

When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions

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As women, we live in the midst of a society that regards us as contemptible. We are despised, as a gender class, as sluts and liars. We are the victims of continuous, malevolent, and sanctioned violence against us — against our bodies and our whole lives. Our characters are defamed, as a gender class, so that no individual woman has any credibility before the law or in society at large. Our enemies — rapists and their defenders — not only go unpunished; they remain influential arbiters of morality; they have high and esteemed places in the society; they are priests, lawyers, judges, lawmakers, politicians, doctors, artists, corporation executives, psychiatrists, and teachers.

—Andrea Dworkin¹

* Assistant Professor, DePaul University College of Law. Pauline Bart, a sociologist who has done extensive research concerning rape, first brought the issue of prompt complaint to my attention. At Pauline's urging, I became familiar with the enormous amount of empirical research in the area of rape myths and their power. The ideas for this Article evolved from a combined legal and behavioral science perspective. I need to acknowledge not only the able research assistance provided by Deborah Thornton, Brad Ipema, and Renata Krawczyk, but also their thoughtful suggestions. Many thanks go to the colleagues who kindly commented on an earlier draft: Pauline Bart, Susan Bandes, Mary Becker, Mary Coombs, John Decker, Judith Gaskell, Maria Hylton, Michael Jacobs, and Mark Weber. I also thank the Dean's Faculty Research Fund of DePaul University College of Law for supporting my work on this Article. Finally, I would like to thank Pauline for the inspiration and courage she imparts to all of us who hope that, someday, women will no longer be victimized and articles about rape will no longer be necessary.

¹ ANDREA DWORKIN, *OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS* 42 (1976). [Editor's Note: At the Author's request, citations to books and periodicals include authors' first names. The Author and many other feminist legal scholars advocate this method of citation because it eliminates some of the dehumanization in citation of authorities, rejects the hierarchy that determines one form of writing (*i.e.*, books) to be superior to another (*i.e.*, articles), and reveals the extent and depth of scholarship by

INTRODUCTION

The legal treatment of rape seems to be structured to make it as difficult as possible to establish that any given man has raped any given woman. Substantial reforms over the past decade have addressed some of these difficulties: statutes preventing the introduction of evidence of the victim's prior sexual activity with someone other than the accused,² recognition of marital rape,³ and admission of expert testimony concerning Rape Trauma Syndrome.⁴ Despite these reforms, however, numerous impediments to the successful prosecution of rape remain, hindering the eradication of this form of terrorism against women.⁵

Perhaps the most potent barrier is the law's adoption of, or at least willingness to tolerate, the many myths about rape that abound in society. These rape myths are familiar to us all —

women. Inclusion of first names in citations of articles is not sanctioned by A UNIFORM SYSTEM OF CITATION (14th ed. 1986), but has received approval in THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION (U. Chi. L. Rev. & U. Chi. Legal F. eds. 1989) (also known as the MAROON BOOK). While this journal follows A UNIFORM SYSTEM OF CITATION, it has decided to deviate from it in this instance. For a background on the debate over inclusion of authors' first names, see generally Mary I. Coombs, *Lowering One's Cites: A (Sort of) Review of the University of Chicago Manual of Legal Citation*, 76 VIR. L. REV. 1099 n.21 (1990); Carolyn Heilbrun & Judith Resnick, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913 n.** (1990); Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2271 n.* (1990).]

² See *infra* notes 245-49 and accompanying text for a discussion of rape shield laws.

³ See *infra* notes 250-51 and accompanying text for a discussion of marital rape.

⁴ See *infra* notes 252-53 and accompanying text for a discussion of Rape Trauma Syndrome.

⁵ Susan Griffin states that "rape is a form of mass terrorism, for the victims of rape are chosen indiscriminately, but the propagandists for male supremacy broadcast that it is women who cause rape by being unchaste or in the wrong place at the wrong time — in essence, by behaving as though they were free." Susan Griffin, *Rape: The All-American Crime* in FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER 47, 66 (1977). See also SUSAN GRIFFIN, RAPE: THE POLITICS OF CONSCIOUSNESS 23-24 (1986) [hereafter S. GRIFFIN, RAPE CONSCIOUSNESS]. Even President George Bush has called for a stop to this war against women. In an address to the American Association of University Women on June 26, 1989, President Bush acknowledged that "'archaic and unacceptable' attitudes toward women help breed violent crimes against them and can rob them of full equality in American life." *Bush: War Against Women Must Stop*, Chicago Tribune, June 27, 1989, § 1, at 10, col. 2. Nonetheless, he failed to propose any specific remedies to stop the violence against women.

women mean "yes" when they say "no"; women are "asking for it" when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; women are vengeful, bitter creatures "out to get men"; if a woman says "yes" once, there is no reason to believe her "no" the next time; women who "tease" men deserve to be raped; the majority of women who are raped are promiscuous or have bad reputations; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner; women derive pleasure from victimization. Even though these myths are untrue and are overwhelmingly refuted by the data,⁶ they continue to play an important role in the way judges, jurors, and others perceive testimony in rape trials.

For example, one of the many ways these rape myths insinuate themselves in rape prosecutions is the courts' continued adherence to the "prompt complaint" (or "immediate outcry") doctrine.⁷ Even though the prompt complaint requirement usually is not a statutory element of the crime, judges admit into evidence and place great emphasis on the speed with which the victim complained of the alleged rape to a third party.⁸ According to the courts, the introduction of evidence of a prompt complaint is nec-

⁶ Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 402-03 (1985); see *infra* text accompanying notes 56-78.

⁷ This doctrine dates back to 1680 when Chief Justice Matthew Hale of the King's Bench incorporated misogyny into the British common law. 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* *632 (R.H. Small ed. 1847). However, evidence of the doctrine's continuing vitality is its appearance in the MODEL PENAL CODE § 213.6(4) (Proposed Official Draft 1962). At one time or another, all American jurisdictions have adopted a form of the prompt complaint doctrine. Note, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOKLYN L. REV. 1087, 1087 n.2, 1091-92 (1988) [hereafter DuBois] (authored by Dawn M. DuBois). For a fuller discussion, see *infra* notes 139-55 and accompanying text.

⁸ See, e.g., *People v. Lawler*, 194 Ill. App. 3d 547, 557-58, 551 N.E.2d 799, 807 (1990); *State v. Ciskie*, 110 Wash. 2d 263, 275, 751 P.2d 1165, 1171 (1988); see also DuBois, *supra* note 7, at 1087; Note, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 695 n.34 [hereafter Fischer] (authored by Karla Fischer).

essary in order to negate the inference of a recent fabrication.⁹ In fact, however, many rape victims do not report sexual assaults promptly to their family or friends, much less to a stranger.¹⁰ Because of the stigma attached to rape in our society, many women's "natural" reaction is *not* to make an immediate outcry.

In this Article I discuss rape myths in general as well as their effect on judicial and juror attitudes and decision-making in rape prosecutions. I assert that the acceptance of rape myths prevents victims from receiving a "fair trial" by impartial decision-makers. Accordingly, I make two specific proposals to insure a fair trial. First, I argue that the prompt complaint requirement should be abolished. Second, I advocate "de-programming" jurors, judges, and others involved in the criminal justice system through the use of expert testimony concerning rape myths. Both changes, however, must be undertaken within a context of total re-evaluation of all legal aspects of rape to assure none is based on acceptance of rape myths. Because rape myths prevent justice for rape victims, for women, and for society as a whole, there is a compelling need to reveal the lies and misogyny behind the myths.¹¹

⁹ See, e.g., *People v. Lutzow*, 240 Ill. 612, 619, 88 N.E. 1049, 1052 (1907) ("In cases of this kind [rape], where the prosecutrix is old enough to appreciate the nature of the offense that has been committed upon her, it is usually regarded as a suspicious circumstance if she fails to make complaint of her mistreatment as soon as she has a reasonable opportunity to do so."); *People v. Brown*, 170 Ill. App. 3d 273, 281, 524 N.E.2d 742, 747 (1988) ("[E]vidence of the victim's prompt complaint should be admissible to overcome the adverse inference which would otherwise arise from her silence."); see also DuBois, *supra* note 7, at 1093 (prompt complaint doctrine permits "anticipatory rehabilitation").

¹⁰ See Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in *RAPE AND SEXUAL ASSAULT* 3, 3 (Ann Burgess ed. 1988). According to Kym Norman, a police officer at the 113th Precinct in Jamaica, New York, most victims wait two to seven days before reporting a rape. *When the Rapist Was a Friend*, *Newsday*, May 1, 1990, at 23 (LEXIS, NEXIS library, Papers file). In a survey conducted by the Massachusetts Department of Public Health between January 1, 1985, and December 31, 1987, over half of the victims in the 7,254 sexual attacks in Massachusetts did not report the attack until some time after the attack occurred. *Boston Globe*, July 6, 1990, *Metro*, at 60 (LEXIS, NEXIS library, Papers file).

¹¹ As Kurt Weis and Sandra S. Borges have stated:

In a more general sense, the mythology of rape serves two fundamental functions. It allows the man both to engage in the otherwise forbidden behavior and to rationalize and justify it

Part I addresses the social context of rape and rape myths as revealed by various social and behavioral science studies.¹² The specific effects of beliefs in rape myths on rape trials are discussed in Part II.¹³ These effects are far-ranging, from juror and judicial attitudes and decision-making to evidentiary rules and jury instructions which incorporate rape myths. Beliefs in rape myths create biased factfinders; hence, Part II also outlines how rape victims and the state are denied fair trials and how society is harmed as a result. Finally, Part III suggests two specific proposals designed to achieve fair trials in rape prosecutions.¹⁴

I. THE SOCIAL CONTEXT OF RAPE AND RAPE MYTHS

Myths about rape make it difficult, if not impossible, to establish that a rape has occurred.¹⁵ In addition, their acceptance is inextricably linked to the tolerance of rape in our society. The prevalence of rape and rape myths has been demonstrated time and again in numerous studies.¹⁶ These studies range from how attitudes about rape are acquired to how they affect individuals' propensity to rape to how jurors who believe them react to claims of rape.

In 1980 Martha Burt designed a study specifically to analyze cultural myths and how they perpetuate rape.¹⁷ She defined rape myths as prejudicial, stereotyped, or false beliefs about rape, rape

after the event. While loosening social control for the man, the mythology further binds the woman: It functions as a mechanism which effectively prevents her from reporting it and keeps her in her place of inferiority and subordination.

Kurt Weis & Susan S. Borges, *Victimology and Rape: The Case of the Legitimate Victim*, in *THE RAPE VICTIM* 35, 49-50 (Deanna R. Nass ed. 1977). In her powerful article in support of admissibility of expert testimony concerning Rape Trauma Syndrome (RTS), Toni Massaro also extensively addresses the cost of the rape mythology. Massaro, *supra* note 6, at 404 n.49.

¹² See *infra* notes 15-133 and accompanying text.

¹³ See *infra* notes 134-240 and accompanying text.

¹⁴ See *infra* notes 241-75 and accompanying text.

¹⁵ Legal definitions of rape vary from state to state. However, most of the studies cited herein either neglect to define the term internally or utilize the traditional, narrow legal definition of intercourse (penile-vaginal penetration) obtained by force or threat of force. I believe any coerced sexual activity is "rape."

¹⁶ In addition to the multitude of articles cited herein, see the bibliography in Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 *J. PERSONALITY & SOC. PSYCHOLOGY* 217, 229-30 (1980).

¹⁷ Burt, *supra* note 16.

victims, and rapists. In both her review of the literature and her own work she found that attitudes about rape vary directly with rape myth acceptance.¹⁸ According to Burt, the results of her study have two major implications:

First, many Americans do indeed believe many rape myths. Second, their rape attitudes are strongly connected to other deeply held and pervasive attitudes such as sex role stereotyping, distrust of the opposite sex (adversarial sexual beliefs), and acceptance of interpersonal violence. When over half of the sampled individuals agree with statements such as "A woman who goes to the home or apartment of a man on the first date implies she is willing to have sex" and "In the majority of rapes, the victim was promiscuous or had a bad reputation," and when the same number think that 50% or more of reported rapes are reported as rape only because the woman was trying to get back at a man she was angry with or was trying to cover up an illegitimate pregnancy, the world is indeed not a safe place for rape victims.¹⁹

Based on her conclusion that "[r]ape is the logical and psychological extension of a dominant-submissive, competitive, sex role stereotyped culture," Burt proposes a long-range strategy focused on addressing sex role stereotyping at a very young age to counter these misogynous cultural myths.²⁰ She further attributes the fact that the United States has the highest rape rate of any industrialized country to the combination of sex role stereotyping and a psychological culture of violence.²¹ Burt concludes

¹⁸ *Id.* at 218.

¹⁹ *Id.* at 229.

²⁰ *Id.* For a practical discussion of the incorporation of materials concerning sex role stereotyping in sex education, see MARGARET L. STUBBS, *SEX EDUCATION AND SEX STEREOTYPES: THEORY AND PRACTICE* (Wellesley College, Center for Research on Women, Working Paper No. 198, 1989). Although Ms. Stubbs notes the limited effects of sex education on students to date, she believes the disappointing results may be because most courses are inadequately structured and fail to address sex equity considerations. *Id.* at 1-2. See also SUSAN S. KLEIN, *HANDBOOK FOR ACHIEVING SEX EQUITY THROUGH EDUCATION* (1985); RAPHAELA BEST, *WE'VE ALL GOT SCARS: WHAT BOYS AND GIRLS LEARN IN ELEMENTARY SCHOOL* (1983); NATIONAL EDUCATION ASSOCIATION, *SEX ROLE STEREOTYPING IN THE SCHOOLS* (1973).

²¹ Burt, *supra* note 16, at 229. According to Diana Russell, international statistics on reported incidents suggest that rape is considerably more prevalent in this country than in other Western nations. In 1971 the reported rape rates per 100,000 were as follows: 35 in the United States; 1.9 in France; 1.2 in Holland; and 0.8 in Belgium. DIANA E.H. RUSSELL, *SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT* 30 (1984). See also *The Female Fear*, Chicago Tribune, Apr. 16, 1989, § 6, at 1, col. 1, § 6, 7, col. 1 ("Experts say the U.S. has the highest

that "[d]eveloping an accurate theoretical understanding of rape attitudes and assaultive behavior will help make social change efforts more effective."²² That is precisely the intent of this Article, and the proposals I make are intended to assist the legal system in dealing fairly and appropriately with the practice of rape.

Even social scientists questioning feminist contentions about rape reach conclusions remarkably similar to Burt's. In 1985 James Check and Neil Malamuth reviewed research evidence relating to rape myths and their influence, including the normality of rape, the pervasiveness of rape and sexual coercion, and the effects of sexual violence against women in the mass media.²³ Their conclusions confirm the connection between acceptance of rape myths, rape, and callous, unbelieving attitudes towards rape victims. Their findings and those of other social and behavioral scientists provide a firm base from which we can extrapolate the specific role rape myths play in rape prosecutions.

A. *The Pervasiveness of Rape and Sexual Coercion*

The Federal Bureau of Investigation estimates that one out of every three women in the United States will be raped.²⁴ This

rate of rape in the world."). Interestingly, in her research on rape in tribal societies, Peggy Sanday concluded that in rape-prone societies women have little power and do not participate in public decision-making. See PEGGY R. SANDAY, *FEMALE POWER AND MALE DOMINANCE: ON THE ORIGINS OF SEXUAL INEQUALITY* (1981).

²² Burt, *supra* note 16, at 229.

²³ James V.P. Check & Neil M. Malamuth, *An Empirical Assessment of Some Feminist Hypotheses About Rape*, 8 INT'L J. WOMEN'S STUDIES 414 (1985) [hereafter Check & Malamuth, *Feminist Hypotheses*].

²⁴ *Sharing the Burden of Abuse: Men Take Steps Against Male Violence*, Boston Globe, Oct. 17, 1990, at 81, col. 2. Another source states that one in three American women is raped or sexually assaulted by age 19. *Scary Survey: Date "Rape" Is OK Grade Schoolers Say*, Philadelphia Inquirer, May 4, 1988, at A23, col. 1. Actual police statistics, for a variety of reasons, are an inadequate reflection of the number of rapes committed. Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 415-16. The primary reason is that rape is severely underreported to the police. Gail Wyatt, a professor of medical psychiatry at the University of California, Los Angeles, found in a month-long survey of 248 women in Los Angeles County that only 3% of the surveyed women who were attacked had reported the crime to the police. *Violence Against Women Pervasive Panel Told*, L.A. Times, Oct. 17, 1990, at B1, cols. 3-4. In the Russell San Francisco survey, discussed *infra* notes 27-33 and accompanying text, the report rate for rape was 9.5%. D. RUSSELL, *supra* note 21, at 31. Exacerbating the effects of underreporting is the police

astonishing estimate verifies the fact that rape has become an aspect of accepted sexual behavior. Moreover, multiple independent surveys of women substantiate the FBI's estimate.²⁵ There can be no doubt that sexual assault is widespread in the United States.²⁶

One of the best determinations of the number of women raped in this country was developed in the Russell San Francisco survey.²⁷ That study involved in-person interviews with 930 randomly selected adult female residents of San Francisco during the summer of 1978.²⁸ Of the women interviewed, 223 (24 percent) reported at least one completed rape, and 291 (31 percent) at least one attempted rape. When the categories of rape and attempted rape were combined, as they are in official statistics, 407 (44 percent) of the women responded affirmatively.²⁹ While it may seem that the prevalence of sexual assault is shockingly high, the unwillingness of some respondents to disclose their experiences suggests that these results still are an underestima-

practice of "unfounding" rape complaints. *See infra* notes 71-74 and accompanying text (discussing unfounding process).

²⁵ In a nationwide survey of 32 college campuses conducted in 1984-85 by Mary Koss, a psychiatry professor at the University of Arizona, one out of four women reported having been a victim of rape or attempted rape, usually by acquaintances. *Fear Grips Women on Campuses*, Chicago Tribune, Feb. 11, 1990, § 2, at 1, col. 6. Diana Russell's San Francisco survey discovered that 44% of the women surveyed had experienced a rape or attempted rape. D. RUSSELL, *supra* note 21, at 35. *See also infra* notes 27-33 and accompanying text (discussing results of San Francisco survey).

²⁶ Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 416.

²⁷ *See* D. RUSSELL, *supra* note 21, at 34-41.

²⁸ *Id.* at 34-35. The probability sample of households was prepared by Field Research Associates, a public opinion polling organization located in San Francisco. A specific methodology was developed for the study. *See generally id.* (detailing methodology). Carefully trained female interviewers conducted detailed discussions lasting an average of one hour and 20 minutes. Each respondent was paid \$10 for participating. *Id.*

²⁹ *Id.* at 35. When rapes by husbands were excluded, and the categories of rape and attempted rape combined, a total of 379 (41%) of the women reported at least one completed or attempted nonmarital rape. *Id.* at 36. Fifty percent of the 407 women who had ever experienced either kind of attack had been raped more than once. *Id.* Other studies indicate that 85% of the victims of rape or attempted rape (excluding wife rape) were single at the time of the assault. *Id.* at 88. Russell found the vast majority of rapes (87.2%) occurred to victims between the ages of 11 and 30. The most vulnerable years appear to be from ages 13 to 26. *Id.* at 80-81.

tion of the problem.³⁰ The frightening conclusion from the Russell survey, based on an assumption that the rape rate will remain the same in the future,³¹ is that women face a 26 percent probability of being raped at some time in their lives.³² Furthermore, when attempted rape is included, the estimate is that women face a 46 percent probability of being sexually assaulted.³³

Unfortunately, not only is rape widespread, but there is also enormous acceptance of this violence against women.³⁴ This acceptance of coerced sexuality is found even in young adults and children. In a survey of 1700 Rhode Island sixth- to ninth-graders, 24 percent of the boys and 16 percent of the girls said it is acceptable for a man to force a woman to have sex with him if he has spent money on her.³⁵ A total of 65 percent of the boys and 47 percent of the girls said it is acceptable for a man to force sex with a woman if he has been dating her for more than six months.³⁶ Moreover, 87 percent of the boys and 79 percent of the girls said rape is acceptable if a couple is married.³⁷ Finally, 31 percent of the boys and 32 percent of the girls believed it would not be improper to rape a woman who was sexually

³⁰ *Id.* at 47. This reluctance to disclose a rape resulted in only 66 (8%) of the total number of rape and attempted rape incidents being reported to the police. *Id.* at 35-36.

³¹ In fact, there has been an alarming increase in the true rape rate over the years. *Id.* at 57.

³² *Id.* at 49-50.

³³ *Id.*

³⁴ James Check and Neil Malamuth summarized one study as follows:

Up to 40% of both females and males indicated some acceptability for forcing a woman to have intercourse if she gets the man sexually excited, is stoned or drunk, or has had intercourse with other men. These results . . . provide support for the notion that the use of force in sexual interactions is indeed quite widespread and acceptable in our society.

Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 416. See also John Briere & Neil M. Malamuth, *Self-Reported Likelihood of Sexually Aggressive Behavior: Attitudinal Versus Sexual Explanations*, 17 J. RES. PERSONALITY 315, 319-22 (1983) (stating that acceptance of sexual aggression against women is pervasive in North American culture).

³⁵ Jacqueline Jacjson Kikuchi, *Rhode Island Develops Successful Intervention Program for Adolescents*, NATIONAL COALITION AGAINST SEXUAL ASSAULT NEWS, Fall 1988, at 26. The survey was conducted at the Cranston, Rhode Island Rape Crisis Center Assault Awareness Program by Jacqueline Jackson Kikuchi.

³⁶ *Id.* at 26-27.

³⁷ *Id.*

active.³⁸

B. *The Normality of Men Who Rape*

The traditional psychiatric view of rape as a mental aberration has been challenged persuasively by several feminist theorists who argue that rapists and "normal" men are essentially similar.³⁹ Multiple studies have verified this view.⁴⁰ Instead of finding a relationship between sexual aggressivity and scores on the psychopathic deviant scale in the most widely used personality assessment test,⁴¹ researchers have discovered a link between sexual aggressivity and socially acquired attitudes about rape, women, and sexual relations.⁴²

The results of a study of junior college students further support the position that rapists are "normal."⁴³ The students in the study showed a generally callous attitude about rape that was

³⁸ *Id.*

³⁹ See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

⁴⁰ Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 415. The authors found that "[d]espite . . . numerous efforts to identify ways in which rapists are abnormal, the results have generally indicated very few differences between rapists and nonrapists which would justify any conclusion that rapists are grossly abnormal." *Id.* See also Todd Tieger, *Self-Rated Likelihood of Raping and the Social Perception of Rape*, 15 J. RES. PERSONALITY 147 (1981).

⁴¹ The psychopathic deviant scale is one of ten clinical scales measured by the Minnesota Multiphasic Personality Inventory (MMPI),¹ an objective personality assessment test developed in 1937. A. FREEDMAN & H. KAPLAN, *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 528 (1967). The MMPI is the most widely used and most thoroughly researched objective personality assessment test. It consists of 550 items which the subject must answer true, false, or "cannot say." In addition to providing scores on the ten clinical scales, the MMPI also has several scales which increase the validity of the test, including the lie scale, which measures false answers; the frequency scale, which measures bizarre thinking; and the correction scale, which measures guardedness or defensiveness in test-taking attitudes. *Id.* The ten clinical scales are (1) hypochondriasis, (2) depression, (3) hysteria, (4) psychopathic deviance, (5) social distance, (6) masculinity-femininity, (7) paranoia, (8) psychasthenia, (9) schizophrenia tendencies, and (10) hypomania. *Id.* at 529-30.

⁴² Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 415.

⁴³ Tieger, *supra* note 40. In Tieger's study, 392 junior college students responded to a questionnaire concerning a depiction of a rape incident in which the attractiveness of the victim was manipulated. *Id.* at 149-50.

strikingly similar to the attitudes of many convicted rapists.⁴⁴ James Check and Neil Malamuth concluded from the results of this study that “many rape-related attitudes, as well as much rape-related behaviour, are the products of our sex-role socialization” and not abnormal behavior.⁴⁵ Unfortunately, this data is not widely known, and the public strongly embraces the myth that rapists are “sick, emotionally disturbed” men.⁴⁶

Another indication that rapists are what psychologists call “normal” men is the number of men who rape or who indicate they would be likely to rape if there were no possibility of sanctions.⁴⁷ In one study college male subjects believed that close to half of the male population would rape if they were assured that they would not be caught and punished.⁴⁸ With respect to their own potential involvement, over half did not rule out the possibility

⁴⁴ *Id.* at 149.

⁴⁵ Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 415.

⁴⁶ JOYCE E. WILLIAMS & KAREN A. HOLMES, *THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES* 136 table 18, 195 app. A.3 (1981). The results of the first cross-cultural study of public attitudes about rape showed the following rates of belief among the people surveyed in the myth that rapists are “sick, emotionally disturbed men”: 91% of Anglo men and 92% of Anglo women; 83% of Black men and 98% of Black women; and 87% of Mexican American men and 63% of Mexican American women. The researchers utilized a sample from the San Antonio, Texas population (in excess of 800,000, composed of 52% Mexican American, 39% Anglo, 8% Black, and 1% other residents). *Id.* at 51. A stratified random sample design was used in securing personal interviews with 335 Anglos, 336 Blacks, and 340 Mexican Americans, with each sample almost equally divided between males and females. A person of the same racial-ethnic identity and sex as the interviewee conducted the interviews. *Id.* at 66.

⁴⁷ A variety of studies use a measure that asks men to indicate the likelihood they would commit sexual aggression if they could be assured they would not suffer any negative consequences. In measuring responses, researchers use either a single item to assess likelihood of rape (LR), an additional item to also assess likelihood of forced sex (LF), or a three-level hierarchy based on these two items (LFR). A number of criticisms have been raised about the validity of such measures. For a thorough response to these critiques see Neil M. Malamuth, *The Attraction to Sexual Aggression Scale: Part One*, 26 J. SEX RES. 26 (1989); Neil M. Malamuth, *The Attraction to Sexual Aggression Scale: Part Two*, 26 J. SEX RES. 324 (1989). Malamuth concludes that while an Attraction to Sexual Aggression (ASA) scale is most reliable, the other scales also showed significant relationships with the criterion measures. *Id.* at 352.

⁴⁸ Neil M. Malamuth, Scott Haber & Seymour Feshbach, *Testing Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Differences, and the “Normality” of Rapists*, 14 J. RES. PERSONALITY 121, 134 (1980).

that they would act in the same fashion as the man portrayed in a fictional rape account if they could be certain they would not be caught and punished.⁴⁹ Ironically, a large portion of the public believes that men can commit rape and get away with it.⁵⁰ And, unfortunately, this is *not* a myth: conviction rates for rape are estimated to be as low as one to four percent.⁵¹

In a study of high school males, 50 percent of those interviewed “believed it acceptable ‘for a guy to hold a girl down and force her to have sexual intercourse’ in various situations, such as when ‘she gets him sexually excited’ or ‘she says she’s going to have sex with him and then changes her mind.’”⁵² Research with men from the general community yielded very similar data.⁵³ With half of the male population responding in such a fashion, the rapist profile closely resembles an everyday man for whom rape is an extension of normal sexual behavior and socialization rather than the product of a sick and aberrant mind.⁵⁴

⁴⁹ *Id.* Without the assurance of escaping punishment, only 17% said they might emulate the rapist’s behavior. *Id.* at 130. Similarly high results were obtained in a separate study by Neil Malamuth, which revealed that an average of 35% of males indicated any likelihood of raping, and an average of about 20% indicated a strong likelihood. Neil M. Malamuth, *Rape Proclivity Among Males*, J. SOC. ISSUES, Fall 1981, at 138, 140 [hereafter Malamuth, *Rape Proclivity*]. Todd Tieger also found that male subjects with a high likelihood of raping (LR) “believe that their own sexual aggression toward women would be well received and a normal response to the perceived seductive behavior on the part of the victim.” Tieger, *supra* note 40, at 156.

⁵⁰ J. WILLIAMS & K. HOLMES, *supra* note 46, at 136 table 18. The researchers discovered the following racial and gender agreement with the proposition that men can get away with rape: 93% of Anglo men and 98% of Anglo women; 65% of Black men and 92% of Black women; and 88% of Mexican American men and 77% of Mexican American women. *Id.*

⁵¹ See sources cited *infra* note 212.

⁵² Malamuth, *Rape Proclivity*, *supra* note 49, at 152 (quoting Giarusso, Johnson, Goodchilds & Zellman, Adolescents’ Cues and Signals: Sex and Assault (paper presented at the Annual Meetings of the Western Psychological Association, San Diego, Cal., Apr. 1979)).

⁵³ See William D. Murphy, Emily M. Coleman & Mary R. Haynes, *Factors Related to Coercive Sexual Behavior in a Nonclinical Sample of Males*, 1 VIOLENCE & VICTIMS 255 (1986).

⁵⁴ While these results may be criticized as merely “attitudinal,” studies have found that male subjects’ self-reported likelihood of raping is correlated with physiological measures of sexual arousal in response to rape depictions. See Malamuth, *Rape Proclivity*, *supra* note 49; Neil M. Malamuth & James V.P. Check, *Penile Tumescence and Perceptual Responses to Rape As a Function of Victim’s Perceived Reactions*, 10 J. APPLIED SOC. PSYCHOLOGY 528

Thus, the studies consistently establish that at this time in the history of our culture substantial numbers of men have some desire or proclivity to rape women⁵⁵ and substantial numbers of women are, in fact, raped.

C. Myths About Rape Victims

The classic rape myths can be summarized into four categories: (1) only women with "bad" reputations are raped; (2) women are prone to sexual fantasies; (3) women precipitate rape by their appearance and behavior; and — by far the most potent myth — (4) women, motivated by revenge, blackmail, jealousy, guilt, or embarrassment falsely claim rape after consenting to sexual relations. None of these myths survives scrutiny.

First, although the myth is that mainly "bad girls" are raped, behavioral science has demonstrated a contrary reality. A study of rape done in the District of Columbia found that in 82 percent of the rapes studied, the rape victim had a "good reputation."⁵⁶ Moreover, the statistics concerning the number of rape victims who are attacked by men they know well further undermine this myth: a national crime survey found that over half of the women raped knew their attacker or were married to him.⁵⁷

(1980) [hereafter Malamuth & Check, *Penile Tumescence*]. Additionally, several studies using samples of college men reveal a connection between attitudes and actual sexual aggressiveness. Neil M. Malamuth, *Sexually Violent Media, Thought Patterns, and Antisocial Behavior*, 2 PUB. COMM. & BEHAV. 159, 190 (1989) [hereafter Malamuth, *Sexually Violent Media*]. Moreover, the difficulties with experiential research to determine if the subjects actually aggress against women are obvious. See *infra* note 84. Diana Russell addresses the distinction between predisposition to rape and internal and social inhibitions against acting out rape desires. Diana Russell, *Pornography and Rape: A Causal Model*, 9 POL. PSYCHOLOGY 41, 57-63 (1988).

⁵⁵ See Russell, *supra* note 54, at 45.

⁵⁶ S. GRIFFIN, RAPE CONSCIOUSNESS, *supra* note 5, at 13. This statistic leads Ms. Griffin to state that the "safer course" is promiscuity. *Id.* Nonetheless, Williams and Holmes discovered the following rates of agreement with the proposition that a woman's reputation has something to do with the question of rape: Anglo men, 24%; Anglo women, 19%; Black men, 37%; Black women, 6%; Mexican American men, 23%; and Mexican American women, 29%. J. WILLIAMS & K. HOLMES, *supra* note 46, at 135 table 17 (phrasing question as "A woman's part has nothing to do with rape," responses were inverse percentages).

⁵⁷ In 1986 a National Crime Survey showed that 41.7% of women who are sexually attacked knew their attacker well; 3.8% were casual acquaintances; 6.5% were attacked by their husbands; and 4.8% were

Second, dubious psychoanalytic theory has profoundly imprinted the notion that false charges are rooted in women's fantasies of rape. Susan Estrich describes this phenomenon as primarily a male invention:

Men have written for decades about women's rape fantasies — about our supposed desire to be forcibly ravished, to “enjoy” sex without taking responsibility for it, to be passive participants in sexual ecstasy which, when we are spurned in the relationship or caught in the act and forced to explain, we then call “rape.”⁵⁸

Even though some psychoanalysts once believed that women's rape fantasies were prevalent, if not universal, that belief has been widely discredited.⁵⁹ Nonetheless, this myth continues to thrive in our patriarchy,⁶⁰ sometimes with a new wrinkle.⁶¹

Third, most rapes are not provoked by women. According to the National Commission on Crimes of Violence, only 4 percent of reported rapes involve any precipitative behavior by the victim, consisting of as little as a gesture.⁶² A 1987 study concluded that

attacked by an ex-spouse. *Rape: We're Still Not Handling This Crime Well*, Chicago Tribune, Feb. 9, 1989, § 1, at 23, col. 1.

⁵⁸ SUSAN ESTRICH, *REAL RAPE* 5 (1987).

⁵⁹ See, e.g., JEFFREY MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* 107-19 (1984). In a 1982 study, Gary Kanin found that females who engaged in realistic rape fantasies, as opposed to seduction fantasies, regarded these as *negative* fantasy experiences. He concluded that “the conscious fantasizing of rape [by women] as a sexually rewarding event appears to be something of a rare phenomenon.” Gary Kanin, *Female Rape Fantasies: A Victimization Study*, 7 *VICTIMOLOGY* 114, 119 (1982). See also Susan B. Bond & Donald L. Mosher, *Guided Imagery of Rape: Fantasy, Reality, and the Willing Victim Myth*, 22 *J. SEX RES.* 162 (1986); Massaro, *supra* note 6, at 418-19.

⁶⁰ Results from the San Antonio survey revealed the following rates of agreement with the statement that “even though women are terrified of being raped, somewhere in the back of their minds there is a curiosity and excitement about rape”: Anglo men, 27%; Anglo women, 17%; Black men, 84%; Black women, 7%; Mexican American men, 24%; and Mexican American women, 32%. J. WILLIAMS & K. HOLMES, *supra* note 46, at 135 table 17.

⁶¹ In 1990 Sir Derek Hodgson, a judge in Manchester, England, ordered a jury to acquit the defendant, a dentist, of indecently assaulting seven women patients after hearing evidence that the sedative Valium, injected as a relaxant, *could* have caused the women to believe in “unreal experiences.” *Fantasies, Not Fondling, Ruled in Dentist Case*, Chicago Tribune, Feb. 7, 1990, § 1, at 15, col. 6 (emphasis added).

⁶² S. GRIFFIN, *RAPE CONSCIOUSNESS*, *supra* note 5, at 7. See also Kenneth A. Cobb & Nancy R. Schauer, *Michigan's Criminal Sexual Assault Law*, in

the impetus for sexual assault lies in the attacker and not in the appearance and behavior of the victim, further persuasive evidence refuting this myth.⁶³ The fact that 82 percent of rapes are planned or partly planned in advance, and not spontaneous,⁶⁴ is even more convincing. These rapists choose their victims based on accessibility and vulnerability, not attractiveness.⁶⁵

Finally, there is the particularly vicious myth of false claims — a myth that underlies many of the evidentiary rules and jury instructions used in rape trials.⁶⁶ Perhaps the first official judicial recognition of this mythical moral flaw in women is the oft-quoted, classic statement of the 17th century English jurist, Sir Matthew Hale. Hale asserted that rape charges are “easily to be made and hard to be proved, and harder to be defended by the party accused, tho’ never so innocent.”⁶⁷ Three centuries later, this statement of deep distrust of female rape complainants is still being cited as legal authority.⁶⁸

FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER 170, 176-77 (1977).

⁶³ George Smeaton & Donn Byrne, *The Effects of R-Rated Violence and Erotica, Individual Differences, and Victim Characteristics on Acquaintance Rape Proclivity*, 21 J. RES. PERSONALITY 171, 182 (1987). Smeaton and Byrne found a relationship between the likelihood of raping an acquaintance and “hypermasculinity,” a composite personality characteristic in men consisting of calloused sexual attitudes toward women, a belief that violence is manly, and a perception of danger as exciting. *Id.* at 175. The result of their study, the researchers concluded, “provides convincing evidence that the impetus for sexual assault lies in the attacker and not in the appearance and behavior of the victim.” *Id.* at 182.

⁶⁴ MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 141-42 (1971), *cited in* Cobb & Schauer, *supra* note 62, at 176.

⁶⁵ *See* Christian Science Monitor, Apr. 24, 1987, § 4 (Business), at 11, col. 1. Still, many people believe that most rapes could be avoided if women did not provoke them: 19% of Anglo men; 25% of Anglo women; 73% of Black men; 23% of Black women; 32% of Mexican American men; and 70% of Mexican American women. J. WILLIAMS & K. HOLMES, *supra* note 46, at 135 table 17.

⁶⁶ *See infra* notes 134-63 and accompanying text (discussing evidentiary rules and jury instructions based on rape myths).

⁶⁷ I M. HALE, *supra* note 7, at *635.

⁶⁸ *See, e.g.,* People v. Nye, 38 Cal. 2d 34, 40, 237 P.2d 1, 4 (1951), *overruled* People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975); People v. Phillips, 181 Ill. App. 3d 144, 152, 535 N.E.2d 1242, 1246 (1989) (Pincham, J., dissenting) (“This admonitory truism by Lord Hale approved by our supreme court [in a 1930 case] is just as accurate and viable today as it was when it was first uttered by Lord Hale.”); State v. Fisher, 190 Neb. 742, 744, 212 N.W.2d 568, 570 (1973).

In fact, there is no empirical data to prove that there are more false charges of rape than of any other violent crime.⁶⁹ Estimates indicate that only 2 percent of all rape reports prove to be false, a rate comparable to the false report rate for other crimes.⁷⁰ Unfortunately, reports of a high proportion of “unfounded” rape complaints may have contributed to this myth that women falsely cry rape.

Many valid rape complaints go through an “unfounding” process, in which “the police establish[] that no forcible rape offense or attempt occurred.”⁷¹ For instance, in 1968 police reported that one-fifth of received rape complaints were “unfounded.”⁷²

⁶⁹ See NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, *FORCIBLE RAPE: A MANUAL FOR FILING AND TRIAL PROSECUTORS* 4 (Prosecutors' Vol. II 1979). Nonetheless, the San Antonio study discovered the following rates of agreement with the proposition that men are often falsely accused of rape: Anglo men, 40%; Anglo women, 63%; Black men, 92%; Black women, 41%; Mexican American men, 73%; and Mexican American women, 57%. J. WILLIAMS & K. HOLMES, *supra* note 46, at 136 table 18.

⁷⁰ See Patricia A. Hartwig & Georgette Bennett Sandler, *Rape Victims: Reasons, Responses, and Reforms*, in *THE RAPE VICTIM*, *supra* note 11, at 13; see also Margaret A. Clemens, *Elimination of the Resistance Requirement and Other Rape Law Reforms: the New York Experience*, 47 ALBANY L. REV. 871, 883 (1983); Roberta J. O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution—Or How Many Times Must a Woman Be Raped?*, 18 SANTA CLARA L. REV. 119, 141 n.131 (1978). Moreover, studies have shown that rape victims are no more likely to recant their testimony than victims of any other offense — an estimated 2%. *The “Rape” and the Repercussions*, Washington Post, May 9, 1985, at C1, col. 1, C14, col. 4. Nonetheless, false charges seem to receive an inordinate amount of coverage by the media. When Cathy Crowell Webb claimed on national television in 1985 that she had lied about being raped by Gary Dotson, the story was “big news all through the spring.” *Redefining Society's Perceptions of Rape*, Chicago Tribune, June 2, 1985, § 2, at 1, col. 1. More recently, a judge in Nebraska sentenced a woman who falsely accused a man of raping her to six months' imprisonment and ordered her to run advertisements in local newspapers apologizing to him. *Apology Ordered in False Rape Charge*, Chicago Tribune, June 15, 1990, § 1, at 10, col. 6.

⁷¹ D. RUSSELL, *supra* note 21, at 29 (quoting FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS (1973)). See also Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 J. CRIM. L. & CRIMINOLOGY 267 (1990) for a study of Chicago police decisions to “found” complaints of sexual assault.

⁷² Camille E. LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER* 71 (1977).

However, the term “unfounded” is technical and does not indicate whether the rape report is false; rather, it means that for one reason or another, the police decided not to pursue the complaint.⁷³ Most of the complaints deemed “unfounded” by police involve at least one of the following factors: (1) evidence that the victim was intoxicated; (2) the victim’s delay in reporting; (3) lack of physical conditions supporting the allegation; (4) the victim’s refusal to submit to a medical examination; (5) existence of a previous relationship between the victim and the offender; (6) the use of a weapon without accompanying battery; (7) the victim’s failure to preserve the necessary physical evidence; or (8) the victim’s refusal to cooperate fully with the police.⁷⁴ In other words, an unfounded complaint is one in which, although a rape may have occurred, the police have determined that barriers exist to obtaining a conviction in court. Many of these barriers rest on rape myths.

Ironically, empirical research indicates that the exact opposite of the false claim myth is true: most victims never report the crime of rape.⁷⁵ Victims have good reasons for not doing so.

⁷³ *Id.* A study of all sexual assaults processed in Indianapolis during 1970, 1973, and 1975 found that no police officers were ever questioned by superiors about the decision to unfound a case. GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 56 (1989). Sometimes the pressures to close a case cause police to categorize rape complaints as “unfounded” without appropriate investigation. For instance, after a media story the police department in Oakland, California, was forced to reopen 203 rape complaints that had been listed as “unfounded” although no investigation had occurred. *Oakland Cops To Change Rape Case Procedures*, San Francisco Chronicle, Sept. 20, 1990, at B10, col. 5.

⁷⁴ LeGrand, *supra* note 72, at 71-72. In the Indianapolis study, police provided three official reasons for unounding cases: (1) problems with the complainant’s moral character or conduct (70.9%); (2) lack of cooperation from the complainant (20%); and (3) technical reasons (9.1%). G. LAFREE, *supra* note 73, at 69. Cases unfounded because of problems with the complainant’s moral character or conduct most often involved victims who were drinking or using drugs when the incident was reported or investigated, who were “runaway” juveniles and were believed by police to have fabricated the rape accusation, or were hitchhiking at the time of the offense. *Id.* Note that none of these behaviors, with the single exception of illegal drug use, constitutes a criminal offense for adults, but rather could be deemed “nonconformist.” No cases in which police reported nonconformist victim behavior resulted in an arrest. *Id.* at 152.

⁷⁵ The Russell San Francisco survey found a report rate for rape of only 9.5%. D. RUSSELL, *supra* note 21, at 31. Only 3% of the 248 women

Shame and fear are primary considerations for many women.⁷⁶ Additionally, women know that even if the police believe them, the experience of a trial is grueling and frequently provokes responses in the victim similar to those caused by the actual rape.⁷⁷ Other emotional and psychological factors inhibit the reporting of rape: "rape victims who admit they were raped often suffer in their personal relationships because acquaintances, friends, and lovers sometimes withdraw, deny the incident, blame or disbelieve the victim, or even abandon the victim out of ignorance, anger, fear or hurt."⁷⁸ The myth is false claims of rape; the

surveyed in a Los Angeles study reported their rape to the police. *Violence Against Women Pervasive Panel Told*, *supra* note 24, at B1, col. 3, B4, col. 1. Two rape researchers describe the decision to report a rape to the authorities as follows:

She [the rape victim] may not have told anyone of her misfortune immediately after the rape, but may have followed her general inclination dictated by her upbringing, and washed, changed clothes, or perhaps gone to bed not to think about the rape for a while, and later appear before the police as she thinks she should present herself before authorities: properly dressed and made up.

.
Thus, much of the woman's emotional conflict may center around the potential or actual act of having to relate the incident to a man (the police, her husband, a doctor) and making him both understand and believe her about the nature of the encounter. She is often doomed even before she starts. She may see the experience of being raped as essentially non-sexual. However, the difference between rape and intercourse may not be as clear to her male audience. . . . From some men's perspective, rape is sex, and sex is fun.

Weis & Borges, *supra* note 11, at 64-66.

⁷⁶ See *Violence Against Women Pervasive Panel Told*, *supra* note 24, at B1, col. 4; Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 983 (1974).

⁷⁷ Eugene Borgida & Phyllis White, *Social Perception of Rape Victims: The Impact of Legal Reform*, 2 L. & HUM. BEHAV. 339, 340 (1978). For a discussion of the psychological effects of rape, see Ann Wolbert Burgess, *Rape Trauma Syndrome*, 1 BEHAVIORAL SCI. & L., Summer 1983, at 97, 101-4; Dean G. Kilpatrick, Patricia A. Resick & Lois J. Veronen, *Effects of a Rape Experience: A Longitudinal Study*, 37 J. SOC. ISSUES, Fall 1981, at 105, 110.

⁷⁸ Massaro, *supra* note 6, at 422-23. Unfortunately, victims may accept these reactions and blame themselves for the incident. *Id.* Patricia A. Hartwig and Georgette Bennett Sandler suggest the following reasons why many women do not report a rape:

The accusatory, skeptical, and insensitive treatment that the victim all too often receives from institutional personnel on an

reality is severe underreporting of rape.

In short, the empirical data refute each and every one of the classic rape myths relating to victim behavior. The inevitable question, then, is why these myths are so ingrained and accepted in our society. In the next section I address one of the primary means of encouraging the acceptance of rape myths, the mass media.

D. The Role of Mass Media in Fostering Rape Myths

Feminists contend that mass media portrayals of women play a significant role in fostering rape myths and encouraging acceptance of rape and other violence against women.⁷⁹ Researchers James Check and Neil Malamuth found this contention to be supported by considerable empirical research.⁸⁰

interpersonal level reflects many of the internalized attitudes mentioned at the beginning of this discussion. Due to her societal conditioning, the victim frequently experiences shame and embarrassment, and may also feel on some level that she was responsible for the attack. These two dynamics become mutually reinforcing, and her emotional trauma is intensified. This further augments the trauma that she is already experiencing as a result of the physical assault and subsequent loss of autonomy and privacy. She may be in a state of confusion and disorientation, and defense mechanisms such as denial and repression may be operating. This obviously interferes with the victim's ability to give information to the police which will help in their apprehension of the assailant. Many victims, feeling that the attack was bad enough, do not wish to prolong the agony or to pursue reporting the crime and prosecuting the offender because of the harassment and humiliation they have traditionally experienced in their dealing with the police and prosecuting personnel, as well as with the defense attorney in the court proceedings.

Hartwig & Sandler, *supra* note 70, at 16.

⁷⁹ Images have always had a profound effect on human behavior. As Susan Griffin states: "A culture both expresses itself and continues itself through imagery. Cultural assumptions, spiritual traditions, even political ideologies are passed on through stories and pictures which appeal to a part of the self that is not always conscious." S. GRIFFIN, *RAPE CONSCIOUSNESS*, *supra* note 5, at 63. The role that pornography plays in the continued subordination of women has been addressed by Andrea Dworkin and Catherine MacKinnon, and is beyond the scope of this Article.

⁸⁰ Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 420; *see, e.g.*, Edward Donnerstein & Leonard Berkowitz, *Victim Reactions in Aggressive Erotic Films As a Factor in Violence Against Women*, 41 J. PERSONALITY & SOC. PSYCHOLOGY 710 (1981); Neil M. Malamuth, *Factors Associated with Rape As*

In one study subjects were exposed to experimental films depicting sexual violence against women in a favorable light. The study found that this exposure increased males' acceptance of interpersonal violence against women and tended to increase their acceptance of rape myths as well.⁸¹ In another study, male students who viewed a rape slide-audio show created more violent sexual fantasies than those exposed to a mutually consenting version.⁸² Yet another study documented the antisocial impact of exposure to materials that portray rape in a relatively "positive" manner, showing that this exposure causes or perpetuates undesirable rape myths.⁸³

Research has further demonstrated the applicability of these results to settings beyond the laboratory. Because most of the studies discussed above were based on laboratory experiments, and hence are vulnerable to the criticisms of artificiality and "demand characteristics," Neil Malamuth and James Check created a field experiment to determine the effects of mass media exposure on acceptance of violence against women.⁸⁴ After labo-

Predictors of Laboratory Aggression Against Women, 45 J. PERSONALITY & SOC. PSYCHOLOGY 432 (1983); Neil M. Malamuth & Edward Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 103 (L. Berkowitz ed. 1982). These findings lend support to another feminist argument, that pornography encourages violence against women. Diana Russell has proposed a theory that: "pornography (1) predisposes some men to want to rape women or intensifies the predisposition in other men already so predisposed; (2) undermines some men's internal inhibitions against acting out their rape desires; and (3) undermines some men's social inhibitions against the acting out." Russell, *supra* note 54, at 41. See also Neil M. Malamuth, *Rape Fantasies As a Function of Exposure to Violent Sexual Stimuli*, 10 ARCHIVES SEXUAL BEHAV. 33 (1981) [hereafter Malamuth, *Rape Fantasies*].

⁸¹ Neil M. Malamuth & James V.P. Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women*, 15 J. RES. PERSONALITY 436, 442 (1981) [hereafter Malamuth & Check, *Mass Media Exposure*].

⁸² Malamuth, *Rape Fantasies*, *supra* note 80, at 42-44. Concluding that exposures to rape stimuli may arouse rape fantasies in some subjects, Malamuth expressed concern that, to the extent that such fantasies persist beyond the confines of the laboratory, they may contribute to deviant behaviors. *Id.* at 43-44.

⁸³ Malamuth & Check, *Penile Tumescence*, *supra* note 54, at 543-44. College students reported relatively high levels of sexual arousal to a rape depiction when the victim was shown as involuntarily experiencing sexual arousal, as is typically the portrayal in pornography. *Id.* at 529-30.

⁸⁴ Malamuth & Check, *Mass Media Exposure*, *supra* note 81, at 437-38. There are obvious ethical concerns with experiments that expect to result in

ratory experiments focusing on male subjects had yielded data consistent with the contention that the portrayal of violent sexuality in the mass media has undesirable effects on both attitudes and behavior, the psychologists decided to assess outside the laboratory context the effects of mass media stimuli that fuse sexuality and violence.⁸⁵ They tested the hypothesis that the acceptance of violence against women in a culture affects the "incidence of violent acts, victims' willingness to report offenses, and societal reaction to and punishment of these violent crimes."⁸⁶ The conclusion from this field experiment was that exposure to films showing violent sexuality did increase male subjects' acceptance of interpersonal violence against women and their acceptance of rape myths.⁸⁷

In a follow-up study, Neil Malamuth and James Check found further corroboration that mass media stimuli encourage the fusion of sexuality and aggression in men.⁸⁸ They discovered relatively long-term antisocial effects from mass media stimuli that portray sexual violence as having "positive" consequences, such as soap opera portrayals of rapes that evolve into romances.⁸⁹ Their "findings strongly support the hypothesis that a depiction portraying the myth that a rape victim becomes sexually aroused increases males' beliefs in such a rape myth."⁹⁰ Unfortunately, the data suggest that men who have relatively higher inclinations to aggress against women are particularly likely to be affected by exposure to aggressive pornography that portrays rape myths.⁹¹ In response to the criticism that results based on fictitious stories

increased aggression towards women. In light of these concerns, most experiments culminate with a "de-briefing" of the subjects. *See infra* text accompanying notes 258-67. Furthermore, it goes without saying that the experimenters cannot examine the relationship between pornography and actual sexual aggression.

⁸⁵ Malamuth & Check, *Mass Media Exposure*, *supra* note 81, at 437.

⁸⁶ *Id.*

⁸⁷ *Id.* at 441.

⁸⁸ Neil M. Malamuth & James V.P. Check, *The Effects of Aggressive Pornography on Beliefs in Rape Myths: Individual Differences*, 19 J. RES. PERSONALITY 299, 299-300 (1985).

⁸⁹ *Id.* at 300-01.

⁹⁰ *Id.* at 313.

⁹¹ *Id.* at 314. Malamuth and Check concluded that "[w]hen examining subjects' beliefs that women in general enjoy sexual violence, it was found that greater beliefs in these myths were associated with higher LR ratings, power motivation for sexuality, and higher levels of exposure to pornography." *Id.*

are unlikely to reflect judgments about events like rape in the "real" world, the psychologists state that "there is considerable evidence suggesting that even when subjects are clearly aware of the fictional nature of ideas or information, the greater accessibility of these cognitions in memory may have a significant impact on their 'real' world judgments."⁹²

Exacerbating these effects is the substantial increase of sexually violent portrayals of women in the media, even in so-called "soft-core" pornography.⁹³ A 1980 study analyzed the content of two of the most popular "men's" magazines for a five-year period, 1973 through 1977.⁹⁴ The hypotheses driving this study were: (1) modeling and disinhibition effects occur as a result of exposure to mass media fusion of sexuality and violence; (2) the coupling of sex and violence may involve a conditioning process whereby violent acts become associated with sexual pleasure; and (3) the information conveyed in much of the sexually violent

⁹² *Id.* at 316.

⁹³ While there also has been an explosion of violence generally in the media, males act against females in the majority of sexually aggressive depictions, whereas the victim is usually male in nonsexual portrayals of violence. When sexual violence is portrayed, it frequently includes the suggestion that, despite initial resistance, the female victim secretly desires the abusive treatment and eventually derives pleasure from it; male victims usually "fight back." See Malamuth, *Sexually Violent Media*, *supra* note 54, at 167. Additionally, sexual violence is usually presented without any negative consequences for either the victim or the perpetrator. For example, in a survey of 428 adult books less than 3% of rapes portrayed resulted in negative consequences for the rapists; indeed, many of the rapists were rewarded. *Id.* (citing Don Smith, *Sexual Aggression in American Pornography: The Stereotype of Rape* (1976) (unpublished manuscript)). A recent content analysis of 150 pornographic home videos revealed similar results. *Id.* (citing T.S. Palys, *Testing the Common Wisdom: The Social Content of Video Pornography*, 27 *CANADIAN PSYCHOLOGY* 22 (1986)). Moreover, unlike nonsexual violence, pornography is designed to arouse men sexually. Such arousal might result in subliminal conditioning and cognitive changes in the consumer by associating physical pleasure with violence. Russell, *supra* note 54, at 48-49.

⁹⁴ Neil M. Malamuth & Barry Spinner, *A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotic Magazines*, 16 *J. SEX RES.* 226 (1980). The raters, one male and one female, without formal training, were told that their judgments should correspond to those of the "average" person. They were instructed to rate as sexually violent those stimuli in *Playboy* and *Penthouse* that depicted rape, sadomasochism, or exploitative/coercive sexual relations. If the stimulus was ambiguous as to its violent nature, the raters were instructed to be conservative and not rate it as sexually violent. *Id.* at 228-29.

material is that women are masochistic and in need of male domination.⁹⁵ A systematic evaluation of the two magazines' pictorials, a relatively realistic stimulus, revealed a significant increase over the five years of pictorials showing violent sexuality, both in absolute numbers and as a percentage of the total number of pictorials.⁹⁶ As of 1977, a reader of two of the most popular "men's" magazines would have been exposed to sexual violence in about 10 percent of the cartoons and close to 5 percent of the pictorials.⁹⁷ Viewing these results alongside the results of other rape studies, the experimenters concluded:

[R]ecent laboratory research examining the effects of mass-media violent sexuality, such as those analyzed herein, indicate that they stimulate rape fantasies, increase the levels of electric shock administered to a female victim in comparison to neutral, sexual, or aggressive stimuli, and reduce perceptions of the degree of trauma suffered by a rape victim. Moreover, a number of studies have shown that sexual arousal to sexually violent pictorials and stories (but not arousal to nonviolent sexuality) is correlated with callous attitudes towards rape and with a self-reported possibility of committing a rape.⁹⁸

These results are troubling, to say the least.

Moreover, the level of exposure to media depictions of sexual violence against women is shockingly high.⁹⁹ A study conducted in 1988 suggests that pornographic materials, both violent and nonviolent, are widely used.¹⁰⁰ More than three-quarters of a sample of 222 undergraduate males reported using nonviolent, sexually explicit materials within the last year; nearly half used

⁹⁵ *Id.* at 227-28.

⁹⁶ *Id.* at 232-34. No significant changes in the percentage of sexually violent cartoons were found in either *Playboy* or *Penthouse*, although in *Penthouse* there was an increase in the absolute number of such cartoons. *Id.* at 234.

⁹⁷ *Id.* at 235.

⁹⁸ *Id.* (citations omitted).

⁹⁹ One study found that heavy exposure to common nonviolent pornography resulted in: (1) trivialization of rape as a criminal offense; (2) significant enhancement of males' sexual callousness toward women; (3) a decline among men in support for equality between the sexes; and (4) an appetite for stronger material. Dolf Zillmann & Jennings Bryant, *Effects of Massive Exposure to Pornography*, in *PORNOGRAPHY AND SEXUAL AGGRESSION* 115, 132-35 (1984).

¹⁰⁰ Dano Damare, John Briere & Hilary M. Lips, *Violent Pornography and Self-Reported Likelihood of Sexual Aggression*, 22 *J. RES. PERSONALITY* 140, 149 (1988).

some form of pornography depicting violence against women.¹⁰¹ In another study over 36 percent of male undergraduates reported seeing violent pornography at least once within the past year; 13 percent had viewed violent pornography more than twice.¹⁰² And this exposure begins at a tender age, during adolescence: 20 percent of males in this study had their first exposure to sexually explicit media by age twelve.¹⁰³ More than a third of Canadian teenagers report viewing sexually explicit films at least once a month.¹⁰⁴ From these horrifying statistics Neil Malamuth concluded that “[t]he first knowledge of sexual life acquired by these children may come from viewing films in which sexual conduct is inextricably entwined with violence, hatred, coercion and the humiliation of women.”¹⁰⁵ Pornography has become one of the primary sources of sex education for male youth.¹⁰⁶ Not surprisingly, subjects who reported obtaining information about sex from explicit media also held attitudes more supportive of violence against women.¹⁰⁷

The importance of these results is underscored by a study which analyzed not only whether exposure to sexual violence may alter perceptions of the degree of pain experienced by a rape victim, but also whether exposure to sexual violence affects the

¹⁰¹ *Id.* Data from the investigation further indicated that the males’ use of sexually violent pornography was specifically associated with self-reported hypothetical likelihood of engaging in sexual aggression against women. *Id.* at 151.

¹⁰² Malamuth, *Sexually Violent Media*, *supra* note 54, at 168.

¹⁰³ *Id.* at 169.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (quoting Roth, *Introduction: The Social-Psychological Phenomenon of Violence*, in VIDEO VIOLENCE AND CHILDREN (1985)).

¹⁰⁶ *Id.* at 180.

¹⁰⁷ *Id.* at 181. Two additional studies emphasize the connection between exposure to pornography and violence against women. First, a 50-state analysis comparing rape rates and circulation rates of eight pornographic magazines (*Chic, Club, Forum, Gallery, Genesis, Hustler, Oui, and Playboy*) found a highly significant correlation between the two rates. Larry Baron & Murray A. Straus, *Sexual Stratification, Pornography, and Rape in the United States*, in PORNOGRAPHY AND SEXUAL AGGRESSION 185, 198 (1984). Second, in a survey of over 6,000 college students, college men who reported rape behavior were significantly more likely than college men who denied such behavior to be frequent readers of at least one of the following magazines: *Playboy, Penthouse, Chic, Club, Forum, Gallery, Genesis, Oui, or Hustler*. Russell, *supra* note 54, at 66 (citing M. KOSS, HIDDEN RAPE: SURVEY OF PSYCHOPATHOLOGICAL CONSEQUENCES, REPORT TO THE NATIONAL INSTITUTE OF MENTAL HEALTH (1986)).

inhibiting influence of perceiving the victim's pain.¹⁰⁸ The experimenters discovered an affirmative relationship.¹⁰⁹ They also determined that for males who had been presented earlier with a portrayal of pain infliction as a source of pleasure, the relationship was reversed, so that higher levels of perceived pain were associated with greater sexual arousal.¹¹⁰ The correlations were found to be consistent with the assertion that certain forms of pornography create an image of women as essentially masochistic in nature. Exposure to depictions of sexual violence thus affects reactions to actual violence perpetrated against women.¹¹¹

Thus, several studies show that the mass media promotes rape myth acceptance among members of society. Moreover, rape myth acceptance has also been demonstrated to be a valid predictor of responses to both fictional and real rape descriptions.¹¹² Unfortunately, greater rape myth acceptance results in increased tolerance of rape and an environment in which women are perceived as not only provoking rape, but deriving pleasure from it.

E. Rape Myth Acceptance As a Predictor of Sexual Aggression

In addition, researchers have found that the level of rape myth acceptance is predictive of males' self-reported likelihood of raping (LR), a finding consistent with other research showing that rape myth acceptance is associated with aggressive behavior.¹¹³ Men with higher LR scores have more callous attitudes towards rape, and they believe in rape myths to a greater degree than those with lower LR scores. Research consistently shows that higher LR scores are:

positively and significantly related to the belief that other men would rape if they knew they could avoid being caught, to identification with rapists in depictions of rape, to perceptions that rape victims cause and derive pleasure from such assaults . . . and with the belief that women in general secretly desire and enjoy

¹⁰⁸ Malamuth, Haber & Feshbach, *supra* note 48, at 133.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 417-18 (citations omitted). Subjects' perception of a fictional rape victim's experience as positive has been associated with rape myth acceptance, acceptance of interpersonal violence against women, and adversarial sex beliefs. *Id.*

¹¹³ *Id.*

such victimization.¹¹⁴

In fact, one study demonstrated that rape-supportive attitudes and beliefs, not sexual variables, predict a likelihood to rape or use sexual force.¹¹⁵ As the authors concluded, their study offered relatively direct support for Martha Burt's claim that the antecedents to rape are cultural — socially transmitted attitudes about women, rape, and rapists which are stereotyped and prejudicial.¹¹⁶

F. Gender and Cultural Differences in Accepting Rape Myths and Blaming Rape Victims

While the pervasiveness of rape myths cannot be denied,¹¹⁷ not surprisingly there is a clear differentiation in the influence of rape myths on males and females. Research focusing on existing attitudes consistently shows that male subjects are more accepting of violence against women and more accepting of rape myths than females.¹¹⁸ For instance, in a study involving university students, 40 percent of the women felt that rape is a male exercise in power over women, while only 18 percent of the men agreed with this

¹¹⁴ Malamuth, *Rape Proclivity*, *supra* note 49, at 144. Further, self-reported likelihood of raping has been associated with actual aggression toward women, "both in self-reported 'date' situations and in more objective observations of subjects under laboratory conditions." Briere & Malamuth, *supra* note 34, at 316.

¹¹⁵ Briere & Malamuth, *supra* note 34, at 319. These attitudes, as derived from the study's questionnaire, were: disbelief of rape claims, victim responsibility for rape, rape reports as manipulation, rape only happens to certain kinds of women, male dominance is justified, adversarial sexual beliefs, women enjoy sexual violence, acceptance of domestic violence, and acceptance of vengeance. *Id.* at 317-18.

¹¹⁶ *Id.* at 321. Actually, the Briere and Malamuth study extended the research in this area even further by isolating an aggressive, nonsexual component of Burt's rape-supportive scales: "male dominance is justified." This component was the most significant in predicting which subjects were willing to be sexually aggressive. *Id.*

¹¹⁷ More than half of the 598 Minnesota residents surveyed agreed with such statements as "In the majority of rapes, the victim was promiscuous or had a bad reputation." A similar percentage believed that most reports of rape are made only because the woman was trying to get back at a man with whom she was angry or because she was trying to cover up an illegitimate pregnancy. Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 416-17 (citing Burt, *supra* note 16). See also *supra* text accompanying notes 56-78.

¹¹⁸ Malamuth & Check, *Mass Media Exposure*, *supra* note 81, at 438; see also J. WILLIAMS & K. HOLMES, *supra* note 46, at 153-55.

characterization.¹¹⁹ Second, the study found that male students were more concerned than female students with protecting males from a "false" charge of rape.¹²⁰ This concern was indicated by beliefs that a woman's degree of resistance should be the major factor in determining if a rape has occurred (held by 40 percent of men compared to 18 percent of women) and that it should be difficult to prove that a rape has taken place (held by 40 percent of men compared to 15 percent of women).¹²¹ Finally, almost one-third of the men in the study, compared to 8 percent of the women, believed that it would do some women some good to get raped.¹²²

Significant differences between males and females in the structure of beliefs about rape have been prominent in most studies.¹²³ Consistently, males blame and hold victims of rape responsible for their victimization to a greater degree than do females.¹²⁴ They recommend less punishment for the rapist and generally view rape more as a sex crime and less as a violent crime than do women.¹²⁵ They view rape victims as failing to properly resist the crime and believe that rape is enjoyable to women.¹²⁶ Females experience a more sympathetic and empathetic response to the rape victim.¹²⁷

However, females as well as males seem to believe some myths about rape. In one experiment, female subjects believed that over 25 percent of the female population would derive some pleasure from being victimized, even though the subjects themselves clearly believed that they personally would not derive pleasure

¹¹⁹ Nona J. Barnett & Hubert S. Feild, *Sex Differences in University Students' Attitudes Toward Rape*, J.C. STUDENT PERSONNEL, March 1977, at 93, 94. The study used an Attitudes Toward Rape Questionnaire (ATR) which asked respondents to rate their degree of agreement or disagreement with statements reflecting rape myths. *Id.* at 93. The sample of 200 women and 200 men had a mean age of 20.8 years for the women and 21.3 years for the men; 88% of the women and 81% of the men were single. *Id.* at 95. "Of the 25 *t* tests calculated, 18 were significant, suggesting substantial sex differences in attitudes toward rape among these college students." *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 95-96.

¹²³ Tieger, *supra* note 40, at 147-48.

¹²⁴ *Id.* at 148.

¹²⁵ *Id.*

¹²⁶ *Id.* at 155.

¹²⁷ *Id.*

from being victimized under any circumstances.¹²⁸ These results occurred even though the females “identified more with the victim’s plight, were more cognizant of her pain and suffering, and were less inclined to believe that the victim derived pleasure from being raped.”¹²⁹ Nonetheless, females were less likely to minimize the assailant’s dangerousness or his responsibility for the rape, or to perceive any justification for his behavior.¹³⁰

In the first cross-cultural study of public attitudes about rape, researchers found that public responses to rape varied significantly across ethnic-racial groups as well as between males and females within groups.¹³¹ Their findings suggest a strong tendency by some groups to fix responsibility on women for the cause and prevention of rape.¹³²

In sum, the social and behavioral science literature firmly establishes that not only is rape epidemic, it is also normal. Rapists are not psychotic, sex-starved momma’s boys — they are the boys next door.¹³³ Ample evidence demonstrates that a large portion of the general population, both male and female and across ethnic lines, believes rape myths and that these stereotyped beliefs affect attitudes about women, rape, and rapists. The influence of rape myths, as well as the effects of the mass media’s portrayal of sexual violence against women, encourage rape and result in an environment in which women are not to be believed, particularly when they cry “rape.”

II. THE EFFECTS OF RAPE MYTHS ON RAPE TRIALS

Rape myths, which exert a profound influence on society, inevitably exert a profound influence on rape prosecutions as well. Historically, the common law treated rape in accordance with classic rape myths. Modern jury instructions evolved from this tradition. Recent social science research indicates that the atti-

¹²⁸ Malamuth, Haber & Feshbach, *supra* note 48, at 134.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ J. WILLIAMS & K. HOLMES, *supra* note 46, at 143.

¹³² *Id.* at 134. For instance, 73% of the Black males and 23% of the Black females believed that rapes could be avoided if women did not provoke them; only 19% of Anglo men and 25% of Anglo women agreed; and 32% of the Mexican American males and 70% of the Mexican American females blamed women for rape. *Id.* at 135 table 17.

¹³³ The pertinence of Andrea Dworkin’s quote at the beginning of this Article thus becomes even more clear.

tudes of judges and jurors are also a product of uninformed rape myth acceptance. When rape myths are allowed to pervade rape trials, fair trials are denied not only to the state and individual rape victims, but also to society as a whole.

A. *The Common Law Doctrine of Prompt Complaint*

The common law, relying heavily upon beliefs in rape myths, imposed on rape prosecutions a myriad of burdens unique among prosecutions for violent crimes. Many common law courts required the prosecution to prove, in addition to the statutory elements of the crime, that the victim resisted,¹³⁴ made a prompt complaint,¹³⁵ and did not consent.¹³⁶ Corroboration of the victim's testimony was necessary.¹³⁷ All of these rules, special to claims of rape, reflect an acceptance of beliefs supporting the rape myths discussed and refuted above — mainly that women are lying sluts.¹³⁸ The doctrine of prompt complaint persists today as an embodiment of these insidious myths.

The doctrine of prompt complaint, or immediate outcry, derives from the common law doctrine of hue and cry.¹³⁹ Historically, it was not limited to the crime of rape, but applied to all violent crimes. Victims were expected to alert the community in order to increase the possibility of apprehending the offender. However, although the hue and cry requirement has been discarded for other crimes, it has persisted when rape is alleged. Initially, courts refused to hear a rape complaint unless the victim

¹³⁴ See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094-1101 (1986); see also DuBois, *supra* note 7, at 1098-99; Fischer, *supra* note 8, at 695.

¹³⁵ See Estrich, *supra* note 134, at 1139; see also DuBois, *supra* note 7, at 1089-91; Fischer, *supra* note 8, at 695.

¹³⁶ See Estrich, *supra* note 134, at 1121-32; see also DuBois, *supra* note 7, at 1098-99.

¹³⁷ See DuBois, *supra* note 7, at 1098; Fischer, *supra* note 8, at 696.

¹³⁸ Wigmore's statements in his treatise, *Evidence in Trials at Common Law*, typify this attitude. Wigmore devoted an entire section to false complaints of rape. "Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted . . . partly by bad social environment, partly by temporary physiological or emotional conditions." 3A WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736 (Chadbourn rev. 1970). He concluded that: "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." *Id.* at 737 (emphasis in original).

¹³⁹ DuBois, *supra* note 7, at 1089.

had raised the hue and cry immediately following the event. Later, this rule was modified: a victim's failure to immediately report the rape would not bar a prosecution but would still raise an inference adverse to the prosecutrix.¹⁴⁰

Close examination of the doctrine of prompt complaint reveals that it is based on rape myths. The underpinning of the doctrine is a basic distrust of the sworn testimony of women.¹⁴¹ Because it was a commonly held view that it was "natural" for a rape victim to complain as soon as possible after the assault,¹⁴² in the absence of such a report made to a third party the rape charge was assumed to be a fabrication created by a vindictive complainant.¹⁴³ In some states, this evolved into a formal presumption that juries could infer that a rape allegation was false unless buttressed by proof of an immediate outcry.¹⁴⁴

Ironically, the empirical research discussed above documents a reality in which women do *not* promptly report a rape.¹⁴⁵ Thus, to infer that a rape did not occur in the absence of a prompt com-

¹⁴⁰ *Id.* At one time, all American jurisdictions had adopted a form of the prompt complaint doctrine. See *supra* note 7 and accompanying text. As of the mid-1950s, no jurisdiction absolutely barred prosecution of rape cases in the absence of a fresh complaint. S. ESTRICH, *supra* note 58, at 53.

¹⁴¹ See *supra* text accompanying notes 67-68.

¹⁴² As one judge stated: "the natural instinct of a female thus outraged and injured prompts her to disclose the occurrence at the earliest opportunity to the relative or friend who naturally has the deepest interest in her welfare." *People v. Romano*, 306 Ill. 502, 504, 138 N.E. 169, 170 (1923); see *People v. Damen*, 28 Ill. 2d 464, 472, 193 N.E.2d 25, 30 (1963) ("it is entirely natural that the victim of a forcible rape would have spoken out regarding it"); *People v. Lawler*, 194 Ill. App. 3d 547, 557-58, 551 N.E.2d 799, 807 (1990); see also Note, *The Admissibility of Extrajudicial Rape Complaints*, 64 B.U.L. REV. 199, 210 (1984) (authored by Christine Kenmore).

¹⁴³ See *Damen*, 28 Ill. 2d at 472, 193 N.E.2d at 30 (the absence of a prompt complaint would "in effect be evidence of the fact that nothing violent had occurred"); *People v. Lutzow*, 240 Ill. 612, 619, 88 N.E. 1049, 1052 (1907) ("[W]here the prosecutrix is old enough to appreciate the nature of the offense that has been committed upon her, it is usually regarded as a suspicious circumstance if she fails to make complaint of her mistreatment as soon as she has a reasonable opportunity to do so."); *Lawler*, 194 Ill. App. 3d at 557-58, 551 N.E.2d at 807; see also DuBois, *supra* note 7, at 1093; Estrich, *supra* note 134, at 1139; Michael H. Graham, *The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence*, 19 WILLAMETTE L. REV. 489, 492-93 (1983); Massaro, *supra* note 6, at 400 n.28.

¹⁴⁴ DuBois, *supra* note 7, at 1087-88.

¹⁴⁵ See *supra* note 10 and accompanying text.

plaint is contrary to most victims' experiences. Nonetheless, police investigators and prosecutors still actively seek evidence of a prompt complaint.¹⁴⁶ A national survey of prosecutors revealed that promptness of complaint was the third most important factor in the decision to make a criminal charge, following only proof of penetration and physical force.¹⁴⁷

Another aspect of the prompt complaint requirement that is contrary to the reality of rape is the arbitrary time limit within which a complaint must be made in order to qualify as "prompt." Since this doctrine is not statutory, but part of the judge-created common law, there usually is no specific statute that provides a mandatory time limit. Most cases state generally that a complaint must "be promptly made" but do not fix a definite limit.¹⁴⁸ Some courts have refused to admit the fact of a complaint into evidence because the victim did not make her complaint "as soon as practi-

¹⁴⁶ ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, 1990 REPORT 107 (Cynthia Bowman, reporter).

¹⁴⁷ NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS 18 (Prosecutors' Vol. I 1977).

¹⁴⁸ See, e.g., *People v. Damen*, 28 Ill. 2d 464, 472-73, 193 N.E.2d 25, 30 (1963). One court approved small delays if they were consistent or explained within the circumstances, such as an incoherent, fearful, hysterical, or emotional complainant who waits for a person or place representing security before speaking out about her rape. *People v. Houck*, 50 Ill. App. 3d 274, 285, 365 N.E.2d 576, 584 (1977). The *Houck* court summarized the circumstances in which delays would not be viewed as inconsistent or unexplained:

[A] complainant avoided making the charge to strangers encountered on the street, preferring the certainty of assistance from her own family; having been spurned in her first attempt at seeking aid, a complainant refused to answer the questions of those who finally rendered her aid out of fear of retaliation, began to cry, and upon attaining her composure made the charge; complainant's mother observed an intruder in complainant's bedroom, left the room to seek the assistance of her husband, telephoned police, talked with complainant who was hysterical and nonresponsive to questioning and was then told by her of the rape; a complainant told her mother that she was beaten, but as soon as her mother walked away she made an immediate charge of rape to a policeman; and a complainant avoided telling the cab driver who drove her home, but within five minutes after her arrival she woke her mother and made the charge.

Id. (citations omitted).

cable."¹⁴⁹ In real life, a significant number of women who are raped do not report the rape for several days¹⁵⁰ or may even experience a "silent reaction" and not tell anyone of the assault.¹⁵¹ Thus, the courts assign probative value to the delay in reporting a rape in the face of evidence that women who are raped or sexually abused do *not* react uniformly in terms of promptness of reporting.¹⁵²

In recognition of the unsoundness of the prompt complaint doctrine and its discriminatory impact on women, Canada abrogated use of the doctrine in sexual assault cases in 1983.¹⁵³ Unfortunately, the Model Penal Code has taken the opposite road, incorporating a requirement that a complaint must be filed within three months in order to maintain a rape prosecution.¹⁵⁴

¹⁴⁹ See *People v. Szybeko*, 24 Ill. 2d 335, 340, 181 N.E.2d 176, 179 (1962) (victim failed to say anything to dormitory doorman, the first person she saw after leaving defendant); *People v. Fuelner*, 104 Ill. App. 3d 340, 350, 432 N.E.2d 986, 994 (1982) (victim told her sister only that she had been attacked, but not raped, after rapist threatened sister's life if she went to police; victim did not complain of rape until over 24 hours after attack); *People v. Bain*, 5 Ill. App. 3d 632, 635, 283 N.E.2d 701, 703 (1972) (after alleged rape, victim did not complain to first two people she saw; not until hours later when she went to her mother's home were police called).

¹⁵⁰ See *supra* note 10 and accompanying text.

¹⁵¹ See *infra* note 252 and accompanying text (discussing Rape Trauma Syndrome).

¹⁵² *Id.*; see DuBois, *supra* note 7, at 1105. The continued use of the doctrine is even more bizarre because admission of evidence of a prompt complaint, which is an out-of-court statement, is contrary to the rules of evidence barring hearsay. Under the Federal Rules of Evidence, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Hearsay is generally inadmissible, in the absence of a specific exception, because it relies on the credibility of the out-of-court asserter who is unsworn or unavailable for cross-examination. See *People v. Carpenter*, 28 Ill. 2d 116, 121, 190 N.E.2d 738, 741 (1963); Fischer, *supra* note 8, at 695 n.34.

¹⁵³ R.S.C., Bill C-127, S.C. 1980-81, c. 125, § 246.5 (in force Jan. 4, 1983) ("The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated."), quoted in D. Fletcher Dawson, *The Abrogation of Recent Complaint: Where Do We Stand Now?*, 27 CRIM. L.Q. 57 (1984-85). Ironically, following criticism that the corroboration requirement was a groundless and discriminatory presumption that the rape victim's testimony was unreliable, the state of New York finally repealed the requirement in 1975; however, the prompt complaint doctrine was overlooked. DuBois, *supra* note 7, at 1103-04.

¹⁵⁴ MODEL PENAL CODE § 213.6(4) (Proposed Official Draft 1962).

The Model Code comments justify this rule with an all-too-familiar rape myth: "The requirement of prompt complaint springs in part from a fear that unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant."¹⁵⁵ Thus, the Model Penal Code has turned the prompt complaint doctrine, a strong but nonconclusive presumption against a woman's veracity, into a type of mandatory statute of limitations.

B. Jury Instructions

Many jury instructions also incorporate rape myths. One of the most infamous is the cautionary instruction based on Lord Hale's concern that rape is easy to claim and hard to defend against.¹⁵⁶ Typically, the instruction read:

A charge such as that made against the defendant in this case is one which is easily made, and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the information with caution.¹⁵⁷

Fortunately, all the state courts recently confronting the issue of whether such an instruction is mandatory have found it not required.¹⁵⁸ Yet the Model Penal Code still mandates that the

(4) *Prompt Complaint*. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

Id. (brackets in original). For a discussion of this provision, see Estrich, *supra* note 134, at 1139. Professor Estrich states that the "rule is unique to rape, and its justification is unique to women victims of sexual assault." *Id.*

¹⁵⁵ MODEL PENAL CODE § 213.6 comment (Proposed Official Draft 1962). As Professor Estrich notes, the MPC commentary "is startlingly attentive to the problem of the vindictive, spurned woman, but silent about the woman who legitimately worries about the receptiveness of police, prosecutors, juries and even friends or employers to a report that she was raped." Estrich, *supra* note 134, at 1140.

¹⁵⁶ See *supra* note 67 and accompanying text.

¹⁵⁷ Until July 1975, judges in California were required to give this instruction to the jury in all rape cases. SUE BESSMER, *THE LAWS OF RAPE* 124 (1984).

¹⁵⁸ See Fischer, *supra* note 8, at 696 n.37; see also NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *LAW ENFORCEMENT ASSISTANCE*

cautionary instruction be given:

In any prosecution before a jury for an offense under this Article [213: Sexual Offenses], the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.¹⁵⁹

The Model Penal Code is at least consistent in its adoption of rape myths as reality.

Other types of instructions created specially for rape prosecutions include warnings such as the following: an "unchaste" woman is more likely than others to consent to sexual advances;¹⁶⁰ "women who say no do not always mean no";¹⁶¹ the credibility of the prosecutrix may be impeached by her failure to have made a timely complaint;¹⁶² and "[h]owever reluctantly given, consent to the act at any time prior to penetration deprives the subsequent intercourse of its criminal character."¹⁶³ The underlying justification for these instructions is obvious: belief in rape myths.

C. Juror Attitudes

1. Juror Acceptance of Rape Myths

There is no reason to believe that jurors, who are intended to

ADMINISTRATION, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES 30-32 (1978). The courts should go one step further and hold it reversible error to give such an instruction.

¹⁵⁹ MODEL PENAL CODE § 213.6(5) (Proposed Official Draft 1962).

¹⁶⁰ The California Legislature has now barred such an instruction. CAL. PENAL CODE §§ 1127d, 1127e (West Supp. 1991); Leon Letwin, "Unchaste Character," *Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 39-40 (1980) (stating one effect of rape shield law is to "bar the use of jury instructions of the 'prior unchastity' genre").

¹⁶¹ In 1982 a judge at the Cambridge Crown Court gave the following summary 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.

Rape: Is this Crime Inevitable?, N.Y. Times, Jan. 4, 1987, Book Review, at 11, col. 1.

¹⁶² 1 NEW YORK JURY INSTRUCTIONS, CRIMINAL (CJINY) § 7.27, at 306 (1983); see *supra* text accompanying notes 134-55.

¹⁶³ MARYLAND JURY INSTRUCTIONS § 4.32 Rape (1975).

represent a cross-section of the community, will have attitudes about women, rape, and rapists different from those held by members of society as a whole.¹⁶⁴ As discussed above, for the most part these attitudes are based on stereotyped beliefs about rape and rape victims. In order to test juror attitudes, however, Hubert Feild and Leigh Bienen conducted an extensive study examining the relationships between selected demographic and attitudinal characteristics of potential jurors and their reactions to hypothetical rape cases brought to trial.¹⁶⁵ The data collected amply illustrate that prospective jurors' attitudes toward rape, like those of society as a whole, are a series of misconceptions about rape and the criminal justice system.¹⁶⁶

For instance, even though nearly all of the 1,056 potential jurors (96 percent) believed a woman can be raped against her will, many attributed rape to the woman.¹⁶⁷ The majority (66 percent) saw rape as being provoked by the victim's behavior or

¹⁶⁴ The ways that police and prosecutors perceive rape and rapists have an even more profound effect on rape prosecutions; many rape charges never get to trial. In his three-year study of rape charges filed in Indianapolis, Gary LaFree discovered that of 881 cases reported to the police only 328 resulted in arrest, 153 were filed as criminal felonies, 74 ended in guilty pleas, and only 50 went to trial. G. LAFREE, *supra* note 73, at 60. See also Kerstetter, *supra* note 71, at 279-84. Although this Article does not begin to address the prosecutorial bureaucracy, it can be assumed that it is similarly affected by beliefs in rape myths.

¹⁶⁵ HUBERT S. FEILD & LEIGH B. BIENEN, *JURORS AND RAPE* 3 (1980). The subjects for the study were 1,056 adults (19 years of age or older) from a wide variety of socioeconomic backgrounds, living in a medium-sized southeastern community. Half men and half women, the subjects were 15% Black and 85% Anglo. *Id.* at 9. Five basic measuring instruments were used: Legal Rape Case (a six-page, written narrative of a rape trial designed to assess the effect on jurors' deliberations of the victim's race, the defendant's race, the victim's physical attractiveness, the victim's moral character, the type of rape, and the strength of the evidence); Attitudes Toward Rape Questionnaire (a 32-item questionnaire containing statements reflecting various perceptions people may have about rape); Attitudes Toward Women Scale (a 25-item questionnaire measuring people's attitudes toward the rights and roles of women in society); Rape Knowledge Test (a 14-item, multiple-choice test measuring respondents' factual knowledge of rape); and Personal Data Sheet (to obtain limited demographic data for classifying and describing responses to the other instruments). *Id.* at 12.

¹⁶⁶ *Id.* at 3.

¹⁶⁷ *Id.* at 54.

appearance.¹⁶⁸ In addition, over one-third (34 percent) believed women should be held responsible for preventing their own rape.¹⁶⁹ Eleven percent blamed women for rape, agreeing that a woman who was raped was asking for it.¹⁷⁰ The authors concluded that if their findings could “be extrapolated to other populations, it would appear that rather substantial numbers of people attribute rape primarily to women, not to men.”¹⁷¹

When asked about the causes of rape, almost half (45 percent) of the potential jurors felt that most rapists are motivated by sex; many (83 percent) therefore concluded that rape is a sex crime and that rapists are sexually frustrated individuals.¹⁷² Less than one out of ten (6 percent) believed rape functions to put or keep women in their place.¹⁷³ Thus, the potential jurors tended to see rapists as being “sick,” sexually frustrated individuals: 85 percent did not believe that rapists are “normal” men, and over half (57 percent) viewed rapists as mentally ill.¹⁷⁴ This belief is clearly contradicted by the results of multiple studies demonstrating the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 55. Feild and Bienen proposed the following explanation:

It would seem that the perceptions of rape as a sex crime might be tied to the views of the roles of women in rape and sexual activities. Historically, men have been viewed and even encouraged to be aggressors in sexual encounters while women have been characterized as being passive, disinterested receivers of these attentions. Once stimulated by women, however, men have been depicted as being victims of uncontrollable sexual desires and passionate emotions, thus placing the responsibility on a woman for determining how far sexual relations with a man will go. When such relations have gone “too far,” society has been quick to blame the woman while her aggressor has been excused for “just being a man.” Due to some individuals’ conceptions of woman’s monitoring role in sexual activities and their views of rape as a sex crime, it would seem these same individuals would likely hold a woman responsible in a rape, particularly if it is believed she “encouraged” the attack. Also the logic that “rape is sex, sex is fun; therefore, rape is fun” may subconsciously be used by some in perceiving rape.

Id.

¹⁷³ *Id.* at 56.

¹⁷⁴ *Id.*

normality of rape.¹⁷⁵

Not surprisingly, a third (34 percent) of the potential jurors tended to support Lord Hale's bromide, stating it should be difficult to prove a rape in order to protect the accused man.¹⁷⁶ As a result, many potential jurors believed that the degree of resistance used by the victim was a critical factor: almost one-third (32 percent) indicated that a woman's resistance should be the major factor in determining if a rape has taken place, and over half (59 percent) felt that a woman should do all she can to resist while being raped.¹⁷⁷

In conclusion, the results of the survey indicate that citizens, as a group from whose ranks jurors are drawn, know very little about rape. Most of the potential jurors in the study fared only slightly better on the rape knowledge test than if they had simply guessed on the fourteen questions.¹⁷⁸ It is this very lack of knowledge about the reality of rape that allows citizens in general and jurors in particular to believe in rape myths, perhaps even perpetuating the attitudes which ultimately contribute to the offense.

2. Juror Decision-Making

Behavioral scientists now know a great deal about how jurors

¹⁷⁵ See *supra* text accompanying notes 39-54 (discussing the normalcy of rape).

¹⁷⁶ H. FEILD & L. BIENEN, *supra* note 165, at 56.

¹⁷⁷ *Id.* Feild and Bienen drew the following conclusion from this information:

In deciding rape cases, jurors typically look for corroborating evidence as an indication that a rape has occurred. One form of proof frequently considered as evidence of forcible rape is the physical condition of the victim. The presence of bruises, scratches, or cuts is taken as one form of proof that the victim did not consent to intercourse. Their absence, however, may suggest to some jurors that a rape did not take place. The insistence of active victim resistance by jurors, the courts, or the police may produce a conflict situation for [the victim]. On the one hand, she may be told by the police or experts in victimology to do as her attacker directs; compliance is the best course for self-protection. Society as well as the criminal justice system, however, typically insists upon resistance as proof of rape. Our data confirm this insistence among many of the citizens in the sample.

Id. at 57.

¹⁷⁸ *Id.* at 84-85. The average score was less than four items correct. *Id.* at 89.

make decisions.¹⁷⁹ One prominent student of juror psychology emphasizes that “the framework jurors use to interpret the facts of a case” and “to attribute blame” consists of their own “attitudes and opinions, in the form of beliefs, values, and sometimes prejudice and bias.”¹⁸⁰ That is why belief in rape myths is such a powerful influence on jurors.

Most jurors think deductively, reasoning from the general to the particular. As a result, jurors will try to fit the facts they hear into the few fundamental premises they already hold and believe to be true.¹⁸¹ Social science research has found that jurors are willing to attribute blame based on very slight and fragmentary evidence; selective memory is common.¹⁸² Jurors will even distort and twist evidence until it becomes consistent with their attitudes.¹⁸³

These fundamental premises that jurors bring with them to the courtroom are what psychologists call “cognitive structures.”¹⁸⁴ While cognitive structures allow individuals to learn new information, they tend to perpetuate themselves by screening out information that is inconsistent with what is already believed. Cognitive inflexibility is what prosecutors face in trying to convict rapists when jurors have cognitive structures based on rape myths. Jurors will strive to reach a verdict in a rape case that will not conflict strongly with the rape myth cognitions they hold at the beginning of the trial.¹⁸⁵

¹⁷⁹ After applying social science theories and techniques to more than 700 cases as a psychologist with Litigation Sciences, Donald E. Vinson has compiled and published his conclusions. DONALD E. VINSON, *JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY* (1986).

¹⁸⁰ *Id.* at xv. Vinson defines “attitude” as a “disposition to like or dislike some object or person.” *Id.* § 1-2, at 7. According to Vinson, “[a]ttitudes result from a person’s value system, and the development of this value system begins as a child. Our values are modified as a result of learning and experiences.” *Id.* Most psychologists believe that attitudes are learned by a process of social interaction, primarily with parents and peers, and information acquisition. *Id.* § 1-4, at 10-11. Attitudes are connected to the way we behave; some evidence indicates that we form attitudes in part by observing and drawing appropriate conclusions from our own behavior. *Id.* § 1-5, at 13.

¹⁸¹ *Id.* § 1-5, at 3.

¹⁸² *Id.* § 3-5, at 68-69.

¹⁸³ *Id.* § 1-7, at 15.

¹⁸⁴ *Id.* § 1-7 at 5.

¹⁸⁵ *Id.* Even though juror attitudes and beliefs are rigid, they can be altered when new information collides with them. Psychologists suggest

Obviously, jurors' cognitive structures, or intense beliefs, may adversely affect their ability to rationally decide a case on the facts. Bias resulting from such intense beliefs can inhibit or distort jurors' perception and evaluation of evidence, testimony, and jury instructions. This bias sometimes leads jurors, even before formal deliberations begin, to arrive at verdicts that are resistant to change.¹⁸⁶ One of the most fundamental categories of bias is stereotyping.¹⁸⁷ We have already seen the connection between sex role stereotyping and negative perceptions of rape victims.¹⁸⁸

Another important aspect to juror decision-making is the need of jurors to believe in a "just world." A basic impulse of jurors in hearing a case is to construct an organized, meaningful explanation of what has happened. This impulse stems from the natural human need to understand and control our immediate environment and thereby limit the impact of unpredictable and uncontrollable situations.¹⁸⁹ In trying to make unpleasant and sometimes tragic situations comprehensible and to some extent controllable, jurors seek cause-and-effect patterns. Being able to explain what happened reassures jurors that such a thing will not happen to them.¹⁹⁰ In a "just world," individuals get what they deserve and deserve what they get.

According to this notion, if something unpleasant happens to an individual, she is seen as deserving it for one of two reasons: (1) because she is an intrinsically evil person, her character merits the bad outcome; or (2) because she has behaved in a specific and direct manner, she brought about the bad outcome.¹⁹¹ Thus, in

that the most effective way to change attitudes is to carry out a direct emotional attack on the attitudes or beliefs in question. *Id.* § 1-5, at 12. I suggest ways to alter these prejudicial attitudes in Part III, *infra*.

¹⁸⁶ D. VINSON, *supra* note 179, § 4-3, at 74. In fact, research on the impact of the opening statement consistently reveals that as many as 80% to 90% of all jurors have reached their ultimate verdict during or immediately after opening statements. *Id.* § 8, at 171-72. Thus, consistent with the strength of the juror's cognitive structure, everything in the trial following opening statements will be selectively perceived to reinforce the decision already reached. *Id.*

¹⁸⁷ Psychologists define a stereotype as an attitude set that forms overall impressions, usually negative, of people or objects on the basis of a small number of traits. *Id.* § 4-4(B), at 86.

¹⁸⁸ See *supra* text accompanying notes 15-22.

¹⁸⁹ D. VINSON, *supra* note 179, § 3-1, at 48.

¹⁹⁰ *Id.*

¹⁹¹ Cathaleen Jones & Elliot Aronson, *Attribution of Fault to a Rape Victim*

order for jurors to cope with an anxiety-provoking event like rape, they neutralize the possible impact of blind fate, or uncontrollable outside forces, and blame the victim.¹⁹² Applied to a rape victim, the reasoning goes something like this: it happened to her, because she is a promiscuous person who dressed provocatively, but it would not happen to me because I am not like that. In the context of a rape trial, shifting the blame onto the victim serves as a self-protective mechanism for both male and female jurors.¹⁹³

The social science literature establishes that (1) rape myth acceptance is prevalent among jurors and (2) jurors' attitudes play an important role in decision-making and blame attribution. Studies focusing specifically on decision-making in rape trials have confirmed that issues and factors other than the admitted evidence determine, to a significant degree, the treatment of an accused rapist.¹⁹⁴ Jurors are inclined to allow certain victim, defendant, and rape case characteristics to influence their decisions.¹⁹⁵

As a Function of Respectability of the Victim, in *THE RAPE VICTIM*, *supra* note 11, at 27.

¹⁹² D. VINSON, *supra* note 179, § 3-3, at 57.

¹⁹³ Hartwig & Sandler, *supra* note 70, at 14. In a study designed to test this general phenomenon, social scientists investigated whether the perceived culpability of a rape victim was a function of her social status. They varied the description of the victim in a rape case as married, a virgin, or a divorcee. Jones & Aronson, *supra* note 191, at 28. More fault was attributed to the divorcee, and sentencing was lighter for the rapist of the divorcee. *Id.* at 27-28, 31-32.

¹⁹⁴ H. FEILD & L. BIENEN, *supra* note 165, at 106-19. Feild and Bienen utilized simulated legal rape cases and various psychological measures to obtain data from 1,056 citizens serving as "mock" jurors in rape trials. *Id.* at 141. They were addressing three research questions:

- (1) Do defendant, victim and rape case characteristics, singly or in combination, have any effect on jurors' verdicts in rape trials?
- (2) Are jurors' attitudes toward rape and toward women as well as selected background characteristics predictive of their decisions in such trials?
- (3) Do characteristics of jurors seem to combine in unique ways with defendant, victim, and rape case characteristics to influence jurors' verdicts?

Id.

¹⁹⁵ *Id.* at 116-17, 141-43; *see also* G. LAFREE, *supra* note 73, at 7 (compiling information on disparate treatment by race in sexual assault cases in Indianapolis from July 1978 to September 1980). LaFree's study involved 38 jury trials (5.5% of the rapes reported to police). Two investigators were present at every trial; 90-minute post-trial interviews

Hubert Feild and Leigh Bienen's study of juror decision-making in rape trials confirmed the importance of juror attitudes in the outcome of rape trials. In their study Feild and Bienen analyzed variables in jurors' background and attitudes. They found that "the attitudes which the jurors held toward rape were more important in predicting their verdicts than were background characteristics."¹⁹⁶ In general, jurors treated Black offenders more harshly than white offenders. They gave more lenient sentences to assailants of Black women than to assailants of white women. When jurors perceived that the victim had contributed to or precipitated the rape, they were more inclined to be lenient.¹⁹⁷ These findings led Feild and Bienen to conclude that, while trial attorneys usually look to background characteristics as predictors of juror decisions, in a rape trial juror attitudes about rape provide an even better set of predictors.¹⁹⁸

Feild and Bienen also found that "in general, the juror characteristics which were predictive of juror decision making were different [in] Black and white jurors." For Blacks, predictive background factors were education and previous jury service; predictive beliefs concerned women's responsibility in rape prevention, sex as motivation for rape, and severity of punishment for rape. For whites, the predictive background factors were age and years of education; predictive beliefs concerned woman's responsibility in rape prevention, severity of punishment for rape, victim precipitation of rape, and the normality of rapists.¹⁹⁹ Not only do these findings have obvious implications for jury selection, but they also illustrate the discrimination, both racial and gender-based, that occurs in jury determinations in rape cases.

were conducted with 331 of the 456 jurors (70.4%); and post-trial questionnaires were collected from the presiding judges. *Id.* at 153-55. The jurors had the following racial and gender characteristics: white women, 41.4%; white men, 40.1%; Black women, 12.9%; and Black men 5.5%. Participation of Blacks on juries stood in stark contrast with their courtroom participation as crime victims (39%) and defendants (44%). *Id.* at 158.

¹⁹⁶ H. FEILD & L. BIENEN, *supra* note 165, at 124.

¹⁹⁷ *Id.* at 141-42.

¹⁹⁸ *Id.* at 124-25.

¹⁹⁹ *Id.* at 142. According to Feild and Bienen, the major findings regarding the interactions of juror characteristics included the following:

1. Assailants of attractive women were give harsher sentences than assailants of unattractive women by jurors with the following characteristics: jurors who did not believe that women should be responsible for preventing rape; jurors 30

These results from a "mock" juror study are reinforced by a study of actual rape jury trials held in Indianapolis between July 1978 and September 1980.²⁰⁰ In general, the results confirmed that jurors' gender-role attitudes are more important than their personal characteristics in determining their perceptions of rape.²⁰¹ Jurors were less likely to believe a defendant guilty if the victim had engaged in sex outside marriage, drank or used drugs, or had known the defendant, however briefly, prior to the assault.²⁰² Similarly, when the defendant claimed that the victim had consented, jurors' verdicts were not significantly affected by evidence measures such as use of a weapon, victim injury, and eyewitness testimony.²⁰³ On the other hand, evidence of a victim's good moral character and behavior swayed jurors.²⁰⁴ Jurors were also likely to be influenced by racial stereotypes, believing that Black women were more likely to consent to sex or were more sexually experienced and hence harmed less by the assault.²⁰⁵ The results of the Indianapolis study establish that victims' nontraditional behavior is more important in predicting ver-

years of age or older; and jurors who believed that rape is caused by a desire for power over women.

2. Jurors were inclined to treat a defendant of the race opposite to themselves more severely than one of the same race.

3. Jurors who had personally known a woman who had been raped gave a longer sentence to the black defendant as well as the assailant of the white victim than did people without such knowledge.

4. Jurors who strongly supported severe punishment for rape sentenced defendants in both precipitous and nonprecipitous rape cases to longer sentences than those without such beliefs. Similarly, individuals supportive of severe punishment for rape were likely to discriminate in defendant sentencing by giving the black defendant a longer sentence than the white one.

5. Jurors who did not strongly believe that women precipitate rape gave a significantly longer sentence to an offender of a sexually experienced woman than jurors who strongly felt that women cause rape.

Id. at 142-43.

²⁰⁰ G. LAFREE, *supra* note 73, at 155, 226. See *supra* note 195 for a discussion of LaFree's methodology.

²⁰¹ G. LAFREE, *supra* note 73, at 213.

²⁰² *Id.* at 217. In post-trial interviews jurors commented about the impact of the victim's gender-role behavior on their evaluations of cases. *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 217-18.

²⁰⁵ *Id.* at 220.

dicts than actual evidence about the particular rape.²⁰⁶

The inescapable conclusion is that jurors know very little about rape, and what they believe about it is based upon acceptance of pernicious rape myths. As a result, it is extremely difficult to find jurors without victim-blaming attitudes toward rape.

D. Judicial Attitudes

Although most citizens seem to accept as inevitable the biases evidenced by police and defense attorneys toward rape victims, they believe that judges will balance any inequities.²⁰⁷ There is a common assumption that the judge is the objective source of authority and control in the courtroom and that his²⁰⁸ presence assures a balance.²⁰⁹ However, rather than representing a neutralizing force,²¹⁰ judges for the most part seem to adopt and enforce the most insulting myths about rape victims.²¹¹

When Carol Bohmer interviewed thirty-eight Philadelphia judges who had handled rape cases, she discovered that judicial attitudes toward rape victims reflected the same prejudices prevalent in society. For instance, some judges expressed the concern that rape is the easiest crime to allege and the hardest to disprove — echoes of Lord Hale.²¹² She found that judges tended to

²⁰⁶ *Id.* at 240.

²⁰⁷ Carol Bohmer, *Judicial Attitudes Toward Rape Victims*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER* 161, 161-62 (1977).

²⁰⁸ I use the male pronoun as a reflection of reality. According to the American Bar Association's Commission on Women in the Profession, as of 1988 women comprised only 7.4% of federal, district, circuit, and U.S. Supreme Court judges. Women represented 7.2% of state court judges, but only 6.8% of judges on state courts of last resort and 6.5% of intermediate appellate judges. Women are very much under-represented considering they comprise approximately 20% of the legal profession. Commission on Women in the Profession, American Bar Ass'n, *Women in Law* (1988).

²⁰⁹ Bohmer, *supra* note 207, at 161-62.

²¹⁰ As a feminist, I do not believe that anyone is "neutral"; we all have a perspective. However, I am using the term in the way it is generally understood in legal context: without an obvious bias.

²¹¹ See S. ESTRICH, *supra* note 58, at 56; Massaro, *supra* note 6, at 404-06.

²¹² Bohmer, *supra* note 207, at 163. This belief persists even in the face of statistics showing

that of the four violent crimes, rape has the *highest* rate of acquittal or dismissal and the *lowest* rate of conviction for the offense charged. Further, based upon recent crime statistics, an individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.

divide victims into three basic types: genuine, consensual, and vindictive.²¹³ When a judge had no trouble defining the situation as forcible rape, or “genuine,” he was generally sympathetic to the victim.²¹⁴

It was a different story for the other two categories. In many cases which technically may have been rape according to the law, judges classified the occurrence as consensual intercourse, inferring that the woman had “asked for it.” In response to a sample scenario in which a woman meets a man in a bar, agrees to let him drive her home, and in which the man then forces intercourse, the judges variously described it as “friendly rape,” “felonious galantry,” “assault with failure to please,” or “breach of contract.”²¹⁵

Judges invoked the third category when they saw the accusation of rape as marked by “female vindictiveness.” In these cases, the judges believed either that the event that occurred was totally consensual or that the alleged event did not in fact occur. Therefore, they evaluated these claims in terms of a woman’s desire to get even with a man.²¹⁶

H. FEILD & L. BIENEN, *supra* note 165, at 95. Diana Russell’s survey found only a 1% conviction rate. D. RUSSELL, *supra* note 21, at 102. She explained this appallingly low rate as follows:

It is as clear as it is tragic that rapes perpetrated by the rapists who are least difficult to apprehend and identify — those who are known to the victim — are the cases that are least likely to be taken seriously and prosecuted vigorously. The rapes committed by men who are most difficult to apprehend and identify — strangers — are the cases that are most likely to be taken seriously.

Id.

²¹³ Bohmer, *supra* note 207, at 164.

²¹⁴ *Id.*

²¹⁵ *Id.* Prostitutes frequently experience the censure of judges. In 1986 a superior court judge in Pasadena, California, dismissed charges against a man accused of raping and sodomizing a prostitute on the ground that “a prostitute could not be a victim of rape because her activities put her outside the protection of law.” *Victim of Alleged Rape May Have Fled Because of History As Prostitute*, L.A. Times, Nov. 17, 1990, at B3, col. 2, B8, col. 5.

²¹⁶ Bohmer, *supra* note 207, at 164-65. A bizarre twist on blaming the victim occurred when a Florida judge ignored state sentencing guidelines and ordered an admitted rapist set free with two years of probation. The judge, Kenneth Leffler, said he was familiar with the woman from a divorce case he presided over several years ago: “Anyone who could be so stupid to take up with this woman deserves some consideration,” he told a reporter. In open court, the judge called the woman “pitiful” and said it would be a

The Indianapolis study of actual rape trials echoed these results, indicating that judges hold stereotypical beliefs about rape victims.²¹⁷ In an interview, one male judge who presided over several of the rape trials in the study made the following comments:

The typical rape case involves a tremendous amount of asking for it. The average rape is a girl, well-endowed . . . went to a tavern, drank all night, expected a sexual encounter and got raped — he used more force than she expected. . . .

. . . .
I believe biologically it is wrong to entice a man knowing the situation you're creating and then saying "no." There is a button a man has that cannot be turned off and on like a light switch. And a man can go to prison for a very long time because of it.²¹⁸

Clearly, any attempt to correct the bias against victims of rape that exists in the criminal justice system must focus on judges as well as jurors.

E. Denial of a Fair Trial

It is apparent from the enormous amount of data collected by social scientists that pervasive juror and judicial beliefs in rape myths prejudice rape prosecutions in favor of defendants. Simply put, jurors and judges who believe rape myths are not impartial. There are two compelling reasons why the state should insure that any juror and judge bias, based upon attitudes formed from beliefs in rape myths, is eliminated: (1) such bias denies the state and rape victims a fair trial and (2) the sex discrimination inherent in such a bias undermines the integrity of the justice system.

While there is no explicit constitutional right of a *victim* to a fair trial, the Supreme Court has implied that the state does have such

"miscarriage of justice" to follow a plea agreement calling for the admitted rapist to serve 4-1/2 years in prison. Leffler suggested that the 40-year-old victim had a history of taking advantage of men; he wondered out loud why the rapist was attracted to the woman. *Judge Frees Rapist, Says Victim at Fault*, Chicago Tribune, Sept. 22, 1990, § 1, at 2, col. 3.

²¹⁷ G. LAFREE, *supra* note 73, at 95-99. A second aspect of LaFree's study was using official police, prosecution, and court records to trace 881 rape cases reported to Indianapolis police in the years 1970, 1973, and 1975. He also conducted dozens of interviews with the police, prosecutors, defense attorneys, and judges who processed the rape cases included in the study. *Id.* at 7.

²¹⁸ *Id.* at 95-96.

a right, at least in the context of entitlement to an unbiased jury.²¹⁹ In *Hayes v. Missouri*,²²⁰ the Court required impartial jurors in criminal cases, defining impartiality as “not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.”²²¹ This precedent has been used frequently to support the state’s right to a fair trial.²²² Even critics of the notion of the state’s right to a fair trial agree that the accused’s right²²³ is only to an impartial jury, and not to a jury which favors the accused over the prosecution.²²⁴ *Hayes* and its progeny confirm the state’s constitutional right to a fair trial in a rape case, free from any juror — or judge — bias resulting from beliefs in rape myths.

Moreover, rape victims are entitled to a fair trial as well. Rape is the only crime which involves a role reversal between the accused and the accuser — thereby placing the victim on trial.²²⁵ The female victim must prove her innocence, while the male defendant is treated as if he has been defamed.²²⁶ For example, during the 1984 media-hyped trial involving a New Bedford, Mas-

²¹⁹ *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). *But see* Susan Bandes, *Taking Some Rights Too Seriously: The State’s Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1024-25, 1047 (1987) (questioning constitutional right of state to fair trial that results in limitation on constitutional rights of accused).

²²⁰ 120 U.S. 68 (1887).

²²¹ *Id.* at 70.

²²² *See, e.g.*, *Witherspoon v. Illinois* 391 U.S. 510, 535, *reh’g denied*, 393 U.S. 898 (1968) (prosecution at a capital sentencing hearing may exclude for cause jurors who state that they could not under any circumstances impose death penalty); *Swain v. Alabama*, 380 U.S. 202, 220, *reh’g denied*, 381 U.S. 921 (1965).

²²³ U.S. CONST. amend. VI.

²²⁴ *See* Bandes, *supra* note 219, at 1024.

²²⁵ *See* Borgida & White, *supra* note 77, at 349; Hartwig & Sandler, *supra* note 70, at 11; Lynda Holmstrom & Ann Burgess, *The Victim and the Criminal Justice System*, 3 INT’L J. CRIMINOLOGY & PENOLOGY 101, 107 (1975) (“[I]t becomes clear that in people’s minds the victim is as much on trial as the defendant.”). Additional support for this proposition comes from Gary LaFree’s finding that defendants do not always testify and when they do their testimony tends to be shorter than that of the victim, thus reinforcing the impression that it is the victim who is really on trial. G. LAFREE, *supra* note 73, at 160.

²²⁶ *Cf.* G. LAFREE, *supra* note 73, at 160; Fischer, *supra* note 8, at 695. This is also consistent with the “just world” psychological response of jurors. *See supra* text accompanying notes 189-93.

sachusetts gang rape, at least one newspaper account acknowledged that:

[I]t was not clear who was on trial — the woman who claimed she was gang-raped in a New Bedford bar, or the six men charged with the crime.

During brutal cross-examination, defense attorneys attempted to portray the alleged victim as a welfare cheat, an unmarried mother who hardly stopped to put her two young children to bed before going out to drink, a sex-starved flirt who encouraged the men that night and who had cried rape just two years earlier.²²⁷

While undermining the credibility of the victim is a common tactic of defense lawyers in a variety of criminal cases, it is more prevalent in rape trials.²²⁸ In many rape prosecutions the victim, for all practical purposes, becomes a pseudo-defendant. Since a criminal defendant is entitled to an impartial jury,²²⁹ by extension, the pseudo-defendant in a rape trial — the victim — should be assured of jury impartiality as well. States should adopt rules for rape prosecutions designed to ensure fair rape trials, free from juror bias and prejudice resulting from beliefs in rape myths.

Juror bias not only denies the rape victim and the state a fair trial, it also harms society. Rape is a sex-based crime, the only crime in which men are the offenders and women the victims.²³⁰

²²⁷ Washington Post, Mar. 4, 1984, at A2, col. 1. The movie, *The Accused*, for which actress Jodie Foster received an Academy Award for Best Actress, was loosely based on this case.

²²⁸ *Id.* Actually, the vicious treatment of rape victims during trial has prompted many lawyers to refuse to defend accused rapists. An article in *The Independent* noted this phenomenon:

Lawyers who refuse to defend in rape cases — and a number who do not — say a woman who has been raped faces the prospect of a gruelling ordeal in court. All victims of violent crime suffer the trauma of re-living the attack and of confronting their assailants, and they all face the prospect of attacks on their credibility. But a rape complainant faces an inquisition on her morals and respectability. Her dress and general behavior may be used to undermine her integrity; the most intimate details of her private life — her sexual history, sexual fantasies and sexual preferences — may all be put on display. For these reasons, it is argued, the complainant stands trial along with the defendant in a way that no other victim does.

Law: An Unsuitable Job for a Women?, *The Independent*, Apr. 13, 1990, at 19 (LEXIS, NEXIS library, Papers file).

²²⁹ U.S. CONST. amend. VI.

²³⁰ G. LAFREE, *supra* note 73, at 13.

Hence, rape prosecutions inherently reflect the way society perceives women, men, and the proper role of each.²³¹ When the prosecution of rape incorporates rape myths, it promotes sex discrimination and undermines women's confidence in the legal system.

The current legal treatment of rape results in a conviction rate of 1 to 4 percent, lower than for any other violent crime.²³² This low conviction rate lends support to the belief that rape operates as a social control mechanism to keep women in a position of subordination.²³³ As long as rapists need not fear punishment, women will need to fear rape.²³⁴ This fear is not limited to women who have been victimized; the threat of rape is a central and significant concern for all women.²³⁵ It operates as a form of social control over women, limiting their ability to move about

²³¹ If, as the labeling and conflict criminology theorists propose, criminal laws are not objective and uniformly applied, but rather subjective and inconsistently applied to maintain the social power of dominant groups, the lack of rape convictions demonstrates the patriarchy's vise-like grip on the justice system. One of the earliest and most influential labeling theorists articulated his theory in HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963), a study of marijuana smokers. He challenged the positivist assumptions about crime, substituting instead a belief that the law is written and applied to maintain the social power of dominant groups. By the mid-1970s conflict theory evolved, stressing the need to study crime and official reactions to crime in the larger context of social class, economic systems, and power. LaFree identifies two propositions from labeling and conflict theory that have special relevance to the study of rape: "(1) Crime is not an objective property of certain behavior, but rather a definition constructed through social interaction. (2) The law is applied to control the behavior of individuals who threaten the power of dominant groups." G. LAFREE, *supra* note 73, at 12.

²³² See *supra* note 212. The LaFree study found that out of 881 cases reported to the police, 104 (11.8%) resulted in guilty pleas and verdicts and 42 (4.8%) resulted in a convicted offender being sent to prison. G. LAFREE, *supra* note 73, at 60.

²³³ See Weis & Borges, *supra* note 11, at 56.

²³⁴ *Id.* According to the Russell survey, almost 50% of all women will suffer a rape or attempted rape. See *supra* text accompanying note 33. Reported rapes doubled between 1960 and 1970 and doubled again between 1970 and 1980. *Rape: We're Still Not Handling This Crime Well*, *supra* note 57.

²³⁵ See MARGARET GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* (1989). These two researchers interviewed hundreds of women in Chicago, Philadelphia, and San Francisco to determine the level of women's fear of rape, how women coped with that fear, and how that fear affected their lives. *Id.* at xii.

freely.²³⁶ Put more bluntly, "rape is an aggressive act against women as woman."²³⁷

Women, more than one-half of the population, cannot believe in a legal system that operates to continue their historic subordination. Allowing the sex discrimination inherent in the rape myths to continue to flourish in rape prosecutions undermines public confidence in the fairness of the justice system.²³⁸ Just as the Supreme Court refused to permit race discrimination in the jury selection process in *Batson v. Kentucky*,²³⁹ courts should also recognize and reject the sex discrimination that results from juries biased by rape myths.²⁴⁰ Jury bias should be rejected not only for its inherent unfairness, but also for the harm it inflicts upon the community. It is therefore essential that we identify and adopt ways to correct meaningfully the juror and judge bias against rape victims.

²³⁶ *The Female Fear*, *supra* note 21.

²³⁷ Deena Metzger, *It Is Always the Woman Who Is Raped*, 133 AM. J. PSYCHIATRY 405 (1976). Dr. Metzger believes rape is a ritual of power. *Id.* She further states:

The rapist acts for the society, concertizing certain ideas through his behavior. He is often marginally integrated into the society, and rape is the way he affiliates himself, if not through the act, then through the attitudes. Through rape he asserts power and possession in a common violent and spontaneous action. By choosing to assert himself against woman and her body, he — like church, state, schools, advertisers, and the media — is simply asserting certain rights and prerogatives over woman, using her for his own purposes.

Id. at 406.

²³⁸ According to Feild and Bienen, there is a widely held opinion that victims are not afforded equal protection in the courts and that rape trial verdicts are frequently influenced by factors other than the evidence. H. FEILD & L. BIENEN, *supra* note 165, at 141.

²³⁹ 476 U.S. 79 (1986).

²⁴⁰ *Id.* at 87. Another problem rests with the restrictive legal definition of "bias." When bias is limited to a juror's special interest in the matter, or familial relatedness, other sources of bias are excluded. The behavioral science view is much more appropriate: bias is an extreme partiality or lack of fairness. See D. VINSON, *supra* note 179, § 4-3, at 75. The bias that is manifest in the use of stereotyping based on acceptance of rape myths, the making of extreme attributions, and the tendency to exhibit a marked blindness toward incontrovertible facts, must be addressed in rape prosecutions. For a full discussion of the concept of juror bias, see *id.* §§ 4-1 to 4-3, at 71-75.

III. PROPOSALS TO ACHIEVE FAIR TRIALS IN RAPE PROSECUTIONS

It cannot be overstated that we live in a society which, to a high degree, believes many, if not most, of the myths about rape.²⁴¹ As a result of this societal prejudice, it is difficult to find jurors or judges without a victim-blaming attitude toward rape.²⁴² There is really only one viable long-range solution to this problem: mandatory education about the reality of rape. This is not a novel idea. Many feminists have suggested that the education of the general public through rape awareness programs may reveal and destroy the myths about rape, and there is some empirical data to suggest this would be effective.²⁴³ Because attitudes about rape begin forming at a very young age,²⁴⁴ state legislatures should enact laws requiring all primary and secondary schools to create courses which tell the truth about rape and its effects.

A. Reforms in Progress

Recognizing the misogyny and sexual stereotypes inherent in the historical treatment of rape, state legislatures have already begun to enact reforms. These reforms include rape shield statutes, recognition of marital rape, and admission of testimony about Rape Trauma Syndrome.²⁴⁵

So-called "rape shield" laws attempt to address the usual defense tactic of attacking the victim's character by forcing her to testify about prior sexual behavior. The arguments that support rape shield statutes are based on an assumption that jurors regard prior sexual history evidence as unduly probative of a victim's credibility, moral character, and consent, and that such perceptions have a prejudicial impact on the jury decision-making pro-

²⁴¹ See *supra* notes 56-68 and accompanying text.

²⁴² See H. FEILD & L. BIENEN, *supra* note 165, at 175; Massaro, *supra* note 6, at 406-07.

²⁴³ See H. FEILD & L. BIENEN, *supra* note 165, at 87. Feild and Bienen found a correlation between rape knowledge and people's sensitivity to rape. They concluded that the "correlations do *not* necessarily mean that by providing people with additional knowledge about rape, they will change their attitudes toward the offense . . . however, an experimental public education program aimed toward changing people's attitudes concerning rape may be worthwhile." *Id.*

²⁴⁴ See *supra* text accompanying notes 34-38, 103-06.

²⁴⁵ This Article is not intended to be a comprehensive listing of all such legislative reforms. However, a sampling of these reforms indicates a legislative awareness of the need to correct the historic treatment of rape.

cess.²⁴⁶ The rape shield statutes also address one of the primary reasons that rape victims do not press charges: the victim's desire to avoid the ordeal of having her prior sexual activities examined in detail and in public through courtroom testimony.²⁴⁷ When President Carter signed legislation creating the federal rape shield statute,²⁴⁸ he said it was "designed to end the public degradation of rape victims and, by protecting victims from humiliation, to encourage the reporting of rape."²⁴⁹

Additionally, most states now have rejected the marital rape exemption, the common law rule that a husband is not criminally liable for raping his wife.²⁵⁰ This anachronistic rule was based

²⁴⁶ See, e.g., Borgida & White, *supra* note 77, at 340. Obviously, this juror attitude is directly related to the myth that only virgins can be raped, a variation on the classic myth that rape victims have "bad reputations." One might question why, if a woman's sexual behavior is believed to be directly related to her credibility as a witness, prior sexual history testimony is not admissible in every trial in which a woman serves as a witness. And why is the defendant's prior sexual history not considered probative of his credibility, and hence admissible?

²⁴⁷ Borgida & White, *supra* note 77, at 339-40.

²⁴⁸ FED. R. EVID. 412.

²⁴⁹ Borgida & White, *supra* note 77, at 340. Unfortunately, rape shield statutes, like other rape reforms, are only as good as the judges ruling on them. For example, Justice Souter, while sitting on the New Hampshire Supreme Court, had an opportunity to interpret New Hampshire's rape shield statute in *New Hampshire v. Colbath*, 130 N.H. 316, 540 A.2d 1212 (1988). Reversing the rape conviction, Justice Souter gutted much of the law by finding it applicable only to prior *private* sexual activity. He offered the following justification:

[D]escribing a complainant's open, sexually suggestive conduct in the presence of patrons of a public bar obviously has far less potential for damaging the sensibilities than revealing what the same person may have done in the company of another behind a closed door. On the other hand, evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners.

130 N.H. at 324, 540 A.2d at 1216. Apparently Justice Souter believes the myth that prostitutes cannot be raped. Thus, depending on the specific statute and judge ruling on it, a rape victim may or may not be "shielded" from cross-examination about her sexual history.

²⁵⁰ Most rape statutes originally stated that a man could only be guilty of raping someone "other than his wife." The origin of the marital rape exemption once again can be traced to the opinions of Matthew Hale, Chief Justice in England in the 17th century. In *Pleas of the Crown*, Lord Hale

upon the idea of wife as property. As of July 1989, husbands can be prosecuted for raping their wives in forty-two states, the District of Columbia, and on all federal land.²⁵¹

Finally, a growing number of courts and legislatures have recognized that not all victims react to rape in ways that a jury biased with firmly entrenched beliefs about rape can comprehend. Acknowledging that actual victim responses contradict many of the commonly held misconceptions about rape, these jurisdictions have allowed introduction of expert testimony about Rape Trauma Syndrome (RTS).²⁵² This testimony explains a victim's

stated: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband which she cannot retract." 1 M. HALE, *supra* note 7, at *628. See also DIANA E.H. RUSSELL, RAPE IN MARRIAGE 17 (1990).

²⁵¹ D. RUSSELL, *supra* note 250, at 21. See generally DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985). For additional information, contact Laura X. at the National Clearinghouse on Marital and Date Rape, Berkeley, California.

²⁵² See Fischer, *supra* note 8, at 691-94. The term Rape Trauma Syndrome (RTS) derives from a study of 92 adult, heterogeneous female rape victims conducted by Ann Wolbert Burgess and Lynda Lytle Holmstrom. Burgess & Holmstrom, *supra* note 76, at 981. Burgess and Holmstrom found that the rape victims they studied had a two-stage reaction to the sexual assault, with behavioral, somatic, and psychological responses at each stage. According to Burgess and Holmstrom, RTS is "the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation." *Id.* at 982. In the acute phase, the women experienced an extremely wide range of emotions, such as fear, anger, and anxiety, which they either expressed (through such behavior as crying, sobbing, smiling, restlessness, and tenseness) or controlled (through masking or hiding feelings behind a calm, composed, or subdued affect). *Id.* During the weeks following the incident, victims commonly expressed a wide range of emotions: fear, humiliation, embarrassment, anger, revenge, and self-blame. However, fear of physical violence and death was the primary feeling described. Burgess and Holmstrom also reported varying degrees of disorganization in the victims' lifestyles, including an increase in motor activity, dramatic changes in sleeping patterns, and phobic reactions. *Id.* at 982-85. The authors warned that since a significant proportion of women still do not report a rape, clinicians should be alert to those women who experience the "silent reaction" to rape. "This reaction occurs in the victim who has not told anyone of the rape, who has not settled her feelings and reactions on the issue, and who is carrying a tremendous psychological burden." *Id.* at 985.

According to Fischer, three state supreme courts have held that expert

post-rape behavior, such as delay in reporting an attack, that jurors might find inconsistent with a claim of rape as a result of their beliefs in rape myths.²⁵³

While these reforms in the legal treatment of rape are important, they do not fully address the effect of rape myths on rape trials. Accordingly, I recommend two additional, specific steps that the legal system can take to remedy discrimination against women in rape prosecutions: (1) abrogate the prompt complaint doctrine and jury instructions incorporating the doctrine; and (2) allow "de-programming" of jurors, judges, and others involved in the criminal justice system through the use of expert testimony. Both of these proposals must be developed within the context of a complete and continuous re-evaluation of every legal aspect of

testimony on RTS is always inadmissible; ten state supreme courts allow RTS expert testimony for at least some limited purpose; four state supreme courts have allow RTS expert testimony when the victim is a child; and other courts have allowed expert testimony similar to RTS but do not label it as such. Fischer, *supra* note 8, at 692 n.15. According to Mary L. Boland, a staff attorney for the Illinois Coalition Against Sexual Assault, more than 35 states have considered the issue of expert testimony in sexual assault/abuse cases. MARY BOLAND, *PSYCHOLOGICAL EVIDENCE: CRIMINAL SEXUAL ASSAULT/ABUSE 4* (1990).

In effect, expert testimony on RTS is testimony which supports the victim's story, thus reinforcing her credibility. Ann R. Bristow, *State v. Marks: An Analysis of Expert Testimony on Rape Trauma Syndrome*, 9 *VICTIMOLOGY: INT'L J.* 273, 274 (1984). In her article, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, Toni Massaro thoroughly addresses the arguments, both pro and con, concerning admissibility of expert psychological testimony about RTS. See Massaro, *supra* note 6, at 432-69. See also Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 *AM. U.L. REV.* 417 (1984) [hereinafter Wilk] (authored by Pamela A. Wilk).

²⁵³ At least eight states have allowed expert testimony about RTS to explain a victim's delay in reporting an incident. *Testimony Allowed Over Rape Trauma*, *New York Law Journal*, Feb. 14, 1990, at 1, col. 3, 4, col. 5. Some states, such as Illinois, now have statutes permitting expert testimony about post-traumatic stress syndrome. *ILL. ANN. REV. STAT.*, ch. 38, para. 115-117.2 (1990). For a discussion of how the courts have reacted to the move to introduce expert testimony concerning RTS, see Massaro, *supra* note 6, at 436-53. For an insider's view of a prosecutor's first attempts to introduce such expert testimony, see JUDITH ROWLAND, *THE ULTIMATE VIOLATION* (1985). Unfortunately, defense attorneys are beginning to appropriate RTS expert testimony to show that the victim's behavior is inconsistent with that of a rape victim suffering from RTS. See *Henson v. State*, 535 N.E.2d 1189, 1192-93 (Ind. 1989).

rape.²⁵⁴

B. Abrogation of the Prompt Complaint Doctrine

Since the very foundation of the prompt complaint doctrine is based on false rape myths,²⁵⁵ courts should no longer utilize it in any fashion. Canada already has abrogated rules relating to evidence of recent complaint in sexual assault cases.²⁵⁶ Every state should follow Canada's lead. In addition, to debunk the myths upon which the prompt complaint doctrine rests, the jury should be charged with an affirmative instruction to the effect that the absence of a prompt complaint does not suggest that a rape did not occur.²⁵⁷

C. "De-Programming" Factfinders Through Expert Testimony About Rape Myths

To correct factfinder bias based on prejudicial beliefs in rape

²⁵⁴ It is beyond the scope of this Article to discuss the many other legal reforms which would contribute to the elimination of discrimination in the prosecution of rape, such as jury instructions and other evidentiary rules. For instance, states should consider evidentiary rules that exclude irrelevant yet highly prejudicial evidence, such as what the victim was wearing. After a jury in Florida acquitted a rapist because the victim was wearing a skimpy skirt and no underwear, the Florida Legislature expanded its rape shield statute to exclude "evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery." FLA. STAT. ANN. § 794.022(3) (West Supp. 1991). Previous rape evidence statutes have been criticized for their limited practical applicability because: (1) the statutes may only exclude evidence of one particular type introduced for one particular purpose; (2) the statutes may be so broadly drafted as to be vulnerable to viable constitutional challenge; (3) the statutes may be ineffective because they cannot address and change the irrational sexist attitudes held by judges and juries which are prevalent in society; (4) lawyers and judges may be unaware of their existence; or (5) the statutes are directed at a disposition by trial when the vast majority of criminal cases are decided without a trial by plea agreement. H. FEILD & L. BIENEN, *supra* note 165, at 179-80.

²⁵⁵ See DuBois, *supra* note 7, at 1099; *supra* text accompanying notes 139-52.

²⁵⁶ See *supra* note 153.

²⁵⁷ Such an instruction might read: "The fact that the complaining witness did not report the alleged attack promptly does not render her account of the occurrence any less credible." This is only one of many jury instructions that would assist in demythologizing rape. While it is beyond the scope of this Article to propose comprehensive new jury instructions, I recommend that other jury instructions addressing rape myths be created.

myths, courts should allow expansion of the concept of expert RTS testimony and permit introduction of expert testimony concerning the falsity of rape myths. Research studies have shown a similar type of “de-programming” to be effective in reducing beliefs in rape myths.

Researchers in many of the experiments which exposed subjects to pornographic rape portrayals made a surprising discovery — one with transformative potential. The hypothesis of these experiments, which proved to be true, was that rape myth acceptance and its consequent antisocial effects resulted from exposure to pornography. The researchers naturally had ethical concerns that such beliefs would extend beyond the research setting.²⁵⁸ Therefore, they devised a “debriefing”²⁵⁹ communication to follow the experiment: subjects were provided a strong statement concerning the absolute falsehood of rape myths and affirming the true horror of rape.²⁶⁰

Data indicated that these debriefings were effective in counteracting the adverse effects of exposure to sexually violent depictions. Subjects who had been debriefed showed a lowered acceptance of rape myths in assessments conducted days or weeks following exposure.²⁶¹ Thus, researchers believe it is possible to

²⁵⁸ See Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 420; Neil M. Malamuth & James V.P. Check, *Debriefing Effectiveness Following Exposure to Pornographic Rape Depictions*, 20 J. SEX RES. 1 (1984) [hereafter Malamuth & Check, *Debriefing*]; Malamuth & Check, *Mass Media Exposure*, *supra* note 81; Malamuth & Check, *Penile Tumescence*, *supra* note 54. As Neil Malamuth stated in a survey article:

It is ethically impossible to test in a completely satisfactory way the proposition that certain thought patterns contribute causally to the occurrence of rape and other forms of serious sexual aggression. To do so would require some experimental manipulation that would intentionally increase such thought patterns, particularly in those most likely to commit sexual aggression.

Malamuth, *Sexually Violent Media*, *supra* note 54, at 185.

²⁵⁹ While the behavioral scientists utilize the term “debriefing,” I have modified their language to a word more commonly understood — “de-programming” — when it is not being used in the scientific context.

²⁶⁰ Malamuth & Check, *Penile Tumescence*, *supra* note 54, at 531 n.3. Such debriefings are now typically required by ethics committees granting permission to conduct sexual assault research. Malamuth, *Sexually Violent Media*, *supra* note 54, at 186.

²⁶¹ Malamuth, *Sexually Violent Media*, *supra* note 54, at 186; *see also* Malamuth & Check, *Mass Media Exposure*, *supra* note 81, at 445 (“[E]xposure

reduce acceptance of rape myths by providing an appropriate debriefing.²⁶²

In order to study this effect, Canadian researchers Neil Malamuth and James Check devised an experiment specifically to gauge the success of such debriefings.²⁶³ After dividing 77 male and 73 female undergraduate subjects into two groups, they exposed one group to sexually explicit stories depicting a rape and the other to sexually explicit stories depicting mutually consenting intercourse. Those students exposed to the rape version were then provided with the following statement:

While the following is probably obvious to all subjects, we would like to emphasize that the stories you read were *COMPLETE FANTASY*. Some of you read a story which depicted a rape. These stories were constructed specifically for this experiment. In reality, as you hopefully are aware, rape is a terrible crime, and in Canada is punishable by many years in prison. As well, rape victims suffer severe psychological damage as well as the more obvious physical effects of the assault. Unfortunately, many people still believe a number of falsehoods or myths about rape. For example, one totally unfounded myth is that if a woman does not immediately report a rape, or hesitates to report it, then the act is somehow not considered a real rape. A second falsehood is that if a woman does anything which puts her at a greater risk or makes her more vulnerable to being victimized (e.g., going to a man's apartment, wearing enticing clothing, etc.) she somehow brings the rape upon herself. These are in fact just myths and are totally unfounded. Hopefully, you will leave this experiment with a more realistic and accurate view of rape.²⁶⁴

The communication was designed to counteract the increased acceptance of rape myths produced by exposure to the pornographic portrayal of rape. About ten days later the subjects were given a "public survey" ostensibly conducted by a local committee of citizens to measure reactions to newspaper articles, including one about rape. The subjects who had read a rape depiction followed by the rape debriefing were less inclined to see women wanting to be raped and precipitating rape than the subjects who

to mass media violent sexuality followed by a debriefing concerning the falseness of such stimuli has beneficial long-term effects in reducing subjects' acceptance of rape myths.'").

²⁶² Check & Malamuth, *Feminist Hypotheses*, *supra* note 23, at 420.

²⁶³ Malamuth & Check, *Debriefing*, *supra* note 258.

²⁶⁴ *Id.* at 5.

originally had read the consensual intercourse depiction.²⁶⁵

From these results Neil Malamuth and James Check concluded that even after exposure to a rape depiction, subsequent exposure to the rape debriefing was indeed effective in reducing acceptance of rape myths.²⁶⁶ This conclusion has been confirmed by independent experiments also finding that subjects presented with violent pornography followed by a debriefing accepted rape myths to a lesser degree than control subjects.²⁶⁷

Given the extensive data showing wide acceptance of rape myths, and the important links between such attitudes and socially significant behavior, there is considerable social value in the possibility of reducing beliefs in rape myths. The difficulty is in ascertaining a legal device for doing so that is both appropriate and acceptable to the courts.

Clearly, rather than developing an altogether new instrument,²⁶⁸ it would be preferable to adapt an already recognized tool. Then, any arguments against the proposed de-programming would have to be based on substantive considerations, which I believe have been adequately addressed by the data presented in this Article. Since several jurisdictions have deemed admissible expert testimony concerning Rape Trauma Syndrome,²⁶⁹ a logical extension is to allow admission of expert testimony about the falsity of rape myths.

This is particularly apt since many of the judges admitting RTS expert testimony do so on the basis that it can assist jurors by dispelling common misperceptions about rape. For instance, a New York appellate judge, who held RTS testimony admissible, stated that “[b]ecause cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970s, we believe that patterns of response among rape victims are not

²⁶⁵ *Id.* at 7-8.

²⁶⁶ *Id.* at 11.

²⁶⁷ See Donnerstein & Berkowitz, *supra* note 80, at 721-23; sources cited *supra* note 258.

²⁶⁸ For instance, a possibility would be to require all potential jurors to read an information sheet similar to the one utilized by Malamuth and Check, and provided *supra* in text accompanying note 264. However, defendants might raise constitutional objections to their lack of opportunity to cross-examine.

²⁶⁹ See *supra* text accompanying notes 252-53.

within the ordinary understanding of the lay juror.”²⁷⁰ Another court considering the admissibility of RTS expert testimony acknowledged its particular usefulness in “disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.”²⁷¹ Even a court that held testimony about the syndrome itself inadmissible, allowed “closely related expert testimony aimed at eliminating misconceptions.”²⁷² In other words, expert testimony can assist the trier of fact to understand the evidence without the distortion and prejudice created by beliefs in rape myths.²⁷³

Some courts have already acknowledged the appropriateness of allowing expert testimony to educate a jury about a specific myth invoked by the defense in a rape prosecution, provided the expert testimony is not used as evidence that the rape actually occurred.²⁷⁴ Thus, there is some precedent to admit expert testimony about a rape myth when the defense attacks the related aspect of the victim’s behavior. To date, this has been limited to explaining that the victim’s behavior is not “unusual” or “inconsistent” with someone who has been raped.²⁷⁵

I propose that expert testimony which exposes rape myths be utilized to explain other aspects of rape to the factfinders as well. For instance, the expert might address the myth of victim precipitation to dispel biased juror attitudes based upon a belief in the

²⁷⁰ *People v. Taylor*, 75 N.Y.2d 277, 289, 552 N.E.2d 131, 136 (1990).

²⁷¹ *People v. Bledsoe*, 36 Cal. 3d 236, 247-48, 681 P.2d 291, 298, 203 Cal. Rptr. 450, 457-58 (1984).

²⁷² *People v. Bergschneider*, 211 Cal. App. 3d 144, 159, 259 Cal. Rptr. 219, 227 (1989). See also Note, *Rape Trauma Syndrome in the Rape Trial*, 8 CRIM. JUST. J. 427 (1986) (authored by Sue Schnepf).

²⁷³ This is the general standard (“assist the trier of fact to understand the evidence”) articulated in the Federal Rules of Evidence. FED. R. EVID. 702. The same arguments made in support of the admissibility of expert testimony about RTS are equally applicable in support of expert testimony about the falsity of rape myths. See Fischer, *supra* note 8, at 707-13; Massaro, *supra* note 6, at 432-53; Wilk, *supra* note 252, at 429-56.

²⁷⁴ *Bergschneider*, 211 Cal. App. 3d at 227, 259 Cal. Rptr. at 159; *People v. Hampton*, 746 P.2d 947, 952 (Colo. 1987) (expert testimony properly admitted only after the defense made issue of victim’s delay in reporting rape); *State v. Ciskie*, 110 Wash. 2d 263, 278-79, 751 P.2d 1165, 1173 (1988) (expert testimony about battered woman’s syndrome allowed only to rebut prompt complaint myth invoked by defense). Karla Fischer refers to this as the “misconception theory.” Fischer, *supra* note 8, at 716.

²⁷⁵ See generally Fischer, *supra* note 8.

myth that women are responsible for their own rapes. The expert could educate the factfinders about the empirical data to the contrary. In general, the expert should be allowed to testify about any rape myth implicated in the particular case.

CONCLUSION

Rape is a form of social control of women. Even though there have been substantial reforms in rape laws over the past decade, there remains a basic impediment to the successful prosecution of rapists — juror and judicial beliefs in rape myths. In order for the legal system to be just, the sex discrimination inherent in this bias must be eliminated. I suggest two specific legal reforms: (1) abrogation of the prompt complaint doctrine and (2) “de-programming” jurors and judges through expert testimony about the falsity and misogyny of rape myths. These two strategies should be developed within the context of a complete and continuous re-evaluation of every legal aspect of rape to assure that none is based upon a myth or operates to further subordinate women.

