

## Rape Victims' Access to Justice: Understanding and Combatting Pervasive Rape Myths

From biblical times, the justice system separated victims of rape into two categories: those who were rapeable and those who were not. Although much has changed, this history continues to inform public perceptions of rape and rape victims—including the perceptions of police, prosecutors, judges, jurors, and even survivors—and provides at least a partial explanation for the continuing prevalence of many rape myths. The pervasiveness of rape myths impacts every stage of our justice process, influencing—for example—whether the victim will choose to report the crime, whether law enforcement will take the report seriously, whether the judge will admit evidence regarding the victim's sexual history, and whether the jury will presume consent.

This *Bulletin* provides a short history of the treatment of victims in rape cases to elucidate how the historical underpinnings of rape law continue to inform public perceptions. It then overviews a number of pervasive rape myths and identifies how these myths affect a victim's ability to access justice. Finally, this *Bulletin* provides practical tips regarding how to use the information provided to combat rape myths and bolster legal protections for victims.<sup>1</sup>

### I. Historical Treatment of Rape Victims

In the Bible, rape was a property crime, which could be committed only against a virgin.<sup>2</sup> The rape of non-virgins was not proscribed.<sup>3</sup> Virginity remained a requirement of the legal definition of rape into twelfth-century England.<sup>4</sup> Soon thereafter, it was recognized that a non-virgin could be raped, although the punishment for this crime was not as severe as that for the rape of a virgin.<sup>5</sup>

As with much of England's common law, England's laws with regard to rape were incorporated into the colonial and then state law of the United States.<sup>6</sup> Early American case law reveals that a woman's character for chastity was seen as key evidence both as to whether the victim consented to a sexual encounter,<sup>7</sup> and as to whether the victim was credible.<sup>8</sup> Some courts did find that evidence as to the victim's character for chastity was not necessary, but only when the victim showed other signs of credibility or there was corroboration.<sup>9</sup> These signs—now part of a larger collection of misperceptions about rape commonly referred to as "rape myths"—also have roots in English common law<sup>10</sup> and included that the victim

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“hue and cry” or otherwise show signs of a struggle<sup>11</sup> and make a “prompt complaint.”<sup>12</sup>

## II. Twentieth-Century Reform

Recognizing the harm that the system was inflicting on victims<sup>13</sup> and the general failure of the system to successfully prosecute rapists,<sup>14</sup> activists worked to pass legislation to reform rape law.<sup>15</sup> Perhaps the best known of such reforms is the legislation that became known as “rape shield.” Rape shield provisions are aimed at curtailing the use of evidence of the victim’s sexual history, subject to certain statutorily-created exceptions.<sup>16</sup> Other critical reforms included: replacing the single crime of rape with a series of offenses graded by seriousness; expanding the definition of rape, such as by making rape gender-neutral and including various conduct as sexual assault; changing the consent standard by modifying or eliminating the requirement that the victim resist her attacker; and eliminating the corroboration requirement.<sup>17</sup>

## III. The Continued Pervasiveness of Rape Myths

Despite the passage of rape reforms, evidence reveals that public perception about who is “rapeable” has remained relatively static, with concepts of victim-blaming remaining in the forefront of the public’s (and, by extension, law enforcement’s, prospective jurors’, judges’, and even victims’) minds.<sup>18</sup> For example, although character for chastity as an explicit indicator of credibility fell into disfavor,<sup>19</sup> character for chastity as explicitly tending to disprove consent continued to be generally accepted through the 1960s, both in law<sup>20</sup> and in public perception. And although there is no longer an explicit chastity requirement, the victim’s reputation and sexual history, particularly with the defendant,

continues to be viewed as evidence that the victim is more blameworthy or less likely to have been raped.<sup>21</sup> Similarly, other factors that are perceived as correlating to a victim’s sexuality, such as the victim’s use of alcohol<sup>22</sup> and the victim’s dress,<sup>23</sup> are seen as external indicators that the victim “wanted” or “asked for” the sexual contact, and therefore is not credible in her assertion of rape.<sup>24</sup> Additionally, the centuries-old rape myths that the victim should make a prompt complaint<sup>25</sup> and hue and cry,<sup>26</sup> though generally no longer codified,<sup>27</sup> remain prevalent in the public’s mind and directly impact the investigation, prosecution, and outcome of rape cases.<sup>28</sup>

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The continued pervasiveness of these rape myths has been noted in multiple studies. For instance, in a 2012 study of college students, researchers found that at

least 20 percent agreed or strongly agreed with statements such as “a woman who is raped while drunk is at least somewhat responsible”; “rape accusations are a way of getting back at men”; and “a woman who dresses in skimpy clothes shouldn’t be surprised if a man tries to force her to have sex.”<sup>29</sup> In another study, 34 percent of respondents agreed that a woman who behaved flirtatiously was partially responsible for the subsequent rape, and 26 percent reported that they would hold a woman who wore sexy or revealing clothing at least partially responsible.<sup>30</sup> In other words, the insidious belief that those perceived as unchaste are “unrapeable” remains.<sup>31</sup>

## IV. The Implications of Rape Myths for Victims and Their Rights

Studies have also demonstrated that rape myths have many implications for victims and the adjudication of rape cases—including whether such crimes are reported, charged, or

successfully prosecuted.

With respect to victims' rights, the continuing weight of rape myths has several implications. First, and most fundamentally, the victim's ability to access justice is undermined. "Access to justice" is about each individual's access to courts,<sup>32</sup> as well as the availability of remedies for violations of rights. Studies have revealed that rape myths impact reporting, documenting that survivors are less likely to report a rape if it does not meet characteristics of the "real rape" paradigm, such as the use of a weapon, victim injury, and lack of prior relationship.<sup>33</sup> This, in part, may be due to the survivors' views about whether what happened to them was "real rape" and their fear that police will not perceive the assault as a rape.<sup>34</sup> Their fear may be founded, as research reveals that police officers are generally less likely to recommend charging rapists when the factual scenario deviates from that of the "real rape" paradigm.<sup>35</sup> Additionally, prosecutors are less likely to prosecute when victims do not meet the standard of the "ideal" victim.<sup>36</sup> When survivors choose not to report and when system actors are unwilling to pursue charges because of the impact of rape myths, victims' ability to access available legal protections is diminished.

Additionally, the victims' rights to be treated with fairness, dignity, and respect<sup>37</sup> may be violated by the continued acceptance of rape myths. For example, if victims choose to report, they may feel blamed or be made to feel somehow responsible for the attack by police or prosecutors who are expecting facts that conform to the "real rape" paradigm or present a "perfect" rape victim.<sup>38</sup> Indeed, one study found that 87 percent of victims experienced some degree of secondary victimization after being interviewed

by police.<sup>39</sup> Examples of victim-blaming lines of questioning that directly incorporate and reflect rape myths include asking what the victim wore prior to the assault and whether the victim had an orgasm during the rape.<sup>40</sup>

In the rare instance that a rape case makes it to trial, the introduction of a victim's sexual history—either through the misapplication of rape shield or through the workings of one of the exceptions to the rule—can directly implicate the victim's rights to privacy and protection.<sup>41</sup> The admission of legally irrelevant information regarding the victim's alcohol consumption or attire can also undermine the victim's privacy and fairness rights. And the misuse of that information by juries and judges can again implicate these same rights.<sup>42</sup>

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It is clear that the pervasiveness and insidiousness of rape myths continue to impact victims and their ability to access justice. For this reason, those who work with victims must work to expose and undermine these myths if our criminal justice system is to be capable of delivering justice.

## V. Combatting Rape Myths: What Can You Do?

Because rape myths are deeply ingrained in our culture, many people may not be conscious of the fact that they hold beliefs about rape that are unfounded in fact. Accordingly, the first step in combating rape myths is to build awareness and educate about rape and trauma. Providing such education through training has been shown to have positive results within the criminal justice system. For instance, studies of police officers have shown that, with training, police can learn to interact differently with victims so as to avoid legally irrelevant and harmful lines of questioning.<sup>43</sup> Also, letting attorneys, advocates, law enforcement, and the general public know

that *all* persons can be raped will help erode misperceptions about rape and expose and disprove the assumptions that underlay all rape myths.

Another means of educating is through advocacy within the legal system. Prosecutors, victims' attorneys, and advocates should fight hard for legal protections for rape victims. Some means of doing this are by filing a motion to protect victims' rights under federal or state rape shield statutes; moving to enforce the victims' rights to be treated with dignity, fairness, and respect; and working to ensure that the rules of evidence operate to exclude irrelevant and prejudicial information about victims.<sup>44</sup> The victim's right to appeal adverse decisions must also be preserved, as court decisions resulting from such appeals may create legal precedent debunking rape myths and help to expose the erroneous and harmful nature of these myths.

Finally, expert witnesses should be used at trial to debunk some of the more common rape myths. Because a large percentage of the public falls prey to rape myths, presenting jurors and judges with concrete evidence of the falsity of rape myths can help educate system participants and lead to a just result at trial.<sup>45</sup>

Understanding the historical basis of rape myths, their continued presence, and their impact on survivors and the administration of justice are the first steps toward changing how our society defines and responds to rape. Through education and legal advocacy, the fallacy of rape myths can be exposed, enabling more victims to access justice.

[L]etting attorneys, advocates, law enforcement, and the general public know that all persons can be raped will help erode misperceptions about rape and expose and disprove the assumptions that underlay all rape myths.

<sup>1</sup> According to studies by the U.S. Department of Justice, a large majority of sexual assault victims are female, and a large majority of perpetrators are male. See Jennifer L. Truman, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Crime Victimization Survey: Criminal Victimization Survey, 2010*, 9 (2011), available at <http://www.bjs.gov/content/pub/pdf/cv10.pdf>; Shan-nan Catalano, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Crime Victimization Survey: Criminal Victimization Survey, 2003*, 7-9 (2004), available at <http://www.bjs.gov/content/pub/pdf/cv03.pdf>; Lawrence A. Greenfield, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *An Analysis of Data on Rape and Sexual Assault: Sex Offenses and Offenders*, 3 (1997), available at <http://www.bjs.gov/content/pub/pdf/soo.pdf>. For this reason, and

for ease of reference, feminine pronouns are used in this *Bulletin* when referring to victims of sexual violence and masculine pronouns are used when referring to perpetrators of violence. This should not detract from the understanding that women perpetrate sexual violence and men are victimized by it, and that all victims deserve access to justice and to the services they need.

<sup>2</sup> Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Law*, 70 *Geo. Wash. L. Rev.*

51, 61 n.41 (2002) [hereinafter Anderson, *Chastity Requirement*] ("The centerpiece of rape law . . . was the female's virginity, which was property stolen from her prospective husband when she was betrothed, and which was property stolen from her father when she was un-betrothed."); Lisa Dawgert Waggoner, *New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption*, 22 *N.M. L. Rev.* 551, 553 (1992) ("Rape originated not as a crime against the person, but as a property crime . . . . The early purpose of rape laws was to protect men's property interest in women."); *People v. Liberta*, 474 N.E.2d 567, 576 (N.Y. 1984) (stating that the purpose of proscriptions against rape was to protect

the chastity of women and their property value to their husbands and fathers). The punishment meted out upon the offender varied based upon whether the virgin-victim was betrothed. If the virgin-victim was to be married, the offender was put to death; if the virgin-victim was not betrothed, then the rapist was required to pay the bridal price to the victim's father and marry her. Anderson, *Chastity Requirement*, at 43 n.41.

<sup>3</sup> Anderson, *Chastity Requirement*, *supra* note 2, at 61. See also *id.* at 62 (discussing the Mishnah, a book of legal rules compiled by Jewish sages in second-century Roman Palestine, which indicated that rape was a crime only when the victim was a virgin).

<sup>4</sup> Anderson, *Chastity Requirement*, *supra* note 2, at 62 (citing Year Books of Edward II: The Eyre of London (14 Edward II A.D. 1321) 87 (Helen M. Cam ed., 1968)) (noting that in *Seler v. Limoges*, the court held that the defendant could not be convicted of the rape of an eleven-year-old girl who was not a virgin “above all because she could not twice be deprived of one and the same maidenhead”).

<sup>5</sup> The rape of a virgin was a felony punishable by the removal of the offender's eyes and testicles; the rape of a nonvirgin required grave corporeal punishment, but not the loss of life or members. *Id.* at 63. Applied, this meant that in the case of gang rape, punishment of the first man who raped a virgin was greater than that given to subsequent rapists. *Id.* at 64.

<sup>6</sup> *Id.* at 64.

<sup>7</sup> See, e.g., *People v. Benson*, 6 Cal. 221, 223 (1856) (“[P]revious intercourse with other persons may be shown, as tending to disprove the allegation of force, and such evidence would seem to be highly proper, as it must be obvious to all that there would be less probability of resistance upon the part of one already debauched in mind and body, than there would be in the case of a pure and chaste female.”); *Rice v. State*, 17 So. 286, 287 (Fla. 1895) (“If she was a woman of general bad reputation for chastity, or had been guilty of acts of lewdness with the defendant, the case would be different. In the first instance, the evidence would bear directly upon the question as to whether such a woman would be likely to resist the advances of any man; and in the second, as to whether, having yielded once to the sexual embraces of the defendant,

she would not be likely to yield again to the same person.”); *People v. Abbott*, 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838) (“[W]ill you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?”); *Woods v. People*, 55 N.Y. 515, 516 (N.Y. 1874) (“[E]vidence showing that the character of the prosecutrix for chastity was bad is competent, and this for the reason that it is more probable that an unchaste woman assented to such intercourse than one of strict value.”); *Lee v. State*, 179 S.W. 145, 146 (Tenn. 1915) (“And, although the body of a harlot may, in law, no more be ravished than the person of a chaste woman, nevertheless it is true that the former is more likely than the latter voluntarily to have yielded.”); *Ross v. State*, 132 S.W. 793, 797 (Tex. Crim. App. 1910) (“Generally in cases of rape and assault to rape, it is held competent evidence to prove that the reputation of the prosecutrix for chastity is bad, not as an excuse for the offense or justification for the same, but as raising the presumption that she may have yielded her consent and was not in fact forced.”). See generally Robert E. Rodes, Jr., *On Law and Chastity*, 13 (2006) (“While the unchastity of the victim has never been a defense to a rape charge, it was generally regarded as admissible evidence on the issue of consent.”); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 15 (1977) (“Generally, courts have considered the victim's character for chastity pertinent to whether or not she consented to the act that led to the charge of rape.”).

<sup>8</sup> *Herndon v. State*, 56 So. 85, 87 (Ala. Ct. App. 1911) (“That the prosecutrix is unchaste is permitted to be shown, because such evidence bears on the probability . . . that she is of bad character for truth and veracity, when she testified as a witness, as bearing on the weight to be given to her testimony.”); *Brown v. State*, 280 So. 2d 177, 179 (Ala. Crim. App. 1973) (“Where the defense is based entirely upon the fact of consent, as it is here, evidence of the general reputation of the prosecutrix for chastity is competent evidence bearing on the probability of her consent . . . . This rule is based on the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and that a woman who is chaste will be less likely to consent to an illicit connection, than one who is unchaste.”); *Frank v. State*, 35 N.W.2d 816, 822 (Neb. 1949) (“[T]his court recently concluded that in cases wherein a woman charges a man with a

sex offense, immorality has a direct connection with veracity . . .”). The correlation between chastity and veracity was confined to the female victim. *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895) (“It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.”).

<sup>9</sup> See, e.g., *Packineau v. United States*, 202 F.2d 681, 686 (1953) (“It might be that there are cases where a woman has been set upon and forcibly ravished by strangers coming out of ambush or the like and any inquiry as to her chastity or lack of it is irrelevant.”); *People v. Gabler*, 249 N.E.2d 340, 343 (Ill. App. Ct. 1969) (finding chastity evidence was not erroneously excluded where victim fought back, tried to run away, and had torn clothes: “The reputation for chastity in a rape case is only material where the defense is consent.”); *Ross v. State*, 132 S.W. 793, 797 (Tex. Crim. App. 1910) (finding no need for evidence of the victim’s chastity where force was used and the victim had a black eye and torn dress).

<sup>10</sup> Henrici De Bracton, a thirteenth-century English jurist, succinctly set forth some of the more enduring rape myths as follows: “When therefore a virgin has been so deflowered and overpowered . . . forthwith and whilst the act is fresh, she ought repair with hue and cry to the neighbouring vills, and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the hundred and to the serjeant of the lord of the King, and to the coroners and to the viscount and make her appeal at the first county court.” Henrici De Bracton, 2 De Legibus et Consuetudinibus Angilae 483 (Sir Traver Twiss trans., 1879) (quoted in Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. Rev. 945, 947 (2004)) [hereinafter Anderson, *Prompt Complaint*].

<sup>11</sup> Anne M. Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1, 14 (1998) (“Up until the latter part of this century, courts in all jurisdictions held that intercourse was nonconsensual where there was evidence that the woman physically resisted the man’s sexual proposals. In its most rigorous form, this definition of

‘nonconsensual’ required proof that the woman had offered her ‘utmost’ or ‘earnest’ physical resistance to her attacker.”); *Mills v. United States*, 164 U.S. 644 (1897) (“Although the crime is completed when the connection takes place without the consent of the female, yet in the ordinary case where the woman is awake, of mature years, of sound mind and not in fear, a failure to oppose the carnal act is consent; and though she object verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape in the man.”); *Matthews v. State*, 29 S.E. 424 (Ga. 1897) (“In order that the offense might constitute rape, she must have resisted with all her power, and kept up that resistance as long as she had strength.”); *Frank v. State*, 35 N.W.2d 816, 823 (Neb. 1949) (“[C]onsent or failure to resist when opportunity appears is an absolute defense in all such cases, and the jury should be so instructed. Resistance by prosecutrix must be in good faith, to the utmost or limit of her ability, with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so.”).

<sup>12</sup> Anderson, *Prompt Complaint*, *supra* note 10, at 977 (quoting 4 John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* 1135 (3d ed., 1940)) (“[I]t was entirely natural, after becoming a victim of assault against her will, that she should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done[.]”); *State v. Neel*, 60 P. 510, 511 (Utah 1900) (“While delay in making complaint may awaken suspicion, and tend to discredit the testimony of the prosecuting witness, yet mere lapse of time is not a test of admissibility, but simply a matter which the jury may consider in determining the weight which ought to be given to it.”). Although unfounded in fact, these rape myths—which include that the victim “hue and cry” or otherwise show signs of a struggle and make a “prompt complaint”—have created a paradigm of “real rape” such that many people believe that a rape could not have occurred unless these signs are present.

<sup>13</sup> See, e.g., Monica Romero-Sanchez et al., *The Role of Alcohol and Victim Sexual Interest in Spanish Students’ Perceptions of Sexual Assault*, 27 J. of Interpersonal Violence 2228, 2231 (2012) (“Being blamed by others for what happened to [rape victims]

promotes attributions of self-blame and feelings of futility in victims of sexual assault, which in turn predict higher depression, fear and problem drinking. Self-blame has been associated with a lower probability of reporting the assault to the police for fear of not being believed, and to a higher rate of sexual revictimization.”); Gillian E. Mason et al., *The Impact of Past Sexual Experiences on Attributions of Responsibility for Rape*, 19 J. of Interpersonal Violence 1157, 1157 (2004) (“Blaming a victim for her rape may adversely affect her psychological response to the assault, her self-reported rate of recovery, and whether she blames herself for the assault.”).

<sup>14</sup> See *Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, NCVLI Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Sept. 2010, at 1 [hereinafter NCVLI, *Excluding Evidence*].

<sup>15</sup> See generally Berger, *supra* note 7, at 22-32.

<sup>16</sup> For a more in-depth discussion of rape shield law, see generally NCVLI, *Excluding Evidence*, *supra* note 14.

<sup>17</sup> Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. Crim. L. & Criminology 554, 559-60 (1993). For more information on rape shield law, see NCVLI, *Excluding Evidence*, *supra* note 14, at 2.

<sup>18</sup> Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Abuse on Victim Blaming*, 17 Aggression and Violent Behavior 443, 444 (2012) (“A large body of literature has examined attributions of rape victims by others and revealed that individuals who have become the victims of crime are often judged by outsiders as being responsible for their own fate.”).

<sup>19</sup> *State v. Bolden*, 241 So. 2d 490, 491 (La. 1970) (“It is well settled that in rape cases the chastity or lack of chastity or bad reputation for chastity of the victim is not admissible for the purpose of impeaching credibility.”).

<sup>20</sup> See, e.g., *People v. Fryman*, 122 N.E.2d 573, 576 (Ill. 1954) (“In order to show the probability of consent, the general reputation of prosecutrix for immorality and unchastity is of extreme importance and may be shown. The underlying thought is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman . . . .”); *Grigsby v. Commonwealth*, 187 S.W.2d 259, 263 (Ky. Ct. App. 1945) (“[E]vidence of particular acts of immorality with other men occurring shortly before the alleged rape is competent upon the idea that if she has made merchandise of her virtue, that fact will strongly militate against the probability that she did not consent in the case in hand. Especially competent is evidence of voluntary sexual relations with the defendant prior to the occasion charged and testimony that the prosecutrix had a bad reputation in the community in which she lived for chastity, as circumstantial corroborative evidence on the issue of consent or as bearing upon the question of its probability.”).

<sup>21</sup> Regina A. Schuller & Patricia A. Hastings, *Complainant Sexual History Evidence: Its Impact on Mock Jurors’ Decisions*, 26 Psychol. of Women Quarterly 252, 253 (2002) (concluding that evidence of the victim’s prior sexual history influenced participants’ case judgments, with the impact being most pronounced when the sexual history information involved sexual intercourse); Bettina Frese et al., *Social Perceptions of Rape: How Rape Myth Acceptance Modulates the Influence of Situational Factors*, 19 J. of Interpersonal Violence 143, 144 (2004) (finding that factors such as the existence of a prior relationship with the rapist increase blame and decrease perceived levels of trauma). See also Ellen S. Cohn et al., *In the Eye of the Beholder: Do Behavior and Character Affect Victim and Perpetrator Responsibility for Acquaintance Rape?*, 39 J. of Applied Soc. Psychol. 1513, 1529 (2009) (“A woman with a bad reputation is most likely seen as being more likely to consent to sexual intercourse. . . . Typically the burden of permission is placed entirely on the female; it is her job to draw the line for acceptable sexual interaction. Participants might have believed that the victim with a bad reputation was ‘teasing’ and the man with the good reputation simply thought she was ‘playing hard to get.’”).

<sup>22</sup> See, e.g., Donna M. Vandiver & Jessica Rager Dupalo, *Factors That Affect College Students’*

*Perceptions of Rape: What is the Role of Gender and Other Situational Factors?*, 57 Int. J. Offender Therapy & Comp. Criminology 592, 596 (2012) (Typically, when a victim consumes alcohol prior to a rape incident, it is less likely to be perceived as rape. Researchers have documented that when a woman has been drinking, she is perceived as sexually promiscuous.”); Calvin M. Sims et al., *Rape Blame as a Function of Alcohol Presence and Resistance Type*, 32 Addictive Behaviors 2766, 2773-74 (2007) (discussing findings indicating that the use of alcohol by the victim increases the blame placed on the victim for the sexual assault); Karen G. Weiss, “Boys Will Be Boys” and Other Gendered Accounts: An Exploration of Victims’ Excuses and Justifications for Unwanted Sexual Contact and Coercion, 15 Violence Against Women 810, 812-13 (2009) (“[W]omen may be seen as deserving or legitimate victims when they have behaved ‘inappropriately,’ which could include getting drunk, being sexually assertive, or going to bars alone. Several studies have shown that women who are described in vignettes as being sexually promiscuous, having a bad reputation, or engaging in a variety of ‘unfeminine’ behaviors are more likely to be blamed for precipitating their own sexual assaults.”); Monica Romero-Sanchez et al., *supra* note 13, at 2250 (2012) (finding that college students found the victim more to blame when she accepted alcohol or admitted to feeling sexually attracted to the perpetrator prior to the assault).

<sup>23</sup> See, e.g. Vandiver & Dupalo, *supra* note 22, at 597 (noting that the manner in which a woman dresses affected perceptions of the rape and finding that at least 20 percent of college students agreed that a woman who dresses in “skimpy clothes” should not be surprised if a man tries to force her to have sex); Mark A. Whatley, *The Effects of Participant Sex, Victim Dress, and Traditional Attitudes on Causal Judgments for Marital Rape Victims*, 20 J. of Fam. Violence 191, 197 (2005) (finding that more study participants attributed responsibility and blame to victim of marital rape who were dressed seductively than dressed in a neutral manner).

<sup>24</sup> See, e.g., Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 Fla. L. Rev. 487, 489 n.12 (1991) (discussing a study in which 59 percent of men polled and 38 percent of women polled agreed that women provoke rape by their appearance or behavior); Vandiver & Dupalo, *supra* note 22, at

601 (polling college students and finding at least 20 percent agreed or strongly agreed with statements such as a woman who is raped while drunk is at least somewhat responsible; rape accusations are a way of getting back at men; and a woman who wears skimpy clothes should not be surprised if a man tries to force her to have sex).

<sup>25</sup> In reality, “many sexual assault victims never report offences, and . . . many more will delay reporting, often for significant periods.” Louise Ellison & Vanessa E. Munro, *Reaction to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility*, 49 Brit. J. of Criminology 202, 203 (2009).

<sup>26</sup> Importantly, social science has shown that many women “shut down” during an assault (a reaction known as “tonic immobility”), making fighting back physically impossible. See, e.g., Tiffany Fuse et al., *Factor Structure of the Tonic Immobility Scale in Female Sexual Assault Survivors: An Exploratory and Confirmatory Factor Analysis*, 21 Anxiety Disorders 265 (2007); Brian P. Marx et al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors*, 15 Clinical Psychol.: Sci. and Prac. 74, 78 (2008) (noting that 37 percent of rape survivors reported some paralysis during the sexual assault).

<sup>27</sup> Pennsylvania is an exception, allowing lack of prompt complaint evidence to cast doubt on the occurrence of the rape. *Commonwealth v. Freeman*, 441 A.2d 1327 (Pa. Super. Ct. 1982). The prompt complaint requirement is also present in the most recent version of the American Legal Institute’s Model Penal Code. Model Penal Code 213.6(4) (“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.”).

<sup>28</sup> Grubb & Turner, *supra* note 18, at 445 (noting that continued rape myth acceptance has “an enormous impact on conviction rates and prosecution of cases”).

<sup>29</sup> Vandiver & Dupalo, *supra* note 22, at 601.

<sup>30</sup> Ellison & Munro, *supra* note 25, at 203 (discussing a 2005 study of individuals in England and Wales). *See also* Dianne Cyr Carmody & Lekeshia M. Washington, *Rape Myth Acceptance Among College Women: The Impact of Race and Prior Victimization*, 16 J. of Interpersonal Violence 424, 429 (2001) (finding in a study of college women that 16-25 percent agreed that when women “go around braless or wearing short skirts and tight tops, they are just asking for trouble”); Grubb & Turner, *supra* note 18, at 447 (“It is suggested that men who hold sexist attitudes portray women as either ‘good girls’ or ‘bad girls.’ Therefore, women who do not behave in a manner consistent with the cultural stereotypes of a ‘good girl’ will be more likely to be blamed for leading their partners on and will be regarded as deserving to be raped.”); Whatley, *supra* note 23, at 197 (finding respondents attributed more responsibility and feelings that the victim deserved the rape if she were dressed seductively). *See generally* Berger, *supra* note 7, at 30 (“[J]uries react extremely harshly to the complainant whenever she seems in any way to have brought the attack upon herself, and, much more shocking, the jury imports equitable notions of unclean hands into the criminal prosecution. Specifically, it punishes unchaste women by refusing to credit their accusations even in clearly meritorious cases involving no hint of precipitating conduct.”).

<sup>31</sup> The theory that victims are to blame for the rape is often called victim-precipitated rape. The influential article that coined this phrase explained: “The term ‘victim precipitation’ describes those rape situations in which the victim actually, or so it was deemed, agreed to sexual relations but retracted before the actual act or did not react strongly enough when the suggestion was made by the offender(s). The term applies also to cases in risky or vulnerable situations, marred with sexuality; especially when the victim uses what could be interpreted as indecency in language and gestures, or constitute what could be taken as an invitation to sexual relations.” Menachem Amir, *Victim Precipitated Forcible Rape*, 58 J. Crim. L. & Criminology 493, 496 (1968). “Risky behavior” often includes the use of alcohol, or voluntarily going home with the rapist. Indeed, even one of the foremost feminist scholars on rape in the 1970s has commented that: “To be sure, some women court disaster by acting in ways that are foolish or risky in light of current social realities: accepting rides from strangers, for example, or picking up unknown men

in bars.” Berger, *supra* note 7, at 26.

<sup>32</sup> Courts recognize the fundamental nature of the right of all people to access the courts. *See, e.g., Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) (“Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment.”); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right).

<sup>33</sup> Lynn A. Addington & Callie Marie Rennison, *Rape Co-Occurrence: Do Additional Crimes Affect Victim Reporting and Police Clearance of Rape?*, 24 J. of Quantitative Criminology 205, 206 (2008).

<sup>34</sup> Elisabeth McDonald, *And Still We Must Talk about “Real Rape,”* 29 Pace L. Rev. 349, 354 (2009) (discussing research finding that victims may be less likely to report rape if the rape does not meet certain characteristics).

<sup>35</sup> Amy Dellinger Page, *True Colors: Police Officers and Rape Myth Acceptance*, *Feminist Criminology* 315, 329 (“Police officers generally . . . deemed victims with certain characteristics (e.g., a virgin, a professional woman) more credible than others (e.g., a man, a prostitute).”); Berger, *supra* note 7, at 23-24 (“The police, like the courts, like society as a whole, have fashioned a stereotype, which contains the attributes assumed to be part of the true victim’s character. Like negligence’s reasonable man, the true victim of rape exercises due care and caution for her safety. She possesses a reputation for chastity in her community. Additionally, she copes well with aggression, usually meeting force with force. Should she fail to overpower her aggressor and rape occurs, she will make an immediate complaint in a hysterical state. Those women who fail in some way to fulfill this image will often see their complaints deemed ‘unfounded’; that is, the police will decide that the crime did not occur and recommend against charging.”).

<sup>36</sup> Cassia Spohn & Katharine Tellis, *The Criminal Justice System’s Response to Sexual Violence*, 18 Violence Against Women 169, 176 (2012) (noting that the charging decisions of the prosecutor may depend in part on the character or reputation of the victim); Grubb & Turner, *supra* note 18, at 445

(discussing a study finding that “prosecutors were less likely to take on rape cases when a victim admitted to having flirted with an offender prior to an incident, allowed him to take her home, consented to some sexual acts, or was intoxicated at the time of the assault”).

<sup>37</sup> See, e.g., 18 U.S.C. § 3771(a)(8) (stating that crime victims have the “right to be treated with fairness and with respect for the victim’s dignity and privacy”).

<sup>38</sup> See, e.g., Grubb & Turner, *supra* note 18, at 445 (“[R]ape myth acceptance encourages a culture of victim blaming . . . . Such victim blaming ideologies are so pervasive that they also factor into the discretionary decisions made by police or prosecutors and as such have an enormous impact on conviction rates and prosecution of cases.”); Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Social Systems*, 29 *Psychol. of Women Quarterly* 97, 104 (2005) (noting that women who were asked victim-blaming questions were significantly more likely to state that they felt guilty or blamed themselves for the assault).

<sup>39</sup> Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors’ Help-Seeking Experiences with the Legal and Medical Systems*, 20 *Violence and Victims* 55, 56 (2005).

<sup>40</sup> Rebecca Campbell, *Rape Survivors’ Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 *Violence Against Women* 30, 36-37 (2006).

<sup>41</sup> See, e.g., 18 U.S.C. § 3771(a)(8) (stating that crime victims have the “right to be treated with fairness and with respect for the victim’s dignity and privacy”); *id.* at § 3771(a)(1) (requiring that victims be reasonably protected from the accused). See generally *Fundamentals of Victims’ Rights: A Summary of 12 Common Victims’ Rights*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Nov. 2011, at 1-2; 4-5, available at <http://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12>. See also generally NCVLI, *Excluding Evidence*, *supra* note 14, at 3 (describing that, in addition to rape shield laws “there may also be federal or state victims’ rights laws that favor excluding the evidence. For instance, under the federal

Crime Victims’ Rights Act, victims have the right to be treated with fairness, and with respect for their dignity and privacy. Many states have constitutional or statutory protections extending the same rights to victims.”).

<sup>42</sup> Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 *Colum. J. Gender & L.* 1, 25 (2011) (“Rape myths have real-world consequences for the administration of the justice system. A study that followed up on actual jurors found that juror evaluations were significantly influenced by the [common] patterns of blame attribution . . . . Subsequent research with mock jurors has confirmed the widespread presence of rape myths in juror decisionmaking.”).

<sup>43</sup> Rebecca Campbell, “*What Has It Been Like for You to Talk with Me Today?*”: *The Impact of Participating in Interview Research on Rape Survivors*, 16 *Violence Against Women* 60, 77 (2010) (finding that by using feminist interviewing techniques—namely, reducing the hierarchy of the interviewer-interviewee relationship by engaging in mutual dialog and disclosure—victims overwhelmingly found the interview to be positive); Debra Patterson, *The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes*, 26 *J. of Interpersonal Violence* 328, 343 (2010) (stating that law enforcement agents are more likely to provide empathy and address victim needs if properly trained).

<sup>44</sup> For sample motions and research, please contact NCVLI.

<sup>45</sup> See generally Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorney Association Special Topic Series (August 2007), available at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf). NCVLI will be publishing two Bulletins this year on the use of experts to explain what jurors or judges might otherwise perceive as counterintuitive behaviors in sexual assault and domestic violence victims.

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