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FIGHTING RAPE CULTURE WITH NONCORROBORATION INSTRUCTIONS

Tyler J. Buller*

For centuries, the criminal justice system has erected barriers to the successful prosecution of sexual violence. Today, many of the formal obstacles to prosecution have been abolished, but their effects linger. Rape myths weigh heavily on jurors, often manifesting in a rape culture that is unwilling to convict defendants of sexual violence unless victim testimony is corroborated by independent physical evidence. Yet empirical social science overwhelmingly finds that most sexual assaults do not involve eyewitnesses or result in corroborating physical injuries. One way to combat mistaken stereotypes about sexual abuse is through "noncorroboration instructions" that explain to jurors that they can return a guilty verdict if they believe the victim's testimony beyond a reasonable doubt, even without corroborating evidence.

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INTRODUCTION

Courts have systematically discriminated against sex-assault victims for hundreds, if not thousands, of years. Dating back to biblical times, victims (nearly always women) have been viewed with harsh skepticism and rarely believed.[1] The English legal system was infected with what we now call "rape myths"—misogynist falsehoods about sexual assault—that eventually made their way across the Atlantic.[2] By the mid 1960s, most American states had erected a number of obstacles to the effective prosecution of sexual assault, including a legal requirement that allegations of rape or sexual abuse be "corroborated" before a jury could find the defendant guilty.[3]

The rape-reform movement of the late twentieth century made important strides in abolishing most of the formal legal barriers to prosecution, including the corroboration requirement.[4] But the implicit effects of institutionalized sexism and anti-victim bias persist in the hearts and minds of jurors. The research shows that myths about sex-assault victims are pervasive, continually reinforced by rape culture and false stereotypes.[5] One of those rape myths, still held today, is the erroneous belief that a sexual assault victim's testimony is not enough to find a defendant guilty.[6] Potential jurors, misled by rape culture biases and the media, believe they cannot convict when cases do not have corroborating

1. *See infra* note 75 and accompanying text.
2. *See infra* Part II.A.
3. *See infra* Part II.A.
4. *See infra* Part II.B.
5. *See infra* notes 119–23 and accompanying text.
6. *See infra* notes 119–23 and accompanying text; Part III.A.2.

evidence such as DNA or eyewitnesses. Yet the reality is that most sex assaults do not cause visible injuries and eyewitnesses are exceptionally rare.[7]

This Article proposes one way to address jurors' mistaken beliefs: informing them that the law allows a guilty verdict without corroborating evidence, so long as jurors believe the victim's testimony beyond a reasonable doubt. At least fifteen American jurisdictions have considered whether jurors should be informed that corroboration is not required, through the provision of what I call "noncorroboration instructions."[8] Appellate courts have divided sharply over the language and propriety of these instructions. A slight majority of courts approve noncorroboration instructions, largely because they correctly state the law and help debunk rape myths.[9] A minority of courts reject or criticize the instructions, expressing concern that the instructions single out a victim's testimony or are too difficult for jurors to understand.[10] I catalog the arguments for and against the instructions in Part III, contrasting them with the available social science research and the historical corroboration rule.

I conclude the Article by proposing a model noncorroboration instruction. The model instruction aims to address potential criticisms, while still preserving the intent of the instruction: to inform jurors that the historical corroboration requirement has been abolished and, if they believe a victim's testimony beyond a reasonable doubt, they are permitted to find the defendant guilty.

I. MYTH-BUSTING: THE REALITY OF SEX CRIME PROSECUTION

Before discussing specifics regarding the corroboration requirement, we need context to understand sex-assault[11] prosecutions. First and foremost, this means deconstructing the "rape myths"[12] that perpetuate our culture and courtrooms.[13] "Rape myths are stereotypical and erroneous beliefs about sexual assault, women who are victims of sexual assault, and men who perpetrate sexual assault."[14] The topic of addressing rape myths could, on its own, warrant multiple books and law review articles.[15] Suffice to say

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7. *See infra* Part III.A.2.

8. *See infra* Part III.

9. *See infra* Appendix A (reproducing the eight instructions approved by appellate courts).

10. *See infra* Appendix B (reproducing the seven instructions disapproved by appellate courts).

11. A note on language: In this Article, I variously refer to "rape" and "sex assault." Terminology matters. Whenever citing to research that specifically uses one term, I use the same language as the research. For example, when discussing historical sources (such as the writings of Lord Hale, discussed in Part II *infra*), I will generally refer to "rape" because that is the language those sources use. When discussing the broader range of sexual offenses, I will generally refer to "sex assaults." As Susan Estrich highlighted in her pioneering book, the terms writers use affect how we perceive the problem of sexual assault. *See* SUSAN ESTRICH, REAL RAPE 10–11 (1987). My goal here is to be as faithful as possible to both the literature and the reality of prosecuting sex crimes.

12. Meagen M. Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059, 1070 (2015).

13. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1014 (1991).

14. Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 229–30 (1980).

15. For accessible overviews of rape myths and how they impact the legal system, readers should see generally Hildebrand & Najdowski, *supra* note 12; Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761 (2011); Torrey, *supra* note 13. Readers more interested in the cultural aspects of rape myths should consider the essays contained in EMILIE

at this point, rape myths are widely held by between a quarter and a third of Americans.[16] Below I survey just a few of the rape myths most relevant to noncorroboration instructions.

Myth: Rape is rare. It is not. About one in five women and about one in thirty men report being raped at some point in their life.[17] A conservative estimation of that figure means that more than twenty-five million American women and more than four million American men have been raped.[18] If the range of conduct is expanded to include child molestation (such as fondling and other non-penetrative sex assaults), the number reaches about two in five girls and one in six boys.[19] The number for women climbs closer to fifty percent if you include both rapes and attempted rapes.[20]

Myth: Most rapes end up in court. Rape is rarely reported and only a tiny fraction of rapes are prosecuted to verdict. For every 100 forcible rapes committed:

Less than 20 are reported to police or other authority figures;[21]

Less than 5.4 are prosecuted;[22]

Less than 5.2 result in conviction;[23] and

Less than 2.8 result in incarceration.[24]

In short, "rape is the least reported, least indicted, and least convicted non-property felony in America."[25] The subset of data for male victims involves even lower numbers, driven by the decreased likelihood that men will report a rape to the police.[26]

Myth: There are witnesses to rape and other sex assaults. Sex crimes are most frequently committed in private, often in the residence of the victim or the offender.[27]

BUCHWALD ET AL., TRANSFORMING A RAPE CULTURE (2d ed. 2005).

16. *See infra* note 59 and accompanying text.

17. *See* MICHELE C. BLACK ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE STUDY 1 (2010) (finding 18.3% of women and 1.4% of men reported being raped at some point during their lifetime); PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE VIOLENCE AGAINST WOMEN SURVEY 7 (2000) (finding 17.6% of women and 3.0% of men reported an attempted or completed rape over the course of their lives). Some recent research indicates the rate of sexual assault against men may be nearly as high as for women, but past data-collection efforts do not reflect this due to gender bias and definitional errors. *See* Lara Stemple & Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. PUB. HEALTH 19, 19–29 (2014).

18. *See* LINDSEY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010, at 2, https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf.

19. ANNA C. SALTER, PREDATORS, PEDOPHILES, RAPISTS, & OTHER SEX OFFENDERS 12 nn.7–8 (2003) (collecting studies).

20. *See* DIANA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 34–36 (1984).

21. Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 157 (noting five percent to twenty percent of all forcible rapes are reported to law enforcement).

22. *Id.* (noting that seven percent to twenty-seven percent of cases are prosecuted).

23. *Id.* (noting that three percent to twenty-six percent yield a conviction).

24. *Id.* (noting that ninety-five percent of forcible rape convictions result in incarceration).

25. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK L. REV. 467, 467 (2005); *see also* PROPOSED REVISION TO MODEL PENAL CODE CHAPTER 213 (AM. LAW INST., Tentative Draft No. 1, 2014), at 14, ll. 11–19, http://jpp.whs.mil/Public/docs/03_Topic-Areas/02Article_120/20140807/03_ProposedRevision_MPC213_ Excerpt_201405.pdf [hereinafter PROPOSED REVISION TO MODEL PENAL CODE].

26. *See generally* Nathan W. Pino & Robert F. Meier, *Gender Differences in Rape Reporting*, 40 SEX ROLES 979, 985 (1999).

27. *See* Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward*

Although extensive data is not available, it is beyond dispute that, "[i]n most [sex-assault] cases, there are no witnesses."[28] Two of the only reliable data points indicate that between one-fifth and one-tenth of sex-assault cases involve third-party eyewitnesses.[29]

Myth: Sex assaults result in physical injuries. In reality, many victims (including adults) sensibly make the decision to not forcibly resist armed rapists, which means there will be no visible injuries—like bruising or cuts—to corroborate the crime, even when the offender procures consent by force.[30] One study of sex-assault victims admitted to hospital emergency rooms found that two-thirds of sex-assault victims had no physical injuries, about a quarter had minor injuries that did not require medical treatment, around five percent had moderate injuries, and only one percent had severe injuries.[31] Statistics for genital injuries are more variable, but the consensus is that—even following forcible rape—"the examiner will usually not find genital injuries."[32] Other research finds the number of sexual assaults that result in any form of injuries is as low as ten percent.[33] And the odds of finding any physical trauma decreases dramatically following the first twenty-four hours after an attack.[34] In spite of this scientific data, "[t]he myth that a real victim should be found lying crumpled on the ground in a pool of blood is still alive and well."[35]

Myth: Most sex assaults are committed by strangers. Most sex assaults are

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Acquaintance Rape Victims, 13 NEW CRIM. L. REV. 644, 646 (2010) ("The typical rape in the United States does not happen in an alleyway. It most often happens in the victim's own home or in the home of a friend, relative, or neighbor."); JOSEPH PETERSON ET AL., THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 62, 92, 109 (2010) (noting there were no third-party eyewitnesses in 78.3% of rape cases); Wendy A. Walsh et al., *Prosecuting Child Sexual Abuse: The Importance of Evidence Type*, 56 CRIME & DELINQUENCY 436, 437 (2008) ("The crime of sexual abuse is often committed in private; there are rarely eyewitnesses; and the child's testimony usually provides most of the information about the crime."); TERESA P. SCALZO, NAT'L DIST. ATTORNEYS ASS'N, PROSECUTING ALCOHOL-FACILITATED SEXUAL ASSAULT 12 (2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf ("There are almost never eyewitnesses to a rape."); R.E. GAENSSLEN & HENRY C. LEE, SEXUAL ASSAULT EVIDENCE: NATIONAL ASSESSMENT AND GUIDEBOOK 57 (2002) (showing most reported sex crimes take place in homes).

28. Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1175 (1986).

29. *See* SEDELLE KATZ & MARYANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 198–99 (1979) (nine percent); PETERSON ET AL., *supra* note 27, at 62, 92, 109 (noting 78.3% of rape cases lack third-party witnesses, meaning 21.7% have witnesses). This is not to say that sex assaults are always committed in complete isolation. For example, the sexual abuse of young children is sometimes committed with adults in close proximity who are unable to detect the abuse due to deception by the offender. *See* SALTER, *supra* note 19, at 28 (noting documented instances of abuse where parents were in the next room, the same bed, or the front seat of the same car while their child was being molested).

30. *See* Anderson, *supra* note 27, at 646; State v. Cabral, 410 A.2d 438, 441 (R.I. 1980); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, 1371–72 (1972) [hereinafter *Repeal Not Reform*].

31. LINDA E. LEDRAY, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT NURSE EXAMINER (SANE) DEVELOPMENT AND OPERATION GUIDE 69–70 (1999) (collecting studies). Given that the DOJ-cited figures concern emergency rooms—where one can assume medical professionals see somewhat more severe cases of sex assault than the total offense population—these numbers likely overestimate the rate at which physical evidence or injuries can be found after a sex assault or rape. *See* Anderson, *supra* note 27, at 651 (noting that the DOJ study concerns "a population that one would assume suffers from more serious and numerous physical injuries than victims not admitted to emergency rooms after rape").

32. *See* LEDRAY, *supra* note 31, at 70.

33. *See* Susan B. Sorenson & Judith M. Siegel, *Gender, Ethnicity, and Sexual Assault: Findings from a Los Angeles Study*, 48 J. SOC. ISSUES 93, 97 (1992).

34. *See* LEDRAY, *supra* note 31, at 70.

35. LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 95 (1991).

actually committed by acquaintances or intimate partners.[36] Particularly among college-aged populations, sex-assault victims almost always know their attackers.[37] This dovetails with the preceding data about the lack of injuries: acquaintance rapes are often committed by way of verbal coercion, alcohol, and the subtle use of force, rather than brute violence or the use of weapons that might cause visible injuries.[38]

Myth: Victims tell right away. Most victims do not report sex assaults to law enforcement at all, let alone soon after the attack.[39] Only about twelve percent of rape victims contact the police within twenty-four hours.[40] With sex assaults committed by non-strangers, a majority of victims delay reporting.[41] Despite this research, society "expects that a victim of sexual assault will report immediately to law enforcement."[42]

Myth: False allegations are common. Not so. Among reputable studies, the rate of false sex-assault allegations is estimated at less than ten percent,[43] and is perhaps closer to two percent.[44] One of the most empirically sound investigations in the area found that 5.9% of cases involved false allegations.[45] Perhaps most importantly, "there is no empirical data to prove that there are more false charges of rape than of any other violent crime."[46] Despite this, the public believes that as many as half of rape allegations are false.[47]

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36. Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 921–22 (2001) ("In total, acquaintances and intimates commit four out of five rapes and sexual assaults."); ESTRICH, REAL RAPE, *supra* note 11, at 11–12 (describing Massachusetts and Seattle data that show "the overwhelming majority of women who contacted rape centers had been attacked by men they knew").

37. HEATHER KARJANE ET AL., U.S. DEP'T OF JUSTICE, CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 2 (2002) (noting between 84% and 97.8% of sex assaults were perpetrated by non-strangers). For an explanation of why many of these offenders remain undetected, despite being "repeat rapists," see David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002).

38. Anderson, *supra* note 27, at 651. One emerging area of research concerns how many college men (and some college women) perceive coercion as seduction. *See generally* Bryana H. French et al., *Sexual Coercion Context and Psychosocial Correlates Among Diverse Males*, 16 PSYCHOL. MEN & MASCULINITY 42, 42–53 (2015) (on men who report seduction by women); Gerald H. Burgess, *Assessment of Rape-Supportive Attitudes and Beliefs in College Men*, 22 J. INTERPERSONAL VIOLENCE 973, 973–91 (2007) (on male attitudes toward women). As a counterpoint to the perception that men mistake seduction for coercion, the data shows that most sexual assaults are committed by a small subset of repeat rapists, who have committed an average of 5.8 rapes each. *See* Lisak & Miller, *supra* note 37, at 73.

39. Lonsway & Archambault, *supra* note 21, at 157 (noting five percent to twenty percent of all forcible rapes are reported to law enforcement); Laura M. Monroe et al., *The Experience of Sexual Assault: Findings from a Statewide Victim Needs Assessment*, 20 J. INTERPERSONAL VIOLENCE 767, 770 (2006) (noting that 55.6% of victims who did report the sexual assault waited "years" to disclose, 17.7% disclosed within "days," and another 17.7% disclosed within "hours").

40. NAT'L VICTIM CTR. ET AL., RAPE IN AMERICA: A REPORT TO THE NATION, 6 fig.7 (1992), https://victimsofcrime.org/docs/Reports%20and%20Studies/rape-in-america.pdf.

41. WIS. OFFICE OF JUSTICE ASSISTANCE, PROSECUTOR'S SEXUAL ASSAULT REFERENCE BOOK 20–21 (2009), https://www.wcasa.org/file_open.php?id=3 ("Delayed reporting of sexual assault, particularly in non-stranger sexual assaults, is the norm rather than the exception.") [hereinafter WIS. PROSECUTOR'S REFERENCE BOOK]; ESTRICH, REAL RAPE, *supra* note 11, at 11 (noting victims are more likely to report attacks by strangers).

42. WIS. PROSECUTOR'S REFERENCE BOOK, *supra* note 41, at 21.

43. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329–30 (2010).

44. Torrey, *supra* note 13, at 1028 n.70.

45. Lisak et al., *supra* note 43, at 1329.

46. Torrey, *supra* note 13, at 1028.

47. Edwards et al., *supra* note 15, at 767 (collecting studies that show the public believes between nineteen percent and fifty percent of rape allegations are false).

These myths impose real barriers to successfully prosecuting all types of sex crimes.[48] But they are arguably most damaging to the prosecution of child sex abuse.[49] The sexual abuse of children is notoriously difficult to prosecute,[50] and rape myths play a powerful role in thwarting successful prosecutions.[51] Of all sex assaults committed, more than two thirds are committed against children under eighteen, and just over a third involve children under eleven.[52] Most of these crimes involve fondling or oral sex rather than forcible penetration,[53] which makes medical and physical evidence especially uncommon—found in approximately one in ten cases.[54] The overwhelming majority of child sex abuse is committed in a private residence by someone the child knows, which means that independent eyewitnesses are exceptionally rare.[55] And children so frequently do not tell right away that the literature has a term for the phenomenon: "delayed disclosure."[56] Often, disclosure happens so many years later that, even if the case was otherwise viable for prosecution, it would fall outside the statute of limitations.[57] Finally, despite the widespread belief that children are easy to manipulate into making false allegations, children are no more likely to make false allegations of sex assault than

48. *See* Torrey, *supra* note 13, at 1031–32.

49. *See* Frederick J. Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BROOK. L. REV. 378, 378 (1970) (discussing the impact of the corroboration requirement, noting that the average age of victims impacted by the requirement was thirteen years old).

50. *E.g.*, John E. B. Myers, Jan Bays, Judith Becker, Lucy Berliner, David L. Corwin & Karen J. Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 3 (1989) (noting child sex abuse is "exceedingly difficult to prove"). Notably, child-sex-abuse convictions face skepticism not only from trial juries, but also from appellate courts. *See* Irving Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 FORDHAM L. REV. 263, 274 (1971) (noting the New York appellate courts had reversed "virtually every conviction based upon the uncorroborated testimony of [a minor] . . . for insufficiency of proof"); *see also* Tyler J. Buller, State v. Smith *Perpetuates Rape Myths and Should Be Formally Disavowed*, 102 IOWA L. REV. ONLINE 185 (2017) (discussing the lasting effect of an appellate decision that relies on rape myths and suggesting reform).

51. *See generally* Lisa DeMarni Cromer & Rachel E. Goldsmith, *Child Sexual Abuse Myths: Attitudes, Beliefs, and Individual Differences*, 19 J. CHILD SEXUAL ABUSE 618 (2010).

52. HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000), http://www.bjs.gov/content/pub/pdf/saycrle.pdf (noting 66.9% of assaults are committed against children under seventeen, and 34.1% against children under eleven) [hereinafter SEXUAL ASSAULT OF YOUNG CHILDREN REPORT].

53. *Id.* (juveniles had greater proportion of fondling crimes than penetration); David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, FUTURE OF CHILDREN, Summer/Fall 1994, at 24, http://www.unh.edu/ccrc/pdf/VS75.pdf (only twenty percent to twenty-five percent of sexual abuse against female children involves vaginal penetration *or* contact).

54. *See* Walsh et al., *supra* note 27, at 8 (finding fourteen percent of cases referred to a Texas Child Advocacy Center had physical evidence while nine percent had medical evidence).

55. SEXUAL ASSAULT OF YOUNG CHILDREN REPORT, *supra* note 52, at 6; Walsh et al., *supra* note 27, at 2 ("The crime of sexual abuse is often committed in private; there are rarely eyewitnesses; and the child's testimony usually provides most of the information about the crime.").

56. The complex and sometimes-conflicting reasons for delayed disclosure are outside the scope of this Article. For an introduction to the topic, see generally Irit Hershkowitz et al., *Dynamics of Forensic Interviews with Suspected Abuse Victims Who Do Not Disclose Abuse*, 30 CHILD ABUSE & NEGLECT 753, 753–69 (2006).

57. SALTER, *supra* note 19, at 28. Some states have modified the statute of limitations in these cases by legislation. *See* Brittany Ericksen & Ilse Knecht, NAT'L CTR. FOR VICTIMS OF CRIME, *Statutes of Limitations for Sexual Assault: A State-by-State Comparison*, (Aug. 21, 2013), http://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf?sfvrsn=2.

adults.[58]

Rape myths pervade society[59] and contribute to what we now call "rape culture"—"a complex of beliefs that encourages male sexual aggression and supports violence against women."[60] Rape culture causes "the perpetuation of rape myths"[61] through television,[62] music,[63] pornography,[64] print,[65] social organizations like fraternities,[66] and even political campaigns.[67] The literature, based in part on empirical social science, concludes that rape culture affects the reporting rate for sex crimes, the attrition rate for the prosecution of those cases, and—most relevant to this Article—how jurors perceive and respond to evidence in rape trials.[68]

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58. David A. Finkelhor, *Child Sexual Abuse: Challenges Facing Child Protection and Mental Health Professionals, in* CHILDHOOD AND TRAUMA–SEPARATION, ABUSE, WAR 108 (Elisabeth Ullmann & Werner Hilweg, eds., Mary Heaney Margreiter & Kira Henschel, trans., Ashgate Publ'g Co. 1999).

59. Hildebrand & Najdowski, *supra* note 12, at 1064 n.32 (citing John D. Foubert, *The Longitudinal Effects of a Rape-Prevention Program on Fraternity Men's Attitudes, Behavioral Intent, and Behavior*, 48 J. AM. C. HEALTH 158, 160–61 (2000); William O'Donohue et al., *Rape Prevention with College Males: The Roles of Rape Myth Acceptance, Victim Empathy, and Outcome Expectancies*, 18 J. INTERPERSONAL VIOLENCE 513, 527 fig.2 (2003)). A meta-analysis of available research suggests that between twenty-five percent and thirty-five percent of Americans agree with most rape myths. *See* Edwards et al., *supra* note 15, at 762.

60. BUCHWALD ET AL., *supra* note 15, at vii.

61. Hildebrand & Najdowski, *supra* note 12, at 1060.

62. *See, e.g.*, LeeAnn Kahlor & Matthew S. Eastin, *Television's Role in the Culture of Violence Toward Women: A Study of Television Viewing and the Cultivation of Rape Myth Acceptance in the United States*, J. BROADCASTING & ELECTRONIC MEDIA, 215–31 (2011). In fairness to the television landscape, not every program reinforces rape myths. *See* Stacey J. T. Hust et al., *Law & Order, CSI, and NCIS: The Association Between Exposure to Crime Drama Franchises, Rape Myth Acceptance, and Sexual Consent Negotiation Among College Students*, 20 J. HEALTH COMM. 1369, 1374–77 (2015) (finding that watching *Law & Order* was associated with "lower rape-myth acceptance" among survey participants); Ryan J. Stephens, Analyzing Media Representations of Male Rape and Debunking Myths on '*Law and Order Special Victims Unit*' 2 (Apr. 30, 2016) (unpublished manuscript), http://cupola.gettysburg.edu/celebration/2016/Saturday/35 (offering similar anecdotal observations concerning male rape).

63. *See, e.g.*, Tanya Horecek, *#AskThicke: "Blurred Lines," Rape Culture, and the Feminist Hashtag Takeover*, 14 FEMINIST MEDIA STUD. 1105 (2014).

64. *See, e.g.*, David A. Makin & Amber L. Morczek, *The Dark Side of Internet Searches: A Macro Level Assessment of Rape Culture*, 9 INT'L J. CYBER CRIMINOLOGY 1, 1 (2015) (discussing the trend in Google searches for violent rape scenes).

65. *See, e.g.*, Anne Torkelson, *Violence, Agency, and the Women of Twilight*, *in* THEORIZING TWILIGHT: CRITICAL ESSAYS ON WHAT'S AT STAKE IN A POST-VAMPIRE WORLD 209–21 (2011); Renee Franiuk et al., *Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case*, 14 VIOLENCE AGAINST WOMEN 287–309 (2008).

66. *See, e.g.*, E. Timothy Bleecker & Sarah K. Murnen, *Fraternity Membership, the Display of Degrading Sexual Images of Women, and Rape Myth Acceptance*, 53 SEX ROLES 488 (2005).

67. *See, e.g.*, James Hoyt, *Donald Trump's Election Alters the Playing Field for Sexual Assault Awareness on Campuses*, USA TODAY (Nov. 21, 2016), http://college.usatoday.com/2016/11/21/trump-election-sexual-assault-on-campus; Ashley Welch, *Sexual Assault Survivors Struggle to Cope with Trump Election*, CBS NEWS (Nov. 17, 2016), http://www.cbsnews.com/news/sexual-assault-survivors-cope-with-donald-trump-election; Laurel Raymond, *Trump's Campaign Embraces Rape Culture*, THINK PROGRESS (Oct. 13, 2016), https://thinkprogress.org/donald-trumps-campaign-is-the-embodiment-of-rape-culture-and-toxic-masculinity-cce0e91fba5c#.lec8j65w7; Emma Gray, *Trump's Latest Comments About Women are Rape Culture in a Nutshell*, HUFFINGTON POST (Oct. 7, 2016), http://www.huffingtonpost.com/entry/donald-trump-billy-bush-rape-culture_us_57f80a89e4b0e655eab4336c.

68. Hildebrand & Najdowksi, *supra* note 12, at 1060–62, 1078–81. Notably, the problem of rape myths infecting the criminal justice system is not unique to the United States. *See* Jennifer Temkin, *"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom*, 13 NEW CRIM. L. REV. 710, 714–19 (2010) (discussing rape myths in England and Wales); Natalie Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, AUSTL. INST. CRIMINOLOGY (2007), http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi344.pdf (discussing the impact of biases on

As one might expect, these rape myths did not arise on their own, suddenly, in the twentieth and twenty-first centuries. To fully understand rape myths and today's rape culture, it is necessary to take a brief detour into the past.

II. THE HISTORICAL CONTEXT OF THE CORROBORATION REQUIREMENT AND THE RAPE-REFORM MOVEMENT

Cultural attitudes toward rape and sex assault stretch back thousands of years into the past.[69] For purposes of this Article, which addresses concepts that came to America directly from the Anglo legal tradition, the most relevant history begins in eighteenth century England. As discussed below, the law has historically imposed strict corroboration requirements on women who reported sexual assault and sought relief in the courts. It is only in the last three or four decades that the rape reform movement has made significant strides against this requirement, such that most states have repealed the corroboration requirement for most sex-crime prosecutions.[70]

A. *The Genesis of the Corroboration Requirement for Rape and Sex-Assault Victims' Testimony*

Among scholars and modern courts, much of the blame for the corroboration requirement in the English tradition is placed at the feet of Lord Matthew Hale.[71] In his 1736 treatise, Hale argued that an allegation of sexual assault is "easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[72] This attitude was common among the era's legal heavyweights.[73] John Wigmore—the same Wigmore so often favorably cited for his treatise on evidence—proclaimed later: "No judge should ever let a sex-offence 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."[74]

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mock juror deliberations in Australia).

69. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 19–22 (1975) (discussing how women have always been "unequal before the law" and tracing the history of rape law from ancient Babylon to Renaissance Europe); MENACHIM AMIR, PATTERNS IN FORCIBLE RAPE 6 (1971) ("The crime of rape reaches back into man's history as far as records take us.").

70. I refer generally in this Article to the corroboration requirement for "sex crimes," but historically some courts extended the rule to non-sex-offense prosecutions where the facts related to sexual assault. *See* Younger, *supra* note 50, at 269–71 (discussing the application of the corroboration rule to lesser-included non-sex offenses in New York).

71. *See, e.g.*, A. Thomas Morris, Note, *The Empirical, Historical, and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 37 DUKE L.J. 154, 154 (1988) ("The cautionary instruction is a relic dating back to Lord Chief Justice Matthew Hale in the seventeenth century."); *see also* Gilbert Geis, *Lord Hale, Witches, and Rape*, 5 BRIT. J.L. & SOC'Y 26, 42 (1978); Mildred B. Dodson, Note, People v. Rincon-Pineda: *Rape Trials Depart the Seventeenth Century—Farewell to Lord Hale*, 11 TULSA L.J. 279, 280–82 (1975).

72. MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 636 (1736).

73. Lord Edward Coke viewed rape as a crime against chastity, faulting women for not forcibly resisting and concluding that husbands could not rape their wives. *See* Thomas A. Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims*, 18 BUFF. J. GENDER, L. & SOC. POL'Y 73, 85–86 (2010). Blackstone quotes Hale at length, emphasizing the need for prompt complaints and corroboration. *See id.* at 88–89.

74. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 924a (3d ed. 1940).

Hale and Wigmore's observations were not outliers. Tales of false allegations date back, literally, to our ancient ancestors.[75] For millennia, people—mostly men—have publicly fanned fears of false rape allegations. The law, written and executed by men, "reflected age-old prejudices and unfair, pervasive doubts about the credibility of any woman who claimed to have been raped."[76] Twentieth century judges described forced intercourse between acquaintances as "friendly rape" or "assault with failure to please."[77] Law reviews maintained "stories of rape are frequently lies or fantasies" concocted by women due to mental illness, shame, or revenge.[78] One piece, published in 1962, recommended only permitting sex-crime prosecutions where the victim could pass a polygraph.[79] These prejudices, which did little more than perpetuate rape myths, infected the law and encouraged the same prejudice and skepticism among jurors.[80]

Motivated in part by these prejudgments about women and sex, American states began to judicially or legislatively require that the testimony of a victim be corroborated to secure a conviction for sex crimes.[81] Leading writers opined that the corroboration requirement was "consistent with the best traditions of Anglo-American law."[82] According to commentators, three primary concerns justified the corroboration requirement: (1) the frequency of false allegations; (2) the risk jurors would be overcome by emotion and sympathize with the victim; and (3) the difficulty of defending against sex-assault charges.[83]

As to the first justification, nineteenth and twentieth century legal writers—in particular the courts—accepted without proof that "false accusations of sex crimes in general, and rape in particular, [were] much more common than untrue charges of other

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75. *See* BROWNMILLER, *supra* note 69, at 22–23 (discussing the false allegations made by Potiphar's wife against Joseph in *Genesis* 39:6–23 and noting similar legends in the Koran, Egyptian folklore, and Celtic mythology).

76. Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1051–52 (2008).

77. Torrey, *supra* note 13, at 1056 n.215 (citing Carol Bohmer, *Judicial Attitudes Toward Rape Victims*, *in* FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER 161–62 (1977)).

78. Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1137 (1967).

79. Glanville Williams, *Corroboration-Sexual Cases*, 62 CRIM. L. REV. 662, 664 (1962).

80. Torrey, *supra* note 13, at 1040–41 ("Recent social science research indicates that the attitudes of judges and jurors are also a product of uninformed rape myth acceptance."); PROPOSED REVISION TO MODEL PENAL CODE, *supra* note 25, at 89, ll. 8–16.

81. *See Repeal Not Reform*, *supra* note 30, at 1367–68. Of note, these jurisdictions varied in the degree to which they required corroboration. *See id.*

82. Note, *Corroborating Charges of Rape*, *supra* note 78, at 1141. Somewhat inconsistent with this conclusion, corroboration was not required at common law, despite Hale and others' instructions that victim testimony be viewed skeptically. *See* Estrich, *supra* note 28, at 1137 (noting "the requirement of corroboration of the victim's testimony [was] a rule which did not exist at common law"); Note, State v. Tatum: *The Rape Corroboration Requirement*, 15 CREIGHTON L. REV. 220, 220 (1980) ("The corroboration rule for charges of rape did not exist at common law.") [hereinafter Note, State v. Tatum]; Janette B. Pratt, *The Demise of the Corroboration Requirement—Its History in Georgia Rape Law*, 26 EMORY L.J. 805, 812 (1977) (noting "corroboration has never been a prerequisite to a proper conviction for rape" at English common law); Younger, *supra* note 50, at 264, n.5 (1971) (citing People v. Gibson, 93 N.E.2d 827 (N.Y. 1950)).

83. *Repeal Not Reform*, *supra* note 30, at 1378–84; Note, State v. Tatum, *supra* note 82, at 223–25. Among these reasons, arguably the first was the most potent for men writing the laws: "The danger sought to be avoided by the corroboration rule is that of the deranged complainant who invents a story of sexual indignities visited upon her." Younger, *supra* note 50, at 277; *accord* Estrich, *supra* note 28, at 1137 ("The usual justification for corroboration requirements is that women intentionally lie about sex.").

crimes."[84] Women and girls were thought to fabricate charges for any number of untoward reasons—from regret, to revenge, to blackmail, to confusion, to attention-seeking.[85] Psychologists publicly speculated that women almost universally fantasized about rape and frequently converted their sexual fantasies into public accusations.[86]

Second, as to jurors' sympathies toward victims, courts opined that the allegation of rape was so heinous that juries presumed guilt.[87] The assumption was that "jurors are ordinarily biased in favor of an alleged rape victim and so should be cautioned against this natural inclination."[88] Any concern about a presumption of guilt was likely exacerbated by the potential penalty: in the mid-twentieth century, rape was still a capital crime in more than a dozen states,[89] and these concerns were heightened by the risk of racial animus in prosecutions of black men for raping white women.[90]

Third, proponents of the corroboration requirement argued that sex-assault allegations were markedly more difficult to defend against than other crimes, because "the issue of whether a crime was even committed may turn solely on the conflicting testimony of the complainant and the defendant."[91] The rule thus presumed that, if the State's case rested solely on the testimony of the victim, the defendant must win by default, or there is too great a risk of wrongful conviction.[92]

The corroboration requirement, while not adopted by every jurisdiction, was mainstream. A majority of American states had adopted some form of the corroboration requirement by the early 1960s.[93] This sexist—if not misogynistic—approach to sex crimes was frozen in amber through the Model Penal Code ("MPC").[94] Even today, the MPC does not permit a conviction for rape upon the uncorroborated testimony of a

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84. *See Repeal Not Reform*, *supra* note 30, at 1373; *see also* Note, *Corroborating Charges of Rape*, *supra* note 78, at 1138 ("Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false.").

85. *See Repeal Not Reform*, *supra* note 30, at 1373; Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 66–68 (1952); Williams, *supra* note 79, at 662 (asserting "sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed.").

86. *See Repeal Not Reform*, *supra* note 30, at 1376–77 (collecting references, including HELENE DEUTSCH, THE PSYCHOLOGY OF WOMEN 123–24, 239–78 (1944)). Susan Estrich rightly places some of this blame at the feet of Sigmund Freud, noting: "[A]lthough [Freud] did not invent the fear of lying women complainants, he gave the fear a solid foundation and an aura of reasoned elaboration that is evidenced in the law review writings of the 1950's and 1960's." Estrich, *supra* note 28, at 1090 n.6.

87. *See Repeal Not Reform*, *supra* note 30, at 1378–79; *see also* Roberts v. State, 183 N.W. 555, 557 (Neb. 1921) ("Public sentiment seems inclined to believe a man guilty of any illicit sexual offense he may be charged with, and it seems to matter little what his previous reputation has been."); State v. Connelly, 59 N.W. 479, 481 (Minn. 1894) ("It is human nature to incline to the story of the female, especially if a young girl. But, while virtue and veracity are the rule with them, yet even young girls, like older females, sometimes concoct an untruthful story to conceal a lapse from virtue.").

88. Anderson, *supra* note 27, at 651.

89. *See Repeal Not Reform*, *supra* note 30, at 1381.

90. *See, e.g.*, Estrich, *supra* note 28, at 1089 n.2; *Repeal Not Reform*, *supra* note 30, at 1380–81.

91. *See Repeal Not Reform*, *supra* note 30, at 1382.

92. *See id.* at 1382.

93. *See* Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 214, n.57 (2003); *see also* Anderson, *supra* note 36, at 925–26.

94. *See* Denno, *supra* note 93, at 209.

victim.[95] The importance of this cannot be overstated. The "model" criminal code, which a national group of law professors urges states to adopt, disallows sex-assault prosecutions that are based solely on the victim's testimony—even though science tells us that the overwhelming majority of sex crimes cannot be corroborated due to offender behavior.[96]

In addition to requiring corroboration, judges throughout the United States also gave "cautionary instructions" to jurors, modeled on Hale's writings. This was one common formulation:

> 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.[97]

Other instructions told jurors that an "unchaste woman is more likely than others to consent to sexual advances," that "women who say no do not always mean no," and that reluctant consent renders penetration lawful.[98] In short, the instructions' purposes were to overtly criticize the credibility of sex-assault victims, regardless of the facts in any particular case. This, too, was captured in the MPC,[99] even though no other crime in the Code carried such an admonition.[100] As one commentator aptly observes, the MPC is nothing if not "consistent in its adoption of rape myths as reality."[101]

Numbers are hard to come by, but it is hard to argue with the somewhat self-evident conclusion that the corroboration requirement and the cautionary instruction "made it quite difficult to convict even the guilty for the crime of rape."[102] As the American Legal Institute puts it, these barriers made "rape convictions . . . exceptionally difficult to obtain."[103] A social science experiment has confirmed that instructions from a mock judge supporting rape myths have a statistically significant effect on mock jurors' verdicts.[104] Anecdotal statistics also support that conclusion: under New York's twentieth century corroboration statute, there were 1085 arrests for rape and only 18 convictions—a result

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95. *See* MODEL PENAL CODE § 213.6(5) (AM. LAW INST. 1962); *see also* Denno, *supra* note 93, at 214. In fairness to the American Law Institute, there is a pending proposal to reform Article 213 of the Model Penal Code, and the proposal includes eliminating the corroboration requirement. *See generally* PROPOSED REVISION TO MODEL PENAL CODE, *supra* note 25.

96. *See supra* notes 31–35 and accompanying text (discussing how there is no medical or physical evidence in most sex assaults).

97. MODEL PENAL CODE § 213.6(5) (AM. LAW INST. 1962).

98. Torrey, *supra* note 13, at 1046. To read these instructions today is jarring. Consider this one, given in relatively-recent 1982:

> 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.

Id. at 1046 n.161.

99. MODEL PENAL CODE § 213.6(5) (AM. LAW INST. 1962).

100. *See* Anderson, *supra* note 27, at 649.

101. Torrey, *supra* note 13, at 1046. Among other troubling aspects, the Model Penal Code required that a rape complaint be made within three months in order to sustain a prosecution. *See id.* at 1044.

102. Klein, *supra* note 76, at 983.

103. PROPOSED REVISION TO MODEL PENAL CODE, *supra* note 25, at 10, ll. 9–16.

104. Jacqueline M. Gray, *Rape Myth Beliefs and Prejudiced Instructions: Effects on Decisions of Guilt in a Case of Date Rape*, 11 LEGAL & CRIMINOLOGICAL PSYCHOL. 75, 78 (2006).

attributed, at least in part, to the corroboration requirement.[105] The Chief Assistant District Attorney for Queens, New York, offered perhaps the most troubling observation: "The corroboration requirement has nullified the prosecution of practically every sex offense in the current Penal Law."[106] As discussed below, these numbers eventually gave rise to a movement that led to the weakening and formal abolition of most states' corroboration requirements.

B. The Rape-Reform Movement Struck Back Against the Justifications for Corroboration Instructions

Since Hale's day, we have moved the ball down the field on women's rights. The rape-reform movement has achieved real change in a number of areas: by largely eliminating statutory barriers to prosecution; by promulgating various forms of what we now call rape shield laws; and by including spousal rape as a form of sexual assault.[107] Yet despite these reforms, and despite an improved understanding of sex crimes, most of the data suggests no significant change in the rate at which victims report sex assault, the frequency with which officers conduct an investigation or make an arrest, or the percentage of sex-assault indictments that result in convictions.[108] Full discussions of the rape reform movement appear elsewhere in the literature,[109] so I will focus just briefly on reform of the corroboration requirement.

Based on changes in public policy and new scholarly research, every justification for the corroboration rule has been undermined over the last thirty to forty years. There is no rash of false allegations, nor are juries emotionally overwhelmed by sympathy for rape

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105. *Repeal Not Reform*, *supra* note 30, at 1370 n.38.

106. Ludwig, *supra* note 49, at 379; *accord Repeal Not Reform*, *supra* note 30, at 1371 (observing that "the corroboration requirement will often virtually bar successful prosecution" in sex-assault cases).

107. *See generally* Klein, *supra* note 76, at 983–1057; 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, 558–60 (1993); Seidman & Vickers, *supra* note 25, at 469–71.

108. Klein, *supra* note 76, at 1030–32 (collecting and summarizing research); Cassia C. Spohn & Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Case*s, 86 J. CRIM. L. & CRIMINOLOGY 861, 884 (1996); David Bryden & Sonya Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997); Lonsway & Archambault, *supra* note 21, at 158–59 (noting the data suggests "little or no change in the rate of prosecution, conviction, and incarceration for rape" nor any significant change in the numbers of sexual assaults); Seidman & Vickers, *supra* note 25, at 470–71, 490; Bachman & Paternoster, *supra* note 107, at 573; Mitchell, *supra* note 73, at 74; Estrich, *supra* note 28, at 1157–61 (summarizing much of the existing research and noting, "The record is scanty, but the results that have surfaced must be a disappointment to the 'reformers,' however defined."); Andrea A. Curcio, *The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws*, 20 GA. ST. L. REV. 566, 579–83 (2004) (summarizing empirical studies). As a counterpoint to claims that there has been little change, one study has found a moderate increase in the rate at which rape is reported to the police, and a significant increase in the rate at which rape offenders are sent to prison. *See* Bachman & Paternoster, *supra* note 107, at 565–66. But even these authors describe reform efforts as a "partial success." *See id.* at 573–74. All the debate over statistics, however, should be tempered with recognition that "[m]any of the goals of rape law reform cannot easily be tested by statistical studies." Estrich, *supra* note 28, at 1157. Even if the number of convictions remains low or only increases slightly, the rape reform movement has made strides toward improving the law and "the experience of an individual victim as she proceeds through the system." *Id.*

109. *See, e.g.*, Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 839–47 (2013) (discussing the reform movement, with particular emphasis on rape shield laws); Klein, *supra* note 76, at 986–87 (discussing a wide range of rape reform measures); Estrich, *supra* note 28, at 1133–57 (discussing reform legislation with particular emphasis on the Model Penal Code and the Michigan criminal-sexual-conduct statute).

victims, nor is it impossibly difficult to defend against a victim's uncorroborated testimony.[110] The empirical data, as discussed in Part I, do not support fears that "ladies lie" about rape.[111] There is no reason to think that the low rate of false rape allegations—a single-digit percentage of cases—differs materially from the rate of false allegations for other crimes.[112] Nor is there any meaningful data to show juries wrongfully convict alleged rapists out of emotional concern for female victims[113] or because it was too hard for suspects to defend against uncorroborated testimony.[114] The reality is that "relatively few uncorroborated rape accusations result in a trial, much less a conviction, even in the absence of a formal corroboration requirement."[115] Perhaps most damning to justifications for the corroboration instruction, it turns out that the percentage of sex-assault cases that lack eyewitnesses is not so different from other crimes—yet there has never been an outcry for special courtroom treatment of burglary victims, which lack eyewitnesses five times more often than sex assaults.[116]

In part because its foundations were crumbling, the corroboration requirement was formally abolished in nearly every jurisdiction by the turn of the twenty-first century.[117] Yet despite the abrogation or formal repeal of corroboration statutes, fears about corroboration and "ladies who lie" persist in sex-crime prosecutions. As Susan Estrich puts it: "In the law of rape, supposedly dead horses continue to run."[118]

The corroboration requirement, in particular, survives in the hearts and minds of jurors. Jurors still expect to see corroborating physical evidence or erroneously believe that a conviction cannot be had without corroboration.[119] One study found that prosecutors

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110. *See* Morris, *supra* note 71, at 157–67.

111. *See generally* Patricia Falk, *"Because Ladies Lie:" Eliminating Vestiges of the Corroboration Requirement and Resistance Requirements from Ohio's Sexual Offenses*, 62 CLEV. ST. L. REV. 343, 343 (2014).

112. *See supra* notes 44–46 and accompanying text.

113. *See* Note, State v. Tatum, *supra* note 82, at 224. To the contrary, there is data that suggests "a tendency for juries to sympathize more with the accused, especially if the accused and prosecutrix were acquainted with each other prior to the rape." Patrick J. Gregory, Note, *An Evaluation of Nebraska's Corroboration Requirement*, 21 CREIGHTON L. REV. 601, 616, nn.155–56 (1987) (citing *Repeal Not Reform*, *supra* note 30, at 1374; Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objective of the Consent Standard*, 62 YALE L.J. 55, 73 (1952)).

114. *See* Note, State v. Tatum, *supra* note 82, at 225. One of the studies relied upon by the Note found that, out of a population of 109 rape cases, 18 were tried, 4 concluded with a guilty verdict, 10 resulted in acquittal, 1 ended with a hung jury, and 3 were found guilty on a lesser-included offense. *Id*.

115. *Repeal Not Reform*, *supra* note 30, at 1384.

116. PETERSON ET AL., *supra* note 27, at 62, 92, 107 (48.1% of robberies and 4.7% of burglaries are committed without eyewitnesses, compared to 21.7% of rapes).

117. This change was gradual, with thirty-five states rejecting a corroboration requirement by 1974, and another seven by 1986. *See* Klein, *supra* note 76, at 986–87. That said, even today a handful of states maintain a limited corroboration requirement for certain circumstances. *See* Anderson, *supra* note 27, at 652; PROPOSED REVISION TO MODEL PENAL CODE, *supra* note 25, at 88–89, ll. 4–6; Caroline Pineda Han & Sukyong Suh, *Evidentiary Matters in Sexual Offense Cases*, 3 GEO. J. GENDER & L. 625, 627 (2002). These circumstances also remain part of the larger cultural narrative. *See Law & Order: SVU*, "Competence" at 23:40–23:50 (NBC television broadcast May 10, 2002) (fictional Manhattan Assistant District Attorney Alex Cabot explaining that the "uncorroborated testimony" of a victim with Down syndrome was "not enough" for conviction under modern New York state law).

118. Estrich, *supra* note 28, at 1091.

119. *See* Klein, *supra* note 76, at 1049; HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 56 (1980); Curcio, *supra* note 108, at app. A (reprinting the Report of the Georgia Supreme Court Commission on Equality concerning sexual violence); Pratt, *supra* note 82, at 808 n.11 (reproducing a portion of a Georgia Governor's bill signing statement regarding abolition of the corroboration

obtain convictions in more than eighty percent of sex-assault cases with corroborating evidence, compared to only sixty-one percent of cases without.[120] In short, while the rape myths that undergird the historical corroboration rule have been disproven, "they continue to play an important role in the way judges, jurors, and others perceive testimony in rape trials."[121] So long as rape myths "continue to be effectively enforced by juries due to long-held beliefs on gender and sex norms,"[122] both individual victims and society are denied fair trials and substantial justice.[123] One potential solution to the vestigial damage of corroboration requirements has been what I call a "noncorroboration instruction" and discuss in detail below.

III. EXISTING APPROACHES TO NONCORROBORATION INSTRUCTIONS

Although the precise wording varies,[124] some trial courts have issued "noncorroboration" instructions to inform jurors they can find a sex-assault defendant guilty based on a victim's testimony, even when there is not significant corroborating evidence. As discussed below, these instructions generally track state statutes or judicial opinions that have abolished the common law corroboration instruction discussed in Part II above.

Appellate courts are sharply divided over whether it is proper for trial courts to issue noncorroboration instructions. A slight majority of jurisdictions—California, Georgia, Michigan, Nevada, New Hampshire, Pennsylvania, Washington, and Guam—explicitly approve of instructing juries that the testimony of a sex-assault victim need not be

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requirement, including: "It is believed [by the public] that an eye witness is required to support complaints of rape."). One could debate whether jurors truly believe in rape myths or are instead ignorant about rape realities. *See* Torrey, *supra* note 13, at 1055 ("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."). There is some support for jurors' (perhaps willful) ignorance, including a study that found that potential jurors who completed a "rape knowledge test" barely scored better than they would have if they had guessed blindly on every question. *See id.* at 1049 (citing FEILD & BIENEN, *supra* note 119, at 84–85).

120. Walsh et al., *supra* note 27, at 447–48. This statistic only concerns cases brought to disposition; it does not account for cases that are diverted out of the criminal-justice process either by police or prosecutorial discretion. *See id.* at 447.

121. *Cf.* Torrey, *supra* note 13, at 1015, 1052 ("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."); *see generally* Burt, *supra* note 14, at 229–30.

122. Kristen L. Stallion, *Missouri Abolishes the Corroboration Rule and the Destructive Contradictions Doctrine: A Victory for Victims of Sexual Assault?*, 80 MO. L. REV. 607, 608 (2015).

123. Torrey, *supra* note 13, at 1041.

124. The exact language of instructions considered by appellate courts is reproduced in Appendices A and B *infra*.

corroborated.[125] Three of these states—California,[126] Michigan,[127] and Pennsylvania[128]—affirmatively encourage noncorroboration instructions by publishing them in state model jury instructions. On the other end of the spectrum, a slight minority of state appellate courts—Alaska, Florida, Indiana, Minnesota, South Carolina, Texas, and Wyoming—disapprove of noncorroboration instructions.[129] Below, I catalog the most common arguments for and against issuing noncorroboration instructions, as captured in the case law.

A. Arguments in Favor of Noncorroboration Instructions

The slight majority of courts approving noncorroboration instructions conclude that arguments in their favor outweigh the criticisms. As discussed below, these instructions correctly state the law, debunk rape myths, combat defense arguments that prey on rape-culture misconceptions, and ultimately improve how the criminal justice system responds to sex-assault cases and victims.

1. Noncorroboration Instructions Correctly State the Law

The best argument in favor of noncorroboration instructions is the simplest and most straightforward: They are correct statements of the law. To anyone who believes that jury instructions reflect the judge communicating the law to lay jurors, this should create a presumption in favor of noncorroboration instructions. Arguing against noncorroboration instructions, then, is really an argument to keep jurors from finding out what the law is and hiding the reform of rape law from the public.

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125. *See* People v. Gammage, 828 P.2d 682, 687 (Cal. 1992); Mency v. State, 492 S.E.2d 692, 699 (Ga. Ct. App. 1997); People v. Welch, No. 90–00008A, 1990 WL 320365, at *1 (D. Guam Oct. 30, 1990); People v. Smith, 385 N.W.2d 654, 657 (Mich. Ct. App. 1986); State v. Marti, 732 A.2d 414, 420 (N.H. 1999); Gaxiola v. State, 119 P.3d 1225, 1231–32 (Nev. 2005); Commonwealth v. Barney, No. 1460 MDA 2014, 2015 WL 7433518, at *3 (Pa. Super. Ct. Mar. 27, 2015); State v. Clayton, 202 P.2d 922, 923 (Wash. 1949). I do not include Nebraska in this list because Nebraska's high court only partially approved an instruction. *See* State v. Schmidt, 757 N.W.2d 291, 297 (Neb. 2008). The Nebraska court essentially concluded that there may be some cases where a noncorroboration instruction is important, but the instruction "should not be given" in a routine prosecution. *See id.*

126. *See* CALIFORNIA MODEL CRIMINAL JURY INSTRUCTION NO. 1190 (2006), http://www.courts.ca.gov/partners/documents/calcrim _ 2016_edition.pdf ("Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone.").

127. *See* MICHIGAN MODEL CRIMINAL JURY INSTRUCTION 20.25 (2014), http://courts.mi.gov/courts/michigansupremecourt/criminal-jury-instructions/documents/mcrimji.pdf ("To prove this charge, it is not necessary that there be evidence other than the testimony of [name complainant], if that testimony proves guilt beyond a reasonable doubt.").

128. *See* Pennsylvania Suggested Standard Criminal Jury Instruction § 4.13B (2005).

> The testimony of [*name of victim*] standing alone, if believed by you, is sufficient proof upon which to find the defendant guilty in this case. The testimony of the victim in a case such as this need not be supported by other evidence to sustain a conviction. Thus you may find the defendant guilty if the testimony of [*name of victim*] convinces you beyond a reasonable doubt that the defendant is guilty.

Reproduced in AM. PROSECUTORS RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 437 (3d ed. 2004).

129. Burke v. State, 624 P.2d 1240, 1257 (Alaska 1980); Gutierrez v. State, 177 So.3d 226, 229–30 (Fla. 2015); Ludy v. State, 784 N.E.2d 459, 461–62 (Ind. 2003) (finding the instruction harmless); State v. Williams, 363 N.W.2d 911, 914 (Minn. Ct. App. 1985); State v. Stukes, 787 S.E.2d 480, 499–500 (S.C. 2016); Veteto v. State, 8 S.W.3d 805, 816 (Tex. Ct. App. 2000), *abrogated on other grounds by* State v. Crook, 248 S.W.3d 172 (Tex. Crim. App. 2008); *Garza v. State*, 231 P.3d 884, 890–91 (Wyo. 2010) (finding instruction harmless).

The purpose of jury instructions is "to provide the jury with proper legal standards for reaching a verdict."[130] And courts almost universally recognize that judges have a duty to fully instruct jurors on the applicable law.[131] So it is difficult to conceive of any good reason to prevent jurors from receiving instructions that closely track statutory language. I am aware of no other area in the law where courts openly debate whether they should instruct jurors on the plain language of statutes and relevant legal principles.[132]

2. Noncorroboration Instructions Debunk Rape Myths

The California Supreme Court has recognized that noncorroboration instructions address the "special features" of sex-crime prosecution[133]—in other words, they help debunk rape myths. Although the specific effects of noncorroboration instructions have not been previously addressed in the literature, there is commentary urging that judges should tell jurors that the absence of a prompt complaint does not make a victim less credible.[134] Just as that instruction would "debunk the myths upon which the prompt complaint doctrine rests," a noncorroboration instruction debunks other rape myths discussed in Part I of this Article.[135]

Perhaps the most damaging rape myth—fanned by defense attorneys and rape culture—is that you cannot find an offender guilty without corroborating the victim's testimony. The Nevada Supreme Court captures this point well:

> Jurors mistakenly assume that they cannot base their decision on one witness's testimony even if the testimony establishes every material element of the crime. Therefore, it is appropriate for the district court to instruct the jurors that it is sufficient to base their decision on the alleged victim's uncorroborated testimony

130. Laurence J. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 199 (1984); *accord* Wylie A. Aitken, Comment, *The Jury Instruction Process–Apathy or Aggressive Reform?*, 49 MARQ. L. REV. 137, 137 (1965) ("It should give the jury a fair understanding of the issues of the case, outline the questions of fact to be determined, and convey a comprehension of the applicable principles of law."); People v. Novak, 643 N.E.2d 762, 773–74 (Ill. 1994) ("The purpose of jury instructions is to provide to the jury the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence.").

131. *See, e.g.*, State v. Concepcion, 545 A.2d 119, 122 (N.J. 1988) ("The trial court has an absolute duty to instruct the jury on the law governing the facts of the case."); People v. Sanchez, 219 P.2d 9, 12 (Cal. 1950) ("A trial court's duty is . . . to see to it that the jury are adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity with the applicable law."); Grindstaff v. State, 165 P.2d 846, 847 (Okla. 1946) ("Trial court has duty to instruct jury fully on all questions of law developed by the evidence."); Aitken, *supra* note 130, at 138 ("Throughout the years, the main concern in the area of instructional enlightenment of the jury had been whether the particular charge given by the judge correctly stated the applicable law.").

132. The closest criminal trial courts come to withholding legal information from jurors is when they decline to tell jurors what penalty may be imposed following conviction. That situation is distinguishable from victim corroboration. Noncorroboration instructions relate directly to the question at trial (whether there is enough evidence to convict), while information about the penalty is not relevant to the guilt phase and may cause jurors to decide the case on an improper basis. *E.g.*, State v. Kolbet, 638 N.W.2d 653, 662–63 (Iowa 2001) (holding that it was proper for the district court to refuse to permit comment on penalty); *see* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 692–95 (2010) (on the transition from sentencing juries in colonial times to the modern system, where juries determine guilt and judges impose the sentence).

133. People v. Gammage, 828 P.2d 682, 687 (Cal. 1992).

134. Torrey, *supra* note 13, at 1065.

135. *See id.* at 1066.

as long as the testimony establishes all of the material elements of the crime.[136]

Scholars believe that jurors continue to require corroboration,[137] and the data supports that view. One quantitative Indiana study concluded: "Even though corroboration is not formally required . . . such a requirement persists on an informal level."[138] In a similar vein, one New Zealand study found that, even when jurors believed victims and were certain of the defendant's guilt, "they often looked for tangible evidence to verify their view and felt that, in the absence of that, the charge could not be 'proved.'"[139] Of course, it is possible that some jurors know the law does not require the victim's testimony be corroborated. But, as the California Supreme Court recognizes, some—if not most—jurors are still unaware.[140] And even if every juror did know the law on corroboration, "no harm is done in reminding juries" it is not required.[141] In other words, while perhaps "the 'historical imbalance between victim and accused in sexual assault prosecutions' has been partially redressed in recent years, there remains a continuing vitality in instructing juries that there is no legal requirement of corroboration."[142] Finally, correcting myths about corroboration is tremendously important for practical reasons: "Corroborative evidence of sexual assault—such as torn clothes or injuries—is not only uncommon, it is downright rare."[143] This means that, when jurors mistakenly believe they must have corroboration to secure a conviction, it will be the death knell for many, if not most, sex-assault prosecutions.

In addition to mistaken beliefs about corroboration, "[t]he implied assumption that the victim's testimony is inherently untrustworthy" is a pervasive rape myth.[144] This fiction requires correction. Research shows that the rate of false allegations is no higher

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136. Gaxiola v. State, 119 P.3d 1225, 1233 (Nev. 2005); *see also* People v. Welch, No. 90–00008A, 1990 WL 320365, at *1–2 (D. Guam Oct. 30, 1990) (citing and quoting People v. McIntyre, 115 Cal. App. 3d, 899, 907 (Cal. Ct. App. 1981)).

137. Stallion, *supra* note 122, at 624 ("While the corroboration rule has virtually disappeared from the vast majority of jurisdictions, the rule continues to pervade trials because jurors continue to require evidence of corroboration in order to convict despite abolition of the formal requirement."); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 597–98 (2009) ("In addition, the vindictive shrew myth continues to pervade nonparadigmatic rape trials, leading jurors to require evidence of corroboration despite elimination of the formal requirement."); Klein, *supra* note 76, at 1049–50 ("Corroboration may not be legally required any longer, but jurors may still wish to see more evidence than just the claim of the woman."). As with other rape myths (discussed in Part I), the implied requirement of corroboration does outsized damage to child-sex-abuse prosecutions. *See* Laura Lane, *The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases*, 36 CATH. U. L. REV. 793, 794 (1987).

138. Martha A. Myers & Gary D. LaFree, *Sexual Assault and Its Prosecution: A Comparison with Other Crimes*, 73 J. CRIM. L. & CRIMINOLOGY 1282, 1300 (1982). From their data, the authors also drew the inference that "[t]his informal requirement could reflect an underlying official skepticism toward sexual assault complaints." *Id.*

139. Warren Young et al., *Juries in Criminal Trials Part Two*, § 3.23, at 27 (N.Z. Law Comm'n, Discussion Paper No. 37, 1999), http://www.nzlii.org/nz/other/nzlc/pp/PP37/PP37.pdf.

140. People v. Gammage, 828 P.2d 682, 687 (Cal. 1992).

141. *Id.*

142. *Id.* (quoting *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1353 (Cal. 1991)).

143. Anderson, *supra* note 27, at 652; *accord* State v. Rayfield, 631 S.E.2d. 244, 250 (S.C. 2006) ("In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator."). For more discussion on this point, see *supra* Part I.

144. Morris, *supra* note 71, at 163.

for rape than any other crime,[145] yet "[r]ape victims are much more frequently perceived as lying than are victims of other violent crimes."[146] And while empirical studies estimate that between two percent and eight percent of rape allegations are false, the public nevertheless believes the rate of false allegations is between twice and ten times that much.[147] A noncorroboration instruction counterbalances this myth by informing the jury that it is possible—though not required—that they return a guilty verdict based solely on the word of the victim, if they believe her or him beyond a reasonable doubt.

Noncorroboration instructions also indirectly combat the myth that victims report right away. In some ways, this concern overlaps with myths about the use of violence and injuries—even if there were detectable injuries at the moment of the attack, the window for finding most injuries can be as short as twenty-four hours.[148] The odds of finding DNA, fibers, or other corroboration—odds that are not high in any case—decrease significantly as time goes on.[149] For obvious reasons, if a victim does not report a sexual assault to the police until weeks after, the police will generally be unable to collect any corroborative physical evidence. Perhaps less obviously, when victims delay reporting even slightly, they often inadvertently destroy evidence. "[T]he most immediate response of many rape victims" is "bathing, douching, brushing her teeth, [and] gargling," all of which can compromise any physical evidence that might be present in or on the victim's person.[150] Because most cases will not involve corroborating physical evidence, noncorroboration instructions help reduce the disconnect between jurors' expectations and reality.

Noncorroboration instructions also challenge gender biases stirred by rape culture. As one scholar has put it, correcting rape myths is a partial antidote to discrimination against women in the courtroom.[151] Juries are innately skeptical of sex-assault allegations[152] and, "unless challenged, [jurors'] beliefs in the validity of these myths are persistent."[153] Noncorroboration instructions help combat rape myths because jurors may employ these biases subconsciously,[154] and the instruction affirmatively tells jurors to evaluate a sex-assault victim the same way they would evaluate the victim of any other crime. Persistent belief in rape myths, both consciously and subconsciously, is likely responsible for many wrongful acquittals in sex-assault trials.[155] We owe it to jurors to

145. *See supra* notes 43–46 and accompanying text.

146. Morris, *supra* note 71, at 164.

147. Edwards et al., *supra* note 15, at 767 (collecting studies showing the public believes that between nineteen percent and fifty percent of rape allegations are false).

148. *See* LEDRAY, *supra* note 31, at 70–71.

149. *See* JOHN O. SAVINO ET AL., RAPE INVESTIGATION HANDBOOK 121–22 (2005) (noting the high probability forensic evidence cannot be recovered outside the first seventy-two hours after a sexual assault).

150. Estrich, *supra* note 28, at 1175.

151. Torrey, *supra* note 13, at 1060–61.

152. Klein, *supra* note 76, at 984.

153. Hildebrand & Najdowski, *supra* note 12, at 1065.

154. Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 24 (2011) ("The import of this finding for rape myths and their pervasiveness is striking: we may employ rape myths without even knowing it.").

155. Hildebrand & Najdowski, *supra* note 12, at 1078; *see* NINA BURROWS, RESPONDING TO THE CHALLENGE OF RAPE MYTHS IN COURT: A GUIDE FOR PROSECUTORS (2013), http://nb-research.com/wp-content/uploads/2013/04/Responding-to-the-challenge-of-rape-myths-in-court_Nina-Burrowes.pdf (collecting studies and concluding the data supports that rape myths affect juror judgments); HARRY KALVEN, JR. & HANS

ensure they are able to make reliable decisions, within the bounds of the law, when deliberating sex-assault verdicts.[156]

3. Noncorroboration Instructions Mitigate Improper Arguments by Defense Counsel

Although nearly every state recognizes corroboration is not required by law, defense attorneys still "attempt to play on rape culture" by propagating rape myths and urging that jurors must acquit when cases lack physical evidence or eyewitnesses.[157] Social science research confirms that closing arguments by defense counsel can have a significant impact on juror deliberations, even when jurors are told the arguments are not evidence.[158] Improper arguments, including those that turn on a lack of corroboration, deny justice to sex-assault victims.

Some data supports the unsurprising conclusion that telling jurors to be skeptical of uncorroborated testimony may cause jurors to convict less often.[159] The effect of this argument is magnified by group discussions, like those of jurors during deliberations.[160] When drilling down into mock jurors' deliberations, improper corroboration arguments are particularly suspect because they do not actually result in any discussion of potential corroborating evidence;[161] instead, they result in mock jurors making fewer negative comments about the defendant.[162] The most reasonable inference from this data is that corroboration arguments manage to play on jurors' misconceptions and (unfounded) fears about false allegations, rather than motivate a thorough review of the evidence.

ZEISEL, THE AMERICAN JURY 249–57 (1966) (summarizing data showing that, in the mid-twentieth century, jurors were more likely to acquit defendants of rape than any other criminal charge). Rape myths sometimes also affect female jurors, who may rely on the myth that "good girls don't get raped" because accepting that "normal" women can be raped "increases women's sense of their own vulnerability." *See* MERRIL D. SMITH, ENCYCLOPEDIA OF RAPE 28 (2004) (briefly discussing the "good girls don't get raped" myth); Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 COLUM. J.L. & SOC. PROBLEMS 277, 280 (1992).

156. Scott A. McDonald, Note, *When a Victim's a Victim: Making Reference to Victims and Sex-Crime Prosecution*, 6 NEV. L.J. 248, 258 (2005) ("[D]efendants should not have a monopoly on notions of fairness in the criminal justice system. Justice also belongs to victims and society as a whole. A conviction based on facts proven beyond a reasonable doubt reinforces social norms and reaffirms society's abhorrence for the crime of rape.").

157. *See* Hildebrand & Najdowski, *supra* note 12, at 1084; WIS. PROSECUTOR'S REFERENCE BOOK, *supra* note 41, at 35–44 (documenting "common defenses to sexual assault," including the false-allegations myth and the lack of physical injuries); McDonald, *supra* note 156, at 253 ("[D]efense attorneys frame the presentation of the circumstances surrounding the attack in a manner consistent with rape mythology so that the evidence or testimony reinforces juror bias in favor of the defendant."); NEW ZEALAND LAW COMM'N, THE JUSTICE RESPONSE TO VICTIMS OF SEXUAL VIOLENCE § 6:23, at 113 (2015), http://r136.publications.lawcom.govt.nz/uploads/NZLC-R136-The-Justice-Response-to-Victims-of-Sexual-Violence.pdf (Defense attorney's "[q]uestions may draw on rape myths and stereotypes, seeking to engage juror misconceptions and 'social world' knowledge about how victims or perpetrators of sex offences *should* behave, but which is usually not borne out by the research.").

158. *See* Tamara M. Haegerich et al., *Are the Effects of Juvenile Offender Stereotypes Maximized or Minimized by Jury Deliberation?*, 19 PSYCHOL. PUB. POL'Y & L. 81, 90 (2013).

159. Valerie P. Hans & Neil Brooks, *Effects of Corroboration Instructions in a Rape Case on Experimental Juries*, 15 OSGOODE HALL L.J. 701, 708 (1977). The authors note that, given their sample size, this effect fell slightly short of statistical significance. *See id.* at n.15.

160. *Id.* at 709.

161. *See id.* at 709–10.

162. *See id.* at 709–10, 712–13.

While prosecutors can respond to corroboration arguments in closing argument or rebuttal, a prosecutor lacks the voice of authority accompanied by jury instructions.[163] Creating a "battle of lawyers"—a defense lawyer who insists corroboration is necessary and a prosecutor who argues it is not—is untenable because prosecutors and defense counsel are on unequal footing. The State bears the burden of proof beyond a reasonable doubt, while the defense has no burden at all. Thus, if conflicting arguments are made by counsel, and the judge does not instruct on the issue, it is hard to blame the jury for resolving conflicts in favor of the defense—and thus contrary to the law. Noncorroboration instructions may not cure every improper argument made about sex-assault victims, but they are strong medicine against a bias that is known to the research and has been thoroughly debunked.

4. Noncorroboration Instructions Will Improve Sex-Assault Investigation and Charging Practices

Noncorroboration instructions most directly affect what happens at trial, but they will also impact police investigations and prosecutors' charging practices. Some scholars have referred to this as "downstream orientation within the criminal justice system"—basically the idea that investigation and charging decisions are made with an eye toward the likelihood a conviction will result.[164] Once jurors are informed they can return a guilty verdict without corroborating physical evidence, police may be slower to disregard uncorroborated victim statements and prosecutors may be more willing to bring charges, particularly in child-sex-abuse cases.

Prosecutors and police are not without their critics, particularly when it comes to sex crimes.[165] Michelle Anderson and others have argued that some police departments disproportionately screen out sex-assault cases as "unfounded," meaning that no real investigation will ever be done.[166] Anderson also makes the case that some prosecutors disproportionately decline to prosecute rape cases, in part due to a lack of corroboration.[167] In other words, Anderson argues, "The historical impediments written into rape law are . . . related to today's disproportionate exercise of prosecutorial discretion."[168] This criticism

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163. *Cf.* People v. Smith, 385 N.W.2d 654, 657 (Mich. Ct. App. 1986) (finding the noncorroboration instruction was appropriate, particularly where "defense counsel vigorously argued in closing that . . . the jury should insist on some corroborative evidence, which the prosecution had failed to supply").

164. *See* Lonsway & Archambault, *supra* note 21, at 163. Here is how Lonsway and Archambault cast their "downstream orientation" theory:

> If prosecutors do not believe they can persuade jurors to convict in a sexual assault case, they may charge and try fewer cases. Then as law enforcement investigators see that fewer cases are being charged and tried, they may move forward fewer cases to the prosecutor's office. Finally, as fewer cases proceed through the stages of investigation and prosecution, victims may be less likely to report their sexual assault to law enforcement. Therefore, any change that is targeted at the final point in the attrition process has the potential to push for reforms all the way "upstream," even to the point of victim reporting.

Id.

165. *See* Anderson, *supra* note 36, at 927–39.

166. *See id.* at 928–31.

167. *Id.* at 932–35.

168. *Id.* at 934.

is perhaps too sweeping—my own experience tells me there are good police and bad, just as there are good prosecutors and bad. But, for those police and prosecutors still making decisions based on rape myths[169]—or those making decisions because they fear jurors will follow rape myths when rendering a verdict[170]—allowing noncorroboration instructions will help bring these law enforcement actors into the twenty-first century.

B. Common Critiques of Noncorroboration Instructions

The arguments against noncorroboration instructions are less uniform than those in their favor. Among the minority of courts that have rejected the instruction, there are three common threads. First, several courts suggest that noncorroboration instructions single out the testimony of the victim. Second, some courts explicitly or implicitly worry that noncorroboration instructions make it too easy to obtain sex-crime convictions. And finally, a few of these courts worry that noncorroboration instructions are too confusing for jurors to understand. Below, I survey these criticisms and evaluate the weight they should be given.

1. Critique: Noncorroboration Instructions Single Out Victims' Testimony

Most of the courts that have disapproved of noncorroboration instructions cite a fear that the instruction unfairly singles out the victim's testimony for special treatment.[171] The language used by the Florida courts is typical: they find the instruction "is improper because it constitutes a comment on the testimony presented by the alleged victim and presents an impermissible risk that the jury will conclude it need not subject the victim's testimony to the same tests for credibility and weight applicable to other witnesses."[172] This argument does not carry much weight for two reasons. First, states routinely instruct juries on how to evaluate expert testimony, and there is no reason those instructions should be widely approved and the noncorroboration instruction for sex-assault victims should be rejected. Second, careful drafting can ensure noncorroboration instructions do not unfairly benefit the State by adding weight to the victim's testimony.

Nearly all jurisdictions have adopted model jury instructions that "emphasize that expert witness opinion testimony must be assessed in the same manner as lay witness testimony."[173] In fact, at least half of the states that reject noncorroboration instructions also (hypocritically) approve instructions that single out the testimony of expert witnesses.[174] There is no sound reason for courts to accept instructions that place expert

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169. Although her research is somewhat dated, Estrich makes the case that "the existence of corroborating evidence" is one of the most important crime-related factors to "determine whether a rape arrest will lead to prosecution and conviction." Estrich, *supra* note 28, at 1171, n.289.

170. *Id.* at 1174–75 (noting that, even if police and prosecutors do not hold sexist views, rape myths about corroboration may still drive these officials' behavior due to their "perceptions of the reactions of juries.").

171. State v. Stukes, 787 S.E.2d 480, 499–500 (S.C. 2016); Gutierrez v. State, 177 So.3d 226, 229–30 (Fla. 2015); Garza v. State, 231 P.3d 884, 890–91 (Wyo. 2010); Ludy v. State, 784 N.E.2d 459, 461–62 (Ind. 2003); Burke v. State, 624 P.2d 1240, 1257 (Alaska 1980).

172. *Gutierrez*, 177 So.3d at 229–30.

173. BETTY LAYNE DESPORTES, JURY INSTRUCTIONS ON EXPERT TESTIMONY 1, http://benjamindesportes.com/pdfs/Jury _Instructions.pdf (last visited July 23, 2017).

174. Minnesota, South Carolina, and Wyoming do not provide free and publicly accessible model instructions.

testimony in the proper context while rejecting the same type of instruction for victim testimony. It is thus no surprise that many of the appellate courts approving noncorroboration instructions have expressly considered and rejected this argument.[175]

To the extent the concern about emphasizing victim testimony is legitimate,[176] the instruction can be tailored to mitigate any risk of undue influence. This type of limiting language is common to expert-testimony instructions.[177] Using a similar approach, noncorroboration instructions can be prefaced with language that tells the jury to evaluate the credibility of victims the same way they evaluate other evidence. Including that verbiage takes the wind out of the sails for this concern.

As a final note, even if one remains unconvinced by the preceding arguments, the history of systemic discrimination against sex-assault victims discussed in Parts I and II may very well warrant special treatment. Only sex-assault victims have been subjected to institutional discrimination like the Hale cautionary instruction, the prompt complaint rule, and the historical corroboration requirement. As one scholar notes, courts have "denied women equal protection of the law in response to rape" and legal rules historically

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Alaska's instructions read:

> . . . In determining whether to believe expert witnesses and the weight to give to their opinions, you should consider: their knowledge and qualifications; the reasons given for the opinion; the information on which they based their opinion; the factors given [sic] you for evaluating the testimony of any other witness. You are not required to accept an expert's opinion but should give it the weight, if any, to which you find it entitled. As with other witnesses, you may believe all, part, or none of the testimony of an expert witness.

ALASKA CRIMINAL PATTERN JURY INSTRUCTION §1.11 (2012), http://www.courtrecords.alaska.gov/webdocs/crpji/ins/1.11.doc.

Florida's instructions read:

> Expert witnesses are like other witnesses, with one exception — the law permits an expert witness to give [his] [her] opinion. However, an expert's opinion is reliable only when given on a subject about which you believe [him] [her] to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

FLORIDA STANDARD JURY INSTRUCTION IN CRIMINAL CASES §3.9(a) (1981), http://federalevidence.com/pdf/JuryInst/FLA.CrimJI.pdf.

Indiana's instructions read:

> A person who has specialized education, knowledge or experience is permitted to express an opinion in those areas. You should evaluate this testimony as you would other evidence in this case. You should also consider the witness's skill, experience, knowledge, and familiarity with the facts of this case.

INDIANA CRIMINAL PATTERN JURY INSTRUCTION No. 12.2300 (2015), http://www.indianajudgesassociation.org/pdf/IJA%20Public%20Access%20Criminal%20Pattern%20Instruction.pdf.

175. Mency v. State, 492 S.E.2d 692, 699 (Ga. Ct. App. 1997); State v. Marti, 732 A.2d 414, 420–21 (N.H. 1999); Gaxiola v. State, 119 P.3d 1225, 1231–32 (Nev. 2005).

176. One might plausibly argue that sex-assault trials, for better or worse, already focus disproportionately on victim behavior because victim-blaming runs rampant:

> Victims of other crimes are simply not treated with such suspicion. Imagine a bank robber acquitted because he was tempted by the money in the bank or an aggravated assault charge dropped because the victim was small and presented an inviting target. Only rapists are accorded this special jury treatment.

Morris, *supra* note 71, at 163.

177. *See* IOWA CRIMINAL JURY INSTRUCTION No. 200.37 (2004) ("Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case."); *see also supra* note 174 and accompanying text.

"evinced obvious gender bias."[178] Noted trial lawyer Irving Younger made this point in 1950, long before such disparity would be recognized writ large: "When all is said and done, it just might be that the requirement of corroboration in prosecutions for sex offenses . . . is nothing more than another illustration of the law's unequal treatment of women."[179] Against this backdrop, the noncorroboration instruction could be viewed purely as a corrective measure, to mitigate the lasting damage inflicted by past legal institutions. These instructions may not be necessary after another century of rape reform, but they are needed today.[180]

2. Critique: Noncorroboration Instructions Comment on the Evidence and Tilt the Scales, Making It Too Easy to Obtain Sex-Crimes Convictions

Judicial opinions rejecting noncorroboration instructions also reflect express or implied concern that the instructions make it too easy to obtain sex-assault convictions. This concern is generally cast in language that suggests jurors will mistakenly believe they do not need to hold the victim's testimony to the same standard as other witnesses.[181]

It is hard not to be skeptical of this claim. The historical track record for prosecuting sex crimes suggests obtaining convictions is remarkably difficult and is not likely to become easy any time soon.[182] In important ways, "the charge of rape [is] easier to disprove than other violent felonies: first, the victim is a convenient target for the focus of the trial; second, the jury is often reluctant to weigh the evidence impartially."[183] Moreover, as Professor Younger put it, "Jurors are not ignorant; they look with suspicion upon *ipse dixit*[184] complaints of sexual misconduct and, in any event, appellate courts do not hesitate to reverse 'thin' convictions."[185]

This criticism also expresses a modern form of the Hale cautionary instruction—that normal safeguards are adequate to prevent wrongful conviction in every type of case *but* sex-assaults, where we need special rules because "ladies lie."[186] Our system of criminal justice includes safeguards against wrongful conviction in every type of case—trial by jury, the assistance of competent counsel, the right against self-incrimination, the rules of evidence, post-conviction review by appellate courts, and a great many others.[187] To draw

178. Anderson, *supra* note 36, at 924.

179. Younger, *supra* note 50, at 276 n.105.

180. *See* People v. Gammage, 828 P.2d 682, 687 (Cal. 1992) (noting that, while "the 'historical imbalance between victim and accused in sexual assault prosecutions' has been partially redressed in recent years, there remains a continuing vitality in instructing juries that there is no legal requirement of corroboration.") (quoting *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1353 (Cal. 1991)); c*f.* Grutter v. Bollinger, 539 U.S. 306, 310 (2003) (expressing a hope that, someday, the corrective measure of race-conscious admissions will no longer be necessary).

181. *E.g.*, Gutierrez v. State, 177 So.3d 226, 229–30 (Fla. 2015).

182. *See supra* notes 23 and 102–05 and accompanying text.

183. Morris, *supra* note 71, at 160.

184. "Ipse dixit" is Latin for "he himself said it." *See Ipse Dixit*, BLACK'S LAW DICTIONARY (9th ed. 2009). In law, it is an evidentiary term used to describe "something asserted but not proved." *Id.*

185. Younger, *supra* note 50, at 276 (footnote omitted).

186. Falk, *supra* note 111, at 349–50.

187. *Cf.* Pratt, *supra* note 82, at 839 (listing off the "trial-level safeguards which apply to all felonies" and describing them as sufficient to guard against improper rape convictions, even without the corroboration requirement).

on Younger again: "If the ordinary safeguards suffice for a case of murder, blackmail, or robbery, why do they fail for a case of rape?"[188] Even if one were to indulge the argument that, for whatever reason, sex-assault cases warrant special scrutiny, a number of factors—police discretion, prosecutorial review, consultation with medical professionals, etc.—already "eliminate the most baseless" sex-assault allegations, often at the expense of also excluding legitimate claims.[189] In other words, even if one were to humor the notion that sex-assault cases deserve extra review, so many other flex points in the criminal justice system screen out cases lacking corroboration that there is no risk a jury instruction on the issue will release a flood of uncorroborated accusations or convictions.[190]

Of the criticisms that allege these instructions comment on the evidence, one that seems to gain the most traction concerns use of the word "victim" rather than "alleged victim." The Texas courts claim that this amounts to a comment on the evidence because "[r]eferring to [X] as the victim instead of the alleged victim lends credence to her testimony that the assaults occurred and that she was, indeed, a victim."[191] As illustrated in Part IV below, this concern is surmountable because it is easily addressed by the choice of language in a noncorroboration instruction.

3. Critique: Noncorroboration Instructions Are Hard to Understand and Will Confuse Jurors

Another recurring theme among courts that criticize noncorroboration instructions is that the instruction will confuse or mislead jurors.[192] The Florida courts speak the most to this claim, asserting that a noncorroboration "instruction has a high likelihood of confusing and misleading the jury regarding its duty to consider the weight and credibility of the testifying victim of a sexual battery."[193] Another Florida case similarly alleges "that telling the jury that a particular witness's testimony does not need to be corroborated without further explanation is likely to mislead the jury."[194] Finally, an Indiana case comes right out and says that the meaning of the word "uncorroborated" is beyond the understanding of lay jurors.[195]

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188. Younger, *supra* note 50, at 276; *see also* State v. Economo, 666 N.E.2d 225, 230–31 (Ohio 1996) (making a similar observation); Estrich, *supra* note 28, at 1138 (asking, "Why is that constitutional mandate [proof beyond a reasonable doubt] sufficient to protect the rights of all criminal defendants except those accused of rape?").

189. Morris, *supra* note 71, at 166–67.

190. *See* Estrich, *supra* note 28, at 1162–78 (describing different stages of "screening" at which potential rape prosecutions are diverted from the criminal justice system, including underreporting by victims, screening within the system by police and prosecutors, and improper acquittals by juries).

191. Veteto v. State, 8 S.W.3d 805, 816 (Tex. Ct. App. 2000).

192. *E.g.*, Brown v. State, 11 So.3d 428, 439 (Fla. Dist. Ct. App. 2009) (noting that, even though "the requested instruction is a correct statement of the law," the court believed it was "likely to confuse and to mislead the jury"); Ludy v. State, 784 N.E.2d 459, 462 (Ind. 2003) ("Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness's testimony, and ignore evidence that conflicts with the witness's version of events.").

193. Gutierrez v. State, 177 So.3d 226, 230 (Fla. 2015).

194. *Brown*, 11 So.3d at 439.

195. *Ludy*, 784 N.E.2d at 462.

These courts take a rather dim view of jurors' reading comprehension. Consider the instruction at issue in *Brown v. State*: "The testimony of the victim need not be corroborated in a prosecution for sexual battery."[196] That instruction is composed of terms that can be understood by persons of ordinary intelligence and the instruction is no more complex than other routine instructions—and surely simpler than something as nebulous as reasonable doubt. The dictionary definition of "corroborate" gives jurors enough information to apply the instruction—it means "to make more certain; confirm."[197] So, the ordinary understanding of the instruction is that the testimony of the victim need not be confirmed by additional evidence to return a guilty verdict, which is exactly the instruction's legal meaning.

Some courts express this concern in a slightly different way, arguing that the noncorroboration concept may be appropriate for appellate judges, but not trial juries.[198] This claim is not discussed at length in the judicial opinions and is a little hard to decipher. At least for Florida, this view is best explained as fidelity to the particular vagaries of state legislative history, given that the Florida Code previously authorized a judge to "instruct the jury with respect to the weight and quality of the evidence" and that language was subsequently stricken.[199] While one reasonable interpretation of the statutory revision is that it expressly prohibited the Hale cautionary instruction, the Florida courts seem to have interpreted the change as an absolute bar to any kind of instruction for how jurors should evaluate sex-assault cases, including the noncorroboration instruction.[200] It is unclear whether this approach can or should find support outside these particular legislative circumstances.[201]

To the extent that some noncorroboration instructions may have been written in a way that confuses jurors, this can be addressed with careful drafting. In the South Carolina *State v. Stukes* case, a trial judge instructed the jury, "The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence."[202] During deliberations, the jury sent the court a question, asking whether the instruction meant that "the victim's testimony must be accepted [by the jury] as being true?"[203] The judge, rather than answer the question, re-issued the general credibility instructions.[204] The jury's confusion could have been eliminated either with a better-drafted instruction or by the judge honestly answering the question. An instruction such as the model suggested in Part IV can adequately explain both what the law requires and that the jury "may" (but not "must") return a guilty verdict if they believe the victim's testimony. Similarly, the judge answering "no" or informing the jury "they may, but are

196. *Brown*, 11 So.3d at 431.

197. *Corroborate*, DICTIONARY.COM, http://www.dictionary.com/browse/corroborate (last accessed July 24, 2017).

198. *Ludy*, 784 N.E.2d at 461–62; *Brown*, 11 So.3d at 439.

199. *Brown*, 11 So.3d at 434–35.

200. *See generally id*. at 434–39.

201. *Ludy* (the Indiana case) does not rely on legislative history, but does rely on past appellate cases that hold, "The mere fact that certain language or expression [is] used in the opinions of this Court to reach its final conclusion does not make it proper language for instructions to a jury." *Ludy*, 784 N.E.2d at 462 (citing and quoting Drollinger v. State, 408 N.E.2d 1228, 1241 (Ind. 1980)).

202. State v. Stukes, 787 S.E.2d 480, 497 (S.C. 2016).

203. *Id.*

204. *Id.*

not required, to believe the victim's testimony" would have adequately conveyed the law without confusion. In the end, it was the imperfect language and drafting of the instruction in *Stukes* that warranted reversal, not the concept underlying the instruction.

IV. PROPOSED MODEL NONCORROBORATION INSTRUCTION

The positive effects of noncorroboration instructions warrant issuing them at trial, but courts should do so carefully to avoid appellate criticism. As indicated in Part III above, some of the concerns expressed by courts rejecting noncorroboration instructions were driven by the particular instruction's language and drafting. To address these concerns, while still maintaining the favorable aspects identified by a majority of courts, I propose a model noncorroboration instruction, followed below by an explanation of certain drafting choices:

> You should evaluate the testimony of the alleged victim the same way you evaluate the testimony of any other witness. The law does not require that the testimony of the alleged victim be corroborated. You may find the defendant guilty if the alleged victim's testimony convinces you of guilt beyond a reasonable doubt.

The first sentence is an explicit bulwark against the criticism levied by courts that worry noncorroboration instructions unduly emphasize victim testimony. The language is modeled on many states' model instructions for expert witnesses[205] and is consistent with statutory provisions that prohibit instructions suggesting jurors view victims' testimony differently than any other witnesses.[206] It also operates as a rejection of the historical Hale cautionary instruction, which admonished jurors that victims should be viewed differently and skeptically.[207]

The second sentence is written in the negative because most of the approved instructions take that approach. The Guam, Michigan, New Hampshire, Nevada, and Washington instructions all open with a declaration that corroboration is not required.[208] The proposed second sentence also generally tracks the statutes in those states that legislatively abolished the corroboration requirement, with the replacement of "shall not be required" (a passive, outdated construction) with "the law does not require" (a more active, modern construction).[209]

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205. *See supra* note 174 and accompanying text (reproducing several model instructions regarding expert witnesses).

206. *See, e.g.*, IOWA CODE § 709.6 (2013) ("No instruction shall be given in a trial for sexual abuse cautioning the jury to use a different standard relating to a victim's testimony than that of any other witness to that offense or any other offense."); N.M. STAT. ANN. § 30-9-15 (1975) ("The testimony of a victim need not be corroborated in prosecutions [for sex crimes] and such testimony shall be entitled to the same weight as the testimony of victims of other crimes under the Criminal Code."); 18 PA. CONS. STAT. § 3106 (1995) ("The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. . . . No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.").

207. *See generally supra* Part II.

208. *See* Appendix A.

209. *See, e.g.*, N.H. REV. STAT. ANN. 632-A:6 (2013) ("The testimony of the victim shall not be required to be corroborated in prosecutions under this chapter."); NEB. REV. STAT. § 29–2028 (2006) ("The testimony of a person who is a victim of a sexual assault . . . shall not require corroboration."); 11 R.I. GEN. LAWS ANN. § 11-37-11 (West 1979) ("The testimony of the victim need not be corroborated in prosecutions under this chapter."); IOWA R. CRIM. P. 2.21(3) (2002) ("Corroboration of the testimony of victims shall not be required.").

The third sentence tracks language used in a majority of states to approve the instruction, by using positive language to explain that a conviction may be returned based solely on the testimony of the victim.[210] The overt reference to "beyond a reasonable doubt" mitigates any criticism that the instruction lessens the burden of proof.

To briefly address language that was not included, I made the conscious choice to omit lengthy verbiage from the New Hampshire or Washington instructions concerning credibility or the role of the jury.[211] My concern is that any discussion of whether a particular victim or witness is "credible" may invite criticism and arguably undo the work of the first sentence in quelling concerns about drawing undue attention to victim testimony.

Finally, a confession about my deliberate choice to place "alleged" before "victim." I use that terminology not because I believe it is objectively better, but instead because it will quiet concerns that the instruction singles out the victim's testimony with an impermissible comment on the evidence.[212] Scott McDonald, in his Nevada Law Journal article, notes that it is only in rape trials that litigants spar over whether a victim is truly a "victim."[213] McDonald accurately observes: "When a sexual act has taken place between a man and a woman and the man asserts that the penetration was consensual, our legal system immediately calls the status of the victim into question."[214] The unfair treatment of sex-crime victims is a blight on the criminal justice system. Yet I must admit that—if forced to choose—I prefer a court approving noncorroboration instructions that refer to an "alleged victim" versus courts disallowing noncorroboration instructions as an impermissible comment on credibility.[215]

There is, perhaps, no such thing as a perfect jury instruction, just as there is no such thing as a perfect jury.[216] The proposed instruction here, however, is written in plain English and accomplishes the goals of the noncorroboration instruction, while avoiding the potential pitfalls identified by appellate courts.

CONCLUSION

There is no instant cure to the legal system's long-term discrimination against sex-assault victims. Over the past few decades, the rape-reform movement has made progress by eliminating the formal corroboration requirement and the Hale anti-victim cautionary

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210. *See* Appendix A (reproducing Georgia, California, New Hampshire, Nevada, and Washington instructions).

211. *See* Appendix B (reproducing those instructions).

212. As discussed in Parts II.B.1 and II.B.2, *supra*, two of the most common concerns expressed by courts are that noncorroboration instructions single out victim testimony or improperly comment on the evidence.

213. McDonald, *supra* note 156, at 250. Though not directly relevant to this Article, I wholeheartedly share McDonald's view that it is appropriate to refer to sex-crime victims as "victims" during litigation.

214. *Id.*

215. *See* State v. Walston, 766 S.E.2d 312, 319 (N.C. 2014) (noting it is a "best practice" to refer to victims as "alleged victim" or "prosecuting witness"); Veteto v. State, 8 S.W.3d 805, 816–17 (Tex. Ct. App. 2000) (noting reference to a "victim" rather than "alleged victim" amounted to a comment on the evidence).

216. As the Iowa Supreme Court once said:

> It is probably true that no instruction or charge to a jury has ever been drawn with such perfect clearness and precision that an ingenious lawyer in the seclusion and quiet of his office with a dictionary at his elbow cannot extract therefrom some legal heresy of more or less startling character.

Law v. Bryant Asphaltic Paving Co., 157 N.W. 175, 177–78 (Iowa 1916).

instruction. But there is more work to be done, particularly in educating jurors and the public about the falsehoods perpetuated by rape myths. One way to strike back against rape culture is for courts to issue noncorroboration instructions, such as the instruction proposed here. Noncorroboration instructions will not suddenly transform victims' treatment in the courtroom, but the instructions are one step toward ensuring every victim receives a fair trial based on the law rather than rape myths.

APPENDIX A — APPROVED INSTRUCTIONS

California: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone."[217]

Georgia: "[T]he uncorroborated testimony of the victim is sufficient to sustain a conviction of the charges of child molestation and aggravated child molestation as contained within this bill of indictment if that testimony is sufficient to convince you of the defendant's guilt beyond a reasonable doubt."[218]

Guam: "The testimony of the victim of sexual penetration and sexual contact need not be corroborated if that victim is believed beyond a reasonable doubt."[219]

Michigan: "To prove this charge, it is not necessary that there be evidence other than the testimony of [name complainant], if that testimony proves guilt beyond a reasonable doubt."[220]

Nevada: "There is no requirement that the testimony of a victim of sexual offenses be corroborated, and his testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty."[221]

New Hampshire: "With respect to each of the[ ] [charged] offenses corroboration of the testimony of the victim is not required. That means if you find the victim to be credible in

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217. CALIFORNIA MODEL CRIMINAL JURY INSTRUCTION No. 1190 (2006), http://www.courts.ca.gov/partners/documents/calcrim_2016_edition.pdf.

218. Mency v. State, 492 S.E.2d 692, 699 (Ga. Ct. App. 1997).

219. People v. Welch, No. 90–00008A, 1990 WL 320365, at *1 (D. Guam Oct. 30, 1990).

220. MICHIGAN MODEL CRIMINAL JURY INSTRUCTION 20.25 (2014), http://courts.mi.gov/courts/michigansupremecourt/criminal-jury-instructions/documents/mcrimji.pdf.

221. Gaxiola v. State, 119 P.3d 1225, 1231–32 (Nev. 2005).

light of all of the evidence introduced during the course of the trial, that testimony alone is sufficient to establish the State's case—burden of proof beyond a reasonable doubt."[222]

Pennsylvania: "The testimony of [the victim] standing alone, if believed by you, is sufficient proof upon which to find the defendant guilty in this case. The testimony of the victim in a case such as this need not be supported by other evidence to sustain a conviction. Thus, you may find [the defendant] guilty if the testimony of [the victim] convinces you beyond a reasonable doubt that [the defendant] is guilty. No medical testimony is required to corroborate his testimony or to convict [the defendant] if his testimony, if [the victim's] testimony, is found to be credible by you."[223]

Washington: "You are instructed that it is the law of this State that a person charged with [a sex offense] may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act."[224]

APPENDIX B — DISAPPROVED INSTRUCTIONS

Alaska: "It is not essential to a conviction of a charge of rape that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence."[225]

Florida: "The testimony of the victim need not be corroborated in a prosecution for sexual battery."[226]

Indiana: "A conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt."[227]

Minnesota: "[I]n the prosecution for intrafamilial sexual abuse, it is not necessary that the testimony of the complainant or complaining witness be corroborated."[228]

South Carolina: "The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence."[229]

Texas: "The law provides the testimony of the victim alone, if believed by you beyond a reasonable doubt, need not be supported by other evidence before a finding of guilt can be

222. State v. Marti, 732 A.2d 414, 420 (N.H. 1999).
223. Commonwealth v. Barney, No. 1460 MDA 2014, 2015 WL 7433518, at *3 n.11 (Pa. Super. Ct. Mar. 27, 2015) (names replaced with generic terms for victim and defendant).
224. State v. Clayton, 202 P.2d 922, 923 (Wash. 1949).
225. Burke v. State, 624 P.2d 1240, 1257 (Alaska 1980).
226. Gutierrez v. State, 133 So.3d 1127, 1127 (Fla. Dist. Ct. App. 2014).
227. Ludy v. State, 784 N.E.2d 459, 460 (Ind. 2003).
228. State v. Williams, 363 N.W.2d 911, 914 (Minn. Ct. App. 1985).
229. State v. Stukes, 787 S.E.2d 480, 482 (S.C. 2016).

returned. That is to say, the testimony of [this particular victim], standing alone, if believed by you beyond a reasonable doubt, is sufficient proof to support a finding of guilt."[230]

Wyoming: "Corroboration of a victim's testimony is not necessary to obtain a conviction for sexual assault."[231]

230. Veteto v. State, 8 S.W.3d 805, 816 (Tex. Ct. App. 2000).
231. Garza v. State, 231 P.3d 884, 890–91 (Wyo. 2010).