

HOW WE STILL FAIL RAPE VICTIMS: REFLECTING ON RESPONSIBILITY AND LEGAL REFORM

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ABSTRACT

Despite over thirty years of rape law reform, rape remains too prevalent, and successful convictions of rapists remain too rare. I argue in this Article that we continue to fail rape victims because we are too quick to give in to our instinct to blame and less willing to engage in the careful reflection that would lead us to see more profoundly our collective responsibility for this failure.

The Article proceeds in five sections. In Section I, I review a number of studies and argue that rape reforms to date, while significant, have nonetheless been inadequate. I then discuss the pervasiveness of rape myths about blame, both over time and in the present day. In Section II, I extend my analysis to rape in the tort system. Drawing on a recent empirical analysis of jury verdicts and settlements, as well as interviews with practicing plaintiffs' attorneys, I argue that unless harm is concrete and visible, we tend to devalue it.

In Section III, I turn my attention to policymaking. Based on a series of empirical studies, I discuss the role of the media and legislators in shaping policy response to sex crimes. I argue that the policy response has often been driven by moral panic rather than careful reflection. In Section IV, I evaluate why reform has failed and suggest that the impulse to blame all men or all men in fraternities is overly simplistic. In Section V, I conclude the paper with a reflection on the deeper meanings of rape myths and rape law reform. I argue that to find lasting solutions for the problems of sexual violence we must first look inward. Reflection, leading to collective responsibility and collective action, is the best path to reform.

[W]e must move on from the reassuring repetition of stale phrases to a new, difficult, but essential confrontation with reality. For the great enemy of truth is very often not the lie – deliberate, contrived and dishonest – but the myth – persistent, persuasive, and unrealistic. Too often we hold fast to the clichés of our

forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.

—John F. Kennedy ¹

Can you look at yourself in the mirror and say: “I have contributed to the sexual assault of a woman?” If you’re like me, not only is the answer no, but the very question is offensive. *Me*, contribute to someone’s rape? Never. How dare you! To buttress our responses, we quickly point to other targets. We might blame the victim, pornography, out-of-control men, the media, the courts, or something else—but whatever it is, we make sure that we stay out of harm’s way. We know who we are, and we *know* that it couldn’t possibly be us. After all, we’re reading a law review article. We’re educated. We’re working for change. We are open-minded. We are the *good guys* here . . . aren’t we?

Through a series of publications over the past decade, led in part by Jon Hanson and his colleagues at Harvard Law School’s Project on Law and Mind Sciences, scholars have begun to challenge legal academia to confront a disconcerting possibility: we don’t know ourselves as well as we think we do. Through a situationist approach to legal analysis, Hanson and his collaborators have challenged us to think not only about the law,

¹ John F. Kennedy, United States President, Yale University Commencement Speech (Jun. 11, 1962), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03Yalc06111962.htm>.

but about ourselves as well.² In this article, I employ a situationist approach to revisit the laws of rape and sexual assault.

Specifically, I argue that reflecting on our response to rape will help us better understand why, despite over three decades of rape law reform, we have failed to make significant progress on preventing rape before it happens and prosecuting rape after it happens. In short, I argue that we must all take responsibility for our collective failures in prevention and prosecution of rape.

In taking the situationist approach, I borrow a line from Hanson and colleagues and encourage the reader to “[t]ry to be aware of what you bring to this Article; be aware of how you read, why you are reading, and even that you are reading. Do you have expectations about what this Article will say or how you will feel about it? Ask yourself: What am I looking for in this Article, and why?”³

What happens when we discover that someone in our community has been sexually assaulted? How do we respond? Do we engage in the discomforting process of addressing it? Do we take any responsibility, as a member of the victim’s community, for the crime? Or do we simply point our fingers at something or someone else?

Years ago, when I began writing this Article, I didn’t start out with these questions. Rather, I wanted to immediately

² See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *Critical Realist Perspective*]; Jon Hanson & Adam Benforado, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24 (2005); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1106 (2004); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to The Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 132 (2003) [hereinafter Hanson & Yosifon, *The Situation*]; Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying Racial Oppression In America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006).

³ Hanson & Yosifon, *The Situation*, *supra* note 2, at 132.

develop concrete policy proposals and a *solution*. But after much research, the evidence simply didn't add up. I found myself proposing the same "solutions" that were already on the table (and that have had only limited effectiveness thus far). Something was missing.

It was only when I began to listen more carefully to the accounts of rape victims themselves—when I took a step back and acknowledged my own situation—that I sensed why I was stumbling. Since the 1970s, researchers have found that in reaction to the rape of loved ones, boyfriends and husbands typically respond with a strong desire to "get" the perpetrator.⁴ My academic response was similar—I wanted a policy that would find and punish the bad guys. I wasn't going to blame the victim, but I was going to blame somebody. And I certainly wasn't going to implicate someone who resembled me.

My own process of writing is, I believe, indicative of our societal, political, and legal response to rape. When we try to understand why rape happens and who is responsible, we are typically careful to ensure that we are in no way personally responsible. Whether it is by making our analysis academic and distanced, by blaming the victim, or by blaming members of a group to which we don't belong, we fail to look inward. We avoid the discomfort that such reflection would produce.

Without careful reflection, we are left with myths about blame and responsibility. And as the epigraph from President Kennedy at the outset of this Article suggests, such myths are persistent and persuasive even though they are unrealistic.⁵ Myths are persuasive because they comfort us—they reaffirm our place in the world. Myths are persistent because when our myths are challenged, we react by creating new ones in their place. This Article aspires to do one thing: encourage us all to

⁴ See, e.g., Lynda Lytle Holmstrom & Ann Wolbert Burgess, *Rape: The Husband's and Boyfriend's Initial Reactions*, THE FAM. COORDINATOR, Jul. 1979, at 321.

⁵ Kennedy, *supra* note 1.

reflect, from many different viewpoints, on how we assign and discuss blame and responsibility in the context of rape.⁶

The Article proceeds in five sections. In Section I, I argue that rape reforms to date, while significant, have nonetheless been very inadequate. I then discuss the pervasiveness of rape myths about blame, both over time and in the present day. I argue that these myths remain very much with us today. In Section II, I extend my situationist analysis to rape in the tort system. I argue that we often do not (or choose not to) see the true harm that rape victims suffer. Drawing on an empirical analysis of jury verdicts and settlements, as well as interviews with practicing plaintiffs' attorneys, I argue that unless harm is concrete and visible, we tend to devalue it. The psychological trauma of rape is an invisible harm.

⁶ Although I focus solely on rape in this Article, I recognize that situationist analysis could also be very useful for analyzing domestic abuse, wife battering, stalking, and workplace harassment. I also focus primarily on the United States, but I recognize that international analysis would be appropriate in further study. The issue of consent, for instance, has also been debated in Britain, especially following the *Morgan* decision in 1975. D.P.P. v. Morgan, 61 Cr. App. R. 136 (H.L. 1975) (Eng.) E. M. Curley, *Excusing Rape*, 5 PHIL. & PUB. AFF. 325 (1976). See also Ellen Bass, *Child Sexual Abuse*, in RAPE AND SOCIETY (Patricia Scarles & Ronald Berger eds., 1995); E. Stark & A. H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVS. 97 (1988); KERRY LOBEL, NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (1986); DEL MARTIN, BATTERED WIVES (1976); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982); LENORE E. WALKER, THE BATTERED WOMAN (1979); Murray A. Straus, *Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales*, 41 J. MARRIAGE & FAM. 75 (1979); CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN 55 (1979) (arguing that "sexual harassment of working women presents a closed system of social predation in which powerlessness builds powerlessness"); LINDA REGAN AND LIZ KELLY, RAPE: STILL A FORGOTTEN ISSUE (2003); Irene Hanson Fricze, *Investigating the Causes and Consequences of Marital Rape*, 8 SIGNS 532 (1983); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993); Gretchen Soderlund, *Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition*, 17 NAT'L WOMEN'S STUD. ASS'N J. 64 (2005); Mary Dechesnay, *Father-Daughter Incest: An Overview*, 3 BEHAV. SCI. & L. 391 (1985).

In Section III, I turn my attention to policymaking. I discuss the role of the media, state legislators, and public opinion in shaping policy response to sex crimes. I argue that the policy response has often been driven by moral panic rather than careful reflection. In Section IV, I evaluate why reform has failed, and suggest that the impulse to blame all men, or all men in fraternities, is overly simplistic. In Section V, I conclude the paper with a reflection on the deeper meanings of rape myths and rape law reform. I argue that to find lasting solutions for the problems of sexual violence we must first look inward. Reflection, leading to collective responsibility and collective action, is the best path to reform.

I. The Persistent Problem of Rape and the Pervasiveness of Rape Myths

The thirty-year period from 1977 to 2007 in the United States saw much innovation in sex crime law, including multiple waves of rape law reform, but this Article argues that these changes have done little to eliminate the fundamental myths about blame attribution that permeate many aspects of criminal and civil rape law.⁷ Perhaps most striking is the fact that an entire “rape myth” literature, consisting of hundreds of scholarly works, has uncovered myths about many aspects of blame attribution but has been unable to loosen their grip on us.⁸

Section I reviews these myths of blame attribution, exploring (A) the failures of rape law reform and, thus, the need to revisit the issue of blame; (B) the historical context of blame attribution in rape; (C) the origins of rape myths in our desire to believe in a just world; (D) the implications of rape myths for

⁷ For reviews of this research, see Mary P. Koss, *Empirically Enhanced Reflections on 20 Years of Rape Research*, 20 J. INTERPERSONAL VIOLENCE 100 (2005); Rebecca Campbell & Sharon M. Wasco, *Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions*, 20 J. INTERPERSONAL VIOLENCE 127 (2005).

⁸ As Benforado, Hanson, & Yosifon have argued, “Our real problem is that we have an extremely difficult time seeing and understanding the role of unseen features in our environment and within us and too readily attribute responsibility and causation to the more obvious ‘personal choices’ of [others].” Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1653 (2004).

adjudication in the legal system; and (E) the importance of race in understanding rape myths.

A. The Failures of Rape Law Reform

In the last four decades, much has been written about rape law, its reform, and the failures of those reforms.⁹ In fact, there has been so much written on rape that fifteen years ago, a study had to be done to summarize research about the research.¹⁰ In such a dense field, there is no lack of suggestions for legal reform. This Article does not attempt to review all of these many reform proposals; rather, it attempts to use a situationist framework as a conceptual tool for developing a new, and perhaps more complex, understanding of these reforms.

Despite all of the research to date, and all the policy changes that have followed, very little has changed in some of the most important outcomes of interest. One of the most comprehensive studies of the effects of rape law reform found that "[a]lthough attitudes about rape and victimization may have become more enlightened over the past two decades, there is little evidence to suggest that these attitudes have been translated into significant performance changes in the criminal justice

⁹ See Duncan Chappell, Gilbert Geis, & Faith Fogarty, *Forcible Rape: A Bibliography*, 65 J. CRIM. L. & CRIMINOLOGY 248 (1974); Hubert S. Feild & Nona J. Barnett, *Forcible Rape: An Updated Bibliography*, 68 J. CRIM. L. & CRIMINOLOGY 146 (1977); Barbara M. Pawloski, *Forcible Rape: An Updated Bibliography*, 74 J. CRIM. L. & CRIMINOLOGY 601 (1983).

¹⁰ Jacquelyn W. White & Richard Farmer, *Research Methods: How They Shape Views of Sexual Violence*, 48 J. SOC. ISSUES 45 (1992). See also Barbara Krahe, *Social Psychological Issues in the Study of Rape*, 2 EUR. REV. SOC. PSYCHOL. 279 (1991); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194 (1997) (reviewing the most common claims of first- and second-wave rape law reformers); Ronct Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554 (1993); STEPHEN J. SCHULHOFER, *UNWANTED SEX* (1998).

system."¹¹ These findings were consistent with previous studies of smaller scale.¹²

Sexual violence against women in the United States remains prevalent.¹³ Moreover, prosecution of rape in the United States remains woefully inadequate.¹⁴ Data on the prevalence of rape and the likelihood of a successful conviction suggest that less than ten percent of all sexual assault assailants will be convicted for their crime.¹⁵

Rape thus remains a critical policy problem, despite a series of federal, state, and local reforms. Over the course of the 1970s and 1980s, states changed their criminal law statutes in

¹¹ Bachman & Paternoster, *supra* note 10, at 574.

¹² See, e.g., Ronald J. Berger et al., *The Social And Political Context Of Rape Law Reform: An Aggregate Analysis*, 72 SOC. SCI. Q. 221 (1991); Jeanne C. March et al., *RAPE AND THE LIMITS OF LAW REFORM* (1982).

¹³ See, e.g., Mary P. Koss, *The Underdetection of Rape: Methodological Choices Influence Incidence Estimates*, 48 J. SOC. ISSUES 61 (1992); Mary P. Koss, *Detecting the Scope of Rape: A Review of Prevalence Research Methods*, 8 J. INTERPERSONAL VIOLENCE 198 (1993); Robinson G. Erlick, *Violence Against Women in North America*, 6 ARCHIVES WOMEN'S MENTAL HEALTH 185 (2003).

¹⁴ For a review of the impact of the Violence Against Women Act, see KRISTEN J. ROE, NAT'L ALLIANCE TO END SEXUAL VIOLENCE, *THE VIOLENCE AGAINST WOMEN ACT AND ITS IMPACT ON SEXUAL VIOLENCE PUBLIC POLICY: LOOKING BACK AND LOOKING FORWARD*, available at http://ncw.vawnet.org/Assoc_Files_VAWnet/VAWA-SVPubPol.pdf.

¹⁵ This estimate is based on the author's calculation from statistics reported in the 2003 National Crime Victimization Study. See BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION STUDY (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv03.pdf> (last visited May 10, 2011). The data suggest that if we consider a hundred instances of rape, we will see a winnowing effect of the following sort: sixty of those rapes will never be reported to the police. Of the forty that are reported, only twenty will lead to an arrest. Sixteen of these twenty will be prosecuted, but only ten will result in conviction. A similar conclusion is reached based on a meta-analysis of empirical studies. See Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 CRIME & JUST. 565 (2010).

efforts to improve the prosecution of rapists.¹⁶ In 1975, the National Center for the Prevention and Control of Rape (NCPCR) was established.¹⁷ Although the NCPCR was phased out in 1987, the federal government passed the Violence Against Women Act (VAWA) in 1994.¹⁸ The Violence Against Women Office was established by the Department of Justice in 1995 and continues to operate today as the Office on Violence Against Women (OVW).¹⁹ The Office has distributed more than \$1 billion in grant funds.²⁰

It is clear, then, that many resources have been invested in solving the problem of rape in the United States. It is also clear, however, that these investments have not led to great payoff.

B. Rape Myths: Historical Context

One of the reasons for the failure of rape law reform may be the persistence of myths of blame attribution. This section reviews the history of these rape myths and discusses some of the reasons why they are so persistent.

¹⁶ Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 72-74 (2001).

¹⁷ Mary P. Koss, *Empirically Enhanced Reflections on 20 Years of Rape Research*, 20 J. INTERPERSONAL VIOLENCE 100 (2005).

¹⁸ *Id.* at 102.

¹⁹ *Id.*

²⁰ *Id.*

Rape myths about blame attribution have a long history.²¹ For over thirty years, scholars have been attempting to identify and debunk rape myths.²² But long before they were ever labeled as "myths," blame attribution mechanisms were in operation.²³ In the earliest written laws—the Code of Hammurabi, for example—women were seen as the property of males. Rape was thus considered a property crime against either a husband or a father.²⁴ In ancient Greece, too, a convicted rapist paid damages not to the victim, but "to the husband or father whose rights to exclude other men from her sexual body had been disrespected

²¹ In a review essay, Peggy Miller and Nancy Biele write that "[r]ape, the crime and its attendant myths, is as old as dirt." Peggy Miller & Nancy Biele, *Twenty Years Later: The Unfinished Revolution*, in TRANSFORMING A RAPE CULTURE 49 (Emilie Buchwald et al. eds., 1993). See also Corinne Saunders, *A Matter of Consent: Middle English Romance and the Law of Raptus*, in MEDIEVAL WOMEN AND THE LAW 105 (Noel James McNuge ed., 2000); Diana C. Moscs, *Livy's Lucretia and the Validity of Coerced Consent in Roman Law*, in CONSENT AND COERCION TO SEX AND MARRIAGE IN ANCIENT AND MEDIEVAL SOCIETIES (Angeliki Laiou ed., 1993); Manon van der Heijden, *Women as Victims of Sexual and Domestic Violence in Seventeenth-Century Holland: Criminal Cases of Rape, Incest, and Maltreatment in Rotterdam and Delft*, 33 J. OF SOC. HIST. 623, 635 (2000).

²² See, e.g., Martha Burt, *Cultural Myths and Supports for Rape*, 38 J. PERS. SOC. PSYCHOL. 217 (1980); Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCHOL. WOMEN Q. 133 (1994); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991); Robin G. Sawyer, Estina E. Thompson, & Anne Marie Chicorelli, *Rape Myth Acceptance Among Intercollegiate Student Athletes: A Preliminary Examination*, 18 AM. J. HEALTH STUD. 19 (2002). Eric R. Buhi, *Reliability Reporting Practices in Rape Myth Research*, 75 J. SCH. HEALTH 63 (2005).

²³ For a powerful consideration of rape and its visual representation throughout history, see DIANE WOLFFHAL, *IMAGES OF RAPE: THE "HEROIC" TRADITION AND ITS ALTERNATIVES* (1999). Susan Brownmiller also discusses the myth of the "heroic rapist," moving from Ovid to King Arthur's Round Table to James Bond and Mick Jagger's Rolling Stones. She argues that "throughout history no theme grips the masculine imagination with greater constancy and less honor than the myth of the heroic rapist." SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 320 (1976).

²⁴ J. J. Finkelstein, *Sex Offenses in Sumerian Laws*, 86 J. AM. ORIENTAL SOC'Y 355, 360 (1966).

by the violation.”²⁵ This is consistent with other earlier rape laws, which were “[h]istorically . . . property laws. Rape was a crime not against the victim, but against the man who owned her, her husband or father.”²⁶

In the United States, rape myths have been operating since before the Constitution. The schemas operating in the colonies and early United States will likely jump out at a modern reader: when bringing a claim against a white man, white women were presumed to be the party at fault, either by having brought a false claim or having engaged in illegal fornication.²⁷ African-American men were not given this benefit of the doubt, and Black women were given no legal protection at all.²⁸ Illustrative examples from Massachusetts, Virginia, and Pennsylvania make clear how strong these rape myths were.

²⁵ LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 34 (1998).

²⁶ Miller & Biele, *supra* note 21, at 50. If we look back to early civilization:

[R]ape laws originally came from the Roman law of *raptus*. *Raptus* was a violent theft that could apply to any kind of property that belonged to a man, including his slaves, children, or wife. It referred to abduction and theft, not to sexual violation. If a sexual assault occurred, it was still the abduction, *raptus*, that was charged. From the beginning, rape laws have been designed to protect a man's property, not to protect women.

LINDA E. LEDRAY, *RECOVERING FROM RAPE* 204 (1994).

²⁷ See, e.g., *SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA* (Merril Smith ed., 2001) [hereinafter *SEX WITHOUT CONSENT*]. Religion was also interlaced with rape in Colonial times. “In America the earliest colonial law codes contained lengthy lists of sexual offenses meriting punishment, with fornication, adultery, bestiality and homosexuality all drawing severe physical penalties. These acts were forbidden because they were regarded as grave sins.” PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 22 (1998).

²⁸ Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 *NEV. L.J.* 1, 8 (2006) (“Raping a Black woman was not a crime for the majority of this Nation's history.”).

In seventeenth-century Massachusetts, and for most of the early Republic, "rape" didn't officially occur frequently because the law generally refused to recognize it. Puritan concepts of chastity and femininity translated into strong social and legal presumptions of consent by the woman.²⁹ One of the more striking legal presumptions was that of consent in cases where the rape led to conception. The Massachusetts Bay Court of Assistants followed the English jurisprudence manual *The Countrey Justice*, by Michael Dalton.³⁰ Dalton's view on rape was that if "a woman at the time of the supposed rape do conceive with child by the Ravisher, this is no Rape, for a woman cannot conceive with child, except she doth consent."³¹ Not surprisingly, given these definitions of rape, there were few rapes reported. Between 1630 and 1692, only fourteen men were tried for rape and three for attempted rape.³² If the situation was bad for white women, it was even worse for female Black slaves, whose situation was wholly determinative: raping a slave was not recognized as a crime in Virginia law.³³

One additional case will clearly illustrate the types of presumptions historically made about rape victims.³⁴ In 1855 in Vermont, Levi Johnson (a white man) was accused of raping and committing incest with his 16-year-old daughter Sarah.³⁵ The

²⁹ Elsc L. Hambleton, *Playing the Rogue: Rape and Issues of Consent in Seventeenth-Century Massachusetts*, in *SEX WITHOUT CONSENT*, *supra* note 27, at 27.

³⁰ *Id.*

³¹ *Id.* at 28 (citing MICHAEL DALTON, *THE COUNTRY JUSTICE* 350–51 (1618)).

³² *Id.*

³³ See Terri L. Snyder, *Sexual Consent and Sexual Coercion in Seventeenth-Century Virginia*, in *SEX WITHOUT CONSENT*, *supra* note 27, at 46; LISA LINDQUIST DORR, *WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA, 1900–1960* (2004).

³⁴ For more information about this case, see Hal Goldman, *A Most Detestable Crime: Character, Consent, and Corroboration in Vermont's Rape Law, 1850–1920*, in *SEX WITHOUT CONSENT*, *supra* note 27, at 178.

³⁵ *State v. Johnson*, 28 Vt. 512 (1856).

case against Johnson included charges that he had sex with Sarah three times and impregnated her. At trial, the judge refused to allow Sarah to be cross-examined, but this was appealed to the Vermont Supreme Court. The Supreme Court ruled 2-1 that although a woman's past sexual experiences with other men couldn't be directly introduced into evidence, if she took the stand, defense had a right to cross-examine her on these matters.³⁶ The majority reasoned in the second sentence of the opinion that "her general character for truth, *as well as for chastity*, are matters involved in the trial of the case."³⁷ The presumptions about blame are made explicit in the next section of the decision:

[A]uthorities in England and in this country are uniform in holding that it is competent for the respondent, without any cross-examination of the witness, to introduce witnesses showing that the prosecutrix is a woman of ill fame, of general light-ness of character, a street-walker, and that she associates with persons of lewd and dissolute character. . . . Those cases are founded upon the principle that such testimony is competent, not merely for the purpose of impeaching her general character for truth, but to show on her part, a corrupted mind, from which her consent to such an act is the natural result of her inclinations.³⁸

In this view of rape, it is the woman's *choice* that is on trial. Previous *bad choices* about sexual conduct are considered persuasive evidence that in this case too she has made a *bad*

³⁶ *Id.*

³⁷ *Id.* at 513 (emphasis added).

³⁸ *Id.* (citations omitted).

choice. It is not acknowledged that her so-called choices were constrained both before this incident and during it.³⁹

C. Rape Myths Acknowledged

Although myths such as the one perpetuated in the Vermont case have existed for centuries, it was not until the 1970s that academic researchers, led by social psychologists and feminist scholars, began to scientifically evaluate and classify them.⁴⁰ Following psychologist Martha Burt's pioneering development of the Rape Myth Acceptance Scale, hundreds of articles have been published exploring the dimensions of rape myths.⁴¹ The term rape myth refers not to a single belief but to a related collection of myths that "include the belief that a rape victim wanted or deserved to be victimized and the belief that a victim

³⁹ The dissent in the case argued that the previous instances of sexual conduct should not be allowed into evidence, but it still agreed with the general chastity schema that "in prosecutions of this kind, the general character of the prosecutrix for chastity is involved." *Johnson*, 28 Vt. at 518.

⁴⁰ I focus in this Article primarily on the United States, but assessments from across the world suggest that rape myths are a universal experience. A New Zealand study concluded that "rape is an experience which shakes the foundations of the lives of the victims. For many its effect is a long-term one, impairing their capacity for personal relationships, altering their behavior and values and generating fear." Jennifer Temkin, *Women, Rape and Law Reform*, in *RAPE: AN HISTORICAL AND SOCIAL ENQUIRY* 17 (Sylvana Tomaselli & Roy Porter eds., 1986). Similarly, in Western Australia, defense lawyers have been observed to use three tactics when cross-examining rape victims: (1) "continual questioning as to details of the rape," (2) in cases of acquaintance rape, asking about "the most intimate aspects of any pre-existing sexual relationship," and (3) asking questions about the woman's sexual past. *Id.* at 19 (citing L. Newby, *Rape Victims in Court—the Western Australia Example*, in *RAPE LAW REFORM* 117 (Jocelynn A. Scutt ed., 1980)).

⁴¹ See, e.g., Burt, *supra* note 22, at 217; Lonsway & Fitzgerald, *supra* note 22, at 133; Torrey, *supra* note 22, at 1013; Sawyer, Thompson, & Chicorelli, *supra* note 22, at 19. Before the RMAC, the Rape Empathy Scale (RES) and Attitudes Toward Rape Scale (ATR) were also employed. See Sheila R. Deitz & Lynne E. Byrnes, *Attribution Of Responsibility For Sexual Assault: The Influence Of Observer Empathy and Defendant Occupation and Attractiveness*, 108 J. PSYCHOL. 17 (1981); Nona J. Barnett & Hubert S. Feild, *Sex Differences in University Students' Attitudes Toward Rape*, 18 J. C. STUDENT PERSONNEL 93 (1977); Hubert S. Feild, *Attitudes Toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors, and Citizens*, 36 J. PERSONALITY & SOC. PSYCHOL. 156 (1978).

is at fault if she is raped."⁴² In the sections that follow, I will explore some of the most widely acknowledged myths.

To introduce rape myths, it is useful to consider an excerpt from an anonymous letter sent to a campus newspaper in the 1990s. In the letter, a female undergraduate student wrote:

I was raped about a year ago . . . by a very public member of the student body. . . . He did not put a gun to my head or threaten my life, but sometimes I have thought that would have been better. Then I would have had a excuse for "letting this happen."⁴³

⁴² Buhi, *supra* note 22, at 63. See also Cynthia A. Lanier et al., *Evaluation Of An Intervention to Change Attitudes Toward Date Rape*, 46 J. AM. C. HEALTH 76 (1998); Derck R. Holcomb et al., *A Mixed-Gender Date Rape Prevention Intervention Targeting Freshmen College Athletes*, 36 C. STUDENT J. 165 (2002); Sandra L. Caron & D. Bruce Carter, *The Relationships Among Sex Role Orientation, Egalitarianism, Attitudes Toward Sexuality, and Attitudes Toward Violence Against Women*, 137 J. SOC. PSYCHOL. 568 (1997); William H. George & Lorraine J. Martinez, *Victim Blaming In Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism*, 26 PSYCHOL. WOMEN Q. 110 (2002); Cathalcene Jones & Elliot Aronson, *Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim*, 26 J. PERSONALITY & SOC. PSYCHOL. 415 (1973); Gloria Cowan & Robin R. Campbell, *Rape Causal Attitudes Among Adolescents*, 32 J. SEX RES. 145 (1995); Barbara Quinones & Vicky Pharos, *Beliefs and Attitudes about Sexual Aggression*, 23 PSYCHOL. WOMEN Q. 559 (1999). In presenting the full results of their study, Robin Warshaw listed a series of commonly held rape myths including that:

Rape is committed by crazed strangers; . . . [a] woman who gets raped deserves it, especially if she agreed to go to the man's house or ride in his car; . . . [w]omen who don't fight back haven't been raped; . . . [i]f there's no gun or knife, you haven't been raped; . . . [i]t's not really rape if the victim isn't a virgin; . . . [i]f a woman lets a man buy her dinner or pay for a movie or drinks, she owes him sex; . . . [a]greeing to a kiss or neck or pet with a man means that a woman has agreed to have intercourse with him.

ROBIN WARSHAW, I NEVER CALLED IT RAPE 19 (1988).

⁴³ Letter reprinted in MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, *SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT* 127 (1997).

When we see a gun to someone's head, we recognize that their actions are not the result of their own choices. But without a gun, we often subscribe to the choice myth: we blame the victim for "letting it happen." Law professor Susan Estrich uses a similar gun to the head image:

At one end of the spectrum is the 'real' rape, what I will call the traditional rape: a stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law—judges, statutes, prosecutors, and all—generally acknowledge that a serious crime has been committed.⁴⁴

When the rape is not "real," we tend to dismiss it. Even those close to rape survivors can fall into patterns of victim-blaming. This is especially true for acquaintance rape:

At a time when women most need friends and family around them, they often find those sources of emotional support and comfort shut to them. The reason is simple: Acquaintance-rape victims aren't believed or are blamed for

⁴⁴ Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986). Estrich goes on to note that:

Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight, the understanding is different.

Id.

what happened, even by those who are close to them.⁴⁵

Or, as a woman who participated in a survey conducted by *Ms.* magazine wrote:

I told my mother what had happened . . . and to this day I wish I had never told her. . . . In her mind her 'little girl' was ruined. I am afraid I thought the same thing. After all, I was not 'ruined goods.' Unfortunately she later told my father who said he was "disappointed."⁴⁶

Disapproval from family members, especially fathers or husbands, is not an uncommon response. Describing her experiences recovering from rape, Kay Scott writes:

My father's yelling was something I learned to tolerate but could never get used to. . . . 'What were you doing out there at night? You should have known better! If you hadn't been out there, it never would have happened! . . . I couldn't believe it. He was blaming me.'⁴⁷

In the 1970s a series of studies examined acquaintance rape (also called "date rape"), and "[t]hese studies suggest that individuals, both as actors and as observers, are unlikely to

⁴⁵ WARSHAW, *supra* note 42, at 77. Later researchers confirmed this finding. See Dominic Abrams, G. Tendayi Viki, Barbara Masser, & Gerd Bohner, *Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity*, 84 J. PERS. & SOC. PSYCHOL. 111, 116 (2003) (finding that, in a study of sixty-five university students in England, "participants assigned more blame to the victim of an acquaintance rape in comparison with the stranger rape victim." The authors note that this conclusion is consistent with previous research.).

⁴⁶ WARSHAW, *supra* note 42, at 78.

⁴⁷ KAY SCOTT, *SEXUAL ASSAULT: WILL I EVER FEEL OKAY AGAIN?* 65 (1993).

perceive acquaintance rape as 'real' rape."⁴⁸ Surveying a sample of 287 undergraduate psychology students, the authors reached a conclusion about two causal pathways.⁴⁹ First, they suggested that "the greater an individual's degree of egalitarianism about women, the greater is his/her tendency to perceive the victim as not blameworthy."⁵⁰ But they also found that, holding constant the Attitudes Toward Women scale, "women blame the victim more than do men."⁵¹ They speculated that "a female's experience as sexual gate keeper may make her more critical of our victim's behavior because she may have felt, had she been Diane [the fictitious subject in the experiment], that she could have successfully avoided victimization."⁵²

What factors correlate with blaming victims? Research suggests that we scrutinize the victim's behavior, looking for reasons to blame her. LaFree et al., summarizing the research, noted that the "importance of the victim's behavior in adjudication has been demonstrated by research documenting less serious penalties for men accused of raping women with 'bad' reputations or who were reputedly promiscuous, those in unconventional living arrangements, and those identified as chronic alcohol users or those drinking when the offense occurred."⁵³ Rye et al., with a sample of 256 undergraduate psychology students, examined the role that the sex of the victim and the offender had on blame attribution. Their summary of the literature, while citing different sources, was essentially the

⁴⁸ R. Lance Shotland & Lynne Goodstein, *Just Because She Doesn't Want to Doesn't Mean It's Rape: An Experimentally Based Causal Model of the Perception of Rape in a Dating Situation*, 46 SOC. PSYCHOL. Q. 220 (1983).

⁴⁹ *Id.* at 222.

⁵⁰ *Id.* at 229.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Gary D. LaFree, Barbara F. Reskin, & Christy A. Visser, *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 390 (1985) (internal citations omitted).

same as that which came thirty years before.⁵⁴ The authors note that “[t]here seems to be a pervasive view that [a] woman walking home or [a] woman on [a] date did ‘something’ that makes her more responsible for her victimization than [a] woman who was assaulted while asleep.”⁵⁵ They continue by pointing out that “[i]n general, when a victim knows the perpetrator, the victim is blamed more, and, subsequently, the perpetrator is blamed less. In addition, when the perpetrator is inebriated, blame and punishment may be attenuated However, when a victim of sexual assault has consumed alcohol, the victim is often judged as having some responsibility for the attack.”⁵⁶

Blame may rest on a victim both for her character (e.g., she was a “loose” woman) and for her behavior (e.g., she was walking alone in a bad neighborhood).⁵⁷ On the character side, victims may be blamed for their past sexual experiences.⁵⁸ On the behavioral side, whether or not a victim physically resists

⁵⁴ B. J. Rye, Sarah A. Greatrix, & Corinne S. Enright, *The Case of the Guilty Victim: The Effects of Gender of Victim and Gender of Perpetrator on Attributions of Blame and Responsibility*, 54 SEX ROLES 639 (2006).

⁵⁵ *Id.* at 639 (citations omitted).

⁵⁶ *Id.* at 640 (citations omitted).

⁵⁷ In exploring the breakdown between a victim’s character and a victim’s behavior, Karuza and Carcy noted that “a general tendency was found for observers to engage in behavioral blame more than in characterological blame. As expected, however, in instances where the victim’s behavior was clearly careful, the extent of behavioral blame declined to the lower level of characterological blame.” Jurgis Karuza Jr. & Thomas O. Carcy, *Relative Preference And Adaptiveness Of Behavioral Blame For Observers Of Rape Victims*, 52 J. PERSONALITY 249, 257 (1984).

⁵⁸ Gillian E. Mason, Stephanie Rigcr, & Linda A. Folcy, *The Impact of Past Sexual Experiences on Attributions Responsibility for Rape*, 19 J. INTERPERSONAL VIOLENCE 1157 (2004); William H. George & Lorraine J. Martinecz, *Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism*, 26 PSYCHOL. WOMEN Q. 110 (2002); SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, AND RESPONSIBILITY* (1996); Judith E. Krulcwitz & Janet E. Nash, *Effects of Rape Victim Resistance, Assault Outcome, and Sex of Observer on Attributions About Rape*, 4 J. PERSONALITY 557 (1979); Caron & Cartcr, *supra* note 42, at 568 (1997).

also affects blame. Studying 229 undergraduates, Krulewitz and Nash found more evidence that “a woman who does not offer obvious *physical* resistance to a sexual assault is less likely to be perceived as raped than is a woman who does resist in an obviously physical manner.”⁵⁹ Research also suggests that when alcohol is involved, victims are blamed more and perpetrators are blamed less.⁶⁰ Angelone, Mitchell, and Pilafova examined how the use of club drugs would affect victim blame attribution.⁶¹ They found that when victims were thought to be unintentionally consuming drugs, they were held less responsible than when they were viewed as knowingly taking drugs into their system.⁶²

A large body of research points to the physical attractiveness of the victim as a factor that sways our judgments.⁶³ Seligman, Brickman, and Koulack conducted early research on attractiveness: they showed experimental subjects a

⁵⁹ Krulewitz & Nash, *supra* note 58, at 568.

⁶⁰ Karla J. Stormo, Alan R. Lang, & Werner G. K. Stritzke, *Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences*, 27 J. APPLIED SOC. PSYCHOL. 279, 303 (1997); Calvin M. Sims, Nora E. Noel, & Stephen A. Maisto, *Rape Blame as a Function of Alcohol Presence and Resistance Type*, 32 ADDICTIVE BEHAV. 2766, 2773 (2007).

⁶¹ D. J. Angelone, Damon Mitchell, & Adriana Pilafova, *Club Drug Use and Intentionality in Perceptions of Rape Victims*, 57 SEX ROLES 283 (2007).

⁶² *Id.* at 289.

⁶³ Feild found that:

Because of the belief that attractiveness precipitates rape, the effect of victim attractiveness on juror decisions might work in one of several ways. For an *attractive* victim, jurors might conclude that “the poor guy was so overcome with passion, he just couldn’t help himself.” On the other hand, jurors may also reason for an *unattractive* victim, “she’s so homely, who would want to rape her?”

Hubert S. Feild, *Rape Trials and Jurors’ Decisions*, 3 J. HUMAN BEHAV. 261, 264 (1979) (citation omitted). See also Lars Hall, THE CHOICE BLINDNESS LAB, <http://www.lucs.lu.se/Projects/ChoiceBlindness/> (last visited July 19, 2011).

story that included a photo of the victim.⁶⁴ Varying the photo between a more and less attractive figure, they found that subjects felt unattractive rape victims were more likely to be blamed for bringing on their own rape.⁶⁵ But when the same experiment was conducted for mugging and robbery scenarios, with no sexual assault, no significant differences between unattractive and attractive women were found.⁶⁶ In short, subjects could understand why a man would rape an attractive woman, but they couldn't understand why he would rape an unattractive woman without some provocation from her. Studying 210 undergraduates in 1978, Deitz and Byrnes found that both social and physical attractiveness of victims affected attitudes toward rape scenarios.⁶⁷ Subjects were more willing to place blame on an accused janitor than on an accused scientist, and more willing to blame a physically attractive defendant than a less attractive one. Jacobson and Popovich also found that beauty cuts both ways.⁶⁸ Based on undergraduate evaluations of a written rape account, the researchers found that more attractive female victims were blamed more than their less attractive counterparts, while more attractive male defendants were blamed less than less attractive male defendants.⁶⁹ Additional findings confirm the role that attractiveness, perceived provocation, and respectability play in rape victim blame attribution.⁷⁰

⁶⁴ Clive Seligman, Julie Brickman, & David Koulack, *Rape and Physical Attractiveness: Assigning Responsibility to Victims*, 45 J. PERSONALITY 554, 562 (1977).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Deitz & Byrnes, *supra* note 41.

⁶⁸ Marsha B. Jacobson & Paula M. Popovich, *Victim Attractiveness and Perceptions of Responsibility in an Ambiguous Rape Case*, 8 PSYCHOL. WOMEN Q. 100 (1983).

⁶⁹ *Id.*

⁷⁰ Suresh Kanckar and Maharukh B. Kolsawalla, *Responsibility of a Rape Victim in Relation to her Respectability, Attractiveness, and Provocativeness*, 112 J. SOC. PSYCHOL. 153 (1980); .

Our own backgrounds—for instance, our own sexism—can affect our judgments as well.⁷¹ Consider our political ideologies. Researcher Sarah Williams looked to see if students with conservative ideologies were more likely to focus on individual disposition than situational factors.⁷² She found that ideology matters: “Conservatives are more willing than liberals to derogate and blame victims. Similarly, conservatives are less likely than liberals to express feelings of sympathy and more likely to express disgust. These left-right differences have generality insofar as they are found in reactions to a welfare client and a theft victim.”⁷³

D. Where Do Rape Myths Come From?

Rape myths come from many places. As Warshaw points out, “[l]ike most of our beliefs, we absorb these myths as we grow up: from the people around us, from the books we read, from the movies and television programs we watch, even from the way products are sold to us in advertisements.”⁷⁴ We may even be affected by watching *Jerry Springer*.⁷⁵ There is evidence suggesting that already by adolescence there is a tendency to focus on individual victim characteristics and not on situational factors.⁷⁶ In high school too rape blame myths are prevalent. In one study 352 high school students were presented with a

⁷¹ G. Tendayi Viki, Dominic Abrams, & Barbara Masser, *Evaluating Stranger and Acquaintance Rape: The Role of Benevolent Sexism in Perpetrator Blame and Recommended Sentence Length*, 28 L. & HUM. BEHAV. 295, 296–97 (2004); Abrams, Viki, Masser, & Bohnet, *supra* note 45.

⁷² Sarah Williams, *Left-Right Ideological Differences in Blaming Victims*, 5 POL. PSYCHOL. 573, 580 (1984).

⁷³ *Id.*

⁷⁴ WARSHAW, *supra* note 42, at 20.

⁷⁵ Tara Ferguson et al., *Variation in the Application of the “Promiscuous Female” Stereotype and the Nature of the Application Domain: Influences on Sexual Harassment Judgments after Exposure to The Jerry Springer Show*, 52 SEX ROLES 477 (2005).

⁷⁶ Cowan & Campbell, *supra* note 42, at 150.

vignette about a date rape.⁷⁷ While all students heard the exact same vignette, one group was shown a picture of the victim wearing provocative clothing, one group was shown a picture of the victim wearing conservative clothing, and a third group was not shown any picture of the victim. Students who were shown the victim in provocative clothing were more likely to assign blame to the victim than students in the other groups.⁷⁸

But why are we so eager to buy into these blame myths, even at an early age? One explanation relies on the “just world theory” developed by psychologist Melvin Lerner.⁷⁹ As summarized by Idisis et al. in the context of rape, the just world theory tells us that:

[P]eople get what they deserve and deserve what they get People with a strong belief in a just world want to believe that the world is safe and protected even in the face of harsh reality. This belief extends to rape. In order to preserve their belief in a “just world,” believers will try either to detract from the victim’s suffering or to blame the victim for what happened.⁸⁰

Although there are important variations to note, the overwhelming thrust of the findings on rape myths is that again and again, across populations, Lerner’s theory has held true. We generate myths when we need to maintain our belief in a just world.

⁷⁷ Linda Cassidy & Rose Marie Hurrell, *The Influence of Victim’s Attire on Adolescents’ Judgments of Date Rape*, 30 *ADOLESCENCE* 319, 320 (1995).

⁷⁸ *Id.* at 322.

⁷⁹ See generally MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980); Melvin J. Lerner & D. T. Miller, *Just World Research And The Attribution Process: Looking Back And Ahead*, 85 *PSYCHOL. BULL.* 1030 (1978).

⁸⁰ Yacl Idisis et al., *Attribution of Blame to Rape Victims among Therapists and Non-Therapists*, 25 *BEHAV. SCI. L.* 103, 104 (2007).

Murray, Spadfore, and McIntosh provide us with evidence as to how these just-world beliefs are activated.⁸¹ The authors note that *a priori* there are two possibilities: "One possibility is that these beliefs are activated consciously and then applied via the use of effortful cognitive processing. Another possibility is that just-world beliefs are activated and applied without people's awareness."⁸² In their experiment, "women participants were exposed to rape-related or neutral words below the threshold of conscious awareness. After this task, participants read a scenario depicting a first date between a college-aged man and a college-aged woman. In this scenario, the man engaged in ambiguously forceful behaviors, and the woman's behavior was ambiguous about how much responsibility she held for the man's behavior. Participants then made impression judgments about the man and the woman."⁸³ The researchers found "strong support for the theory that just-world beliefs are automatically activated and subsequently used by people in social perception."⁸⁴ The import of this finding for rape myths and their pervasiveness is striking: we may employ rape myths without even knowing it.

E. Rape Myths in Action

Rape myths have real-world consequences for the administration of the justice system. A study that followed up on

⁸¹ John D. Murray, Jo Ann Spadfore, & William D. McIntosh, *Belief in a Just World and Social Perception: Evidence for Automatic Activation*, 145 J. SOC. PSYCHOL. 35 (2005).

⁸² *Id.* at 36.

⁸³ *Id.* at 38.

The flashes were actually words followed by a pattern mask. Of all the participants, 17 saw words that were related to the concept of rape (e.g., 'rape,' 'aggressive,' 'scream'). We had selected the rape-related words on the basis of face validity. The remaining 17 participants saw words that were neutral but matched to the rape-related words for length and frequency (e.g., 'rank,' 'followers,' 'unlike,' respectively).

Id. at 39.

⁸⁴ *Id.* at 42.

actual jurors found that juror evaluations were significantly influenced by the patterns of blame attribution discussed thus far.⁸⁵ Subsequent research with mock jurors has confirmed the widespread presence of rape myths in juror decisionmaking.⁸⁶ Reviewing the research as it stood in 1979, psychologist Hubert Feild found "that given the emotional issue of rape and the stereotypes many individuals have attributed to the offense, decisions affecting the outcome of rape trials may not be made on the evidence alone; juror decisions in rape trials seem particularly sensitive to the impact of extraevidential factors."⁸⁷ Studying 180 University students in Britain, Gray found that rape myth acceptance was related to verdicts in a trial scenario,

⁸⁵ The researchers examined juror behavior, conducting post-trial interviews "with 331 jurors . . . who served in the 38 forcible sexual assault trials held in Marion County (Indianapolis), Indiana between July 1978 and September 1980." LaFree et al., *supra* note 53, at 393. LaFree, et. al. found that the legal context mattered also, as:

[S]ome variables (e.g., victim sexually active, black) affected jurors' judgments only when the rape was disputed, some when the rape was not disputed (e.g., number of charges, weapon), and others when the rape either was or was not disputed (e.g., victim drank, used drugs, victim-defendant acquainted). In general, feminist views of rape were most applicable to cases in which the defense disputed the occurrence of the sexual assault.

Id. at 402.

⁸⁶Linda Jane Coats, Discourse Analysis of Sexual Assault Trial Judgments: Causal Attributions and Sentencing 98-109 (1996) (unpublished Ph.D dissertation, University of Victoria).

⁸⁷ Feild, *supra* note 63, at 262.

as those with stronger beliefs in rape myths were more likely to acquit the accused.⁸⁸

Rape myths add up to create a typical “good case” that will win in court. Warshaw describes the good case in this way: “[i]n the prototypical ‘good’ rape case, the victim – a virgin who lives at home with her parents – is grabbed from behind by a man she’s never seen before as she’s walking in broad daylight to visit her dying grandmother in the hospital. Her assailant has a knife, a gun, and brass knuckles. He breaks her jaw by punching her, so she can’t scream, and stabs her at least once before forcing her into the bushes and raping her. She fights back forcefully nonetheless, and the struggle attracts the attention of a male police officer, who arrives and pulls the man off of his victim. An official examination finds the man’s semen within the woman’s vagina and traces of her blood and skin on his body. The bruises on her face match the pattern on his brass knuckles.”⁸⁹ In other words, the “good” rape case is the dispositionist rape case—it is the gun to the head or the knife to the throat.

Empirical research has found these biases extend well beyond judges and juries. Cheryl Alexander found that nurses also allow victim characteristics to affect their blame

⁸⁸ Jacqueline M. Gray, *Rape Myth Beliefs and Prejudiced Instructions: Effects on Decisions of Guilt in a Case of Date Rape*, 11 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 75 (2006). Additional evidence from Europe supports this contention. Krahe, Temkin, & Bieneck studied students at the University of Potsdam, and found that in evaluating a vignette about rape, “the data support the proposition that the process of impression formation about rape cases is affected by schematic conceptions about rape that interfere with the normatively prescribed data-driven appraisal of the individual case.” Barbara Krahe, Jennifer Temkin, & Steffen Bieneck, *Schema-Driven Information Processing in Judgments about Rape*, 21 *APPLIED COGNITIVE PSYCHOL.* 601, 617 (2007). Even in providing practical advice, Linda Ledray tells victims in her book *RECOVERING FROM RAPE*: “Be sure to dress appropriately for any meeting in which you will discuss your case. Even if it is a hot summer day, don’t arrive in shorts or a halter top. Dress conservatively. This applies to any time you are meeting with anyone involved in your case.” LEDRAY, *supra* note 26, at 193. If this is coming from the progressive, survivor-friendly Ledray, we know we are still in trouble.

⁸⁹ WARSHAW, *supra* note 42, at 139.

attribution.⁹⁰ Victims deemed respectable because they were married, didn't know the assailant, struggled, or suffered serious injuries were judged more favorably than victims who were seen as disrespectable because they were divorced, wearing halter tops, didn't struggle, or only had minor scratches.⁹¹ Leslee Kassing and Loreto Prieto studied the beliefs of counselors in training, and found that many of them, especially male counselors, held rape-myth beliefs as related to male victims.⁹² As Kassing and Prieto note, "[t]he literature suggests that although mental health personnel generally have a significantly more sympathetic view of rape victims as compared with laypersons, even counselor professionals may hold blaming attitudes or make myth-based judgments concerning victims of sexual assault."⁹³ For college students, situational factors can affect the advice victims receive from campus authorities.⁹⁴ Idisis compared 36 therapists and 36 non-therapists in Israel, finding that the "hypothesis that therapists would attribute lower levels of blame to victims than would non-therapists was not supported."⁹⁵ Seemingly everywhere rape victims turn—from their family to their support systems to the courts—they are met by individuals whose blame attribution is powerfully affected by situational variables.

F. Rape & Race

⁹⁰ Cheryl S. Alexander, *The Responsible Victim: Nurses' Perceptions of Victims of Rape*, 21 J. HEALTH & SOC. BEHAV. 22 (1980).

⁹¹ *Id.* at 27.

⁹² Leslee R. Kassing & Loreto R. Prieto, *The Rape Myth and Blame-Based Beliefs of Counselors-in-Training Toward Male Victims of Rape*, 81 J. COUNSELING & DEV. 455 (2003).

⁹³ *Id.* (citing Ellen Dyc & Susan Roth, *Psychotherapists' Knowledge About and Attitudes Toward Sexual Assault Victim Clients*, 14 PSYCHOL. WOMEN Q. 191 (1990)).

⁹⁴ R. Barry Ruback, Kim S. McNard, & Maurcen C. Outlaw, *Normative Advice to Campus Crime Victims: Effects of Gender, Age, and Alcohol*, 14 VIOLENCE & VICTIMS 381 (1999).

⁹⁵ Idisis, *supra* note 80, at 115.

Rape myths become even more complicated when interacting with America's complex history of racial attitudes and race relations. Historically, white male concerns about sexual relationships between black men and white women have been central to the intersection of race and rape.

In a landmark 1937 study, economist Gunnar Myrdal found that this fear of race mixing was at the center of America's social and legal structure.⁹⁶ Myrdal identified three elements of the "white man's theory of color caste": (1) concern for "race purity"; (2) rejection of "social equality," which is understood as a precaution to hinder miscegenation and particularly intermarriage; and (3) the danger of miscegenation, which is so tremendous that the segregation and discrimination inherent in the refusal of "social equality" must be extended to nearly all spheres of life.⁹⁷ In this framework, the rape of a white woman by a black man represented a complete violation of the principles of race purity and anti-miscegenation.⁹⁸

These views of rape permeated many aspects of life. As found in a study of literature at the start of the twentieth century, the basic characters reappear often: "the black rapist, the white rape victim, the white avenger, and the black woman as prostitute."⁹⁹ To justify these stereotypes, the white male ingroup called on a familiar strategy: they made up assumptions about the black male outgroup. White men developed myths about the beastly nature of black men. African American males were

⁹⁶ GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

⁹⁷ *Id.* at 58.

⁹⁸ A study of Black-on-White rape in Virginia from 1945–1960 suggests, however, that there is fluidity in these race myths. The study concluded that although Black men still faced considerable obstacles to defeating a rape charge, after World War II they were "more likely to receive a minor sentence or be acquitted entirely." Dorr attributes this change to a greater unwillingness of white men to believe the claims of white women, in conjunction with better legal defense as a result of the civil rights movement. Lisa Lindquist Dorr, *Another Negro-Did-It Crime*, in *SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA* 260 (2002).

⁹⁹ SANDRA GUNNING, *RACE, RAPE, AND LYNCHING: THE RED RECORD OF AMERICAN LITERATURE, 1890–1912* 11 (1996).

depicted as beasts ravishing white women.¹⁰⁰ As described by Gunning, “[f]or many white supremacists, the stereotype of the black male as sexual beast functioned as an externalized symbol of social chaos against . . . all whites, regardless of class.”¹⁰¹ These assumptions were offered as justification for much ill-treatment, including lynchings.¹⁰²

Race can play itself out in the courtroom as well. In a study with mock jurors, Feild looked at both physical attractiveness

¹⁰⁰ While this myth is a powerful one, we should remember that it is not as clearly delineated as we might first think. Diane Sommerville’s careful study of the nineteenth-century American South starts by noting how neither of two extreme “myths” can be wholly accurate:

The “rape myth,” one of the hallmarks of a distinctive southern society, has thus bequeathed to us two potent and enduring assumptions. The first is that white southerners throughout their entire history have been preoccupied (some would say obsessed) with black male sexuality. A related and concomitant assumption is that black men and slaves never raped white women at all and, hence, claims that they did were based on fear, not reality. These twin assumptions have book-ended us into a largely unexamined debate about rape and race in the South. Once we acknowledge that neither position is tenable, we are free to engage in an in-depth study of how race, class, and gender interacted in local settings when charges of black-on-white rape were aired.

DIANE MILLER SOMMERVILLE, *RAPE AND RACE IN THE NINETEENTH-CENTURY SOUTH* 3 (2004). One of Sommerville’s striking findings is that White men did not universally accept the word of White women accusing Black men of rape. Indeed, by making such an accusation, White women were upsetting other power dynamics by calling into question the ability of the slave’s master to maintain order. *Id.* at 5. Sommerville also finds that local practices found ways to mitigate the harsh sentences prescribed for African American males convicted of rape. Sommerville reminds us that race by itself is not an adequate explanation for explaining White behavior in the South. *Id.* at 15.

¹⁰¹ GUNNING, *supra* note 99, at 6.

¹⁰² There is some debate about what constitutes lynching and how prevalent it was. See generally Christopher Waldrep, *War of Words: The Controversy over the Definition of Lynching, 1899–1940*, 66 J. S. HIST. 75 (2000); W. FITZHUGH BRUNDAGE, *LYNCING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930* (1993); Stewart E. Tolnay & E.M. Beck, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930* (1995).

and rape. Feild used for his study "896 white citizens of a community (population = 50,000), who volunteered to serve as jurors in a mock rape case."¹⁰³ The results were striking. The largest prison sentence, almost 25 years, came for black assailants who raped attractive white women.¹⁰⁴ Those who raped attractive black victims received only 10 years.¹⁰⁵ Studying the reactions of undergraduates as they were given summaries of various crimes, other researchers have uncovered evidence of unconscious racial bias. Their evidence suggests that "Black and White victims are treated differently, and that in this instance the difference arises primarily because the White victim receives preferential consideration in all stages of the decision process."¹⁰⁶ The pervasiveness of rape myths is met with the pervasiveness of race myths. It is a potent combination.

II. Failing to See the Hidden Costs of Rape

The physical wounds of rape—the cuts and bruises—will heal first. The psychological wounds are much deeper and take much longer to heal. One of the most unfortunate yet frequently faced dilemmas of rape survivors is the expectation from others that they should "be over it" in two weeks to a month, by the time the cuts and bruises heal. Once the outward signs of the trauma are gone, it is more difficult for others to see the inner turmoil.

¹⁰³ Feild, *supra* note 63, at 266. Feild controlled for other factors such as the victim's sexual history, the evidentiary strength, and the specific details of the rape context.

¹⁰⁴ *Id.* at 272–73.

¹⁰⁵ *Id.* Cautiously interpreting these results, Feild notes that "the findings of Sigall and Ostrove (1973) and Barnett and Feild (1978) suggest that the jurors perceived the socially attractive or white defendant as having more potential worth and more opportunities for improvement and therefore as deserving of more lenient treatment." *Id.* at 278 (emphasis original).

¹⁰⁶ Kitty Klein and Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21, 30 (1982).

—Linda Ledray¹⁰⁷

If you know a victim of sexual assault or have read a survivor's memoir, you know that the personal costs associated with rape are enormous.¹⁰⁸ But without a personal connection to a victim, we are often unable to see the true costs of rape because they are experienced privately. As Ledray observes, "once a rape has ended and the woman has survived, an intensely personal second struggle begins for her: to recover, to take back control of her body and her life, and even to forge a stronger identity as a result of what has happened."¹⁰⁹ In this section I argue that just as criminal law fails rape victims, so too does civil law fail to adequately recognize the costs associated with this second struggle.

While criminal law reforms have been greatly scrutinized, scholars and commentators have generally ignored the civil side.¹¹⁰ It does appear, however, that civil actions following rape are on the rise. Bublick's analysis of verdicts from state appellate courts suggests that since 2000, the number of tort

¹⁰⁷ LEDRAY, *supra* note 26, at 136 (1994).

¹⁰⁸ CHRISTINE CARTER, *THE OTHER SIDE OF SILENCE: WOMEN TELL ABOUT THEIR EXPERIENCES WITH DATE RAPE*, (1995); MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* (1997); LEDRAY, *supra* note 26; JUDITH H. KATZ, *NO FAIRY GODMOTHERS, NO MAGIC WANDS: THE HEALING PROCESS AFTER RAPE* (1984); JENNIFER FAY, *FREE OF THE SHADOWS: RECOVERING FROM SEXUAL VIOLENCE* (1990); SCOTT, *supra* note 47; PATRICIA WEAVER FRANCISCO, *TELLING: A MEMOIR OF RAPE AND RECOVERY* (1999); NANCY VENABLE RAINE, *AFTER SILENCE: RAPE AND MY JOURNEY BACK* (1998).

¹⁰⁹ LEDRAY, *supra* note 26, at 4.

¹¹⁰ An important exception is work by law professor Ellen Bublick. *See, e.g.*, Ellen M. Bublick, *Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55 (2006); Ellen Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999).

claims for sexual assault has risen.¹¹¹ Halsted notes the rise of third-party negligence liability for rape.¹¹² Warshaw too reports that the choice of civil suits is "a fight that more and more women are choosing to wage."¹¹³ Still, civil suits are relatively rare. We do not have robust data on the percentage of rape and sexual assault victims who pursue civil litigation, but the data I will present later in this Article suggest that this figure is no larger than one percent.

At first blush, the minimal use of the civil side may seem strange. Given the failures of the criminal system, as well as the lower evidentiary bar, we might expect more rape victims to pursue civil actions.¹¹⁴ Upon closer examination, however, it is not hard to understand why so few cases are brought. Civil suits for rape are relatively scarce for at least two reasons: (1) defendants in civil rape suits are often judgment-proof (i.e., rapists rarely have any money, and there are no "deep pockets" to go after), and (2) the same hesitations that prevent criminal suits prevent civil suits as well.¹¹⁵ It is this second issue—the prevalence of blame attribution myths in the civil system—that I focus on here.

A. Rape and the Civil Justice System

¹¹¹ Ledray, for instance, informs her readers, "You do have an alternative if the criminal charges are denied. You can press civil charges, or you can press civil charges in addition to the criminal charges; it is not the either / or situation. More and more women are pressing civil charges." LEDRAY, *supra* note 26, at 211.

¹¹² Halsted also proposes the creation of a compensation fund specifically for rape victims. James B. Halsted, *The Rights of Rape Victims are Enhanced: Using the Law of Premise Liability for Compensation*, 10 J. POLICE & CRIM. PSYCHOL. 35 (1995).

¹¹³ WARSHAW, *supra* note 42, at 144.

¹¹⁴ Civil law employs a "preponderance of the evidence" standard, while criminal law adopts a "beyond a reasonable doubt" standard for guilt. Bublick, *supra* note 110, at 68 (citing *Ashmore v. Hilton*, 834 So. 2d 1131, 1134 (La. Ct. App. 2003)).

¹¹⁵ A third reason is the psychology of taboo.

In this section I explore the question: how well does the civil justice system redress the injuries experienced by rape victims? The answer, I argue, is that there is much room for improvement.

To begin, let us consider *United States v. Morrison*, in which the Supreme Court struck down the 1994 Violence Against Women Act (VAWA). Writing for the majority, Justice Rehnquist wrote that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."¹¹⁶ In his dissent, Justice Souter cited a series of studies that emphasized the commercial costs of domestic violence and rape.¹¹⁷ As Souter argued, "While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of \$3 billion in 1990."¹¹⁸

In an effort to further call into question the majority's analysis in *Morrison*, Lori Post and colleagues examined the costs of sexual violence using data from Michigan.¹¹⁹ The

¹¹⁶ *United States v. Morrison*, 529 U.S. 598, 613 (2000).

¹¹⁷ *Id.* at 629.

¹¹⁸ *Id.* at 635 (citing S. Rep. No. 101-545, at 33 (1990) (Comm. Rep.)). The Court also noted annual costs of \$5 to \$10 billion in 1993. See S. Rep. No. 103-138, at 41 (1990) (Comm. Rep.). Catharine MacKinnon's interpretation of *Morrison* is markedly different; MacKinnon argues that the civil remedies portion of VAWA was found unconstitutional:

[N]ot because, as the Supreme Court contended, the ties of gender-based violence to commerce were insufficient, or because, as some have thought, the Court did not see the clear analogies to race that the case posed. It was invalidated because federalism institutionalizes male dominance and the VAWA provision deinstitutionalized it. This is to criticize the *Morrison* opinion for deploying male dominance in substance in the form of the structural doctrine of federalism.

CATHARINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 9 (2005).

¹¹⁹ Lori A. Post et al., *The Rape Tax: Tangible and Intangible Costs of Sexual Violence*, 17 J. INTERPERSONAL VIOLENCE 773 (2002).

authors define tangible costs to include “the costs of medical care, mental health services, loss of economic productivity, insurance administration costs, police investigations, criminal prosecutions, and costs associated with the correctional system” and intangible costs to include “the psychological pain and suffering of survivors and the generalized fear of victimization in society.”¹²⁰ They estimated “the total cost of one rape or sexual assault to be \$108,447 in Michigan in 1996.”¹²¹ The evidence suggests that rape, in many senses of the phrase, is economic activity. The unwillingness of the Court in *Morrison* to recognize this is yet another instance in which the legal system has failed rape victims.¹²²

When rape victims do have their day in civil court, they will find that their case is judged less by the nature of the harm they experienced and more by the extent to which they are blamed for the assault. Support for this claim emerges from empirical work I conducted in a separate study on assessing the

¹²⁰ *Id.* at 775 (citing T. R. MILLER ET AL., NATIONAL INSTITUTE OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996)).

¹²¹ *Id.* at 777. Based on their research, Post et al. go on to argue that:

[C]ourts and prosecutors need to think about sexual violence as an economic crime to better protect victims and survivors of sexual violence . . . [because] the economic costs of rape, sexual assault, and sex-offense homicide are astronomical. Laws and public policy that ignore the economic burden sexual violence places on society at large, as well as on individual survivors, are laws and public policy that misunderstand and underestimate the nature and cost of sexual violence.

Id. at 780.

¹²² In other contexts too, the legal system fails to recognize specifically the costs of rape as well as those of spousal abuse. For instance, courts have been slow to accept evidence of rape trauma syndrome; see Patricia A. Frazier & Eugene Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 L. & HUM. BEHAV. 293 (1992). Victims of spousal abuse have also had struggles drawing on battered woman syndrome as a legal defense. See generally BRENDA L. RUSSELL, BATTERED WOMAN SYNDROME AS A LEGAL DEFENSE: HISTORY, EFFECTIVENESS AND IMPLICATIONS (2010).

harms of rape.¹²³ As one part of the study, I examined the verdicts of civil sexual assault trials, from 2002 to 2006, as reported in the National Jury Verdict Review & Analysis and the LexisNexis database of Combined Verdicts, Settlements and Expert Directories.¹²⁴ My analysis found that litigating victims were more successful when they had been abducted or had been seriously physically assaulted, and that victims in date rape litigation received lower than average damage or settlement awards.

The findings suggest that the interaction of situation and victim character matters significantly in the civil system, just as it does in the criminal system. When a victim's rape is perceived as more "real"—that is, when a victim is abducted or has other serious physical injuries—juries are more willing to believe her. But when the victim's character is more central to jury deliberations, as it is in date rape cases, juries are less willing to recognize and compensate the victim's harms.

In addition to looking at jury verdicts, my study also included an experiment to see how experimental subjects would assess the harms of rape victims under different conditions.¹²⁵

The experimental results confirmed the analysis of jury verdicts and settlements: child victims and victims of stranger assault received significantly greater awards. Subjects read vignettes in which a victim experienced some type of sexual assault under various conditions. After reading the vignettes, subjects assigned, on average, over \$10 million in harm when the victim was an eight-year-old girl raped by a stranger. When the victim was a twenty-nine-year-old woman raped by someone she knew, however, the average was only \$206,000. These

¹²³ Francis X. Shen, *Assessing the Harms of Rape*, (2008) (unpublished Ph.D. dissertation, Harvard University) (on file with author),.

¹²⁴ The National Jury Verdict Review & Analysis, published by Jury Verdict Review Publications, Inc., contains selected verdicts and settlements from September 1985. <https://www.lexis.com/research/xlink?source=verdet;ntlrev> The Lexis Database contains information from over 40 different reporting organizations. <http://www.lexis.com/xlink?source=LITGAT;EXPRT>.

¹²⁵ Shen, *supra* note 123.

results, which were confirmed in the study by more robust statistical analysis, suggest that we believe that those victims who have somehow “chosen” their assault have suffered less harm.

Why are juries so unwilling to acknowledge victim harms in cases that aren’t “gun to the head”? The explanation, I suspect, has to do with our desire to live in a world we perceive as just. Social psychologist Yael Idisis and colleagues summarize the connection between overlooking harm and making the world (in our heads) seem to be a safer and more just place:

If the victim is not severely harmed, the event is seen as an accident. However, as the level of harm increases, the fear that ‘this could happen to me’ also increases. Blaming the victim and convincing oneself that one would have acted differently in similar circumstances help restore faith in a safe, controllable environment. . . . [B]laming the victim serves to provide the blamer with a sense of control, safety, and protection from traumatic events such as rape.¹²⁶

By refusing to acknowledge the true costs of rape, we insulate ourselves. While such insulation may make us feel safer, we are unlikely to make progress on improved justice for victims in the civil system until we confront the actual costs of sexual assault.

B. More than Money: What Victims Want in the Civil System

Why is it important to allow rape victims to effectively pursue justice in the tort system?

Due in part to the failures, real and perceived, with the criminal justice system, some rape victims now see the civil

¹²⁶ Idisis, *supra* note 80, at 104.

system as a means to justice.¹²⁷ Robin Warshaw writes that “[t]aking acquaintance-rape complaints to civil court is a new approach that offers many victims a better way to fight back than they may find through criminal law channels.”¹²⁸ Quoting a civil attorney, Warshaw goes on to observe that although “money’s not going to make it all right, . . . civil suits can help the victim and they’re a deterrent to people.”¹²⁹

To explore this possibility—that civil suits can serve rape victims as a tool of empowerment separate from possible monetary compensation—I conducted several interviews with plaintiffs’ attorneys who have represented victims of sexual assault.¹³⁰ While these interviews are not wholly representative, they are suggestive of why victims pursue civil remedies—and why we may tend to look past these genuine motivations to see only dollars and cents.

An innovative new practice is a joint effort in Colorado by attorney John Clune and Dr. Sheri Vanino, a licensed clinical psychologist specializing in trauma and sexual assault.¹³¹ Dr. Vanino served previously as the Director of Victim Services and

¹²⁷ To be sure, some commentators disagree about the value of civil action. Mary Frawley, a psychologist who works with victims of sexual abuse, suggests that:

[N]o matter the amount of the ensuing financial settlement, a residue of emptiness and lost hope persists. At the core of the survivor’s being, the worst has happened yet again; he has been paid off to go away while life goes on relatively untouched for the perpetrator and those who shielded him.

Mary Gail Frawley, *The History and Consequences of the Sexual-Abuse Crisis in the Catholic Church*, 5 STUDS. GENDER & SEXUALITY 11, 23 (2004).

¹²⁸ WARSHAW, *supra* note 42, at 144.

¹²⁹ *Id.*

¹³⁰ The interviews were conducted in Fall 2007. Letters were sent out to attorneys of record listed in the National Jury Verdict Review & Analysis database. I report here on five of the interviews conducted.

¹³¹ Interview with Sheri Vanino, Director of Victim Services, Counseling Director, Rape Assistance Awareness Program (Oct. 12, 2007).

Counseling Director for the Rape Assistance and Awareness Program, Colorado's largest rape crisis center, and Clune was the former Chief Deputy District Attorney for Eagle County, Colorado.¹³² Clune was also counsel in the Kobe Bryant civil suit that gained national headlines.¹³³

Clune and Dr. Vanino both discussed the stigma against civil suits. Dr. Vanino, drawing on her extensive work with rape victims, sees the question differently: "my thought on that is that making decisions for victims, or assuming what will or will not feel good for a victim, *that's* demeaning for a victim."¹³⁴ For the victims Dr. Vanino works with, civil suits are "one more way to hold the perpetrator accountable . . . and that feels empowering."¹³⁵ Clune observed that "[e]very single client that comes into my office says, 'This isn't about the money'."¹³⁶

Michael Princi, an attorney in Massachusetts, echoed a similar sentiment when discussing a client who was suing a doctor for negligent oversight of an employee who fondled his client. Commenting on what makes these sexual assault cases different from a regular tort case, Princi noted that "these types of cases are very personal in nature."¹³⁷ Chicago attorney Joe Klest, who represents clients who were sexually abused as children, says that his clients are "really looking for some sort of justice."¹³⁸ These attorneys and the others to whom I spoke returned to a common theme: with the criminal system failing them, clients sought out justice through the civil system. Yes,

¹³² See *The Firm*, VICTIM JUSTICE PC, <http://www.victimjustice.com/firm.php>.

¹³³ *Id.*

¹³⁴ Interview with Sheri Vanino, *supra* note 131.

¹³⁵ *Id.*

¹³⁶ Interview with John Clune, Chief Deputy District Attorney, Eagle County, Colorado (Oct. 12, 2007).

¹³⁷ Interview with Michael Princi, Partner, Wynn & Wynn (Nov. 6, 2007).

¹³⁸ Interview with Joseph Klest, Attorney at Law (Oct. 3, 2007).

there was money involved. But these victims were after something far deeper.

It might be worth pausing now, here in the middle of the article, to gauge your reaction to the comments of these trial lawyers. These are plaintiffs' lawyers, after all. Should we really believe them? Shouldn't we be more skeptical? Shouldn't we assume that it's *always*, one way or another, about maximizing financial return?

If you are having that sort of reaction, think about why. Hanson and Yosifon provide us with an important reminder: "When we see disposition and miss situation, we implicitly presume that the situation is neutral, that the playing field is stable, and that everything else is equal."¹³⁹ In focusing on the disposition of victims who file civil suits, have we already forgotten the situation discussed in the last section? Have we pushed aside the massive evidence of biases and myths that permeate both the criminal and civil justice systems? Have we, once more, perpetuated myth? And in doing so, are we failing rape victims?

III. Myth Maintenance and Lawmaking

Thus far in the Article, I have argued that we fail to adequately provide justice to rape victims in both the criminal and civil systems. I have argued that our system is deeply broken. But if the system has been broken for so long, why haven't legislatures done more to fix it? In this section I argue that our policymaking process is also deeply flawed—it is overly focused on punishing a small subset of high-profile bad actors, and it fails to examine and address more prevalent and systemic challenges.

While this section focuses on public policy response, it is useful to think first about our own personal responses to rape. How do we react to rape? What do we do when we learn that

¹³⁹ Hanson & Yosifon, *The Situation*, *supra* note 2, at 327.

someone close to us has been the victim of sexual assault?¹⁴⁰ Based on her work with many victims, Ledray observes that "wanting to rescue a rape survivor, to become overprotective, is a normal response The desire to rescue and protect the 'helpless victim' is a pitfall of many trained counselors as well as family members, friends, and loved ones."¹⁴¹

Our first reaction is thus often to think about ourselves, and how we can channel our anger by blaming someone. We forget about the victim, and we fail to see the situation in which both victim and offender are operating.

Section III proceeds by (A) providing historical background on societal and political response to sex offenders; (B) exploring the media's role in this response; and (C) looking at contemporary statehouse efforts to address issues related to sexual assault.

A. Sex Crimes and Moral Panic

Reactions focused on pointing fingers and demonizing some "other" can be understood within the "moral panic" framework. As developed by British sociologists Jock Young and Stanley Cohen, moral panics are distinguished by five prominent features: "1. Something or someone is defined as a threat to values or interests. 2. This threat is depicted in an easily recognizable form by the media. 3. There is a rapid build-up of public concern. 4. There is a response from authorities or opinion-makers. 5. The panic recedes or results in social changes."¹⁴² Over the past thirty years, a subfield of sociology has developed research that considers what constitutes a moral

¹⁴⁰ Holmstrom & Burgess, *supra* note 4. In a 1979 study of the reactions of rape victims' boyfriends and husbands, Holstrom and Burgess found that "In his reactions, three issues predominate: (a) perceptions and feelings about who is hurt, (b) the desire to get the guy, and (c) the 'if-only' reaction." *Id.*

¹⁴¹ LEDRAY, *supra* note 26, at 110-11.

¹⁴² KENNETH THOMPSON, MORAL PANICS 8 (1998) (citing STANLEY COHEN, FOLK DEVILS AND MORAL PANICS (1972); Jock Young, *The Role of the Police as Amplifiers of Deviance*, in IMAGES OF DEVIANCE (Stanley Cohen ed., 1971)).

panic, and why they develop.¹⁴³ At the same time, a growing literature in sociology has recognized the role of risk management and fear in modern society. Beck first developed the concept of a "risk society,"¹⁴⁴ in this view, "modernization increases risks and makes people more rather than less conscious of being at risk."¹⁴⁵

Moral panic theory and historical perspective can help us understand how we arrived at the system we have today. Sex crime panics hit America in both the 1930s and 1940s, and "[e]ach of the two major sex crime panics—roughly from 1937 to 1940 and from 1949 to 1955—originated when, after a series of brutal and apparently sexually motivated child murders, major urban newspapers expanded and, in some cases, sensationalized their coverage of child molestation and rape."¹⁴⁶ Historian Estelle Freedman's study found that everyone was in on the panic: "Psychiatrists, journalists, and politicians all helped create the sexual psychopath, but a public concerned with changing gender relationships seized upon the threat of 'uncontrolled desires' to help redefine sexual normality and deviance in

¹⁴³ See, e.g., CHAS CRITCHER, CRITICAL READINGS: MORAL PANICS AND THE MEDIA (2006); CHAS CRITCHER, MORAL PANICS AND THE MEDIA (2003). American sociologists have emphasized the role of social movements and interest groups in spurring and building moral panics. British sociologists have tended to emphasize "society-wide cultural and social structural explanations." THOMPSON, *supra* note 142, at 19. See Jeffrey S. Victor, *Moral Panics and the Social Construction of Deviant Behavior: A Theory and Application to the Case of Ritual Child Abuse*, 41 SOC. PERSP. 541 (1998); ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE (1994); Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. REV. SOC. 149 (1994). For a review of the literature, see Erich Goode, Book Note, *No Need to Panic? A Bumper Crop of Books on Moral Panics*, 15 SOC. F. 543 (2000) (reviewing KENNETH THOMPSON, MORAL PANICS (1998); PHILLIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA (1998); JOAL BEST, RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS (1999); BARRY GLASSNER, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS (1999)).

¹⁴⁴ ULRICH BECK, RISK SOCIETY (1992).

¹⁴⁵ THOMPSON, *supra* note 142, at 22.

¹⁴⁶ Estelle B. Freedman, "Uncontrolled Desires": The Response to the Sexual Psychopath, 74 J. AM. HIST. 83, 92 (1987).

modern America.”¹⁴⁷ The federal government also stepped in, as J. Edgar Hoover “called for a ‘War on the Sex Criminal’” and charged that “the sex fiend, most loathsome of all the vast army of crime, has become a sinister threat to the safety of American childhood and womanhood.”¹⁴⁸

Spurred in part by such rhetoric, the states passed a large number of sex crime bills, but in the twenty years following the second major sex crime panic (1958–1976), legal, academic, and political leaders revisited and seriously critiqued the sex psychopath laws. Emphasizing rehabilitation and overcriminalization, this movement challenged and overturned many of the earlier statutes.¹⁴⁹ Jenkins’ historical analysis finds that “by the early 1970s, it was the legislation concerning sex offenders that was portrayed as the pressing social problem, not the offenders themselves.”¹⁵⁰ The laws passed by the states were, in Jenkins’ view, “far too likely to target minor violations of public morality, while there is no evidence that they fulfilled their advertised function of preventing atrocious violence.”¹⁵¹

Legislative response typically fails to address the fundamental problem of inadequate prosecution of non-child rapists. As argued by Chiricos in a study of moral panics and violent crime, “the point of a moral panic is ‘not that there’s nothing there’ but that societal responses are ‘fundamentally inappropriate’.”¹⁵² In short, the laws had made headlines, but

¹⁴⁷ *Id.* at 87.

¹⁴⁸ *Id.* at 94.

¹⁴⁹ The major legal case was *Davy v. Sullivan*, 354 F.Supp. 1320 (1973). See also *Millard v. Harris*, 406 F.2d 964 (1968).

¹⁵⁰ JENKINS, *supra* note 27, at 117.

¹⁵¹ *Id.* at 76.

¹⁵² Ted Chiricos, *The Media, Moral Panics, and the Politics of Crime Control*, in *THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES* 60 (George F. Colc, Marc G. Gertz & Amy Bunger eds., 2002) (quoting STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 204 (1972)).

had ultimately failed to change the legal landscape for rape victims.¹⁵³

B. Media and Agenda Setting

The moral panic literature just reviewed suggests that our societal response to sex crimes has been to focus zealously on identifying and punishing sex offenders. The mass media, catering to the mass public's desire for sensational news, help to facilitate this moral panic response. In doing so, they reinforce our desires to blame and punish, and they prevent more careful reflection.

In the context of rape, as in other media coverage, societal attention is often driven by high-profile incidents. In the language of political science, such events are called "focusing events."¹⁵⁴ These events are an important part of the policymaking process because they focus the public's attention on a certain subset of problems, and in response, lawmakers often craft new legislation.

¹⁵³ This was not only an American phenomenon, but a British experience as well. Chas Critcher's 2003 study of the rise and fall of the pedophilia issue in Britain (covering the period 1990–2001) is instructive. Looking at public discourse and media portrayals, Critcher concludes in the case study that "paedophilia fulfilled virtually every criterion in the ideal type of a moral panic: a newly discovered problem of identifiable folk devils threatening moral order, with consensus among media, pressure groups and politicians" But the effects of this moral panic, like others, were to distort and distract from the real issues. In Critcher's words, "in vilifying, pursuing, and incarcerating 'known' paedophiles, we maintain an illusion of effective action. Moral panics distort our capacity for understanding, even when they recognize a genuine problem." CRITCHER, *supra* note 143, at 116–17.

¹⁵⁴ JOHN KINGDON, *AGENDAS, ALTERNATIVES, & PUBLIC POLICIES* (1984). The agenda-setting process is typically conceived as a political one involving multiple, sometimes competing and sometimes overlapping, interests. A large body of scholarship has explored agenda setting across policy domains. A review of the literature found that "[d]uring the past 30 years, more than 350 studies have been conducted on agenda setting theory." Matthew D. Matsaganis & J. Gregory Payne, *Agenda Setting in a Culture of Fear: The Lasting Effects of September 11 on American Politics and Journalism*, 49 AM. BEHAV. SCIENTIST 379 (2005).

The media utilizes these focusing events to shape their coverage, which is selective.¹⁵⁵ Research from the United Kingdom provides insight into what is selected for coverage by the media. Examining samples of national and local newspapers in the United Kingdom in 1951, 1961, 1971, 1978, and 1985, Kevin Soothill and Sylvia Welby find that “[t]he major theme in the coverage of sex crime is the construction of the sex beast, the sex fiend, or the sex monster.”¹⁵⁶ Media goes after the sensational, leaving the mundane (and more typical) types of sex crimes out of the paper. At the same time, the public reaction contributes to reinforcement of myths: “Media stories about stranger-danger are thus complemented, reinforced and reiterated through everyday conversation and the very public, sometimes collective, nature of some of the experiences.”¹⁵⁷

Media studies professor Jenny Kitzinger’s study of pedophilia is also instructive. Kitzinger studied closely the role of the media in contributing to the rise of the pedophilia crisis in the late 1980s and early 1990s in Britain.¹⁵⁸ She found that “[b]y confining their attention to a minority of convicted multiple abusers and defining those who already sexually abuse children as a certain type of person, ‘a pedophile,’ the media were able to focus not on society but on a few dangerous individuals within it.”¹⁵⁹ Still, Kitzinger reminds us that it is “unhelpful to dismiss the media as ‘interfering’ or ‘sensationalist’ or to blame the press

¹⁵⁵ For a summary and reflection, see Keith Soothill, *Editorial: Sex crime and the media*, 14 CRIM. BEHAV. & MENTAL HEALTH 227 (2004).

¹⁵⁶ KEITH SOOTHILL & SYLVIA WALBY, SEX CRIME IN THE NEWS 146 (1991).

¹⁵⁷ JENNY KITZINGER, FRAMING ABUSE: MEDIA INFLUENCE AND PUBLIC UNDERSTANDING OF SEXUAL VIOLENCE AGAINST CHILDREN 140 (2004).

¹⁵⁸ Kitzinger, *supra* note 157; Jenny Kitzinger, *The Ultimate Neighbor From Hell? The Media Representation of Paedophilia*, in SOCIAL POLICY, THE MEDIA AND MISREPRESENTATION 207–21 (Bob Franklin ed., 1999).

¹⁵⁹ Jenny Kitzinger, *Media Coverage of Sexual Violence Against Women and Children*, in WOMEN AND MEDIA: INTERNATIONAL PERSPECTIVES 30 (Karen Ross & Carolyn M. Byerly eds., 2004).

for 'media hype'.¹⁶⁰ Media "templates," Kitzinger argues, "are a crucial site of media power, acting to provide context for how we understand a problem and interpret new events, as well as informing policy responses."¹⁶¹ Media also work through "story branding," and "although the notion that sexual abuse might happen in normal homes is acknowledged as a fact, it is rarely developed at the level of symbolism."¹⁶² As a consequence, "this fact is rarely fundamentally absorbed into people's ways of thinking."¹⁶³

The type of coverage can also be biased. Professor of Journalism Helen Benedict's study of media coverage of sex crimes examined in-depth four sex crimes from the 1980s.¹⁶⁴ Analyzing the coverage of these events, complemented by additional case study analysis, Benedict reminds us that journalists' adherence to rape myths affects their reporting in

¹⁶⁰ Jenny Kitzinger, *The Ultimate Neighbor From Hell? The Media Representation of Paedophilia, in SOCIAL POLICY, THE MEDIA AND MISREPRESENTATION* 207–21 (Bob Franklin ed., 1999).

¹⁶¹ JENNY KITZINGER, FRAMING ABUSE: MEDIA INFLUENCE AND PUBLIC UNDERSTANDING OF SEXUAL VIOLENCE AGAINST CHILDREN 78 (2004) [hereinafter FRAMING ABUSE].

¹⁶² JENNY KITZINGER, FRAMING ABUSE: MEDIA INFLUENCE AND PUBLIC UNDERSTANDING OF SEXUAL VIOLENCE AGAINST CHILDREN 124 (2004).

¹⁶³ FRAMING ABUSE, *supra* note 161, at 124.

¹⁶⁴ HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES (1992). The four major cases were:

[T]he 1979 Greta and John Ridcut marital rape case in Oregon . . . ; the 1983 pool table gang-rape of a woman in a New Bedford, Massachusetts bar . . . ; the 1986 sex-related killing of Jennifer Levin by Robert Chambers in New York . . . ; and . . . the 1989 gang rape and beating of the Central Park jogger in New York.

Id. at 4.

ways that fail to accurately reflect victims' experiences.¹⁶⁵ More recently, scholars have explored rape myths in the coverage of the Kobe Bryant rape case.¹⁶⁶ One study found that the "she's lying" myth was quite prevalent in coverage of the Bryant case, and that exposure to this myth (as opposed to a media story without it) was significantly related with subjects' subsequent belief that the victim was lying.¹⁶⁷

In a separate empirical study of my own, examining media coverage of rape cases in 2006 and 2007, I compared the types of incidents covered in newspapers with the types of incidents that occur most frequently.¹⁶⁸ One of the most interesting findings to emerge, presented graphically in Figure 1, is the disparity between the ages of victims in reported news stories and the national distribution of victim ages as seen in the

¹⁶⁵ *Id.* at 7. Bias in news coverage of sex crimes is not a new phenomenon. It has been shown that "[a]s far back as the eighteenth century . . . trial reports about cases of sexual crimes, adultery, and non-traditional sexual practices have been constructed as a genre of pornography." SOOTHILL & WALBY, *supra* note 156, at 12.

¹⁶⁶ Renae Franiuk et al., *Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case*, 14 VIOLENCE AGAINST WOMEN 287 (2008); Renae Franiuk, Jennifer L. Seefeldt, & Joseph A. Vandello, *Prevalence of Rape Myths in Headlines and Their Effects on Attitudes Toward Rape*, 58 SEX ROLES 790 (2008).

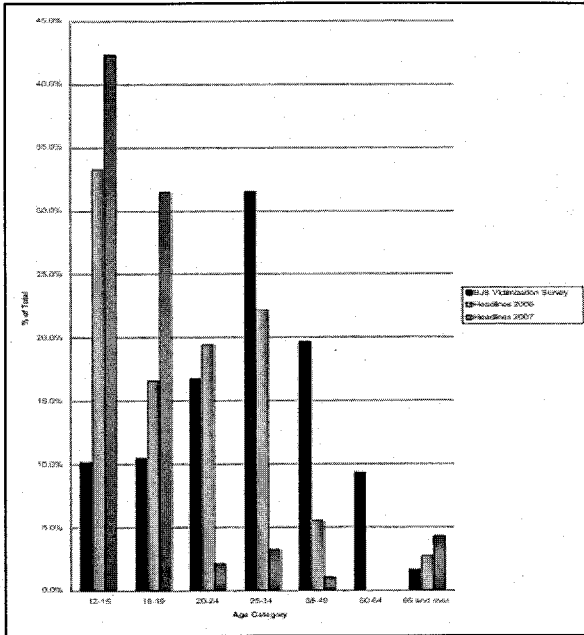
¹⁶⁷ Franiuk et al., *supra* note 166, at 13–14.

¹⁶⁸ Francis X. Shen, *Media, State Legislatures and Sex Crimes: An Exploratory Analysis* (2008) [hereinafter Shen, *State Legislatures*] (unpublished manuscript) (on file with author). I used Lexis Academic to search the headlines of thirty-one major United States newspapers for March 2006. To broaden the pool, for March 2007 I used the Google News aggregator, which searches over 4500 news outlets. These searches produced eighty-four articles to code for March 2006 and one-hundred and eight articles for March 2007. In order to compare the newspaper coverage to a benchmark, I also gathered information from the 2003–04 National Crime Victimization Survey (NCVS). The NCVS is conducted by the Bureau of Justice Statistics (BJS), and provides data from a "nationally representative sample of 42,000 households comprising nearly 76,000 persons on the frequency, characteristics and consequences of criminal victimization in the United States." BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION (2003), available at <http://www.ojp.usdoj.gov/bjs/cvict.htm>.

National Crime Victimization Survey (NCVS).¹⁶⁹ There is a strong bias in favor of reporting on young victims (Figure 1). While only 10% of victims on average nationally are between the ages of twelve and fifteen, 33% of the victims in the March 2006 newspaper articles and 42% in the March 2007 sample were in the 12–15 age range. This 300–400% increase in attention to child rape is consistent with the moral panic argument advanced in the previous sections. At the same time, while the national average finds that women in the 35–49 age range comprise 20% of total rape victims, only 5% of the March 2006 newspaper stories and only 1% of the March 2007 stories focused on incidents involving women in this age range. Such statistics make clear that newspapers cover rapes selectively. Why this selective coverage emerges cannot be answered by the data itself, but it seems quite plausible that newspapers are selecting the stories that are most likely to shock, and therefore most likely to sell. Such motivations are understandable, yet they are problematic because they produce media coverage that systematically overlooks the harms experienced by some types of victims.

¹⁶⁹BUREAU OF JUSTICE STATISTICS, *supra* note 168. To obtain the NCVS estimate of the percentage of rape / sexual assaults committed by a stranger, I used NCVS Table 34, "Percent distribution of victimization, by type of crime and relationship to offender." To estimate the percentage of rape victims in a series of six age categories, I used data from NCVS Table 3, "Victimization rates for persons age 12 and over, by type of crime and age of victims." NCVS Table 3 provides the sexual assault rate per thousand persons in each age group, as well as the total population in each age group. Using these two figures, I was able to construct an estimate of the number of victims in 2003–04 in each age group. I divided the number of victims in each age group by the total number of victims in order to arrive at a measure of the percentage of victims falling in each age group. I then compared these NCVS figures to the data from my sample of newspaper articles.

Figure 1—Comparing the age of rape victims in media stories in March 2006 and March 2007 with Bureau of Justice Statistics data on national averages for age of rape victims



Notes on figure: The data source for the BJS data is <http://www.ojp.usdoj.gov/bjs/cvict.htm>. I used data from NCVS Table 3, "Victimization rates for persons age 12 and over, by type of crime and age of victims." I was able to construct an estimate of the number of victims in 2003-04 in each age group. I divided the number of victims in each age group by the total number of victims in order to arrive at a measure of the percentage of victims falling in each age group. I then compared these NCVS figures to the data from my sample of newspaper articles. See Shen, State Legislatures, *supra* note 168.

In addition to overemphasis on child rape, media coverage also is heavily weighted toward high-profile cases. In both samples of media coverage, several high-profile cases drew the most attention. In the March 2006 sample, for instance, of the eighty-four initial articles, nine were about the Duke lacrosse rape case, and nine were about the rape and murder of Imette St. Guillen in New York City.¹⁷⁰ St. Guillen was found dead in a park after leaving a popular New York City bar. Her case drew much attention for its gruesomeness (she was strangled and bound in addition to being assaulted), as well as for the ensuing investigation that focused on the bar's bouncer. That a few stories dominated coverage supports the thesis that media coverage of rape is biased toward sensationalism and away from the types of rape that are much more common.

To be sure, it is not just the media, but we, the readers and viewers, who contribute to this skewed coverage. Are we more likely to read about a sensational murder-rape, or a 'typical' rape? And when we label the more common rape 'typical', what are we saying about our attitude toward those victims?

C. Contemporary Sex Crime Legislation

While the media and public opinion play important roles, it is in the statehouse where the actual laws are made (or not, as the case may be). The activities of state legislators thus deserve special attention. In this section of the Article, I examine contemporary statehouse activity, drawing on an empirical study I conducted of statehouse activity in the 2007 legislative

¹⁷⁰ See, e.g., Richard Fausset, *Gang-Rape Allegations Roil Duke*, L A TIMES, Mar. 31, 2006 at A5; Sal Ruibal, *Rape Allegations Cast Pall at Duke*, USA TODAY, Mar. 30, 2006, at 6C; Joc Holley & Christian Swczey, *Rape Accusation Against Lacrosse Players Roils Duke*, WASH. POST, Mar. 30, 2006, at E01; Jeff Barker, *Rape Probe Grounds Duke Lacrosse Team*, THE BALT. SUN, Mar. 29, 2006, at 1A; Viv Bernstein and Joe Drape, *Rape Allegation Against Athletes Is Roiling Duke*, N Y TIMES, Mar. 29, 2006, at A1; Michael Frazier, *Linking Suspect to Nassau Case*, NEWSDAY, Mar. 17, 2006, at A22; Kareem Fahim, *Police Have More Trouble Tying Bouncer to Rapes*, NY TIMES, Mar. 15, 2006, at B3; Michelle McPhcc, *Search For a Killer; Police Probe Rape Connection*, BOS. HERALD, Mar. 8, 2006, at 005.

season.¹⁷¹ I argue that state legislatures today fail to give adequate attention to the needs of rape victims.

What expectations should we have for legislative behavior? A number of social science theories predict that legislators may feed a moral panic about sex crimes. Jonathan Simon argues, for instance, that Megan's Law legislation (referring to laws that require registration of sex offenders and making publicly available their residence) is a contemporary example of "governing through crime"—using the criminal justice system as a way to promote other ends.¹⁷² Mona Lynch similarly argues that "the policymaking is not simply motivated by a rational drive to manage the risk posed by this class of offenders, but rather it is seeped in a constellation of emotional expressions of disgust, fear of contagion, and pollution avoidance, manifested in a legislative concern about boundary vulnerabilities between social spheres of the pure and the dangerous."¹⁷³ Since the public is typically uninformed about crime policy and often misestimates statistics, politicians have enormous sway in how a problem is defined.¹⁷⁴

The analysis I conducted found that America's state legislators continue to define the problem as: how do we deal with sex offenders?¹⁷⁵ Popular pieces of legislation, seen in multiple states, are bills that restrict sex offender residential locations, require reporting and/or notification of sex offender

¹⁷¹ Francis X. Shen, *Race, Gender, and Contemporary Rape Law Reform* (2010) (unpublished manuscript) (on file with the author).

¹⁷² Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 L. & SOC. INQUIRY 1111 (2000).

¹⁷³ Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 532 (2002) (citing MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* (1966)).

¹⁷⁴ Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99 (1992).

¹⁷⁵ Shen, *supra* note 171.

whereabouts, and increasing penalties for sex crimes against minors.¹⁷⁶ Castration is even back on the table.¹⁷⁷

Not only are sex offenders being kept at a safe distance from schools, but some proposals would keep them away from libraries, amusement parks, carnivals, and ice cream trucks as well.¹⁷⁸ Moreover, additional proposals would restrict sex offender Halloween costumes;¹⁷⁹ require sex-offender license plates;¹⁸⁰ and allow for arresting, without a warrant, a person suspected of violating the sex offender requirements.¹⁸¹

These individual anecdotes are telling, but to gain a comprehensive, national perspective, I constructed a database of

¹⁷⁶ *Id.* Foucault's argument that "punishment has become an economy of suspended rights" seems an apt description of the approach most state legislators are presently taking with regards to sexual assault and rape. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 11 (Alan Sheridan trans., 1977).

¹⁷⁷ S.B. 3, 2006 Sen., Reg. Sess. (La. 2006) proposed "the administration of medroxyprogesterone acetate to or voluntary castration of persons convicted of a crime which classifies the convicted person as a 'sex offender'."

¹⁷⁸ S.B. 1624, 2006 Reg. Sess. (Fla. 2006) (libraries); S.B. 438A, Reg. Sess. (N.Y. 2008) (ice cream truck), A. B. 2453, Reg. Sess. (N.Y. 2007) (amusement parks); S.B. 337, Reg. Sess. (Md. 2007).

¹⁷⁹ S.B. 254, 2006 Reg. Sess. (La. 2006) (proposing that sex offenders be prohibited "from wearing a mask, hood or disguise during holiday events and from distributing candy or other gifts on Halloween to persons under eighteen years of age.") The bill did not come out of the Committee on Judiciary.

¹⁸⁰ In Ohio, two State Senators proposed that all sex offenders who owned cars be issued "sex offender license plates" and that these license plates have a "distinctive pink background color." S.B. 229, 129th Gen. Assembly (Ohio 2005). The pink-plate bill failed, but the thought returned in 2007 with a new color: fluorescent green. Said one of the 2007 bill's sponsors, State Rep. Michael DuBose: "The fluorescent-green license plate will make the most egregious sex offenders easily identifiable." *State Wants Special Car Plates for Sex Offenders*, REUTERS, Mar 1, 2007, available at <http://www.reuters.com/article/2007/03/01/us-usa-crime-sex-plates-idUSN2843294720070301>.

¹⁸¹ In Vermont's 2006 session, a state Senate bill proposed "permit[ting] law enforcement to arrest without a warrant a person who is suspected of violating the sex offender registration requirements." S.B. 184, 2005-2006 Leg. Sess. (Vt. 2006).

every bill proposed in 2007 state legislatures relating to rape, sexual assault, and sex crimes.¹⁸² What types of sex crime bills are state legislators currently proposing? The answer, in short, is that they are proposing bills aimed to punish and monitor sex offenders and child rapists. In my study I found that while 62% of legislation was concerned with sex offenders, and another 27% concerned with child rapists, only 4% (39 of 952 bills) directly addressed the needs of prosecutors trying to secure convictions.¹⁸³ Analysis of an additional sample of 454 bills from 2006 suggests that there is year-to-year variation, but that prosecution remains a relatively low priority.¹⁸⁴ In the 2006 sample, the percentage of bills concerned with improving prosecution was 7%.¹⁸⁵ While this was greater than the 2007 percentage, there were still seven times more sex offender bills and three times more child rape bills proposed than the 2006 sample.

This analysis of the legislative database reveals that there is an enormous disconnect between the concerns of state legislators and the aspects of the legal system that are most in need of reform. Over twenty years ago, in the 1985 version of his textbook on state and community politics, Thomas Dye wrote that “[m]ost behavioral research suggests that it is not the severity of punishment that affects behavior, but the establishment of a sure linkage between the errant behavior and the punishment. In other words, crime is more likely to be deterred by making punishment sure, rather than severe.”¹⁸⁶ Even two decades later, it appears that this simple lesson has not been learned.

¹⁸² The details of the construction of the database are reported in Shen, *supra* note 171.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ THOMAS R. DYE, *POLITICS IN STATES AND COMMUNITIES* 210 (4th ed. 1981).

While details such as pink license plates may have substantive value, it is the premise of this Article that special driver's licenses, an extra 1,500 feet, and keeping sex offenders away from carnival rides are not the kind of fundamental reforms required to transform a broken system. They are certainly not the types of reforms that have been called for by careful observers of the system.¹⁸⁷ A significant problem with sex offender-focused reforms is that they deal only with *convicted* sex offenders, overlooking the fact that most offenders are never convicted.¹⁸⁸

Why do state lawmakers behave in this way, focusing so much on a few bad actors and failing to see the bigger picture? Researchers Lisa Sample and Colleen Kadleck attempted to answer this question, conducting a case study of Illinois legislators and asking them about their motivations for changing the sex offender statutes.¹⁸⁹ The researchers spoke with 21 Illinois representatives and 4 state senators. Their findings confirm the argument I advance in this Article: "Child victimization is not only mentioned in public officials' remarks on the sex offender problem but also when they discuss sex offender legislation. When asked if current sex offender legislation will help control the sex offender problem, most public officials (77%) made some reference to protecting children."¹⁹⁰ In the words of a legislator, "Every time a story comes out about some kid being molested or something, I get calls all day wanting to know what I am going to do about it."¹⁹¹

¹⁸⁷ See, e.g., LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* (1991).

¹⁸⁸ Estimates vary, but only 7–15 rapists will ever do time for their crime. Estimation based on National Crime Victimization Survey. See *National Victimization Survey (NCVS)*, U.S. DEP'T OF JUSTICE, <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=245> (last visited Aug. 26, 2011).

¹⁸⁹ Lisa L. Sample & Colleen Kadleck, *Sex Offender Laws: Legislators' Accounts of the Need for Policy*, 19 CRIM. JUST. POL'Y. REV. 40, 53–54 (2008).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 56.

Another official directly acknowledged that sometimes they are less concerned with real reform and more concerned with looking good in the public eye. Said one employee at the Illinois Attorney General's Office: "We have more laws than ever before [for sex offending]. Whether any of them help or not, at least it looks like we're trying."¹⁹² Just as myth wins out in criminal law, in civil law, and in the media, so too does illusion trump reality in the statehouse.

IV. Reflecting on Rape Law Reform

Much has happened in United States legislatures to promote improved societal and legal response to rape. Since the early 1970s, "state and federal legislatures have enacted rape shield laws, provided for privileged protection of rape counseling records, repealed marital rape exceptions, eliminated evidentiary corroboration requirements and cautionary instructions regarding the absence of corroboration, and abolished the statutory 'reasonable mistake of fact' defense."¹⁹³ But despite these and other reforms, rape myths have remained strong. Seidman and Vickers' careful review finds that:

Sadly, it now appears that by any available measure, [rape law] reforms have had no significant substantive impact. No major scholar in the area of rape law and rape reform has argued that these reforms have produced significant results. Perhaps most disheartening is that trial, appellate and state supreme courts are still arguing over the same old ground: the meaning of consent, degrees of force, the victim's role as an active or passive participant in the event, and the victim's privacy.¹⁹⁴

Why haven't these numerous rape law reforms produced more substantial systematic victories for rape victims? In this part of the Article, I reflect on that question by revisiting—with a

¹⁹² *Id.*

¹⁹³ Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 467 (2005).

¹⁹⁴ *Id.* at 470.

critical eye—several of the prominent theories of reform. Part IV proceeds by (A) acknowledging that some important progress has been made; (B) complicating our impulse to blame males and fraternities for harms of rape; and (C) discussing the role of institutions in limiting systemic rape policy reform.

A. Rape Law Reform: Historical Context

Although I argue in the subsequent sections that we have not come as far as we may think, it is important to note that much positive reform of U.S. rape laws has taken place since the 1970s.¹⁹⁵ As a start, the issue has drawn increasing attention from scholars: the literature on violence against women “has expanded exponentially over the past three decades to influence practice and policy at the local, state, and federal levels.”¹⁹⁶

As a result of this increase in scholarship, we have better statistics and are more aware of the prevalence of sexual assault. One of the most frequently cited studies was conducted by Mary Koss and her colleagues, who used data from the National Crime Survey (NCS), a victimization survey where a representative group of respondents are asked if they or anyone else in their household have been victims of particular crimes in the previous

¹⁹⁵ Seidman & Vickers summarize these reforms in four categories: “These criminal justice reforms fell into four categories: (1) redefinition of the offense (repealing spousal exemptions and abolishing specific gender roles for the accuser and accused); (2) evidentiary reforms (elimination of corroboration requirements, enactment of rape shield statutes); (3) reforms in statutory age requirements; and (4) reforms in statutory structures (grading of offenses according to severity of force and resulting injuries).” *Id.* at 470. *See also* STEPHEN J. SCHULHOFER, UNWANTED SEX 12 (1998).

¹⁹⁶ Claire M. Renzetti & Raquel Kennedy Bergen, *The Emergence of Violence Against Women as a Social Problem*, in VIOLENCE AGAINST WOMEN 1, 2 (2005).

six months.¹⁹⁷ Koss' findings were shocking at the time: 27.5% of college women and 7.7% of college men reported experiencing either rape or attempted rape.¹⁹⁸ Since these respondents also reported not going through the criminal justice system, a gap between the statistics provided by the FBI's Uniform Crime Reports (UCR) and the victimization surveys became clear.¹⁹⁹ The National Institute of Justice eventually responded by conducting a second national study of college students, this time changing its questions to make them similar to other victimization surveys. This new study found that rape prevalence was eleven times greater than the earlier federal survey.²⁰⁰ Koss and others have continued to analyze new rounds

¹⁹⁷ Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample in Higher Education Students*, J. CONSULTING & CLINICAL PSYCHOL., Apr. 1987, at 162. Another important step was the MS. magazine campus survey, which surveyed 6100 college women across 32 college campuses, and which was led by psychology professor Mary Koss. The study was crucial in bringing attention to the prevalence and reality of acquaintance or "date rape," especially on college campuses. Koss' work more generally challenged the official reporting of statistics, and found through victimization surveys that the crime was more frequent than previously believed. WARSHAW, *supra* note 42, at 2-3. Diana E. H. Russell wrote a groundbreaking book on rape in marriage, based on her survey of 930 women in San Francisco, in which she found that fourteen percent of respondents reported being raped by their husbands or ex-husbands. DIANA E. H. RUSSELL, *RAPE IN MARRIAGE* 57 (1982).

¹⁹⁸ Koss et al., *supra* note 197, at 168.

¹⁹⁹ *Id.* at 162 (noting that "The Federal Bureau of Investigation (FBI) defines rape as 'carnal knowledge of a female forcibly and against her consent' and reports that 87,340 such offenses occurred in 1985. However, these figures greatly underestimate the true scope of rape because they are based only on instances reported to police.") (citations omitted). For more discussion of these two different measures of crime incidence—police reports vs. victimization surveys—see Steven Block & Michael G. Maxfield, *The U.S. Uniform Crime Reports and the National Crime Victimization Survey*, in INTERNATIONAL CRIME AND JUSTICE 455 (Mangai Natarajan ed., 2011).

²⁰⁰ BONNIE S. FISHER, FRANCIS T. CULLEN, MICHAEL G. TURNER, NAT'L INST. OF JUSTICE, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 13 (2003).

of the Sexual Experiences Survey, with similar results.²⁰¹ The advancement of better instruments to assess rape prevalence is another sign of progress.

Turning to legal reform, we can think of rape law as having been reformed in three primary ways: "The first sort of reform attempts to alter those rules of evidence which have in the past made it extremely difficult (if not altogether impossible) for the state to prosecute successfully cases of rape; the second reform redefines rape in terms of the perpetrator's conduct rather than the victim's consent; and the third redefines rape as a crime of violence, as either sexual assault or as assault pure and simple."²⁰²

One of the goals of the reform movement was to redefine rape as "sexual assault" or "sexual battery" in order to "emphasize that the offense is a violent crime."²⁰³ Nevertheless, it is not clear that these reforms have produced the effects they hoped to. Political scientist Walter Mebane and lawyer Stacy Futter²⁰⁴ performed a state-level analysis of the effects of criminal rape law reform on rape case processing.²⁰⁵ Their

²⁰¹ There are other signs of progress as well. In 1989, the National Crime Victimization Survey expanded its questions to better estimate the incidence of rape and violence by intimate partners and family members. In 1995, the academic journal *VIOLENCE AGAINST WOMEN* was launched. Ronet Bachman, *A Comparison of Annual Incidence Rates and Contextual Characteristics of Intimate-Partner Violence Against Women from the National Crime Victimization Survey (NCVS) and the National Violence Against Women Survey (NVAWS)*, 6 *VIOLENCE AGAINST WOMEN* 839, 842 (2000).

²⁰² ROSEMARIE TONG, *WOMEN, SEX, AND THE LAW* 91 (1984).

²⁰³ Berger et al., *supra* note 12, at 224.

²⁰⁴ Futter & Mebane, Jr., *supra* note 16. Another well-designed, state-level empirical analysis was carried out by Baron & Straus. LARRY BARON & MURRAY A. STRAUS, *FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS* (1989). Using responses to the General Social Survey (GSS), Baron & Straus are able to quantify measures of social disorganization, gender equality, sex magazine circulation, and legitimate violence in each of the fifty states. They then use these measures to explain rape outcomes as measured by the Uniform Crime Reports. They find support for the social disorganization, gender equality, and pornography hypotheses.

²⁰⁵ *Id.*

“statistical analysis shows that defining sex crimes on a single continuum, subjecting spouses and cohabitants to prosecution, limiting the admissibility [of evidence] at trial about the victim’s past sexual history with the defendant or about the victim’s past sexual history on cross-examination, and denying a mistake of incapacity defense all significantly increased the number of ‘actual rapes’.”²⁰⁶ Their data, however, do not allow for examination of the success rates of prosecution, or the experiences of victims as they go through the criminal justice system.

Mebane and Futter’s evidence suggests that we are allowing more victims access to the system by broadening our legal definitions of rape, but victims may not be faring much better once they have gained access. Returning to the review of research by Seidman and Vickers, it seems true that “few commentators can point to any data suggesting that criminal rape reform laws have deterred the commission of rape, increased its prosecution, or increased conviction rates. In short, the ‘outcomes’ of the criminal justice system—arrest, indictment, and conviction—have remained fairly constant.”²⁰⁷

Why has the law, even the reformed law, failed to achieve its ends? A number of critiques can be, and have been, offered. One prominent argument is that changes in the law have not

²⁰⁶ *Id.* at 111.

²⁰⁷ Seidmann & Vickers, *supra* note 193, at 467–68.

See also David P. Bryden, *Forum on the Law of Rape*, 3 BUFF. CRIM. L. REV. 317, 320–21 (2000); Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, JURIMETRICS, Winter 1999, at 119, 128–30, 130 n. 3; CASSIA SPOHN & JULIA HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT, 100–05 (1992) (finding no change in number of reports, indictments, and convictions in majority of jurisdictions studied); Futter & Mebane, Jr., *supra* note 16, at 83–85 (discussing various empirical studies of rape law reform impact). See generally Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN’S L.J. 127 (1996).

been matched by more fundamental changes in society.²⁰⁸ Miller and Biele wrote, in a piece looking back at twenty years of reform, that “all our efforts in education, redefinition, and personal history have brought about only minor changes in social attitudes.”²⁰⁹ Rosemarie Tong also provides an important reminder that “the law is not a substitute for morality, and legal reform is not the same as moral transformation.”²¹⁰

This perspective, placing our focus on social mores, invites a reframing of our question: why hasn’t the rape law reform movement been more successful in changing attitudes? Certainly change in attitudes, even deep-seated ones, is possible on some issues. Consider the change in opinion on interracial marriages in less than fifty years. According to the Gallup Minority Rights and Relations survey, in 1958 only 4% of Americans approved of marriages between blacks and whites.²¹¹ In 2003–04, that number has jumped astronomically to 77%, an increase of

²⁰⁸ Sarah Stage has also pointed out how, drawing on Christopher Lasch’s arguments:

[A]s male supremacy becomes “ideologically untenable,” men assert their domination in more direct and ugly ways. The resulting sexual warfare allows for no neutrality. Women, whether feminist or antifeminist, are caught in the ensuing battle. Lasch blames feminism for making life tougher on women, for depriving them of “protection” and “privileges” formerly accorded the “lady.” Yet in reality it was the so-called sexual revolution of the sixties, not feminism, that did away with the distinction between the “good girl” and the “bad.” Once all women were seen as sexually available, none could claim the protection respectability offered in the past. The pure Mary metamorphosed into the ravenous Eve.

Sarah J. Stage, *Women*, 35 AM. Q. 169, 176 (1983).

²⁰⁹ Miller & Biele, *supra* note 21, at 51.

²¹⁰ TONG, *supra* note 202, at 4.

²¹¹ Joseph Carroll, *Most Americans Approve of Interracial Marriages*, GALLUP.COM, <http://www.gallup.com/poll/28417/Most-Americans-Approve-Interracial-Marriages.aspx> (last visited July 19, 2011).

almost twenty-fold.²¹² Why have we not seen a similar change in attitudes toward rape and sexual assault? I argue here that part of the answer is our impulse to blame. In the process of removing one myth of blame, we create another in its place, leaving little room for self-reflection on our own (and society's collective) responsibility for responding.

B. New Blame Myths

In this section I examine the arguments, put forth by some (though certainly not all) commentators, that two groups are especially deserving of blame for perpetuating rape and preventing meaningful reform: (1) males generally, and (2) men in fraternities in particular. After reflection and review of the evidence for each case, however, this section argues that we need a more nuanced response than blanket blame for an entire group or industry.

1. Should We Point the Finger at All Males?

Susan Brownmiller's landmark book *Against Our Will*, which is cited in virtually every piece written on the topic of rape, implicates all men in the perpetuation of rape and rape myths. As Sorensen and White write in their review of the research, "we cannot overestimate the influence of feminist

²¹² *Id.*

theorists such as Brownmiller upon the thinking of current researchers.”²¹³

One of the most quoted lines from *Against Our Will* is the closing sentence to her first chapter, where Brownmiller argues that, “From prehistoric times to the present, I believe, rape has played a critical function. It is nothing more or less than a conscious process of intimidation by which *all men keep all women* in a state of fear.”²¹⁴ Perhaps due in part to Brownmiller’s own emphasis, what is striking is her argument that *all men* are complicit in rape.

Men are blamed, in different ways, in other theories as well. For instance, drawing on Adrienne Rich’s work, Carole Pateman argues that the “law of male sex-right” is the law that guides all others.²¹⁵ In Pateman’s view, social contract theory

²¹³ RANDY THORNHILL & CRAIG T. PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION 126 (2000) (quoting S. Sorensen & J. White, *Adult Sexual Assault: Overview of Research*, 48 J. SOC. ISSUES 3 (1992)). This is not to say that Brownmiller’s book speaks for the discipline. For a more thorough discussion of feminism and rape, see MARIA BEVACQUA, RAPE ON THE PUBLIC AGENDA: FEMINISM AND THE POLITICS OF SEXUAL ASSAULT (2000); NANCY MATTHEWS, CONFRONTING RAPE: THE FEMINIST ANTI-RAPE MOVEMENT AND THE STATE (1994). In addition, see Rebecca Campbell & Sharon M. Wasco, *Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions*, 20 J. INTERPERSONAL VIOLENCE 127 (2005); Patricia D. Rozec & Mary P. Koss, *Rape: A Century of Resistance*, 25 PSYCHOL. WOMEN Q. 295 (2001); Antonia Abbey, *Lessons Learned and Unanswered Questions About Sexual Assault Perpetration*, 20 J. INTERPERSONAL VIOLENCE 29 (2005). Prominent feminist scholar Catherine MacKinnon, among others, has also written on rape. See CATHERINE MACKINNON, FEMINISM UNMODIFIED (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; MACKINNON, *supra* note 118. For a critique of MacKinnon, see Emily Jackson, *Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal* 19 J. L. & SOC. 195 (1992). For another more general critique, see David J. Giacopassi & Karen R. Wilkinson, *Rape and the Devalued Victim*, 9 L. & HUM. BEHAV. 367 (1985) (arguing that rape law reforms devalue female rape victims).

²¹⁴ Brownmiller, *supra* note 23, at 5.

²¹⁵ CAROLE PATEMAN, THE SEXUAL CONTRACT (1988) (citing Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, 5 SIGNS 631, 645 (1980)).

cannot escape its roots in patriarchy,²¹⁶ exemplified by the slow legal response to spousal-rape. Central to Pateman's argument is that males' control over female sexuality (e.g., gaining sexual access to females via a marriage contract) serves as the grounds for male political power as well. Pateman argues that sexuality is hidden within the social contract. In her analysis, "sexual difference is political difference; sexual difference is the difference between freedom and subjugation."²¹⁷

How does the evidence shape up relative to claims that *all* males are the impediment to better rape law reform? On one hand, there is no escaping the fact that gender matters. There is empirical evidence that "men attribute higher levels of blame to rape victims and are more forgiving of rapists and minimize the level of violence in rape scenarios more than do women."²¹⁸ Bell also finds support for differences between male and female blame attribution.²¹⁹ With 330 university students completing a questionnaire on date and acquaintance rape, males were more likely than females to blame the victim.²²⁰ Both males and females, however, remained affected by situational factors, as they were more likely to blame the victim in cases of date rape versus stranger rape.²²¹ Gender matters, but situation matters too.

²¹⁶ *Id.*

²¹⁷ *Id.* at 6.

²¹⁸ Idisis, *supra* note 80, at 114. See also Cheryl E. Drout & Samuel L. Gaertner, *Gender Differences in Reactions to Female Victims*, 22 SOC. BEHAV. & PERSONALITY 267, 274 (1994); Alice Gold et al., *Reactions to Victims of Crime: Sympathy, Defensive Attribution, and the Just World*, 5 SOC. BEHAV. & PERSONALITY 295 (1977).

²¹⁹ Susan T. Bell, Peter J. Kuriloff & Ilsa Lottes, *Understanding Attributions of Blame in Stranger Rape and Date Rape Situations: An Examination of Gender, Race, Identification, and Students' Social Perceptions of Rape Victims*, 24 J. APPLIED SOC. PSYCHOL. 1719 (1994).

²²⁰ *Id.*

²²¹ *Id.*

Moreover, not all studies have come to the same conclusion about the significance of subject gender in shaping responses.²²² Studying 160 undergraduates asked to evaluate a marital rape scenario, Mark Whatley found that the “results did not support the hypothesis that male participants would hold the victim more responsible for the assault than would female participants.”²²³

Other studies suggest a complex interaction between gender and situation. For instance, Marc Klippenstine conducted research on 197 mock jurors and discovered a “complex interplay between target [alcoholic] beverage consumption and gender of participant.”²²⁴ Whether women were less willing to blame the rape victim was contingent on how much alcohol was consumed by each party. Calvin Sims also found that when alcohol is introduced into the scenario, gender is not a strong predictor for victim blame attribution.²²⁵ In short, it appears that women, just like men, are affected by situational factors such as alcohol consumption.

²²² Krulewitz and Nash, *supra* note 58, at 568, for instance, found that “[g]enerally speaking, women attributed greater responsibility to the victim and less blame to the assailant than did men.”

²²³ In providing context for this finding, Whatley notes the mixed empirical evidence:

The results are consistent with prior research reporting no sex differences in the tendency to blame the victim. These results are inconsistent with those reporting males blame the victim more than females. The results are inconsistent with studies in the literature on stranger and acquaintance rape reporting that female participants assigned more responsibility to the victim than did male participants.

Mark A. Whatley, *The Effect of Participant Sex, Victim Dress, and Traditional Attitudes on Causal Judgments for Marital Rape Victims*, 20 J. FAM. VIOLENCE 196, 221 (2005) (citations omitted).

²²⁴ Marc A. Klippenstine et al., *Perceptions of Sexual Assault: The Expression of Gender Differences and the Impact of Target Alcohol Consumption*, 37 J. APPLIED SOC. PSYCHOL. 2620 (2007).

²²⁵ Calvin M. Sims et al., *Rape Blame as a Function of Alcohol Presence and Resistance Type*, 32 ADDICTIVE BEHAVS. 2766 (2007).

Research conducted by Gerber suggests that men are less likely to blame the perpetrator (and more likely to blame the victim) regardless of whether the situation is one of a man assaulting a woman or a woman assaulting a man.²²⁶ The researchers created scenarios in which a perpetrator bit the victim, and they randomly assigned some subjects to read scenarios in which the traditional gender roles of the perpetrator and victim were reversed. They found that “[p]ersonality factors (e.g. the trait of aggressiveness or the endorsement of stereotypes that men should be dominant) might emerge as stronger determinants of leniency effects than gender per se, with both male and female subjects who score higher on these dimensions showing the greatest leniency effects.”²²⁷

Pointing the finger at males also overlooks the emerging body of evidence on male rape victims. While constituting a much smaller number than female rape victims, the problem of male rape is nevertheless real. Research on male rape has led to some consistent conclusions:

Firstly, male victims tend to be blamed more than female victims in both stranger and acquaintance rape situations. Male victims are judged more harshly than females when they are perceived as being able to escape from the scene or fight off the attacker. Secondly, men tend to be more negative towards male victims than women are. Men are more likely to blame the victim; consider the assault less severe; have less sympathy with the victim; and endorse more myths pertaining to male rape than women are Thirdly, however, men are not negative towards all male victims. Men are more likely to make negative judgments

²²⁶ Gwendolyn L. Gerber et al., *Attributions of Blame in Sexual Assault to Perpetrators and Victims of Both Genders*, 34 J. APPLIED SOC. PSYCHOL. 2149 (2004).

²²⁷ *Id.* at 2162.

towards male rape victims when the victim is portrayed as gay rather than heterosexual.²²⁸

Consistent with this research summary, Wakelin and Long find that victim sexual orientation matters.²²⁹ In an experiment where the victim's sexual orientation was changed in different scenarios, they found that "homophobic attitudes and/or aspects of the gay male stereotype contribute to harsher judgments of gay male rape victims," as "chance factors and personal character contribute more to the blame attributed to gay male victims than to heterosexual male or lesbian victims."²³⁰

Taken as a whole, the evidence suggests that gender certainly matters, but how it matters is not so straightforward. Both men and women are heavily affected by situational variables when assessing blame for rape victims. When we consider sexual orientation and the gender of the victim, it becomes even more difficult to hold onto the position that the answer to rape law reform is to blame all men.

2. Should We Point the Finger at Fraternities?

If not all men, what about singling out those men who are members of fraternities (or similar organizations, such as men's sports teams)? Much has been written about rape on college campuses, with special emphasis on men in fraternities and on sports teams. In *Sexual Assault on the College Campus*, Martin Schwartz and Walter DeKeseredy examine how college males can be encouraged by their male friends to commit sexual

²²⁸ Michelle Davies & Samantha McCartney, *Effects of Gender and Sexuality on Judgments of Victim Blame and Rape Myth Acceptance in a Depicted Male Rape*, 13 J. COMMUNITY & APPL. SOC. PSYCHOL. 391, 392 (2003) (citations omitted).

²²⁹ Anna Wakelin & Karen M. Long, *Effects of Victim Gender and Sexuality on Attributions of Blame to Rape Victims*, 49 SEX ROLES 477 (2003).

²³⁰ *Id.* at 486. Davies, Pollard, and Archer's 2006 study of 161 British undergraduates arrived at similar conclusions. Michelle Davies, Paul Pollard, & John Archer, *Effects of Perpetrator Gender and Victim Sexuality on Blame Toward Male Victims of Sexual Assault*, 146 J. SOC. PSYCHOL. 275, 286 (2006).

assault.²³¹ They identify in the literature four theories that may explain how a college male's situation can influence his decision making in the realm of sex.²³² Most relevant to the choice myth is the *reference group theory*, which suggests that aggressive males find other similarly aggressive males and create a subculture on campus. Kanin was the first to make this argument, basing his ideas on a study conducted on a random sample of 341 unmarried male undergraduates. He concluded that the peer groups "stress the value of the erotic goal so that the male will be prone to become physically aggressive at the point when it is apparent that the usual seductive approaches are not going to be productive."²³³

Kanin's theory has found some empirical support in subsequent studies.²³⁴ A 1999 study, for instance, administered a survey to a sample of 477 males at a large Southwestern Division I university. The results of the survey found that fraternity brothers and athletes, as compared to control groups, had significantly more agreement with rape myths and adversarial gender beliefs.²³⁵ The comparisons are striking. While only 1% of the control group of males strongly agreed with the statement that "women pretend not to want sex, but want to be forced," 7% of fraternity members and 9.6% of athletes agreed.²³⁶ While only 1% of the control group strongly agreed with the statement, "drunk women at a party are fair game for everybody," 3.5% of frat brothers and 12% of athletes

²³¹ MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, *SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT* 2 (1997).

²³² *Id.* at 32.

²³³ *Id.* at 33 (citing E.J. Kanin, *An Examination of Sexual Aggression as a Response to Sexual Frustration*, 29 J. MARRIAGE & FAM. 428 (1967)).

²³⁴ On the other hand, Kanin's theory is also refuted in other studies that do not find significant differences between fraternity and non-fraternity students in the acceptance of rape myths. See, e.g., Martin D. Schwartz & Carol A. Nogrady, *Fraternity Membership, Rape Myths, and Sexual Aggression on a College Campus*, 2 VIOLENCE AGAINST WOMEN 148 (1996).

²³⁵ Scot B. Boeringer, *Associations of Rape-Supportive Attitudes With Fraternal and Athletic Participation*, 5 VIOLENCE AGAINST WOMEN 81 (1999).

²³⁶ *Id.* at 87 tbl. 3.

strongly agreed.²³⁷ And while only 1% of the control group strongly agreed that "any woman can resist rape if she really wants to," 1.8% of frat brothers and 15.4% of athletes strongly agreed.²³⁸

Similarly, social psychologist Chris O'Sullivan argues on the basis of his research on gang rapes and fraternities and college sports teams that because of group psychological dynamics, men who join these organizations become more sexually aggressive and create more opportunities for gang rape. O'Sullivan hopes that "the social evolution of our society will make belonging to a fraternity a source of shame rather than of pride" because "[f]raternities encourage behavior in young men that falls along a continuum of sexual violence."²³⁹ Male peer groups work in a number of ways to encourage college men to see disposition. Peggy Sanday argues that fraternities often view sexual violence as a way to "work[] a yes out."²⁴⁰ Other research finds that a desire to be accepted by male friends also drives aggressive behavior.²⁴¹ A 1989 study of fraternity houses at Florida State found that "the organization and membership of

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Chris O'Sullivan, *Fraternities and the Rape Culture*, in TRANSFORMING A RAPE CULTURE 30 (Emilie Buchwald et al. eds., 1993).

²⁴⁰ PEGGY R. SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS 129-146 (1990).

²⁴¹ See Christine Adler, *An Exploration of Self-Reported Sexually Aggressive Behavior*, 31 CRIME & DELINQUENCY 306, 321 (1985); Scot Boeringer et al., *Social Contexts and Social Learning in Sexual Coercion and Aggression: Assessing the Contribution of Fraternity Membership*, 40 FAM. REL. 558 (1991).

fraternities contribute heavily to coercive and often violent sex."²⁴²

Given all of this research, it is tempting to isolate fraternities and male sports teams as the bad guys, to see them as the "breeding grounds for rape, particularly gang acquaintance rape."²⁴³ But doing so risks falling back into the dispositionist framework, to reassure ourselves that we've found the problem and that we can solve it by doing away with the breeding grounds. By isolating our attention on fraternities, we create a new myth: the male rapist as a loud, beer-guzzling fraternity brother or football player. Such generalizations not only overlook the myriad variations within fraternity and athletic life but also mistakenly lead us to believe that men who don't look like that—men who are studious, well-dressed, and on their way to law school, say—can't be rapists. This temptation to blame and to generate myth must be resisted.

C. Institutions and Blame Avoidance

The previous section argued that we must take a more complicated view of blame if we are to address systemic problems underlying our failures to respond to rape. In this section I turn my attention to institutions, arguing that institutions often fail to engage in systemic reform by employing *feasibility frames*, whereby institutions claim that they have done everything feasible in response to rape. I argue that such frames are problematic because, upon closer examination, much deeper responses *are* feasible—they're just not profitable. I offer several illustrative examples in support of this contention.

1. Feasibility Frames in Theory

²⁴² Patricia Yancey Martin & Robert A. Hummer, *Fraternities and Rape on Campus*, 3 GENDER & SOC'Y 457 (1989). Warshaw similarly finds serious fault with fraternities and all-male sports teams, arguing that "[f]raternity rituals, skits, even publications often have obscene, antifemale content" and that "[f]raternity members themselves are often unapologetic for being part of an environment that demands loyalty to a belief system that often objectifies and denigrates women." WARSHAW, *supra* note 42, at 106–07 (1988).

²⁴³ *Id.* at 112.

When an institution is faced with rape within its community, an institutional response is called for. What should we expect the contours of that response to be? Jon and Kathleen Hanson's theory on "choice myths" provides a theoretical framework to develop an answer to this question. Hanson and Hanson argue that when we are faced with information that challenges our view of how the world should be, we satisfy our craving for the perception of justice "by changing our perception of the victims [rather] than by acknowledging and addressing the underlying unfairness."²⁴⁴

Institutions, like individuals, want to feel better about themselves. Institutional responses, such as from schools or communities, are likely to be shaped by desires to maintain institutional integrity, avoid legal culpability, and prevent changes that would disrupt present operations. Unlike the individual processes, which generally remain unconscious, I believe these institutional reactions are crafted, conscious responses.

Institutional responses, then, stand in contrast to individual reactions which Hanson and Hanson describe as "operating largely in our subconscious" and functioning as "our secret palliative—a coping mechanism for times when the dissonance between reality and ideals threatens to overwhelm what we so desperately wish to see."²⁴⁵ Institutional responses function not as a coping mechanism, but as a *damage control* mechanism. Institutions will adjust their blame attribution in such a way to minimize damage to their profitability. Institutions consciously create confusion, in order to reduce the negative impact of focus on their behavior.

In crafting their response, I believe institutions will adopt a feasibility frame schema, highlighting whatever positive responses they've enacted and justifying any inaction that is called into question. In doing this, they will claim that they are aware of the situation and are already handling it in the best possible manner. To do anything beyond that, the story goes,

²⁴⁴ Hanson & Hanson, *supra* note 2, at 7.

²⁴⁵ *Id.* at 428–29.

simply isn't feasible. Using the feasibility frame, the institution can acknowledge the exposure of the rape while simultaneously avoiding substantial changes to their operations. Implicitly, by saying that it wasn't feasible to do any more, they are assigning the leftover blame to others.²⁴⁶

2. Feasibility Frames in Practice

How well does this theory of feasibility frames play out in the real world? More systematic research is required to test the theory completely, but to provide a first-cut answer, I examined several different incidents involving institutions and rape. First, in 2005 in the City of St. Louis, MO, the local *St. Louis Post-Dispatch* newspaper ran an investigative series of articles about mishandling of rape cases by the St. Louis city police department. In response to these articles, St. Louis Mayor Francis Slay appointed a special task force to investigate the causes of the alleged mishandling.²⁴⁷ When the task force released their report in 2006, they concluded that "the St. Louis police should put more detectives on sex crimes, work more closely with hospitals and counselors and better prepare officers to handle rape cases."²⁴⁸

As predicted, the first response to the paper's myth busting was an acknowledgment that the situation needed to be changed. But as the report went on, the tone of the task force's response changed. The task force remained reluctant to recommend a fundamental shake-up, finding that the newspaper's investigation "illuminated problems but also overlooked the overall competence of the police department."²⁴⁹ Put another

²⁴⁶ In the language of tort law, they are arguing that they have taken optimal precautions. It is likely not a coincidence, given a desire to reduce legal exposure, that institutions would adopt such a position.

²⁴⁷ For the final report of the task force, see MAYOR'S TASK FORCE ON POLICE RESPONSE TO VICTIMS OF SEXUAL ASSAULT, FINAL REPORT, available at <http://web.archive.org/web/20060517045957/http://www.mayorslay.com/docs/FinalReport1-31-061.pdf>.

²⁴⁸ Jeremy Kohler, *What Rape? Charges Are Urged*, ST. LOUIS POST-DISPATCH, Mar. 24, 2006, at D1.

²⁴⁹ *Id.*

way, the task force was reporting that the “overall” situation was fine. To admit otherwise would be to lose too much institutional credibility.

Sometimes it is not the institution itself but someone with a vested interest in supporting the institution who plays the feasibility card. A March 2006 article from the *Rocky Mountain News* reported on the federal Title IX case of two women who accused members of the University of Colorado football team of rape.²⁵⁰ In his comments on the case, Larry Pozner, one of the university’s lawyers, commented that, “Title IX does not make universities liable for everything that happens off campus between its students. . . . If it did, all universities would be broke.”²⁵¹ Put another way, this is using the “not feasible” schema to prevent the situation from being truly addressed.

When Navy cadet Lamar Owens, Jr., was accused of rape by a female midshipman in 2006, it raised a flurry of articles about the culture at the Academy. As one friend of the accuser described the situation, “Any girl at our school who turns in a guy is gonna be crucified.”²⁵² The case gained more attention because the accused was the quarterback and MVP of the Navy football team and was well-known on campus as a religious person. What’s more, the women had been drinking before the assault, raising questions about pervasive underage drinking at the school.²⁵³

There were multiple institutional responses to this incident. Since the victim had been drinking underage at a local bar, the Annapolis Alcoholic Beverage Control Board (AABCB) came under fire.²⁵⁴ In response to inquiries, vice chairman of the

²⁵⁰ Kevin Vaughan. *Judge Tosses CU Suit Again*, ROCKY MOUNTAIN NEWS, Mar. 24, 2006, at 6A.

²⁵¹ *Id.*

²⁵² Ray Riviera, *Pressure on Academy Rape Victims Cited*, WASH. POST, Mar. 10, 2006, at B05.

²⁵³ *Id.*

²⁵⁴ Bradley Olson & Andrea F. Siegel, *Mids Testify About Drinking*, BALTIMORE SUN, Mar. 12, 2006, at 1B.

AABCB Charles Grayston expressed his regret at what happened, but he immediately turned on the feasibility frame, stating that the Board was “doing as much as can be done” in combating underage drinking.²⁵⁵

Naval Academy officials also turned to the feasibility frame. Although this caused some reexamination of Academy procedure, Naval officials presented themselves as already dealing comprehensively with the problem. Captain Bruce Grooms, who serves in a position akin to a dean of students, listed all the things the Academy was already doing:

At the academy, the school has many seminars dealing with alcohol use and assault . . . In the area of sexual assault and awareness, we talk about the date rape drugs . . . We talk about consent, decision analysis, how does alcohol affect your brain when you’re involved in man and woman relationships. What is sexual coercion? . . . With regard to alcohol and drug training, we cover Navy rules and Naval Academy rules and policies. We talk about binge drinking. . . . It’s a pretty comprehensive list.²⁵⁶

Captain Grooms, like the chairman of the local beverage control board, did the one-two step of acknowledging situational influences, then explaining how those influences are already under control. By making such a move, these institutions avoid the deeper, more probing questions about institutional failures.

V. Beyond Failure

This Article has argued that, despite many good faith efforts, the system—criminal, civil, legislative, media, institutional, and more—still fails too many rape victims. We don’t do enough to prevent rape, to prosecute rapists, or to promote systemic reforms that would change the culture in which sexual assault occurs with increasing regularity.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

In this final section of the Article I aim to move beyond failure and beyond myth. I argue that we need to look more closely at our own contributions to the construction and maintenance of the rape blame myths that have stayed with us so long. Undoing these myths is not going to be easy. We must recognize first that “myths about rape have survived in our culture so tenaciously for so long because they have a number of social functions. . . . The myths enable us to maintain our belief that we live in a just world. They allow us to believe that we can prevent future rapes.”²⁵⁷ To challenge myths is thus to challenge ourselves. We must embrace, rather than escape, what President Kennedy called “the discomfort of thought.”²⁵⁸

There are many indications that this sort of introspective work is already well underway. Campus programs seek to raise awareness about myths;²⁵⁹ the federal government has proposed solutions;²⁶⁰ and there are proposals for blind incident reporting.²⁶¹ There has been a rise in analysis of the language of the law, looking at, for instance, the legal metaphors that perpetuate rape myth and victim blame.²⁶² Yet despite the policy proposals, on the whole we continue to look away.

²⁵⁷ LEDRAY, *supra* note 26, at 13.

²⁵⁸ Kennedy, *supra* note 1.

²⁵⁹ CHRISTOPHER KILMARTIN ET AL., SEXUAL ASSAULT IN CONTEXT: TEACHING COLLEGE MEN ABOUT GENDER (2004); Derck R. Holcomb et al., *A Mixed-Gender Date Rape Prevention Intervention Targeting Freshmen College Athletes*, 36 C. STUDENT J. 165 (2002); Cynthia A. Lanier et al., *Evaluation of an Intervention to Change Attitudes Toward Date Rape*, 46 J. AM. C. HEALTH 177 (1998).

²⁶⁰ MAJORITY STAFF OF THE S. COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE (Comm. Print 1993), available at <http://www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponseToRape/introduction>.

²⁶¹ SABRINA GARCIA & MARGARET HENDERSON, FBI LAW ENFORCEMENT BULLETIN, BLIND REPORTING OF SEXUAL VIOLENCE (1999).

²⁶² *Id.* The Judicial Language Project at the New England School of Law examines the use of biased language in judicial proceedings related to rape and sexual assault. See *Judicial Language Project*, NEW ENGLAND SCHOOL OF LAW, <http://www.ncsl.edu/clsr/projects/SDVP/svnews/jlp/public/> (last visited July 19, 2011).

So what are we to do? Benforado, Hanson, and Yosifon remind us that, "[i]n the words of Stanley Milgram," we should "let our awareness be 'the first step to our liberation'."²⁶³ In this final section of the Article, I do not propose specific policies. Instead, I present possibilities with the hope that they will generate awareness.

A. The Possibility of Law and the Policy Process

Describing her experience as she would to her rapist, Kay Scott wrote: "It's as if when you raped me, you threw me into a deep, dark pit. I emerged naked. Piece by piece, I was able to retrieve my clothing. . . . Yet, there was nothing I could put on that could make me feel like a complete woman. . . . a part of me was left naked. Inside of me, it felt like a hole, a hole that could never be filled . . . a vital part of me . . . stolen. Will I ever be a whole woman?"²⁶⁴

Will the law help rape survivors become whole again? Some do not think that law can ever be an effective tool. In her concluding chapter, Susan Brownmiller doubts the capacity of the legal system when she argues that "the most perfect rape laws in the land, strictly enforced by the best concerned citizens, will not be enough to stop rape. Obvious offenders will be punished, and that in itself will be a significant change, but the huge gray area of sexual exploitation, of women who are psychologically coerced into acts of intercourse they do not desire because they do not have the wherewithal to physically, or even psychologically, resist, will remain a problem beyond any possible solution of the criminal justice system."²⁶⁵ If Brownmiller is right, then the law is quite limited in its ability to change our situation.

But not everyone agrees with Brownmiller's position. Catherine MacKinnon reminds us of the law's potential: "Remember the crumpled blankness on the faces of raped women when their violators are exonerated, the look of hope

²⁶³ Benforado, Hanson, & Yosifon, *supra* note 8, at 1806.

²⁶⁴ SCOTT, *supra* note 47, at 105-06.

²⁶⁵ Brownmiller, *supra* note 23, at 400-01

vanquishing disbelief when they are convicted. This—not closure, not incarceration, not money—is what law can mean. It can give people back the humanity that the violation took away. This is what gives law the power to change.”²⁶⁶

For lawmakers and others who wish to improve rape laws, a place to start is following Benforado, Hanson, and Yosifon’s suggestion “to begin thinking about problems and solutions from a different, counterintuitive perspective.”²⁶⁷ Lawmakers from all parts of the political spectrum have something to reconsider. For conservatives in earlier sex crime panics, “the twin dangers of pedophilia and child pornography provided powerful ammunition for conservative interests, who could focus public concern about child endangerment on these forms of stranger danger, the outside menace, rather than the subversive doctrine of mass intrafamilial abuse.”²⁶⁸ Thus, there is a need for conservatives to reexamine what is happening beyond stranger-danger. For those on the liberal end, there is a need to avoid replacing one myth with another. Both sides of the aisle have been caught up in the sex offender panic, and both sides need to re-examine their efforts to aid victims of sexual assault.

B. The Role of Research

Research and ideas have the potential to fundamentally shift our thinking about rape. Too often, however, we fall back into our own disciplinary expectations. Writing about the rape myth literature, for instance, Bryden and Lengnick remark that, “Common sense, reinforced by anecdotal evidence, tells us that, all else being equal, people will blame respectable rape victims less than, say, prostitutes, strippers, runaways, welfare mothers and others who lack middle class credentials.”²⁶⁹ Why, we should ask, is this common sense? It is current practice, but is it *necessarily* so? Is this something we can change, or something

²⁶⁶ MACKINNON, *supra* note 118, at 108.

²⁶⁷ Benforado, Hanson, & Yosifon, *supra* note 8, at 1805.

²⁶⁸ Jenkins, *supra* note 27, at 163.

²⁶⁹ Bryden & Lengnick, *supra* note 10, at 1270.

we must just accept? Questions like these will force us to situate our own research.²⁷⁰

Bryden and Lengnick close with an important observation about the nature of law review articles. In articles "in controversial public-law fields like rape, where readers crave solutions to newly-recognized problems," they find a "triumphalist bias."²⁷¹ This bias leads to the conclusion that "an article that acknowledges a problem but offers no legal solution, or, even worse, suggests that legal solutions are likely to fail, is at best a disappointment, undermining the profession's noblest ideals, which enshrine the goal, not so much of understanding the world realistically, as of changing it beneficially."²⁷² Bryden and Lengnick conclude that "sometimes the other realities dwarf the doctrines to which legal scholars devote most of their attention," suggesting that there is more to consider than simply legal doctrine.²⁷³ Multidisciplinary work, however, need not be divorced from legal scholarship. As I have attempted to do in this Article, one can draw on legal doctrine as well as insights from other disciplines, to think beyond just traditional legal solutions.

Although rape has been explored extensively by scholars over the past four decades, there remains much opportunity for further creative and passionate thinking. In the introduction to a 1993 report by the Senate Judiciary Committee, Senator Joseph Biden wrote that "violence against women reflects as much a failure of our nation's collective moral imagination as it does the failure of our nation's laws and regulations."²⁷⁴ Scholars have an important role to play in imagining possibilities.

²⁷⁰ As Rebecca Campbell has persuasively argued, we may also gain from more readily acknowledging our emotional responses to studying rape. REBECCA CAMPBELL, *EMOTIONALLY INVOLVED: THE IMPACT OF RESEARCHING RAPE* (2002).

²⁷¹ Bryden and Lengnick, *supra* note 10, at 1293.

²⁷² *Id.*

²⁷³ *Id.* at 1294.

²⁷⁴ MAJORITY STAFF OF THE S. COMM. ON THE JUDICIARY, *supra* note 260.

C. *Our Role*

The way out is to tell: Speak of the acts perpetrated upon us, speak the atrocities, speak the injustices, speak the personal violations of the soul. Someone will listen, someone will believe our stories, someone will join us.

—Charlotte Pierce-Baker²⁷⁵

We don't like talking about rape or even hearing the word.²⁷⁶ When we're forced to think about it, we try to make ourselves feel better by lumping the blame on someone else. As Linda Ledray writes, "When we are confronted with the story of rape, the easiest way to maintain our feelings of safety and invulnerability is to believe that what we are hearing is indeed a work of fiction, not a true story."²⁷⁷

²⁷⁵ CHARLOTTE PIERCE-BAKER, *SURVIVING THE SILENCE: BLACK WOMEN'S STORIES OF RAPE* 270 (1998).

²⁷⁶ Virginia J. Noland et al., *Connotative Interpretations of Sexuality-Related Terms*, 51 *SEX ROLES* 523 (2004).

²⁷⁷ LEDRAY, *supra* note 26, at 13. Sometimes too we point to other countries to make us feel better. Consider Fenton Bresler's juxtaposition of Mexico and Spain vis-à-vis the United Kingdom: "[i]t is even worse in Mexico where there is a saying, 'laws are like women, they are there to be violated.' In Spanish, 'to violate' and 'to rape' are translated by the same word." FENTON BRESLER, *SEX AND THE LAW*: LONDON 180 (1988). Rhetorical moves like this gloss make one feel better about their own country. In England, many of the old elements of the law remain on the books. See Temkin, *supra* note 40. In 1982, Judge Wild in the Cambridge Crown Court gave this instruction to the jury:

Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she only has to keep her legs shut and she would not get it without force and there would be marks of force being used.

CAROL SMART, *FEMINISM AND THE POWER OF LAW* 35 (1989). Bresler's commentary about the United Kingdom is consistent with his evaluation: "Unless and until this country's predominantly male judiciary really learns the lesson that . . . rape is a kind of murder of the soul, this branch of law will continue to be a blot on the nation's system of justice." BRESLER, *supra*, at 187 (1988).

Wisdom is to be found in those authors who remind us that rape is personal, and therefore our response must be personal as well. Writer Haki Madhubuti invokes familial ties and suggests that "[a] growing part of the answer is that we men, as difficult as it may seem, must view all women . . . as extended family."²⁷⁸ Talking about the "internal rebuilding" that is necessary, Madhubuti reminds us that "[i]f we are to be just in our internal rebuilding we must challenge tradition and cultural ways of life that relegate women to inferior status in the home church/mosque/temple, workplace, political life, and education."²⁷⁹ Rosemarie Tong offers a similar conclusion about "where to begin: in our schools, our churches, and in our homes. If our children can transcend the patterns of male sexual aggression and female sexual submission that have held us captive for so long, then rape need no longer be the pervasive problem that is it today."²⁸⁰

Emilie Buchwald asks: "How do reach the men most of us know, the men who flinch at the thought of being put into the category of perpetrator but who are socialized to agree tacitly with the beliefs of a rape culture?"²⁸¹ The answer, Buchwald suggests, is a very personal one: "I believe that a father's love for his daughter, and his knowledge of what his own male socialization was like, might inspire him to look at the familiar clubby world of male privilege through a different lens: to recognize the effect that gender inequity has on his daughter's life, to be outraged by the harassment and violence that touches her in some way every day."²⁸² Buchwald argues that "father of daughters should actively promote the idea that sexually violent men are not 'real' men at all but cowards and bullies."²⁸³

²⁷⁸ Haki R. Madhubuti, *On Becoming Anti-Rapist*, in *TRANSFORMING A RAPE CULTURE* 174 (Emilie Buchwald et al., eds., 1993).

²⁷⁹ *Id.* at 176.

²⁸⁰ TONG, *supra* note 201, at 120.

²⁸¹ Emilie Buchwald, *Raising Girls for the 21st Century*, in *TRANSFORMING A RAPE CULTURE* 193 (Emilie Buchwald et al. eds., 1993).

²⁸² *Id.*

²⁸³ *Id.*

A response that reaches beyond the blame instinct recognizes that “[t]he roots of sexual violence are deep. They are part of the very foundation of society.”²⁸⁴ It recognizes that “rape is a social crisis.” And it requires us all to play a part in addressing that crisis.

This is not to say that we each should play the same role. As Catherine MacKinnon argues, “rape is everyone’s problem. But that doesn’t mean it’s men’s problem and women’s problem in the same way.”²⁸⁵ But even if our roles are different, our commitment should be the same. We must begin “[r]eadjusting our lens so we can begin to see ourselves and each other as full, capable, and mighty human beings.”²⁸⁶ Echoing a similar sentiment about our shared human condition, we can say that “[r]ape will not stop until both men and women are allowed our full humanity.”²⁸⁷

Confronting rape, reform, and our collective responsibility will not be easy. If you are, or know, a victim of sexual assault, you already know this. As Kay Scott describes it:

That moment . . . that single moment of pain.
No, the word ‘pain’ cannot touch it. There is
no word to describe it. It cannot be compared
to a burn or a gunshot wound or a broken bone
or a knife piercing the body. It’s a pain like no
other. It’s a pain that kills. It kills every breath
of life within. All energy . . . all will to
resist . . . gone . . . dead. Defeated. *I can’t*

²⁸⁴ Miller & Biele, *supra* note 21, at 52–53

²⁸⁵ MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 213, at 83 (“To men I want to say: have you ever had sex with a woman when she didn’t want it? Were you and are you really careful to find out? Is it enough to say to yourself now, ‘I don’t know’.”).

²⁸⁶ Pamela R. Fletcher, *Whose Body Is It, Anyway?*, in *TRANSFORMING A RAPE CULTURE* 440 (Emilie Buchwald et al. eds., 1993).

²⁸⁷ Miller & Biele, *supra* note 21, at 53.

*move. I'm not me. I'm not here. I am dead. I am nothing. I am . . . no longer.*²⁸⁸

If you have experienced or seen this pain up close, you know that rape myths must be done away with. If you haven't seen the pain of rape victims up close, ask yourself why. Is it because there aren't victims speaking out to you? Or is it because you're not listening?

Moving beyond rape myths will allow us to become better listeners, more sensitive comforters, stronger survivors, and more skillful advocates for change.²⁸⁹

We are, after a long journey, back where we started. Why, if we are so vehemently against rapists, so aware of the problem, and so willing to help, does sexual assault continue to so often be unrecognized and unpunished in this country? Maybe it's because the problem is broader and more complicated than just helping rape victims. Maybe it's because rape isn't just about a victim and an assailant. Maybe it's because confronting a crime as ugly as rape means confronting the ugly part of ourselves.

²⁸⁸ SCOTT, *supra* note 47, at 30-31.

²⁸⁹ Perhaps changing these myths will one day allow us to meet Andrea Dworkin's challenge:

I want a twenty-four-hour truce during which there is no rape. I dare you to try it. I demand that you try it. I don't mind begging you to try it. What else could you possibly be here to do? What else could this movement possibly mean? What else could matter so much? And on that day, that day of truce, that day when not one woman is raped, we will begin the real practice of equality . . . instead of rape we will for the first time in our lives—both men and women—begin to experience freedom.

Andrea Dworkin, *I Want a Twenty-Four Hour Truce*, in *TRANSFORMING A RAPE CULTURE* (Emilie Buchwald et al. eds., 1993).