex trafficking data varies. Some reports estimate that there are 100,000 to 300,000 child sex trafficking victims in the United States, though this number has been heavily criticized. *Id*. Others estimate 45,000 to 50,000 victims trafficked in the United States. *Id.* More recently, the federal government estimates that 14,500 to 17,500 victims are sold into sex trafficking into the United States each year, not including those trafficked domestically. *Id*. In fiscal year 2015, the Department of Justice (DOJ) initiated prosecutions against 466 illegal sex activity traffickers. MARK MOTIVANS & HOWARD N. SYNDER, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF HUMAN-TRAFFICKING CASES 2015 6 (2018), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6286. In fiscal year 2014, DOJ initiated 330 sex trafficking cases. *Id.* Given that DOJ estimates that more than 20,000 sex trafficking victims are trafficked just across the Mexico-United States border annually, these numbers indicate a gross under prosecution of sex trafficking cases, particularly when measured against the rates of prosecution during the War on Drugs. Nick Martin, *Mexican Woman Tells of Ordeal with Cross-Border Child Traffickers*, THE GUARDIAN (Jan. 11 2010), https://www.theguardian.com/world/2010/jan/11/mexican-woman-border-child-traffic. Statistics involving the use of STEs in federal cases do not exist. However, at the time of writing, there were 37 federal cases addressing expert witnesses

federal prosecutors currently use experts in sex trafficking cases, their testimony is often limited to decoding and interpreting the language used during sex trafficking, for example nick names for traffickers and victims, such as the "bottom bitch" to describe the madam or favorite of the trafficker or "pimp,"[30] or terms of the trade, such as "trade" to mark a "john" or purchaser of sex. Beyond mere language decoding, qualified STEs can disrupt the patterns of inequality in sex trafficking cases through four distinct categories of operation: (1) grounding the case in the ritual of spectacle, the historical doctrine of the female as property, and the material reality of inequality; (2) explaining gender violence as a prerequisite to the vulnerability necessary to control and manipulate victims; (3) mapping the operations of gender, race, and class implicit bias as the frame for viewing the evidence; and (4) outlining the gaze of pathology and the ways in which it manifests itself in victim blaming, an overidentification with the perpetrator, and a Stockholm syndrome attachment between victim and perpetrator.

As for "grounding," experts can illustrate and contextualize the case and controversy in the larger tapestry of inequality and the material reality of subordination.[31] Anchoring expert testimony in the patterns of

in sex trafficking cases. Westlaw search performed Mar. 26, 2019, using the terms "sex trafficking" /255 "expert witness" in its Federal Cases database. Given that Congress federalized sex trafficking in 2000, and DOJ estimates domestic sex trafficking victims to be 17,500, it would appear that STEs are severely underutilized, particularly when measured against the benefit they can provide. 18 U.S.C. §§1581 *et seq*. (Oct. 28, 2000). As a former Assistant United States Attorney who specialized in sex trafficking prosecutions, I can attest that expert witnesses are underutilized in sex trafficking cases, particularly when measured against the routine use of expert testimony in drug smuggling cases. It may be that a comprehensive doctrinal analysis of STEs has not been written. Among other things, underutilization of STEs incentivizes the instant article.

[30] "Pimp" is defined as "an adult who negotiates sexual encounters between the prostituted person and a buyer." Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1292 n.55 (2015) (citing Megan Annitto, *Consent, Coercion, and Compassion: Emerging Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 13 (2011)); *see also* H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 80-81 (2014) (demonstrating the issues surrounding prosecutorial abuse in America with the prosecution of Senator Ted Stevens, a case where federal prosecutors failed to provide Sen. Stevens's defense team with exculpatory evidence, leading to their suspension).

[31] *See, e.g.*, Crenshaw, *supra* note 9, at 1383 (describing the hegemonic function of race neutrality as "creat[ing] the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass; instead, as we have seen, class disparities appear to be the consequence of individual and group merit within a supposed system of

intersectional inequality can restore the sex trafficking victim's credibility by explaining her reluctant testimony, mistaken complicity, and grooming at the hands of predators. Experts can ground the gender, race, and class dynamics between all of the stakeholders, including victim, perpetrator, judge, jury, prosecutor, defendant, and the public in the larger context of intersectionality, rituals of spectacle, gender implicit bias, sexism, and patriarchy.[32] Expert guidance and testimony can expose trafficking as a structural problem of intersectional inequality and sexualized violence, as opposed to the victim's flawed morality.[33] STEs can unravel the culture of sex trafficking and the ways in which we are all implicated and complicit in the circumstances that give rise to an insatiable market for vulnerable human flesh.

As for gender violence, intersectional victimization from structural racism, sexism, and classism create the circumstances in which many victims of sex trafficking experience emotional, physical, and sexual abuse before the trafficking,[34] making them terribly attractive profiles to predators and increasingly more vulnerable to their manipulations. Gender, race, and class implicit bias research provide useful frameworks for understanding the complex relations between patterns of individual behavior and structural inequality reflected in social dynamics that continue to shape law and ongoing social practices, like sex trafficking.[35] Both explicit and implicit biases frame the way we see evidence; predict the judgments and verdict; weight the scales of value between the victim and perpetrator; mediate the experience of the victim, perpetrator, investigators, prosecutors, jurors, and judges; predict the predisposition of all the stakeholders, including investigators, prosecutors, jurors, and judges towards victims; and explain the victim's predisposition toward the trafficker. All of these present a perfect storm, compelling the need for an optimal litigation strategy that disrupts the influences of bias in operations of law.

The aim of this article is to create litigation strategies that change the distribution of power by using STEs to change the distribution of

equal opportunity."

[32] *See, e.g.*, United States v. Brooks, 610 F.3d 1186, 1196 (9th Cir. 2010) (finding that an expert's "testimony helped place other witnesses' testimony into context and provided the jury a means to assess their credibility").

[33] Beaumont, *supra* note 21, at 671 (discussing OKIN, *supra* note 23).

[34] *See* Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1476-77 (2015).

[35] Beaumont, *supra* note 21, at 674.

perception.[36] This article is at once conceptual and doctrinal. In addition to a theoretical framework to reconceptualize sex trafficking, this article provides a comprehensive treatment of the legal doctrine surrounding STEs. In order to use intersectional and feminist approaches to promote and expand the use of expert witnesses in sex trafficking cases, this article proceeds in several parts.

Part One sets out a fictional case study to contextualize the vulnerability, intersectionality, and rituals of spectacle that are peculiar to sex trafficking. This article returns to the case study throughout in order to illustrate its central points.

Part Two comprehensively sets out the elements for federal sex trafficking cases with particular emphasis on "force and fraud" adult sex trafficking. Although triers may recognize criminality in child sex trafficking cases, or cases that involve sensationalized physical violence, cases of adult sex trafficking — which require proof of force or fraud— entail greater emphasis on victim credibility, an assessment weighted with intersectionality.

Part Three uses intersectional and feminist approaches to analyze sex trafficking, with particular emphasis on the doctrines and ideologies that extend male entitlement to female bodies and obfuscate the reduction of sexual organs to commodification.

Part Four comprehensively provides the federal law necessary to qualify a STE.

Part Five sets forth what STE testimony would look like through intersectional and feminist enhanced principles while conforming to legal doctrine and the Federal Rules of Evidence.

Part Six discusses the anticipated problems with introducing STE testimony at trial and provides counter arguments to possible objections.

Part Seven addresses additional strategies and interventions for removing the taint of intersectionality from the evidence in sex trafficking cases.

PART ONE. CASE STUDY: JD7

The following is a fictional case study for illustrative and heuristic purposes only.

When she was just twelve years old, and living in the United States, the Sudanese Gangstuhs (SGS) began sex trafficking Jane Doe

[36] Phillips, *supra* note 20, at 1672.

Seven (JD7) for eight years until she was 20. During this time, she was bought and sold sexually for as little as $40 and for as many as twenty times in a single day. Like her traffickers, JD7 and her family fled the Sudanese civil wars and sought shelter in a Ugandan refugee camp. After receiving political asylum, JD7 and her family settled in "Little Sudan," in Lincoln, Nebraska. Both she and her family are poor and practicing Muslims. JD7 dropped out of school after the Lincoln school system placed her two years behind her counterparts because she had poor English proficiency.

When JD7 was twelve, she met Wahim, a twenty-four-year-old SGS. Wahim began grooming JD7 for sex trafficking, initially wining and dining her. Wahim regularly had sex with JD7 during these "dates," often exposing her to his vast porn collection. On one occasion, he told her, "You know you are really lucky to be my woman because my last bitch was too smart." Gradually, Wahim convinced JD7 that having sex with his SGS brothers demonstrated her devotion to him. After a time, Wahim convinced JD7 that because she was so good at sex, she could make a lot of money.[37] With the help of his SGS brothers, Wahim began trafficking JD7. He kept JD7's money, often grilling her for an exact accounting of every cent. Wahim kept regular advertisements of JD7 on Backpage.com. Wahim regularly pimped JD7 in the suburbs of Lincoln where the clientele fetishized JD7's skin as a place to release anxiety, tension, and unrespectable fantasy.

As JD7 grew older and Wahim's "stall" of opioid addicted girls grew larger and younger, Wahim lost interest in JD7 with the exception of her profitability. When JD7 became resistant to Wahim's pimping demands, Wahim introduced JD7 to opioids "to get her mind off things." After a while, JD7 would wake up ill and desperate for opioids, but too afraid to "prostitute" on her own for fear of being raped by the pill sellers, other addicts, and pimps. Initially, she enlisted various members of the SGS to help her "turn tricks," but invariably, they would either rape her, pimp her out while she was high, or steal the money or drugs she received from "tricks."[38] When Wahim discovered that JD7 was making money without him, he punched her in the face, threatened to tell her family about

[37] Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1027 (2013).

[38] Martha Bebinger, *Women With Opioid Addiction Live With Daily Fear Of Assault, Rape,* NPR, (Sep. 21, 2017, 5:01 AM), https://www.npr.org/sections/health-shots/2017/09/21/550730474/women-with-opioid-addiction-live-with-daily-fear-of-assault-rape.

her "whoring," and told her that he had killed the last bitch who left him.

JD7 overdosed and was found in an emergency room. Although she was badly beaten and her clothes torn, no one performed a rape test. While in the emergency room, the police arrested JD7 and interrogated her for prostitution. After several years of investigation, delay, and disinterest, federal prosecutors obtained an indictment from the grand jury for several counts of sex trafficking against Wahim and several SGS members. By the time the government filed its indictment, the statute of limitations had run on JD7's child sex trafficking incidents. As a result, the government only pursued the counts related to adult sex trafficking of JD7, all of which required proof or force, threats of force, fraud, or coercion.

Months after the defendants elected to go to trial, the government filed a motion in limine attempting to introduce STE witnesses. The purpose of the experts was to explain how sex trafficking cases were uniquely different from most other criminal cases because they involved layers of trauma for the victim, which if unexplained, could result in the jury perceiving the victim's reluctance to testify as indicative of a lack of credibility. In addition, the government sought to introduce expert testimony about how traffickers profile for vulnerability and use that vulnerability to manipulate, groom, and control their victims for commercial sex. The prosecutors were well aware that juries often engage in victim blaming and are preoccupied with its various forms, like "if things were so bad, why didn't she leave."

The trial court judge believed that "pimping" should be left to the state courts and was deeply suspicious about whether the government would use the newly minted federal sex trafficking statute to overcriminalize black men who were pimping white women.[39] After thirty

[39] Phillips, *supra* note 20, at 1671 (noting that "racial disparities reveal that the stereotypical pimp is the Black man."). In controlled studies regarding juror bias, where the race of the perpetrator and victim are manipulated, white jurors assign higher ratings of guilt to hypothetical black defendants accused of sexually assaulting white children than black children. Bette L. Bottoms, Suzanne L. Davis, & Michelle A. Epstein, *Effects of Victim and Defendant Race on Jurors' Decisions in Child Sexual Abuse Cases*, 31(1) J. APPLIED SOC. PSYCH. 1, 5 (2004). African Americans are incarcerated at more than five times the rate of whites. In 2014, African Americans constituted 2.3, or 34%, of the 6.8 million correctional population. *Racial Disparities in Incarceration*, NAACP (2019), https://www.naacp.org/criminal-justice-fact-sheet/. Specifically, according to the United States Sentencing Commission, black men who commit analogous crimes as white men receive federal prison sentences that are nearly 20% longer. Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person,*

years on the bench, the judge knew that prosecutors, law enforcement, and jurors much more readily recognized criminality when black bodies performed it, particularly on white bodies.[40] The trial court rejected the government's motion finding that expert testimony was unnecessary because, as the court stated, "pimping was common sense." Because the government had already started the pretrial process, which included travel arrangements for over 300 witnesses, the government did not take an interlocutory appeal on the exclusion of the experts.

At trial, JD7 testified for two weeks about the most intimate details of her life, including her sexual encounters with various SGS and strangers. The prosecutors were unsuccessful in excluding evidence of JD7's Facebook page, which showed provocative and often lewd pictures that JD7 had taken of herself and several SGS. The trial court found that JD7's photos and sexually explicit posts went straight to the evidence involving force, fraud, and coercion. The defense attorneys painted JD7 as a Little Sudanese "girl gone wild," "buxom, beautiful, rebellious, and immoral." The jury acquitted all of the defendants.

PART TWO. LEGAL FRAMEWORK: FEDERAL SEX TRAFFICKING LAW

The main federal sex trafficking statute is Title 18, United States Code, Section 1591 of the Trafficking Victims Protection Reauthorization Act (TVPRA).[41] Section 1591 sets out the following elements:

Study Finds, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/?noredirect=on&utm_term=.93edd067960c.

[40] *See* McCleskey v. Kemp, 481 U.S. 279 (1987). In *McCleskey*, the Supreme Court reviewed statistical evidence proffered by the defense to illustrate the ways in which Georgia law failed to treat Black defendants in the manner it treated White defendants, and that Black defendants were especially demonized where their alleged victims were White. The statistical evidence, contained in what was referred to by the Court as "the Baldus study," concluded that "defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants." *Id*. at 286. Still, the Supreme Court rejected the defendant's equal protection challenge, finding no evidence of discriminatory intent. *Id.* at 292.

[41] Federal sex trafficking prosecutors exercise prosecutorial discretion to add additional counts and charges from other relevant statutes. This is particularly useful if the case proceeds to trial because additional charges expand the field of inculpatory evidence.

> (a) Whoever knowingly—
>
> (1) . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).[42]

Section 1591 sets forth two forms of sex trafficking: (1) sex trafficking of children and (2) sex trafficking of adults through force, threats of force, fraud, or coercion.[43] As for the first form, child trafficking, §1591(a) prohibits sex trafficking anyone under the age of 18.[44] Under federal law, minors cannot consent to sex trafficking.[45] Consequently, proof of force, fraud, or coercion is not required in child sex trafficking cases.[46] The converse is true for persons over the age of 18 — evidence of force, the threat of force, fraud, or coercion is required.[47]

As a general matter, jurors are more inclined to recognize

Section 1591, however, remains the main "sex trafficking" count because it specifically criminalizes "sex trafficking" and provides for aggressive penalties. *Id.* at 1031.

[42] 18 U.S.C. § 1591(a) (2012). The term "commercial sex act" means any sex act for which anything of value is given to or received by any person. *See* 22 U.S.C. § 7102 (2012).

[43] *See generally* 18 U.S.C. § 1591(a) (2012).

[44] *Id.*

[45] *See* United States v. Robinson, 508 F. App'x 867, 870 (11th Cir. 2013) (rejecting defendant's assertion that a minor sex trafficking victim was not forced because "minors cannot consent to prostitution"); United States v. Brooks, 610 F.3d 1186, 1199 (9th Cir. 2010) (a minor's co-offenses like sex trafficking or child molestation); United States v. Campbell, 764 F.3d 880, 888 (8th Cir. 2014) (excluding evidence of other acts of prostitution because minors cannot consent).

[46] *Campbell*, 764 F.3d at 888.

[47] *Id.*

criminality in cases involving child sex trafficking or cases involving aggressive or sensationalized displays of force, like being chained to a radiator.[48] It is more difficult to convince jurors of a defendant's wrongdoing in prosecutions involving subtler forms of coercion, particularly in intraracial sex trafficking cases or cases involving victims that are intersectionally multilayered, like JD7— a victim who has the potential of being rendered invisible by her race, sex, ethnicity, religion, and national origin.[49] Furthermore, in intraracial sex trafficking cases or cases involving intersectionally layered victims, the victim's morality and agency are more contested. The victims' suffering and consent are inextricably linked to coding that is raced, gendered, and classed. It is just these cases, namely those involving intraracial sex trafficking and "lesser" forms of force that are ripe for the interventions proposed in this article.

Section 1591 sets out three basic elements: (1) the defendant acts in the furtherance of or benefits from a commercial sex act; (2) the defendant possesses the requisite *mens rea*; and (3) the defendant used a thing in interstate commerce, which is the federal jurisdictional element under the Commerce Clause. The focus of analysis in this article only requires attention to the first two elements.

The first element requires proof that the defendant engaged in a particular activity or benefitted from a commercial sex act. "[C]ommercial sex act" means any sex act on account of which anything of value is given to or received by any person.[50] The element is satisfied with proof that the defendant knowingly recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or "solicits a person by any means or benefits financially from such activity."[51]

The mens rea requirement of Section 1591 requires proof that either the defendant knew or recklessly disregarded the fact that force, threats of force, fraud, or coercion would cause the victim to engage in a commercial sex act. The defendant need not have caused the act.[52] By its

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[48] *See generally* Parker & Skrmetti, *supra* note 37, at 1037.

[49] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 601 (1990) ("the experience of rape for black women includes not only a vulnerability to rape and legal protection radically different from that experienced by white women, but also a unique ambivalence").

[50] 18 U.S.C. § 1591(e)(3) (2012). The thing of value need not be monetary. It may be any other tangible or intangible thing that has some value to some person. United States v. Petrovic, 701 F.3d 849, 858 (8th Cir. 2012).

[51] 18 U.S.C. § 1591(a)(1) (2012).

[52] *See generally* Parker & Skrmetti, *supra* note 37, at 1033.

plain language, the statute covers anyone who knows what is transpiring and facilitates or benefits from it.[53]

"Force" means "any form of violence, compulsion or constraint exercised upon or against a person."[54] "[T]he use of force involves a degree of compulsion, it can be effected through 'power' or 'pressure,' which do not necessitate physical components."[55] While force is one of four means of the crime, the commercial sex act does not have to be the "dominant purpose" of the defendant's use of force, the threat of force, fraud, or coercion.[56]

"Fraud" means any "deliberate act of deception, trickery, or misrepresentation."[57] Courts have interpreted "fraud" broadly to include standard grooming techniques, including promises to supply drugs, employment, retirement, love, compensation, security, a better credit rating, homes, or cars.[58]

Sex trafficking cases that require proof of force and fraud are particularly problematic. Jurors, judges, and the public more readily recognize force and fraud where the victim is subjected to sensationalized forms of violence. Much less obvious and detectible as "common sense" are the multitudinous forms of vulnerability, psychological

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[53] *Id*.

[54] United States v. Webster, Nos. 08-30311, 09-30182, 2011 WL 8478276, at *1 (9th Cir. Nov. 28, 2011).

[55] United States v. Chacon, 533 F.3d 250, 257 (4th Cir. 2008) (citing United States v. Romero-Hernandez, 505 F.3d. 1082, 1088 (10th Cir. 2007)).

[56] *See* Parker & Skrmetti, *supra* note 37, at 1033 (citing United States v. Marcus, 487 F. Supp. 2d 289, 313 (E.D.N.Y. 2007)).

[57] *Id*. at 1035.

[58] *Id.* at 1036. *See also* United States v. Paris, No. CR 03:06-CR-64(CFD), 2007 WL 3124724, at *14 (D. Conn. Oct. 24, 2007) (finding that evidence of the traffickers' false promises to (1) treat the victims well, (2) pay them, and (3) supply them with drugs all fell within the "ordinary understanding of fraud"); United States v. Flanders, 752 F.3d 1317, 1331 (11th Cir. 2014) (finding "evidence that defendant received payment from two victims in the form of auditioning fees, took money from the wallet of a third victim, and engaged in "venture" to produce and sell pornographic footage of coconspirator having sex with drugged women, was sufficient to support defendant's conviction of benefiting by participating in a venture that committed sex trafficking by fraud"); United States v. McMillian, 777 F.3d 444, 447 (7th Cir. 2015) ("Mainly he had enticed all four by false promises of love and money"); United States v. Rivera, No. 13-CR-149(KAM), 2015 WL 7455504, at *20 (E.D.N.Y. Nov. 23, 2015) (finding the victim's testimony that she had been led to believe she was going to the defendant's home to clean when she was really sent for commercial sex sufficient to show "a reasonable jury [. . .] that Mr. Garrett and Mr. Rivera knowingly misstated the purpose of Ms. Ortiz's visit to Mr. Garrett's home in order to entice her to engage in a commercial sex act").

manipulations, "head games," and grooming processes that sex traffickers use to control their victims. As in battered-women cases, for example, a jury may be reluctant to believe that a victim was unable to escape where she was physically mobile, in public without physical surveillance, or in contact with others.[59] For example, jurors are often preoccupied with the question, "Why didn't she just leave?"[60] The emphasis on force completely elides the psychological coercion pimps and traffickers effectively use to groom, socialize, control, and imprison sex trafficking victims— let alone the heightened vulnerability detection defendants perfect to profile their victims.[61]

As a result, Congress added "coercion" to encompass a range of behaviors, including psychological coercion.[62] "Coercion" means "threats of serious harm to, or physical restraint against any person; [or] any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person."[63] "Coercion," includes explicit threats of force to

[59] For example, Marissa Alexander was originally sentenced to 20 years in prison for firing a warning shot above her husband's head during a domestic dispute. No one was injured. Alexander asserted that she locked herself in the bathroom to hide, when her husband broke through the door and shoved her to the floor. She tried to escape through the garage door, but it would not open. She retrieved a gun from a car parked in the garage. She went back into the house, her husband threatened to kill her, and she fired a non-injurious warning shot. After much public protest, particularly given George Zimmerman shot Trayvon Martin with impunity, the judge deciding her appeal determined that the previous ruling incorrectly placed the burden on Alexander to prove that she was abused. Sam Sanders, *Florida Woman in 'Stand Your Ground' Case Accepts Plea Deal*, NPR (Nov. 25, 2014, 3:42 PM), http://www.npr.org/sections/thetwo-way/2014/11/25/366567307/florida-woman-in-stand-your-ground-case-accepts-plea-deal.

[60] Parker & Skrmetti, *supra* note 37, at 1033.

[61] *Id.*

[62] *Id*.

[63] *Id.* at 1036. *See, e.g*., United States v. Fields, No. 8:13-cr-198-T-24TGW, 2013 WL 11318863, at *3 (M.D. Fl. Dec. 11, 2013) (stating the plain language of section 1591 makes clear that actual threatened physical abuse is not required, rather, the trier must examine "all the surrounding circumstances"); United States v. Campbell, 764 F.3d 880, 888 (8th Cir. 2014) (finding the defendant's assaultive behavior could be viewed as a pattern intended to make the victim believe that noncompliance would result in serious harm); United States v. Gardner, No. 16-20135, 2016 WL 5110191, at *3 (E.D. Mich. Sept. 21, 2016) (using a totality of circumstances test to evaluate whether a reasonable person of the same background as victim would continue prostituting to avoid serious harm); United States v. Weise, 606 F. App'x. 981, 985 (11th Cir. 2015) (finding the victim reasonably believed that continued compliance was necessary to avoid a variety serious potential harm, including physical, financial, and psychological).

psychological manipulations creating a climate of fear. A climate of fear creates a constant state of panic in the victim which exacts compliance because the victim perceives herself at the constant mercy of her assailants.[64] Examples of a climate of fear include situations where a trafficker initially preys on the victim's vulnerabilities, by feigning love and/or promising comfort, and then replaces professions of love with invocations of fear, by performing violence on others with the victim witnessing, boasting about violence committed against others, and threatening harm against third parties, including the victim's family, particularly children.[65]

During opening and closing arguments as well as during the STE's direct testimony, prosecutors can itemize each step a trafficker takes in creating a climate of fear. The prosecutor can, then, conclude that the perpetrator deliberately subjects the victim to a constant state of panic, desperation, and fear in order to make the victim more malleable and subject to the perpetrator's whim. The perpetrator's aim at every stage of the grooming process is to make the victim feel that she is in a constant state of panic because she is ceaselessly subject to threat, particularly if she fails to recognize the perpetrator's sovereignty through compliance and obeisance. A STE can also explain "how a person whose survival was constantly under threat would perceive kindness differently than a person whose survival was not threatened."[66] As in battered women cases, a STE can explain how the cessation of violence, in an atmosphere dominated with fear, can be perceived as a demonstration of kindness.[67]

In the case of JD7, Wahim's conduct covers the spectrum from subtle to severe. In a deft move, his telling JD7 that she should be happy to be his "woman" because her predecessor was too smart serves several purposes: (1) it deliberately plays on her multilayered alienation and vulnerability (feelings of isolation, like she does not belong and has been left behind); (2) it imposes an imposter status on her because she is taking someone else's rightful place; (3) it is commentary on her cognitive function, telling her that she is an idiot; (4) it is intended to communicate to JD7 that Wahim is the progenitor and gate keeper of who is worthy, smart, and deserving; (5) it lets her know that her existence is predicated on Wahim's whimsy; (6) it demonstrates to JD7 that Wahim controls her

64 Parker & Skrmetti, *supra* note 37, at 1036.

65 *Id.* at 1035-6.

66 Shirley Jülich, *Stockholm Syndrome and Child Sexual Abuse*, 27 J. OF CHILD SEXUAL ABUSE 107, 114-15 (2018).

67 *Id*.

space; (7) it is designed to make her evaluate her self-worth through Wahim's eyes; and most importantly, (8) it is intended to create sovereignty in him and obedience in her. A properly admitted STE can explain this seemingly trivial detail, in the context of all the other manipulations at play in rituals of spectacle and sex trafficking dynamics. Openings, closings, and STEs can tie Wahim's pillow talk into the larger themes of sex trafficking, namely the ways traffickers profile for vulnerability and exacerbate pre-existing trauma, all for the purposes of exploitation. Prosecutors can use STE testimony, opening statements, and closing arguments to inform the jurors that that these micro and macro aggressions are designed to keep JD7 prone in a male-dominated institution.

As argued in more detail below, race, gender, and class biases often render some societally vulnerable victims invisible and incapable of being harmed or believed. The shared biases of triers read societal scripts onto women's bodies, such that their very bodies become the source of blame— JD7 as "slut," for example. An inquiry into force, fraud, and coercion directs the factfinder's attention to the victim's agency, blameworthiness, responsibility, immorality, sexual availability, and consent, all of which are inextricably linked to intersectionality.[68] Successful prosecutions must pay careful attention to the presentation of evidence that humanizes the victim by establishing her particularity and specificity. In addition, prosecutors must provide a contextual framework in which to evaluate both the victim's and perpetrator's behavior. Where prosecutors fail to provide the proper context, the gravitational pull of the subconscious mind will lead the trier to moralize the victim and to evaluate her sexual work in a vacuum of victim blaming.

As in many sexualized violence cases, the defense may play to the implicit bias of the trier and place the victim on trial. More specifically, the defense may frame the victim in a manner that makes her victimization appear justified and deserved.[69] A victim's prior sexual history, however,

[68] Phillips, *supra* note 20, at 1656.

[69] The parallels between sexualized violence cases and the police or vigilante shootings of black people is striking. Both involve societally vulnerable victims, power performances on black bodies, victim blaming justifications for the performance, and reassurances to the community of order, as it is race, classed, and gendered. In the case of Trayvon Martin, for example, the defense dog whistled the myth of the black male rapist to a nearly all-white jury of women by, among other things, flashing Martin's bare-chested photos. Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" From Emmett Till to Trayvon Martin*, 102 IOWA L. R.

including her history of prostitution is both inadmissible and irrelevant to the "coercion" inquiry.[70] Any consent by the victim, prior to or after, the challenged commercial sex act lacks relevance as to the use of coercion or force.[71] Regardless of the admissibility of any sexually suggestive conduct, it is imperative that the prosecutor make clear to the jury that sex trafficking victims are not on trial. They are not parties to the proceeding and they lack standing. This can be made clear during voir dire as well as opening and closing arguments. During voir dire, opening statements, or closing arguments, prosecutors can say, "When people are mugged or robbed, they are not asked why they did not resist, and yet, sex trafficking victims are routinely asked this question. Is there more regard for property than there is for a woman's body?"

Sex trafficking trials should not showcase the morality of the victim. Prosecutors should make every effort to exclude the sexual histories of victims, including in limine motions, as far in advance of trial as possible. Such motions should demonstrate that the victim's unrelated sexual conduct is immaterial to the force or fraud inquiry.[72] Additionally,

1113, 1167 (2017).

[70] *See* United States v. Roy, 781 F.3d 416, 421 (excluding evidence of victim's prior prostitution as irrelevant to defendant's charged conduct); United States v. Valenzuela, 495 F. App'x 817, 819–20 (9th Cir. 2012) (per curiam) (holding whether defendants believed the victims were already prostitutes and would be, therefore, willing to continue "is irrelevant because there is ample evidence that the victims did not continue to work willingly once in the United States while the defendants harbored and maintained them with the knowledge that force, fraud, or coercion would be used to cause the victims to engage in commercial sex"); United States v. Cephus, 684 F.3d 703, 708 (7th Cir. 2012) ("They wanted to suggest that having already been a prostitute she would not have been deceived by [the defendant] and therefore her testimony that she was coerced into working for him—an element of one of the charged offenses when the prostitute is not a minor, 18 U.S.C. § 1591(a)—should be disbelieved. But the testimony sought to be elicited by the cross-examination would have been irrelevant. Even if no promises were made to [the victim], this would not be evidence that she consented to be beaten and to receive no share of the fees paid by the johns she serviced."); United States v. Rivera, No. 13-CR-149 KAM, 2015 WL 1886967, at *5 (E.D.N.Y. Apr. 24, 2015); Parker & Skrmetti, *supra* note 37, at 1036.

[71] Parker & Skrmetti, *supra* note 37, at 1040.

[72] *See* United States v. Rivera, 799 F.3d 180, 185 (2d Cir. 2015) (excluding victims' prior commercial sex acts as lacking relevance to coercion, finding that knowledge the sex might be part of the job did not mean they consented to commercial sex trade and citing United States v. Roy, 781 F.3d 416, 420 (8th Cir. 2015)); United States v. Valenzuela, 495 F. App'x. 817, 819–20 (9th Cir. 2012) (excluding questions about prior prostitution as irrelevant to force, fraud, coercion, or the victims' consent); United States v. Cephus, 684 F.3d 703, 708 (7th Cir. 2012) ("[Defendants] wanted to suggest that having already been a prostitute she would

the rape shield statute— Federal Rule of Evidence 412(a) provides another basis for exclusion based on a lack of materiality. If a court admits such evidence, as in the case of JD7, the prosecution should take an interlocutory appeal to exclude any sexually suggestive conduct by JD7 (such as her Facebook page) on relevancy grounds. The trial court's ruling in the case of JD7 clearly contradicted governing case law. JD7's peripheral sexual conduct had no bearing on coercion. As discussed in more detail in Part Two, JD7 will be hypersexualized and rendered undeserving of sympathy, yet exponentially deserving of antipathy for intersectional reasons. The admission of evidence about her sexually suggestive conduct will solidify the intersectional tracks already operative in the case. An interlocutory appeal, therefore, is worth the time to ameliorate the impact of implicit bias on her credibility. If JD7's peripheral sexual conduct does come into evidence, prosecutors can do two things. First, they should use case law that clearly recognizes that a victim's sexual behavior is irrelevant to draft a proposed jury instruction.[73] Second, as discussed in more detail in Part Four, JD7's Facebook conduct is consistent with many victims of sexualized violence, particularly a young girl who suffers from many layers of alienation and who finds a measure of self-worth through "likes" on her Facebook page. Both the prosecutor and STE can explain this to the jury.

PART THREE. THEORETICAL FRAMEWORK

Optimal sex trafficking theorizing starts with the ubiquity, permanence, and entrenchment of white heteropatriarchy.[74] Power, as it is

not have been deceived by [Defendant] and therefore her testimony that she was coerced into working for him . . . should be disbelieved. But the testimony sought . . . would have been irrelevant. Even if no promises were made to [the victim], this would not be evidence that she consented to be beaten and to receive no share of the fees paid by the johns she serviced.").

[73] *See* Parker & Skrmetti, *supra* note 37.

[74] As used throughout this piece, patriarchy is the "manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general." GERDA LERNER, THE CREATION OF PATRIARCHY 239 (1986). As used in this article, sexism is "the social, political, and personal expression of patriarchy." J. O'NEIL & R. NADEAU, MEN'S GENDER-ROLE CONFLICT, DEFENSE MECHANISMS, AND SELF-PROTECTIVE DEFENSIVE STRATEGIES: EXPLAINING MEN'S VIOLENCE AGAINST WOMEN FROM A GENDER-ROLE SOCIALIZATION PERSPECTIVE 94 (1999). Misogyny means hatred of women, but this simplistic, extreme-seeming definition "encourages us to underestimate both misogynists and their effects. It is . . . the implication of much feminist research, that misogyny is not the ideology of an extreme few, but rather a pervasive feature of Western culture." Judith M. Bennett,

raced, classed, and gendered is the deep undercurrent of sex trafficking cases. It creates the narratives, frameworks, and perceptions that inform the viewer, including prosecutors, defense attorneys, judges, factfinders, investigators, and the greater public. In order to design interventions and disruptions that ameliorate the reification of spectacle in the adjudicatory process, it is fundamentally necessary to understand this undercurrent and how it manifests in sex trafficking cases. As a result, Part Two grounds sex trafficking analysis in the doctrinal history of propertizing women, the material reality of subordination, and the obfuscating modes of justification that keep blame fixated on the victim. Borrowing from the lexicons of other disciplines, critical theories, and feminist discourses, the following theoretical frameworks demystify, decode, deconstruct, and make known and knowable the operations of race, class, and gender in sex trafficking for purposes of disrupting the spectacle and correcting and removing the taint of intersectionality from the evidence.

A. THE FEMALE AS PROPERTY

The controlling perceptions of vulnerable bodies is a direct outgrowth of chattel slavery, the buying and selling of human bodies, and its justifications. Victim blaming reflects an internalized discourse of domination and is a direct outgrowth of laws that made vulnerable bodies property, the classic examples being *Dred Scott v. Sanford*;[75] *United States v. Amy*;[76] and the laws of coverture. *Dred Scott* paradigmatically exemplifies the use of citizenship to create vulnerability for purposes of exploitation, specifically physical and sexual.[77] In *Dred Scott*, the denial

Misogyny, Popular Culture, and Women's Work, 31(1) HIST. WORKSHOP J. 166, 183 (1991). Finally, "[m]aterial subordination refers to the ways in which discrimination and exclusion economically subordinate minority groups to the majority." Yousef T. Jabareen, *Law, Minority, and Transformation: A Critique and Rethinking of Civil Rights Doctrines*, 46 SANTA CLARA L. REV. 513, 527 (2006).

[75] 60 U.S. 393 (1857); *see also* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr*., 103 HARV. L. REV. 985, 1030 (1990).

[76] 24 F. Cas. 792, 809-10 (C.C.D. Va. 1859) (No. 14,445) (Taney, C.J.).

[77] In *Dred Scott*, Chief Justice Taney, writing for the majority, famously declared that people in America of African descent had "no rights which white man was bound to respect" whether born free, set free, or enslaved. 60 U.S. at 407. Taney explained that the Constitution did not confer citizenship to African Americans. *Id.* at 404. They were "not included, and were not intended to be included, under the word 'citizens' in the Constitution" and "therefore [they can] claim none of the rights and privileges" of citizenship. *Id.*; Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright*

of citizenship to anyone of African dissent, left them without recourse to the courts or legal protection, and therefore vulnerable to unbridled performances of rape, power, and rituals of spectacle.[78] *Dred Scott* facilitated a property right in philandering, rape, and sexual exploitation; as well as a right of sovereignty in the owner and subordination in the victim.[79] The denial of citizenship to the enslaved enshrined the antebellum enslavers' economic investment in the enslaved's sexual function.[80] The denial of citizenship left the enslaved vulnerable and susceptible to "physical abuse, a lack of free will, forced labor, and social stratification."[81] In remarking on the economic motivations of owners to rape their enslaved, abolitionist Henry Highland Garnet concluded that the true treachery of slavery arose from the enslaver's desire to possess the sexuality of the slave, stating "Every man who resides on his plantation may have his harem, and has every inducement of custom, and of pecuniary gain, to tempt him to the common practice."[82]

Citizenship, 14 TEX. WESLEYAN L. REV. 255, 265-266 (2008) (citing *Dred Scott*, 60 U.S. at 404).

[78] *Dred Scott*, 60 U.S. at 406. *See also* Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 52, 75 (2005) (arguing that the paradigms of private property, enslavement, and sexuality shared a nexus of white males generating wealth and sexual gratification through cheap land, the exploitation of enslaved labor, and the exploitation of black female labor and sexuality; these paradigms interacted to create the white male "American Dream" of cheap land, cheap labor, and cheap sex).

[79] Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 81 (2005) ("[W]hite masters exploited enslaved black women to satisfy their desire for cheap sex."); *see also* Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 334 (1996) (citing Kimberlé Crenshaw, *Whose Story Is It, Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER 402, 413 (Toni Morrison ed., 1992)) ("[W]hile sexual contact between Black men and white women was rigorously policed, the sexual abuse and rape of Black women was decriminalized. This allowed for the full sexual exploitation of Black women's bodies and systematic sexual abuse without social consequences or legal sanction."); ULRICH B. PHILLIPS, AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION REGIME, 193-4 (2d ed. 1969) ("Consistent with the tenets of the legal support given to the property-enslavement nexus, the law allowed a white master to legally 'rape' his enslaved black women.").

[80] Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792 (1993) [hereinafter Katyal, *Men Who Own Women*] (noting "[b]oth pimps and antebellum slave masters have and had economic investments in women's sexual functions").

[81] *Id.*

[82] *Id.* at 801.

Two years after deciding *Dred Scott*, in *United States v. Amy*, the Supreme Court enshrined into law the enduring relationship between black women and the courts, that is— she is clearly recognizable for purposes of criminality and entirely invisible for purposes of humanity. In *Amy*, Chief Justice Taney – the very same Chief Justice who authored the majority opinion in *Dred Scot*—writing as a circuit judge in Virginia, held that the enslaved were recognizable for purposes of criminal punishment, but not cognizable as human for purposes of citizenship and constitutional protection.[83] The relationship of the enslaved to the law was for purposes of property and punishment, not protection. As Crenshaw argues, for the enslaved female, "[t]heir femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection."[84] This dichotomy is fundamentally important to an understanding of sex trafficking. Sex trafficking operates at the site of intersectionality because the female is synonymous with pathology, victim blaming, and moral scorn. She is synonymous with "slut." To the extent she is visible in the court, she is a criminal and unworthy of protection. Read more broadly to apply to other cases involving societally vulnerable victims, the societally vulnerable body is coterminous with pathology and moral blame.

Bradwell v. Illinois[85] is part of a continuum of laws that created vulnerability for purposes of normative white heteropatriarchal performances, particularly sexualized violence. In *Bradwell*, the Supreme Court constitutionally denied women the rights of full citizenship, thereby explicitly entrenching "the dependence of women and their exclusion from civil and political life." [86] Political scientist and legal scholar Elizabeth Beaumont points out that *Bradwell* exists along a continuum of laws that created a right in men to dominate women, including marriage as a status contract, regulation of divorce and child custody, legal treatments of women's obligations for housework and child care, lack of recognition of marital rape, and legal sanctioning of domestic violence.[87]

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[83] *See* United States v. Amy, 24 F. Cas. 793, 809-10 (C.C.D. Va. 1859) (No. 14,445) (Taney, C.J.) (finding that an enslaved was a "person" for purposes of the criminal laws of the United States, even though she is "the property of the master" and "not a citizen" and listing reasons why slavery is "explicitly recognized" by the Constitution).

[84] *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 143 (1989).

[85] Beaumont, *supra* note 21, at 668 (discussing Bradwell v. Illinois, 83 U.S. 130 (1872)).

[86] *Id.*

[87] *Id. See* Okin, *supra* note 23, at 122-30; *see also* CAROL DUBOIS, WOMAN SUFFRAGE

According to Beaumont, through this conflated relationship between gender and explicit legal precepts, historical and hegemonic forms of domination have mutated, adopted, and evolved to reproduce subordination in the present.[88]

Slavery and coverture allowed men to strengthen their dominant position over women and importantly laid the foundation for modern approaches to victims of sexualized violence.[89] The ideologies, discourses, and strategies that entrenched these property codes continue to have tremendous traction in our shared societal consciousness. Although women's formal legal status has changed, contemporary approaches to crimes that are predominantly committed against women, including sexual harassment, sexual assault, and sex trafficking, all of which belie "an underlying commitment to female subordination and female difference."[90] A legislator, judge, or juror may not explicitly conceptualize women as property, or exhibit any other overtly sexist viewpoints, but the approach to female victims of sexualized violence often belie closely held gender bias, particularly the view that women's bodies are property.[91] As Angela Harris argues, "[C]riminal violence emerges not simply out of the desire to control, but out of an extreme emotional dependence, coupled with an unwillingness or inability to see the woman as a separate and independent person."[92]

This bias manifests when jurors, practitioners, and judges maintain a fixed pathological gaze on the victims of violence to the advantage of the accused and distinct disadvantage of the victim. Obsessive fixation on the consent of the victim fortifies the idea of women's bodies as the property of men. The final judgment of conviction represents a value judgment between the victimization of the vulnerable body and the entitlement of the privileged body. Adherence to concepts embedded within victim blaming, such as the idea that a woman's words or actions can provoke an assault, serves to maintain male power in male-dominated institutions.[93] This tactic can be used to shift the blame away from the perpetrator and onto the victim, which completes the objective

AND WOMEN'S RIGHTS (1998).

88 Beaumont, *supra* note 21, at 668.

89 Okin, *supra* note 23, at 122-30.

90 *Id.* at 96.

91 *Id.*

92 Angela P. Harris, *Gender, Violence, Race and Criminal Justice*, 52 STAN. L. REV. 777, 791 (2000).

93 Okin, *supra* note 23, at 96-97.

of Foucauldian obfuscation in that it allows men, the dominant group in heteropatriarchy, to maintain power by shifting blame onto the victim.[94] By way of illustration, the constant pathologizing of the victim or victim blaming exposes the assumption that women are responsible for the violence of men and that women are responsible for male desire to control women. For example, each of the following preoccupations or questions belie the fundamental attitude that women's bodies belong to men and are proper canvasses for male desire: Was she wearing a short skirt; was she being flirtatious; did she ask for it; was she out late; was she drinking: why didn't she know better; why did she wait so long to come forward with her claims; why didn't she complain or report the accused's behavior before; why didn't she resist; or something happened to her, but she just doesn't know who did it.[95]

In an abstract sense, trafficking victims inspire sympathy, but once law enforcement, the judicial system, and the public confront male prerogative, entitlement, and privilege, identification with the victim diminishes and dwindles.[96] Juries are inclined to doubt the credibility of women, particularly when their accusations challenge explicit and implicit presumptions of rape culture, including the assumption that women's bodies are the province of male pleasure.[97] Unlike victims of

[94] Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator Focused Approach*, 6 U. ST. THOMAS L.J. 28 (2008).

[95] In the fall of 2018, such victim blaming tropes (in conjunction with an over valorization of the accused) were played out on the national stage when Dr. Christine Blasey Ford testified before Congress, alleging that now-Supreme Court Justice Brett Kavanaugh had sexually assaulted her years ago, while the two were still in high school. Prosecutor Rachel Mitchell, acting on behalf of Congressional Republicans, questioned— directly and impliedly— Dr. Ford's motives in coming forward, her credibility, and her memory. Dr. Ford, herself a research psychologist and professor, framed her experience in terms of her expertise; though there were aspects of her memory impacted by time and trauma, "Indelible in the hippocampus is the laughter— the uproarious laughter between [Kavanaugh and his friend Mark Judge], and their having fun at my expense." *See* Emily Tillett et al., *Christine Blasey Ford Concludes Her Testimony "100 Percent" Sure Kavanaugh Assaulted Her*, CBS NEWS (Sept. 28, 2018, 2:58 PM), https://www.cbsnews.com/live-news/brett-kavanaugh-hearing-confirmation-today-christine-blasey-ford-sexual-assault-allegations-live/.

[96] Jill Laurie Goodman, *The Idea of Violence Against Women: Lessons Learned from United States v. Jessica Lenahan, the Federal Civil Rights Remedy, and The New York State Anti-Trafficking Campaign*, 36 N.Y.U. REV. L. & SOC. CHANGE 593, 627 (2012).

[97] The idea of the female body as male province is so deeply embedded that when it is challenged, the reaction is sometimes explosive. As an example of the explosiveness of some men who are threatened when their domination and supremacy are challenged. *See* April Fulton, *In Texas And Beyond, Mass Shootings Have Roots In Domestic Violence*,

other crimes, like burglary, another transgression that involves a taking or theft, sex trafficking victims are often pathologized as not telling the truth and inclined toward delusion, unless of course, the victim is white and the perpetrator is black.

In the case of JD7, the prosecution may consider voir dire questions and opening and closing arguments that acknowledge the legacy of propertizing female bodies. By making these issues salient, jurors can (perhaps) acknowledge the wrongfulness of victim blaming.[98] For example, the prosecution can state the following during voir dire, "In this country, we once owned people. In this country, we once thought that it was okay to reduce sexual organs into commodities for exchange and trade on an open market. At one time, as a society, we did that. It was a part of our legacy, a dark time. Now, however, we no longer find it acceptable to own people. In fact, we have outlawed the ownership of human beings. We have moved away from thinking that when someone is sold, they asked for 'what they got.' We no longer believe that anyone has a right to anyone else. We no longer believe in myths that allow for anyone to own anyone else. When we blame the victim, we imply that her conduct validated the harm caused to her. For instance, in a rape case, when we ask was the victim wearing a short skirt, drunk, or out too late, we are saying that the penalty for wearing a short skirt, being out too late, or drinking is rape. We are saying that somehow this behavior excuses rape because it provokes rape. We have moved away from the idea that anyone has a right to someone else, that men have a right to women, particularly when women give them the green light by wearing a short skirt, drinking, or staying out late. Now, does anyone have any problem

NPR (Nov. 7, 2017, 4:53 AM), https://www.npr.org/sections/health-shots/2017/11/07/562387350/in-texas-and-beyond-mass-shootings-have-roots-in-domestic-violence?utm_campaign=storyshare&utm_source=twitter.com&utm_medium=social ("While perpetrators of domestic violence account for only about 10 percent of all gun violence, they accounted for 54 percent of mass shootings between 2009 and 2016."). Daniel Webster, director of the Johns Hopkins Center for Gun Policy and Research in Baltimore, Md, notes that mass shootings "fit[] a pattern of easy access to firearms of individuals who have very controlling kind[s] of relationships with their intimate partners and are greatly threatened when their control is challenged." *Id*.

[98] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in A Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1556 (2013) (arguing "when an individual claims he shot a young black male in self-defense, the police, prosecutor, judge, and jury are likely to find reasonable the individual's claim that he felt he was being threatened by the young Black male unless mechanisms are in place to make the operation of racial stereotypes in the creation of fear salient").

with that whatsoever?" [Excuse those from the venire that do.] Then, continue. "We do not legally require anyone to prove that it was physically impossible to escape. Does anyone have a problem with that?" During opening and closing statements, the prosecution can continue to elaborate on these themes.

Furthermore, a properly qualified STE can carefully discuss the lasting impact of propertizing women in sex trafficking cases. A STE can discuss the ways in which male sovereignty over vulnerable bodies manifests in victim blaming and male entitlement to vulnerable bodies. The direct examination should be careful so as not to appear too academic and to also avoid sensitive issues that may cause jurors to recoil, which is also part of hegemony. Even if a prosecutor elects not to make the implicit explicit by highlighting the salience of intersectionality, the prosecutor should be aware of the doctrinal and historical legacy that frames victims and that awareness should inform the presentation of evidence, including necessary interlocutory appeals.

B. EVALUATING AGENCY IN THE CONTEXT OF VULNERABILITY

Vulnerability is the lynchpin of exploitation. Vulnerability is the result of structural and institutional forces that create inequality in power and control over resources.[99] Economic disparities and limited opportunity place the precarious in circumstances, where they are hypervulnerable to exploitation and hyperexposed to sex trafficking.[100] The aim of this article is to create litigation strategies that change the distribution of power by using STEs to change the distribution of perception. These interventions may position societal institutions, like the courts, law enforcement agencies, and the individuals inside them to recognize the humanity of sex trafficking victims, and thereby, prompt greater attention to their exploitation.

Optimal theorizing about sex trafficking explicitly recognizes the role of race, class, and gender in creating the material subordination necessary for vulnerability and exploitation. The material subordination that intersectional animus creates is ubiquitous in its impact, creating uneven distributions of social, political, and economic vulnerability; opportunities; educational ambitions; security; protection; longevity;

[99] Phillips, *Black Girls*, *supra* note 20, at 1672.
[100] *Id.*

jobs; earning capacities; access; career trajectories; agency;[101] power; social cache; respect; prestige; self-worth; and roles in law and policy.[102]

A material subordination-based critique of sex trafficking places it on a continuum of systemic and structural inequality as well as sexualized violence,[103] as opposed to flawed moral choices gendered as female, raced as black, or classed as poor.[104] Sex trafficking victims exercise their agency within the context of power. This is not an effort to eviscerate the agency of the sex trafficking victim, but to evaluate her conduct in the proper context of her limited opportunities. Optimal litigation strategy can fixate the examination of evidence on economic forces driving sexual exploitation and not voluntary choices.

Where force and fraud are material issues, defense attorneys, of

[101] "Agency" is the capacity of individuals to act independently and to make their own free choices. By contrast, structure is those factors of influence (such as social class, religion, gender, ethnicity, ability, customs, etc.) that determine or limit an agent and his or her decisions. CHRIS BARKER, CULTURAL STUDIES: THEORY AND PRACTICE 448 (2005).

[102] Beaumont, *supra* note 21, at 679. Although the concentrated scope of this paper is limited to domestic sex trafficking, material subordination as the foothold of sex trafficking is a repeated pattern globally. According to Raymond et al., five structural factors contribute to the increase in sex trafficking internationally: economic policies, globalization of the sex industry, male demand, female vulnerability as a consequence of gender inequality, racial myths and stereotypes, and military presence. JANICE G. RAYMOND ET AL., A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS, 1-3 (2002). Many studies suggest that poverty makes women vulnerable to trafficking because of lack of education, knowledge, job opportunities, and government protection.

[103] Perpetrators of sexualized violence target individuals who are vulnerable or lack power. Donna Greco & Sarah Dawgert, *Poverty and Sexualized Violence – Building Prevention and Intervention Responses*, PENN. COALITION AGAINST RAPE 1 (2007), http://www.pcar.org/sites/default/files/resource-pdfs/poverty_and_sexual_violence-_building_prevention_and_intervention_responses.pdf. Poverty is among the root causes of sexualized violence, where poverty often serves to silence and discredit victims, especially when it is compounded by other forms of oppression and isolation. *Id.* Persons with a household income under $7,500 are twice as likely as the general population to be sexual assault victims. *Id.* at 8. Additionally, there is a strong relationship between sexualized violence and homelessness, where sexualized violence can be both an antecedent to and consequence of homelessness. *Id.* Victims and survivors are often dependent on their perpetrators for basic needs such as housing and shelter. Escaping sexualized violence often means becoming homeless. Upon becoming homeless, individuals are at a greater risk for sexual victimization. *Id.* at 12. 92% of a racially diverse sample of homeless mothers had experienced severe physical and/or sexualized violence at some point in their lives. In a study of homeless and marginally housed people, 32% of women, 27% of men, and 38% of transgendered persons reported either physical or sexual victimization in the previous year.

[104] Beaumont, *supra* note 21, at 671 (discussing OKIN, *supra* note 23).

necessity and as a first line of attack, highlight the victims' agency, willingness, or consent. Prosecution strategy, including expert testimony, are vitally important in reconfiguring the frame that surrounds the sex trafficking victim and determining her credibility. The goal of prosecution strategy should be to flip the gaze of pathology from the victim to the perpetrator and to keep it there. Contextualizing the victim's conduct in her material subordination, particularly the victim's socio-economic background, may ameliorate the sting of the pathological fixation on the victim. It requires the factfinder to view the victim in the context of her reality and not the frames that extend and excuse male desire over vulnerable bodies, like victim blaming. Without the proper context, jurors will have an extremely difficult time evaluating demeanor evidence, the victims' credibility, or the believability of the victim's claim.[105] Anchoring sex trafficking in the patterns of inequality presents the added yield of restoring the victim's credibility by explaining reluctant testimony, mistaken complicity, and grooming at the hands of predators. At a minimum, grounding the actions or inactions of victims in the context of material subordination mitigates against the tendency to problematize the victim and to ignore the circumstances that give rise to the victim's decision-making, vulnerability in the first instance, and diminished opportunity to exercise agency. Concentration on material, political, and social vulnerability moves the evaluation away from reducing victims to failed moral agents and instead focuses on the context in which the crime occurred. Intersectional inequality creates the world in which both traffickers and victims act and in which triers make a relative value judgment between victims and assailants as reflected in the verdict. Contextualizing sex trafficking in material subordination is, therefore, fundamentally necessary to understand the sex trafficking impulse, dynamic, and evidence.[106]

Grounding sex trafficking analysis in the narrative and legacy of inequality and the material subordination it creates, provides the proper foundational analysis for viewing each aspect of the sex trafficking spectrum, including the pre-trafficking violence that many victims

[105] In most instances, people in human trafficking schemes are socially vulnerable due to, for example, sexual abuse in childhood, race and sex inequality, drug addiction, and poverty. *See generally* John Elrod, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961 (2015); Ronald Weitzer, *The Mythology of Prostitution: Advocacy Research and Public Policy*, 7 SEXUALITY RES. & SOC. POL'Y 15 (2016).

[106] Beaumont, *supra* note 21, at 668.

endure; the violence that traffickers inflict on their victims;[107] the profiling of vulnerability that pimps master and later use to control and manipulate their victims; the coerced decision to trade prosecutors for pimps that many victims make in order to avoid obstruction or contempt charges or forced registration as sex offenders[108] for refusing to cooperate against their assailants; [109] and the victim blaming, "slut" shaming, and corresponding overvalorization of perpetrators that judges, juries, and the public engage when assessing the victim's credibility, particularly in comparison to the perpetrator's.

Existing case law allows for the admission of evidence that particularizes the victim and explains her susceptibility and vulnerability. When Congress added "coercion," it allowed juries to consider (1) the victim's vulnerabilities and (2) how the trafficker preys on those vulnerabilities.[110] Evidence of a particular vulnerability is admissible to demonstrate how the trafficker exploited the victim in order to "coerce" the commercial sex act.[111] With respect to coercion and force under § 1591, the jury must consider whether a reasonable person of the same background and in the same circumstances would perform or continue performing commercial sexual activity in order to avoid incurring the threatened harm.[112] In making this determination, the jury will be

[107] Butler, *Racial Roots*, *supra* note 34, at 1476-77.

[108] Blanche Cook, *Complicit Bias: Sex-Offender Registration as a Penalty for Obstructing Sex-Trafficking Prosecutions*, 96 NEB. L. REV. 138, 140 (2017).

[109] The same vulnerability that makes victims attractive to pimps finds victims at the mercy of prosecutors who threaten them with charges for refusing to testify against their assailants. These threats are particularly resonant for victims that are poor, and therefore, unable to afford their own representation and are left without an advocate during the course of a sex trafficking prosecution. Blanche B. Cook, *Stepping Into the Gap: Violent Crime Victims, the Right to Closure, and a Discursive Shift Away From Zero Sum Resolutions*, 101 KY. L.J. 671, 673 (2013) [hereinafter Cook, *Stepping Into the Gap*] (citing Danielle Levine, Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in A System of Public Prosecution*, 104 NW. U. L. REV. 335, 341-46 (2010)).

[110] Parker & Skrmetti, *supra* note 37, at 1040.

[111] In *United States v. Mack*, the Sixth Circuit upheld the conviction of a defendant who used "addictions to his advantage by supplying 'free' drugs to the victims, which not only resulted in a high (and fictitious) drug debt, but also exacerbated their addictions." 298 F.R.D. 349, 354 (N.D. Ohio 2014), *aff'd*, 808 F.3d 1074, 1082 (6th Cir. 2015). *See also* United States v. Fields, 625 F. App'x 949, 952-953 (11th Cir. 2015) (upholding an instruction to the jury that it could "consider the victims' special vulnerabilities," where defendant withheld pills from the victims to cause sickness if they did not engage in prostitution).

[112] *See Mack*, 298 F.R.D. at 354 (affirming jury instruction directing consideration of whether the victim "reasonably believed that she had no choice except to remain in the

instructed to consider the "[victim's] particular station in life, physical and mental condition, age, education, training, experience and intelligence."[113]

Drawing from the case study, the litigation strategy, including voir dire, opening and closing arguments, and STE testimony should ground an understanding of JD7 in her enhanced vulnerability as a result of her societal and political alienation and subordination, including her race, sex, class, national origin, religion, and ethnicity. JD7's social markers, the sexual trauma she endured before sex trafficking, and opioid addiction, creates a paradigmatic profile of exploitable vulnerability. Moreover, an expert can explain that drug use is often a form of self-anesthetization from the pain of unbridled vulnerability as well as a trait that traffickers profile in order to control and manipulate victims. Such testimony, then, can turn unfavorable demeanor evidence into relevant evidence that goes to coercion because it explains the victim's particular susceptibility. Properly qualified expert testimony can provide an indispensable framework in which to assess JD7's action and inaction.

C. IMPLICIT BIAS

Decades of neuroscience, cognitive testing, and empirical proof establish the omnipresence of implicit biases. "Implicit bias is the cognitive stereotypes, underlying associations, schematic pairings, and negative perceptions regarding social markers, like gender, race, ethnicity, national origin, religion, age, sexual orientation, and weight, that operate at largely 'preconscious' or 'nonintentional' levels."[114] Implicit bias is the meaning we attach to objects and bodies in the unfiltered and unregulated mind.[115] It is the nanosecond associations of a societally vulnerable body, whether it is raced, gendered, or classed with

service of the [defendants]"); *see also* United States v. Bell, 761 F.3d 900, 908 (8th Cir. 2014) ("A reasonable person in this situation likely would have found his threats of harm credible, especially when Bell physically assaulted Olewnik, carried a weapon, and knew other pimps who could carry out his threats.").

[113] 2 MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 47A.03 (2017); *see* 18 U.S.C. § 1591(e)(4) (2012); *see also* United States v. Djoumessi, 538 F.3d 547, 552–53 (6th Cir. 2008) (recognizing that evidence of a victim's known vulnerabilities, including age, are relevant to a "serious harm" determination under 18 U.S.C. § 1584); United States v. Alzanki, 54 F.3d 994, 1002 (1st Cir. 1995) (holding that "[i]t was entirely proper to instruct the jury to consider [the victim's] background and experience in assessing whether her fears were reasonable").

[114] Beaumont, *supra* note 21, at 671 (discussing OKIN, *supra* note 23).

[115] Cook, *Biased and Broken Bodies*, *supra* note 6, at 573.

suspicion, dangerousness, and the need to be controlled and the equally immediate pairing of a societally privileged body with innocence, righteousness, entitlement, and the need to be vindicated.[116] This schematic pairing produces demonized bodies and simultaneous overvalorized or hypervalorized ones. This dichotomy is fundamentally operative throughout sexualized violence cases as well as cases involving societally vulnerable victims and privileged perpetrators, such as cases involving white police officers shooting black victims.

Implicit bias, however, is not merely isolated to the realm of ideas or thought, having no impact on material reality; rather, implicit bias research provides a broad range of empirical proof and analyses that demonstrate how nanosecond associations and schemas of judgment create distortions of perception and evaluation that directly impact decision-making and behavior[117] and manifest in ubiquitous structural patterns of inequality.[118] Nearly thirty years of empirical and experimental studies and meta-analyses establish the ubiquity of implicit bias as well as its concretization as material inequality in education, employment, and legal institutions.[119] Implicit bias is particularly problematic in white heteropatriarchal dominated institutions, like law, where both implicit and explicit bias stripped women and persons of color of placement and elevation within the judiciary and prosecutors' and public defenders' offices, and consequently, constrained the influence of women and persons of color on adjudication.[120] Implicit bias dictates judicial predispositions toward women or persons of color, as defendants, plaintiffs, victims, and lawyers and then directly skews judgments, sentencings, and treatment in cases involving sex trafficking, domestic

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[116] *Id.*

[117] Beaumont, *supra* note 21, at 673 (discussing OKIN, *supra* note 23).

[118] *Id.* at 671 (discussing OKIN, *supra* note 23) (citing nearly two dozen studies since 1973 where raters considered job candidates' files showing identical qualifications for conventionally "male" jobs ranging from police officer to CEO, they consistently rated candidates lower when they thought they were women—regardless of the rater's gender).

[119] *Id.* at 673 (discussing OKIN, *supra* note 23) (citing Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1315 (2000); Virginia Valian, *Beyond Gender Schemas: Improving the Advancement of Women in Academia*, 20(3) HYPATIA J. FEM. PHIL. 198 (2005); J.T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORG. BEHAV. 39-69 (2009); Martha Chamallas and Jennifer B. Wriggins, *The Measure of Injury: Race, Gender and Tort Law*, 61 J. LEGAL EDUC. 495 (2010)).

[120] Beaumont, *supra* note 21, at 673, n.14.

violence, rape, alimony, sexual harassment, and child support.[121]

Implicit bias frames the way we see evidence. In intraracial sexualized violence cases, under the lens of gender implicit bias, femaleness, or the female body alone, is the site and evidence of temptation, duplicity, cunning, and untrustworthiness while maleness is the evidence of innocence or justified aggression.[122] Implicit bias dictates that the societally vulnerable or female body becomes proof of wrongdoing and criminality and the societally privileged or male body reflects goodness and righteousness.[123] Implicit bias research demonstrates that pathology perpetually clings to the societally vulnerable body and overvalorization or hypervaluation[124] melds with the privileged male body; thus, even where the privileged male body commits sexualized violence, it is perceived and explained as innocent, such as locker room talk,[125] and where the female body is engaged in innocence, it is perennially pathological.[126] In intraracial sexualized violence cases, implicit bias necessitates sympathy for the male offender.

The gaze of pathology references the internalization of the dominant discourse, whether it is raced, classed, sexed, or gendered, and the ways in which implicit bias becomes part of the architectural structure of the brain such that it frames the evidence and circumvents the adjudicatory process by turning the victim into villain and villain into

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[121] *Id.* (discussing OKIN, *supra* note 23, at 132-33).

[122] Cook, *Biased and Broken Bodies*, *supra* note 3, at 573. In the case of race, "L.Z. Granderson says that there is a subconscious element of our culture that looks at a black corpse and quietly puts it, instead of the perpetrator, on trial." L.Z. Granderson, *Why are Black Murder Victims Put on Trial?*, CNN (2013), http://www.cnn.com/2013/11/15/opinion/granderson-whites-shooting-blacks/index.html (last visited Oct 8, 2017). Similarly, in the case of gender, there is a subconscious element of our culture that looks at a sex trafficking victim and quietly puts that body, instead of the perpetrator, on trial.

[123] *See* KELLY BROWN DOUGLAS, STAND YOUR GROUND, 81, 83 (2015) (discussing use of the media to make the black male body synonymous with crime). *See also* Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, 19–20 (2015), http://sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf (last visited Feb. 7, 2017) (discussing the media's role making the black body synonymous with crime).

[124] *See* DOUGLAS, *supra* note 123, at 81, 83.

[125] During the 2016 presidential election, when 12 women had accused Republican Party nominee Donald Trump of sexual harassment, Trump was heard bragging about groping and kissing women on a recorded tape. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST, Oct. 8, 2016. Later, President Trump recharacterized the conversation as "locker room banter."

[126] Cook, *Biased and Broken Bodies*, *supra* note 3, at 573.

victim. In order for white heteropatriarchal power to perfect its sovereignty, it must be seamlessly internalized such that it appears natural, obvious, and just the way things are.[127] The existence and sustainability of white heteropatriarchy necessitates an internalization of the dominant discourse so totalizing that the victim and jury believe in the righteousness of the victim's victimization and the perpetrators' entitlement to it.[128] Internalization serves a legitimating hegemonic function: Pathology clings to the body of the victim and overvalorization grafts onto the perpetrator. Regardless of the circumstances the gaze of pathology remains fixated on the vulnerable body and the gaze of overvalorization becomes synonymous with the overvalorized body.

In sexualized violence cases, the pathological gaze presents a useful framework for explaining two detrimental impacts on evidence: (1) the constant overpathologizing of the victim, which leads to the (over)criminalization of victims and victim blaming, and (2) the simultaneous counterpart of overvalorizing perpetrators, which precipitates an overidentification with the defendant by all stakeholders, including the victim, lawyers, judge, and jury. Internalization of the dominant discourses manifested as implicit bias causes victims to over identify with their perpetrators in a kind of Stockholm Syndrome attachment; jurors to engage in victim blaming, according pathology to the victim and overvalorization to the perpetrator; triers, litigants, and judges to turn victims into villains and villains into victims; and victims to rapidly comprehend their victimization interracially, but falter intraracially.[129] If left unchecked, implicit biased frameworks not only

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[127] Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1714 (1998).

[128] Ann Kegler defines entitlement syndrome as follows:

> Entitlement syndrome is when a person (usually a white man) overestimates his own skills, relative to others. He believes he deserves not only respect for his accomplishments (no matter how mediocre) but also success. He doesn't have to go above and beyond to qualify for excellence, and if he doesn't get the success he deserves, it's not his fault. He can use vocal fry, upspeak, and "sorry" and "just" because he expects to be judged solely on the content of his speech. He also believes he deserves the benefit of the doubt at all times, a partner who is much more attractive than him, and copious amounts of public space.

Anna Kegler, *Hillary Clinton, Melissa Harris Perry and the Opposite of Imposter Syndrome*, HUFFINGTON POST (March 27, 2016, 9:00 PM), http://www.huffingtonpost.com/anna-kegler/hillary-clinton-and-the-opposite-of-imposter-syndrome_b_9553190.html. Note that this entitlement to public space includes female bodies. A female body simply appears as another frontier.

[129] Black men are disproportionately policed and prosecuted as traffickers. Phillips,

frame the way we see evidence, they exist before we see the proof; determine what counts as evidence; determine the presumption of innocence, as well as guilt; dictate the outcomes of both the investigation and adjudication; invert the adjudicative process; and reallocate both the order of proof and the burdens of persuasion in adjudicative proceedings.[130] Left unchallenged, victims of sexualized violence become the villains and their assailants, the unwitting dupes. Experts can locate the intersectional dynamic between all of the stakeholders, including victim, perpetrator, judge, jury, prosecutor, defendant, and the public, in the larger context of structural racism, sexism, and classism. Like eyewitness cases, for example, bank robberies, sociological, psychological, and implicit bias expert testimony can be used to make the jury aware of its biases.

The case study is a paradigm for internalized implicit bias or the ways in which both perpetrators and victims internalize the dominant discourse such that victims believe that they are deserving of their abuse and villains believe that they are entitled to their conduct. Further exacerbating these intertwined and intersectional problems, the behavior of both victim and villain not only appear normative, but benefit from a privileged immunity wherein internalized implicit bias makes abuse appear normal, natural, and just the way things are. Victims' internalization of abuse as deserved is also experienced as shame and reinforced by isolation from others through moral condemnation.[131] Within this field, expert witness testimony is necessary to decode the victim's internalized victimization as well as the perpetrator's privilege in exacting treachery.

By way of example, JD7 is fraught with internalized self-alienation on the imbricating vectors of race, gender, ethnicity, national origin, and religion. She is a young, poor Sudanese female thrust into an alien world. The animus she experiences around her and its subsequent internalization, are not just her "feelings," which is just another effort at

Black Girls, *supra* note 20, at 1675; WILLIAM ADAMS ET AL., U.S. DEP'T JUST., EFFECTS OF FEDERAL LEGISLATION ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 7 (2010), https://www.ncjrs.gov/pdffiles1/ojjdp/228631.pdf.

[130] Cook, *Biased and Broken Bodies*, *supra* note 3, at 568. When police officers kill and brutalize unarmed black people, the grand jury proceeding is inverted, such that prosecutors defend the perpetrators of violence and make the case for justifiable homicide beyond a reasonable doubt, when they would normally aggressively prosecute the targets establishing guilt by a probable cause standard.

[131] Jülich, *supra* note 66, at 117.

victim blaming, casting her subjugation as a problem of her perception, but rather the entire world around her reinforces her material subordination. At the same time, she identifies with the men in her life. Because the world around her reifies her alienation, she internalizes the image, which makes her increasingly susceptible to manipulation. To judge, jury, and JD7 herself, her exploitation becomes well-deserved and justified. Strategic deployment of expert testimony can make this process explicit and understandable to the trier of fact, and in doing so, it can disrupt the potential repetitive process of spectacle in the courtroom.

D. INDIFFERENCE

Part of the persistence, tenacity, and utter adaptability of inequality, despite numerous efforts at reform, is a basic obfuscating denial and refusal to acknowledge the pathology embedded in supremacy, whether it is white, male, or ruling class. In a Foucauldian sense, power obfuscates through denial. Neutrality, or the deliberate decision to ignore inequality in operations of law, whether it is post racialism, colorblindness, gender neutrality, or gender negligence, is a form of denial and is particularly effective because it allows inequality to persist. When racism, classism, or sexism are viewed in a vacuum and not seen as systemic, but rather isolated or aberrant, victim blaming is all that is left. Neutrality writes implicit bias a blank check because it allows it to run rampant and because it robs change of its agent. It destroys the very mechanism to correct, namely the ability to diagnosis the problem or remediate. As Beaumont argues, a key finding of gender implicit bias research demonstrates a fundamental flaw of gender neutrality: Although many people believe that they exercise judgment based on neutral criteria, such as merit or experience, they more often times than not engage underlying, unacknowledged prejudices.[132] The seamless internalization of gender implicit bias is reflected in the similar rates at which both men and women exhibit gender implicit prejudice. A refusal to openly acknowledge gender can thwart genuine neutrality, particularly where people do not believe that they display explicit bias, endorse equality, and believe they are using neutral criteria and applying impartial reasoning.[133]

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[132] This is particularly true in discussions involving race, particularly discourses surrounding affirmative action, where white achievement is made natural through the auspice of merit, experience, and seamless entitlement and black achievement is regarded with suspicion, derision, and loathing.

[133] Beaumont, *supra* note 21, at 673 (citing MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPORT: HIDDEN BIASES OF GOOD PEOPLE (2013)).

A refusal to address race, class, or gender allows the alleged "subconscious" cognitive stereotypes, underlying associations, schematic pairings, and negative perceptions to persist. A refusal to acknowledge, address, challenge, disrupt, or dismantle the operations of gender allows its tenacity to replicate again and again and again.

In the case of racism, implicit bias works in tandem with colorblind and post-racial ideologies, which function both to deny that racial differences exist and thus to deny that racism itself exists.[134] Post racialism and colorblindness is an ideology that serves to maintain the white status quo by obfuscating the source of inequality and legitimizing existing racial disparities.[135] Like gender neutrality, it robs change of its vehicle. Colorblindness is a legitimizing ideology that denies the existence of institutional and structural racism and in turn uses victim blaming as a rational method to explain racial disparity.[136] This, in turn, can lead to the legitimization of inequality through words and actions.[137] Colorblindness is a counterintuitive worldview that may actually demonstrate a heightened sense of prejudice and intolerance in whites, rather than a method that reduces the effect of racial prejudice.[138] Studies have demonstrated that among white adults, increased adherence to colorblind beliefs is related to "greater levels of modern racism, racial and gender intolerance, and a belief in a just world."[139]

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[134] Helen A. Neville et. al., *Color Blind Racial Ideology: Theory, Training, and Measurement Implications in Psychology*, 68(6) AMERICAN PSYCHOLOGIST 455 (2013).

[135] *Id.* at 460.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 461.

[139] *Id.* For more information on studies demonstrating the link between colorblindness and racism, *see generally* Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL'Y. 473 (2011); Helen Neville et al., *Construction and Initial Validation of the Color-Blind Racial Attitudes Scale (CoBRAS)*, 47(1) J. COUNS. PSYCH. 59-70 (2000). It is imperative to note that denial, whether in post racial or gender-neutral form, represents a fatigue with social change and perhaps equality. For example, the recent wave of sexual harassment terminations against significant men of power, like Harvey Weinstein, Matt Lauer, and Senator Al Franken may represent a utopian vision for women and victims of sexualized violence; however, they may also represent a dystopian vision to many men and perpetrators, particularly ones that see sexual harassment as flirtation. By way of analogy, the gains of the Civil Rights movement may represent a utopian vision for some, but they represent a dystopian vision for others. Deniability returns normalcy, normativity, and the status quo, all very comforting for the those currently holding power. In describing the disconcerting feeling of many men during the empowerment of women and victims of sexualized violence in the current sexual harassment crisis, Amber Tamblyn captures

Refusing to acknowledge the intersectionality of victims through an absence of intersectional salience allows the jurors' implicit biases to evaluate the victim in a prism of victim blaming and the gaze of pathology. Making intersectional inequality salient through the use of expert witnesses can fundamentally reverse the tendency of triers to blame. Expert testimony that centralizes the intersectionality of the victim may refocus the jury's attention from the multitudinal forms of victim blaming, particularly where the expert can explain the victim's behavior within the context of race, class, and gender— made salient to the jury through the victim's background.

E. THE INVISIBLE HAND OF WHITE HETEROPATRIARCHY

In *Gender Justice v. The "Invisible Hand" of Gender Bias in Law and Society,* Elizabeth Beaumont posited the theoretical framework of the "invisible hand of gender" to capture how implicit bias contributes to broad structural patterns of inequality.[140] In rejecting Kantian notions that (1) individual actors act rationally and (2) such reasoned actions collectively produce national wealth, Beaumont argues that invisible hand processes, particularly the invisible hand of gender bias, can explain behavior as well as outcomes. Beaumont's invisible hand of gender can be used to expand an intersectional approach to white heteropatriarchy.

Beaumont suggests that in fact, "irrationality" and bias are "the real invisible hand[s] that drive[] human decision making."[141] Borrowing from Beaumont, the invisible hand of gender possesses several central

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the moment as follows:

> That's why the male writer wanted to talk about redemption. The idea appeals to the men I've been talking with, I believe, because they want a sense of normalcy restored. They want measured discussion of consequences, not swift punishment. They want us to leave poor Al Franken and his harmless grabbing alone. I've heard several male friends talk about text chains they are on with other men only; they describe it as a safe space to talk about how they feel in this moment. They feel afraid, disoriented and discounted. And I understand their need for such comfort and security. I am a woman. I know nothing other than needing such comfort and security, for my entire life. *Id.*

Amber Tamblyn, Opinion, *I'm Not Ready for the Redemption of Men*, NY TIMES (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/opinion/im-not-ready-for-the-redemption-of-men.html.

[140] Beaumont, *supra* note 21, at 673-74.

[141] Beaumont, *supra* note 21, at 668, 674 (citing DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (revised and expanded ed., 2010)).

tenets for understanding the pervasiveness of implicit gender bias, which are equally applicable to other social markers such as race. It presents a "bird's-eye view" model for describing social phenomena: how undetected psychological forces and behavioral motivations can 1) lead to individual judgments and actions and 2) endlessly adapt to local environments, thereby perpetuating durable social outcomes or "equilibrai"—even 3) in the absence of centralized planning—so universally held and unchallenged that it requires no conspiracy—for these ultimate outcomes, such as through law or public policy, and 4) even when most people are not consciously attempting to participate, perpetuate, or promote inequality.[142] Drawing from Beaumont's work, the invisible hand of white heteropatriarchy describes a social dynamic in which implicit bias and false neutrality inform individual perceptions, interactions, and decisions, both generating and helping to legitimate and disguise a cycle of inequality.[143] The invisible hand of white patriarchy's genius is its endless mutability.[144] This is a useful framework for conveying the complex relation between patterns of individual behavior and structural inequality.[145] It also teases out the underlying details involved in rituals of spectacle. The invisible hand of white heteropatriarchy helps us understand some of the social dynamics that continue to shape law and undermine basic requirements for formal legal equality, particularly as they shape sex trafficking cases.

F. LITIGATION STRATEGY

The invisible hand of white heteropatriarchy makes the case for interventions and disruptions in sex trafficking cases. Without interventions, judges, juries, prosecutors, and defense attorney will reperform spectacle in the adjudicative process. The absence of intersectional salience allows the unspoken hand of white

[142] Beaumont, *supra* note 21, at 668 (discussing OKIN, *supra* note 23) (citing Laurie Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERS'LTY & SOC. PSYCHOL. BULL. 1315 (2000)); Virginia Valian, *Beyond Gender Schemas: Improving the Advancement of Women in Academia*, 20(3) HYPATIA J. FEM. PHIL. 198 (2005); J.T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORG. BEHAV. 39-69 (2009); Martha Chamallas & Jennifer B. Wriggins, *The Measure of Injury: Race, Gender and Tort Law*, 61 J. LEGAL EDUC. 495 (2010)).

[143] *Id.*

[144] PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 7 (2017).

[145] Beaumont, *supra* note 21, at 673-74.

heteropatriarchy to dictate the outcome. The invisible hand of white heteropatriarchy is particularly useful in understanding sexualized violence and the entrenchment of white heteropatriarchy in the case of JD7. It may be unlikely that investigators, prosecutors, defense attorneys, triers, and judges will explicitly proclaim intersectional animus against JD7 based on her race, gender, national origin, religion, or age. Implicit bias research and the invisible hand of white heteropatriarchy, however, make clear that explicit deliberations are not necessary, rather, the triers' intersectional animus toward JD7 is so strongly held that it need not be spoken in order to be operative. Cynthia Lee argues that making the social marker of race salient, during adjudication, provides finders of fact with an opportunity to consciously regulate their biases. Lee suggests that one means of making race salient is for the prosecution to unmask biases during voir dire.[146] By way of illustration, a prosecutor might say, "I have only one client in this case. My client is you, the United States of America. I also have witnesses. Some of my witnesses are poor. Does anyone have a problem with that? Some of my witnesses are women. Does anyone have a problem with that? Some of my witnesses are black. Do you believe that you can continue to be fair and impartial? Some of my witnesses, like the defendants, are Muslim. Do you believe you can be impartial and fair? In fact, you will hear expert testimony that my witnesses make ideal candidates for sex trafficking because they are poor, female, black, Muslim, and from another country. Do you think that you can fairly and impartially evaluate their testimony?" In addition, prosecutors can submit a questionnaire to the trial court asking the voir dire panels if they believe they can be fair across the intersectional axes and use their answers to make for cause challenges. As Lee suggests, if the trial court permits the prosecutor to inquire into bias during voir dire, the prosecutor would do well not to alienate the prospective jurors by interrogating them, particularly about their biases.[147] Instead, a prosecutor should be strategic in making the jury more cognizant of the ways in which bias may impact the jurors' own perceptions.[148] Prosecutors should consider submitting a questionnaire to the jury, evaluating their biases in conjunction with the

[146] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in A Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1592 (2013) (noting that inquiries into bias during voir dire is not prohibited, but left to the discretion of the trial court) (citing Ristaino v. Ross, 424 U.S. 589, 594 (1976) ("Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.").

[147] *Id.* at 1593.

[148] *Id.*

defense. Similarly, during arguments, a prosecutor may want to turn potentially lethal biases into cause for juror sympathy. For example, a prosecutor might argue, "My witnesses are poor, black, women, from Sudan, who practice Islam. You assured me that you can be fair and impartial. You should also know that the layered identifies of my witnesses are just what drew the defendants to my witnesses in the first place. Their poverty, on top of isolation, made them the perfect profiles for manipulation, desperation, and control."

PART FOUR. QUALIFYING A SEX TRAFFICKING EXPERT WITNESS (STE)

The following section outlines the law necessary to qualify an expert in a federal sex trafficking case.

District courts are the initial screeners or "gatekeepers" to prevent unreliable expert testimony from reaching the jury.[149] A trial court, however, has "broad latitude" in determining whether an expert's testimony is reliable and in deciding how to determine the testimony's reliability.[150] The party proposing the expert has the burden of establishing the expert's admissibility by a preponderance of the evidence. Under Federal Rule of Evidence 702, an expert may testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[151] Courts

[149] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) [hereinafter *Daubert I*]; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999); Restivo v. Hessemann, 846 F.3d 547, 575 (2d Cir. 2017).

[150] *See* Lore v. City of Syracuse, 670 F.3d 127, 155 (2d Cir. 2012) (noting courts of appeal apply "abuse-of-discretion review to a trial court's evidentiary rulings. . . [t]he same abuse-of-discretion standard of review applies to rulings on the admissibility of expert testimony"). *See also* Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1064 (9th Cir. 2002) (citing United States v. Hankey, 203 F.3d 1160, 1167 (9th Cir. 2000)); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999); McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1237 (11th Cir. 2005).

[151] FED. R. EVID. 702 provides, in relevant part as follows: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. In summary and for purposes of understandability, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

have routinely found that the relationship between pimps and prostitutes is not the subject of common knowledge, and as a result, STE testimony is frequently admitted under Rule 702.[152] Rule 702 requires three distinct inquires: (1) whether the expert is appropriately qualified, (2) whether her testimony is relevant, and (3) whether her testimony is reliable.[153] Rule 702 "contemplates a broad conception of expert qualifications."[154] "As

(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

[152] *See* United States v. Taylor, 239 F.3d 994, 998 (9th Cir. 2001) (stating that testimony of an academic expert on the relationship between prostitutes and their pimps was found admissible); United States v. King, 703 F. Supp. 2d 1063, 1071 (D. Haw. 2010) (noting that a pediatrician was qualified to testify as expert on dynamics of pimp-prostitute relationship); State v. Donaldson, 2014-Ohio-3621, ¶ 12 ("[b]ased on Price's unique experience and first-hand knowledge of a world few people are ever exposed to, we find that the court did not abuse its discretion in allowing Price to testify as an expert in sex trafficking"); United States v. Carson, 870 F.3d 584, 590 (7th Cir. 2017) (admitting that a STE who helped explain how the desperate situations in which victims find themselves make them easy targets for sex trafficking); United States v. Willoughby, 742 F.3d 229, 238 (6th Cir. 2014) (upholding a federal agent as qualified to give expert testimony about the methods pimps use to control their victims).

[153] *See Daubert I* (noting that relevancy is distinct from reliability); *Mukhtar*, 299 F.3d at 1066 n.11 (noting that whether an expert is properly qualified is distinct from whether expert testimony is reliable).

[154] Courts have recognized a wide range of knowledge, skill, experience, education, or training when assessing whether an expert is qualified in sex trafficking cases. *See, e.g.*, United States v. King, 703 F. Supp. 2d 1063 (D. Haw. 2010) (nothing that Dr. Sharon Cooper, pediatrician was qualified to testify as expert on dynamics of pimp-prostitute relationship; expert had extensive experience and training as developmental and forensic pediatrician, had extensive experience presenting at numerous national and international conferences in area of child sexual exploitation and human trafficking, had authored multiple chapters for books and training materials on sexual exploitation, and was lead editor of two-volume treatise on child sexual exploitation, and taught a 40-hour class on prostitution four to six times per year, training investigators, prosecutors, judges and others on sexual exploitation through prostitution, including training related to pimp-prostitute relationship dynamics); United States v. Brooks, 610 F.3d 1186, 1195–96 (9th Cir. 2010) (qualifying an expert with no advanced degree based on eight years of police experience; twenty to twenty-five full-scale child prostitution investigations; approximately fifty extended interviews with pimps and prostitutes; undercover work as sex worker; specialized trainings and lecturing on child prostitution; supervisory experience; previous experience as an expert witness; and publications); United States v. Bryant, 654 F. App'x 807, 814 (6th Cir.), *cert. denied*, 137 S. Ct. 412 (2016) (rejecting defendant's claim that agent failed to qualify as expert because he had not performed research, compiled data, or applied research; instead finding the following satisfied qualifications: years as FBI agent, FBI Liaison to the National Center for Missing and

the terms of the rule state, an expert may be qualified either by 'knowledge, skill, experience, training, or education.'"[155] An expert testimony's must fall within her area of expertise, whatever that expertise may be and however it may have been acquired.[156] Rule 702 does not require official credentials in the relevant subject matter for expert testimony. In qualifying an expert, prosecutors should elicit the following information during direct examination: education; specialized training; publications; prior expert testimony; experience interviewing both victims and traffickers; number of interviews; consultations with law enforcement organizations, including police departments and prosecutor's offices; review of academic literature, documentaries, government studies, reports, survivor memoirs, pimp "how-to" books, blogs, and videos; presentation and instructor experience; awards; and, where relevant, prior experience investigating sex trafficking cases as lead agent.

Following *Daubert*, several circuits have fashioned a two-prong test for admissibility of a qualified expert's testimony. First, the proffered testimony must be reliable, i.e., the expert's testimony reflects scientific knowledge, scientific method produces the results, and the work product amounts to "good science."[157] Second, the testimony must meet the "fit" requirement of relevancy, specifically "it logically advances a material aspect of the proposing party's case."[158] A court's determination of relevancy "must be 'tied to the facts' of [the] particular case."[159] In carrying out this inquiry, a court has discretion and flexibility in determining what evidence is relevant, reliable, and helpful to the trier of fact. [160]

Exploited Children, and running the Northwest Ohio Violent Crimes Against Children Task Force); s*ee also* United States v. Smith, 520 F.3d 1097, 1105 (9th Cir. 2008) ([n]o specific credentials or qualifications are mentioned [by Federal Rule of Evidence 702].").

[155] *Id.* (quoting FED. R. EVID. 702).

[156] *See* White v. Ford Motor Co., 312 F.3d 998, 1008-09 (9th Cir. 2002) ("A layman, which is what an expert witness is when testifying outside his area of expertise, ought not to be anointed with ersatz authority as a court-approved expert witness for what is essentially a lay opinion.").

[157] Daubert v. Merrell Dow Pharm., 43 F.3d 1311, 1315 (9th Cir. 1995) (citation and quotation marks omitted) [hereinafter *Daubert II*].

[158] *Id.*

[159] Cooper, 510 F.3d at 942 (quoting Kumho Tire, 526 U.S. at 150).

[160] *See* United States v. Cordoba, 104 F.3d 225, 228 (9th Cir. 1997) ("District courts must strike the appropriate balance between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible approach outlined in *Daubert [I]*.") (citation omitted).

In determining reliability, the focus is on the expert's "principles and methodology, not on the conclusions that they generate."[161] Rule 702 "demands that expert testimony relate to scientific, technical or other specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs."[162] It should be noted that social science research, theories and opinions cannot have the exactness of hard science methodologies, and expert testimony need not be based on statistical analysis in order to be probative.[163]

In establishing reliability, courts consider the following nonexclusive factors: (1) whether the theory, technique or method the expert uses to form her opinion can be or has been tested; (2) the known or potential rate of error in the expert's theory, technique, or method; (3) whether the theory, technique, or method has been subjected to peer review and publication; (4) whether there are standards controlling the theory, technique, or method's operation; and (5) the general acceptance of the theory, technique, or method within the relevant community.[164] An expert need not use a scientific or technical method to establish the requisite degree of reliability that Rule 702 demands.[165] Instead,

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[161] *Daubert I* at 595.

[162] *Cooper*, 510 F.3d at 942 (quotations and citations omitted).

[163] United States. v. Joseph, 542 F.3d 13, 21 (2d Cir. 2008).

[164] *See id*. at 942-43; United States v. Prime, 431 F.3d 1147, 1152 (9th Cir. 2005). Not all of these factors, however, may be applicable in a given case. *See Kumho Tire*, 526 U.S. at 151.

[165] *See, e.g.*, United States v. Lopez-Martinez, 543 F.3d 509, 515 (9th Cir. 2008); United States v. Mejia-Luna, 562 F.3d 1215, 1219 (9th Cir. 2009). Despite the seemingly hypertechnical requirements to satisfy "reliability," courts have routinely accepted a wide range of methods and approaches in satisfying the reliability prong. *See, e.g.*, *King*, 703 F. Supp. 2d 1063 (finding reliability based on the following: medical practice and personal interviews with victims about their experiences, including substance abuse, intimate partner violence, and associated medical problems, and research on clinical case analyses and investigative intelligence from law enforcement professionals, including the FBI and undercover operations, and studying the work of other researchers). *See also* United States v. Shamsud-Din, No. 10 CR 927, 2012 WL 280702, at *7 (N.D. Ill. 2012) (relying on reliability based on doctors' background, experience, qualifications, and previous admission as STE in another case); United States v. Jackson, 299 F.R.D. 543, 546 (W.D. Mich. 2014) (upholding reliability based on five years as coordinator of an Ohio task force on sex trafficking, experience training officers across the US, and in Serbia, and status as FBI liaison to National Center for Missing and Exploited Children); United States v. Geddes, 844 F.3d 983, 991 (8th Cir. 2017) (confirming reliability of STE testimony based on status as member of human trafficking task force, 14 years of experience in human trafficking investigation, and experience as special agent with Minnesota Bureau of Criminal Apprehension); United States v. Brooks, 610 F.3d 1186,

experience and training can provide a reliable basis for an expert's opinions. [166]

One of the most advantageous reasons to use STE testimony is that courts allow such testimony to establish *modus operandi*. In moving for the admission of STE testimony and in defending its admission, it is imperative to note that courts routinely admit expert testimony regarding the *modus operandi* of sex trafficking, human trafficking, and drug trafficking enterprises, among other types of criminal schemes.[167] "The

1195-96 (9th Cir. 2010) (upholding reliability based on two years' experience in vice enforcement unit, participation in over twenty child prostitution investigations, fifty extended interviews with pimps and prostitutes, experience as an undercover sex worker, specialized trainings, and experience lecturing on subject of child prostitution).

[166] *Id.*; *see also Shamsud-Din*, 2012 WL 280702, at *3 (finding both reliability and qualifications based on education, experience, and background, and that courts do not require experts from the social sciences to demonstrate rigid methodologies or statistically significant studies in order to prove reliability); *see, e.g.*, *Joseph*, 542 F.3d at 21 (holding that "[s]ocial science research, theories and opinions cannot have the exactness of hard science methodologies and expert testimony need not be based on statistical analysis in order to be probative") (internal citations and quotation marks omitted); Mihailovich v. Laatsch, 359 F.3d 892, 919 (7th Cir. 2004) ("[T]he *Daubert* framework is a flexible one that must be adapted to the particular circumstances of the case and the type of testimony being proffered[.]"); Dhillon v. Crown Controls Corp., 269 F.3d 865, 870 (7th Cir. 2001) ("Of course, *Daubert* is a flexible test and no single factor, even testing, is dispositive."); Lawson v. Trowbridge, 153 F.3d 368, 375 (7th Cir. 1998) (upholding expert testimony of police officers that "was not scientific — either in a hard or soft (social science) way — and it was entirely descriptive rather than based on empirical study of any sortFalse").

[167] United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984) (stating that in drug trafficking cases, a law enforcement agent is allowed to testify as to "the general practices of criminals to establish the defendants' *modus operandi*False"); *King*, 703 F. Supp. 2d at 1067 (admitting expert testifying as to the typical means of targeting and recruiting victims, the circumstances that commonly make victims more susceptible to traffickers, and the common ways sex traffickers use force and coercion to maintain control and prevent victims from leaving); *Brooks*, 610 F.3d at 1196 (stating that detective's testimony contextualized witness testimony by explaining the role of the "bottom girl" and explaining how victims are methodically isolated from familiar areas); United States v. Anderson, 851 F.2d 384, 392 (D.C. Cir. 1988) (noting that STE testified that pimps often travel an intercity circuit with a group of 10 to 40 women, that pimps often encourage their victims to compete for affection and beat those who do not adhere to the pimp's rules, that victims are often too dependent on pimps to leave when they are beaten, that pimps often spend money on clothes and jewelry to support a "flashy" image as a source of status, and also testified as to the ways pimp-victim relationships typically end); *Jackson*, 299 F.R.D. at 546 (stating that the agent admitted to speak on "the hierarchical structure within a commercial sex trafficking organization, recruiting prostitutes, methods of control over prostitutes, methods of obtaining clients, and site selection/venue of prostitution," common characteristics shared by sex trafficking victims, and victim

federal courts uniformly hold . . . that government agents or similar persons may testify as to general practices of criminals to establish the Defendant's modus operandi."[168] The courts' willingness to allow modus

behavior); *Geddes*, 844 F.3d at 991 (emphasizing that the expert admitted to speak on the operation of a sex trafficking ring, including the recruitment of victims, the relationship between victims and pimps, and the jargon commonly used). For examples of experts being admitted to speak on the modus operandi of human trafficking criminal operations, *see Lopez-Martinez*, 543 F.3d at 514 (holding that the district court did not plainly err by admitting expert testimony about the methods and patterns of alien smugglers in the region); *Mejia-Luna*, 562 F.3d at 1219 (explaining that the agent noted how "alien smuggling operations typically operate, the division of responsibility among actors, methods used, and the manner and method of payment."). Courts also routinely admit expert testimony regarding *modus operandi* of drug trafficking enterprises. *See, e.g.*, United States v. Valencia-Amezcua, 278 F.3d 901, 909 (9th Cir. 2002) (concluding that the district court did not commit plain error by admitting agent's expert testimony regarding the structure and scope of methamphetamine lab operations); United States v. Thomas, 99 F. App'x 665, 668-69 (6th Cir. 2004) (highlighting that expert testimony on drug operations was relevant and probative and not unfairly prejudicial in drug courier trial); United States v. Solorio-Tafolla, 324 F.3d 964, 966 (8th Cir. 2003) (holding that the detective's expert testimony on drug trafficking, including how controlled substances including methamphetamine were distributed, investigation procedures, and manufacturing of methamphetamine, was admissible in drug conspiracy trial); United States v. Solis, 923 F.2d 548, 551 (7th Cir. 1991) (holding that the agent was properly admitted as an expert witness to testify about the use of beepers by drug traffickers); *see also Lawson*, 153 F.3d at 375-76 (admitting police officer expert testimony as to how to properly approach suspects wielding knives, despite the testimony not being based on empirical, or hard science, because officer was testifying about a specialized body of knowledge that was helpful to the jury).

[168] *See, e.g.*, *Mejia-Luna*, 562 F.3d at 1219 (citing *Johnson*, 735 F.2d at 1202). The routine use of experts to establish a general practice of criminals or criminal organizations is vitally important in arguing for the admissibility of a STE. Proponents can defeat the claim that STE testimony is merely pimp profiling, prejudicial to the defendant, violations of Fifth Amendment rights to due process or Sixth Amendment rights to a fair trial, or lacking in relevance because they are not case specific by rigorously arguing that courts routinely accept expert testimony in drug and alien smuggling cases of general criminal behavior in order to establish the defendant's *modus operandi*." *King*, 703 F. Supp. 2d at 1071. *See, e.g.*, *Lopez-Martinez*, 543 F.3d at 514 (finding that Agent Martinez' fourteen years as a border patrol agent, including five as Intelligence Chief, qualified him as an expert to testify about the methods and patterns of human smugglers); *Mejia-Luna*, 562 F.3d at 1219 (holding that the special agent's expert witness testimony was relevant and non-prejudicial where he described the structure and methods of alien smuggling operations, division of responsibility among the actors, and the manner and method of payment); United States v. Gibbs, 190 F.3d 188 (3d Cir. 1999); United States v. Griffith, 118 F.3d 318, 321 (5th Cir. 1997) ("[E]xperienced narcotics agent[s] may testify about the significance of certain conduct or methods of operation to the drug distribution business, as such testimony is often helpful in assisting the trier of fact understand the evidence." (quoting United States v. Washington, 44 F.3d

operandi expert testimony in drug and alien smuggling fully supports expert testimony in sex trafficking cases, including the pimp-prostitute relationship; the grooming process; pimp profiling of the victim; the use of emotional, physical, and substance abuse to manipulate the victim; and overidentification with the pimp.

The second inquiry, the "fit" requirement, is directed "primarily to relevance."[169] The "fit" requirement, however, is not merely a repeat of the general relevancy requirement under Rule 402.[170] Rather, the fit requirement addresses a concern that expert evidence can be both powerful and misleading, particularly given the difficulty in evaluating it. As a result, under Rule 403, the court in weighing possible prejudice against probative force exercises more control over experts than over lay witnesses.[171] "Federal judges must therefore exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that [the evidence] speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury."[172] Under Rule 401, evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[173]

PART FIVE. WHAT STE TESTIMONY LOOKS LIKE

In its simplest form, STE expert testimony can focus on the mechanisms and mechanics of sex trafficking, such as how pimps use cellphones and advertise victims on Backpage.com. Experts can explain the meaning of certain terms commonly used in the prostitution trade, such as "the game," "finesse pimp," "gorilla pimp," "escort," "the bottom bitch," and "throw aways." Far more important and probative, experts can provide the proper narrative and frame through which evidence should be assessed. Experts can reweight the pull of implicit bias. They can offer testimony that can reframe many of the seemingly intuitive

1271, 1283 (5th Cir. 1995))); United States v. Daniels, 723 F.2d 31, 32-33 (8th Cir. 1983) (expert testifying on general practices of drug dealers); United States v. Burchfield, 719 F.2d 356, 357-58 (11th Cir. 1983) (general practices of people passing counterfeit currency); United States v. Hensel, 699 F.2d 18, 38 (1st Cir.) (general practices of drug smugglers); United States v. Kampiles, 609 F.2d 1233, 1247 (7th Cir. 1979) (Soviet intelligence recruiting practices).

169 *Daubert I* at 591.

170 *Daubert II* at 1321, n.17.

171 *Daubert I* at 591.

172 *Daubert II* at 1321, n.17.

173 FED. R. EVID. 401.

preoccupations factfinders may have, such as, why didn't she just leave; why didn't she tell someone; why did she wait so long to say something; isn't she just a "slut"; wasn't she just asking for it; if she put herself out there, what did she expect; she doesn't act like a victim; and how could she possibly find safety and security in that pig. Experts can explain, "What exactly is going on," in ways that may not be intuitive to the factfinder. Experts can redirect the gaze of pathology from the victim onto the perpetrator and ameliorate preoccupations that perpetuate male entitlement to female bodies both subtle and overt. They can redirect implicit bias and victim blaming from the female body as the source of the problem toward a focus on the defendant. Experts can testify that victims of sexualized violence respond and react to trauma in a multitude of ways, including flat affect, anger, sometimes giggling, emotional connectedness to the perpetrator, and self-medication.

Experts can explain the complex dynamics, manipulations, grooming processes, profiling for vulnerability, and playing on those vulnerabilities that would incentivize a woman to sell herself sexually and then give her income to her trafficker, a dynamic that is hardly intuitive and maybe at odds with what the factfinder believes to be "common sense."[174] In fact, what the trier believes to be true about sex trafficking victims along intersectional axes may be utterly detrimental. Moreover, triers, who have not been subjected to these complex dynamics, may find it difficult to understand the reactions of victims and their unyielding loyalty to perpetrators.[175] Triers often ask themselves what they would have done if they were in the victim's shoes, frequently fantasizing that they would have fought their way to freedom. They may also disassociate from the victim by believing that a good "girl" would never put herself in that situation, a move which is particularly detrimental to a credibility determination because it casts the victim as impure, stupid, and untrustworthy. An expert, however, can explain that the grooming process is in so many ways manipulation by a thousand cuts. Experts can explain sex trafficking practices, including the hierarchical structure within a commercial sex trafficking organization;[176] the complex relationship between traffickers and victims; the enterprise of sex trafficking generally and its subculture; recruitment techniques and practices; traffickers'

[174] The Andrew Schulz, *Gunplay Breaks Down The Pimp Game - The Brilliant Idiots*, YOUTUBE (Aug. 14, 2015), https://www.youtube.com/watch?v=bjI9WZIcGeo (explaining the pimp dynamic).

[175] Jülich, *supra* note 66, at 111.

[176] United States v. Jackson, 299 F.R.D. 543, 546 (W.D. Mich. 2014).

methods of manipulation and control; a sex trafficking victim's restricted agency, lack of voice, instability, powerlessness, or inability to frame their experience as abusive; methods for obtaining clients; rules of determining price; site and venue selection for prostitution; the transitory nature of the business, often involving moving around in a city, region, or between states; common characteristics of females who are recruited into commercial sex trafficking; reasons for inconsistencies in a victim's testimony;[177] the behavior of men who are extremely threatened when their control or supremacy is challenged; victim vulnerabilities; the problems victims encounter when they try to leave "the life" or "the game"; trauma bonding, including Stockholm syndrome emotional attachments induced by promises of love, threats, and intermittent kindness, particularly for the societally isolated; patterns of learned helplessness; and victim behavior as it relates to prostitution. The following section treats these dynamics in detail.

A. PARTICULARITY AND MATERIAL VULNERABILITY

Prosecutors must actively combat the inherent bias or prejudices of the triers of fact. The conflation of race, class, and gender renders some victims invisible and their harms not only undetectable, but utterly justified, if not deserved. Prosecutors should use every opportunity to set forth evidence that humanizes and particularizes the victim, specifically proof that allows the jury to understand the context in which the victim acts. Providing the proper analytical framing and grounding moves the trier away from blaming the victim and instead focuses attention on victim's circumstances, all of which is saturated with intersectional inequality.

Furthermore, the prosecution can support the admission of expert testimony as it relates to "social framework evidence."[178] As Lee explains, the prosecutor can argue that just as expert witnesses have provided helpful information to juries on drug trafficking, alien smuggling,

[177] *See, e.g.*, United States v. Anderson, 851 F.2d 384, 392-93 (D.C. Cir. 1988) (stating expert testimony useful in helping a jury understand and evaluate inconsistencies in the victims' testimony and the reasons they might remain with a pimp even if he mistreated them); United States v. Anderson, 560 F.3d 275, 281 (5th Cir. 2009) (allowing expert testimony on behavior of pimps); United States v. Sutherland, 191 Fed. Appx. 737, 741 (10th Cir. 2006) (allowing expert testimony on general characteristics of prostitute recruitment and retention including use of affection, photographs, chemical dependency, trading prostitutes, and deprivation of family support).

[178] Lee, *supra* note 146, at 1597.

"eyewitness unreliability, post-traumatic stress disorders, or cross-cultural differences in the meaning of behavior," the STE can provide the jury with helpful "information about the social and psychological context in which contested adjudicative facts occurred" and "knowledge about the context will help the [jury] interpret the contested adjudicative facts."[179]

United States v. Anderson presents a classic example of the need for expert testimony in maximizing the prosecution strategy; mapping the particularity, vulnerability, and humanity of the victims; providing the proper context in which to view the actions and inactions of both victims and perpetrators; and assisting the tribunal in evaluating the credibility of the victims.[180] In *Anderson*, the court specifically noted that the relationship between sex traffickers and their victims was not a matter of common knowledge and as a direct result, expert testimony was warranted. After making that finding, the court accepted the expert's testimony about how pimps profile for vulnerability, particularly in young women; how pimps manipulate their victims in a "love-hate" dichotomy; and how victims are often so financially and psychologically dependent on their pimps that they are unable to leave even when they are beaten.[181] In addition, the court found the expert's testimony relevant because it might have "shed light on critical issues in the case," such as whether the victims traveled with the defendants consensually "or as part of a pimp-prostitute relationship."[182]The court also stated that such testimony "could have helped the jury to determine the credibility of the government's prostitute-witnesses, particularly where the defendant attempted to undermine the victims' testimony by claiming that they would have left the defendant if he mistreated them as they claimed."[183] The court observed that "[l]eft unrebutted, such cross-examination could have led the jury to speculate that the mistreatment alleged by the government did not actually occur; that the young women had traveled with defendant

[179] *Id.* (citing Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133 (1989)) ("social framework evidence can be defined solely by its function: to supply the [jury] with information about some aspect of human behavior to aid in interpreting disputed facts"). Lee also states that "as Vidmar and Schuller elaborate, '[t]he purpose of social framework evidence, as with any expert evidence, is to assist the trier of fact by providing information that is either unknown to the trier or potentially at variance with what the trier believes to be true.'" *Id*.

[180] *Anderson*, 851 F.2d at 393.

[181] *See id.* at 392.

[182] *Id.* at 393.

[183] *Id.*

voluntarily; and that they had not engaged in prostitution at his direction."[184]

In the case of JD7, a STE can testify about all the of the reinforcing layers of JD7's vulnerability, as well as JD7's seemingly counterintuitive behavior. For example, an expert can explain that teenagers that are conditioned to use "likes" on their Facebook pages or sexual provocativeness as a measure of their self-worth would use social media to cope with alienation, as a means of gaining some sense of control.[185] This would have been particularly crucial in the case of JD7 and other prosecutions that are unsuccessful in excluding irrelevant sexual conduct.

B. EXPLAINING THE RELUCTANT WITNESS AND THE SILENCING THAT COMES WITH VULNERABILITY

Sex trafficking prosecutions are uniquely distinguishable from most criminal cases because the strength of the government's case rises and falls on the credibility of the victim's testimony.[186] Although additional evidence may corroborate the victim's story, the bulk of the government's proof is the victim's believability. Credibility assessments

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[184] *Id.*

[185] Shaila Dewan, *She Didn't Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct Victims*, N.Y. TIMES (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/us/sexual-harassment-weinstein-women.html. Victims of sexual violence often act in ways that may seem counterintuitive to members of a jury, cutting against traditional understandings of how a victim "should" act. Counterintuitive behaviors, however, are often a result a reaction to or coping mechanism resulting from the sexual violence itself. *See generally* Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, (NAT'L DIST. ATTORNEYS ASS'N, Alexandria, Virginia) 2007.

[186] Reluctant victims or victims who are unwilling to testify can be highly problematic for prosecutors. If a victim does not want to testify or refuses to do so, where the case relies heavily on that victim's testimony, the prosecutor can either motivate the witness or allow the case to move forward without the necessary evidence, which will almost certainly end in a loss or a dismissal. There are many mechanism prosecutors can use to motivate the victim to testify, including the promise of a T-Visa. Some tools for motivation are not positive, however. Prosecutors can also use contempt orders and the threat of obstruction charges to convince victims to testify. *See generally* Stacy Caplow, *What If There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1 (1998). Prosecutors can also threaten victims with having to register as sex offenders on the national sex offender registry if they are convicted of obstruction. Blanche Cook, *Complicit Bias: Sex-Offender Registration as a Penalty for Obstructing Sex-Trafficking Prosecutions*, 96 NEB. L. REV. 138, 140 (2017).

are weighted with explicit and implicit biases. Intersectional instability makes sex trafficking victims highly problematic witnesses. Intersectionality frames the perception of credibility. Moreover, the layers of mutually reinforcing trauma that victims endure directly impacts their demeanor evidence. Sexually violated persons, like sex trafficking victims, are uniquely vulnerable to the prosecution, defense attorneys, their former assaillants, and the moral scrutiny of the triers. They are caught in a labyrinthine web of domination. If left unchecked, the trial process will reinforce, repeat, and reify these layers of mutually reinforcing inequality.

This is particularly true in force and fraud cases where defendants leverage their defense on the corruptibility of the victim's testimony by playing into the invisible hand of implicit bias. STE testimony, therefore, becomes particularly relevant within the meaning of 702, where defendants argue that if things were so bad, the victim would have fled; that the victim's reluctance to speak up or testify is indicative of the absence of coercion; or that the victim's stories and recollections are internally inconsistent and contradictory because they lack truth.[187] Without proper context, the hegemonic weight of implicit bias, internalization, and obfuscation will turn the victim into a villain—one that is morally blameworthy and deserving of what she received, and at best, complicit in her own demise. A STE can explain the myriad ways in which male-dominated institutions compel the vulnerable to assimilate and adapt to an internal *status quo* in order to survive;[188] that inconsistent stories and an inability to recall details are a direct result of trauma; that victims have been conditioned to remain and, like battered women, endure the most deplorable of conditions;[189] and that perpetrators encourage confusion and shame in order to control.

In order to provide the proper context in which to assess the victim's veracity, the prosecution should provide evidence that explains the victim's reluctance. Such information need not be limited to expert trial testimony, but may also be introduced by way of questions during voir dire, opening and closing statements, and sentencing hearing testimony, particularly where the Rules of Evidence do not apply. Contextual evidence should explain the problematic nature of sex

[187] *Anderson*, 851 F.2d at 393.

[188] Katie Rogers, *When Our Trusted Storytellers Are Also the Abusers*, N.Y. TIMES (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/us/politics/sexual-harassment-media-politics-lauer.html.

[189] *King*, 703 F. Supp. 2d at 1075.

trafficking victim testimony, particularly where victims are prey to layers of trauma,[190] including sexual and emotional abuse, often from immediate family members, that predate the sex trafficking. Pre-trafficking sexualized violence also makes victims enticingly attractive to traffickers who profile for vulnerability and are grand masters at exploiting it.[191] Traffickers also profile for vulnerability by selecting victims from dysfunctional homes, domestically abusive environments, poverty-stricken areas, opioid and other drug addiction,[192] and other unstable socio-economic circumstances. Many traffickers target young victims because there is a market demand for youth and because younger victims are easier to manipulate and control.[193] Further exacerbating pre-existing abuse, perpetrators traffic their victims under a cloud of moral opprobrium and slut shaming, which elongate victims' feelings of alienation and lack of self-worth.

Like other victims of sexualized violence, including sexual harassment, sex trafficking victims live in the spaces that implicit bias creates. They are all too aware of the pathological gaze that will blame them for their own victimization.[194] They understand that, at every phase

[190] As Cheryl Butler has pointed out, victims of sex trafficking are often persons made vulnerable to exploitation thorough structural racism and inequality, disproportionately women of color. Butler also argues that state-sanctioned structural racism and sexism have also made people of color vulnerable to physical and emotional abuse and hence, poor health. Forcing these victims to register, in particular, would be yet another layer of trauma inflicted on the already traumatized. *See* Butler, *Racial Roots*, *supra* note 34, at 1476-77.

[191] KAMALA D. HARRIS, THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA 21 (2012) ("Many domestic victims of sex trafficking are underage runaways and/or come from backgrounds of sexual or physical abuse, incest, poverty, or addiction."); *see also* Butler, *Bridge Over Troubled Water*, *supra* note 30, at 1291 (stating "[p]rior sexual assaults groom minors for prostitution" because a history of child sexual abuse lowers self-esteem making sex trafficking victims vulnerable to abuse and that children who flee sexual abuse in their families become members of the precarity as runaways and throwaways and therefore ripe for sexually exploitative adults).

[192] Researchers are just beginning to document the problem of sexualized violence and opioid addiction. *See* Martha Bebinger, *Women With Opioid Addiction Live With Daily Fear Of Assault, Rape,* NAT'L PUB. RADIO (Sept. 21, 2017, 5:01 AM), http://www.npr.org/sections/health-shots/2017/09/21/550730474/women-with-opioid-addiction-live-with-daily-fear-of-assault-rape.

[193] Katyal, *Men Who Own Women*, *supra* note 80, at 794 (noting the average age of beginning prostitutes is fourteen).

[194] In one study involving child sexual abuse victims, 252 women (between 18 and 65 years of age) who had reported contact and non-contact sexual abuse before the age of 16, were asked what prevented them from disclosing their abuse. In response, 65% of the

of the investigation as well as the adjudication, every decision they have made will be subject to exacting scrutiny and moral judgment. They understand that they will be caught in the cross hairs of intersectionality. They know that male-dominated institutions, like the SGS, will coalesce around the perpetrator, protect him, explain his conduct through justification, innocence, and "fun"; articulate the victim's action or inaction through condemnation; and subject the victim to endless retaliation for having agitated the "boys club."

In the case study, JD7 suffers from layers of alienation, all of which make her highly attractive prey for rituals of spectacle. A STE can explain JD7's layers of vulnerability in the context of the defendant's conduct, for example how her vulnerability made her attractive, subject to manipulation, and lacking in believability. A STE can explain the impact of her intersectionality on her demeanor evidence. This would include her reluctance to testify because she may be reluctant to feed into Islamophobic and white supremacist narratives read onto her body as well as those of the perpetrators', with whom she shares race, ethnicity, religion, country of origin, and experiences of alienation. In addition, JD7's community may perceive her testimony as betrayal and complicity with a greater Islamophobic scheme to destroy Islam and Muslim men in particular.[195] JD7, like other sex trafficking victims, requires expert testimony to make her visible to triers who might otherwise not see her or grossly misunderstand her.

C. THE GROOMING PROCESS AND *MODUS OPERANDI*

Aside from a history of sexual abuse, the sex trafficking itself along with its attendant manipulations is a form of sexualized violence and torture which further aggravates the initial sexual trauma.[196] In addition to profiling for vulnerability, traffickers are often masters of the

women provided multiple reasons: 29% expected to be blamed, 25% were embarrassed, 24% did not want to up- set anyone, 23% expected they would not be believed, 18% claimed they were not bothered by the abuse, 14% wished to protect the abuser, 11% feared the abuser, and 3% wanted to obey adults. Jülich, *supra* note 66, at 108.

[195] Mona Eltahawy, Opinion, *Muslim Women, Caught Between Islamophobes and 'Our Men*,' N.Y. TIMES (Nov. 19 2017), https://www.nytimes.com/2017/11/19/opinion/muslim-women-sexism-violence.html.

[196] *See generally* Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings Amounting to Torture and Other Forms of Ill-Treatment*, OSCE (2013), https://www.osce.org/cthb/103085?download=true.

"grooming process," physical, emotional, and psychological abuse designed to keep their "trade" in line, including rape and assault; threats of public shaming and exposure; threats to family members; threats to abduct and/or torture children; threats of deportation; social isolation; withholding of food, money, or identification; promises to fix their credit; customized seduction processes; emotional and "romantic" manipulation; substance abuse exploitation; customized opioid cocktails to forget the abuse and to get ready to work; lowering the victim's inhibitions about sex, through pornography as an example; and other forms of playing on and manipulating vulnerability. Moreover, "[t]hose who value others only instrumentally do not hesitate to destroy those lives when they are no longer useful," when they no longer garner a profit, withstand manipulation, or fail to present enticing canvasses for the performance of domination.[197] The process is particularly noteworthy in establishing force, fraud, and coercion because they represent common ways in which traffickers maintain control over their victims, prevent them from leaving, and make them more susceptible to manipulation.[198] The accumulation of trauma and stress can place the victim's counterintuitive behavior far beyond the understanding of the layperson.

In order to concretize the point, in *United States v. Winters*, the court allowed a forensic psychologist to testify about forced prostitution, particularly the ways in which layers of vulnerability reinforce the victim's susceptibility to manipulation and control.[199] In *Winters*, the expert testified that perpetrators create climates of fear through incremental layers of increased threats from seduction, to insult, and assault, all of which create a dehumanizing conditioning process designed to make victims feel completely helpless, dependent, and constantly panicked. The STE testified that the conditioning process included deprivation of proper diet, sleep, money, drugs, and means of identification. The more a victim resisted the conditioning process, the more likely her trafficker would subject her to increasing abuse designed to embed the feeling of complete helplessness. Eventually, the process becomes so effective that a trafficker need only make subtle threats to maintain control over the victim.

D. THE IMPACT OF THE INVESTIGATION AND

[197] Katyal, *supra* note 80, at 813.
[198] *See* United States v. Winters, 729 F.2d 602, 605 (9th Cir. 1984).
[199] 729 F.2d 602, 605 (9th Cir. 1984).

ADJUDICATION ON TESTIMONY

In addition to these waves of trauma, the victims' engagement with law enforcement and the legal process may also be traumatic. In the worst-case scenario, victims may have experienced assault, including rape from law enforcement. In addition, victims may be wounded from exposing the most intimate, explicit, and perhaps embarrassing, details of their lives with strangers, including jurors, investigators, prosecutors, defense attorneys, judges, and the public generally.[200] Law enforcement, like traffickers, often profile, pathologize, and problematize victims, treating them as villains and not victims. Victims may have long criminal histories, which may have been used to cross-examine them in the past and which may be used in the future, which should heighten prosecution efforts to exclude irrelevant criminal histories.

Prosecution-induced trauma may also include protracted proceedings that eviscerate a victim's ability to gain closure and to put the incident behind her;[201] violations of privacy rights; public exposure; and anxiety from unresolved prosecutions and anticipated testimony.[202] Lacking any representation in the courtroom, victims are vulnerable to the defendant, the prosecution, and the courts.[203] Victims are vulnerable to

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[200] Cook, *Stepping Into the Gap*, *supra* note 109, at 690.

[201] *Id.* at 672.

[202] *Id.* at 690.

[203] *Id.* Sex trafficking victims are rarely persons of means. Furthermore, victims do not have the right to counsel. For victims, this combination of disadvantages creates a formula for vulnerability throughout the criminal justice process, as well as an opening for another wave of traumatization. *See generally* George K. Goodhue, *Comment, Maryland v. Craig: Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual Abuse Trials*, 26 NEW ENG. L. REV. 497, 498 (2001) ("An extensive body of professional research clearly demonstrates that many victimized children, when forced to testify in open court in the presence of the accused, suffer a second victimization and traumatization."); Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 176 (2007) ("Researchers and scholars have noted that for many traumatized clients litigation and the legal process can result in re-traumatization."); *see also* ROGER K. PITMAN ET AL., LEGAL ISSUES IN POSTTRAUMATIC STRESS DISORDER, IN TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY AND SOCIETY 378, 378–97 (1996); James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1274 (2004) (noting that the effect of the legal process on sexual assault victims "has been referred to as the 'second injury' or 'second wound.'"); Edward J. Hickling et al., *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAS*, 55 DEPAUL L. REV. 617, 630 (2006) (citations omitted); Jennifer L. Wright, *Therapeutic*

the prosecution, particularly where prosecutors may force the victims to testify, using coercive methods at their disposal, like threats of deportation, obstruction charges, or having to register as sex offenders.[204] Equally, victims of trafficking "often do not immediately seek help or self-identify as victims of a crime due to a variety of factors, including lack of trust, internalization or self-blame, or specific instructions by the traffickers regarding how to behave when talking to law enforcement or social services."[205]

E. SUPPORT FOR STE TESTIMONY FROM OTHER SEXUALIZED VIOLENCE CASES

Additional support and rationale for the use of expert witnesses in sex trafficking litigation can also be drawn from sexual assault cases, particularly where the defense attempts to focus on the victim's morality, as opposed to the defendant's conduct.[206] The "traditional definition of rape, unlawful sexual intercourse with a female without her consent,

Jurisprudence in an Interprofessional Practice at the University of St. Thomas Interprofessional Center for Counseling and Legal Services, 17 ST. THOMAS L. REV. 509, 509 n.11 (2005) ("The risk of re-traumatization of clients who have to repeat and relive their experiences of abuse, first in the lawyer's office and then in court, is serious."). However, as Parker argues, if the legal process is handled correctly, it may be therapeutic. Parker, *supra* at 163.

[204] *See* United States. v. Joseph, 542 F.3d 13, 21 (2d Cir. 2008).

[205] *Myths and Misconceptions*, NAT'L HUMAN TRAFFICKING RES. CTR. (last visited Oct. 8, 2017), http://traffickingresourcecenter.org/what-human-trafficking/myths-misconceptions.

[206] *See, e.g.*, United States v. Simmons, 470 F.3d 1115, 1124 (5th Cir. 2006) (holding that expert testimony that victim's demeanor was consistent with that of sexual-assault victim did not impermissibly intrude upon the jury's fact-finding function by testifying to the ultimate issue as to whether victim was sexually assaulted); Beauchamp v. City of Noblesville, 320 F.3d 733, 745 (7th Cir. 2003) (explaining that expert's citing anecdotal rape research to explain victim's "failure to immediately notify the police that she had been raped" and her "inability to recall the details of the crime clearly" could "be consistent with that of a person who was raped."); United States v. Smith, 142 F.3d 438 (6th Cir. 1998) (admitting psychologist's testimony that "she was familiar with reactions of women who have been victims of rape or sexual assault and that women often do not report the incidents immediately" to rebut defendant's assertion that alleged victims "were unreliable because they did not immediately report their rapes and assaults."); United States v. Alzanki, 54 F.3d 994, 1006 (1st Cir. 1995) (upholding testimony based on expert's general research and personal interaction with hundreds of abuse victims that alleged victim's "behavioral response to the nonsexual abuse administered by the [defendants] was consistent with the behavior of abuse victims generally").

focuses the attention and burden of the trial on the victim."[207] In intraracial sexualized violence cases involving female victims and male perpetrators, verdicts reflect the relative societal value between men and women, allowing the gender implicit bias of the mind to inextricably link pathology to women and valor to men. In intraracial sexualized violence cases, as a necessary part of patriarchy, "it is the victim's behavior, rather than the defendant's, that is subject to intense scrutiny by the defense lawyer, the jury, and the community."[208] Expert testimony can redirect the juror's attention to the defendant's conduct and contextualize the perpetrator's and victim's actions within the wider societal framework in which the crime occurred and in which the jurors use their frames of reference. Expert testimony may sanitize the victim's testimony from the taint of racism, sexism, and classism, which may take the form of victim blaming, hypersexualizing the victim, and immunizing the defendant through "the slut defense." Like expert testimony in rape cases, STE testimony can walk the trier through the nuances of victim behavior and syndromes, such as Rape Trauma Syndrome (RTS), all of which "can correct jurors' misconceptions about sexualized violence and assist the jury in evaluating the victim's psychological injuries."[209]

Some victims may also experience trauma bonding or trauma-coerced attachment, a form of Stockholm Syndrome, a psychological ramification akin to being held in bondage.[210] Here, victims form strong attachments and dependencies to an abuser because the perpetrator exerts control over the victim by subjecting her to complex manipulations, abusive control tactics, power imbalances, and intermittent punishments and rewards. This again includes manipulations of drug addiction, feigned romantic or love interests, emotional and physical abuse, financial

[207] Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 694 (1990).

[208] *Id*. at 695.

[209] *Id.* at 710. *See also* Toni Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1984); Clare Carlson, *"This Bitch Got Drunk and Did This to Herself:" Proposed Evidentiary Reforms to Limit "Victim Blaming" and "Perpetrator Pardoning" in Rape by Intoxication Trials in California*, 29 WIS. J.L. GENDER & SOC'Y 285, 307 (2014).

[210] Chitra Raghavan & Kendra Dovchak, *Trauma-Coerced Bonding and Victims of Sex Trafficking: Where Do We Go from Here?*, 17 INT'L J. EMERGENCY MENTAL HEALTH & HUM. RESILIENCE 583 (2015) (stating that "[t]rauma-coerced attachment is hypothesized to be a dynamic, cyclical state in which victims form a powerful emotional attachment to their abusive partners").

dependency, assault, threats, and other manipulations of vulnerability.[211] Researchers have found that Stockholm Syndrome attaches when the following four conditions co-exist: (1) a perceived threat to survival and the belief that the perpetrator will carry out that threat; (2) the victim's perception of some small kindness from the perpetrator within a context of terror; (3) isolation from perspectives other than those of the perpetrator; and (4) perceived inability to escape.[212] In addition, the syndrome creates reluctance in victims to cooperate against their offenders because they have shared "intimate" relationships with their pimps, an intimacy, it must be emphasized, dependent upon exploitation.[213] These attachments may form an emotional boding that serves to protect the trafficker long after the sexualized violence has ceased.[214] Stockholm Syndrome may explain a victim's reluctance to cooperate and perplexing willingness to recant.

Furthermore, as discussed in Part Two, implicit bias necessitates an overdependence, over reliance, and overvalorization with power as it is raced, classed, and gendered. To the extent a STE is so qualified, the STE can testify as to the overvalorization of the perpetrator and the demonization of the victim. It should be noted that defendants, particularly in cases involving societally marked assailants, may also move for the admission of expert testimony in order to explain how they may be profiled (for example, the black male as hypersexualized). In such cases, the jury can weigh the competing evidence; however, the prosecution should attempt to tip the balance in its favor by exhaustively particularizing the witnesses.

In sum, the idiosyncrasies of sex trafficking prosecutions present a compelling case for STE testimony. Because the viability of an entire

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[211] *Id.*; *see also* United States v. Winters, 729 F.2d 602, 605 (9th Cir. 1984) (explaining where defendant directed jury's attention to the victims' failing to take advantage of opportunities to escape or call for help, as indicative of consent, expert testified that the victims suffered from PTSD and they lacked sufficient ego-strength, self-confidence, and willpower when they were in the threatening shadow of the defendant's domination over them).

[212] Jülich, *supra* note 66, at 112.

[213] *Id.* at 585 (citing JUDITH HERMAN, M.D., TRAUMA AND RECOVERY (1992)). From the perspective of the victim, her abuser is a romantic companion—one to whom she is emotionally loyal and, in some cases, one with whom she has children. In certain relationships, the romantic component is coercively introduced to facilitate control. This hybrid relationship is not always apparent because the massive power imbalance that undergirds it is carefully concealed by the abuser. *Id.*

[214] Jülich, *supra* note 66, at 107-08.

sex trafficking prosecution often rests on the credibility of the victim's testimony, expert witnesses are desperately needed to contextualize the perpetrator and the victim in the larger tapestry of vulnerability and gender inequality. The unique layers of mutually reinforcing trauma and its impact on victims might translate to jurors as an absence of credibility, believability, and integrity. STE testimony can explain why a victim may not have testified truthfully in previous proceedings.[215] Prosecutors must make strategic decisions about teasing out the particulars of the victim's circumstances in order to provide the proper context in which to assess her credibility, being mindful that certain characteristics may be read as moral blameworthiness.

PART SIX. ANTICIPATED OBJECTIONS AND RESPONSES

The following section addresses anticipated objections to STE testimony and provides counterarguments. Generally, there are four categories of STE objections: qualifications, relevance, reliability, and prejudice. Rule 702 recognizes a broad range of knowledge, skill, experience, and training. Consequently, lack of qualifications does not provide the best attack against STE testimony.[216] Courts routinely recognize expertise in law enforcement officers, particularly lead agents or officers who have extensive experience in sex trafficking. Courts also recognize social workers, psychologists, and other professionals with significant expertise. Most objections fall within the remaining categories of relevance, reliability, and prejudice. For ease of reference in defending against attacks to STE testimony, the following section addresses objections in the following order: relevance, impermissible profiling, prejudice, usurping the province of the jury, Crawford objections, and special Federal Criminal Rule of Procedure 16, discovery obligations.

A. RELEVANCE

Unlike the trial court in the case study of JD7, courts have rejected the exclusion of STE testimony based on the notion that sex trafficking is

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[215] *See Taylor*, 239 F.3d at 998.

[216] The federal courts have recognized "qualified" within the meaning of FRE 702, See FED. R. EVID. 702 ("a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify"), in the following cases: United States v. Anderson, 560 F.3d 275, 281 (5th Cir. 2009) (qualifying STE on typical characteristics of adolescent prostitutes and to the behavior of pimps based on expert's experience as director of center serving victims of sexual exploitation).

commonsensical.[217] On the contrary, courts have routinely found that the relationship between pimps and prostitutes is beyond the common experience of lay persons, and thus, expert testimony is helpful within the meaning of Rule 702. According to these courts, STE testimony provides necessary contextual background and assists the trier in understanding the evidence generally and in determining a material fact.[218] More specifically, courts have recognized the usefulness of STE testimony when establishing force, threats of force, fraud, and coercion.[219] As argued throughout this article, the commonsensical understanding of prostitution may blame the victim rather than the defendant. Without the benefit of pointed STE testimony, the trier may blame the victim, hypersexualize her, and acquit the defendant.

B. PROFILING V. MODUS OPERANDI

Several critics of STE testimony have argued that sex trafficking cases are inappropriate for expert testimony because they are too fact specific.[220] Similarly, some scholars and defense attorneys have argued that expert testimony regarding the pimp-prostitute relationship constitutes prohibited profiling.[221] Ironically, courts have rejected these arguments from bodies of case law developed during the War on Drugs, where courts granted broad discretion to the prosecution in an effort to destroy a perceived social menace. Courts have routinely allowed expert testimony, in drug and human smuggling cases, particularly in the form of law enforcement agents, to establish *modus operandi*.[222]

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[217] *See supra* note 132 and accompanying text.

[218] *See supra* note 132 and accompanying text.

[219] United States v. King, 703 F. Supp. 2d 1063 (D. Haw. 2010).

[220] *See, e.g.*, United States v. Jackson, 299 F.R.D. 543, 546 (W.D. Mich. 2014) (rejecting defendant's efforts to exclude expert testimony based on his claim that there are a diversity of relationships that occur in street-based sex work, and that a one-size-fits-all narrative of the child victim and the adult exploiter does not reflect the realities of street-based sex work).

[221] *Id.*; *see, e.g.*, James Aaron George, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?*, 61 VAND. L. REV. 221, 224 (2008) (arguing that state and federal judges should not admit expert offender profiling testimony under Rule 702, state rules equivalent to Rule 702, or the Frye standard because it lacks both evidentiary reliability and general acceptance).

[222] *King*, 703 F. Supp. 2d at 1075; *see, e.g.*, *Mejia–Luna*, 562 F.3d at 1219 (citing United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984)); *Taylor*, 239 F.3d at 998. Courts' willingness to admit modus operandi evidence in other types of criminal operations provides additional support for the use of STE testimony. *See* United States v. Gil, 58 F.3d 1414, 1422 (9th Cir. 1995) ("We have consistently held that government agents or

By way of illustration, in rejecting a defendant's claim that the government's expert testimony amounted to impermissible profiling, the Ninth Circuit found that the expert helped place other witnesses' testimony into context and provided the jury a means to assess their credibility.[223] The expert testified about the mechanics of trafficking, specifically the role of the "bottom girl," a pimp's most senior prostitute, who often trains new prostitutes and collects their earnings until they can be trusted. The court noted that the expert helped the jury evaluate the victim's testimony that she was acting at the trafficker's direction, not her own volition. Similarly, the expert provided additional *modus operandi* evidence when he testified that pimps often isolate new prostitutes from familiar areas, which provided context for evaluating the defendant's intentions in initially transporting the victims to different cities.

Courts have also rejected the "profiling" argument by noting that these objections rest not on qualifications or the reliability of the expert's methodology but rather on the validity and reliability of the expert's conclusions regarding the *modus operandi* of pimps. In response, the courts have defended *modus operandi* expert testimony from exclusion by holding that the trial court's function is not to weigh the expert's conclusions; but rather, to determine if the expert's conclusions were arrived at by reliable methods.[224] As the Ninth Circuit has observed, "[w]hen credible, qualified experts disagree, a criminal defendant is entitled to have the jury, not the judge, decide whether the government has proved its case."[225] "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[226]

The Third Circuit has made clear, moreover, that the prosecution

similar persons may testify as to the general practices of criminals to establish the defendants' modus operandi."); *Mejia–Luna*, 562 F.3d at 1219; *see also* United States v. Romero, 189 F.3d 576, 584–87 (7th Cir. 1999) (affirming admission of expert testimony as to characteristics and methods of child molesters. Such testimony "helps the jury to understand complex criminal activities and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior").

[223] United States v. Brooks, 610 F.3d 1186, 1196 (9th Cir. 2010).

[224] Stilwell v. Smith & Nephew, Inc., 482 F.3d 1187, 1192 (9th Cir. 2007) (stating "[r]eliability is not determined based on the "correctness of the expert's conclusions but the soundness of his methodology").

[225] United States v. Sandoval–Mendoza, 472 F.3d 645, 654 (9th Cir. 2006) (citing Dorn v. Burlington N. Santa Fe R.R. Co., 397 F.3d 1183, 1196 (9th Cir. 2005)).

[226] *Daubert I* at 596.

introduce evidence from which a jury can infer the necessary mental state, so long as the expert witness does not state the ultimate conclusion about the individual defendant's state of mind. For example, in *United States v. Davis*, an expert testified that the circumstances of the defendants' conduct—where they were found in a group, armed with weapons, and carrying multiple packets of narcotics—were "consistent" with an intent to traffic.[227] The court held that this testimony was permissible, given that the witness did not state an opinion regarding the defendants' intent, and merely provided expert knowledge from which the jury could draw the conclusion.

In the case of JD7, an expert can testify to any of the following as permissible contextual evidence from which the jury can infer defendant's state of mind without crossing into the territory of the defendant's ultimate state of mind: *modus operandi*; the enterprise of prostitution in general; profiling for and exacerbating vulnerability; recruitment techniques; the relationship between traffickers and victims; and other methods of manipulation.

C. PREJUDICE OR BIAS

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[228] Analysis regarding the possible prejudicial impact of expert testimony is part of the "fit" test of *Daubert*.[229]

Prosecutors have successfully defended against the claim of STE bias or prejudice by pointing out that bias goes to the weight of the evidence, not its admissibility. In *King*, for example, the defendant argued that the government's witness was essentially a victim's rights advocate who possessed antagonistic, one-sided perspectives toward pimps.[230] In response, the court found that defendant's concern was sufficiently addressed through cross-examination and not exclusion. In the same case, the defendant claimed the expert was biased because she had extensive knowledge of prostitutes, not pimps. The court held that the expert's lack of extensive particularized expertise about pimps, as opposed to the

[227] United States v. Davis, 397 F.3d 173 (3d Cir. 2005).
[228] FED. R. EVID. 403
[229] *Daubert II* at1321.
[230] *King*, 703 F. Supp. 2d at 1077.

female victims, went to the weight of the evidence and did not form a proper basis for preclusion.[231]

In addition, to the extent that the courts engage the Rule 403 balancing test inquiry, courts have found that the relative probative value of the expert testimony greatly outweighs the potential for confusion or misleading the jury.[232] Furthermore, Part Four provides an exhaustive list of arguments and potential evidence that can be used to delineate the usefulness of STE testimony, which can tip the balance of the prejudicial scales.

D. OVERVALUATION: USURPING THE PROVINCE OF THE JURY

Despite mounting concern amongst judges and scholars that ever-increasing experts are usurping the province of the jury, the vast majority of courts have admitted STE testimony.[233] The concern stems from the proverbial angst that a jury may view an expert witness "as an objective authority figure more knowledgeable and credible than the typical lay witness, and because an expert necessarily testifies about a subject that is beyond the common knowledge of the jury, the jury is not as well equipped to question the reliability of the expert's opinion."[234] As a result, *Daubert*'s heightened standards reflect a concern with jury overvaluation of expert testimony. The question, however, "that lies at the core of the

[231] *Id.*; *see also* United States v. Garcia, 7 F.3d 885, 890 (9th Cir. 1993) (citing United States v. Little, 753 F.2d 1420, 1445 (9th Cir. 1984)).

[232] *King*, 703 F. Supp. 2d at 1076 ("the potential for jury confusion does not substantially outweigh the possible probative value. . ."); *see also* United States v. Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000) (holding probative value of expert testimony as to defendant's motive outweighed its potential to mislead the jury); United States v. Harry, 20 F. Supp. 3d 1196, 1237 (D.N.M. 2014) (finding probative value of sexual assault nurse examiner's testimony regarding her examination of victim was not substantially outweighed by prejudice in prosecution for sexual abuse of an incapacitated person in Indian country).

[233] FED. R. EVID. 403 favors admission by placing the burden on the party opposing admission to prove that the prejudicial impact of the expert testimony substantially outweighs its probative value. *See* Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL ADVOC. 563, 567 (1997). Especially in drug trafficking prosecutions, FED. R. EVID. 403 has provided only minimal protection to defendants against the admission of expert testimony from law enforcement officials. *See, e.g.*, United States v. Glover, 479 F.3d 511, 516-17 (7th Cir. 2007); United States v. Romero, 57 F.3d. 565, 572 (7th Cir. 1995); United States v. Castillo, 924 F.2d 1227, 1232-33 (2d Cir. 1991).

[234] Harvey Brown & Melissa Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 HOUS. L. REV. 1, 3 (2014).

worry about overvaluation, though, and thus at the core of the special treatment of expert evidence, is whether the concern with overvaluation is empirically justified."[235] To date, no definitive study has substantiated the angst, and "[e]mpirical research suggests that these claims about jury overvaluation of expert testimony are doubtful."[236]

Despite these concerns, prosecutors can take numerous precautionary measures to tip the balance of concerns in their favor under the Rule 403 analysis. As an obvious threshold measure, prosecutors should bulwark the *Daubert* hearing record and the government's brief in support of its in limine motion to admit STE testimony by exhausting the expert's qualifications, reliability, and relevance. A robust hearing record provides a necessary foundation for an interlocutory appeal if the trial court elects to exclude the expert. In the government's in limine motion as well as the direct examination of the STE, prosecutors would do well to draw a direct line between anticipated expert testimony and specific counts, means, and elements in the indictment, keeping the expert testimony closely tethered to the facts and charges. Among other things, this effort establishes how the expert testimony will be useful and may strategically undermine a claim of jury usurpation.[237] In addition, prosecutors should assure the court that it will limit the subject matter of the expert testimony to matters contained in the indictment; the expert will not opine on the defendant's ultimate state of mind; and the expert will not comment on the guilt or innocence of the defendant; [238] but rather, provide relevant background and context.[239] The government should also assure the court that it will introduce independent evidence of defendant's

[235] *Id*.

[236] Krista M. Pikus, *We The People: Juries, Not Judges, Should Be Gatekeepers of Expert Evidence Note*, 90 NOTRE DAME L. REV. 453, 471 (2014) (*citing* SPECIAL COMM. ON JURY COMPREHENSION, AM. BAR. ASS'N, JURY COMPREHENSION IN COMPLEX CASES 40-43 (1989)).

[237] *King*, 703 F. Supp. 2d at 1075.

[238] Federal Rules of Evidence and most state rules "generally prohibit a witness from commenting on the guilt or innocence of a defendant." *See* Fed. R. Evid. 704. *See also* Marina Moriarty, *Jury Instructions, Not Problematic Expert Testimony, in Child Sexual Assault Cases,* 11 SUFFOLK J. TRIAL & APP. ADVOC. 181 (2006).

[239] *King*, 703 F. Supp. 2d at 1076. *See* FED. R. EVID. 702 & advisory committee notes, (permitting expert testimony in the form of an opinion "or otherwise" consistent with the "venerable practice of using expert testimony to educate the factfinder on general principles"). The Ninth Circuit case law is clear that in certain circumstances present here, such as the means of force, fraud, or coercion, such testimony useful to the trier of fact. *See Taylor*, 239 F.3d at 998.

role and conduct as alleged in the indictment.[240] Prosecutors can also defend against usurpation arguments by indicating to the trial court that the parties will submit the "Pattern Jury Instructions on Experts." The instruction clarifies two points for the jury: (1) expert testimony should be evaluated on par with other testimonial evidence and (2) it can be accepted or rejected based on the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.[241] As another conciliatory measure, only to be used if necessary, the government can offer to have the expert testify after the victim witnesses. This later method is not ideal because it would be more helpful to have the expert's testimony set the frame for the victim's testimony by preceding her testimony. Nevertheless, it may be a final negotiating point that may salvage the expert testimony's admissibility.[242]

Prosecutors would do well to note the thinness of the line demarcating proper contextual evidence, on the one hand, and impermissibly usurping the province of the jury, on the other. The prosecutor's making credibility determinations, weighing the evidence, and making ultimate determinations is off limits. It is one thing for a witness to testify that a victim's testimony is consistent with PTSD, Stockholm Syndrome, Intimate Partner Syndrome, a reluctant witness, or

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[240] *King*, 703 F. Supp. 2d at 1077.

[241] As an example, the MODEL JURY INSTRUCTION FOR THE NINTH CIRCUIT, § 2.13 (last updated July 2017), provides:

> You [have heard] [are about to hear] testimony from [name] who [testified] [will testify] to opinions and the reasons for [his] [her] opinions. This opinion testimony is allowed, because of the education or experience of this witness.
> Such opinion testimony should be judged like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case. *Id.*

An example of the various forms the usurpation may take in sex trafficking cases, in *King*, the defendant argued that experts would be asked to opine on the behavior of pimps to "a reasonable degree of medical certainty[,]" and that they "should not be able to imbue her opinions about pimps and their behaviors with the authority and endorsement of the medical profession." The court rejected the defendant's claim and stated, "Pattern jury instructions uniformly caution that expert testimony should be 'judged like any other testimony,' and is therefore lacking in inherent definitiveness." *King*, 703 F. Supp. 2d at 1071.

[242] *See, e.g.*, United States v. Jackson, 299 F.R.D. 543, 547 (W.D. Mich. 2014) (finding that if the expert's testimony is taken in a vacuum, it has the tendency of taking center stage and displacing the victims; thus, a corrective to lessen the prejudice to the defendant, the expert should testify after the victims and should be confined to issues involving recruitment and control).

a sex trafficking victim. It is quite another for the prosecutor to ask, "Do you believe her" to which the expert responds, "yes."

By way of further illustration, in *United States v. Farrell*, the court drew the boundaries between permissibly assisting the trier of fact to understand the evidence or to determine a fact in issue and usurping the jury's function to weigh evidence and make credibility determinations. There, the court noted that the expert properly testified about the various warning signs that the victim was not laboring voluntarily, but rather in a "climate of fear" or psychological coercion. The expert further testified that she believed several of these warning signs were present in the victim's relationship with defendant and that the victims did, in fact, labor in a "climate of fear." The court noted that the expert's testimony was relevant because it provided the proper context from which the jury could understand the victim's actions, conditions in which they may have labored, and the truthfulness of their allegations.[243] The witness, however, crossed the line when she invaded the fact-finding function of the jury on the issue of "voluntariness" by testifying about the strength of the government's case and the credibility of its witnesses through references to the "incredible" and "strong" nature of the evidence against the defendant; that the victims "were not controlling their money"; and that they were "forced to pay [the debt]." The court found that the expert's testimony was not simply a factual conclusion but rather an attempt to express an opinion on defendant's guilt and the victim's truthfulness.[244]

E. CRAWFORD CHALLENGES

To the extent a defendant raises a Crawford challenge,[245] arguing that expert testimony is inadmissible hearsay in violation of his Fifth Amendment rights to confrontation, at least one court has rejected that

[243] United States v. Farrell, 563 F.3d 364, 377 (8th Cir. 2009) (citing United States v. Kirkie, 261 F.3d 761, 766 (8th Cir. 2001) (admitting testimony "regarding characteristics of sexually abused children in general and as they compared with the characteristics exhibited by the victim in this case")).

[244] *Id.* (citing United States v. Whitted, 11 F.3d 782, 787 (8th Cir. 1993) (finding that a doctor's "diagnosis of sexual abuse was only a thinly veiled way of stating that [the witness] was telling the truth").

[245] In *Crawford v. Washington*, the Supreme Court ruled unanimously that where statements are testimonial in nature, the defendant has a Sixth Amendment right to confront his accuser(s) via cross-examination; thus, out-of-court testimonial statements are *only* admissible at trial where (1) the declarant is unavailable to testify at trial and (2) the defense had a prior opportunity for cross-examination. *See* 541 U.S. 36 (2004).

argument specifically in the context of sex trafficking.[246] In *United States v. Lockart*, the Fifth Circuit held that Federal Rule of Evidence 703 allows an expert to base his testimony on otherwise inadmissible hearsay and an expert's opinion may be based on the evidence in the case, his education, and his experience. Most importantly, when the expert has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.[247]

F. FAILURE TO SUBMIT MATERIAL UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 16

If the government intends to call experts, it must be mindful of its Rule 16 discovery obligations, which unlike other evidentiary obligations are not due at or near the time of trial; rather, Rule 16 requires the government to provide the defense with "a written summary" of the testimony it expects to adduce from an expert and the summary must "describe [her] opinions, the bases and reasons for those opinions, and [her] qualifications."[248] Failure to provide proper notice can result in exclusion.[249] In satisfaction of Rule 16 requirements, courts have upheld government notice letters of its intent to call experts, a copy of the expert's curriculum vitae, and a copy of an expert's testimony in a hearing or trial in an unrelated case.[250] In addition, courts have held that the government's proof during a *Daubert* hearing satisfied its Rule 16 discovery obligations, an additional incentive to conduct a *Daubert* hearing as argued immediately below.[251]

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[246] United States v. Lockhart, 844 F.3d 501, 511 (5th Cir. 2016).

[247] *Id.*

[248] FED. R. CRIM. P. 16(a)(1)(G).

[249] FED. R. CRIM. P. 16(d)(2)(C) and (D).

[250] *King*, 703 F. Supp. 2d at 1077; *see, e.g.*, United States v. Goxcon-Chagal, 886 F. Supp. 2d 1222, 1253 (D.N.M. 2012), *aff'd* sub nom; United States v. Medina-Copete, 757 F.3d 1092 (10th Cir. 2014) (finding the government met Rule 16 requirements by providing notice to defendant of general subject matter of proposed testimony, outline of proposed testimony at a pre-trial hearing, agent's background, and basis for testimony); United States v. Richardson, No. CR 13-86, 2014 WL 12682313, at *2 (E.D. La. 2014) (finding Rule 16 satisfied by a summary, curriculum vitae, and lab reports, giving the defendant "ample notice of the government's experts' opinions, bases for those opinions, and qualifications"); United States v. Brown, 592 F.3d 1088 (10th Cir. 2009) (finding the government satisfied Rule 16 by providing copies of fingerprinting expert's qualifications, her report, and a summary of her proposed testimony).

[251] *Id.*

G. REQUEST A DAUBERT HEARING

In order to determine the admissibility of experts, trial courts should conduct a *Daubert* hearing.[252] Judges, however, are often reluctant to conduct formal *Daubert* hearings. In fact, some courts have held that a *Daubert* hearing is not warranted to qualify an expert.[253] In a 2001 survey of several hundred state court judges, "approximately half of them admitted that they were not adequately prepared to evaluate the range of scientific evidence proffered in their courtrooms."[254] Moreover, "almost every judge failed to demonstrate a basic understanding of half of the *Daubert* criteria."[255] At the federal level, scholars and commentators have noted a similar reluctance to hold *Daubert* hearings, particularly amongst the ranks of inexperienced judges."[256] Law Professor Erica Beecher-Monas, sometimes critical of judicial approaches to *Daubert* hearings, argued that judges should take a heuristic approach to experts with an understanding that the *Daubert* hearing places the court in a better position to weigh the expert's relevance.[257]

As a tactical matter, prosecutors should seek a *Daubert* hearing in as far advance of trial as possible. As in the case study, if the prosecution engages the locomotive efforts to prepare for trial, to schedule all the

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[252] There is no requirement that the trial court always hold a *Daubert* hearing prior to qualifying an expert under Rule 702. United States v. Evans, 272 F.3d 1069, 1094 (8th Cir. 2001); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 958 (1996) (stating "Courts should hold *Daubert* hearings, early and often").

[253] *See, e.g.*, United States v. Diakhoumpa, 171 F. Supp 3d. 148, 152 (S.D.N.Y. 2016) (holding that another pretrial hearing would be essentially re-litigating the same issues); United States v. Williams, 506 F.3d 151, 161 (2d Cir. 2007) (holding court did not abuse it discretion in failing to conduct a *Daubert* hearing because trial court has "latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability"); United States v. Alatorre, 222 F.3d 1098, 1103 (9th Cir. 2000) (upholding an unnecessary a pretrial hearing because the preliminary inquiry as to relevance and reliability is a flexible one, subject to no set list of factors); United States v. Nichols, 169 F.3d 1255, 1262–63 (10th Cir. 1999) (rejecting claim that defendant was entitled to a preliminary hearing on admissibility of expert testimony).

[254] Pikus, *supra* note 236, at 469 (*citing* Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 442 (2001)).

[255] Pikus, *supra* note 236, at 442.

[256] *Id.*; s*ee also* Allan Kanner & M. Ryan Casey, *Daubert and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 291-92 (2007).

[257] ERICA BEECHER-MONAS, EVALUATING SCIENTIFIC EVIDENCE: AN INTERDISCIPLINARY FRAMEWORK FOR INTELLECTUAL DUE PROCESS 1 (Cambridge U. Press. 2007).

witnesses, for example, in large, complex cases, and then receives an adverse ruling excluding the STE testimony, the government will be reluctant to file an interlocutory appeal because it will have to undo all of its efforts to prepare for trial. Seeking an early *Daubert* hearing affords the government the time to file an interlocutory appeal before incurring the expense and effort of trial preparation. Moreover, when the government seeks an early *Daubert* hearing, the trial court can establish the boundaries, contours, and limits of the expert testimony, giving the government sufficient information to prepare its witnesses. Where the government is successful in having its witnesses admitted, the defendant may find added incentive to plead.

PART SEVEN. OTHER INTERVENTIONS

As argued throughout this piece, sex trafficking is a manifestation of endemic patterns and mutually reinforcing layers of intersectional inequality. Any solution to inequality must be as ubiquitous as white heteropatriarchy itself.[258] The strategic deployment of experts is but one partial solution to a multi-layered dilemma. There are limits to the criminal justice systems ability to address the reduction of sexual organs for commercial purposes. At the level of policy, expert witnesses can lobby for the decriminalization of victims and a greater emphasis on the market demand for the trade in human flesh.[259] STEs can also be helpful in all of the following: sensitizing investigators, prosecutors, defense attorneys, jurors, and judges through training; testifying before a grand jury; assisting with drafting voir dire, openings, closings, direct and cross examinations; providing guidance when drafting motions in limine designed to limit the damaging evidence, particularly proof that would further traumatize the victims, like irrelevant sexual histories; testifying during sentencing hearings; and aiding in responses to issues on appeal. In addition to these interventions, the following recommendations may also facilitate a fairer evaluation of the evidence, remove the taint of bias from the evidence, and create a more coherent narrative about the crime.

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[258] I have argued in other publications that any solution to the problem of white heteropatriarchy must be as omnipresent, complex, and entrenched as the problem itself. *See* Cook, *supra* note 3, at 612.

[259] Butler, *Bridge Over Troubled Water*, *supra* note 30, at 1337-38.

> One of the most important policy goals of safe harbor laws is to shift the legal paradigm to recognize prostituted minors as victims, not criminals. International and federal laws make clear that prostituted minors should be legally recognized as crime victims as opposed to criminals. *Id.*

A. DEBIAS TRAINING

The Department of Justice (DOJ) has documented repeated patterns of bias throughout the ranks of law enforcement.[260] Given the near 30 years of empirical proofs, neuroscience, and cognitive tests chronicling implicit bias, it is moral error to grant authority without accountability for bias.[261] Debias strategies can increase the awareness of the unacceptability of bias infected decision-making. Debias strategies can also include programs that incentivize bias free decision-making and accountability for equity.[262] As a partial corrective, implicit bias training should be mandatory throughout the ranks of law enforcement, to include local law officers, federal agents, and state and federal prosecutors and defense attorneys.[263] Just as in armed shooting cases, investigators need sensitivity training in order to curtail their biases in sexualized violence cases. Such training is necessary to scale back law enforcement's profiling of sex trafficking victims; laughing or scoffing at victims; pathologizing and criminalizing those victims; overincarcerating victims, particularly as compared to johns and traffickers; allowing bias to taint the evidence, including the creation of Giglio materials that can later be used to undermine the witnesses;[264] acting or refraining from action that confirms their biases; and engaging in inequitable decision making. Debias training should be mandatory for federal prosecutors, the highest form of law enforcement in whom the wellbeing of the nation is entrusted as well as the enforcement of Section 1591.[265] Training should, at a minimum, make law enforcement much more critically aware of the

[260] The Department of Justice has also found patterns of civil rights violations by police departments, a pattern that results from bias within those police departments. *Justice Department Announces Findings of Investigation into Baltimore Police Department*, U.S. DEP'T OF JUST. (Aug. 10, 2016), https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department.

[261] Katyal, *Men Who Own Women*, *supra* note 80, at 818 (arguing for municipality and local official § 1983 liability where they fail to train officers to recognize sexual slavery).

[262] Carol Isaac, Barbara Lee, & Molly Carnes, *Interventions that affect gender bias in hiring: A systematic review*, 84 (10) ACADEMIC MEDICINE 1440 (2009).

[263] Cook, *supra* note, at 614.

[264] In *Giglio*, the Supreme Court held that the prosecution's failure to inform the jury of an agreement promising immunity from prosecution in exchange for one witness's testimony, constituted a failure on behalf of the prosecution to fulfill its duty to present exculpatory materials to the jury. Giglio v. United States, 405 U.S. at 150 (1972). Giglio was an extension of Brady v. Maryland, 373 U.S. 83 (1963), which requires the prosecution to timely disclose any exculpatory material evidence to the defense. *Brady*, 373 U.S. at 91.

[265] *Id.*

operations of intersectionality on its decision-making and exercise of authority.[266] Making law enforcement critically aware of and most importantly accountable for its implicit bias is imperative.[267]

B. PROVIDING LEGAL REPRESENTATION, ADVOCATES, AND SOCIAL SERVICES FOR SEX TRAFFICKING VICTIMS

Sex trafficking victims are not parties to the litigation, do not have standing, and are not guaranteed an attorney. Victims of sex trafficking are rarely persons of means who can afford an attorney. This absence of representation, which disproportionately affects the poor and persons of color, has led several scholars to argue that victims of violent crimes should be afforded the right to counsel.[268] The right to counsel would afford sex trafficking victims a measure of protection during the adjudicative process. In praxis, the rights and interest of victims may stand at odds with a prosecutor's desire to have victims cooperate and testify against their accusers. The representation of victims may create "a three-ring circus" during litigation and additional problems for the prosecution.

Prosecutorial coercion, however, particularly threats made to victims who refuse to cooperate, creates another layer of psychological force against victims, turning prosecutors into another form of "pimp." Coercing unwilling victims to tell and retell the most embarrassing details of their sexual histories to sundry strangers, including investigators, judges, and jurors, erodes the quality of the victim's testimony and may undermine the integrity of the prosecution. Such coercion may solidify psychological damage to the victim as well as undermine any testimony the victim might render. Furthermore, such coercive tactics provide plenty

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[266] *Id.*

[267] *See Improving Police Response to Sexual Assault*, HUM. RTS WATCH (Jan. 2013), https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf; *Trauma Informed Sexual Assault Investigation Training,* INT'L ASS'N OF CHIEFS OF POLICE (2017), http://www.theiacp.org/Trauma-Informed-Sexual-Assault-Investigation-Training) (chronicling techniques to improve sexualized violence investigations).

[268] *See, e.g.*, Laurence H. Tribe & Paul G. Cassell, *Perspective on the Law; Embed the Rights of Victims in the Constitution; A Proposed Amendment Protects Victims, Without Running Roughshod over the Rights That Are Due the Accused*, 9 LEWIS & CLARK L. REV. 663 (2005) (arguing that without the right to counsel victims' rights become meaningless); *see also* Tanya Asim Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witnesses by Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 244 (2011).

of fodder for cross-examination and the rule established by *Giglio*, which arms defense attorneys with a sound opportunity to undermine the credibility of victims by informing the jury that their testimony was procured by force because they faced threats of prosecution, deportation, and sex offender registration.[269] Herein lies another opportunity for expert intervention in sensitizing the prosecutorial team, jurors, and judges.

Because sex trafficking victims are subjected to multiple layers of intersectional subjugation and routinized forms of domination, a better practice may require prosecutors to provide a broad spectrum of comprehensive support services in order to assist victims with stability as well as coherence and lucidity for trial,[270] including shelters, outreach services, and relocation services.[271] Desperately needed social services often turn investigators and prosecutors into social service providers, where education, housing, food, employment, job training, mental health care, substance abuse care, and basic living essentials are fundamentally necessary for many survivors in order to undo the harms they have endured.

C. SENTENCING HEARING

Federal prosecutors should maximize the advantage of STE testimony in sentencing hearings. In the federal system, ninety percent of federal cases plead and do not proceed to trial.[272] Subsequently, the sentencing hearing is "where the real action is." Furthermore, the Rules of Evidence do not apply, giving wide latitude in the use of expert testimony. With the advent of *Booker* and its progeny, which made the sentencing guidelines advisory and not mandatory, federal prosecutors can take full advantage of the broad discretion of sentencing courts under Title 18, United States Code, Section 3553(a).[273] STE testimony, during

[269] *See Giglio*, 405 U.S. at 150.

[270] Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 658 (2009).

[271] Katyal, *Men Who Own Women*, *supra* note 81, at 824 (citing successful program in Sweden designed to facilitate sex worker's escape from her conditions, rather than her arrest).

[272] *Understanding the Federal Courts*, UNITED STATES CTS., http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases (last visited Oct. 12, 2017) ("More than 90% of defendants plead guilty rather than proceed to trial").

[273] The Supreme Court's rulings in United States v. Booker, 543 U.S. 220 (2005), and its progeny appropriately recognize that "[a] sentencing judge has very wide latitude to decide the proper degree of punishment for an individual offender and a particular crime." *See, e.g.*, United States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008). In addition, Title 18,

sentencing, can provide greatly needed guidance to the sentencing court, support the sentencing decisions of the court, and bulwark the prosecution's sentencing hearing record on appeal. The expert testimony discussed in this article goes to the heart of evidence involving "the nature and circumstances of the offense"; the need for the sentence to reflect its seriousness; proportionality; and specific and general deterrence.[274]

In addition, the sentencing guidelines provide an enhancement for the vulnerable victim. Under Section 3A1.1, the vulnerable victim enhancement may be applied where: (1) the victim was particularly susceptible or vulnerable to the criminal conduct; (2) the defendant knew or should have known of this susceptibility or vulnerability; and (3) this vulnerability or susceptibility facilitated the defendant's crime in some manner; in other words, there was "a nexus between the victim's vulnerability and the crime's ultimate success."[275] The expert testimony discussed in Part Four would support an enhancement and would meet the Section 3553(a) sentencing factors.

CONCLUSION

The entrenched pervasiveness of intersectional inequality saturates every aspect of sex trafficking. It creates the material conditions of vulnerability, the lynchpin of exploitation. It is the proper frame to view the evidence of force, fraud, and coercion, including the sex trafficking grooming processes, layers of victim trauma, and reluctant testimony. Without proper interventions, the adjudicatory process can become yet another layer of trauma for victims and, in the event of failure, can ratify a license to commit sexualized violence with impunity. The adjudication can become another ritual of spectacle. Traditional liberal approaches of neutrality, or the absence of intersectional salience, can serve the

United States Code, § 3553(a) sets out the following relevant factors in rendering a sentence:

> (a). . . The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant. . .

[274] Imposition of a Sentence, 18 U.S.C. § 3553(a) (2010).

[275] United States v. Iannone, 184 F.3d 214, 220 (3d Cir. 1999) (quoting United States v. Monostra, 125 F.3d 183, 190 (3d Cir. 1997)).

hegemonic function of fixating the pathological gaze on the victim and reallocating the burdens, turning victim into villain and villain into victim. Intersectionality and feminist discourses can maximize litigation strategies offering theoretical interventions that relate to autonomy, vulnerability, and capabilities approaches. Expert testimony can be strategically deployed to disrupt the reification of hierarchy and vulnerability in operations of law and to remove some of the taint of intersectionality from the evidence. The use of such experts is not a panacea for sex trafficking prosecutions; however, given the ubiquity of intersectional inequality, it presents one partial solution to a multi-headed hydra.