Women, the Law, and Sexual Assault: Why the Model Penal Code's Ordinary Resolution Standard Furthers Victim Blaming

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WOMEN, THE LAW, AND SEXUAL ASSAULT: WHY THE MODEL PENAL CODE’S ORDINARY RESOLUTION STANDARD FURThERS VICTIM BLAMING

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I. INTRODUCTION

For anybody whose once-normal, everyday life was suddenly shattered by an act of sexual violence, the trauma, the terror can shadow you long after one horrible attack. It lingers when you don’t know where to go or who to turn to. It’s there when you’re forced to sit in the same class or stay in the same dorm with the person who raped you; when people are more suspicious of what you were wearing or what you were drinking, as if it’s your fault, not the fault of the person who assaulted you. It’s a haunting presence when the very people entrusted with your welfare fail to protect you.1

1. Barack Obama, President of the United States, “It’s On Us” Campaign to End Sexual Assault on Campus (Sept. 19, 2024, 2:40 PM).
Barack Obama’s words summarize the experience of millions, and their stories often follow a similar trajectory. A female college student alleges a male student raped her, but because she does not file a police report until a few weeks later, the police do not obtain a rape kit. In her statement, she notes that she consumed a few beers before the assault occurred. The survivor and the alleged perpetrator’s accounts align on all but one issue: consent. The state declines to prosecute and risk acquittal because without a rape kit, a conviction would largely depend on witness credibility. Since the woman had been drinking, the prosecutor recognizes that the victim’s credibility may be diminished, or worse, that some jurors would blame her for the assault.

The injustice underlying the woman’s story is multifaceted and not limited to college campuses. The survivor must not only cope with the assault, but she must also live knowing her perpetrator walks free and could harm others. Such injustice stems partly from the interplay between the law and society’s long-held beliefs about the role and status of women.

For thousands of years, gender stereotyping and inequality has influenced critical parts of rape law and led either directly or indirectly to victim blaming. “Victim blaming can be defined as someone saying, implying, or treating a person who has experienced harmful or abusive behavior (such as a survivor of sexual violence) like it was a result of something they did or said, instead of placing the responsibility where it belongs: on the perpetrator who harmed them.” Examples include: “What did you expect going out dressed like that? You shouldn’t have gone home with them. Why didn’t they fight back? And Why did they get so drunk?” From older common law rules governing witness testimony, to what we know occurs in the jury deliberation room, to black letter law itself, outdated societal views that blame women have infiltrated the legal system. Consequently, even in the twenty-first century, many women are often left without viable paths.

2. Campus Sexual Violence: Statistics, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (last visited Jan. 2, 2024). Women between the ages of eighteen to twenty-four are three times more likely to be victims of sexual violence, and college women between the same ages are four times more likely to be victims of sexual violence than all other women. Id. Among both graduate and undergraduate students, thirteen-percent experience sexual assault. Id. In spring 2022, nearly sixteen million students were enrolled in American colleges. Lyss Welding, College Enrollment Statistics in the U.S., BEST COLLEGES (Sept. 27, 2022), https://www.bestcolleges.com/research/college-enrollment-statistics/#:~:text=References,Total%20U.S%20College,In%20Spring%202022%3A.&text=About%2011.6%20million%20students%20were%20enrolled%20at%20postsecondary%20institutions.&text=About%2011.6%20million%20students%20are%20enrolled%20at%20a%20postsecondary%20institution.&text=Total%20U.S%20College. 3. 461 (2005).

4. Sexual Assault of Men and Boys, RAINN, https://www.rainn.org/articles/sexual-assault-men-and-boys (last visited Jan. 2, 2024). While acknowledging these realities, the focus of this paper is limited to sexual violence against women.


6. Victim Blaming, supra note 5; see generally GRAVELIN ET AL., supra note 5.

to hold their perpetrators accountable. Today, women benefit from the triumphs of feminist activists who came before them, including greater protection for rape victims under the law. Yet, while societal views of rape victims have dramatically improved in the last forty years, some aspects of the law continue to promote victim blaming.

This intersection between law and society provides a ripe opportunity for the law to ensure that the perpetrator stands trial when accused of sexual assault, not the victim. The Model Penal Code ("MPC"), a set of criminal law principles and guidelines issued by the American Law Institute ("ALI"), strongly influences criminal law in the United States and should pioneer the initiative in the modern era by addressing how black letter law itself can further victim blaming. However, many provisions in the MPC fail to account for significant societal shifts and prevailing feminist attitudes regarding sex offenses. Though this issue is not limited to one specific rape offense, the offense the MPC terms "Gross Sexual Imposition" ("GSI") illustrates this point.

The MPC’s gradation scheme that provides for lesser included offenses reflects many states’ laws. In both the MPC and most states, first, second, and third-degree rape require proof of different elements. In general, the MPC terms rape a second-degree felony, elevating it to first-degree only when the perpetrator either "inflicts serious bodily injury upon anyone," or "[when] the victim was not a voluntary social companion of the actor ... and had not previously permitted sexual liberties." Conviction of second-degree rape requires proof that a man “compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone.” To prove GSI, a man is guilty when "he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution." By placing unnecessary emphasis on a woman’s resolve, even through the adoption of a “reasonable person standard,” the GSI provision contravenes modern feminist attitudes, which properly place blame and scrutiny on the perpetrator, not the victim. Given the MPC’s influence on state law, the far-reaching impact of the victim-centered rule language embodied by the MPC cannot be

9. See generally Beichner & Spohn, supra note 3.
12. Lawrence Furbish, MODEL PENAL CODE SEXUAL ASSAULT PROVISION § 213.1 (Old Rsch. Rep. 1998) (“A male who has sexual intercourse with a female not his wife commits a felony of the third degree if: (a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or (b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or (c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.”).
14. Id. at 150–51.
15. Id. at 150 (quoting MODEL PENAL CODE § 231.1(1)(a)(i)–(ii) (AM. L. INST. 1962)).
17. Id. (quoting MODEL PENAL CODE § 231.1(2)(a) (AM. L. INST. 1962)).
measured. Thus, the law should evolve in conformity with prevailing feminist attitudes by taking affirmative steps to reduce victim blaming.

Part II of this Comment examines the evolution of rape law in reference to changing moral and societal attitudes, with specific emphasis on victim blaming. Part III analyzes the MPC’s provision on GSI to illustrate how some sexual assault laws continue to promote victim blaming. In that section, this Comment first argues that the provision promotes victim blaming facially. Alternatively, if not facially, the provision likely indirectly facilitates juror victim blaming, resulting in misapplication of the law. Finally, Part IV will propose a novel jury instruction and a mandatory, model juror survey for use in voir dire in all sexual assault cases to help reduce victim blaming.

II. AN EXAMINATION OF THE HISTORY OF RAPE LAW ILLUSTRATES THAT THE LAW SHOULD Evolve WITH MODERN FEMINIST VALUES

One primary object of the law is regulation of behavior. This goal can be accomplished directly through sanctions or rewards, or indirectly by changing societal attitudes. Inversely, because laws are created by society itself, social variables like prevailing attitudes “impact the course of law or the heading of legitimate change.” Modern rape law has already evolved in response to societal changes in the 1970s and should continue to do so today.

A. Ancient Laws and Attitudes Toward Rape Formed the Foundation for Current Laws that Further Victim Blaming

Pearl S. Buck, the fourth female American winner of the Nobel Prize in Literature, once wrote, “If you want to understand today, you have to search yesterday.” The first rape laws openly condoned victim blaming by classifying rape as a crime against a man’s property and punishing the victim along with the perpetrator. While modern rape laws often come thinly veiled with greater superficial appeal, the undertones and application of the law shows victim blaming continues to influence case outcomes.

20. Id.
23. Pearl S. Buck was born in West Virginia, but a mere five months after her birth, she travelled with her parents, Presbyterian missionaries, to China where she grew up. Pearl S. Buck, BIOGRAPHY, https://www.biography.com/writer/pearl-s-buck (Dec. 1, 2021). After graduating high school, Buck returned to the United States and earned a bachelor’s degree in philosophy at Randolph-Macon Woman’s College in Lynchburg, Virginia. Id. Buck made several trips between the United States and China, spent time teaching, and ultimately obtained her master’s degree in English from Cornell University before returning to China. Id. In China, Buck began writing, and in 1932, she published and later earned the Nobel Prize for “The Good Earth,” a novel that highlights the life of Chinese peasants. PEARL S. BUCK, THE GOOD EARTH (1932).
i. The First Known Rape Laws Classified Rape as a Crime Against Property, Completely Devaluing Victims

Harmful beliefs about rape victims find roots in the definition of “rape” itself. The word “rape” stems from the Latin word “rapere,” which means “seize.” Some of the earliest known laws of rape arose during the Babylonian time period where “[w]omen had social status only in relation to men.” The Babylonians created the Code of Hammurabi, an early set of laws that “considered the rape of a virgin as property damage against her father.” More specifically, the Babylonians characterized rape as nothing but a form of vandalism and theft. Ironically, this characterization meant that, while the perpetrator violated the woman’s body, autonomy, and integrity, the Babylonians viewed the woman’s father or husband as the party harmed.

Similarly, the Babylonians viewed a married man forcing sexual intercourse upon his wife as his right, and they distinguished between victims who were married women and those who were virgins. For example, when a man raped a married woman, both the rapist and the victim were drowned, but the woman’s husband had the option of rescuing her from the river, and the king could excuse a rapist. Conversely, “rape of a single woman without strong ties to a father or husband caused no great concern” because society viewed rape as a crime against a man’s property and a crime that harmed male honor.

Other ancient societies followed suit. For example, the Assyrians’ eye-for-an-eye approach allowed a father of a raped virgin to rape the rapist’s wife as punishment. The Code of Nesilim from the sixteenth and seventeenth century B.C.E. allowed a woman who was raped within her own home to be executed. Similarly, the Code of Assura from the eleventh century permitted a man to kill or punish his wife if she was raped. The Hebrews’ context-specific approach provided that if a woman was raped inside of the city walls, where she could have called for help, she would be stoned alongside her rapist.

26. See Bishop, supra note 24.
28. Bishop, supra note 24; see also Maria Alejandra Gómez Duque, Towards a Legal Reform of Rape Laws Under International Human Rights Law, 52 GEORGETOWN J. OF GENDER & L. 487, 490–91 (2021) (citing CODE OF HAMMURABI, art. 154). Even more harrowing, when a father raped his daughter, the Code considered the act only incest, not rape, because the daughter was considered her father’s property until marriage.
30. See id.
31. Id.; see also Cling, supra note 27.
32. Cling, supra note 27.
33. Flagler, supra note 29.
34. See generally SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (Simon & Schuster, 1975).
35. ENCYCLOPEDIA OF RAPE, supra note 8, at xiii.
36. Id.
37. Cling, supra note 27.
a woman was raped outside of the city walls, the Hebrews forced her to marry her rapist if she was not already betrothed.38 These draconian views and punishments remained widespread until English law redefined rape as a crime, whether the woman was married or unmarried, in the thirteenth century.39

By providing for punishment and even death of the victim, with specific reference to the woman’s societal status or her actions during the assault, ancient laws overtly condoned victim blaming and reinforced a pattern of male control over women.40 The brazen irony of the Babylonians’ approach is that men drowned what they considered to be their property.41 The Assyrians blatantly disregarded women by doubling their harm so that men could “get even.”42 The Hebrews’ context-specific approach demonstrated a slight shift in punishment depending on the circumstances of the rape.43 However, by not only punishing women for being raped but also imposing an affirmative burden that women they cry for help, the Hebrews laid the foundation for modern conceptions of how victims should behave and what society believes constitutes “real rape.”44 Remnants of the Hebrew law can still be seen in the modern rape myth: if a woman remains silent while a man rapes her, she consents.45 In ancient society, victim blaming was not only the appalling norm but also the standard punishment for women and “right” of men.

ii. The First American Rape Laws, Informed by Ancient and English Concepts, Used Victim Blaming as a Method of Determining Guilt and Often Prosecuted Victims for the Crime of Fornication

When Christopher Columbus crossed the Atlantic in 1492, ancient societal views about women directed some of his steps, marking “the start of the entanglement of rape and race in the U.S.”46 The scope of Columbus’s conquest extended far beyond garnering territory and gold. He and his men raped women along their path, considering Native women “they encountered as fair game or prizes.”47 Two-hundred years later, American men adhered to this “tradition” of oppression when African women were first brought to America in the early seventeenth century.48 Because masters “owned” the women’s bodies, they sexually abused African women as they pleased.49

As colonial America developed, English jurists Sir Matthew Hale and Sir William Blackstone strongly influenced rape law.50 Both jurists recognized rape as one of the most serious crimes.51 Hale noted “rape is a most detestable crime, and therefore ought

38. Id.
39. See ENCYCLOPEDIA OF RAPE, supra note 8, at xiv. The English adopted the Statute of Westminster I, providing for punishment of up to two years for the crime of rape. Id.
40. See generally Cling, supra note 27 (explaining the disregard for women as rape victims throughout early and historical rape law).
41. Bishop, supra note 24; Cling, supra note 27.
42. BROWNMILLER, supra note 34.
43. Cling, supra note 27.
44. Id.
45. See Amanda Fielder, End the Gray Areas—Silence Isn’t Sexy, MOVING TO END SEXUAL ASSAULT (Sept. 9, 2014), https://movingtoendsexualassault.org/end-gray-areas-silence-isnt-sexy/.
46. Cling, supra note 27.
47. Id.
48. See generally id.
49. Id. A complete story of rape in America cannot be told without a discussion of race, and a discussion of the interplay of rape and race in the United States deserves far greater emphasis than this Comment provides. Id. While acknowledging this reality, the focus of this paper will be primarily on women generally.
50. ENCYCLOPEDIA OF RAPE, supra note 8, at xiv.
severely and impartially to be punished with death.\textsuperscript{52} Likewise, Blackstone noted that in Jewish law, when the woman was married to someone other than the rapist, rape was punishable by death.\textsuperscript{53} Blackstone and Hale’s widespread influence led colonial America to define rape as a capital crime.\textsuperscript{54} Although rape had technically been a crime in England for nearly 200 years, distrust of victims persisted.\textsuperscript{55} As Hale noted, “[r]ape is an accusation easily to be made and hard to be proved.”\textsuperscript{56} Blackstone also indicated that, while society had evolved, rape was the only crime during this period that did not “express the precise idea which it entertains of the offence.”\textsuperscript{57} To illustrate, at common law, rape was vaguely defined as “carnal knowledge of a woman forcibly and against her will.”\textsuperscript{58}

According to Sharon Block, author and history professor at the University of California-Irvine,\textsuperscript{59} the struggle for British America to define the crime of rape reflects societal power dynamics that arose from ancient ideas of rape and, more specifically, conceptions of consent.\textsuperscript{60} The lines between force and consent in British America were blurred for several reasons.\textsuperscript{61} First, Block notes that because men possessed superior status in society, most people assumed men would be controlling during sexual interactions.\textsuperscript{62} Second, many men, authors, and doctors weaponized the biblical story of Adam and Eve to further the idea that women were created to serve men and to gratify men’s passions.\textsuperscript{63} Proponents believed that, because in the Bible, God created Eve second, from Adam’s rib, women were meant to be subservient.\textsuperscript{64} Finally, Block notes that, in literature from the time, men

\begin{footnotes}
\textsuperscript{52} 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 635 (1736).
\textsuperscript{53} 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210 (William Strahan, 1765-1769).
\textsuperscript{54} However, Jewish law retained the distinction between married and unmarried women. \textit{Id}. As Blackstone noted, \textit{if} the woman was unmarried, the law required the rapist to pay the woman’s father fifty shekels, “and she was to be the wife of the raverisher” for the rest of his life. \textit{Id}. \textsuperscript{55} 4 ENCYCLOPEDIA OF RAPE, supra note 8.
\textsuperscript{57} 56. SUSAN ESTRICH, REAL RAPE (1987). Estrich argues that modern courts gave substance to Hale’s generalized suspicion and distrust of victims by translating those sentiments “into a set of clear presumptions applied against the woman who complains of simple rape.” \textit{Id}. According to Estrich, “simple rape” is defined as “the case of a single defendant who knew his victim and neither beat her nor threatened her with a weapon.” \textit{Id}. at 4.
\textsuperscript{58} 57. See generally \textit{Id}.
\textsuperscript{59} 58. 4 BLACKSTONE, supra note 53, at 210.
\textsuperscript{60} 59. See \textit{BLOCK, supra} note 25, at 16–20.
\textsuperscript{61} 60. BLOCK, supra note 25.
\textsuperscript{62} 61. \textit{Id}. at 16.
\textsuperscript{63} 62. \textit{Id}. at 19–20.
\textsuperscript{64} 63. \textit{Id}. at 19–20. Though many men weaponized the story of Adam and Eve, the most natural translation of the Hebrew word צֶלע (tsela) is not “rib,” but rather “side,” denoting equality rather than subservience. Steven P. Wickstrom, Adam’s Rib, CHRISTIAN ARTICLES (2021), https://www.spwickstrom.com/rib/. Wickstrom analyzes Genesis 2:7–20 with specific emphasis on the meaning of the Hebrew words to conclude, in conjunction with other Biblical passages, that tsela “does not mean ‘rib’” but rather “side.” \textit{Id}. Wickstrom supports his conclusion by examining Genesis 2:18, which reads “[I] will make him a helper fit for him.” \textit{Id}. Wickstrom notes that “[t]he Hebrew term ‘ezer’ is generally defined as ‘help or support,’ but in Genesis 2:18, it denotes mutual assistance.” \textit{Id} (citing Alan M. Harman, \textit{“Ezer,” in THE NEW INT’L DICTIONARY OF OLD TESTAMENT THEOLOGY AND EXEGESIS 3:379 (Willem A. VanGemeren ed., Zondervan Pub’l’g House 1997)). Further “[t]he ‘helper’ is in a position of strength coming to ‘help’ or ‘aid’ the one in need.” Wickstrom, supra note 64. Wickstrom continues to explain that “[t]he Hebrew term kenegdo (translated as ‘fit’ in the ESV) comes from the root word ‘neged’” which is defined as “in the presence of, or in front of.” \textit{Id} (citing R. LAIRD HARRIS ET AL., THEOLOGICAL WORDBOOK OF
often used military terms to describe sexual acts, likening sexual intercourse to a battle where women were expected to accept defeat.\(^{65}\)

Block’s interpretation of the interplay between the law and societal views is reflected in case law from the time. In the colonial Massachusetts rape trial of Robert Wyar and John Garland, a Puritan jury returned a verdict punishing the perpetrators and child victims with public whippings.\(^{66}\) The trial illustrates several ways that victim blaming tendencies inherent in Puritan society informed case outcomes. First, societal notions that heterosexual males were the dominant gender informed procedure because grand juries could ignore a rape complaint or charge the victim with fornication as well.\(^{67}\) Further, grand juries were reluctant to charge men with rape when the woman conceived because colonists believed that “if a woman conceived as a result of the rape, she consented.”\(^{68}\) Finally, when charged with rape, men would often assert the woman’s sexual reputation was such that it would lead all reasonable men to believe she consented.\(^{69}\) In sum, Puritan law dictated that whether a victim was considered a “true” victim or a willing participant in sexual intercourse depended more on her actions than those of her perpetrator.

After the Revolutionary War of 1776, early American law borrowed from principles akin to those in the Code of Hammurabi.\(^{70}\) Some of the earliest known rape laws made rape a crime only when committed outside of marriage.\(^{71}\) Early American law also used victim blaming as a method of determining guilt. In People v. Abbott, a New York woman accused a minister of rape.\(^{72}\) The jury acquitted, finding the state failed to show the following three requirements to succeed on a claim of rape: (1) the woman must be of good reputation; (2) the woman must show evidence of physical resistance; and (3) the woman must have tried to call for help.\(^{73}\) Thus, to convict a perpetrator, the woman had to defend her integrity and actions. The three elements required for conviction dictated that the woman’s actions, not her perpetrator’s, determined the perpetrator’s guilt. Albeit cloaked in a new, more superficially desirable form, these laws allowed harmful views of women to persist, reinforcing the impermissible notion that still exists in our modern world: Some women are to blame for their assaults.

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\(^{65}\) Block, supra note 25, at 19–20; see Loyce Miles, Miles on Block, ‘Rape and Sexual Power in Early America’, HUMANITIES AND SOCIAL SCIENCES ONLINE (2009) (book review). Miles summarizes Block’s discussion of this topic by noting because men were generally characterized as “sexually aggressive and the dominant participants in any sexual act,” “[s]ex could involve violence without it being called rape. Women, on the other hand, were supposed to be chaste and virtuous. They were expected to resist sexual relationships of any kind, even if attracted to a member of the opposite sex.” Id.

\(^{66}\) Id. at 27.

\(^{67}\) Id. at 28.

\(^{68}\) Id. at 28.

\(^{69}\) See generally Bishop, supra note 24.

\(^{70}\) Id. In 1976, Nebraska became the first state to make marital rape a crime. Id.

\(^{71}\) People v. Abbott, 19 Wend. 192, 194 (N.Y. Sup. Ct. 1838).

\(^{72}\) Id. at 194, 197.
B. A Recent History of Rape Law Marked by the Waves of Feminism Demonstrates that Now Is the Time to Address Victim Blaming

Unsurprisingly, feminism arose out of shared experience of sexist oppression. Indeed, most women come to accept some form of sexist oppression before even knowing that practices of group domination exist. While persons of all genders and sexualities can be victims of rape, rape and the relations between genders assigned at birth are inextricably intertwined, as seen in the earliest rape laws that gave different status and penalties to women depending on whether they were single or married. Through feminism, women throughout history have, piece by piece, chiseled out a more equal place in society. In fact, many major developments in rape law and the treatment of victims can be attributed to feminist activism as they coincide with the major waves of feminism.

i. 1848-1920: Activists Successfully Raised the Legal Age of Consent, and Women Won the Right to Vote

Between 1848 and 1920, American women won on two prominent battle fronts: voting rights and raising the legal age of consent. The primary goal of first-wave feminism was to “open up opportunities for women, with a focus on suffrage.” However, the first victory, raising the legal age of consent, came before women won the right to vote. In 1890, the legal age of consent in thirty-eight states was twelve or younger.

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74. See Feminism, MERRIAM-WEBSTER (May 8, 2011), https://www.merriam-webster.com/dictionary/feminism. Feminism is defined as “belief in and advocacy of the political, economic, and social equality of the sexes expressed especially through organized activity on behalf of women’s rights and interests.” Id. In 1837, Charles Fourier first used the word “feminism” to describe “women’s liberation in a utopian future.”; Women of the World, Unite!: Women’s Rights Timeline—Feminist History, UN WOMEN, https://interactive.unwomen.org/multimedia/timeline/womenunite/en/index.html?gclid=CjwKCAiAjs2bBhACEiwALTBWzoN_NXWhp6y-pa-DwMBkFKJmouTYWmPakw4ptonerC3wTnbaV96nRocD90QAvD_BwE#. In the 1900s, feminism first became associated with the women’s suffrage movement, but throughout time, the definition has evolved to include “intersectional feminism.” Id. “Intersectional feminism” refers to different forms of discrimination perpetrated on women based on factors such as “race, ethnicity, class, religion, and sexual orientation.” Id.

75. Bell Hooks, The Significance of Feminism, in CONTEMPORARY SOCIOLOGICAL THOUGHT: THEMES AND THEORIES 233, 235 (Sean P. Heir ed., 2005); Dominance/Domination, NEW DISCOURSES, https://newdiscourses.com/tfw-dominance-dominion/ (last visited Dec. 22, 2022). “The dominant group within a society has the greatest power, privileges, and social status.” Id. The group becomes dominant by “controlling economic and political institutions, communications/media, education and health institutions, the arts, and business.” Id.

76. Sexual Assault of Men and Boys, supra note 4; Bishop, supra note 24; Gómez Duque, supra note 28, at 490–91 (citing CODE OF HAMMURABI, art. 154; Flagler, supra note 29.

77. See generally Hooks, supra note 75.

78. Id. at 233, 235.


80. Martha Rampton, Four Waves of Feminism, PACIFIC MAGAZINE (Fall 2008), https://www.pacificu.edu/magazine/four-waves-feminism.

81. Hamlin, supra note 79.

82. Id.
age of consent in Delaware was only seven.83 During this time period, society believed that “respectable women were not supposed to talk about sex.”84 Yet, despite not having the right to vote and defying societal notions, women used their voices and petitioned legislatures to raise the legal age of consent.85 The feminists of this time period fought for the law to recognize the enduring harm caused by low ages of consent.86 In many ways, the modern crime of statutory rape recognizes that victimization of children at a young age can have long-lasting impacts on victims socially, personally, and even professionally.87 Accordingly, by 1900, “32 states had raised the age to between 14 and 18. . . .”88 Through the lobbying process, women learned valuable political skills that would prove instrumental in winning the right for suffrage in 1920.89

In 1848, first-wave feminism and the staunch battle for women’s voting rights began at the Seneca Falls Convention in New York.90 Susan B. Anthony, a prominent women’s rights activist, did not attend the Convention, but her mother and sister did.91 Inspired by conversations with her mother and her sister, Anthony partnered with Elizabeth Cady Stanton, a prominent feminist advocate, and eventually formed the National Woman Suffrage Association.92 Even with vigorous activism, the Nineteenth Amendment, which granted women the constitutional right to vote, took over thirty years to pass from the time legislators introduced it.93 On August 18, 1920, Tennessee ratified the amendment, giving it the three-fourths state majority vote needed to amend the United States Constitution.94

Despite these feminist victories, societal views of rape at the time, heavily influenced by prominent psychologists, continued to further victim blaming and shape legal outcomes.95 For example, Sigmund Freud’s theories “associated women with passivity and masochism.”96 Freud’s widely-adopted theories continued to blur the lines of force and consent, reinforcing earlier notions of men as the dominant sex, and sexual intercourse as a battle where women were not only supposed to accept defeat but derive pleasure from it.97 During this time period, when a woman was raped, the legal system initially addressed her as both a defendant and a witness.98 Only at the end of a trial, and only if a man had been found “undeniably guilty” of forcing sexual intercourse on the woman, “without any indication whatsoever” of “her desire for said intercourse,” would the court declare her a victim.99

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83. Id.
84. Id.
85. Id.
86. Hamlin, supra note 79 (providing examples such as widespread prostitution, sexual diseases, and sexual violence).
88. Hamlin, supra note 79.
89. Id.
90. Rampton, supra note 80.
92. Id.
93. NATIONAL ARCHIVES: MILESTONE DOCUMENTS, supra note 79. Legislators first introduced the amendment in 1878, but the House of Representatives and the Senate did not pass the amendment until 1919. Id.
94. Id.
95. ENCYCLOPEDIA OF RAPE, supra note 8, at 83.
96. Id.
97. ESTRICH, supra note 56.
98. See generally Dean Kilpatrick, Rape and Sexual Assault, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER.
99. Id.
In *State v. Sibley*, a case decided nearly sixty years after *People v. Abbott*, victim blaming manifested itself this time through witness questioning. In *Sibley*, the court stated, “[i]t is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based on that alone, while it does that of a woman.” The *Sibley* court also reasoned, “it is no compliment to a woman to measure her character by the same standard that you do of a man’s predicated upon character for chastity.” By its purpose and in effect, this rule allowed for men to impeach the character of female witnesses by inquiring into their past sexual behavior, but not the other way around. Inherent in this common law rule are ancient perceptions of women as “the lustful daughters of Eve.” Women of color suffered even more, continuing the entanglement of rape and race in the United States started by Columbus and reinforced by slavery. Racial epithets were so interwoven into the crime of rape that women of color could not file rape charges against a white man until 1861. While first-wave feminism marked two major victories for women, negative societal views led to victim blaming that infiltrated black letter law and the jury room, leaving more work to be done. Nevertheless, she persisted.

### ii. 1960-1990: By Enacting Rape Shield Laws and Making Marital Rape a Crime, Rape Law Began to Align Even Further with Feminist Views

Beginning in 1960, second-wave feminism began with the “Anti-Rape Movement” as a central focus. The Anti-Rape Movement gained momentum for several reasons. First, in the late 1960s, survivors of sexual assault began meeting together in small groups to share their experiences and support one another. This led to the formation of organizations dedicated to ending sexual violence.

102. *Id.* at 171.
103. *Id.*
104. See *id.*
107. *Id.*
108. *Id.*
109. Rampton, supra note 80.
110. *Anti-Rape*, *Merriam-Webster* (1897), https://www.merriam-webster.com/dictionary/anti-rape. The term “anti-rape” means serving or intended to prevent or discourage rape. Though no definition for “anti-rape movement” is provided, in its most natural sense for this context, Merriam Webster defines “movement” as “a series of organized activities working toward an objective, or “an organized effort to promote or attain an end.” *Movement*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/movement. To synthesize, “the anti-
groups called “consciousness raising groups.” These meetings gave women community, support, and a safe space to speak about the trauma they had endured at the hands of men. In other areas of the country, nationwide awareness of the seriousness of rape continued to grow so much that in 1966, the National Organization for Women was founded. Further, in 1971, the first two rape crisis centers in the nation opened in Washington D.C. and Oakland, California.

Second-wave feminism also changed black letter law. Before the 1960s, rape was defined as “a carnal knowledge of a woman not one’s wife by force or against her will.” In 1962, the MPC proposed a new definition of rape: “A man who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force or a threat of imminent death, serious bodily injury, extreme pain, or kidnapping.” By expanding what may constitute compulsion and dropping the requirement of non-consent, the MPC shifted some focus away from the victim. However, the 1962 MPC did not classify marital rape as a crime. Further, in 1975, Congress enacted the “Rape Shield Laws” which consist of Federal Rules of Evidence 412 through 415. The Rape Shield Laws significantly limit a defendant’s ability to probe into a victim’s past sexual history, while also providing opportunities for victims to introduce evidence of the defendant’s prior sexual misconduct. Later, in 1976, feminism prevailed again when Nebraska became the first state to make marital rape a crime. A new definition of rape, the classification of marital rape as a crime, and the enactment of Rape Shield Laws meant not only that women in local communities were listening, but that the entire nation was, too.

Yet, even while making tremendous strides through changes to black letter law and influencing societal attitudes, victim blaming remained a part of the legal system and feminists endured some setbacks. For example, in Cox Broadcasting Corporation v. Cohn, the Supreme Court held that the media has a right to publish the names of rape victims found in public records. Though the Court struck a balance between the First Amendment right to freedom of press and a victim’s right to privacy, the decision undercut some progress feminists made by discouraging reporting of rape.

rape movement” is best understood as an organized effort to prevent or discourage rape.

112. Id. Consciousness raising groups drew enough interest that in 1971, the New York Radical Feminist group held a public meeting, sparking others throughout the nation.
113. ENCYCLOPEDIA OF RAPE, supra note 8, at xv. National Organization for Women (“NOW”) was established by a group of women who met during the Third Annual Conference of Commissions on the Status of Women when D.C. Friedan wrote “the acronym NOW on a paper napkin.” Highlights, NATIONAL ORGANIZATION FOR WOMEN (last visited Dec. 22, 2022), https://now.org/about/history/highlights/. Since its founding, NOW has continually advocated for women’s rights in various ways including equal rights, the repeal of laws restricting abortion, sex discrimination in employment, Title IX, the Violence Against Women Act, and more. Id.
114. Goodwin, supra note 111.
115. Dean Kilpatrick, Rape and Sexual Assault, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER.
117. See id.; see also Schuelhofer, supra note 10, at 38. Schuelhofer explains that feminist critiques of the law at the time included the treatment of victims in the courtroom and societal stereotypes that influenced verdicts. Id. More specifically, critics argued that gender stereotypes about male and female sexuality “infected credibility determinations and judgments about when male aggression amounted to ‘force.’” Id.
120. FED. R. EVID. 412–15.
121. Bishop, supra note 24.
123. Id. at 488–95.
Further, a study of judicial commentary and jury instructions reported in newspapers from 1971 to 1978 demonstrates that even judges engaged in victim blaming.\textsuperscript{124} The study revealed that in twenty-one percent of rape cases, a judge made a comment criticizing the woman.\textsuperscript{125} In one case, a judge told the jury:

Before [the contraceptive pill], when virginity was common, it may be that virgins would fight if they could, only to protect their virginity. In these days of violence, young girls no longer fight to preserve their honour, but are much more concerned about their physical comfort, and are much more likely to submit.\textsuperscript{126}

In that case, like others where a judge made similar comments, the jury acquitted.\textsuperscript{127} Such judicial commentary can be traced back to the ancient Code of Hammurabi, which provided for different punishments depending on whether the victim was a virgin or married.\textsuperscript{128} These types of comments place great weight, yet again, on the victim’s actions, not the perpetrator’s. Since a jury may have already been predisposed to engage in victim blaming, the impact of judges openly engaging in victim blaming before a jury cannot be measured.

Despite the ongoing challenges, in 1987, Susan Estrich, an attorney and sexual assault survivor herself, published her book, \textit{Real Rape}, which changed the “legal and cultural understanding of rape by highlighting the second-class status of ‘acquaintance rape.’”\textsuperscript{129} Estrich argued persuasively that “rape by someone known to the victim is just as real as stranger rape.”\textsuperscript{130} Estrich also challenged Freudian views of women as passive and masochistic.\textsuperscript{131} Further, in response to rape reform of the era, Estrich urged that the force requirement itself had become a bar to justice.\textsuperscript{132} Estrich’s argument fueled the modern debate in the next wave of feminism over whether rape should require force, non-consent, or both.\textsuperscript{133}

\textsuperscript{124} Keith Soothill et al., \textit{Judges, the Media, and Rape}, 17 J. OF L. & SOC’Y 211, 216–18 (1990).
\textsuperscript{125} Id at 217.
\textsuperscript{126} Id at 220.
\textsuperscript{127} Id. \textit{see also} Gillian Sisley, \textit{7 Horrific Quotes Made by Judges to #MeToo Survivors}, MEDIUM (Feb. 11, 2021), https://medium.com/fearless-she-wrote/7-horrific-quotes-made-by-judges-to-metoo-survivors-b4302e307d0 (noting that in 2016, a Canadian judge asked an alleged victim, “Why couldn’t you just keep your knees together? The judge also told the alleged victim that “Pain and sex sometimes go together.”).
\textsuperscript{128} Flagler, \textit{supra} note 29; Cling, \textit{supra} note 27.
\textsuperscript{130} ESTRICH, \textit{supra} note 56.
\textsuperscript{131} \textit{Id}.
\textsuperscript{132} Id. at 58–71.
\textsuperscript{133} \textit{See} West, \textit{supra} note 25, for an interesting discussion of academics who disagree on whether rape should be defined by the element of non-consent or force.

With the beginning of third-wave feminism, Oklahoma and North Carolina became the final states to “abolish the spousal exemption clauses [for rape] when spouses are living together.” In other areas, the law continued to evolve and expand the advances made during the second wave of feminism. In 1994, New Jersey’s state legislature passed “Megan’s Law,” which established sex offender registration and community notifications that a sex offender lives in a certain area within the state. Other states soon followed suit. Further, in 1996, Congress passed the federal analog of Megan’s Law. Also, in 1994, Congress passed the “Violence Against Women Act,” creating a federal response program to domestic violence, sexual assault, dating violence, and stalking. Not only did the United States recognize the seriousness of sexual violence, but so did the world. In 1998, “during the Rwandan war trials, the United Nations declared that rape is a crime of genocide.” In a marked first for the United Nations, authorities arrested and charged Pauline Nyiramasuhuko, a Rwandan politician, for her role in the country’s genocide, classifying her incitement of rape as a form of genocide. For Nyiramasuhuko’s part in genocide sponsored by the Rwandan government, witnesses alleged she commanded fighters on multiple occasions that, before killing or burning Tutsi women, “you need to rape them.” Her commands led fighters to consider rape to be a prize or part of conquest, similar to Christopher Columbus’ history. Each of these developments in the law,

134. ENCYCLOPEDIA OF RAPE, supra note 8, at xvi.
135. Id. Megan’s Law was created in response to the rape and murder of seven-year-old Megan Kanka by a neighbor. MEGAN’S LAW INFO, https://meganslawinfo.com/megans-story.html. The neighbor was a registered sex offender when he moved nearby and had four previous convictions for sex crimes or attempted sex crimes against young girls, but Megan’s family was unaware of his status and the danger he posed. Id.
136. ENCYCLOPEDIA OF RAPE, supra note 8, at xvi.
137. Id.
138. Id.
139. Id. at xvi.
140. Alexandra A. Miller, From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape, 108 PENN. ST. L. REV. 349, 349–50 (2003). Nyiramasuhuko, the former National Minister of Family and Women’s Affairs for Rwanda, played a role in the government-sponsored genocide of approximately 800,000 Rwandans. Id. at 349 (citing Press Release, International Criminal Tribunal for Rwanda, Pauline Nyiramasuhuko: Former Minister of Women Development Pleads Not Guilty (Sep. 3, 1997), available at www.ictr.org). On April 6, 1994, “an airplane carrying the President of the Republic of Rwanda, Juvenal Habyarimana, was shot down,” marking the start of government-condoned genocide. Id. at 350–51 (noting that in the first two months alone, “Rwandans committed murder every two seconds,” and the number of murders carried out in sum was greater than five times that of the Nazis during World War II) (citing SCOTT PETERSON, ME AGAINST MY BROTHER: AT WAR IN SOMALIA, SUDAN, AND RWANDA 247 (2001)). Among other things, in response, Habyarimana and other government officials established the Interahamwe, a young militia designed to eradicate the Tutsi, one of two main ethnic groups in the country, from Rwanda. Id. at 351 (citing PETERSON, supra note 140, at 257).
142. Sherrie L. Russell-Brown, Rape as an Act of Genocide, 21 BERKELEY J. OF INT’L LAW 2, at 352, 353 (2003); Miller, supra note 140, at 355–56 (citing Landesman, supra note 141, at 82–84); Miller further notes that “Pauline was even seen handing out packets of condoms to Interahamwe during that time. Miller, supra note 140, at 356 (citing Landesman, supra note 141, at 84). Ultimately, the Rwandan Tribunal included a charge of inciting rape as a form of genocide against Nyiramasuhuko because of its decision in the related trial of Prosecutor v. Jean-Paul Akayesu, which determined that rape can be an actus reus of genocide. Id. at 368. See generally Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Judgment, Sep. 2, 1998) ch. 6.3.1 ¶ 496, available at ICTR website, http://www.ictr.org.
including those on the international stage, demonstrate willingness on behalf of legislatures and tribunals to ensure that the law conforms with prevailing feminist attitudes.

From a social standpoint, perhaps the most widespread success of feminism came in 2017 when dozens of female celebrities accused Harvey Weinstein, a Hollywood mogul, of sexual misconduct, sparking the #MeToo movement.¹⁴³ The women accused Weinstein of sexual misconduct ranging from the late 1970s to as recently as 2020.¹⁴⁴ In 2006, New York activist Tarana Burks originally coined the phrase “me too” when, in response to a young girl sharing her story about sexual abuse, Burks replied “me too.”¹⁴⁵ In 2017, shortly after the Weinstein scandal surfaced and when American actress Alyssa Milano tweeted, “[i]f you’ve been sexually harassed or assaulted write ‘me too’ as a reply,” and the overwhelming response from survivors everywhere gave the phrase new life.¹⁴⁶

In effect, “Alyssa Milano invited people who had experienced sexual harassment or assault to use the words to demonstrate the pervasiveness of the problem.”¹⁴⁷ Within twenty-four hours, Milano’s tweet received 55,000 replies and became the number one hashtag trending on Twitter.¹⁴⁸ Nine days later, the “#MeToo” hashtag had been used over 1.7 million times, with tweets coming from every continent.¹⁴⁹ From societies who punished women along with their perpetrators to now,¹⁵⁰ where women everywhere garner the courage to tell the world of the horrors inflicted upon them, one can only imagine how the activists of yesterday would rejoice at the societal changes of today.

iv. The Law Has Already Evolved in Response to Prevailing Feminist Attitudes as Seen Through the Modern Debate Over Whether Rape Offenses Should Require Force

Changing black letter law itself has renewed the same struggle that jurists like Hale, Blackstone, and colonial America itself faced to define the crime of rape.¹⁵¹ Traditionally, rape has required proof of both force and non-consent, and this remains true for

¹⁴³. Laurie Collier Hillstrom, THE #METOO MOVEMENT, (ABC-CLIO 2018). Yet, the activism’s success came only at the victims’ cost of revealing great past trauma.
¹⁴⁷. Hillstrom, supra note 143.
¹⁴⁸. Sayej, supra note 145.
¹⁵⁰. See generally Cling, supra note 27.
¹⁵¹. BLOCK, supra note 25.
most jurisdictions today. However, given societal changes, this notion has come under recent criticism. On one hand, commentators like Susan Brownmiller, author of the influential book Against Our Will: Men, Women, and Rape, Stephen Schulhofer, a prominent legal scholar, and the drafters of the MPC, argue that the law of rape should focus exclusively on force. Proponents of this theory address the inherent complexity in a he-said, she-said trial for rape by stating, “[a]fter all, whatever else might not vitiate consent, surely force does.” Scholars in this camp argue that “forced sex, whether seemingly ‘consensual’ or not, is the evil, and ought to be understood as a crime.” With this approach, rape is primarily understood as an assault-based crime, categorized by force and violence. Proponents argue that eliminating references to the victim’s consent shifts focus to the perpetrator’s conduct.

Conversely, other scholars, including Susan Estrich, author of Real Rape, John Bogart, a prominent sexual assault legal scholar, and the Canadian Parliament, argue that the focus of rape law is more properly on non-consent. With this second approach, rape is understood primarily as a violation of autonomy. Estrich urges “the problem with ‘force’ as a standard is . . . that the focus remains on the victim,” meaning “the conclusion that no force is present emerges not as a judgment that the man acted reasonably, but as a judgment that the woman victim did not.” In other words, Estrich argues that, when a man rapes a woman without using force, some may blame the victim or believe that she consented because the perpetrator did not use physical force to rape her. Even Schulhofer, an advocate for the force requirement, concedes that, because the criminal law continues to focus on force, “sexual autonomy—the right to self-determination in matters of sexual life—is not directly guaranteed.”

154. Id.
155. West, supra note 25, at 233.
156. Id. At least with forcible rapes, proponents argue requiring both force and non-consent becomes redundant. Id.; see also CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 245 (1989) (agreeing that requiring both force and non-consent is redundant, and that “[r]ape should be defined as sex by compulsion, of which physical force is one form.”) The criticized redundancy in requiring proof of both force and non-consent becomes more problematic when looking at the evidence typically used to satisfy each element. Anderson, supra note 25.
157. West, supra note 25, at 242. Schulhofer, in a more overt attempt to adhere to feminist consensus of the 1970s, argued that “the best course was to eliminate from the statutes all references to the victim’s consent and to focus instead on the conduct of the assailant,” to “draw attention away from what the victim might have done. . .” STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW, 31-32 (1998). Proponents of the force requirement also argue where the focus is on the victim’s consent, many women will submit to intercourse out of the belief that less harm will come from submission than to fight and potentially risk one’s own life or other substantial bodily harm. West, supra note 25, at 241-42.
158. West, supra note 25, at 242. Schulhofer, in a more overt attempt to adhere to feminist consensus of the 1970s, argued that “the best course was to eliminate from the statutes all references to the victim’s consent and to focus instead on the conduct of the assailant,” to “draw attention away from what the victim might have done. . .” SCHULHOFER, supra note 157, at 31–32. Proponents of the force requirement also urge where the focus is on the victim’s consent, many women will submit to intercourse out of the belief that less harm will come from submission than to fight and potentially risk one’s own life or other substantial bodily harm. West, supra note 25, at 241–42.
159. Kinports, supra note 152, at 756 n.4.
160. West, supra note 25, at 242.
161. ESTRICH, supra note 56, at 63.
162. See generally id.
163. SCHULHOFER, supra note 157, at 32–33.
group of scholars is to define rape as “nonconsensual sex,” and then grade “the severity of the offense,” and thus, punishment, according to the degree of force or violence used.\[164\]

In sum, though the two scholarly camps come to different conclusions, both agree with the fundamental premise that requiring proof of both force and lack of consent does not go far enough to protect women against harm.\[165\] Throughout much of the common law, resistance could be used to satisfy both the elements of force and non-consent, but the law often required “the utmost resistance.”\[166\]

Now, hardly any statute requires the utmost resistance, but many courts still use the degree of resistance to determine whether the force and non-consent elements are satisfied.\[167\] While requiring the utmost resistance can be problematic, few have proposed solutions.\[168\] In response, legal scholar Michelle Anderson proposes that resistance should be a sufficient, but not necessary, requirement to prove both force and non-consent.\[169\]

Further, Anderson urges that “from a purely pragmatic standpoint . . . it is important for feminists to incorporate what real women do in response to sexual attacks (inter alia, struggle, plead, and cry) into the non-consent and force requirements, so that those women can secure convictions of their assailants.”\[170\] The struggle over how to define the crime of rape, the typical requirement of resistance, and hesitancy to criminalize rape by means other than force informs why the MPC chose a “reasonable person standard” for GSI.\[171\]

III. The MPC’s Failure to Account for Feminist Attitudes Toward Sexual Assault Fails Victims and Exacerbates Erroneous Views on Sexual Assault

Though the MPC’s 1962 provision was ahead of its time, the GSI’s reasonable person standard falls far short of eliminating victim blaming.\[172\] While the drafters may have chosen a reasonable person standard precisely to reduce victim blaming, in effect, the provision furthers long-held beliefs that women are to blame.\[173\]

The American Law Institute (“ALI”) is currently revising the MPC, and notable changes include a new definition of consent and a new definition of coercion, which includes “psychological threat

164. West, supra note 25, at 234.
166. Anderson, supra note 25, at 953, 957. See also ESTRICH, supra note 56, at 31. Estrich points out that during much of the time when the law required the “utmost resistance,” women were prohibited from practicing law in many states. Id. (citing Bradwell v. Illinois, 83 U.S. 130 (1873) (upholding denial of admission of an otherwise qualified woman to practice law on the basis of sex alone). This meant that men were describing female responses to rape. Id. Estrich posits “[t]he resistance requirement may have been more accurate as a description not of the reactions of women, but of the projected reactions of men to the rape of their wives and daughters.” Id. (citing Sally Gold & Martha Wyatt, The Rape System: Old Roles and New Times, 27 CATHOLIC UNIV. L. REV. 696–700 (explaining how rape has sometimes been viewed as an injury between men).
168. Id.
169. Id. at 960.
170. Id. at 1007.
172. See generally Robinson & Dubber, supra note 10.
of legal pressure.”

However, the ALI gives no indication that it intends to make substantive changes to the ordinary resolution standard.

A. A Brief Overview of Rape by Means Other than Force, Including Rape by Coercion and Fraud, Suggests Why the MPC Adopted a “Reasonable Person Standard” for § 213.1(a)

The MPC’s GSI provision encompasses both rape by coercion and rape by fraud. In this context, fear of overbroad criminalization spurs debate about whether rape by fraud or rape by coercion should be classified as crimes at all because of the traditional requirements of force and non-consent. A few primary issues arise in this context. First, criminalization presents a definitional issue because scholarly camps disagree over whether rape should be considered a crime of violence or a crime against sexual autonomy. Second, absent physical force, questions about the proper relationship between the elements of force and non-consent emerge. Finally, with rape by fraud or by coercion in particular, age-old tendencies to victim blame arise as the focus often centers around the typical behavior of men and women in sexual encounters, and improperly, the blame-worthiness and legitimacy of the victims. As a result of these issues, many state statutes only criminalize rape when it involves violence or threats of physical violence.


175. See generally id.

176. See generally MODEL PENAL CODE § 213.1 (AM. L. INST. 1962). For purposes of this Comment, only § 213.1(a) will be used for illustrative purposes.

177. Aya Gruber, Consent Confusion, 38 CARDOZO L. REV. 415, 417 (2016) (citing Rubenfeld, The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, 122 YALE L. J. 1372 (2013) (asserting that the consent framework is inconsistent with the legal rejection of rape by deception); cf Mark Kelman, Thinking About Sexual Consent, 58 STAN. L. REV. 935, 978 (2005) (book review) (complicating purely autonomist notions of sexual consent)); Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 BROOKLYN L. REV. 39, 44 (1998) (noting the debate about whether rape by fraud and rape by coercion has occurred for more than a century); see also Schulhofer, supra note 10, at 35. Schulhofer elaborates on two other practical difficulties that arise with expanding rape law. First, Schulhofer explains that because existing rape law “is already far more restrictive than standards of behavior considered ‘normal’ and acceptable by powerful strands of contemporary culture . . . .”, expanding the law further seems impractical. Id. Second, Schulhofer notes that the law struggles to create standards that adequately account for the complexity of social interaction and communication, and some new proposals seem utopian in light of this. Id.

178. See generally Falk, supra note 177, at 45–46 (highlighting three primary issues in the debate over whether rape by fraud and rape by nonphysical coercion should be criminalized).

179. Id. at 45 (citing e.g., Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUMBA L. REV. 1780, 1802 (1992); Stephen J. Schulhofer, The Gender Question in Criminal Law, 7 SOC. PHIL. & POL’Y 105, 135 (1990)); see also Kinports, supra note 152, at 755 n.3–4 (noting Susan Brownmiller, an influential author, and Stephen Schulhofer argue rape law should focus exclusively on force but explaining influential author Susan Estrich, legal scholar John Bogart, and the Canadian Parliament argue rape law should focus exclusively on consent).

180. Falk, supra note 177, at 46 (citing Lucy R. Harris, Comment, Towards a Consent Standard in the Law of Rape, 43 U. CHI. L. REV. 613, 613 (1976)); Anderson, supra note 25, at 953 (expounding on the interplay between the elements of force and non-consent by explaining that in many jurisdictions, the elements of both non-consent and force can be satisfied by resistance, though the degree of resistance required varies).

181. Falk, supra note 177, at 46 (citing Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, CAL. L. REV. 777, 832 (1988)); see also Joel Feinberg, Victim’s Excuses: The Case of Fraudulently Procured Consent, 96 ETHICS 330, 337 (1986). Feinberg explains that in such cases, many people believe “If she is that stupid, she deserves what she gets.” Id. But in response, Feinberg argues that “negligent or not, stupid or not, she could have been severely harmed by her experience . . . .” Further, “people do not forfeit their rights simply by being ignorant or naively trusting, and even stupid people—especially stupid people, can be taken advantage of and harmed.

For example, *State v. Thompson* is one example of a case where courts dismissed various sexual assault charges because the threats did not involve force. The state alleged that the principal threatened to prevent a female student from graduating if she refused to submit to intercourse, thereby precluding her consent. The Montana Supreme Court affirmed dismissal of the two counts of sexual intercourse without consent, specifically finding that the facts as alleged failed to meet the definition of “without consent” under Montana’s Criminal Code. Under Montana law, “without consent” meant: “(i) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone.” In rejecting the state’s argument, the court strictly construed the statute yet simultaneously condemned the behavior alleged in the underlying facts. Further, absent a statutory provision defining “force,” the court adopted “its ordinary and normal connotation: physical compulsion, the use or immediate threat of bodily harm, injury.” By strictly construing the statute and adopting the “ordinary and normal connotation” of the word “force,” the decision reflects hesitancy to expand rape law and also a determination that rape is a crime of violence. Importantly, the case also reflects a certain degree of victim blaming inherent in the notion that intimidation is not serious enough to preclude consent.

*Commonwealth v. Mlinarich* presents another example of the kind of abuse of power that is common to rape by nonphysical coercion cases, but still falls outside of the law’s protection. The Pennsylvania Supreme Court affirmed reversal of the defendant’s conviction for rape where the legislature criminalized forcible compulsion to sexual intercourse if the impact of force is sufficient to overcome “resistance by a person of reasonable resolution.” This definition meant that a fourteen-year-old girl whose guardian threatened to return her to juvenile detention if she did not submit to intercourse never received justice while her abuser walked free.

Both *Thompson* and *Mlinarich* reinforce societal notions reflected in the law that Susan Estrich advocated against: some rapes constitute “real rape” while other rapes do not. Further, extralegal factors that focus on the victim form part of the distinction. As a survivor herself, Estrich noted that, if such a thing exists, she considers herself to be a “very lucky rape victim.” Because unlike the high school girl in *Thompson*, whose

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**Model Penal Code § 213.1(1) cmt., at 70 (AM. L. INST., Discussion Draft No. 2, 2015) (“[M]any states (possibly the majority) continue to restrict . . . sexual offenses to situations involving threats of physical violence.”).**

184. Id. at 1104.
185. Id. at 1105.
186. Id. at 1105 (citing 45-5-501, MCA).
187. Id. at 1106–07.
188. Thompson, 792 P.2d at 1106.
189. Id. at 1106–07; Falk, supra note 177, at 45, 46 (1998) (citations omitted); Schulhofer, supra note 179, at 135; see also Kinports, supra note 152, at 755 n.3, 756 n.4; Anderson, supra note 25, at 953.
190. Falk, supra note 177, at 45, 46 (1998); Schulhofer, supra note 179, at 135 (1990); see also Kinports, supra note 152, at 755 n.3, 756 n.4; Anderson, supra note 25, at 95; Thompson, 792 P.2d at 1106-8.
192. Id. at 248, 255–256.
193. Id. at 249.
194. ESTRICH, supra note 56, at 3.
195. Id. at 17–18.
196. Id. at 3.
principal allegedly threatened to prevent her from graduating, or the fourteen-year-old-girl in *Mlinarich*, whose guardian threatened to send her back to juvenile detention, Estrich’s perpetrator held an ice pick to her throat and threatened to kill her if she did not submit, so no one doubted if she was “really raped.”

In contrast, states that do criminalize rape by nonphysical coercion condemn conduct such as: “extortion,” “intimidation,” “threats of public humiliation or intimidation,” threats to accuse another person of a crime, and “use of physical, intellectual, moral, emotional, or psychological force, either express or implied.” Other examples include threats to “expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule.” Such states often view rape as a crime against sexual autonomy. For example, in *People v. Cicero*, a California court expanded the definition of force, holding that “force” plays merely a supporting evidentiary role, as necessary only to ensure an act of intercourse has been undertaken against a victim’s will. The court reasoned that physical harm is not required because “the fundamental wrong at which the law of rape is aimed . . . is the integrity of a woman’s will and the privacy of her sexuality from an act of intercourse undertaken without her consent.” By this definition, the court affirmed the defendant’s convictions for lewd or lascivious acts on children where he lured young girls near him under the guise of playing a game, molested the girls, and kissed the girls after he told them he would let them go if they kissed him. If *Cicero*, a case without additional extrinsic force that caused harm, were governed by the Montana law in *Thompson*, or the Pennsylvania law in *Mlinarich*, the result likely would have been different. That is so because of the positions that state legislatures take on the three broad issues of (1) how to define rape, (2) the relationship between force and non-consent, and (3) stereotypical behavior of men and women during sexual encounters directly influence case outcomes.

Though the previous cases were decided after the 1962 MPC was published, the cases reflect a debate that has endured for over a century and suggest why MPC drafters agreed on the 1962 GSI provision. Because the 1962 version of the MPC was enacted during second-wave feminism and the Anti-Rape Movement, societal change also likely informed the drafters’ decision. Yet, until the 1962 MPC, rape was still defined as “a carnal knowledge of a woman not one’s wife by force or against her will” and required the utmost resistance. Thus, the drafters of the 1962 MPC understood the need for reform but were not far removed from a harrowing past where women had far less protection.

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199. Id.
201. Id. at 590.
202. Id.
203. Id. at 586–87, 590.
205. Falk, supra note 177, at 44 (noting the debate about whether rape by fraud and rape by coercion has occurred for more than a century).
206. See generally Hamlim, supra note 79; Bishop, supra note 24.
207. Dean Kilpatrick, *Rape and Sexual Assault*, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER; see also Schulhofer, supra note 10, at 35.
208. Schulhofer, supra note 10, at 37. Schulhofer explains that the MPC reformers attributed problems with obtaining convictions at the time to three primary defects in the law: (1) the resistance requirement, (2) too great a focus on consent, and (3) a single felony category that encompassed an overbroad range of conduct. Id. In response, Schulhofer notes that the MPC proposals abolished the resistance requirement, avoided mention of
Consequently, the 1962 MPC attempted to strike a balance between advancing protection for victims and safeguarding the criminal defendant’s rights by adopting a “reasonable person standard,” like that in Mlinarich, for GSI. The MPC’s 1962 “reasonable person standard” also attempts to distinguish between trivial instances of coercion and serious threats stemming from a fear of overbroad criminalization. However, given the law’s history and persistent, outdated societal attitudes that are slowly evolving, but persist, a reasonable person standard facilitates victim blaming either directly or indirectly. Further, the 2021 revisions to the MPC broaden the definition of coercion to include “‘psychological threat of legal pressure.’” This change shows that the MPC drafters are less concerned about separating trivial threats from non-trivial threats than in 1962. Hesitation to enact overbroad laws remains valid to a degree. But the line the law currently draws implies that, while the defendant’s conduct may be morally reprehensible, only some victims, those that are “reasonable,” are worthy of legal protection.

**B. The MPC’s Provision for the Crime of Gross Sexual Imposition Illustrates How State Laws Continue to Further Victim Blaming Facialy**

The MPC’s provision for the crime of GSI provides:

> A male who has intercourse with a female not his wife commits a felony of the third degree if: (a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or (b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or (c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

Section 213.1(a) closely resembles many states’ rape by coercion statutes, and though state statutes may differ slightly, the MPC’s standard is the leading plurality. To the drafters’ credit, the provision’s broad language of “any threat” clearly encompasses cases where submission is obtained without force, meaning the MPC was ahead of its time. In this respect, the 1962 MPC was ahead of its time. The provision also gives a victim nonconsent,” instead focusing on the male’s conduct, and divided the crime into three offenses. *Id.* The third offense, GSI, intended to cover instances of rape where the perpetrator used nonlife-threatening force or compelled submission by other threats. *Id.*

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211. *Id.*
213. See Falk, supra note 177, at 51.
jury maximum discretion to do justice in any given case because in theory, it should not matter what the particular victim did or did not do, but only what a hypothetical reasonable person—a person of ordinary resolution—would have done.\textsuperscript{216} The provision also does not require the two traditional elements of force and non-consent.\textsuperscript{217} According to Schulhofer, the drafters recognized three main issues in the law warranting reform, with one being a focus on non-consent.\textsuperscript{218} One rationale for dropping the non-consent requirement was to shift focus to the perpetrator’s actions instead of the victim’s—a direct attempt to stifle victim blaming.\textsuperscript{219}

Despite this rationale, the GSI provision still only provides some victims recourse.\textsuperscript{220} For example, in many jurisdictions, a man obtaining intercourse under the following threats would not be criminal: (1) “If you don’t have sex with me, I’m going to file for divorce, get custody of the kids, and you will never see them again,” (2) “If you don’t have sex with me, I’m going to report you to immigration,” and (3) “If you don’t have sex with me, I’m going to break up with you.”\textsuperscript{221} Given these examples, would the principal in Thompson—who threatened to prevent a high school student from graduating if she did not submit to intercourse—prevent resistance by a person of ordinary resolution?\textsuperscript{222} Questions like this lack a clear legal answer because of the maximum discretion given to juries when evaluating victims under a reasonable person standard. Each of the above victim examples has unique personal, social, emotional, and financial characteristics that create a power imbalance in their respective relationships.\textsuperscript{223} This power imbalance necessarily makes each woman more vulnerable to sexual violence than she would be without such concerns.\textsuperscript{224}

By giving a jury maximum discretion, it can consider these factors and have compassion for the victim. However, maximum discretion also means that a jury could, and may be more likely to, use those very same factors to blame the victim for the assault. For example, consider a hypothetical victim with a mental illness and history of complex trauma. The jury could consider her mental illness and trauma to determine that the perpetrator took advantage of a particularly vulnerable victim. Conversely, the jury could determine that her mental illness and trauma meant that she did not have “ordinary resolution,” and that a person with ordinary resolution would not have submitted.

In theory, a jury does not scrutinize a victim’s actions, but considers what a reasonable person would have done; but, in practicality, this task cannot be accomplished without comparing the two.\textsuperscript{225} Crucial variables like age, personal characteristics, and trauma responses should not be blindly entrusted to a jury because of law and society’s history of victim blaming. Initially, factors like age may properly be within a jury’s discretion because the importance of those facts is highly case-dependent.\textsuperscript{226} Juries may be

\begin{itemize}
\item \textsuperscript{216} MODEL PENAL CODE § 213.1 (AM. L. INST. 1962).
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Schulhofer, supra note 10, at 37 (1992) (citing preoccupation with victim consent, along with the stringent resistance requirement and the inclusion of too broad a continuum of behavior within a single felony category as three primary deficiencies in prevailing statutes).
\item \textsuperscript{219} SCHULHOFER, supra note 157, at 31–32.
\item \textsuperscript{220} See generally Feinberg, supra note 181, at 337.
\item \textsuperscript{221} Hanus, supra note 182, at 1141.
\item \textsuperscript{222} State v. Thompson, 792 P.2d 1103, 1104 (1990).
\item \textsuperscript{224} Sloane Ferenchak, Introduction to Navigating Power Dynamics, DANCESAFE (May 24, 2019), https://dancesafe.org/introduction-to-navigating-power-dynamics/.
\item \textsuperscript{225} See generally MODEL PENAL CODE § 213.1 (AM. L. INST. 1962).
\item \textsuperscript{226} Learn About Jury Service, U.S. COURTS, https://www.uscourts.gov/services-forms/jury-service/juror-
best suited to determine the relevance of an older, more sophisticated, upper-class victim versus a poverty-stricken youth.\(^{227}\) Juries may properly consider variables like age and sophistication because those variables are often not direct proxies for victim blaming.\(^{228}\) However, the majority of the victim’s personal characteristics are not properly within the jury’s discretion because rape myths may bias a jury and risk comparison to an “ideal” victim.\(^{229}\)

The MPC’s GSI provision encourages victim blaming because the line that separates a “reasonable” victim from an “ideal” victim is blurred at best and nonexistent at worst.\(^{230}\) What many people might consider an “ideal” or even “reasonable” victim may also contravene modern psychology and stem from rape myths.\(^{231}\) For example, one common rape myth is that “[a] victim must have ‘asked for it’ by being seductive, drunk, careless, high, etc.”\(^{232}\) If a prosecutor brought a case in which the victim was intoxicated or high when an assault occurred, the GSI standard enables a jury to conclude far too easily that a woman of ordinary resolution, i.e., one who was not intoxicated or high, would not have been assaulted. Thus, requiring the woman to be of ordinary resolution forms a bridge for rape myths to be injected into proceedings. As another example, consider the victim who accompanies a date to their room on the first date, or a victim in the LGBTQIA+ community.\(^{233}\) Factors such as these may lead a jury to adopt another common rape myth: Because of the victim’s choices or sexual identity, the victim deserved to be raped.\(^{234}\) Hence, a jury’s consideration of some personal characteristics may prejudice the victim—the very person the law is designed to protect.

Finally, trauma responses may be the most improper factor entrusted to a jury under the GSI standard. During traumatic experiences, “the brain’s fear circuitry...
dominates. When the fear circuitry dominates, four common trauma responses occur: Fight, flight, freeze, or fawn. When a perpetrator coerces a victim, a jury may easily recognize fight or flight as appropriate responses, but in the context of rape by nonphysical coercion, these may be the most unlikely responses. Though equally legitimate, freeze or fawn responses may not be considered appropriate, or worse, they may be used as evidence that the victim did not have ordinary resolution. Without clear guidance on what is and is not appropriate for juries to consider, victim blaming likely occurs because an ordinary resolution standard contravenes the freeze and fawn trauma responses.

Requiring the threat to be serious enough to induce compulsion by a woman of ordinary resolution is further dangerous because, in principle, it mirrors a stringent resistance standard of the past. Many states still use resistance to satisfy either the force or non-consent elements in rapes that do involve extrinsic force. Yet, even in those cases, juries may find that the woman did not resist strenuously enough—a problematic notion in itself. In rape by non-physical coercion cases, this problem is only amplified because the threat does not involve physical harm, thereby elevating what jurors may consider ordinary resolution under the circumstances. In effect, like Abbott, where under New York law, the woman’s reputation, resistance, and attempts to call for help deter-
In sum, a standard requiring jurors to engage in ex post facto analysis of what a reasonable victim would have done when the victim was experiencing a trauma response during the relevant time period is grossly inadequate. A well-established principle of criminal law is that contributory negligence is irrelevant because the criminal law “is made to protect those who are harmed.” Yet, the GSI standard means that the victims who are of average firmness and ability will be protected, but some of the most vulnerable victims will not. Such a standard in rape law provides a blank license for victim blaming because in many cases, people believe “[i]f she is that stupid, she deserves what she gets.” Yet, regardless of how naïve, “negligent,” unsophisticated, susceptible, afraid, vulnerable, or “stupid” a victim may be, the victim still has rights. Though a GSI victim may be a uniquely vulnerable individual, the very kind of person the criminal law is designed to protect, the GSI standard may not only prevent justice, but may victimize a survivor twice by blaming her for the assault.

C. Even If the GSI Provision Does Not Perpetuate Victim Blaming Facialy, It Encourages Juror Victim Blaming and Misapplication of the Standard

Even if the GSI provision does not facially encourage victim blaming, it likely facilitates victim blaming through the injection of juror bias. Large portions of society continue to “believe the outdated and disproved mythology that surrounds sexual violence.” Numerous research shows that the victim’s behavior, dress, choices, response to the assault, and relationship with the defendant impact jury deliberations. In this respect, acceptance of rape myths can lead to bias, and because of a jury’s maximum discretion, jurors can base verdicts on that bias in the secrecy of the jury room—a bias stemming from factors that should be irrelevant.

Juror bias can come in many forms and may be multifaceted. For example, responsibility or accountability bias describes a tendency to blame the person seeking to

245. See generally Neo, supra note 236.
247. Feinberg, supra note 181, at 337.
248. Id.
249. Id.
avoid responsibility for his or her own actions. In sexual assault cases, a juror may “use the responsibility bias to blame the victim twice” because the victim is first accusing the defendant of wrongdoing and, second, some jurors may believe her irresponsibility “invited the assault.” At the same time, a juror may exhibit “defensive attribution bias.” Defensive attribution bias involves blaming the victim for her acts or omissions where the conduct resembles a juror’s own conduct. A juror may engage in such bias in an attempt to safeguard his or her belief in a safe and just world. When jurors are biased toward victims, an ordinary resolution standard permits jurors to use victim blaming as a method of determining guilt, similar to the New York law discussed in People v. Abbott. In Abbott, the victim had to prove (1) her good reputation, (2) resistance, and (3) that she tried to call for help—a modern jury can use these same factors behind the veil of the jury room to determine a victim lacked ordinary resolution. In sum, whether directly or indirectly, the MPC’s GSI standard furthers victim blaming.

D. The MPC Should Not Use a Reasonable Person Standard for Sexual Assault Laws

As Hale noted, “rape is a most detestable crime,” but the MPC’s language does not reflect the same. By using a “reasonable person standard” and even mentioning resistance, the GSI provision invites the factfinder to engage in victim blaming unique to the crime of rape. For example, consider how widely criminal law would change if legislatures used a “reasonable person standard” or made resistance an element for other crimes. In Oklahoma, robbery is defined as “a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” If Oklahoma defined robbery using a reasonable person standard, the statute might instead read: “Robbery is defined as a wrongful taking of personal property in the possession of another, from the person or the person’s immediate presence, and against the person’s will, by force or fear sufficient to overcome resistance by a person of ordinary resolution.” Similarly, Oklahoma’s battery provision provides: “A battery is a willful and unlawful use of force or violence upon the person of another.” If Oklahoma defined battery using a reasonable person standard and incorporated resistance, the statute might read: “A battery is a willful and unlawful force or violence upon the person of another sufficient to overcome resistance by a person of ordinary resolution.”

The way robbery, battery, and other crimes that violate a person’s autonomy are defined illustrates that concern for separating trivial threats or uses of force is not justified for the crime of rape. In neither robbery, nor battery, nor most other serious crimes, does the law look to the victim to determine if the perpetrator’s actions were severe enough to warrant punishment. With robbery and battery, how strongly the victim resisted is irrelevant to determining guilt, and rape law should reflect the same.

Robbery and battery statutes rightly make no reference to a victim’s resolve. Out of all serious crimes, rape is the last crime where the law should place emphasis on the

253. Id.
254. Id.
255. Id.
256. Id.
257. Friedlander & Rudolph, supra note 252.
258. Id.
261. 1 MATTHEW HALE, supra note 52, at 635.
victim given its history of victim blaming. Rape law should not include a resistance element or a reasonable person standard because, unfortunately, prosecutorial discretion will mean that most cases where the threat is trivial will never go to trial. Indeed, prosecutors hesitate to take rape cases to trial even when force is used if the victim delayed reporting, if the victim had been drinking, or if the victim and the perpetrator had a prior sexual relationship. Therefore, a reasonable person standard and the requirement of resistance in rape law serve only to further victim blaming and promote juror misapplication of the law.

IV. A MANDATORY JURY SURVEY DISCERNING RAPE MYTH BIAS IN Voir Dire AND A PROPER JURY INSTRUCTION MAY REDUCE VICTIM BLAMING

Though changes to the MPC’s GSI provision may be warranted, the GSI provision merely illustrates a larger problem within rape law. The provision represents the ongoing debate over how to define the crime of rape, the relationship between the elements of force and non-consent, and the necessity of creating laws that actually serve those they are designed to protect. Most importantly, the provision shows how the law can further victim blaming. In a rape trial, the victim is not a party, and victims have limited rights. For centuries, rape has supposedly been considered one of the most detestable crimes, but treatment of victims, case outcomes, and hesitancy to expand the law do not reflect the same. While widespread societal change and resolving the definitional issue will take considerable time, the legal system can evolve now to reduce victim blaming by using juror bias surveys in voir dire and issuing a jury instruction in all rape cases that addresses victim blaming. Given its history, the law cannot sit passively in the face of injustice; it must take proactive steps to remedy a problem it helped create.

A. While Defining the Crime of Rape Differently May Influence Victim Blaming Indirectly Over Time, a Jury Instruction Admonishing Victim Blaming Is a Direct, Immediate Solution

In the context of rape, the law’s history and societal tendency to blame the victim demonstrate a need for jurors to understand that contributory negligence plays no role in

264. See generally Beichner & Spohn, supra note 3.
265. Id.
266. See generally Michele & Brown, supra note 252, at 75 (noting that “it is often the victim rather than the perpetrator who gets blamed and shamed by society.”).
267. Kinports, supra note 152, at 755 n.3, 756 n.4; see also CATHERINE A. MACKINNON, supra note 156, at 245 (noting that requiring both force and non-consent is redundant, and that “[r]ape should be defined as sex by compulsion, of which physical force is one form.”).
269. Michele & Brown, supra note 252, at 75.
270. See, e.g., Cling, supra note 27 (noting that if man raped a woman inside of the city walls, where she could have called for help, she would be stoned alongside her rapist); People v. Abbott, 19 Wend. 192 (N.Y. Sup. Ct. 1838) (illustrating how the woman bore the burden of proof to convict a rapist based on her personal characteristics).
the criminal law. One potential way to reduce juror victim blaming in sexual assault cases may be through a jury instruction admonishing the jury not to consider certain evidence. A jury instruction could address many common rape myths. Moreover, while legal scholars wrangling with the language of rape offenses behind the scenes can indirectly affect juror victim blaming, instructing the jurors directly may prove more effective. Though scholars debate the effectiveness of jury instructions, the Supreme Court has stated that the jury trial system depends on the “crucial assumption . . . that juries will follow the instructions given them by the trial judge.” Societal attitudes toward victims continue to evolve, increasing the chance that an instruction will be effective. Research also shows that, when jury instructions use ordinary words and explain legal concepts, comprehension and presumably effectiveness increase.

For example, a sample jury instruction could read:

Under this state’s sexual assault laws, contributory negligence is not a defense to criminal liability and should not impact your deliberations. In civil cases, “contributory negligence” is a rule which bars plaintiffs from recovering for the negligence of others if they too were negligent in causing the harm. In determining guilt or innocence, you should not consider certain factors which you may perceive as “negligence” on the victim’s part. These factors include but are not limited to the victim’s clothing, lifestyle, occupation, sexual or gender identity, sexual arousal during the assault, the victim’s delay in reporting the assault, and whether the victim was intoxicated or high.

Even though a jury instruction may be a small proposition, any proactive step the law can take to abrogate victim blaming cannot be considered futile.

B. Asking Targeted Questions During Voir Dire Through a Juror Rape-Myth Bias Survey Could Lead to Systematic Change

The effectiveness of a proper jury instruction could be enhanced by a rape-myth bias survey that mirrors the instruction. Studies have shown that high rates of rape myth acceptance are linked to high rates of victim blaming. In fact, qualitative research indicates that “mock jurors’ scores on so-called ‘rape myth scales’ are significant predictors of their judgments about responsibility, blame, and (most importantly) verdict.”

273. Hillstrom, supra note 143. The widespread endorsement of #MeToo illustrates just how far society has evolved in its understanding of rape victims; see also Mallios & Meisner, supra note 248 (noting that a juror who understands facts about rape that contradict rape myths can educate other jurors).
275. Contributory Negligence, LEGAL INFORMATION INSTITUTE. (last visited Dec. 27, 2022). This is an original jury instruction, but I have cited to accurately reflect the doctrine of contributory negligence as well as rape myths. The next citation is included only for reference to certain recognized rape myths.
276. Rape Myths, supra note 231 (detailing certain rape myths). This is an original jury instruction, but I have cited to accurately reflect the doctrine of contributory negligence as well as rape myths.
277. See generally Friedlander & Rudolph, supra note 252.
278. Michele & Brown, supra note 252, at 82.
279. Leverick, supra note 7.
Currently, most of the rape myth scales that exist are Likert scales, with higher scores corresponding to lower levels of rape myth acceptance and vice versa. Instruments like these could prove valuable to prosecutors for several reasons.

First, to understand victim blaming and rape myth bias, prosecutors must understand aspects of psychology and sociology beyond legal education. Second, even assuming prosecutors are well-educated on rape myths, some rape myths are less obvious than others and are difficult to discover in voir dire without specifically targeted questions. Rape myth scales that have been proven effective provide an excellent starting point for the legal system to discern bias and reduce victim blaming.

Though voir dire procedures differ across jurisdictions, and some judges prefer to conduct voir dire instead of the attorneys for efficiency purposes, allowing the use of rape myth scales as a survey would benefit all involved. First, victims would benefit not only from the exclusion of jurors prone to victim blaming but also because implementing a rape myth scale could potentially result in more prosecutors being willing to take rape cases to trial. Since one of the primary rationales for prosecutors declining to prosecute certain cases are extralegal factors that often stem from rape myths, a rape myth scale in voir dire could counter that concern. Second, while judges do have an interest in judicial economy, the interest in doing justice is greater. Third, defendants would not be prejudiced because they could have access to the survey results and thus potentially eliminate jurors perceived to be overly biased in favor of victims. Finally, if the prosecution could successfully demonstrate bias, perhaps the legal system could eventually add rape myth acceptance bias as a basis to exclude jurors through for-cause challenges. Even if the law never includes rape myth acceptance bias as a basis for exclusion through for-cause challenges, the instruments could provide prosecutors with a valuable tool for use in peremptory challenges.

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280. See generally Saul McLeod, *What is a Likert Scale?*, SIMPLY PSYCH. (2019), https://www.simplypsychology.org/likert-scale.html. Likert scales measure attitudes and use a five or seven point scale for each question where the participant indicates how much he or she disagrees with a statement. *Id.* Likert scales obtain quantitative data useful for analysis because the responses allow for varying degrees of opinion rather than simple “yes” or “no” answers. *Id.*

281. See, e.g., McMahon & Farmer, *Updated Illinois Rape Myth Acceptance Scale (IRMA)* (2011), false-rape-842.pdf (falserratetimeline.org). Each subscale contains question designed to discover bias related to four rape myths: (1) she asked for it; (2) he did not mean to; (3) it was not really rape; and (4) she lied. *Id.* Each question may be answered on a five-point Likert scale, with an answer of one denoting “strongly agree” and an answer of five denoting “strongly disagree.” *Id.* See generally *Illinois Rape Myth Acceptance Scale*, PSYCH. SCALES, https://scales.arabpsychology.com/s/illinois-rape-myth-acceptance-scale/ (last visited Dec. 28, 2022). The Updated Illinois Rape Myth Acceptance Scale is a twenty-two-question survey with four separate subscales.


283. See *id.*


286. *Id.*


good reason, but decisions should not be made in the jury room counter to the principles of justice. Implementing rape myth scales in voir dire is a small price for judicial economy to pay to decrease victim blaming, and it could help the law mirror modern feminist attitudes.

V. CONCLUSION

One in six women has been a victim of sexual assault or attempted sexual assault during her lifetime, but the sad reality is that “out of every 1,000 sexual assaults, 995 perpetrators will walk free.” An overview of the history of rape law demonstrates evolution in response to feminist activism, but the law must do more to protect victims. Given the MPC’s widespread influence, it should pioneer the initiative and recognize the nuance inherent in the victim-blaming issue.

In 2022, survivor advocates placed 103 outfits on mannequins in an exhibit entitled “What were you wearing?” at the United Nations Headquarters in New York City, New York. Each of the 103 outfits represented more than ten million survivors comprising the 1.3 billion worldwide. Someone wore each of the outfits when a perpetrator committed a sexual assault, and the outfits differ in age, gender, culture, and occasion—demonstrating that rape transverses all bounds. The exhibit poignantly illustrates the fallacy in a common rape myth: What the victim was wearing invited sexual assault. Yet, as the exhibit shows, what a survivor was wearing is irrelevant. What a survivor had to drink before the assault lacks consequence—drinking by itself did not cause the assault, the perpetrator did. Neither does a person’s sexual identity give another person license to sexually assault. Neither alcohol, nor clothes, nor sexual identity, nor any other extrinsic variable is what rapes victims: Rapists rape victims. Only when the law successfully reflects this proposition will survivors get the justice they deserve.

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https://legaldictionary.net/challenge-for-cause/.
291. Schulhofer, supra note 10, at 36. Schulhofer notes that modern rape law is the combined product of the 1950s MPC revision and “the feminist critique of the mid-1970s.”
293. Experience the Exhibit: what were you wearing?, RISENow, https://www.risenow.us/mannequins (last visited Dec. 27, 2022).
294. Id.
295. Id.
296. See generally id.
297. Id.
299. Id.
300. Id.

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