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Cathren Page

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## HOW THE BOOGEYMAN SAVED BRETT KAVANAUGH

Cathren Page\*

*Do not dangle your foot off the bed, or the monster under the  
bed will get you.*

*The monster under the bed;<sup>1</sup> the stranger in a dark alley;<sup>2</sup> the  
man hiding in the back seat of your car.<sup>3</sup>*

*The two unknown strangers who actually attempted to rape Dr.  
Christine Blasey Ford.<sup>4</sup>*

We love to hate these boogeymen. When the societal narrative creates these invisible boogeymen, people can pour their rage against sexual abuse into these faceless antagonists. At the same time, the enraged survivors and protectors avoid conflicts with family, neighbors, colleagues, and social acquaintances who might

\* Tenured Associate Professor of Law, Barry University School of Law. Thank you to my research assistants, Thameswarie (Natasha) Ghamandi and Hannah Jacobsen. Special thanks to my colleague, Professor Nancy Cantalupo, who invited me to join her in advocating for Christine Blasey Ford, to our co-organizers Professor Judy Koons and Debbie Fequire Dawson, J.D., Orlando NOW President, Kim Porteous, who advocated alongside us, Orlando State Representative Anna Eskamani, who connected us with others in the movement, Professor Joanne Sweeney, who offered input on previous essays regarding Kavanaugh, the victim-survivors of America, and all the vulnerable.

<sup>1</sup> The monster under the bed is such a frequent childhood fear that a book on childhood fears has been named for the phenomenon. *See generally* Stephen W. Garber et al., *Monsters Under the Bed and Other Childhood Fears: Helping Your Child Overcome Anxieties, Fears, and Phobias* (1993).

<sup>2</sup> *See* Cristina G. Messerschmidt, *A Victim of Abuse Should Still Have a Castle: The Applicability of the Castle Doctrine to Instances of Domestic Violence*, 106 J. CRIM. L. & CRIMINOLOGY 593, 613 (2016) (mentioning the stranger rape narrative).

<sup>3</sup> *See Animated Humorous Short Film "Choke" Breathes Life Into Serial Killer Legend*, MKT. WIRED (Aug. 3, 2010, 10:04 ET), <http://www.marketwired.com/press-release/animated-humorous-short-film-choke-breathes-life-into-serial-killer-legend-1299169.htm> (referencing the urban legend of the man hiding in the car).

<sup>4</sup> *See* Transcript courtesy of Bloomberg Government, *Kavanaugh hearing: Transcript*, WASH. POST (Sept. 27, 2018), [https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm\\_term=.c46593b8460b](https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.c46593b8460b).

actually commit or enable sexual abuse. We can dodge sticky questions regarding how a churchgoer, a judge, or an Ivy Leaguer could have committed a heinous act. The survivors can avoid all the victim-blaming backlash, threats of violence, and invalidation that accompanies reporting a sexual offense.<sup>5</sup> Moreover, having less power on their own, survivors can continue to draw power and resources from the offenders and enablers aided by this narrative.

In a viral quote, Jackson Katz explains how our societal conversation about sexual abuse creates this invisibility spell:

We talk about how many women were raped by men last year, not about how many men raped women . . . . the use of passive voice has a political effect. It shifts the focus off of men and boys and onto girls and women. Even the term ‘violence against women’ is problematic . . . . when you look at that term ‘violence against women’ nobody is doing it to them. It just happens to them. Men aren’t even a part of it.<sup>6</sup>

At the Thursday, September 27, 2018 Senate hearing regarding Dr. Christine Blasey-Ford’s sworn allegation that Brett Kavanaugh attempted to rape her,<sup>7</sup> the accused plugged his defense into that stranger-rape cultural narrative. His narrative strategy can be summarized as follows:

I am highly qualified, a Yale graduate who was once a teen like all of you. The Democrats have blind-sided me with allegations for political revenge. They have used poor Christine Ford as a pawn in their sick power quest. Christine Ford was raped by someone. It was impossible for me to be there at the time she was raped, and my calendar,

<sup>5</sup> The term “sexual offense” is employed broadly in this article to cover not only civil, criminal, and family law offenses, but also to cover psychological injuries. “Offender” is used to describe anyone who inflicts these injuries, intentionally or otherwise.

<sup>6</sup> Valentina Zarya, *‘We Talk About Women Being Raped, Not Men Raping Women.’ Meet the Man Behind the Viral Quote*, FORTUNE (Oct. 18, 2017), <http://fortune.com/2017/10/18/rape-viral-quote-twitter-weinstein/>.

<sup>7</sup> See Transcript courtesy of Bloomberg Government, *supra* note 5.

2019] *HOW THE BOOGEYMAN SAVED BRETT KAVANAUGH* 53

my witnesses, and my academic record corroborate that impossibility.<sup>8</sup>

Thus, Kavanaugh gave his audience an invisible boogeyman to blame. The cultural story has trained his audience to accept this stranger rape narrative.<sup>9</sup> They can empathize with Ford, exculpate the religious Yale graduate, and still feel righteous rage towards the monster under the bed who attacked a teenage Dr. Blasey-Ford.

Yet, even the monster under the bed often symbolizes something or someone real that a child actually fears in real life.<sup>10</sup> If society wants to stop sexual abuse, then it must quit blaming strangers in dark allies.<sup>11</sup> Society must be willing to hold movie producers,<sup>12</sup> family members,<sup>13</sup> Yale graduates, and even Supreme Court nominees responsible when they sexually abuse.

<sup>8</sup> See *id.*

<sup>9</sup> See Courtney Fraser, *From "Ladies First" to "Asking for It": Benevolent Sexism in the Maintenance of Rape Culture*, 103 CAL. L. REV. 141, 166 (2015).

(stating that in practice the criminal justice system favors the stranger rape narrative).

<sup>10</sup> Judi Bertola & John Allan, *Counseling seriously ill children: use of spontaneous drawings*, 22 ELEMENTARY SCHOOL GUIDANCE & COUNSELING 206, 206 (1988) (discussing how terminally ill children made a set of drawings representing their real life stages of fear, grief, and acceptance).

<sup>11</sup> See Messerschmidt, *supra* note 3 at 613 (indicating that women know most of the violent attackers and rapists who attack or rape them).

<sup>12</sup> See generally, e.g., Brooks Barnes, *Harvey Weinstein, Fired on Oct. 8, Resigns From Company's Board*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/business/media/harvey-weinstein-sexual-harassment.html> (more than thirty women have publicly accused the Hollywood mogul Harvey Weinstein of sexual harassment and rape allegations). See also Cara Buckley, *Bill Cosby and Roman Polanski Expelled From the Film Academy*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/movies/cosby-polanski-academy-expelled.html> (Roman Polanski, who won the Oscar for best director, fled the U.S. in 1978 while awaiting sentencing for statutory rape); see Sopan Deb & Deborah Leiderman, *A Look at Major Events in the Complicated History of Mr. Allen and the Farrow Family*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/movies/woody-allen-mia-farrow-dylan-farrow-a-timeline.html> (recount of a seven year old Dylan Farrow accusing Woody Allen of molesting her in their attic and the DA choosing not to further proceed with criminal charges to protect the young Dylan Farrow).

<sup>13</sup> The Woody Allen case mentioned in the previous footnote illustrates these family dynamics. Initially, his partner, Mia Farrow, dismissed friends' concerns that Allens' behavior with their daughter, toddler Dylan Farrow, was inappropriate. After Mia's toddler Dylan outcried, Mia Farrow pursued the complaints. However, struggling with the stigma, Dylan Farrow's older brother Ronan initially tried to distance himself from the story and encouraged Dylan to do the same. See generally Ronan Farrow, *My Father, Woody Allen, and the Danger of Questions Unasked*, HOLLYWOOD REPORTER (May 11, 2016, 3:00 AM), <https://www.hollywoodreporter.com/news/my-father-woody-allen-danger-892572>. Ronan came to regret that stance, and he declared public support in an Op. Ed. *Id.* Eventually, he

Not only does this stranger rape narrative perpetuate abuse,<sup>14</sup> but it also prevents full healing for the survivor-victims<sup>15</sup> aspect of the sexual abuse wound itself. Survivors live daily with the notion that other people's perceptions and voices matter more than their own.<sup>16</sup> When society replaces the actual offender with a stranger, this replacement overwrites a portion of the victim's perspective, that portion that recognizes and remembers the offender. Therefore, survivor-victims may distrust their own perspectives and place others' perspectives above their own.<sup>17</sup>

investigated the Harvey Weinstein story. *See also* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER, (Oct. 10, 2017, 10:47 AM) <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>. When NBC refused to run with the story, he took it to The New Yorker, which ran the story. *See generally* John Koblin, *How NBC and Ronan Farrow Ended Up in a Feud Over Harvey Weinstein*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/business/media/nbc-ronan-farrow-harvey-weinstein.html>. Nonetheless, abuse family dynamics are complicated. Farrow adopted numerous children, and, according to some accounts, she did initially ignore Allen's inappropriate behaviors or back down in the face of his threats, and Allen had full access to her children. *See generally* Stav Ziv, *Did Woody Allen Sexually Assault Dylan Farrow? What You Need To Know Before Her First Television Interview*, NEWSWEEK (Jan. 17, 2017), <https://www.newsweek.com/dylan-farrow-giving-her-first-television-interview-what-you-need-know-watching-783888>. *See also* Maureen Orth, *10 Undeniable Facts About the Woody Allen Sexual Abuse Allegation*, VANITY FAIR (Feb. 7, 2014, 5:14 PM), <https://www.vanityfair.com/news/2014/02/woody-allen-sex-abuse-10-facts>. Now an adult, one of these children, Moses Farrow reports that Mia Farrow emotionally abused him and has allied with Woody Allen rather than Dylan Farrow blaming an imagined dream-monster instead. *See generally* Laura M. Holson, *Moses Farrow Defends Woody Allen and His Family Pushes Back*, NEW YORK TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/arts/moses-farrow-woody-allen-dylan-abuse.html>

<sup>14</sup> *See Sexual Violence: Prevalence, Dynamics And Consequences*, WHO, [https://www.who.int/violence\\_injury\\_prevention/resources/publications/en/guidelines\\_chapter2.pdf](https://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chapter2.pdf) (last visited Mar. 26, 2019).

<sup>15</sup> *See id.*

<sup>16</sup> *See* Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 578 (2006); *see generally* Julie A. Allison & Lawrence S. Wrightsman, *Rape: The Misunderstood Crime* 152-55 (1993).

<sup>17</sup> *See generally* Michael Papendick & Gerd Bohner, "Passive Victim – Strong Survivor"? *Perceived Meaning of Labels Applied to Women Who were Raped*, 12 PLOS ONE 1, 9 (2017) (finding that participants who accepted rape myths high in rape myth acceptance, who were motivated to exonerate the perpetrator, used more passive voice and nominalizations to describe the perpetrator's actions (e.g., "and then she was raped"; "the rape occurred"), thus shifting the focus of attention on the victim or at least away from the perpetrator); *see also* Kathryn A. O'Leary, Case Comment, *Evidence-Defendants' Sixth Amendment Right to Confrontation Becomes Discretionary Under Sexual Assault Counselor-Victim Privilege-Commonwealth v. Two Juveniles*, 397 MASS. 261, 491 N.E.2d 234 (1986), 21 SUFFOLK U. L. REV. 1222, 1229 (1987) (describing a trauma reaction where rape survivors come to believe that they deserved the rape).

2019] *HOW THE BOOGEYMAN SAVED BRETT KAVANAUGH* 55

Thus, an echo of self-doubt can play continuously in the survivor's subconscious.

Moreover, in this scenario, the survivor remains forever deferential to the actual offender, sometimes a family member or someone in a position of trust.<sup>18</sup> Too afraid to risk losing this important relationship<sup>19</sup> and face the re-traumatization from victim-blaming and normalizing, survivors often tell their story only when the offender is a stranger to the audience. Thus, the survivor's voice and perspective remain forever diminished before the actual offender and those who know the offender.

To pull the monster out from under the bed and into the light of day, advocates must first change the cultural narrative to create a safe space for survivors to name their offenders. This campaign has already begun on a grassroots level via #MeToo.<sup>20</sup> The news media, entertainment industry, and law journals, such as this one, have followed suit in challenging that cultural narrative.

Attorneys representing a survivor-victim must step into the space created by this movement and tell a new story. They must tell the story regarding the damage done by victim-blaming, slut-shaming, and normalizing. They must show how these stories create many monsters under many beds.

Victim-blaming forms the core of sexual offenses. A sexual offense is unwanted sexual contact;<sup>21</sup> thus, the offense consists of overriding the survivor-victim's wants and substituting those of the offender. Thus, by substituting the offender's desire for the victim's wishes, the offender negates the victim's wishes via the

<sup>18</sup> See Heather R. Hlavka & Christopher Uggen, *Does Stigmatizing Sex Offenders Drive Down Reporting Rates? Perverse Effects and Unintended Consequences*, 35 N. KY. L. REV. 347, 351 (2008) (indicating that offenders are more typically family members or acquaintances than strangers).

<sup>19</sup> See ASS'N OF FAMILY AND CONCILIATION COURTS, *Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation*, 54 FAM. CT. REV. 674, 680 (2016); Mary Deutsch Schneider, *About Women, War and Darfur: The Continuing Quest for Gender Violence Justice*, 83 N.D. L. REV. 915, 956 (2007).

<sup>20</sup> See Elizabeth A. Harris, *Terry Crews and Other Sexual Violence Survivors Narrate New 'Me Too' Videos*, N.Y. TIMES (Jan. 28, 2019), <https://www.nytimes.com/2019/01/28/arts/terry-crews-me-too-videos.html> (discussing how Tarana Burke founded the "Me Too" movement in 2006 as a grass roots organization to help survivors of sexual violence).

<sup>21</sup> See Elizabeth M. Donegan, *Key Tactics for Sex Crime Investigators*, Aspatore, 2015 WL 7300474, at \*1 (2015); see also MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1 (AM. LAW. INST., Tentative Draft No. 1, 2014) (using requirements such as "force" or lack of capacity to consent at all in defining most sexual offenses).

offense. The offense itself blames the victim by sending a physical and traumatic message that offender's desire erases the victim's wishes.

In fact, many offenders may actually believe the act was consensual.<sup>22</sup> Offenders then often blame the victim for the offense.<sup>23</sup> Many of our criminal laws involving sexual offenses examine the offenders' state of mind.<sup>24</sup> This process replaces the victim's state of mind with the offender's.<sup>25</sup> Often even society erases the victims' inner mind,<sup>26</sup> and the victim carries the responsibility and shame of the event.<sup>27</sup>

Indeed, a subcategory of victim-blaming, slut-shaming, further injures the survivor-victim.<sup>28</sup> Offenders, their enablers,<sup>29</sup> and defenders frequently attempt to indicate that the victim's sexuality somehow justifies the offenders' offense.<sup>30</sup> In the cultural narrative, if someone, particularly a woman or other marginalized person, has sexual characteristics or sexual desires at all, then that stands as an open invitation to anyone for any and all sexual

<sup>22</sup> See Laurie Halse Anderson, *I've Talked with Teenage Boys About Assault for Twenty Years. This is What They Still Don't Know*, TIME, (Jan. 15, 2019), <http://time.com/5503804/ive-talked-with-teenage-boys-about-sexual-assault-for-20-years-this-is-what-they-still-dont-know/>.

<sup>23</sup> See *id.*

<sup>24</sup> See Dini Rosenbaum, *STRICT LIABILITY AND NEGLIGENT RAPE: OR HOW I LEARNED TO START WORRYING AND QUESTION THE CRIMINAL JUSTICE SYSTEM*, 14 CARDOZO J.L. & GENDER 731, 742 (2008).

<sup>25</sup> See Cathren Page, *Brett Kavanaugh and Christine Blasey Ford Could Both Be "Right": A War of Gender Narratives*, SALON (Oct. 3, 2018, 2:30 PM), <https://www.salon.com/2018/10/03/brett-kavanaugh-and-christine-blasey-ford-could-both-be-right-a-war-of-gender-narratives/>.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> Claire L. Molesworth, *Knowledge Versus Acknowledgment: Rethinking the Alford Plea In Sexual Assault Cases*, 6 SEATTLE J. SOC. JUST. 907, 924 (2018) (stating that victim blaming exacerbates trauma); see also Rebecca Campbell et al., *Preventing the "Second Rape" Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1240 (2001) (stating that victim blaming exacerbates trauma).

<sup>29</sup> See John Slack, *Twitter Wars: How the Kentucky General Assembly and Courts Should Strike Back Against Virtual Victim-Blaming in Sexual Assault Cases*, 56 U. LOUISVILLE L. REV. 411, 435 (2018) (discussing how people slut-shame survivors on the Internet).

<sup>30</sup> Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395, 404 (1985).

2019] *HOW THE BOOGEYMAN SAVED BRETT KAVANAUGH* 57

abuse.<sup>31</sup> Thus, enablers and offenders make the victim feel ashamed for any sexual feelings or characteristics the victim might have ever had.

In addition to victim-blaming and slut-shaming the victim's sexuality, offenders, their defenders, and enablers, normalize offenses.<sup>32</sup> They claim that men are not able to avoid non-consensual or degrading sexual conduct.<sup>33</sup> They claim that men and boys cannot be expected to respect boundaries at all times,<sup>34</sup> or worse, that men are somehow entitled to violate women.<sup>35</sup>

In addition to these defense tactics, the process used to determine abuse can itself become abusive. For example, in the classic abuser model, the abuser gaslights the victim regarding the legal system;<sup>36</sup> the abuser misrepresents the system to intimidate and shame the victim into silence and to shift responsibility for the wrong onto the victim.<sup>37</sup> For instance, a pedophile might tell a child, "If you tell, we will both go to jail."<sup>38</sup>

<sup>31</sup> Willemijn Ruberg, *Trauma, Body, and Mind: Forensic Medicine in Nineteenth-Century Dutch Rape Cases*, 22 J. HISTORY SEXUALITY 85, 89 (2013) (explaining women avoided explicitly mentioning sexuality when addressing rape since sexuality always implied a woman's consent); Jane Campbell Moriarty, *Rape, Affirmative Consent to Sex, and Sexual Autonomy: Introduction to the Symposium*, 41 AKRON L. REV. 839, 845 (2008) (stating that juries still believe that women who drink or engage in flirtatious behavior are culpable in their own abuse).

<sup>32</sup> See Michele N. Struffolino, *The Devil You Don't Know: Implicit Bias Keeps Women in Their Place*, 38 PACE L. REV. 260, 261-2 (2018); Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 136 (1993).

<sup>33</sup> See Massaro, *supra* note 31, at 402.

<sup>34</sup> See *id.*

<sup>35</sup> See Kyla Barranco, *Canadian Sexual Assault Laws: A Model for Affirmative Consent on College Campuses?*, 24 MICH. ST. INT'L L. REV. 801, 810-11 (2016); Noam Shpancer, *Why Do Men Sexually Assault Women?*, PSYCHOLOGY TODAY (Nov. 3, 2014), <https://www.psychologytoday.com/us/blog/insight-therapy/201411/why-do-men-sexually-assault-women>

<sup>36</sup> See, e.g., Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1428 (1993) (showing that the abuser uses the legal system as a weapon against the victim, threatening to use the legal system against them).

<sup>37</sup> See, Rebecca Naeder, *"I Know My Client Would Never Hurt His Daughter, But How Can I Prove It?" A Lawyer's Guide to Defending Against Child Sexual Assault Accommodation Syndrome Evidence*, 80 BROOK. L. REV. 1153, 1159 (2015).

<sup>38</sup> *Id.* at 1159 (stating that many children believe that they will face blame if they outcry regarding abuse); John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. DAVIS J. JUV. L. & POL'Y 1, 26 (2010) (providing an example of an offender saying that the child will not have a place to live if the child tells); Anderson, *supra* note 37, at 1428 (explaining that abusers often tell immigrant victims that the U.S. will deport them if they outcry regarding abuse).



Similarly, in the Kavanaugh case, Kavanaugh's surrogates gaslit the American public about our legal system and legal process.<sup>39</sup> Kavanaugh received more deference and process than he would have even if he faced termination of his parental rights to a child.<sup>40</sup> Yet he was interviewing for one of the highest, most competitive positions in the land.<sup>41</sup> Even in a termination of parental rights case involving constitutional rights and a higher clear and convincing burden of proof,<sup>42</sup> the process provides greater protection to the survivor-victim and shows less deference to the accused. The initial investigation and discovery extends longer and further<sup>43</sup> than the Kavanaugh hearing did. In contrast to the single attorney in the Kavanaugh hearing, the attorneys in a child protection case introduce multiple witnesses and exhibits,<sup>44</sup> unlike the two witness and single, self-serving calendar.<sup>45</sup> In some states, survivor-victims receive their own attorney who asks questions,<sup>46</sup> whereas the hearing side-lined

<sup>39</sup> Caprice Roberts, *Kavanaugh's Senate Hearing Isn't a Trial: The Standard Isn't Reasonable Doubt.*, WASH. POST (Sept. 21, 2018); *Legal Experts Stress Due Process as Brett Kavanaugh, Accuser Set to Testify*, BOSTON HERALD (Sept. 27, 2018), <https://www.bostonherald.com/2018/09/27/legal-experts-stress-due-process-as-brett-kavanaugh-accuser-set-to-testify/> (attempting to legitimize sources who tried to import inapplicable standards). For discussion of related ideas see also Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. FORUM 281, 291 (2016) (discussing how criminal law standards are inapplicable in Title IX proceedings).

<sup>40</sup> See Roberts, *supra* note 40 (explaining that Kavanaugh's hearing is not a trial with the standard of "beyond a reasonable doubt" rather there is no set standard of proof by which the senators must offer their advice and consent). See also, *Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (showing that the standard for termination of parental rights to a child is "clear and convincing proof").

<sup>41</sup> *The Role of the Supreme Court*, SCHOLASTIC, <https://www.scholastic.com/teachers/articles/teaching-content/role-supreme-court/> (last visited Apr. 20, 2019).

<sup>42</sup> *Santosky*, 455 U.S. at 768-69.

<sup>43</sup> See, e.g. TEX. FAM. CODE ANN. § 261.3017 (West 2017) (indicating that an initial sixty day investigation prior to removal petition is considered an "abbreviated" investigation that must meet certain criteria); TEX. FAM. CODE ANN. § 263.401 (West 2017) (providing roughly a one year deadline for completion of the suit, which would include discovery, after petition has been filed); see also *Investigating Child Sexual Abuse: The Length of Criminal Investigations*, CHILDREN'S COMMISSIONER 1, 3 (2017), <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Investigating-Child-Sexual-Abuse-CCO-April-2017-1.2-1.pdf> (indicating that the typical length to investigate such cases in the United Kingdom is 248 days).

<sup>44</sup> See, e.g. *In re Paige L.*, 2017 ME 97, ¶ 9, 162 A.3d 217, 220.

<sup>45</sup> See Transcript courtesy of Bloomberg Government, *supra* note 5.

<sup>46</sup> See, e.g., TEX. FAM. CODE ANN. § 262.105(a)(2) (West 2017).

2019] *HOW THE BOOGEYMAN SAVED BRETT KAVANAUGH* 59

Blasey-Ford's attorneys.<sup>47</sup> If the survivor-victims have to testify at all,<sup>48</sup> then their attorneys ask them open-ended questions on direct as opposed to cross-examining them<sup>49</sup> as the prosecutor did to Ford in the Senate hearings.<sup>50</sup> None of these procedural safeguards existed in the Kavanaugh hearing,<sup>51</sup> a hearing which by law should have had a lower burden of proof, accorded less deference to Kavanaugh, and provided greater protection to Ford.

Thus, when a survivor-victim comes forward, the victim faces all of these re-injuring processes, the victim-blaming, slut-shaming, normalizing, and gaslighting regarding the legal process. Their abusers and society may have gaslit them long-term regarding the legal system and regarding what happened during the abuse so that they question their own perception.

Moreover, these survivor-victims frequently suffer from Post-Traumatic-Stress, Post-Traumatic-Stress Disorder, or the more severe Type II Trauma, and speaking out about the abuse can send them into a tailspin.<sup>52</sup> When a person perceives themselves to be in a life-threatening situation, the amygdala essentially overrides the rest of the brain.<sup>53</sup> The amygdala houses our flight, fight, or

<sup>47</sup> MJ Lee, *Ford's Lawyers are Back in the Hearing Room, this Time in the Audience*, CNN POLITICS (Sept. 27, 2018, 3:11 PM), [https://www.cnn.com/politics/live-news/kavanaugh-ford-sexual-assault-hearing/h\\_284f5eed0cc8a8acb2f2ad7bc8ad2bb1](https://www.cnn.com/politics/live-news/kavanaugh-ford-sexual-assault-hearing/h_284f5eed0cc8a8acb2f2ad7bc8ad2bb1)

<sup>48</sup> See Christopher T. Fell, *Crying Out for Change: A Call for A New Child Abuse Hearsay Exception in New York State*, 76 ALB. L. REV. 1853, 1889 (2013) (indicating often outcries of sexual abuse can be introduced without the child's testimony); Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL. PUB. POL'Y & L. 485, 486 (1999) (indicating often outcries of sexual abuse can be introduced without the child's testimony).

<sup>49</sup> See Raymond J. McKoski, *Prospective Perjury By A Criminal Defendant: It's All About the Lawyer*, 44 ARIZ. ST. L.J. 1575, 1578 (2012) (indicating that lawyers ask their own clients open-ended questions on direct examination); FED. R. EVID. 611(c) (indicating that leading questions are prohibited on direct examination in trial in Federal Court).

<sup>50</sup> See Randall D. Eliason, *The GOP Hired a Pro to Question Ford. It Did not Go Well.*, WASH. POST (Sep. 27, 2018), [https://www.washingtonpost.com/opinions/the-gop-hired-a-pro-to-question-ford-it-did-not-go-well/2018/09/27/d11ba5be-c289-11e8-a1f0-a4051b6ad114\\_story.html?utm\\_term=.cf9fc42f1451](https://www.washingtonpost.com/opinions/the-gop-hired-a-pro-to-question-ford-it-did-not-go-well/2018/09/27/d11ba5be-c289-11e8-a1f0-a4051b6ad114_story.html?utm_term=.cf9fc42f1451); see also Transcript courtesy of Bloomberg Government, *supra* note 5.

<sup>51</sup> See Transcript courtesy of Bloomberg Government, *supra* note 5.

<sup>52</sup> See Shelley Johnson et al., *Victimization, Social Support, And Psychological Well-Being: A Study of Recently Released Prisoners*, 37 CRIM. JUST. & BEHAVIOR 1140, 1141 (2010).

<sup>53</sup> See Steven M. Southwick et al., *Neuropsychology of PTSD: Biological, Cognitive, Clinical Perspectives* 31 (Jennifer J. Vasterling & Chris R. Brewin eds. 2005).

freeze reaction<sup>54</sup> and floods the body with stress-response hormones.<sup>55</sup> The survivor's heart pounds.<sup>56</sup>

Particularly for sexual assault survivors, the brain records that amygdala response, perhaps to protect the survivor from future attackers.<sup>57</sup> Thus, when an image, word, smell, sound, or "triggers" the memory,<sup>58</sup> the amygdala once again overrides the higher brain and floods the body with hormones.<sup>59</sup> Images of past attacks stream through the survivor's mind,<sup>60</sup> and the survivor is now fighting to stay alive insofar as the survivor's brain and body is aware.<sup>61</sup> The outside world might see a conversation or a courtroom, but the Post-Traumatic Stress survivor sees impending death.<sup>62</sup> Regardless of how otherwise healthy, kind, and rational the survivor may be, a period of calm breathing and soothing must occur for the stress hormones to dissipate and for the higher brain function to return.<sup>63</sup> Just one note of attack from hearing or from

<sup>54</sup> Debra Kaminer & Gillian Eagle, *Post Traumatic Stress in South Africa* 31 (Wits University Press 2010) (discussing the flight, fight, or freeze reaction but not the amygdala); Christian Grillon, *Models and Mechanisms of Anxiety: Evidence from Startle Studies*, 199 *Psychopharmacology* 421, 422, 424 (2007) (discussing the fight or flight system).

<sup>55</sup> *Understanding the Stress Response*, HARVARD HEALTH PUBLISHING (Mar. 2011), <https://www.health.harvard.edu/staying-healthy/understanding-the-stress-response>

<sup>56</sup> Kaminer, *supra* note 55, at 31.

<sup>57</sup> Kaminer, *supra* note 55, at 36.

<sup>58</sup> *Post-Traumatic Stress Disorder*, NAT'L INST. OF MENTAL HEALTH, [http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml#part\\_145370](http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml#part_145370) (last visited Apr. 8, 2019).

<sup>59</sup> James L. McGaugh & Benno Roozendaal, *Learning and Memory: A Comprehensive Reference*, 3 *MEMORY SYSTEMS* 205, 541 (John H. Byrne ed., 2009); Benno Roozendaal et al., *Stress, Memory and the Amygdala*, 10 *NATURE REV. NEUROSCIENCE* 424-5 (2009); Amy F. T. Arnsten, *Stress Signaling Pathways That Impair Prefrontal Cortex Structure and Function*, 10 *NATURE REV. NEUROSCIENCE* 410-1 (2009).

<sup>60</sup> See Kaminer, *supra* note 55, at 31 (discussing flashbacks of the event).

<sup>61</sup> *What is PTSD?* U.S. DEP'T VETERANS AFF. (Aug. 13, 2015), <https://www.ptsd.va.gov/understand/what/index.asp> [<http://perma.cc/R7QU-6AMP>]; see *Post-Traumatic Stress Disorder*, NAT'L INST. MENTAL HEALTH, [http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml#part\\_145370](http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml#part_145370)

<sup>62</sup> See *id.*; *Post-Traumatic Stress Disorder*, NAT'L INST. MENTAL HEALTH, [http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml#part\\_145370](http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml#part_145370).

<sup>63</sup> Laurie Kelly McCorry, *Physiology of the Autonomic Nervous System*, 71 *AM. J. PHARM. EDUC.* 1, 3 (2007) (stating that the return to normal occurs more gradually than the triggering); *Self Help Strategies for PTSD*, ANXIETYBC, [https://www.anxietycanada.com/sites/default/files/adult\\_hmptsd.pdf](https://www.anxietycanada.com/sites/default/files/adult_hmptsd.pdf) (last visited Mar. 27, 2019) (explaining calm breathing can help to soothe a post-traumatic reaction).

2019] *HOW THE BOOGEYMAN SAVED BRETT KAVANAUGH* 61

one of the offenders' enablers can trigger this process.<sup>64</sup> In addition to Post-Traumatic Stress, survivors of family sexual abuse may also suffer from attachment wounds that cause an insecure attachment style.<sup>65</sup> From birth, as a necessary part of survival, all mammals attach to their caregivers.<sup>66</sup> However, when a caregiver abuses or neglects a child, that typically harms the child's attachment.<sup>67</sup> In some instances, the child can develop an insecure attachment.<sup>68</sup> When the caregiver leaves the room, the insecure child fears death and becomes hysterical.<sup>69</sup> The child often clings to the caregiver.<sup>70</sup> This insecure attachment can then extend later to the child's larger social circle, or particularly to a partner, even when the child is an adult.<sup>71</sup> Primal panic strikes the insecurely attached adult when people miss appointments or forget to call.<sup>72</sup>

This insecure attachment style poses yet another challenge for outcrying survivors. Abandonment and rejection pose a life-threatening risk to insecurely attached persons so far as their brains and bodies feel.<sup>73</sup> The survivor faces potential

<sup>64</sup> See Kaminer., *supra* note 55, at 31-32 (discussing how a traumatic reminder or trigger as small as a smell from the past can cause flashbacks).

<sup>65</sup> Everett Waters et al., *Attachment Security in Infancy and Early Adulthood: A Twenty Year Longitudinal Study*, 71 *CHILD DEV.* 684, 687 (2000) (explaining that one study showed that children experiencing sexual abuse or other negative events were more likely to develop an insecure attachment, more so if the attachment in their family was more insecure to begin with).

<sup>66</sup> See Sue Johnson, *Love Sense* 183 (Little Brown & Company Kindle Edition 2013) (discussing how infants innately bond to their parents out of a need for survival and, as adults, later bond to others).

<sup>67</sup> See Karen Schneider-Rosen et al., *Current Perspectives in Attachment Theory: Illustration from the Study of Maltreated Infants*, 50 *MONOGRAPHS SOC'Y RES. CHILD DEV.* 194, 210 (1985) (discussing a study indicting that abused or neglected children displayed attachment insecurity at more significant percentages than children who had no documented history of abuse).

<sup>68</sup> *See id.*

<sup>69</sup> See Johnson, *supra* note 67, at 193. The author of this article having recovered from this phenomenon can attest that to the brain and the body of the survivor, the survivor faces death in these situations. *See id.* For a survivor who also has a higher brain, this process creates warring tailspin. The higher brain castigates the survivor for foolishness, yet the body and stress response system screams that the surviving is dying.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 75.

<sup>72</sup> *Id.* at 75-6 (generally discussing how a momentary absence of a loved one can plunge someone into a "primal panic").

<sup>73</sup> In fact, in one study, children in an orphanage deprived of touch became ill with failure to thrive and died at higher rates. See Daniel Goleman, *The Experience of Touch: Research Points to a Critical Role*, *N.Y. TIMES* (Feb. 2, 1988), <https://www.nytimes.com/1988/02/02/science/the-experience-of-touch-research-points-to-a-critical-role.html>.

condemnation and mass social rejection or, perhaps, rejection from a family member or important member of the community. This threat can send the survivor into a suicidal tailspin.<sup>74</sup>

While this process may sound psychological, for survivors living in abusive communities, the survivors face a real prospect of isolation. The survivor may become orphaned,<sup>75</sup> ostracized,<sup>76</sup> and without financial,<sup>77</sup> medical,<sup>78</sup> or social support.<sup>79</sup> The attachment mechanism that bonds us in social or familial support exists because people need other people for survival.

So the survivor faces hard choices. The survivor can outcry. The offender, enablers, and defenders will blame<sup>80</sup> and shame the survivor, who may lose standing in the community. The survivor will re-experience the injury of the shame and endure a post-traumatic tailspin and must endure normalization defenses. Indeed, typically survivors with post-traumatic stress disorder avoid post-traumatic triggers.<sup>81</sup> The survivor may likely lose

<sup>74</sup> Rosemary Barkett, "Bringing Human Rights Home"? *I Thought They Were Already Here! Human Rights and Our Constitution*, 91 N.Y.U. L. REV. 535, 555 n.105 (2016) (citation omitted) (discussing how victim blaming and slut shaming on the Internet can lead to suicide).

<sup>75</sup> Christiana Desrosiers, *The Consideration of Male Victims of Sexual Violence as a Subset of the Particular Social Group "Homosexual" in Adjudicating Asylum Claims*, 30 PACE INT'L L. REV. 279, 282 (2018) (citations omitted) (mentioning this process for male victims of rape).

<sup>76</sup> Dwight Stirling & Laura Riley, *Less than Honorable: Understanding the Sociocultural Context of Military Life in Which Sexual Trauma Takes Place is Crucial in Advocating for Survivors who Receive "Bad Paper"*, L.A. LAW., Sept. 2016, at 36; Leila Mokhtarzadeh, *Ending War Rape: A Matter of Cumulative Convictions*, 36 FORDHAM INT'L L.J. 1021, 1036 (2013) (citation omitted); Stacey Pastel Dougan, *With Justice for Whom? The Presumption of Moral Innocence in Rape Trials*, 71 IND. L.J. 419, 437 (1996) (citation omitted)

<sup>77</sup> See, e.g., Clifford S. Fishman, *The Child Declarant, The Confrontation Clause, and The Forfeiture Doctrine*, 16 WIDENER L. REV. 279, 297 (2010) (citation omitted) (discussing how outcries of sexual abuse can result in job loss and homelessness); United States Army Legal Services Agency, *USALSA Report*, ARMY L., Dec. 1997, at 45 (discussing victim's loss of military benefits after former spouse's conviction of sexual abuse).

<sup>78</sup> See Dayna Bowen Matthew, *Medical-Legal Partnerships and Mental Health: Qualitative Evidence That Integrating Legal Services and Health Care Improves Family Well-Being*, 17 HOUS. J. HEALTH L. & POL'Y 343, 363-64 (2017) (citation omitted) (discussing the relationship between interpersonal violence and poor health outcomes).

<sup>79</sup> See Leah M. Slyder, *Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Cases Brought by Rape Survivors*, 68 CASE W. RES. L. REV. 543, 581 (2017) (citation omitted) (discussing the need for pseudonymity in court cases for rape victims due to social stigma).

<sup>80</sup> See Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1466 (1999) (citation omitted) (indicating victims are likely to avoid bringing civil suits to avoid victim blaming).

<sup>81</sup> Kaminer, *supra* note 55, at 32.

2019] *HOW THE BOOGEYMAN SAVED BRETT KAVANAUGH* 63

family relationships or other important community or social relationships<sup>82</sup> and, indeed, may be completely isolated, friendless, and orphaned. Moreover, some survivors face death threats. Christine Blasey Ford had to move out of her home and hire a security team because of the threats she received.<sup>83</sup>

To many, the choice may seem easy after all. In biblical times, people would confess the sins of the community onto the head of a goat.<sup>84</sup> This scapegoat would then be sent into “solitary land.”<sup>85</sup>

In 2018, rather than a goat we had the monster under the bed, the stranger in a dark alley, and the boogeyman. Everybody loves to hate the most violent stranger rapist. For instance, when the State of Florida executed one of the world’s most violent stranger rapists and convicted serial killer Ted Bundy, throngs of rowdy, drunken college aged men came to cheer for his death.<sup>86</sup> In this manner, victims, their supporters, and offenders alike can all come together and pour the sin of sexual offense onto the heads of such strangers.<sup>87</sup> In so doing, they avoid all the challenges detailed above.

Yet when we allow the monster to leap out from under the bed to save Brett Kavanaugh or any other sexual offender, we allow the abuse cycle to continue. If women like Christine Blasey-Ford are to continue to come forward, advocates must challenge the substandard processes like the one she received. Although Kavanaugh surrogates attempted to gaslight the American public and survivors by claiming due process, advocates for survivors must label that tactic for the abuse-dynamic that it is.

Advocates must saturate American culture with the new story paradigm for the legal fixes to succeed. The new paradigm must show society the boogeyman’s face even when he is cloaked in a judicial robe.

<sup>82</sup> *Id.* at 39 (explaining how the greater and more supportive the social support network is for a survivor, the less likely a survivor is to develop post-traumatic stress symptoms).

<sup>83</sup> Tim Mak, *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR (Nov. 8, 2018, 9:00 AM), <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say>.

<sup>84</sup> *Leviticus* 16:21 (New American Standard Bible).

<sup>85</sup> *Id.* at 16:22.

<sup>86</sup> *Conversations with a Killer: The Ted Bundy Tapes: Burn Bundy Burn* (Netflix Jan. 24, 2019).

<sup>87</sup> *See Leviticus*, *supra* note 85, at 16.