

Victim-blame as a symptom of rape myth acceptance? Another look at how young people in England understand sexual consent

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There is no doubt that being ‘critical’ about victim-blame requires ensuring first that it is the perpetrator and not the victim who is held responsible for sexual offending. At the same time, engagement with this topic requires critical acuity as to how victim-blame is identified, and to the boundary between raising legitimate questions about the presence or absence of consent in less than ideal circumstances, and falling back on to myths and stereotypes that are unfair to complainants and damaging to victims. This paper identifies and critiques three purported intersections of rape myths and victim-blame that have gained widespread acknowledgement within feminist legal studies: first, that a woman is blamed for voluntarily putting herself into circumstances in which ‘rape happens’; secondly, that a woman is blamed for ‘miscommunicating’ her refusal; and, thirdly, that consent is wrongly understood to have been given in circumstances where a woman in fact lacked the freedom to do so. This critique of methodological and analytical approaches to identifying victim-blame as a symptom of rape myth acceptance focuses on research published recently by the Office of the Children’s Commissioner, “‘Sex Without Consent, I Suppose That Is Rape’”: How Young People in England Understand Sexual Consent’.

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INTRODUCTION

Intersections of rape myth acceptance and victim-blame

A number of studies of beliefs and attitudes surrounding rape and sexual assault have sought to show empirically that we live in a culture in which certain types of victims tend to be blamed for their own attack. According to these studies, victim-blame can be explained by the widespread popular acceptance of the traditional sexual double standard (which says that sexual behaviour that is acceptable for men is unacceptable

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for women),¹ and rape myths (eg that ‘real rape’ involves a pathological stranger who unleashes a ‘blitz’-style attack outside, at night and using overwhelming force).² A woman who is raped or sexually assaulted in circumstances that run counter to that stereotype, who may have been drinking,³ who dressed provocatively⁴ or who perhaps invited a man home for ‘coffee’⁵ and then failed to communicate her refusal effectively⁶ may be blamed for *precipitating* her own victimisation and, as such, made to bear a degree of responsibility that ought to fall squarely on the rapist.⁷ Victim-blame may be regarded as a further wrong suffered by victims, as well as inflicting further harm in terms of the victim’s self-esteem, her capacity to recover from the ordeal. Since the relevant rape myths and sexual double-standards affect the perceptions of both lay people and legal professionals, victim-blaming attitudes are also said to affect the chances of an offender being tried and punished by the criminal justice system.⁸

This paper does not take issue with the characterisation of victim-blame as wrongful and harmful, and indeed I would strongly emphasise that being ‘critical’ about victim-blame requires insisting first that it is rapists and not their victims who are blamed for rape. It was because it was read as undermining this principle that the NHS/Home Office poster ‘One in Three Reported Rapes Happens When the Victim

1. NB Gray, GJ Palileo and D Johnson ‘Explaining rape victim-blame: a test of attribution theory’ (1993) 13 *Sociol Spectrum* 377; M Duran et al ‘Social perceptions of rape victims in dating and married relationships: the role of perpetrator’s benevolent sexism’ (2010) 62 *Sex Roles* 505; R Allison and BJ Risman ‘A double standard for “hooking up”: how far have we come toward gender equality?’ (2013) 42(5) *Soc Sci Res* 1191–1206; LA Rudman, JC Fetterolf and DT Sanchez ‘What motivates the sexual double standard? More support for male versus female control theory’ (2013) 39(2) *Pers Soc Psychol Bull* 250.
2. PA Newcombe et al ‘Attributions of responsibility for rape: differences across familiarity of situation, gender, and acceptance of rape myths’ (2008) 38(7) *J Appl Soc Psychol* 1736; L Ellison and V Munro ‘Better the devil you know? “Real rape” stereotypes and the relevance of a previous relationship in (mock) juror deliberations’ (2013) 17(4) *Int’l J Evidence & Proof* 299.
3. E Finch and V Munro ‘Demon drink and the demonized woman: socio-sexual stereotypes and responsibility attribution in rape trials involving intoxicants’ (2007) 16(4) *Soc & Legal Stud* 591; C Gunby, A Carline and C Beynon ‘Alcohol-related rape cases: barristers’ perspectives on the Sexual Offences Act 2003 and its impact on practice’ (2010) 74(6) *J Crim L* 579; S Wallerstein ‘“A drunken consent is still consent” – or is it? A critical analysis of the law on a drunken consent to sex following *Bree*’ (2009) 73(4) *J Crim L* 318.
4. J Ringrose and E Renold ‘Slut-shaming, girl power and “sexualisation”: thinking through the politics of the international SlutWalks with teen girls’ (2012) 24(3) *Gender & Educ* 333–343.
5. B Masser, K Lees and BM McKimmie ‘Bad woman, bad victim? Disentangling the effects of victim stereotypicality, gender stereotypicality and benevolent sexism on acquaintance rape victim-blame’ (2009) 62 *Sex Roles* 494.
6. SE Hickman and C L Muehlenhard ‘“By the semi-mystical appearance of a condom”: how young women and men communicate sexual consent in heterosexual situations’ (1999) 36(3) *J Sex Res* 258.
7. See generally A Carline and P Eastal *Shades of Grey – Domestic and Sexual Violence Against Women* (Abingdon: Routledge, 2014) pp 159–160. Women are ‘frequently judged and considered to be blameworthy due to their behaviour’. B Russell, DL Oswald and SW Kraus ‘Evaluations of sexual assault: perceptions of guilt and legal elements for male and female aggressors using various coercive strategies’ (2011) 26(6) *Violence and Victims* 799.
8. A perception understood to warrant the publication of model directions for directing Crown Court juries to counter ‘entrenched ... stereotypical opinions’: see Carline and Eastal, above n 7, p 160.

has been Drinking' was widely criticised in the UK in 2014.⁹ However, broadly speaking, there are two types of questions legitimately to be raised regarding the way in which some currently influential studies draw victim-blame as a symptom of rape myth acceptance, where rape myths are understood to be beliefs about rape or sexual assault that are either factually wrong or else unacceptable on ethical grounds.¹⁰ First, identifying that a given response to an alleged rape or sexual assault constitutes *victim*-blame requires that the person concerned is in fact a *victim* and not something else. As I suggest below, a conceptual framework in which rape myth acceptance is understood to provide the key to identifying victim-blame may not always be the most reliable. Take, for example, the well-known myth that says that 'women often lie about being raped'.¹¹ Anyone who is familiar with rape myth acceptance scholarship understands that such a statement describes a stereotype that, if believed, may be damaging to the credibility of a particular complainant. But do we endorse or perpetuate this rape myth if we insist on drawing a sharp distinction between *complainants* (who may or may not have been raped) and *victims* (whose victimhood is acknowledged and recognised) until the truth of the complainant's account has been decided by a jury? Carline and Easteal, in their chapters on the damaging effects of a prevailing 'climate of suspicion' in the reporting, pre-trial and trial stages of the criminal justice system, seem to imply as much in their repeated use of the word 'victim' interchangeably with 'complainant'.¹² Of course there are very good reasons to keep up pressure on criminal justice systems to ensure that women who bring complaints are not dissuaded from doing so, and that deserving cases are not dropped prematurely. However, for the purposes of analysing victim-blame in a scholarly context, it would be a mistake to draw from the fact that the 'lying rape complainant' is a stereotype, that victimhood is established from the point at which a complaint is made. In cases in which the question of what actually constitutes *victimisation* arises, to do so would be to conflate two different conceptual categories: a slippage that is liable to mislead us in understanding popular responses to rape and sexual assault.

Secondly, given the strongly negative moral implications of 'blame' in this context, *victim-blame* must necessarily be distinguished from responses to victims that may be something other than blame. A 2005 study commissioned by Amnesty International claimed to have uncovered evidence of a disturbing 'blame culture' in the UK, including 26% of people asked who seemed to regard a woman at least partly to blame if she wore 'sexy clothing'.¹³ However, the question actually asked of participants of

9. J May 'NHS & Home Office: remove all copies of this victim-blaming poster' Change.org; available at <https://www.change.org/p/jeremy-hunt-nhs-home-office-remove-all-copies-of-this-victim-blaming-poster> (accessed 22 July 2015).

10. H Gerger et al 'The acceptance of modern myths about sexual aggression scale: development and validation in German and English' (2007) 33 *Aggress Behav* 422–440.

11. M Burton 'How different are "false" allegations of rape from false complaints of GBH?' (2013) 3 *Crim L Rev* 203; H Littleton 'Rape myths and beyond: a commentary on Edwards and colleagues (2011)' (2011) 65 *Sex Roles* 792; KM Ryan 'The relationship between rape myths and sexual scripts: the social construction of rape' (2011) 65 *Sex Roles* 774.

12. Carline and Easteal, above, n 7, p 163ff.

13. Amnesty International 'UK: new poll finds a third of people believe women who flirt partially responsible for being raped'; available at <http://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being> (accessed 22 July 2015).

that study was whether a victim was totally, partly or not at all ‘*responsible*’ for an assault on account of their behaviour. Crucially, answers that say that a victim was ‘partly responsible’ may indicate a negative moral judgement, but at the same time may also indicate ‘a more benign belief that a victim’s behaviour had enhanced her vulnerability to being raped’.¹⁴ This unfortunate conflation of responsibility and blame must be understood against the context of rape myths discourse. For it is because the idea that a victim of rape or sexual assault might have done something to precipitate the attack is a myth – that is, either factually wrong or else factually accurate but wrong in an ethical sense – that makes raising questions about ‘likelihood’ and ‘responsibility’ on the part of the victim so fraught and politically charged. As we will see below, if it is ethically unacceptable to suggest that any aspect of the victim’s behaviour might have been relevant to the fact that she was sexually assaulted or raped, then the possibility that participants of the relevant research studies might have been expressing something *other than* victim-blaming attitudes becomes problematically difficult to identify.

The structure and scope of the paper

It should be emphasised here that this paper does not in any way seek to downplay, deny or trivialise sexual victimisation. The critical remarks below are instead directed towards understanding ‘victim-blame’ as a social and cultural phenomenon: it considers arguments about what actually constitutes victim-blame as such, and arguments about where victim-blame comes from. To this end, the paper identifies and critiques scholarly arguments with respect to three purported ways in which victim-blame in cases of male-on-female rape and sexual assault tends to be explained by the fact of popular acceptance of rape myths. The first of these says that victim-blame may flow from myths about women precipitating their own rapes and sexual assaults by their own risky behaviours. Section 1 (‘Victim-blame and risk: myths and facts’) highlights two strands of thinking amongst the relevant scholarship. The first of these insists that the idea of increased risks for women as a result of their own behaviour is itself a myth; the second acknowledges a factual basis for understanding risk, but goes on to insist that women make themselves vulnerable to those risks unwittingly because they themselves so firmly believe in the real rape myth.¹⁵ This section argues that within both strands of thinking, the privileged status accorded to rape myth acceptance is questionable, and that claims to be able to identify victim-blaming attitudes that apparently flow from rape myth acceptance need to be treated with caution.

Secondly, someone who would hold a woman responsible for her own rape or sexual assault on the basis that she failed to give a clear and explicit refusal may be affirming the myth of ‘miscommunication’.¹⁶ Section 2 (‘Victim-blame and mythical thinking about “miscommunication” and “seedy” sex’) acknowledges that miscommunication is indeed both factually and normatively problematic. It goes on to argue, however, that the evidence of miscommunication serving merely as a

14. Quoting Ellison and Munro, above n 2 [at fn 4]. See also Gray et al, above n 1, who also draw conclusions about ‘blame’ from having asked questions about ‘responsibility’ (see esp p 380).

15. Rudman et al, above n 1, represents that first strand; Littleton, above n 11, represents the second.

16. Hickman and Muehlenhard, above n 6.

cynical excuse for sexual coercion is not sufficiently strong or generalisable to justify deeming the *very idea* to be a rape myth. Furthermore, studies that identify victim-blaming attitudes via the miscommunication ‘myth’ can sometimes be shown to confuse, on the one hand, the issue of a woman’s freedom and/or capacity to consent in any given context and, on the other, the quite separate issue of the normative quality (the ‘seediness’) of certain sexual behaviours.

Thirdly, where a woman is deemed to have ‘chosen’ to engage in sexual activity in circumstances in which her freedom to do otherwise may have been constrained, this may also be viewed as victim-blaming. Section 3 (‘Victim-blame, and choice as myth’) agrees that to rely uncritically on liberal contractarian ideology of choice often obscures the real constraints on freedom that many women face, particularly women living in circumstances of economic hardship. However, it also argues in favour of recognising the possibility of choice even within compromised circumstances, and that whether or not such a choice has been made must make room for the possibility that a person may consent to sex for reasons other than authentic sexual desire. As in section 2, the argument of section 3 identifies in relevant studies an analytical slippage in the relevant literature between assessments of consent and assessments of the quality of the sex involved; in other words, a tendency to conflate judgements about whether *this particular woman did or did not* choose sex, with judgements about whether *any woman would or would not* choose sex in certain circumstances.

Due to constraints on space, this paper will not attempt to offer a comprehensive critical review of the vast body of scholarship on rape myths and the various ways in which these are theorised with respect to gender and victimhood. It focuses instead on some particularly significant examples of relevant work, including studies by psychologists, sociologists and criminologists that have informed and influenced legal scholarship.¹⁷ Each of the three main sections of this paper (described above) is split into two subsections. The first of these subsections puts a particular aspect of the purported connection between rape myth acceptance and victim-blame under critical scrutiny in general terms, and considers a broad spectrum of relevant literature. The second of the subsections undertakes a close reading of one particular recent study, and draws from it elements that I suggest are representative of a much broader set of methodological problems. These close readings will comprise both a critique of the researchers’ analysis as well as my own re-reading of the data, in order to illustrate an alternative narrative on rape myth acceptance and victim-blame. The study in question is ‘*Sex Without Consent, I Suppose That Is Rape*’: *How Young People in England Understand Sexual Consent*, conducted by Maddy Coy, Liz Kelly and colleagues at the Child & Woman Abuse Studies Unit (London Metropolitan University), and published by the Office of the Children’s Commissioner.¹⁸ As I shall explain below, Coy et al’s study is, on the one hand, representative of a feminist conceptual framework shared more broadly by other studies in which rape myth acceptance serves to identify and to explain

17. For a more wide-ranging critical review, see H Reece ‘Rape myths: is elite opinion right and popular opinion wrong?’ (2013) 33(3) *Oxford J Legal Stud* 445; see also D Gurnham ‘A critique of carceral feminist arguments on rape myths and sexual scripts’ *New Crim L Rev*, forthcoming.

18. M Coy et al ‘*Sex Without Consent, I Suppose That Is Rape*’: *How Young People in England Understand Sexual Consent* (London: Office of the Children’s Commissioner, 2013); available at <http://www.childrenscommissioner.gov.uk/publications/sex-without-consent-i-suppose-rape-how-young-people-england-understand-sexual-consent> (accessed 23 July 2015).

victim-blame.¹⁹ On the other hand, it is distinctive in its own right inasmuch as it focuses on the attitudes and beliefs of people who would be too young to have participated in (say) mock jury research and, being published by the Office of the Children's Commissioner in 2013, provides a timely insight into the sort of research that is attracting the attention of relevant policy-focused bodies outside of academia. Most importantly, though, the fictional scenarios that Coy et al's study presents usefully distil some of the key ambiguities in sexual behaviour that allow us to reflect critically on which sorts of responses we regard as victim-blaming, and which we do not. These qualities in combination make Coy et al's study particularly helpful as an object both for close scrutiny and for broader debate.

1. VICTIM-BLAME AND RISK: MYTHS AND FACTS

Debating risk: responsibility and vulnerability

Let us focus here on the first of the ways identified above in which victim-blame intersects with rape myths: the myth that says that a woman's risk of being raped or sexually assaulted may be increased by own behaviour or decisions. In order to understand victim-blame in this context, we need to distinguish two quite different strands of feminist-informed scholarly thinking on rape myths. On the one hand, studies such as Rudman et al and Gray et al have taken the very idea that a woman's own behaviour might make rape more likely is itself a rape myth.²⁰ This is presumably because they regard it as impossible to accept that the likelihood of rape and sexual assault is greater for women who engage in behaviours such as drinking, flirting, dressing in certain ways, casual sex and so on without also running the risk of implicitly endorsing the traditional double standard, and hence the responsabilising and blaming of victims. Other commentators, by contrast, have been more prepared to run that particular risk, and in doing so show up the limitations of that position. For example, in a statement of fact not dissimilar to the much-criticised 'One in Three Reported Rapes' NHS/Home Office poster, Littleton et al state: 'Alcohol use is also ubiquitous in sexual assaults among college women, with one recent survey finding that 72% of a sample of US college rape victims reported that they were intoxicated at the time of the rape.'²¹ Feminist-informed studies have similarly identified increased risks for women who engage in scripted refusal (saying 'no' when meaning 'yes'), promiscuity and early sexual activity,²² and more

19. See eg L Ellison and V Munro 'Of "normal sex" and "real rape": exploring the use of socio-sexual scripts in (mock) jury deliberation' (2009) 18(3) *Soc & Legal Stud* 291; H Littleton et al 'Risky situation or harmless fun? A qualitative examination of college women's bad hook-up and rape scripts' (2009) 60 *Sex Roles* 793–804; C Gunby, A Carline and C Beynon 'Regretting it after? Focus group perspectives on alcohol consumption, nonconsensual sex and false allegations of rape' (2013) 22(1) *Soc & Legal Stud* 87.

20. Gray et al, above n 1, whose eight-item scale to test for rape myth acceptance includes statements such as: 'When females go around braless or wearing short skirts and tight tops, they are asking for trouble.' By using the phrases 'go around' and 'asking for trouble', the researchers seem to be interested in victim-blaming attitudes. However, the statement may be broad and vague enough also to catch people who (correctly) perceive an increased risk of assault, but without regarding such females as culpable. The same might be said of another of the eight items on that scale, namely: 'Many females who get raped have done something to provoke it.'

21. Littleton et al, above n 19, at 794.

22. B Krahe, S Bieneck and R Scheinberger-Olwig 'Adolescents' sexual scripts: schematic representations of consensual and nonconsensual heterosexual interactions (2007) 44 *J Sex Res* 316.

generally to traditionally counter-normative sexual behaviour, such as engaging in multi-partner sex, possibly with strangers and/or for material reward.²³

This second strand of scholarly intervention does not deny (and in fact affirms) that a woman's own chosen behaviour may put her at an increased risk of being raped or sexually assaulted. But instead of 'responsibility' for the consequences of their choices, these interventions speak of women's *vulnerability*: to the social and cultural dangers of being stigmatised for behaviour for which men are not stigmatised (the sexual double standard),²⁴ to being sexually coerced when they do so²⁵ and then to being blamed for this. Although it is has been suggested elsewhere that this approach of distinguishing 'responsibility' and 'vulnerability' is actually a linguistic fudge that dresses up in acceptable guise arguments that in other contexts would be condemned as victim-blame,²⁶ I do not think this is necessarily so. The distinction emphasises that engaging in victim-blame in this context involves adopting a double standard in response to risk; that is, to use the facts about risk in order to advocate for women to place limits on their choices, where no such limitations are placed on men.²⁷ However, this argument itself runs into difficulties when it seeks to avoid 'responsibilising' victims by premising women's 'vulnerability' on the dominance of the real rape myth and hence on an assumption that young women lack insight into the risks of certain behaviours.

Research by Littleton et al on the attitudes of young female college students seeks to show that the real rape myth impacts so powerfully upon public perceptions that women who engage in alcohol-fuelled 'hook-ups' (an example of a circumstance that is removed from the real rape stereotype) do not recognise or acknowledge the dangers therein of sexual coercion.²⁸ Likewise, Turchik et al showed that female college students may be unable to recognise the danger signs in risky contexts because they are themselves conditioned to think of rape only in terms of blitz/stranger rape.²⁹ Both studies purport to show that young women, because they themselves accept the real rape myth, are unable or unwilling to see themselves as victims of rape even when they actually experience it. They thus fall into a cycle of repeated 're-victimisation risk behaviours', typically never realising the truth that they are being raped and/or assaulted.³⁰ These and other studies purporting to demonstrate the popular acceptance of rape myths have already been criticised in various ways that I will not rehearse here.³¹ However, I would emphasise that their reliance on the notion of

23. Coy et al, above n 18, pp 21–36.

24. Littleton, above n 11, at 793: '[W]omen who are more sexually assertive/aggressive or who engage in less common sexual acts are particularly likely to be viewed in a negative stigmatized manner.'

25. Ibid: 'Women who are labelled in this manner [as 'sluts' or as 'easy'] are often regarded as appropriate targets for aggressive sexual advances by men and as having fewer rights to refuse these advances.'

26. See eg Reece, above n 17.

27. As Wallerstein (above n 3) puts it: 'the law should be designed to protect the vulnerable even if they got into this vulnerable position stupidly and by their own doing. The fact that a woman takes a risk does not mean that she now is responsible for all the normal consequences of her actions ...' (at 327).

28. Littleton et al, above n 19.

29. JA Turchik et al 'Personality, sexuality, and substance use as predictors of sexual risk taking in college students' (2010) 47 J Sex Res 411.

30. Littleton, above n 11, at 795.

31. See Gurnham, above n 17; Reece, above n 17.

're-victimisation' is problematic for understanding victim-blame, because it conflates the two different notions of running the risk of being victimised and actually being victimised. Within a conceptual framework in which the real rape myth is credited with the power to prevent young people understanding when they are being coerced, these two notions become fused into one heading ('re-victimisation behaviours') that claims to offer an objective way of identifying 'victims' that bypasses the subjective experience of the woman involved.

Risk, vulnerability and the real rape myth: 'Tashi' and 'Monique'

At this point, we come to the first of three close readings of Coy et al's research, conducted by survey and focus groups on 497 young people aged 13–19. Like Littleton et al and Turchik et al, this study also employs the real rape myth to explain their respondents' failures to identify rape and sexual assault in a range of fictional scenarios. For example, Coy et al note that, in response to a story in which a 15-year-old male called Josh had sex with his girlfriend Tashi after they had both become 'drunk' at a party and she had 'passed out', only 58.6% of respondents said that they were 'Not OK with the sex described'.³² That of the same group of respondents, 72.6% also said this amounted to rape (75.1% of females, 65.1% of males) may additionally suggest that for many young people, sex without consent is sometimes 'okay' even though it constitutes rape. Coy et al argue that the reason for this apparent approval of rape might be explained by the assumption that 'there was some kind of ongoing, taken for granted, consent on which Josh could draw' as Tashi's boyfriend, and that this illustrates respondents 'drawing on stereotypes of rape as committed by strangers'.³³ Coy et al contrast this against a scenario in which 17-year-old Monique wakes up one morning after a night out at a club, feeling 'disoriented, confused and achy', missing her handbag and phone, finding 'evidence of sexual intercourse in her underwear' but not being able to remember anything from the night before, after having been followed into a toilet cubicle by a man she had only just met. In response to this scenario, 88.9% of respondents were 'Not OK with the sex described', with 93.2% identifying what had happened to her as rape (with no significant difference between males' and females' responses). Coy et al explain the greater and more consistent recognition of the incident as a crime as '*undoubtedly* due to in part to [*sic*] the limited relationship between the parties; this scenario is closer to the stereotype of "real rape"...'.³⁴ However, I would take issue with this confident assertion about the significance of the real rape myth.

In the 'Tashi and Josh' scenario, for example, the first thing that we learn is that 'Josh is 15 and has been going out with Tashi, his "gorgeous, smart" girlfriend for four months.' Respondents may have sensed, therefore, that the researchers intended to imply some significance in the described context of an already established sexual relationship, and in this they would of course be correct. But if, as Coy et al claim, 'many' of the respondents saw that significance as signalling that explicit consent is not necessary in a sexual relationship (and that this could not be rape by virtue of that relationship),³⁵ there is equally evidence, not acknowledged by Coy et al, that such a view evaporates as respondents mature from 13 to 18. While it is true that only 50.5% of 13–14-year-olds were 'Not OK with the sex described', this rises dramatically to 70.8% for 16–18-year-olds. Likewise, since we are

32. Coy et al. above n 18, p 21.

33. Ibid, p 22.

34. Ibid, p 26 (my emphasis).

35. Ibid, p 21.

invited by the researchers to place significance on the fact that only 62.2% of 13–14-year-old respondents identified the scenario as rape, then we should note that this also rises significantly to 81.4% for 16–18-year-olds. Coy et al do not remark on either of these aspects of their findings. I would suggest that it should not be at all surprising that young peoples' ability to think critically about consent to sex within relationships will develop and improve in this way as they themselves gain knowledge and experience of sex and relationships as well as of consent and coercion, and confirmation of this upward trajectory must surely be cause for an optimism that Coy et al do not admit. Nor do Coy et al comment on the possible wider significance of these findings at both ends of the age range. At the top of the higher end, respondents are at an age at which they will be eligible for jury service, and at the lower end, the fact that children as young as 13 demonstrate that they can engage meaningfully in a discussion of this kind about consent *at all* is itself impressive, given that they are still three years short of attaining the intellectual and emotional maturity necessary to give legally valid sexual consent themselves.

This, of course, does not prove that Coy et al are wrong to conclude that the obvious differences between the 'Tashi' scenario and the real rape myth played a role in respondents' views, but attention to what Coy et al leave out from their analysis must at the very least give us pause before accepting their claims about the impact of stereotypical differences between stranger and partner rape. In the case of the second scenario, involving Monique (waking up having blacked out in the nightclub toilet cubicle), we note that, despite Coy et al's confident assertion that the fact of the man involved being a stranger 'undoubtedly' contributed to respondents' almost unanimous judgement that it constituted rape, no evidence that this reasoning was significant is offered. Instead, the only two responses quoted focus on capacity: 'she can't even remember what happened, which shows she couldn't say yes or no' (18-year-old male); 'she can't say yes, she can't say no' (14-year-old male). Additionally, an explicitly victim-blaming statement is included from a 19-year-old male respondent: 'Girl went out to a young age out to a place she's not meant to be ... To be honest I think that's her own fault.' But since the scenario is designed to come closest to the stereotype of real rape (in which respondents are supposedly most attuned to the fact of a rape having been committed), such a response does little to support Coy et al's argument that the real rape myth makes rape *easier* to recognise and take seriously in this scenario. If this suggests anything at all, it can only be that the connection between rape myth acceptance and victim-blame is weaker than has been claimed.

2. VICTIM-BLAME AND MYTHICAL THINKING ABOUT 'MISCOMMUNICATION' AND 'SEEDY' SEX

Blamed for not saying no?

This section addresses the second of the three purported intersections between rape myth acceptance and victim-blame. Here, we consider whether the excuse of miscommunication is a rape myth, and whether allowing an alleged attacker to rely on it amounts to blaming the victim (ie for 'failing' to communicate her refusal effectively). As a legal question in England and Wales, s 1(1)(c) of the Sexual Offences Act 2003 stipulates that a 'reasonable belief' in consent will separate the accused from a conviction for rape or sexual assault even if all of the other requirements are proved. This arguably allows for the possibility that in some circumstances a jury might decide that it was 'reasonable' for a man to have taken a woman's lack of explicit refusal as an

indication of willingness.³⁶ But in defining a ‘reasonable belief’, s 1(2) then refers to ‘any steps A has taken to ascertain whether B consents’, implying that there ought to be no reason to place a responsibility on the complainant to have actively refused to give consent if the accused made no attempt to ascertain it. Empirical studies can shed some light on popular beliefs and attitudes with regard to the possibility and meaning of miscommunication, albeit with results that are sometimes inconsistent and contradictory. For example, studies by Clark and Carroll and by Hickman and Muehlenhard both report that men are more likely than women to interpret reluctant passive acquiescence as consent or at least as understandable miscommunication.³⁷ However, a study by Gunby et al reported more women than men attributing responsibility to other women to say ‘no’ in communicating refusal for a credible complaint to be made.³⁸

As we found in the previous section, much of the debate about whether miscommunication constitutes victim-blame dovetails with talk about ‘responsibility’, or as Coy et al put it, the ‘moral responsibility on young women to police and maintain boundaries’.³⁹ Research by, for example, Melanie Beres⁴⁰ and Kitzinger and Frith⁴¹ suggests that to expect women to ‘take responsibility’ for communicating refusal in a sexual context is unjustifiably to treat sexual communication differently from any other sort of communicative exchange, since in fact both men and women routinely give and understand refusals that are made indirectly, whatever the setting. Indeed, a number of studies agree that to credit miscommunication as a genuine problem is dangerous because it allows men cynically to *pretend* to misunderstand indirect or implicit refusals.⁴²

But although treating miscommunication as a myth would seem to give us a useful and progressive way of tackling its potentially dangerous and responsabilising implications, we must acknowledge that there have also been studies indicating a factual basis for it. While arguably limited in their usefulness, for reasons that I shall describe here, these studies cannot be simply be dismissed as attempts merely to find excuses for rape or sexual assault. Two studies led by clinical psychologist Charlene L Muehlenhard reported alarmingly high usages of ‘token resistance’ and ‘scripted refusal’ (ie the practice of saying ‘no’ when they ‘had every intention to and were willing to engage in sexual intercourse’) amongst young women with new sexual

36. GE Panichas ‘Simple rape and the risks of sex’ (2006) 25 Law & Phil 613.

37. MD Clark and MH Carroll ‘Acquaintance rape scripts of women and men: similarities and differences’ (2008) 58 Sex Roles 619 at 623; Hickman and Muehlenhard, above n 6.

38. Gunby et al, above n 19.

39. Coy et al, above n 18, p 33.

40. M Beres ‘Sexual miscommunication? Untangling assumptions about sexual communication between casual sex partners’ (2010) 12(1) Culture Health & Sexuality 1.

41. C Kitzinger and H Frith ‘Just say no? The use of conversation analysis in developing a feminist perspective on sexual refusal’ (1999) 10(3) Discourse & Soc’y 293.

42. KN Jozkowski and ZD Peterson ‘College students and sexual consent: unique insights’ (2013) 50 J Sex Res 517 at 521–522; Beres, above n 39; Kitzinger and Frith, above n 41; S Hansen, R O’Byrne and M Rapely ‘Young heterosexual men’s use of the miscommunication model in explaining acquaintance rape’ (2010) 7 Sexuality Res & Soc Pol’y 45; M O’Byrne, M Rapely and S Hansen ‘“You couldn’t say ‘No’, could you?” Young men’s understandings of sexual refusal’ (2006) 16 Feminism & Psychol 133.

partners.⁴³ It has since been shown that these studies were methodologically flawed, and Ellison and Munro are quite right to refer to them dismissively as making ‘dubious claims’.⁴⁴ The flaw lay in the fact that Muehlenhard et al’s questions did not distinguish clearly between *refusing* sex and *not wanting* sex, such that the apparently high numbers of women reporting to have used scripted refusal and token resistance may in fact be explained by women’s *genuine* refusals being miscategorised when they reported refusing sex, not because they did not desire it but because, say, they didn’t have a condom.

The problem with the sort of dismissal of Muehlenhard’s scripted refusal/token resistance studies as made by Ellison and Munro, however, is that it fails to acknowledge that this flaw was later recognised and corrected in a subsequent study by Muehlenhard and Rogers, who found that even excluding the previously miscategorised genuine refusals, a smaller but not insignificant number of people had used ‘no’ in a ‘scripted’ sense (ie meaning ‘yes’).⁴⁵ Ellison and Munro are not alone in ignoring the later study by Muehlenhard and Rogers: their important corrective is rarely, if ever, acknowledged in feminist-informed legal scholarship on rape myths. Such an omission is understandable politically, but it suggests to me a certain lack of balance in the handling of relevant psychology and sociology research findings by legal scholars. The point that must be emphasised here is that however difficult we might find the idea of people using scripted reluctance and refusal as part of a favoured sexual script, simply to ignore those findings is not the same thing as refuting them. Muehlenhard and Rogers’ later study may itself now (at time of writing) be 17 years old and hence a study of a previous generation of young people. But it is important to keep in mind that Ellison and Munro’s dismissal in 2009 of Muehlenhard et al’s earlier studies was not based on the fact that they were carried out so many years ago, but because their methodology was demonstrably flawed in some specific way. Even if the findings of Muehlenhard and Rogers have not specifically been confirmed, evidence of their continuing relevance can be found in the large number of studies published since then that indicate that a lack of explicit consent – and the possibility of danger that this brings – is explicitly or implicitly eroticised in a good deal of sexual behaviour experienced as non-coercive and non-victimising.⁴⁶

43. C Muehlenhard and L Hollabaugh ‘Do women sometimes say no when they mean yes? The prevalence and correlates of women’s token resistance to sex’ (1988) 54 *J Personality & Soc Psychol* 872. In Texas, 39% of 610 female students reported using ‘token resistance’. CL Muehlenhard and ML McCoy ‘Double-standard double bind – the sexual double-standard and women’s communication about sex’ (1991) 15 *Psychol Women Q* 447. Of the 403 female respondents, 37.2% had used scripted refusals with a new partner. The key question asked of respondents was: ‘You were with a guy who wanted to engage in sexual intercourse and you wanted to also, but for some reason you indicated that you didn’t want to, although you had every intention to and were willing to engage in sexual intercourse. In other words, you indicated “no” and you meant “yes.”’

44. Ellison and Munro, above n 19.

45. That is, 15.4% of women and 12.5% of men: CL Muehlenhard and CS Rogers ‘Token resistance to sex: new perspectives on an old stereotype’ (1998) 22 *Psychol Women Q* 443.

46. ZD Peterson and CL Muehlenhard ‘Conceptualizing the “wantedness” of women’s consensual and nonconsensual sexual experiences: implications for how women label their experiences with rape’ (2007) 44(1) *J Sex Res* 72; Hickman and Muehlenhard, above n 6; T Humphreys ‘Perceptions of sexual consent: the impact of relationship history and gender’ (2007) 44(4) *J Sex Res* 307; Jozkowski and Peterson, above n 42; GY Lim and ME Roloff ‘Attributing sexual consent’ (1999) 27 *J Appl Comm Res* 1; SA Vannier and LF O’Sullivan ‘Communicating interest in sex: verbal and nonverbal initiation of sexual activity in young adults’ romantic dating relationships’ (2011) 40(5) *Arch Sexual Behav* 961; V Cameron-Lewis and L Allen ‘Teaching pleasure and danger in sexuality education’ (2013) 13(2) *Sex Educ* 121.

At the same time, studies that purport to indicate that claims about women giving confusing cues are generally false – and hence that miscommunication can be regarded as a ‘myth’ – suffer from difficulties inherent in the drawing of general conclusions from narratives that range across all kinds of sexual behaviours and forms of communication. For example, Melanie Beres’ study of communication between casual sex partners (based on interviews with just 10 men and 11 women) attempts to draw a general impression about miscommunication as a myth in the first instance from her interviewees’ confident assertions that they ‘just know’ an indirect refusal when they see it.⁴⁷ Following this rather naïve acceptance of her interviewees’ claims as fact, she then applies a heavily theorised analysis in order to ‘demonstrate’ how men cynically deploy ‘miscommunication’ to get away with sexual coercion, and how women allow them to do this. Hence, a female interviewee (Jane, aged 19) describes an incident in which rather than explicitly communicating consent she ‘just kinda went with it’ and that ‘it just kind of happened’, despite not actively wanting sex. Beres concludes that ‘By not refusing sex, she does not risk being in a position where he might not listen to her refusal and thus risk getting raped.’⁴⁸ Passing over Jane’s own stated reflections on her partner’s potential as a rapist (‘I’m sure if I’d said, you know, no, he would’ve stopped’) and on her own agency (‘I continued on, though’), Beres confidently concludes that it doesn’t matter whether or not she said no, because that man *would probably have deliberately ignored her refusal had she articulated it*.⁴⁹

Beres also analyses an interview with Don, aged 26, who, when asked what he would do if his female partner seemed uncomfortable, replied with the following:

I just sort of slow it down and make sure she is comfortable and if there is anything that is on her mind. You know it’s really how far into things you are because you don’t just kill it, by saying ‘is everything okay?’ ‘do you have a boyfriend?’ ... It’s stuff like that really kills it, so you just sort of have to like, it’s almost like you take it back down to take it down a notch and then work back up to, like tear it apart and rebuild it and sort of start from scratch again. Not like put on your clothes and start all over again but ... Yeah take it down a notch, makes sure she’s comfortable.

Beres treats this passage as an admission that Don (and, by implication, men more generally) prefers non-verbal communication because it provides a useful cover for sexual coercion: ‘His persistence at pursuing sex results from a lack of willingness to hear his partners’ refusal, not for mistakenly believing that she was comfortable and wanted to continue with the sexual activity.’⁵⁰ In assessing how much we can draw from this study, it is important to keep in mind that in the case of both Jane and Don the refusals that Beres refers to (and the cynicism with which they are met) only ever exist as a hypothesis that is conditional upon things turning out as the researcher imagines. Beres’ claim that she has, as a result of her interviews, ‘found’ that men use miscommunication cynically thus relies heavily on supplementing her empirical findings with general and

47. Beres, above n 40, at 5–6, 8–9. For example, to quote Beres on the subject of ‘tacit knowledge’: ‘When participants were asked about how they understand their partner’s willingness to engage in certain sexual activities, almost all participants responded by saying that it is easy to determine when someone was interested in casual sex – “you just know”’ (at 5).

48. *Ibid.*, at 10.

49. *Ibid.*

50. *Ibid.*

theoretical assumptions as regards the roles of men (coercers) and women (victims) and on how sex and consent *ought* to work. A more credible approach to analysing narratives on sexual attitudes and behaviours is that adopted by Jozkowski and Peterson. In contrast to Beres, they are hesitant about drawing strong conclusions – in their case, from finding that 27.1% of the 185 young men they sampled endorsed using ‘aggressive strategies’ to gain consent, such as ‘telling their partners they were going to have sex with them’ – due to the possibility of different readings of the data.⁵¹ Jozkowski and Peterson’s analysis equivocates as to whether such language as used by these young men implies ‘a direct order’ signifying that any refusal would not be listened to, or else is merely the result of ‘imprecise semantics, such that the men could really just mean that they would engage in a dialogue to determine consent’.⁵²

The problem with confidently categorising miscommunication as a myth seems to be an uncomfortable dissonance between facts and norms. Kitzinger and Frith, for example, reluctantly admit that as politically problematic as it is to say it, the fact that there are sexual scripts in which a refusal is given in full and positive anticipation that it be overcome undercuts our desire simply to affirm the purer normative position on miscommunication that ‘No’ (or indirect cues that similarly signal reluctance) ought only ever to mean no to all people in all contexts.⁵³ Unlike Beres, the analyses given by Kitzinger and Frith and by Jozkowski and Peterson are sensitive to the possibly distortive consequences of deeming miscommunication to be a myth and hence removed from the realm of empirical, contingent fact altogether.

These remarks should certainly not be taken either as denying that miscommunication can often be used cynically, or as trivialising the worrying consequences of holding women ‘responsible’ for disabusing men of a sense of sexual entitlement. But if we are going to make use of the available empirical research at all, then it seems to me that we cannot rely solely on studies that indicate that miscommunication is a lie while dismissing as politically unacceptable studies that suggest that actual sexual practices make miscommunication a genuine possibility. If that possibility exists, then there are reasons to be concerned about the further carceral implications of pursuing the argument that a response to an alleged rape or sexual assault that is receptive to a plea of miscommunication amounts to victim-blame. There is a difficult balance to be struck here, and we should be slow to use the discourse of rape myths merely to endorse another myth by implication: namely, that sexual behaviours that deviate from the norm are inherently and essentially coercive. Ellison and Munro warn of this danger in their perceptive criticism of their mock jurors, who seemed unconsciously to endorse traditionally stereotyped and scripted differences between ‘normal sex’ and rape on the basis of *where* the incident in question had taken place.⁵⁴ Some jurors found it hard to believe that any woman would consent to sex in a ‘seedy’ or ‘desperate’ place such as a stairwell or outdoors in an alleyway, expressing the view that a woman who wants sex to happen would invite a man to ‘a more comfortable environment’ such as her own home.⁵⁵ Ellison and Munro’s analysis highlights just how easy it is to allow traditionally moralistic assumptions to creep into judgements about sex and consent, as we shall see below.

51. Jozkowski and Peterson, above n 42, at 520.

52. *Ibid.*, at 521.

53. Kitzinger and Frith, above n 41.

54. Ellison and Munro, above n 19.

55. *Ibid.*, at 299.

Distinguishing the non-consensual from the seedy: ‘Kate’, ‘Sabrina’ and ‘Kelly’

The second of our close readings of Coy et al’s study of young peoples’ understandings of consent involves two fictional scenarios in which explicit discussion between the parties as to consent is either absent (‘Kate’) or else undertaken in less than ideal circumstances (‘Sabrina’). These will then be contrasted against a third, very different, scenario (‘Kelly’). Coy et al’s respondents were called upon to decide whether or not the alleged victims were put under such pressure that the sex described cannot be understood as consensual. Although, as I have noted above, Coy et al are alert to the possibility that their respondents may have been led astray by stereotypes, there are reasons to think that the researchers themselves may have allowed themselves to be similarly misled. They show this by their failure to distinguish between two quite separate questions: whether consent was negated by constraint on the one hand, and the normative quality of the sexual activity in question on the other. In determining whether a crime was committed, only the former question is relevant. In a scenario involving a 14-year-old girl called Kate, for example, Kate has sex with three boys at a friend’s house and is filmed doing so. Shortly before that, the boys had ‘annoyed’ Kate by making crude remarks about her breasts. They had ‘snatched her phone’, offering to return it only if she kissed them, and had told her to ‘show some effort’.⁵⁶

We are not given any other information as to Kate’s own thoughts or feelings. But for Coy et al, these details are sufficient to indicate that she gave no consent to the sex that followed, and that, furthermore, to expect a girl or young woman in her position to say no is evidence of victim-blame. Respondents who suggested that she may have been capable of exercising any kind of agency despite this setting are admonished by the researchers for ‘implicating’ the victim and ‘inviting’ her own rape.⁵⁷ Coy et al’s point is that in finding herself outnumbered, with her property effectively stolen and in unfamiliar surroundings, Kate considered that she had no choice. This is an intuitively attractive analysis, of course, since it appeals to us to consider the likely effect of a power imbalance between the parties. Coy et al are certainly right to the extent that there is enough information in the narrative to suppose that a properly directed jury may well conclude that Kate was raped. But I would question the researchers’ claim to have actually established that, by considering Kate’s opportunities to ‘speak up’, the respondents are engaging in victim-blame as opposed to legitimate and proper analysis of her freedom to choose. In Coy et al’s analysis of the scene, the sense of coercion is not established by scrutinising Kate’s opportunities to refuse, and the reason for this seems to be that they believe that such scrutiny inevitably constitutes victim-blame. What supplies the necessary ‘proof’ of coercion, therefore, is the normative quality (ie the *seedy* quality) of the sexual behaviour described, which is not necessarily connected to consent at all. In other words, we are directed to the fact that the scene involves: (a) sex between one girl and a group of boys (two of whom she hadn’t previously met); (b) a bartering of sex for the return of property; and (c) the filming of the incident (again, without Kate’s consent), which could represent the objectifying male gaze in general. These are all activities that Coy et al seem to believe no young woman would or could freely consent to, and thus such a scene could only be a description of a rape. To repeat:

56. Coy et al, above n 18, p 27.

57. Ibid, pp 29–31. Examples of such contributions included the following: “‘she didn’t open her mouth, she can talk herself can’t she? She’s got her own mouth, if she didn’t want to she didn’t have to do it ...’ (female, aged 16); ‘why didn’t she just go “well you can have my phone then, I’m not screwing all three of you”’ (male, aged 17)’.

the researchers are quite right to insist that contextual information that is suggestive of refusal is relevant to the questions of consent and coercion. But in order to avoid the accusation of conflating two different issues (coercion that negates the possibility of consent and the normative value or quality of the sexual acts depicted) and thereby of mischaracterising respondents' attitudes, researchers must also counter the suggestion that deviation from 'normal sex' characterises coercion.

Consider also another of Coy et al's scenarios, this time involving 13-year-old Sabrina, who is described giving 14-year-old Amir oral sex. We are told that Amir had invited Sabrina to his house, that he instigated sexual activity by showing her pornography and asked her to 'kiss' his penis. He furthermore told her that she made him 'hard' and in response to her hesitation said 'I thought you liked me too'; he was forceful while the sexual activity actually took place, 'holding her head down' until he was 'finished'.⁵⁸ We also glean evidence of her reluctance from information such as 'she didn't want him to think she was frigid', that 'she didn't know what to do', that she 'had never done anything like this before' and that afterwards she 'just wanted to go home'.⁵⁹ Again, it would be strange if our sympathy were not immediately drawn to such a young and timid girl, who seems to be the victim of pressure to conform to another (apparently older and more experienced) person's sexual fantasy. Indeed, for Coy et al, this collected information as regards Amir's pressure and Sabrina's passivity clearly adds up to rape, and the researchers once again dependently report that 'a third of young people did not recognize' rape in the scenario (31.6%), and that only 'a small number' (37.4%) thought that Amir's 'manipulation' constituted a constraint on Sabrina's 'freedom to consent'.⁶⁰ What Coy et al at no point consider, however, is whether their own analysis of the scenario might have been affected by the obviously 'seedy' or non-normative qualities of the sexual behaviour, or whether the respondents who were doubtful about it as depicting a rape may simply have recognised that the use of pornography and mild force (such as holding the head of a person performing oral sex) are both elements of a particular sexual script involving initiation and domination. While adherence to such a script may not exactly indicate a progressive view of sex as regards gender equality, nor does it in itself establish victimisation or coercion without further details.⁶¹ Unless and until the possible influence of the pointedly seedy normative quality of the sex involved is excluded, Coy et al's conclusion – that respondents who failed to identify it as rape are engaging in victim-blame – is premature and potentially misleading. The factual question of consent and the normative quality of the setting against which we judge consent are two different issues, which need to be kept separate.

By contrast, the study's 'control' scenario, which Coy et al use 'as a debrief at the end of the survey, written to depict both communicative consent, and the possibility of deciding jointly not to have sex', oozes sexual normativity *as well as* depicting the 'correct' way for a boy to respond appropriately to a girl's silent cues. The scenario

58. Ibid, p 31.

59. Ibid.

60. Ibid, pp 31–32.

61. Obviously Sabrina's young age makes her consent invalid in any case, but this is also true of Amir. On the potential for ambiguity in interpreting limited information about sexual behaviours and attitudes, see Jozkowski and Peterson, above n 42, p 521, who suggest that men who report being prepared to use force in a sexual encounter 'may be imprecisely referring to direct, assertive, or passionate initiation with a sexual partner during a sexual encounter rather than actual physical force'.

depicts a 14-year-old girl called Kelly and a boy (presumably the same age) called Eli. It takes place in the bedroom, *not* in a seedy stairwell, alleyway or toilet cubicle. Eli has been Kelly's 'boyfriend' for 4 months without the pair yet having had sex – definitely *not* strangers 'hooking-up' or using sex as part of some unwholesome bargain. They have been studying together when the question of whether to engage in sexual activity arises – *not* drinking, or taking drugs and so on. The scene involves no 'extras' or technology for making potentially exploitative DIY porn, and in any event involves only very mild sexual activity, short of penetration or even genital touching (he immediately backed off when she 'flinched' upon touching his penis).⁶² As an educational tool for teaching young adolescents about respecting potential sexual partners and responding to their cues, getting them to reflect on this scenario is a positive idea. I do not doubt that a number of Coy et al's young participants probably benefited from the chance to do so. But if researchers are to gain a fuller understanding of the relationship (if any) between victim-blame and rape myth acceptance, then they must take more care than do Coy et al to avoid falling into endorsing what Ellison and Munro usefully identify as the traditional and moralistic distinction between 'normal sex' and 'real rape'. In order to avoid marginalising or stigmatising certain kinds of sexualities and practices that attract obvious suspicion and disapproval from a moral point of view, this means concerning ourselves instead with the opportunities that a potential complainant might have had or not had for offering a refusal in the circumstances in which she found herself. To respond to an alleged rape or sexual assault by asking whether D's actions actually did prevent her from doing so is not to engage in victim-blame, but in entirely appropriate scrutiny.

3. VICTIM-BLAME, AND CHOICE AS MYTH

Does 'choice' mean 'victim-blame'?

A third way in which victim-blame arguably intersects with rape myth acceptance requires us to think more deeply about the possibility of choice under compromised conditions and the liberal ideology that underpins law's determination that such a choice may be valid. Of course, there is no space here for a detailed examination of that debate. However, it is pertinent to consider whether we sometimes hear the liberal insistence 'you had a choice'⁶³ as a judgemental 'it was your own fault', and as perpetuating victim-blame by constructing certain types of male pressure as mere inducements, and women's submission due to (say) economic hardship as exercising agency. The English legal meaning of 'freedom' to consent, according to the Sexual Offences Act 2003, is a liberal formulation in the sense that, absent one of the limited number of circumstances in which lack of consent may be presumed, whether the complainant had sufficient freedom to make a choice is a

62. Coy et al, above n 18, p 34.

63. For a scholarly defence of the possibility of 'choice' under compromised circumstances, see D Dripps 'Men, women and rape' (1994) 63(1) *Fordham L Rev* 125 at 139–147. The question of whether the law itself engages in victim-blame arose in the wake of *R v Bree* [2007] All ER (D) 412 (Mar), in which Sir Igor Judge P ruled, at para 34, that: '[W]here the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape.' For a critique of this judgment that engages in victim-blaming on the basis of a woman's 'prior fault' in voluntarily getting drunk, see Wallerstein, above n 3, particularly pp 324–328.

question of fact.⁶⁴ A jury must weigh constraining factors in the balance in considering whether they amount to a negation of choice. In this way, English law distinguishes between consent that may be valid notwithstanding that it was given in response to an inducement rather than authentic sexual desire, and mere submission to threats or coercion.⁶⁵ In other words, consent (and for that matter the idea of choice) is not negated simply because it was given for reasons other than the consent-giver's own sexual desire, nor because she gave it under less than unfettered circumstances.⁶⁶

But despite this recognition by law that choices may be made in imperfect conditions, the point at which 'inducement' shades into 'coercion' is not always clear, and legitimate concerns arise about the extent to which juries may be willing or able to call it appropriately. Taking a critical view on how ordinary people (jurors or otherwise) are to distinguish the two sets of circumstances without falling into victim-blaming raises some difficult questions. For example, when ought a lack of desire to engage in sex, except in order to receive something in return, be understood to negate choice? Secondly, does considering whether there were possible alternatives (to sex) that might have been open to a woman in such circumstances necessarily fail to appreciate the coercive nature of ostensibly non-threatening or non-violent 'offers', thus constituting victim-blame? Feminist critical perspectives on liberal law's apparent approval of choices under potentially coercive circumstances have long grappled with the question of how – if at all – to accommodate a woman's own self-perception. Some commentators – for example, Karen Busby – have argued that since any given case inevitably exists within a culture of patriarchal assumptions about female availability and male entitlement, we may be justified in treating a woman who claims to have exercised agency under constrained circumstances with scepticism.⁶⁷ In a publication from 2011, Coy, Thiara and Kelly argued that a girl or young woman who engages in 'risk taking behaviour such as getting in cars with boys; swapping sexual acts for gifts, alcohol, peer approval; and involvement in more formalised prostitution' is already engaging in activity that is '*potentially ... abusive*' even if not viewed as such by the girl or woman involved.⁶⁸ This scepticism about a woman's insight into her own victimisation is echoed, as we have seen, by empirical analyses such as Beres' reading of a female interviewee's explanation that sex 'just kind of happened' as an attempt to avoid confronting the truth of her partner's readiness to rape her.⁶⁹ We have also seen that Littleton's research on young women's 're-victimising' behaviours leads her to propose setting aside the idea of 'choice'. Others still have argued that to focus, as we have done here, upon that 'moment of agreement' in which consent may have been given is to impose a further danger on women. According to this argument, ostensibly egalitarian regimes that

64. Section 74 defines consent as being where a person 'agrees by choice, and has the freedom and capacity to make that choice'; s 75 lists six circumstances (s 75(2)(a–f)) in which there is an evidential presumption that the complainant did not consent.

65. A position that in English law derives from the pre-SOA case of *R v Olugboja* [1982] QB 320.

66. See Dripps, above n 63.

67. K Busby 'Every breath you take: erotic asphyxiation, vengeful wives, and other enduring myths in spousal sexual assault prosecutions' (2012) 24 Can J Women & L 328.

68. M Coy, R Thiara and L Kelly *Boys Think Girls Are Toys? An Evaluation of the NIA Project Prevention Programme on Sexual Exploitation*, Final report (London: Child and Woman Abuse Studies Unit, London Metropolitan University, 2011) (my emphasis).

69. Beres, above n 40.

protect non-normative sexualities by insisting that ‘yes means yes’ mean imposing a risk-management responsibility on women. From this perspective, then, for law to treat a woman’s ‘yes’ as ‘yes’ in circumstances that are also potentially exploitative, harmful and humiliating leads these risks, as well as the risk associated with any ambiguity about the authenticity of that agreement, to fall on her.⁷⁰

However, the dangers of understanding victim-blaming attitudes by framing choice as a dangerous fiction in particular settings makes two untenable assumptions. The first of these is that the costs of applying the violence of criminal justice against men to circumscribe consent in difficult contexts are always outweighed by the benefits, and that incarceration does not itself inflict significant harm and humiliation to be weighed against the harm of an overly broad understanding of sexual victimisation. However, we know that this is not the case and, furthermore, that penal sanctions in practice tend to fall disproportionately on already marginalised and disadvantaged members of society. This is a criticism of the ‘carceral’ implications feminist critiques of consent that invoke criminal justice, which has been explored elsewhere and is beyond the scope of this discussion.⁷¹ The second assumption is that it is possible in any case to isolate a broad category of circumstances that, by virtue of their exploitative or potentially harmful quality, are inimical to the very idea of female agency. It is with this point in mind that we turn to the last of our close readings of Coy et al’s study of how young people in England understand consent.

Survival sex: ‘Chelsea’

We have already noted that elsewhere in their study Coy et al cite, as evidence of victim-blaming attitudes, suggestions by their respondents that the girls and young women depicted had made a ‘choice’ in circumstances where their freedom to choose was constrained in some way. In a scenario involving 16-year-old Chelsea and 23-year-old Steve, they make this the central point. The scenario depicts what Coy et al describe as ‘survival’ sex. Chelsea, who is drunk and homeless, takes up Steve’s offer that she may sleep on his sofa in return for giving him oral sex, despite being ‘tired and wanting to be left alone’. In the weeks that follow, she repeatedly returns to Steve’s flat, each time allowing Steve to do ‘what he wants to Chelsea’, since she is ‘scared’ of being back on the streets.⁷²

It would not be unreasonable to agree once more with Coy et al that someone in Chelsea’s position might well feel that their freedom to make a choice is limited to the extent of being altogether negated. At the very least, there is little doubt that Steve’s actions are exploitative in an ethical sense, since he not only derives a benefit from Chelsea, but he furthermore uses her own disadvantaged and vulnerable position as a homeless person in order to do so.⁷³ However, Coy et al’s purpose in using this scenario

70. L Gotell ‘Governing heterosexuality through specific consent: interrogating the governmental effects of *R. v. J.A.*’ (2012) 24 Can J Women & L 360; E Craig ‘Consent to a sexual risk’ (2014) 17(1) New Crim L Rev 103. For empirical research on attitudes towards the use of pressure and the traditional sexual script, see eg E Strang et al ‘Discrepant responding across self-report measure of men’s coercive and aggressive sexual strategies’ (2013) 50(5) J Sex Res 458; also Clark and Carroll, above n 37.

71. See U Khan *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014) pp. 265–266.

72. Coy et al, above n 18, p 23.

73. J Feinberg *The Moral Limits of the Criminal Law*, vol IV: *Harmless Wrongdoing* (Oxford: Oxford University Press, 1988) chs 31, 32.

is not merely to demonstrate the rightness of this conclusion but, furthermore, that respondents who failed to come to it themselves are perpetrators of victim-blame. Coy et al understand their respondents to be demonstrating victim-blaming attitudes by their failure 'to think of this [scenario] as legally constituting rape', with almost half of respondents thinking of Chelsea as having made the 'wrong decision' (46.5% for the initial sex, and 47.9% for her repeated returns).⁷⁴ What the researchers fail to mention in their analysis, but is apparent from their published quantitative data, is that in fact almost 90% of respondents reported being 'Not OK with the sex described', three quarters of them identifying the initial sex as rape, and less than half of respondents identifying Chelsea as being able to make a choice in either stage. In the light of the principles that inform it, it is clear that Coy et al's view of their respondents' own understanding of the scenario as problematic is actually a shorthand critique of liberal notions of choice as such.

It is quite right, of course, for Coy et al to be critical of naïve and ideologically embedded assumptions about an individual's freedom to choose, and in so doing they follow well-established critical positions on the structural inequalities and constraints ordinarily obscured beneath liberal ideas of sexual autonomy and agency. The problem with Coy et al's analysis of this particular case, however, is that they seem to expect their respondents to come to the view that no choice is being made (and that rape is committed) here without any apparent acknowledgement that a good deal of 'grey' lies between the solid 'black' of choice-negating constraint and the brilliant 'white' of ideal full freedom. Nor is there any sense in which the meanings of words such as choice, agency and freedom and the relationships between these concepts are anything but clear.

If we think about this scenario in relation to the question (posed above) about when a lack of desire to engage in sex except in order to receive something (somewhere to sleep, in this case) negates choice, Coy et al have chosen here to use homelessness to represent an external constraint. But is this to imply that there is something particularly coercive about *this* particular constraint, or that *any* inducement to sex based on an offer of basic resources is sufficiently coercive? We should remember, after all, that Chelsea's case (like Coy et al's other scenarios) is a fiction designed to represent a certain class of case. How widely are we supposed to apply its implications for the exchange of sex for food, money, alcohol, drugs and so on? If the right response to Chelsea's story is that she is raped and that to deny as much amounts to victim-blame, then does this not commit one to saying that a sex worker is raped if she relies on the punters' money for her livelihood? There are, of course, feminist scholars for whom this would indeed be an acceptable implication, and for whom the difference between paying for sex and rape is so narrow that both may be deemed criminal offences. Indeed, a number of legal jurisdictions such as Sweden and more recently Canada and Northern Ireland have broadly followed this approach.⁷⁵ However, sex-positive and sex-radical feminist scholars strongly reject that view,⁷⁶ and there is no basis for it in England and Wales, where Coy et al's research was carried out.

74. Coy et al, above n 18, p 25.

75. C MacKinnon *Are Women Human? And Other International Dialogues* (Cambridge, MA: Harvard University Press, 2006); M Waltman 'Prohibiting sex purchasing and ending trafficking: the Swedish prostitution law' (2011–2012) 33 *Mich J Int'l L* 133. For a critique of the so-called 'Swedish' model and efforts to implement it in other countries, see Global Network of Sex Work Projects *The Criminalisation of Clients*, Briefing Paper 2 (Edinburgh: NSWP); available at <http://www.nswp.org/sites/nswp.org/files/Criminalisation%20of%20Clients-c.pdf> (accessed 18 February 2014).

76. Khan, above n 71.

Secondly, there is the question of whether considering possible alternatives open to a woman other than trading her body for basic goods and services is to engage in victim-blaming. Coy et al report that some respondents arrived at their erroneous view that Chelsea chose sex because, in suggesting that Chelsea should have gone to a 'nightshelter' or 'somewhere safe', they were 'overestimating the extent of support for homeless young women'.⁷⁷ But whether such suggestions overestimate the availability of support in any particular location is another empirical question: it is not something that can be known a priori in any case, let alone in a fictional one like this, with no information about local services. We might add to this that at no point do Coy et al consider whether Chelsea herself regards the 'offer' made to her by Steve as so coercive as to negate her freedom to make a choice. The sex is certainly *unwanted*, but wanting and consenting are separate things and should be assessed separately, as noted above with respect to analysing the flawed research on the use of scripted refusal and token resistance.⁷⁸ As Wallerstein has rightly said: 'To consent, it is not necessary for me to want the result (though I may very well 'want' it), but I am said to consent to it even if I only accept that it may be brought about and do not act in order to prevent it.'⁷⁹ For me, the lack of space within Coy et al's perspective to take seriously *any* suggestion that Chelsea (or a woman in her position) might have made a different decision is misguided. It implies that the researchers' analysis is impervious to empirical or contextual facts, whether about the parties themselves or their environment. Thus the formula of sofa-for-sex = rape is for Coy et al a necessary and abstract Truth; to adopt the contrary view is apparently to deal in myths.

CONCLUSION

Nothing in this paper is intended to lend support to the notion that women must 'take responsibility' for behaviours that may or may not contribute to their being targeted for sexual victimisation. It does not detract in any way from the fundamental premise that it is rapists and not their victims who are to blame for rape. But in terms of identifying and explaining victim-blaming attitudes in public perceptions of consent and coercion, this can only ever be a starting point. In seeking to derive general information about victim-blame and a blame 'culture' from the vignette and mock-jury research participants' references to such fraught themes as 'responsibility', 'risk', 'miscommunication' and 'choice', we should be wary about the dangers of drawing out conclusions that are more far-reaching than the evidence actually allows. All of these themes have, in various ways, been deemed in relevant feminist-informed literature to be *myths*, in the sense that for some they signify a belief about rape that is either factually wrong or else wrong in an ethical sense, and as such unacceptable in rape discourse. However, as I have argued here, using rape myth acceptance as a conceptual framework for understanding whether a particular response constitutes victim-blame may be as likely to mislead as to guide. A broad review of psychological and sociological research actually suggests that seeking to exclude certain beliefs as unacceptable may be both

77. Coy et al, above n 18, p 25.

78. Muehlenhard and Rogers, above n 45. See also Peterson and Muehlenhard, above n 46, who demonstrate some ways in which individuals may consent to unwanted sex and conversely desire sex that is non-consensual.

79. Wallerstein, above n 3, at 325.

unwarranted and unhelpful.⁸⁰ Furthermore, analyses of the necessary conditions for recognising the validity of consent have tended to presuppose a particular (and contested) normative framework that does not adequately account for individuals consenting to apparently 'seedy' or 'sexist' sexual acts. Finally, particular critical responses to liberal law's deference to jury discretion in determining the validity of consent fail to anticipate an individual woman's capacity for exercising sexual agency under compromised circumstances. In combination, therefore, as helpful as notions of rape myth acceptance may be in constructing a critique in broad terms of patriarchal and liberal ideologies as such, using these to highlight specific instances of so toxic a practice as victim-blame is to stretch it beyond the limits of credibility.

80. On this point, see further H Reece 'Debating rape myths', LSE Law, Society and Economy Working Papers (21/2014); available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497844 (accessed 9 July 2015).