



# United States Department of Justice

## Framework for Prosecutors to Strengthen Our National Response to Sexual Assault & Domestic Violence Involving Adult Victims May 2024

Sexual assault and domestic violence are among the most challenging cases to prosecute, and as a result, meritorious allegations are too often declined for prosecution.<sup>1</sup> This guide seeks to turn the tide and strengthen our collective response to these crimes, equipping prosecutors to build provable cases in a trauma-informed manner that treats victims with humanity and ensures due process for defendants.<sup>2</sup> Written by prosecutors for prosecutors, this guide reflects decades of expertise, insight, and experience of more than 120 state, Tribal, military, and federal prosecutors, as well as advocates, academics, and investigators who have dedicated their careers to combatting sexual assault and domestic violence. Certain practices among them vary based on the size, region, and laws of the jurisdictions in which they practice. But there is clear consensus around principles that, if implemented, will lead to better outcomes for victims, safer communities, and greater accountability for perpetrators.

This guide sets out these principles and encourages every prosecutor to consider them when evaluating, investigating, and prosecuting allegations of sexual assault or domestic violence, particularly involving adult victims.<sup>3</sup> This is a blueprint for a stronger, consistent, and more effective response to these crimes. It is not an exhaustive treatise on the law nor is it a nuanced discussion of investigative strategies and trial practice. Instead, it is designed to address misconceptions about how sexual assault and domestic violence are committed and reported; overcome fallacies about victim behavior, victim accounts, and the evidence required to prove those accounts; and provide practical baseline principles to implement in response to allegations. It is for all prosecutors at all levels of government, and it is intended for all levels of experience: lawyers new to the courtroom; seasoned prosecutors who have spent years in the courtroom but only sometimes handle sexual assault or domestic violence cases; prosecutors

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<sup>1</sup> See, e.g., Ashley K. Fansher & Bethany C. Welsh, "[A Decade of Decision Making: Prosecutorial Decision Making in Sexual Assault Cases](#)," *Social Sciences* 12.6 (2023): 348 (summarizing research of sexual assault case attrition, including intimate partner-committed-sexual assault, and factors affecting prosecutors' decision-making).

<sup>2</sup> This document is not intended to, and does not, create any right, benefit, trust, or responsibility, whether substantive or procedural, enforceable at law by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees, or agents, or any person.

<sup>3</sup> This guide pertains to investigations and prosecutions of sexual assaults and domestic violence involving adult victims. While many of the same principles apply regardless of the age of the victim, there are special considerations for child victims not covered in this document. In addition, we use the term "domestic violence" to generally refer to physical assaults committed by intimate partners, including strangulation. Sexual assault is a form of domestic violence when committed by intimate partners, but unless otherwise noted, the term "sexual assault" does not distinguish among the types of perpetrators or the relationship of the perpetrator to the victim.

specializing in handling these crimes; and supervisors who oversee these matters and are tasked with both advising line prosecutors and deciding how best to allocate resources.

This guide is rooted in the maxim that a prosecutor represents a government whose interest is not to “win a case” but to see “that justice shall be done.”<sup>4</sup> Our primary obligation is to the Constitution and the rule of law, even if a victim or public sentiment demands the opposite.<sup>5</sup> We bring cases only when they are supported by credible, admissible evidence that will sustain a conviction beyond a reasonable doubt. This applies to every prosecutor in this country, handling every kind of case. We focus here on meritorious sexual assault and domestic violence allegations and how to determine if we can prove them.<sup>6</sup>

## **PRINCIPLE ONE: RELY ON THE EVIDENTIARY VALUE OF THE VICTIM’S ACCOUNT AND USE IT TO FRAME THE INVESTIGATION**

Most sexual assault and domestic violence prosecutions rely on the victim’s account.<sup>7</sup> Simply put, the jury’s verdict is often tantamount to whether the jury finds the victim’s account credible. This is true for two reasons. First, these crimes generally do not occur in front of witnesses, nor are they captured on video, and they rarely result in dispositive physical evidence. Second, the defense to most incidents of domestic violence and sexual assault (where the identity of the perpetrator is not at issue) is that the victim is lying. Consequently, the credibility of the victim’s account is paramount. Perpetrators of sexual assault and domestic violence often target victims based on their vulnerabilities and their perceived lack of credibility within society (from which jurors are drawn).<sup>8</sup>

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<sup>4</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>5</sup> See Principle Four, *infra* at page 9, for a discussion of justice and accountability.

<sup>6</sup> Our obligation is to seek the truth. Allegations unsupported by law and admissible, credible evidence must be declined for prosecution. Nothing in this document should be read to convey the opposite.

<sup>7</sup> We recognize that some victims prefer the term “survivor.” We also recognize that some jurisdictions use the term “complainant” to refer to victims in criminal cases. For clarity and consistency, we use the term “victim” to refer to the person against whom a crime was committed. Because “victim” is an impersonal term, we recommend calling victims by their preferred names when meeting with them and referring to them by name during trial and other proceedings (absent privacy and safety considerations). See, e.g., *United States v. Daskal*, 2023 WL 9424080, at \*3 (E.D.N.Y. July 12, 2023) (discussing the practice of allowing sexual assault victims to testify under a pseudonym or limiting disclosure of their identities); see also Principle Three, *infra* at page 17, for a discussion about victim privacy.

<sup>8</sup> Anyone can be a victim of sexual assault or domestic violence, and anyone can perpetrate these crimes. Therefore, at times, we use gender-neutral pronouns. But because women are most often the victims of these crimes, at other times, we use pronouns to reflect that. Failing to acknowledge the disproportionate victimization of women does a disservice to our collective efforts to prevent and address gender-based violence. Sexual assaults and domestic violence are, in large part, underreported, under-investigated, and under-prosecuted because of gender bias (and other intersecting biases) rooted in the fallacies that surround these crimes, including that women lie about sexual assault and domestic violence and that their own behavior contributes to their victimization. To effectively investigate and prosecute these matters, we must account for our own biases and suspend our often-unconscious inclination to disbelieve someone who may have exercised judgment different from our own or whom society may view as imperfect. For a more in-depth discussion of the impact of gender bias, see the Justice Department’s 2022 updated guidance on [Improving Law Enforcement Response to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias](#). This guide for prosecutors is meant to complement that guidance for law enforcement.

As a result, prosecutors may hesitate to bring charges, concluding that a jury will never believe the victim and the case cannot be proven. But these cases are provable. Prosecutors can have success on the merits, uphold the rule of law, and serve victims and the public, all while relying on a victim's account. Yet because so many criminal cases are built on evidence like paper trails, wiretaps, surveillance, cellphone video, and abandoned or seized drugs and firearms, learning to build a case with a victim's account as its foundation often requires a shift in mindset as to what a prosecutable case looks like.

### ☆ **Expect Counterintuitive Behavior by Victims of Sexual Assault and Domestic Violence**

It is not uncommon for victims of trauma, and specifically of domestic violence and sexual assault, to behave in a seemingly counterintuitive manner, both at the time of the crime and later when they are interviewed. But such behavior becomes less counterintuitive if we understand the dynamics of sexual assault and domestic violence as well as the neurobiology of trauma, i.e., the effects of trauma on the brain, and for some domestic violence victims, the effects of repeated traumatic brain injuries that can accumulate without the chance to heal between assaults.<sup>9</sup> Doing so will allow us to effectively interview (and not interrogate) victims in a manner designed to give them the best opportunity to accurately recall what happened. Conducting a trauma-informed interview will not only lessen the re-traumatization of the victim, but it will also allow us to better evaluate the evidence and obtain the information needed to conduct a thorough investigation.

When interacting with victims, at minimum, we should keep in mind three aspects about victims and traumatic memory:

*First*, trauma may affect which and how many details of an event get stored as memory. Trauma does not affect accuracy, but trauma and stress can affect a victim's ability to recall memories and provide a linear account.<sup>10</sup> As a result, a victim may sound scattered and fragmented, which may be unintentionally exacerbated by the way an interview is conducted. Even though we may be inclined to view a non-linear account with skepticism, we should be aware that such an account may instead be a hallmark of trauma and, by extension, truthfulness.

*Second*, disclosure is a process, not an event. Victims may disclose more over time because they may trust us more as time goes on (an inherently human characteristic, particularly given the intimate nature of sexual assault and domestic violence). Or, given the way traumatic memory works, victims may remember additional details about the

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<sup>9</sup> Domestic violence victims who have experienced repeated brain injuries may present in a way similar to football players who cannot remember their last play due to a concussion. *See, e.g.*, Kellianne Costello & Brian D. Greenwald, "[Update on domestic violence and traumatic brain injury: A narrative review](#)," *Brain sciences* 12.1 (2022): 122.

<sup>10</sup> *See* Deborah Tuerkheimer, [Victim, Reconstructed: Sex Crimes Experts and the New Rape Paradigm](#), 2024 U. Ill. L. Rev. 55, 65 (2024) (discussing "that a key concept in memory research is the distinction between central details and peripheral details. Even under ordinary circumstances, we pay most attention to central details . . . details we don't notice or find significant may not be converted into storable memory.") (internal citations omitted); *see also* [Jim Hopper, Ph.D. | Sexual Assault and The Brain](#) (last visited April 29, 2024).

assault as times passes. This, too, runs counter to the common belief that an individual's account given closer in time to an event is more reliable than anything they say thereafter. But an evolving account, or a delayed account as discussed more below, should not be automatically discredited (or be a reason for declination). As victims disclose more, a case may take on a different shape and provide more avenues for investigation.

*Third*, there is no typical demeanor for a sexual assault or domestic violence victim when they are recounting their assaults. A victim may cry and appear distraught. Or they may have a flat affect or appear emotionally detached, express anger, display stoicism, or even laugh nervously or act in a manner we may perceive as inappropriate. Such conduct is consistent with trauma and with typical human behavior and does not necessarily connote unreliability.<sup>11</sup>

Similarly, victims of domestic violence and sexual assault often engage in a variety of counterintuitive conduct during an assault or in its aftermath. Some of it may be intentional; some of it may be an involuntary trauma response. As an example of the former, victims may delay disclosure or keep an assault a secret out of (misplaced) shame or embarrassment or because they fear retaliation or not being believed. In the case of domestic violence, they may not want their families or social circles to know what they have endured, or they may initially lie because they fear that telling the truth will put them in greater danger. In the case of sexual assault, they may have drunk alcohol or initially flirted with the perpetrator. While neither of these actions vitiates the perpetrator's guilt or serves as a reason for declination, such conduct can cause victims to blame themselves and think that we will blame them, too. In addition, victims may not fight back during an assault because the perpetrator is stronger or bigger, has threatened the well-being of their children, has access to a weapon, has been violent in the past, or they fear that the perpetrator will hurt them even more if they resist. These explanations are logical, and victims are often able to articulate them to a jury when asked. But there will also be times when it may seem to an outsider that a victim should have tried to resist or escape, but their brain's response to trauma kept them from doing so. A victim may explain, for example, that they "froze" and were unable to move, often blaming themselves for failing to do so or questioning why they could not react. Yet "freezing" may be more than just momentary, reflexive fear. We are accustomed to thinking about trauma response as "fight or flight." But "freeze" is also a common response, known as "tonic immobility." It is a temporary state of paralysis that a victim cannot control.<sup>12</sup>

We do not suggest that, because of the effects of trauma, prosecutors must automatically credit a victim's account. But we do urge prosecutors not to automatically discredit it. Suspending disbelief at the outset will not sacrifice a prosecutor's objectivity; it will ensure it.<sup>13</sup> Victims' fear of not being believed contributes significantly to domestic violence and sexual assault being

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<sup>11</sup> See *supra* footnote 10, [Tuerkheimer](#), 2024 U. Ill. L. Rev. at 67 (Discussing the impacts of trauma on demeanor and stating, "Because emotional demeanor is not diagnostic of witness honesty . . . people are downgrading the believability of certain victims for no good reason.") (internal citations omitted).

<sup>12</sup> See Jen Percy, ["What People Misunderstand About Rape,"](#) New York Times, August 22, 2023; see also footnote 10, [Hopper, Sexual Assault and The Brain](#) (discussing trauma responses and the difference between tonic immobility and reflexes and habits) (last visited May 2, 2024).

<sup>13</sup> See Fara Gold, ["Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases,"](#) Emerging Issues in Federal Prosecution, *USA Bulletin* (2018), page 77 ("What to Do," at pages 86-87).

among the most underreported violent crimes, even though rates of false reporting of these crimes are low.<sup>14</sup> The ultimate issue for prosecutors is determining whether we can meet the burden of establishing proof beyond a reasonable doubt that the victim's account is true. But we cannot make that decision without an investigation. More specifically, a declination cannot be based on insufficient evidence or a victim's perceived lack of credibility without an adequate investigation that allows us to assess the victim's account.

### ☆ **Corroborate the Victim's Account and Rebut Motives to Lie**

Jury instructions vary among jurisdictions throughout the United States, but the law consistently recognizes that a victim's account *is* evidence. A jury should consider it the same way it considers testimonial evidence from any other witness. A credible account is legally sufficient to sustain a conviction,<sup>15</sup> and prosecutors should rely on jury instructions that stand for that proposition while delivering closing argument.<sup>16</sup> That does not mean that our only admissible evidence will be the victim's account. Rather, a guilty verdict will be based on the trier of fact believing that account to be true. The investigation must therefore focus on whether there is evidence that corroborates the victim's account to establish *why* that account is credible and *why* the trier of fact can believe the victim's testimony.

Corroboration typically will not be "smoking gun" evidence like eyewitness testimony or a digital recording of the crime that places the victim's account beyond question. Most often, no one except the victim will be able to testify about the moments of the assault. Prosecutors must therefore corroborate the victim's account by showing that events leading up to, following, and surrounding the assault occurred in a manner consistent with the victim's account. We can do this in myriad ways, from establishing the perpetrator's pattern of conduct and admitting a

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<sup>14</sup> See David Lisak, Lori Gardinier, Sarah C. Nicksa, & Ashley M. Cote, "[False allegations of sexual assault: An analysis of ten years of reported cases.](#)" *Violence against women* 16.12 (2010): 1318-1334; See also Tyler J. Buller, "[Fighting Rape Culture with Noncorroboration Instructions.](#)" 53 *Tulsa L. Rev.* 1, 7 (2017) ("There is no empirical data to prove that there are more false charges of rape than of any other violent crime.") (internal citations omitted).

<sup>15</sup> See *infra* footnote 29; *United States v. Sheppard*, 569 F.2d 114, 118 (D.C. Cir. 1977) ("The corroboration requirement poses a potentially severe obstacle to legitimate convictions for sex offenses. [It] serves to foreclose jury consideration of cases in which a highly credible complainant prosecutes charges, on the basis of her testimony alone, against a defendant whose account of the events is clearly less credible. And the mere existence of the rule may encourage victims never to report, and prosecutors never to bring charges for, rapes in which independent corroboration is absent or marginal."). Also note that some jurisdictions permit non-corroboration jury instructions, particularly *if* the defendant makes an issue of lack of corroboration during closing argument. See, e.g., *Pitts v. State*, 291 So. 3d 751, 757 (Miss. 2020) (upholding an instruction to the jury "that the uncorroborated testimony of a sex-crime [or domestic violence] victim is sufficient to support a conviction if accepted as true by the finder of fact"); *but see State v. Kraai*, 969 N.W.2d 487 (Iowa 2022) (listing jurisdictions that both upheld and overruled victim non-corroboration instructions, and holding that although an accurate statement of law, the "'noncorroboration' instruction was improper because it unduly emphasized the [victim's] testimony," rather than being a general instruction on credibility of witnesses).

<sup>16</sup> Consider asking for the following or similar credibility instruction: "The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testified or the quantity of evidence that was presented. What is more important than numbers or quantity is how believable the witnesses were and how much weight you think their testimony deserves." [3rd Cir. Model Criminal Jury Instruction](#), 3.04 (Feb. 2021).

victim's prior consistent statements made under certain circumstances, as discussed in Principle Three (strategic and effective use of evidentiary rules), to corroborating seemingly minor aspects of the victim's account. For example, the victim's payroll records may corroborate her absence from work the day after the assault; the defendant's cell site data may corroborate an unaccounted period of time in a location consistent with where and when the victim said the assault occurred; or eyewitness testimony may describe the victim's condition or demeanor before or after the assault. Corroboration may also include evidence consistent with the victim's description of where the assault occurred, such as a vinyl yellow couch or dirty bathroom stall; or consistent with what the victim focused on while the perpetrator was assaulting her, such as a crack in the ceiling or the incessant drip of a leaky sink. No fact or piece of evidence is too small or insignificant for consideration in an investigation because, when taken together, these seemingly small facts can serve as powerful corroboration.

A victim's decision to come forward and their reason for doing so can also lend credence to their account, as can their reason for delayed reporting. A victim may report right away or may wait to report for a day or a decade. They may report one assault or ongoing violence, but there is always a reason why they ultimately chose to come forward. A victim's explanation about what caused them to immediately report or what caused them to change their mind and make a report later may also provide new allegations to investigate (e.g., the perpetrator began abusing the victim's child). These reasons often make sense and thus may be compelling to a jury — which is why we need to ask victims about them. The following examples illustrate this point: an incarcerated victim, upon being transferred to a new prison and no longer in the custody of the guard who raped her, felt safe to report; a transgender victim learned that other victims came forward, and as a result, had less fear of being disbelieved; a victim came forward to set an example of strength for her teenage daughter; a college student's mother encouraged her to report, and she therefore knew she had support; a victim feared the abuse would escalate to lethal levels if the perpetrator was not stopped.

Yet when we ask for those reasons, particularly when we ask why a victim delayed reporting, we must be mindful of how victims may perceive our questions. We must take care to let victims know that we are not judging them. Rather we want to understand what happened so that we can effectively convey it to a jury.

Just as people take action for a reason, they also lie for a reason. We know this from everyday life: children lie about finishing their homework so they can have more time to play; defendants lie to investigators in hopes of skirting accountability for their crimes. A lie is necessarily accompanied by a reason to lie, be it a simple, complex, or nuanced reason. It follows that those who falsely report crimes do not lie about them for no reason; that is, they do not lie without a motive to do so. And even if someone has a motive to lie, it does not necessarily follow that they are, in fact, lying. Therefore, because the defense to sexual assault and domestic violence is most often that the victim is lying, we must focus on investigating would-be motives to lie and how to rebut them during trial. Typically, the defense is predicated on four types of motives to lie: *one*, lying for monetary gain; *two*, lying for a nonmonetary benefit, such as a benefit in a victim's pending criminal case, revenge, child custody, immigration relief, or momentary fame; *three*, in domestic violence cases, lying because the victim was the primary aggressor; or *four*, in sexual assault cases, lying about "regrettable" or embarrassing consensual sex.

Some of these purported motives, particularly the latter, may play into misogynistic stereotypes about women. It can be an effective argument to pierce the logic of these tropes. For example, it would generally make little sense for an individual to want to endure cross-examination in a public courtroom about, e.g., a consensual, though “regrettable” encounter, rather than keep a private moment to herself and go on with her life. Other putative motives to lie that may hold more weight can be rebutted with evidence rather than via closing argument. A victim’s early disclosure or outcry (via, e.g., text, email, journal entry, or conversation) may be substantively admissible to rebut a claim of recent fabrication or improper motive.<sup>17</sup> Those disclosures can be further corroborated by the testimony of outcry witnesses or the records that reflect the communication. In addition, victims and other witnesses can testify as to what victims realistically stand to gain by testifying and about the negative impacts from coming forward. They can put into perspective, for example, that just because a victim sought counsel from a civil attorney and filed a lawsuit does not mean that the victim lied about the assault – particularly if she disclosed the assault to her best friend before contacting that attorney.

Throughout an investigation, we should ask ourselves (and ultimately the jury) why the victim would lie and what that victim would gain from making up an incident of sexual assault or domestic violence. If the answer is that the victim had no motive to lie, legitimate or otherwise, the logical conclusion may very well be that the victim is telling the truth. To be sure, we cannot vouch for a victim’s credibility during closing argument. However, we can certainly argue to a jury that, if the victim had no motive to lie, then the reason that the victim is accusing the defendant of assaulting her is because he did.

☆ **Although the Victim’s Account Is the Center of the Case, Focus on the Perpetrator’s Conduct**

Just as we should ask why a victim would lie, so too should we ask the same of a perpetrator. We should question a perpetrator’s motives during his statements to investigators, on the witness stand, or to the victim during the course of the crime and thereafter. Our attention should likewise be trained on the perpetrator’s actions. Focusing on a perpetrator’s conduct can establish consciousness of guilt and intent, corroborate aspects of the victim’s account, and reveal a pattern of conduct that may be admissible for various purposes.<sup>18</sup>

The perpetrator’s choice of victim may likewise be incriminating, even though, at first blush, it may appear to present insurmountable challenges to prosecution. Victims of domestic violence and sexual assault tend to be perceived as less credible than their perpetrators, either because of their perceived status in life, status at the time of the crime, or status relative to the perpetrator (often due to power disparities within a relationship, be it, for example, intimate partners, superior and subordinate, teacher and student, doctor and patient, parishioner and penitent, officer and arrestee). Victims may have mental health or substance abuse issues; they may have disabilities, have criminal convictions, be undocumented, or have limited English proficiency; they may be marginalized within society because of their race, gender, ethnicity, age, gender identity, or sexual orientation; they may be financially or otherwise dependent on the perpetrator; they may have been voluntarily or involuntarily intoxicated or similarly

<sup>17</sup> See, e.g., Fed. R. Evid. 801(d)(1)(B)(1) (A Declarant-Witness’s Prior Statement) (discussed in Principle Three, *infra* at page [15](#)).

<sup>18</sup> See, e.g., Fed. R. Evid. 413(a) (Similar Crimes in Sexual Assault Cases), Fed. R. Evid. 404(b)(2) (Other Crimes, Wrongs, or Acts) (discussed in Principle Three, *infra* at page [15](#)).

incapacitated at the time of the crime; or, in cases of sexual assault, they may have been in custody at the time of the assault or have a history of being in the commercial sex trade. But prosecutors should “flip the script” and view these perceived credibility deficits as potential reasons for why a perpetrator targeted them. Perpetrators frequently choose victims whom they expect no one to believe, anticipating that they will evade responsibility. These perceived imperfections often make for the “perfect victim.”

Sexual assaults facilitated by alcohol, illicit substances, or predatory drugs<sup>19</sup> illustrate this point and the significance of focusing on perpetrators’ conduct. These cases are often viewed as among the most challenging because of victims’ voluntary or involuntary intoxication, even when they clearly recollect lack of consent. But that view overlooks the fact that perpetrators of these crimes weaponize intoxication. Investigations should focus on the perpetrator’s behavior, including his initial interactions with the victim; whether he appeared less intoxicated than the victim; whether he was aware of how intoxicated she was by, for example, purchasing drinks or encouraging her to drink; and whether he took steps to isolate the victim, perhaps under the guise of taking care of her. We should carefully consider whether we would draw the same conclusions about that perpetrator if he similarly targeted a victim, but it did not involve a bar, a college campus, or a victim that may be perceived as exercising poor judgment. If instead the perpetrator followed the victim home after she left work and then pretended to be a delivery person to gain entrance into her house, the predatory conduct is readily apparent. Yet we tend to view that scenario differently because it comports with the stereotypical narrative of sexual assault by a stranger, even though the conduct (sexual assault of a vulnerable victim where the perpetrator targeted and isolated her) and the danger the perpetrator presents to the community are the same as in sexual assaults facilitated by alcohol, predatory drugs, or the like.

Evidence that the perpetrator chose a victim whom he thought no one would likely believe, evidence that the perpetrator isolated the victim, and evidence that the perpetrator attempted to silence the victim all tend to corroborate the victim’s account and illustrate consciousness of guilt. The perpetrator’s statements to investigators can work the same way. It is rare that a perpetrator will outright confess to physically assaulting his girlfriend or engaging in nonconsensual sex with his colleague, but he may corroborate much of the victim’s account, short of the ultimate issue, without realizing the incriminating nature of his statements. As with any criminal investigation, we should use the perpetrator’s version of events as a guide to uncover evidence that may disprove his version and corroborate the victim’s account.

We should also be mindful not to allow the perpetrator’s version of events to result in an automatic declination because it is “he said/she said,” and therefore supposedly cannot be proven. This is a legal fallacy. When a defendant gives a statement to investigators, despite his Fifth Amendment right not to do so, we do not have to credit it. Neither do juries. We need not credit the incredible or enter defendants’ self-serving statements into evidence.<sup>20</sup> It is rare in life and in criminal law – except for incidents of sexual assault and domestic violence – to get two versions of the same event and automatically conclude that we cannot determine what

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<sup>19</sup> We use the term “predatory drugs” instead of “date rape” drugs because it more accurately describes how these drugs are weaponized to gain submission. It also more accurately conveys the nature of the perpetrator’s conduct than that of someone going on a date.

<sup>20</sup> In such a scenario, defendants cannot admit their own hearsay statements. Their only resort is to testify and be subject to cross-examination.



happened. Instead, we investigate; we look at facts, circumstances, and context; we consider motives to lie, and the lack thereof. Only then should we evaluate the law and the facts and make charging decisions based upon whether the evidence supports a finding of guilt beyond a reasonable doubt by a properly instructed jury.

## **PRINCIPLE TWO: MEET THE VICTIM (WHERE THEY ARE) AND WORK WITH INVESTIGATORS & VICTIM SPECIALISTS TO DO SO**

Prosecutors must meet with victims. We should do so before we make charging decisions, even if investigators represent to us that we cannot prove the allegations.<sup>21</sup> Meeting with the victim, as early as possible in an investigation, is the most basic and effective way to evaluate the merits of an allegation, learn more about what happened, collaborate with investigators on additional investigative steps, and properly assess the viability of various statutory violations that investigators may not have considered. Because the victim's testimony is often at the center of sexual assault and domestic violence cases, meeting with the victim is part and parcel of implementing Principle One and using the victim's account to frame the investigation. Developing a relationship with a victim increases the likelihood of a victim's willingness to participate by the time a case is set for trial. Juries also tend to sense whether there is trust between a prosecutor and the victim. Trust undergirds credibility for the prosecutor and for the victim. Consequently, the continuity of vertical prosecutions, where the same prosecutor handles a case from inception to resolution, is preferable for sexual assault and domestic violence cases. If an office employs horizontal prosecution, where different prosecutors handle a case at different stages, that is even more of a reason for trial prosecutors to meet with victims and restart the rapport-building process.

### **☆ Cultural Humility Is Essential: Collaborate with Victim Specialists and Advocates**

Prosecutors should not meet with victims alone. We should of course avoid being the singular witness to anything substantive a victim says, lest we become witnesses ourselves and risk disqualification. There is also no substitute for the prosecutor meeting with the victim. When doing so, we must consider each victim's individual background. When we first meet with them, we should be cognizant that, in the eyes of many victims, we have little in common with them and cannot relate to them<sup>22</sup> — even if we do and we can. To bridge this gap, not only should we engage with victims as the people they are and find commonality, but we should also take advantage of the resources within our communities and seek the assistance of those who can engender a victim's trust and help them feel more comfortable. This often means ensuring that victims can recognize something about themselves in the people we enlist to help them. At a minimum, for the purpose of relationship-building, this may be, e.g., a fellow Tribal member or member of a culturally specific community, a person of the same gender or similar age, or someone fluent in the victim's native language, each of whom is comfortable with the subject

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<sup>21</sup> See, e.g., [Memorandum of Understanding Between the Montana Attorney General, the Missoula County Attorney's Office, Missoula County, and the U.S. Department of Justice \(June 10, 2014\)](#), Exh. 1 at page 2.

<sup>22</sup> See [American Bar Association's 2023 Profile of the Legal Profession](#).

matter.<sup>23</sup> Preferably, we should rely on the training and expertise of victim specialists within our offices or victim advocates at coalitions, victim service providers, or local hospitals.<sup>24</sup>

When properly resourced and trained, victim specialists can play an integral role in the life cycle of a case, starting at the inception of an allegation through trial or plea and sentencing. Prosecutors' caseloads are too big and our days in the courtroom are too long to give every victim as much attention as they deserve. But victim specialists can stay in contact with victims when we are unavailable, allay their concerns when they receive automatic victim notifications or see case updates on a court's website, and offer expertise that we may not have. Prosecutors still must meet with victims in a thoughtful and considered way and not defer that responsibility to victim specialists. Yet victim specialists can often be a prosecutor's envoy, explaining to a victim the prosecutor's role when a victim may be skeptical. They can help victims understand the criminal justice system. They can also help stabilize victims, including by linking them with outside services and connecting them with community-based victim advocates, where confidentiality may apply. Ensuring the well-being of a victim, and working with a victim specialist to do so, is not only the human thing to do (and often the reason why so many of us enter this line of work), but it also increases the likelihood that a victim will be willing and able to prepare for and testify at trial.

#### ☆ **Meeting With Victims Requires Patience, a Plan, and a Purpose**

We should meet victims where they are, literally and figuratively. We should meet them in an easily accessible place where they feel comfortable and safe, which may not be the prosecutor's office or law enforcement agency. We should meet them at a time that does not conflict with their work schedule or present child, elder, or familial care issues or cause other financial hardships, or put their safety at risk. We should create an environment where they are less likely to feel distracted or anxious, which may require ensuring physical access or language access.<sup>25</sup>

It may also mean setting aside a block of time, and letting the victim know that we are not in a rush, and that the time belongs to them – a luxury of sorts that many victims may have never been given. That opportunity to be heard, to have questions answered, to see that their allegations are being taken seriously, and to have their fears and concerns allayed will pay

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<sup>23</sup> See, e.g., [Attorney General Guidelines for Victim and Witness Assistance 2022 Edition](#), pages 42-44 (working with underserved communities, marginalized populations, and victims with limited or no English proficiency); see *supra* footnote 8, [Improving Law Enforcement Response](#) at Principle Five ("Refer Victims to Appropriate Services").

<sup>24</sup> Prosecutors should ensure that victims are aware that communications between the victim and a systems-based victim specialist are not privileged and may be subject to disclosure to defense counsel. Communications with community-based advocates may be confidential and covered by victim-advocate privilege, depending on the jurisdiction. See, e.g., *Doe v. Old Dominion Univ.*, 289 F. Supp. 3d 744, 752-754 (E.D. Va. 2018) (finding that communications between a sexual assault victim and their advocate were privileged under federal law, citing to Virginia law and Fed. R. Evid. 501).

<sup>25</sup> Meaningful language access is critical during a victim interview. We must ensure that we use trained interpreters who are comfortable with the subject matter. We should not rely on family members or friends to serve as interpreters for the same reasons that family and friends should not be present during victim interviews: they become witnesses to the interview; if they are outcry/early disclosure witnesses or have other information about the assault, we run the risk of tainting their testimony; and victims may not be as candid in the presence of their loved ones.

dividends.<sup>26</sup> If a victim trusts us – not to get a conviction or a certain sentence (because no prosecutor should ever make such promises) – but to answer their questions, listen to their account, keep them informed, and treat them with dignity, that victim will be more likely to stay engaged as a case slowly winds its way toward resolution, and more particularly, trial. It will also result in more productive and meaningful conversations about potential plea offers and perhaps less difficult discussions about declinations when necessary.<sup>27</sup>

During these meetings and throughout the pendency of the investigation and litigation, we should work collaboratively with victim specialists and investigative partners to protect victims' safety and privacy while also recognizing that we are ultimately the ones who will be in the courtroom with the victim asking difficult questions in the presence of the perpetrator. Therefore, we must set the tone for the process. Effective prosecutors understand that, from the beginning, we should manage expectations and be candid about the process. If time allows, we may want to have an initial meeting just focused on rapport-building and answering the victim's questions about the process. Choosing not to discuss the facts at the initial meeting may provide a sense of relief to victims who view us as strangers. The timing of a discussion about the facts also depends on whether there are prior statements that prosecutors and investigators first need to review, whether there are other investigative steps that should take place first, whether a charging decision is imminent, and whether the victim is immediately willing to talk about the assault.

Because disclosure is a process, we may have to meet with victims multiple times. In so doing, there are steps prosecutors can take, in consultation with investigators, to lessen the likelihood that victims will be effectively impeached based on inconsistencies in multiple statements that have no bearing on truthfulness, while adhering to our *Brady* and *Giglio* obligations.<sup>28</sup> During follow-up meetings, we should avoid asking victims to repeat the same facts again. However, we should not shy away from asking clarifying questions (even and especially if the answers may be detrimental to our case) and asking questions the answers to which may appropriately be the subject of motions in limine. We also should ask questions in a basic, "non-legal" way to determine whether the facts support the elements of various statutory violations. In sexual assault cases, this may be as simple and as significant as asking a victim whether she wanted to – or freely chose to – engage in sexual activity with the perpetrator. Asking questions about the elements without inadvertently asking the victim to state a legal conclusion, like lack of consent, takes the onus off the victim to articulate a concept that is fraught with societal misconceptions – which the victim may share – about whether, for example, flirting, failing to fight back, or not forcefully saying "no" is tantamount to consent. Meeting with the victim ensures that we can make an accurate firsthand assessment of the facts and the victim's credibility and therefore, a sound prosecutive decision.

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<sup>26</sup> We recognize that misdemeanor domestic violence caseloads, in particular, do not allow for prosecutors to set aside large blocks of time for every victim. However, even the busiest prosecutors in the country have underscored the importance of meeting with victims, and the benefit of doing so as early as possible, including during the investigative stage.

<sup>27</sup> See, e.g., 18 U.S.C. § 3771(a)(5) (Crime Victims' Rights Act; "the right to reasonably confer with the attorney for the Government on the case"); see *supra* footnote 23, [Attorney General Guidelines](#).

<sup>28</sup> The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. It is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Despite our best efforts during those meetings, every prosecutor should expect that a victim may come to not want to participate at some point during the pendency of a case. Sexual assault and domestic violence are among the worst experiences that a human being can survive. Resistance and hesitance should not be misconstrued as being unwilling to participate. It may be, for example, that a victim has met with investigators multiple times and has been (inexplicably) made to repeatedly recount their assault. That victim's hesitance to do so yet again is likely not a sign of overall lack of cooperation, but rather an understandable sign of frustration or perhaps re-traumatization. Prosecutors should work with investigators to determine the purpose and timing of each meeting and discuss with victims the reasons for their hesitance. Likewise, victims may also seemingly "disappear." They may ignore attempts at contact because, e.g., they may need a break and are focusing on daily life, they may be in crisis, or they may have relapsed into substance abuse. None of this means that a case is no longer prosecutable or that it should not be prosecuted. Tomorrow is a different day, so rather than become angry and impatient with the victim, we should rely on our victim specialists, give the victim time, and ensure that the victim has access to supportive services.

### **PRINCIPLE THREE: USE THE LAW & EVIDENTIARY RULES STRATEGICALLY & EFFECTIVELY**

Statutes, rules of evidence, and the caselaw that interprets those sources provide the structure to successfully prosecute domestic violence and sexual assault. To be sure, there is room for improvement and there are jurisdictional variations, but we have the essential tools, and we should use them. For sexual assault cases, for example, there are generally no longer independent corroboration requirements,<sup>29</sup> marital rape exemptions,<sup>30</sup> or physical force requirements,<sup>31</sup> all of which have historically hampered prosecutions. Nevertheless, societal fallacies about victim behavior and fear that juries will acquit because of those fallacies often lead to declinations. We must take care not to unwittingly project assumptions on an imagined jury and make prosecutive decisions based on those assumptions.<sup>32</sup> The threshold question for prosecution should be whether a prosecutor "believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact."<sup>33</sup> Using that threshold, prosecutors can more successfully charge sexual assaults and domestic violence cases if we deploy available legal tools in a comprehensive, but careful and strategic, manner.

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<sup>29</sup> Michelle J. Anderson, "[Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims](#)," 13 New Crim. L. Rev. 644, 652 (2010) (discussing that jurisdictions have largely repealed corroboration requirement, with three very limited exceptions in Texas, New York, and Ohio); *see supra* footnote 15.

<sup>30</sup> Erin K. Degnan & Cynthia A. Morikone, "[Rape](#)," 4 Geo. J. Gender & L. 503, 520 (2002) ("No state currently provides an absolute protection from prosecution for rape based on marital status . . .").

<sup>31</sup> For instance, in the 2022 reauthorization of the Violence Against Women Act (VAWA 2022), Congress amended the U.S. Criminal Code to prohibit nonconsensual or coercive sexual acts. The federal code previously required force, fear of harm, incapacitation, or a similar additional element to prove the crime of sexual abuse. *See* 18 U.S.C. § 2242(3).

<sup>32</sup> *See, e.g., Principles of Federal Prosecution § 9-27.220*, Comment – Grounds for Commencing or Declining Prosecution ("Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to unpopularity of some aspect of the prosecution or because of the overwhelming popularity of the defendant or his/her cause is not a factor prohibiting prosecution.").

<sup>33</sup> *Id.*

## ☆ Consider Accompanying Criminal Conduct & Alternative Statutory Violations

Prosecutors should consider the applicability of various statutory violations that encompass more than a jurisdiction's standard offenses that criminalize sexual assault and domestic violence. It is not uncommon, for example, for a perpetrator to engage in domestic violence as well as animal abuse, child or elder abuse, cyberstalking, online threats, identity fraud, and computer account hacking to further terrorize victims. Similarly, threatening a victim to remain silent by smashing their phone or wielding a firearm may also violate evidence tampering, obstruction of justice, witness intimidation, or firearms statutes. Charging accompanying criminal conduct like that mentioned above as well as violations of protection orders, false imprisonment, kidnapping, stalking, or simple assault – when supported by the evidence – allows a jury hesitant to convict on sexual assault or domestic violence charges because of societal fallacies to convict on other charges. Charging these crimes together also permits a prosecutor to admit evidence that paints a more complete picture of the perpetrator's conduct and therefore lends credence to the victim's account.

Prosecutors should likewise be familiar with statutes in concurrent jurisdictions that criminalize similar conduct. To effectively do so, we should engage with our counterparts in those jurisdictions to learn about their applicable laws and practices to best serve the communities we share. For example, federal jurisdiction to prosecute sexual assaults and domestic violence offenses is broader than commonly known. It covers domestic violence and sexual assaults, both domestically and abroad, in certain locations such as on cruise ships and on airplanes.<sup>34</sup> It covers continuing offenses that cross state lines<sup>35</sup> or start or end on military bases,<sup>36</sup> and it covers law enforcement officers and other government actors who use their authority to commit sexual assault.<sup>37</sup> Similarly, federal prosecution of stalking,<sup>38</sup> kidnapping,<sup>39</sup> or firearms offenses<sup>40</sup> may be preferable to state prosecution, or vice versa, for a variety of substantive and procedural reasons. The breadth of victims' rights, statutes of limitation, restitution statutes, rape shield provisions, admissibility of a perpetrator's prior bad acts, maximum statutory penalties, standards for pre-trial detention and bond, applicable jury instructions, statutorily mandated sex offender registration, and the requirements of victim testimony or lack thereof to secure an indictment or file an information are all worthy considerations when assessing potential charges among varying jurisdictions.<sup>41</sup>

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<sup>34</sup> For offenses occurring in certain federal enclaves and lands reserved for federal use, *see* the Special Maritime and Territorial Jurisdiction Act, 18 U.S.C. § 7, and for offenses committed by certain individuals accompanying the armed forces abroad, *see* the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261.

<sup>35</sup> *See, e.g.*, 18 U.S.C. § 2261 (Interstate Domestic Violence); 18 U.S.C. § 2421, § 2422(a) (Coercion and Enticement).

<sup>36</sup> 18 U.S.C. § 7 (Special maritime and territorial jurisdiction of the U.S. defined).

<sup>37</sup> 18 U.S.C. § 242 (Deprivation of Rights Under Color of Law); *United States v. Lanier*, 520 U.S. 259 (1997); *see supra* footnote 13, Gold, *Emerging Issues* at page 77; Fara Gold, "[2022 Update: Prosecuting Sexual Misconduct by Government Actors](#)," 70 DOJ J. Fed. L. & Prac. 49 (2022).

<sup>38</sup> 18 U.S.C. § 2261A (Stalking).

<sup>39</sup> 18 U.S.C. § 1201 (Kidnapping).

<sup>40</sup> 18 U.S.C. § 922(g)(1) (Possession of a Firearm by a Convicted Felon); 18 U.S.C. § 922(g)(8) (Possession of a Firearm by an Individual Restrained by a Domestic Violence Protection Order); 18 U.S.C. § 922(g)(9) (Possession of a Firearm by a Convicted Domestic Violence Misdemeanant).

<sup>41</sup> *See supra* footnote 37, Gold, 70 DOJ J. Fed. L. & Prac. at 64 (2022) ("Strong State and Federal Partnerships").

## ☆ **Lessen Victim Re-traumatization, File Pretrial Motions, & Educate the Court**

Despite our best efforts to conduct investigations in a manner that minimizes victim re-traumatization, trials can be re-traumatizing. The victim must recount the intimate details of the crime while sitting feet from their perpetrator. Defense counsel's objective is to portray the victim as a liar, or, at the very least, as someone whom the jury should not believe at that moment. Cross-examination is decidedly not trauma-informed, as it is designed to exploit the victim's counterintuitive behavior both at the time of the crime and on the stand. The questions, in tone and manner, are supposed to elicit responses that make the victim sound scattered or confused. The questions, in substance, are often meant to impugn the victim's character and discredit her in the eyes of the jury.

There are steps we should take to lessen the trauma of testifying. First, we should spend time preparing victims for trial: showing them the courtroom, ensuring they have presentable clothes to wear to court, reviewing prior statements with them, and discussing the mechanics and substance of direct and cross-examination. Second, we should use the rules of evidence to educate the court and protect the victim from being improperly impeached, as we would with any witness. Doing so should not be reserved for in-court objections but should be done anticipatorily via motions in limine. While prosecutors cannot control the tone and tenor of the questions that defense counsel will ask, we can work to limit the substance and breadth of some of those questions in advance.

Filing written motions will give the court an opportunity to make thoughtful, reasoned decisions. Objecting during trial runs the risk of the judge making rushed and unfavorable rulings at sidebar. Even if the judge rules favorably, the proverbial bell has been rung in front of the jury. Pretrial motions as well as trial briefs that outline the evidence and areas of objection will educate the court about the facts and law, potentially allowing for a less contentious trial and a better protected record. This is especially true when a judge is new to the bench or has limited experience presiding over cases involving sexual assault or domestic violence.

The Federal Rules of Evidence and their analogues in other jurisdictions support the preclusion of evidence that has no legitimate bearing on a victim's credibility but would nonetheless threaten to undermine it, if admitted. These rules limit admissibility of criminal convictions<sup>42</sup> and prohibit evidence of specific instances of conduct.<sup>43</sup> This includes prior arrests or prior use of alcohol or other intoxicants unrelated to the victim's ability to recall the crime about which they will testify. It can also include prior victimizations for which there was no evidence of false reports but rather where the crimes were never prosecuted for reasons unrelated to the truthfulness of the allegations. Likewise, rape shield provisions prohibit the admission of evidence for the purpose of proving sexual predisposition or portraying the victim as promiscuous.<sup>44</sup> Such provisions also prohibit the introduction of prior instances of sexual

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<sup>42</sup> See Fed. R. Evid. 609 (Impeachment by Evidence of a Criminal Conviction).

<sup>43</sup> See Fed. R. Evid. 404 (Character Evidence; Other Crimes, Wrongs, or Acts); Fed. R. Evid. 608 (A Witness's Character for Truthfulness or Untruthfulness).

<sup>44</sup> See, e.g., Fed. R. Evid. 412 (Sex-Offense Cases: The Victim).

conduct (including in the commercial sex trade) or gratuitous references to victims' clothes or social media posts.<sup>45</sup>

To ensure that motions in limine are comprehensive, we must have frank conversations with victims about conduct that they will almost assuredly view as embarrassing and irrelevant – which is why we need to know about it. It is therefore incumbent on us to develop enough trust with victims that they are willing to disclose these “bad facts” so that we can successfully preclude them or prepare victims in advance of their introduction, typically during direct examination, so that we can anticipatorily address them.

Just as the rules of evidence allow prosecutors to protect a victim from improper impeachment, so too do they support corroborating a victim's account in two significant ways: first, by admitting the defendant's prior conduct under certain circumstances, and second, by admitting the victim's prior consistent hearsay statements under certain exceptions. Regarding the latter, victim statements made to medical professionals like emergency room physicians or medical forensic clinicians<sup>46</sup> may be admissible as statements made for the purpose of medical diagnosis or treatment;<sup>47</sup> statements made as an event was occurring or shortly thereafter, for example, during a terrified call to a friend or to 911, may be admissible as present sense impressions<sup>48</sup> or excited utterances;<sup>49</sup> and victim statements made before the advent of the investigation may be admissible to rebut a defense of improper motive or recent fabrication.<sup>50</sup> Regarding the defendant's conduct, in sexual assault prosecutions, some jurisdictions permit the admission of the defendant's other sexual assaults to be used for any matter “to which it is relevant,” including as propensity evidence — a rarity in criminal prosecutions.<sup>51</sup> Relatedly, most jurisdictions permit the admission of similar fact evidence to show, for example, the perpetrator's pattern, motive, and intent, which can be used in both sexual assault and domestic violence prosecutions.<sup>52</sup> Similar fact evidence can also be used to rebut a consent defense in sexual assault prosecutions.

### ☆ **Consult with and Learn from Experts and Use Expert Witness Testimony to Educate the Jury**

Experts in sexual assault and domestic violence cases typically fall into two categories: experts whom we are likely to call to testify about the presence or absence of physical evidence, like forensic medical clinicians or DNA analysts, and experts about victim behavior and traumatic

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<sup>45</sup> See, e.g., *Harness v. Anderson Cnty., Tennessee*, 2019 WL 8405381, at \*1 (E.D. Tenn. Oct. 23, 2019) (concluding that absent an exception, evidence of victim's “mode of speech, communications, social media postings[,] and lifestyle[,] as well as her predisposition in and outside the workplace,” generally falls within Rule 412's prohibition (internal citations omitted)).

<sup>46</sup> These are typically forensic nurse examiners or other clinicians who conduct sexual assault exams (rape kits) or exams as a result of intimate partner violence.

<sup>47</sup> See, e.g., Fed. R. Evid. 803(4) (Statement Made for Medical Diagnosis or Treatment).

<sup>48</sup> See, e.g., Fed. R. Evid. 803(1) (Present Sense Impression).

<sup>49</sup> See, e.g., Fed. R. Evid. 803(2) (Excited Utterance).

<sup>50</sup> See *supra* footnote 17.

<sup>51</sup> See, e.g., Fed. R. Evid. 413(a); Ga. Code Ann. § 24-4-413 (West) (Prior offenses in criminal sexual assault proceedings); Ark. Code Ann. § 16-42-103 (West) (Admissibility of evidence of similar crimes in sexual assault cases; and Mil. R. Evid. 413 (Similar crimes in sexual offense cases.)

<sup>52</sup> Unlike Fed. R. Evid. 413, many jurisdictions have a version of Fed. R. Evid. 404(b) (Other Crimes, Wrongs, or Acts).

memory. This latter category of experts is gaining more acceptance by courts throughout the United States.<sup>53</sup> Prosecutors should consult with experts from both categories even if we do not plan to call them at trial. Experts can help inform our investigation, explain victim behavior, offer guidance on questions to ask or how to ask them, and opine on evidence we should request to have analyzed. Meeting with forensic medical clinicians and DNA analysts, in particular, should not be limited to testimony preparation.<sup>54</sup>

Due to the nature of their roles, forensic medical clinicians meet with victims soon after the crime occurred and spend hours with them. They can educate prosecutors about the forensic medical exam itself, specific methods of violence such as strangulation, and the significance of both the presence and absence of evidence. For example, they can explain why they may not recover DNA from a victim's body or why bruises on victims of color may not be visible. They can further explain that sexual assault victims may be more likely to sustain injury to their wrist or ankles where perpetrators grabbed them rather than to their vaginal or anal areas where perpetrators penetrated them. They can opine about the healing time of injury and how the absence of injury does not mean an assault did not occur. Clinicians may also be able to opine about behavior consistent with trauma, like a victim not knowing whether the perpetrator ejaculated,<sup>55</sup> because, for example, she was more focused on survival and therefore stared at the ceiling to mentally escape the assault. To that point, the testimony of forensic medical clinicians and other experts in trauma may help the jury understand the evidence, i.e., the seemingly counterintuitive (though common and even expected) behaviors that victims of sexual assault and domestic violence often exhibit during the crime and its aftermath. Such experts, who can be local victim service providers or family physicians, can strengthen cases by educating the jury about sexual assault myths, why domestic violence victims stay with their abusers, why trauma victims may provide inconsistent statements throughout an investigation, or why victims may engage in "normal behavior" after the assault.

There are two schools of thought regarding expert testimony. Some prosecutors call experts to testify on a case-by-case basis and will not necessarily do so if a victim can sufficiently explain to the jury why she took certain actions, like delaying reporting. Nonetheless, those prosecutors consult with experts to learn from them and improve their investigations and the way they try cases. Other prosecutors call experts to testify in every sexual assault or domestic violence case, often discussing that testimony with specificity in opening statement or calling the expert

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<sup>53</sup> See *United States v. Roberts*, 86 F.4th 1183, 1187 (8th Cir. 2023) (stating that a "wall of precedent in [the Eighth Circuit that] establishes that an expert may properly testify about responses to sexual assault, so long as they do not diagnose someone as a victim of sexual assault or express an opinion that sexual abuse has in fact occurred . . . This is because some post-abuse behavior may seem counterintuitive, so expert testimony will allow jurors to evaluate the alleged victim's behavior and assess credibility by understanding how individuals generally react to sexual abuse" (internal citations omitted)); *United States v. Young*, 316 F.3d 649, 655 (7th Cir. 2002) (expert may properly testify about dynamics of domestic violence and how victims "commonly recant their accusations and that victims of such abuse have limited ability to perceive means of escape").

<sup>54</sup> This applies to both sexual assault and domestic violence cases, particularly those domestic violence cases that involve strangulation. See [A National Protocol for Intimate Partner Violence Medical Forensic Examinations](#) (May 2023), developed by the Justice Department's Office on Violence Against Women.

<sup>55</sup> Julie L. Valentine, Kathleen Sekula, Lawrence J. Cook, Rebecca Campbell, Alison Colbert, & VW Weed, "[Justice denied: Low submission rates of sexual assault kits and the predicting variables.](#)" *Journal of interpersonal violence* 34.17 (2019): 3547-3573.



first to educate the jury at the outset of the trial. Decisions regarding expert testimony often depend on our knowledge of our local jury pool, the presiding judge, and budget constraints.

When calling an expert to testify, prosecutors should consider whether the experts will be “blind,” that is where the expert will not know specific facts about the case and will generally testify about their area of expertise. Blind testimony lessens the risk of inadvertently opining on the credibility of the victim and invading the province of the jury. While a blind expert’s purpose is to broadly educate the jury, they will be cross-examined on their lack of knowledge of the facts. Of course, the testimony of a forensic medical clinician who treated the victim can never be blind, but we should prepare the forensic medical clinician, as we should with any expert, not to run afoul of evidence rules during their testimony.<sup>56</sup>

### ☆ **Use Legal Tools to Protect Victim Safety and Privacy**

Victims may fear retaliation, escalating violence, and a continued violation of privacy after they report to authorities. We should therefore use available tools to protect victims (and witnesses), and, in the process, demonstrate to them that we take their safety and privacy seriously.<sup>57</sup> At the outset of a case, we should seek protection orders, file bond or detention motions, and ask for specific conditions to curtail the perpetrator’s behavior or ensure compliance with treatment and related requirements. When a perpetrator violates those conditions or a protection order, we should move for revocation, bearing in mind that our safety obligation is not only to the victim, but to the community at large.

During the discovery phase, we should remember that while discovery rules are broad and allow defendants access to a lot of information, such access is not unfettered. Prosecutors should routinely scrutinize discovery materials for information that is private, potentially embarrassing, or could compromise victim safety. Where such information is *clearly* immaterial and irrelevant, prosecutors should thoughtfully consider withholding it from defense counsel, consistent with applicable discovery policies. Where it may be material and relevant or we think defense counsel may potentially view it as such, prosecutors should move for in camera review and protective orders that limit access solely to defense counsel, prohibit defendants from retaining their own copies, and permit redaction of sensitive materials or review of those materials by defense counsel only in a prosecutor’s or law enforcement office. Protective orders should require that materials be returned to the prosecutor at the end of the case. Prosecutors should likewise consider providing watermarked discovery with defense counsel’s name to prevent unlawful or inadvertent dissemination on social media or elsewhere. If a jurisdiction requires that a method of contact for the victim be provided, prosecutors should consider recommending to victims that they set up an email address for such a purpose.

Just as we should be mindful of the victim’s privacy during the discovery phase and the pretrial phase, we should also proactively take measures to protect victims’ safety and privacy during

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<sup>56</sup> Prosecutors should also take care to adhere to notice and discovery requirements regarding expert witnesses. *See, e.g.*, Fed. Rule. Evid. 702, Fed. R. Crim. P. 16(a)(1)(G) (Expert Witnesses).

<sup>57</sup> A crime victim has “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy,” 18 U.S.C. § 3771(a)(8), and “[t]he right to be reasonably protected from the accused,” 18 U.S.C. § 3771(a)(1) (Crime Victim’s Rights Act); *see also* 34 U.S.C. § 20141(c) (Victims’ Rights and Restitution Act) (enumerating mandatory victims services that attach prior to the commencement of a prosecution, including but not limited to reasonable protection from a suspected offender).

trial. For example, it may be appropriate to call a victim by a pseudonym during testimony or in publicly filed pleadings, if the court allows.<sup>58</sup> If a victim and defendant are both in custody at the time of trial, we should ensure that they are neither transported to the courthouse together nor held in the same or nearby cells while waiting for court to begin. If during a forensic exam, the forensic medical clinician photographed internal or external injuries to a victim's genitals, anus, or breasts, prosecutors may not necessarily have to enter those photographs into evidence and publish them to the jury. Rather, we should consider having clinicians testify to the injuries and using a sketch as a demonstrative aid. Providing evidence to the jury in this manner may be just as persuasive and simultaneously be less invasive of the victim's privacy. Similarly, we should safeguard and protect such evidence from general viewing, be it during hearings, during transport to and from court, and even within our offices.

In addition, victims' cellphones that contain relevant evidence present privacy and safety challenges. There is no one definitive solution to effectively overcoming those challenges. For many of us, cellphones are our lifelines. For domestic violence victims, that literally may be true. Consequently, when we ask to take their phone for a 24-hour period or longer to conduct an extraction, we may be exacerbating a victim's plight. Some prosecutors therefore rely on taking screenshots of relevant evidence<sup>59</sup> and using those screenshots as a basis for probable cause to obtain a warrant to search the perpetrator's phone. Other prosecutors, in an effort to ensure they obtain all relevant information, as well as information that the defense may attempt to use during cross-examination, obtain limited consent to search a victim's phone with specified parameters consistent with other types of consent searches. With instructions to the victim not to delete anything on their phone, prosecutors retain only information identified within the consent-to-search form and do not maintain an entire copy of the extraction because there is no lawful basis to do so.<sup>60</sup> Regardless of the method used to obtain and preserve such evidence, none of us wants to be surprised at trial with evidence from the victim's cellphone. It may be that such evidence is irrelevant, but we can only move to limit its admissibility and protect the victim's privacy if we know about it in advance. And the best way to do so is through frank conversations with the victim, which will only occur when the victim is comfortable with us. Protecting the victim's privacy, just like building a strong case, finds its foundation in the prosecutor's relationship with the victim.

## **PRINCIPLE FOUR: BE THOUGHTFUL ABOUT WHAT ACCOUNTABILITY & JUSTICE LOOK LIKE**

Victim input is an integral part of the criminal justice process, from the investigation to charging decisions through sentencing. In many jurisdictions, the law mandates it.<sup>61</sup> But as prosecutors, we do not represent the victims. Our obligation is to the community at large, that is, to the

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<sup>58</sup> See *supra* footnote 7.

<sup>59</sup> In so doing, we must be mindful that defense counsel may argue that we "cherry picked" information. We therefore may want to consider employing processes similar to a filter review to ensure we capture arguably exculpatory and impeachment material consistent with our *Brady* and *Giglio* obligations. See *supra* footnote 28.

<sup>60</sup> We urge caution when doing a complete search or extraction of a victim's entire phone because it will necessitate disclosing a wealth of private, irrelevant information that may put the victim's safety and privacy at risk, absent an in-camera review that determines otherwise. Prosecutors should discuss with investigators whether a full search is necessary, and, if so, move for a protective order.

<sup>61</sup> See, e.g., *supra* footnote 27.

people of the jurisdiction we serve. Sometimes a victim's position and our duty to the community align; sometimes they do not.

The way to find out what the victim wants is to ask them. Sexual assault and domestic violence often result in victims' marginalization and dehumanization. Taking the time to listen to them and treat them with humanity, even if we cannot or will not do what they want, may be one of the few things we can do for them. Because not all victims are the same, their views are going to differ based on a host of factors, including the type and extent of victimization they have endured, whether the perpetrator is an intimate partner or they have children in common, and the ways in which participating in a prosecution will impact their lives and the lives of those around them. Consequently, we must be thoughtful and nuanced in our conversations with victims as we set expectations and shepherd cases through resolution.

There will be victims who, subject to the caveats listed above in Principle Two about hesitancy, are willing to participate in prosecution and view a lengthy prison sentence as the only acceptable form of accountability and the only palatable outcome to provide peace of mind, bodily autonomy, and a sense of safety and justice. For example, victims of sexual assault, and particularly where intimate partners are not the perpetrators, may take this position. And indeed, given the nature of the crime, that may be the appropriate outcome. But because both a jury's verdict and a judge's sentence are beyond our control, we should discuss potential plea offers and the factors that go into such offers, as is our obligation. We should also discuss with them whether the act of testifying and confronting their perpetrator, as nerve-wracking as it may be, and then being present for closing arguments, may restore agency in a way that a plea to a lesser number of years or a lesser offense cannot.<sup>62</sup> The victim's preference may not be the approach we ultimately take, but it is one we should discuss with them and consider.<sup>63</sup>

There will also be victims who do not want to participate in prosecution or who do not want the perpetrator to be incarcerated. This is frequently true in domestic violence and intimate partner-committed sexual assault cases, where victims remain financially dependent on abusers, share children with them, or still care about them.<sup>64</sup> Prosecutors handling these cases would benefit from learning about the dynamics of domestic violence to better understand that such victims are not being uncooperative. Rather, they are not yet ready to permanently alter their lives. It is not uncommon for domestic violence victims to view prosecution – and not the conduct of the person who abused them – as causing the destruction of their family.<sup>65</sup>

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<sup>62</sup> Regardless of the outcome, we can often secure procedural justice for victims if we treat them fairly and with dignity throughout the criminal justice process. Procedural justice often results from a victim feeling like the prosecutor believed them, especially after being repeatedly told by the perpetrator that no one would ever believe them.

<sup>63</sup> See, e.g., 18 U.S.C. § 3771(a)(4) that guarantees victims the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding" even if a victim's position differs from that of the government.

<sup>64</sup> See, e.g., Jill Davies, "[When Battered Women Stay... Advocacy Beyond Leaving](#)," *Building Comprehensive Solutions to Domestic Violence*, developed by the National Resource Center on Domestic Violence, in collaboration with Greater Hartford Legal Aid, Inc. (June 2008).

<sup>65</sup> Advocates committed to ending gender-based violence have recognized the need for alternative tools to hold offenders accountable and help victims seek safety, healing, and support. Though not the subject of this document, one such tool may be a form of restorative justice. For example, VAWA 2022 authorized the "Pilot Program on Restorative Practices," pursuant to 34 U.S.C. § 12514, which defines

We should talk to victims about our role and their role and about how accountability does not necessarily have to equate to incarceration. These discussions may make a difference in a victim's willingness to participate. Even so, before allowing victims to sign waivers of prosecution or non-prosecution affidavits, we should ask them what they were hoping for when they called the police in the first instance and what they are most concerned about if prosecution proceeds. We may learn that they want the abuse to stop and for the abuser to get help. In that case, we may work toward a resolution that includes batterer intervention programs, substance abuse counseling, or protection orders. We may learn that the victim is concerned that if the abuser is sentenced to jail time, he will lose his job, and the victim and her children will face housing insecurity or loss of child support. We can work with victim specialists and community service providers to help ensure that the victim is not inadvertently punished for the defendant's crimes.

It is also not uncommon for domestic violence victims and victims of intimate partner-committed sexual assault to refuse to participate out of fear that prosecution will put them in even more danger from abusers.<sup>66</sup> In evaluating these situations, we should consistently weigh accountability and safety. In so doing, some prosecutors' offices, particularly in large jurisdictions, have decided not to go forward on certain misdemeanor domestic violence cases where the victims do not want to participate from the outset. In recognition that it may not be victim-centered to proceed both against the victim's wishes and where the potential for offender accountability is negligible, victim specialists offer services to victims and allow them time during the speedy trial period to change their minds, while a protection order remains in place. But formal charges are not filed, absent the victim changing her mind or the perpetrator assaulting her again in the interim. The decision not to proceed must be a thoughtful one, made after ensuring that the victim's position is not the result of witness intimidation. Other offices, in recognition that domestic violence is a public health issue, proceed with prosecution without the victim's participation – to the extent the evidence permits it – even on first-time misdemeanors, knowing that the first offense is often only the first offense we know about and will likely will not be the last.

To that point, there will be times for each of us when a victim does not want to participate, but community safety and offender accountability mandate that a case proceed. This does not mean that victims should be forced to testify.<sup>67</sup> Arresting victims via material witness warrants or writs of bodily attachment to compel testimony is highly disfavored and is an option of last

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"restorative practice" as community-based and unaffiliated with any civil or criminal legal process. It is initiated by the victim, is based on a victim services framework, and ensures the safety and autonomy of the victim. The statute's program requirements mandate offender risk assessments based on criminal history, the type of offense committed, and other factors, and in certain circumstances, deny eligibility.

<sup>66</sup> See Kathryn Spearman, Jennifer Hardesty, & Jacqueline Campbell, "[Post-separation abuse: A concept analysis.](#)" *Journal of advanced nursing* 79.4 (2023): 1225-1246 (discussing risk factors for post-separation violence).

<sup>67</sup> See, e.g., Tracy Prior, [Stop. Do Not Pass Go. Do not Compel Your Domestic Violence Victim to Court](#), National District Attorneys' Association (Oct. 6. 2020). In addition, VAWA 2022 requires recipients of the STOP Formula Grant Program and the Grants to Improve the Criminal Justice Response Program, to certify that prosecutors follow "a protocol outlining alternative practices and procedures for material witness petitions and bench warrants, consistent with best practices, that shall be exhausted before employing material witness petitions and bench warrants to obtain victim-witness testimony in the investigation, prosecution, and trial of a crime related to domestic violence, sexual assault, dating violence, and stalking of the victim in order to prevent further victimization and trauma to the victim." 34 U.S.C. §§ 10454(3), 10461(c)(1)(F)(iii).

resort.<sup>68</sup> It requires significant consideration about whether the ends justify the means, whether we are putting the victim's safety or her family at risk, and whether the need for offender accountability outweighs the consequences to the victim. Instead, prosecutors should build their cases without the need for victim testimony when possible. Given the nature of domestic violence in particular, even if a victim is willing to testify at the outset, prosecutors should prepare for the possibility that victims will be unavailable to testify at trial, either by their own choice or due to the perpetrator's wrongdoing. Simply put, we should prepare domestic violence cases like we do homicides.

Domestic violence prosecutions without victim participation are sometimes referred to as "evidence-based prosecutions." It is a term of art reserved for domestic violence cases where the victim does not testify at trial. This term has nothing to do with research, as the phrase "evidence-based" suggests, and it further perpetuates the fallacy that a victim's account is not evidence. All prosecutions are based in evidence, whether the victim testifies or not, and a victim's testimony *is* evidence. The misnomer notwithstanding, prosecutions without live victim participation typically involve evidence like documentation of injury, 911 calls that meet hearsay exceptions, expert testimony to explain the victim's absence, and first responding officers' testimony about the perpetrator's conduct and the victim's demeanor. In addition, where prosecutors can prove that the defendant caused the victim's unavailability, we may be permitted to admit the victim's hearsay statements under the doctrine of forfeiture by wrongdoing without running afoul of the Confrontation Clause.<sup>69</sup> Also commonly known for its use in gang prosecutions where informants are murdered to ensure their unavailability at trial, the doctrine of forfeiture by wrongdoing has been used successfully in domestic violence prosecutions throughout the United States. Both severe threats of harm as well as repeated promises of love and affection intended to result in a victim's unavailability, often proved through jail calls and text messages, have been held to constitute forfeiture by wrongdoing.<sup>70</sup>

## **PRINCIPLE FIVE: SUSTAIN A PRODUCTIVE, HEALTHY, & COMMITTED WORKFORCE BY REDEFINING SUCCESS**

Prosecuting sexual assault and domestic violence cases brings with it the "highest of highs and the lowest of lows," a shorthand assessment of the challenging and rewarding nature of this work. Those of us committed to it find purpose in the shared sense of relief when perpetrators are held accountable for committing heinous acts and when victims feel safe, believed, or vindicated. We are proud when we can restore humanity, dignity, and credibility to victims after those things were cruelly stripped away. And we have seen firsthand how the law, when employed skillfully and knowledgeably, can make that possible.

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<sup>68</sup> We are less likely to consider doing so if we adhere to the principles set forth in this guide.

<sup>69</sup> See *e.g.*, Fed. R. Evid. 804(b)(6) (Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability).

<sup>70</sup> See, *e.g.*, *State v. Dobbs*, 180 Wash. 2d 1, 15 (2014) (The "nature of the forfeiture by wrongdoing doctrine [is that] witnesses are scared into silence."); *People v. Smith*, 29 Misc. 3d 1056, 1058 (Sup. Ct. 2010) ("The power, control, domination, and coercion exercised in abusive relationships can be expressed in terms of violence [but also] in repeated . . . expressions of love and concern . . . In this case, the defendant, indicted for five separate incidents of domestic assault, called the victim over 300 times in violation of a court order. This onslaught of attention cannot be viewed in a vacuum but understood in relation to the surrounding circumstances.").

Yet that sense of purpose cannot sustain on its own. The countless hours of listening to accounts of human depravity, the devastation that accompanies an acquittal of a dangerous perpetrator, and the skepticism, if not cynicism, by those who follow the fallacies and not the law, take a toll. As a result, attrition rates are high as prosecutors either choose not to do this work or choose not to stay in this work. These challenges may also discourage new lawyers from entering this line of work.

Office culture and community outreach can reverse this trend, offset frustration fatigue, and promote a stronger response to allegations of sexual assault and domestic violence. We hope that law students consider this work when they graduate, and that prosecutors commit to doing this work and specializing in it. For that to meaningfully happen, it is incumbent on leadership in prosecutors' offices to set the tone that effective investigation and prosecution of sexual assault and domestic violence is important, recognizing that such crimes pose a significant public health and safety threat. Externally, they can demonstrate this by partnering with law enforcement leaders at community events, and publicly assuring victims and would-be victims that their allegations will be taken seriously and investigated thoroughly, with the goal of increasing reporting. Internally, and in support of those public assurances, leaders should encourage partnerships among specialized prosecutors, investigators, and victim specialists and community advocates, often in the form of multidisciplinary teams (MDTs) or sexual assault response teams (SARTs) to ensure that allegations are effectively investigated. This sort of collaboration not only illustrates the importance of these cases, but also provides essential support, resources, and direction, helping to determine what investigative steps are needed to build prosecutable cases and better serve victims.

Prosecutors' offices must also recognize the gravity of sexual assault and domestic violence the same way they recognize the gravity of homicides. That means that these cases require courtroom experience, trial skills, and a fundamental understanding of how to build cases and work with victims. Just as it would not be fair to victims' families or the community at large to assign a caseload of homicides to a brand-new prosecutor, so too is it unfair to victims and the community for new prosecutors to be assigned to handle sexual assault and domestic violence cases. Indeed, it is also unfair to prosecutors and does not set us up to serve our communities well. When lack of resources mandates that inexperienced prosecutors be assigned to these cases, supervisors should emphasize training and mentorship. In fact, we should all recognize that even if we have spent years in the courtroom, the law is always evolving, and we should seek out the opportunity to learn from those with specialization.

Supervisors should have expertise in sexual assault and domestic violence prosecutions. They should know how to get the best out of experienced prosecutors and have the skill and desire to train less experienced prosecutors. They should be able to recognize in line prosecutors the qualities needed to handle these cases, even if those prosecutors do not yet recognize those qualities in themselves. Supervisors should lead by example, and "get in the trenches," teaching and trying cases with those new to domestic violence and sexual assault cases. They should, for example, cover hearings for line prosecutors who are "double-booked," and set up ways to monitor email and voicemail so that when line prosecutors take vacation, those prosecutors experience less regret for taking time away. Where practicable, supervisors should work with their respective courts so that multiple sexual assault and domestic violence trials are not set in succession but are interspersed with other types of cases. They should acknowledge the intense

nature of this work, destigmatize the vicarious trauma associated with it, and ensure access to resources to address the toll of this work.<sup>71</sup>

Supervisors should also promote an environment that does not define success by conviction rate because, as any trial lawyer knows, trial outcomes do not always correlate to the skill, commitment, or quality of work of an attorney. Instead, the metric of success should be based on sound and creative legal skill and analysis, a commitment to ensuring victim safety and victims' and defendants' rights, support for thorough investigations even where they result in declinations, and a practice of trying cases supported by admissible evidence and the law.<sup>72</sup> Supervisors should focus on learning and improvement, asking prosecutors for their unvarnished review of cases without suggesting one view or another, and conducting post-mortems on trials, regardless of the outcome, so that prosecutors can learn what works and what does not and build on their specialization.

In that regard, expertise prosecuting domestic violence and sexual assault cases is essential, whether an office is big enough for a specialized unit or one prosecutor comprises an entire office. Expertise means having a working knowledge of both the issues outlined in this document and those that are jurisdiction specific, even if it also means handling other types of cases as either a break, a new challenge, or an office necessity. It also means possessing emotional intelligence, being capable and willing to work with marginalized and traumatized victims, being able to provide wise counsel to investigators, and having tried enough cases to plan for the expected and be prepared for the unexpected. It is those prosecutors with expertise on whom the rest of us should rely when we handle our first sexual assault or domestic violence case or the first one in a long time. And those of us with expertise should, in turn, rely on peers throughout the country as a "community of practice" to share ideas, improve skills, and better mentor colleagues. In addition, with the support of office leadership, we should proactively teach and speak to law and undergraduate students about our work, encouraging it as public interest career path in service to our communities that students may not yet have considered. Taken together, this is how we strengthen and sustain our collective response to sexual assault and domestic violence.

**For additional information, please visit <https://justice.gov/ovw/prosecutor-guide> or contact Fara Gold, Office on Violence Against Women, U.S. Department of Justice at [fara.gold@usdoj.gov](mailto:fara.gold@usdoj.gov).**

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<sup>71</sup> For information and resources on vicarious trauma, see [What is Vicarious Trauma? | The Vicarious Trauma Toolkit | OVC \(ojp.gov\)](#), developed by the Justice Department's Office on Victims of Crime.

<sup>72</sup> See, e.g., "[Measuring the Response](#)," Volume II of *The Model Response to Sexual Violence by Prosecutors (RSVP)*, ("A comprehensive tool for tracking, measuring, and continuously enhancing the prosecution of sexual violence.") (last visited May 3, 2024).

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