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Kavanaugh's accuser waited years to come forward. Does that undercut her claim?

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One night in 1985, a young girl was pulled by the hand toward a bed and told by her mother's partner to undress before he attempted to penetrate her, as she would come to testify.

When her mother returned home, Audrey S. did not mention the incident "because she was frightened," the California Supreme Court would find. The court reasoned that the minor's later disclosures — about repeated instances of assault — counted as relevant evidence in the criminal proceedings against Ricky Lee Brown. That court's 1994 decision in *People v. Brown* sheds light on some of the reasons people may wait to declare themselves victims of sexual violation.

That issue of delayed reporting — and the legal complexities attached to it — could lie at the heart of the examination of an assault allegation leveled against Judge Brett M. Kavanaugh, President Trump's nominee to the Supreme Court.

"The thing happened — if it happened — an awfully long time ago, back in Ronald Reagan's time, when the actors in the drama were minors and (the boys, anyway) under the blurring influence of alcohol and adolescent hormones," opined Lance Morrow in the Wall Street Journal, capturing an argument made Monday by numerous conservatives, including, in a sarcastic Instagram post, by Donald Trump Jr.

The significant amount of time that has elapsed between the alleged act and the public allegation certainly presents difficulties for discovering the truth of what occurred, said Akhil Amar of Yale Law School, who has defended Kavanaugh's credentials and judgment, testifying on behalf of his former student before the Senate Judiciary Committee. He told The Washington Post in a Monday interview that he supported delaying the confirmation until both sides could be heard.

"There are reasons behind statutes of limitations," Amar said. These reasons include the reliability of old evidence, as "memories fade and physical evidence deteriorates and eyewitnesses die or move," he said. There is also a desire to give people a "fresh start," he said, and an interest in protecting the young from "serious criminal punishment."

There is no criminal case against Kavanaugh, who denies the accusation, as does his friend, Mark Judge, who is said to have been present. Brown was an adult when he was charged with child sex abuse in California in the early 1990s, whereas Kavanaugh was 17 at the time of the alleged events, in which, according to Christine Blasey Ford, a research psychologist who was 15 at the time, he pinned her to a bed and put his hand over her mouth when she tried to scream.

Audrey S. waited five years to speak up against Brown. Ford waited three decades, first discussing the episode in couples therapy in 2012, as she told The Post.

When the 51-year-old testifies Monday before the Senate Judiciary Committee, she is likely to face questions about why she didn't tell anyone until 2012 about an encounter that she claims harmed her psychologically. The queries may echo those faced by Audrey S., who explained at trial why she waited to tell her stepmother about her mistreatment.

"Why did you tell her? . . . Do you remember?" the prosecutor asked at trial in Sacramento County.

"No," the girl responded.

"What was your emotional condition like when you told her about it?"

"Scared."

"And why is that?"

"Well, because I knew if I told my stepmother she would have told my mom and tell my sisters. And I just didn't want anything to go wrong."

Brown was convicted and sentenced to 26 years in prison. On appeal, he argued that Audrey's out-of-court statements disclosing sexual molestation were not admissible evidence because they were not "fresh complaints," meaning they did not closely follow the last alleged incident.

Higher courts upheld the conviction, and, in doing so, shifted the doctrine of "fresh complaint," which originated in the 13th-century rule of "hue and cry," essentially requiring victims of rape and other crimes to immediately alert the community for their claims to be taken seriously. In the 1800s, as the California Supreme Court explained, judges grew skeptical of hearsay, and yet retained this principle for rape cases, replacing the "hue and cry" rule with the fresh-complaint doctrine.

"In articulating this doctrine, courts adhered to the prevailing assumption that it was natural for a woman to confide in someone immediately following a sexual assault, and that if she failed to complain or display any signs of having been assaulted, the only rational explanation was that no offense had been committed," the California court explained.

Evolving ideas about "fresh complaint" — namely the move away from what a 1996 Boston College Law Review article called "the timing myth" — better reflect the way sexual violence is experienced and processed, according to legal experts and psychologists.

"The psychological factors that inhibit reporting of sexual violence have been well documented and closely studied," Peggy Cooper Davis, a law professor at New York University who formerly served on the Family Court of the State of New York, told The Washington Post. "They provide strong evidence that even long-delayed reports should be taken seriously."

No crime is more underreported than rape, according to the National Sexual Violence Resource Center, which estimates that the rate of false reporting is somewhere between 2 and 10 percent.

A range of factors may keep someone from coming forward, said Jessica Shaw, a community psychologist at Boston College. She said it's common for victims to blame themselves for "being

in that circumstance," particularly among teenagers "who had been drinking and might get in trouble for this."

"We have master narratives about what rape is supposed to look like, and what 'good victims' are supposed to do," Shaw said. "Someone may know they didn't like it and know it wasn't okay. But they might not initially think of it in that way."

Studies show that age and relationship with the alleged assailant are important factors. Adolescents are more likely to delay reporting than their older counterparts, and those who have a relationship with the assailant also are more reticent. A 2015 article in the European Journal of Psychotraumatology observed that adulthood brings more information about "rights and options."

For Ford's part, she first tried to suppress the memory — "I'm not ever telling anyone this," she recalled thinking — but came to understand the incident through psychotherapy. She discussed the experience with her husband and a few others, telling friends about a painful encounter long ago with a boy who had gone on to amass power in Washington, according to the Mercury News.

When it became clear that Kavanaugh was on the shortlist of possible nominees to replace retiring Justice Anthony M. Kennedy, she contacted The Post through a tip line in early July.

Shaw said this is common behavior for survivors of sexual violence, who may choose to come forward years later because an individual involved is brought into the public spotlight, or even because of contemporary social context, the psychologist said, citing the #MeToo movement.

"This is a very high-profile case, but the thought process or the behaviors we're observing for someone who has experienced violence is not in any way uncommon," she said. "That years later they decided to report or share this story is not uncommon at all."

What sort of consequences the accused should face for actions taken decades ago is another question, Shaw said. "If we say anyone who has ever committed an act of violence against anyone, there's no space for them at the table — is that something we want to stand by?"

"Perhaps it depends on what table," she said. "This is a very prominent table."

Some legal observers said nothing can be gained from further investigation. Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, wrote in a comment for Politico on Monday that "a he-said/she-said from the mists of time isn't prone to resolution."

But allowing "expert evidence concerning the psychological factors that can cause failure to report," said Davis, the law professor, could help committee members avoid a "he said, she said" quagmire. And, she added, the bar should be high for Kavanaugh. "The character of a Supreme Court justice is extraordinarily important," she said.

Still, Amar warned that there may not be "complete clarity" at the end of the process. Though assault no longer has to yield a "fresh complaint," he said, the question of timing "can go to whether the burden of proof is met."

And in the absence of physical evidence or eyewitness testimony, other means of authentication will have to be used, he said.

“We’re usually cautious of character evidence, but it may be the best evidence we have,” Amar said. “We don’t want to put her sex life on trial, but actually maybe we do want to know the history of the two parties involved. Has she ever accused someone else of rape? Has he ever been accused?”

The likelihood that these questions will come up, he said, suggests the process “may well be painful for the participants.”