Pugh Institute Symposium: Seeking Justice for Survivors of Sexual Assault

LSU | Continuing Legal Education

The George W. and Jean H. Pugh Institute for Justice provides support for research and educational activities that promote justice for individuals in the administration of the criminal and civil justice systems in Louisiana and elsewhere. The Institute achieves its mission in partnership with the Louisiana Law Review, as well as student and community, and public interest organizations, sponsoring symposia that foster publication and electronic distribution of related research, as well as bringing to the LSU campus speakers who enrich public dialogue related to the achievement and protection of individual rights. The Pugh Institute was founded in 1998.

Pugh Institute Symposium: Seeking Justice for Survivors of Sexual Assault

Friday, March 25, 2022		
	12:30 PM - 1:00 PM	Check-in and Conference Registration
	1:00 PM - 1:05 PM	Welcome
1.33 hr.	1:05 PM – 2:25 PM	**Prosecuting Perpetrators in Positions of Power and Listening to Survivors** Hon. Rosemarie E. Aquilina - 30th Circuit Court for Ingham County Annette Milleville - Cook County State's Attorney's Office
1.33 hr.	2:30 PM – 3:50 PM	**Deliberate Indifference? Holding Law Enforcement and Educational Institutions Accountable for Effectively Responding to Sexual Assault** Cordelia Coppleson - Illinois Attorney General's Office Laura Dunn - L.L. Dunn Law Firm
1.33 hr.	3:55 PM – 5:15 PM	**What Kinds of Messages Around Sexual Assault Do Current Laws and Policies Send? How Can They Be Reformed?** Lisa Avalos - LSU Law Center Alena Allen - University of Arkansas School of Law

SPEAKER BIOGRAPHIES

DEAN ALENA ALLEN is Interim Dean & Professor of Law, University of Arkansas School of Law. She teaches family law, health law, public health law, professional responsibility, and torts. Allen previously taught at the Cecil C. Humphreys University of Memphis School of Law where she won Professor of Year in 2013, the Farris Bobango Faculty Scholarship Award in 2019, and the MLK 50 Faculty Service Award in 2021. Allen's work has appeared in the North Carolina Law Review, the Fordham Law Review, the Ohio State Law Journal, and the Cardozo Law Review. Allen's research focuses on the intersection of health policy and feminist theory. Allen currently serves on the University Research Council, the Executive Committee for the AALS Section on Scholarship, the Peer Review Committee for the Food & Drug Law Institute, and as a reviewer for the Association for Prevention and Teaching Research's Prevention and Population Health Education Grant Program. Allen received her B.A. in psychology from Loyola New Orleans in 1999 and graduated from the Yale Law School in 2003.

THE HONORABLE ROSEMARIE E. AQUILINA was elected judge of the 30th Circuit Court, Ingham County, Michigan, in November 2009. She joined the bench of the 55th District Court in 2005 after practicing for more than 16 years as a licensed attorney in the areas of divorce and custody, family law, and probate law. She presided over the 2018 Larry Nassar sentencing hearing in Ingham County, Michigan, where dozens of survivors of Nassar's assaults shared their stories. Judge Aquilina served for twenty years as an officer with the Judge Advocate General (JAG) Corps. The first female JAG officer in Michigan Army National Guard history, she received a commendation medal for Operation Desert Storm and the Army Achievement Medal. Judge Aquilina teaches Trial I (Civil) and Trial II (Criminal) in the Trial Practice Institute. Dedicated to educating and mentoring young attorneys, Judge Aquilina also teaches Criminal Law at MSU College of Law. She also works as an adjunct professor at Thomas M. Cooley Law School. Judge Aquilina has been involved in a multitude of professional, public, and civic organizations throughout her career.

PROFESSOR LISA AVALOS is Associate Professor of Law and holds the Hermann Moyse, Sr. Professorship at Louisiana State University Paul M. Hebert Law Center, where she has taught since 2018, primarily in the areas of criminal law and procedure, sex crimes, and professional ethics. Much of her scholarship addresses gender-based violence and has appeared in the Brooklyn Law Review, Nevada Law Journal, Michigan Journal of Gender & Law, Vanderbilt Journal of Transnational Law, Fordham International Law Journal, and others. She has written opinion pieces for the Guardian, appeared on BBC Radio and Louisiana Public Radio, and has been quoted in numerous publications including the Guardian, Huffington Post, Time Magazine, BuzzFeed, Cosmopolitan, and Vice News. She earned her J.D. at New York University School of Law and holds a Ph.D. from Northwestern University.

CORDELIA COPPLESON is an Assistant Attorney General in the Illinois Attorney General's Office. She is the Law Enforcement Training Project Coordinator for the Sexual Assault Incident Procedure Act. Ms. Coppleson is responsible for helping and supporting law enforcement agencies as they implement a new

Illinois law through adopting policies, training and other requirements of the Act. Ms. Coppleson has created curriculum and training for sexual assault investigators across the state of Illinois. She is a committed prosecutor, having spent the majority of her twenty-year career as a Cook County State's Attorney assigned to the criminal division, with extensive experience in investigating, preparing, and trying sexual assault cases.

PROFESSOR RAY DIAMOND is the director of the George W. and Jean H. Pugh Institute for Justice at LSU Law Center. Prof. Diamond's B.A. and J.D. are from Yale University, and he has taught previously at St. John's University and Tulane University. He has written widely at the nexus of Constitutional Law, legal history and race relations, and teaches courses in Constitutional Law and Criminal Law.

LAURA DUNN is a nationally recognized victim rights attorney and social entrepreneur who has been featured in Forbes, Buzzfeed, National Law Journal, and many more. Dunn is the Founding Partner of the L.L. Dunn Law Firm, as well as a published legal scholar, adjunct at Maryland Law, liaison to the ALI's Model Penal Code on Sexual Assault and Student Sexual Misconduct Project, and a previously appointed member to the ABA's Commission on Domestic & Sexual Violence (2016-2019) and Criminal Justice Section Task Force on College Due Process and Victim Protection (2017). While a student at Maryland Law, Dunn contributed to Obama-era Title IX guidance from the U.S. Department of Education and served on its 2014 rule-making committee to develop implementing regulations for the Clery Act's amendments under Section 304 of the 2013 Violence Against Women Reauthorization Act ("VAWA"). For her national advocacy, Dunn has been publicly recognized by then-Vice President Joe Biden and then-Senate Judiciary Committee Chairman Patrick Leahy on the Senate floor. Upon graduation, she founded the national nonprofit, SurvJustice, which won the 2017 AAUW Eleanor Roosevelt Fund Award. Dunn has received several awards and recognition, including the 2015 Echoing Green Global Fellowship, the 2016 Benjamin Cardin Public Service Award, the 2017 Special Courage Award from the U.S. Department of Justice's Office for Victims of Crime, and a 2018 TED Fellowship, among others. Dunn is a 2014 graduate of the University of Maryland Francis King Carey School of Law.

ANNETTE MILLEVILLE is the Deputy Chief of the Sexual Assault Domestic Violence Division in the Cook County State's Attorney's Office (CCSAO) since 2012. As Deputy Chief, she is jointly responsible for managing the seventeen Assistant State Attorneys who work in the division as well as overseeing sexual assault charging considerations for all of Cook County. In addition, Ms. Milleville actively prosecutes cases involving sexual predators. Prior to her current position, Ms. Milleville was Supervisor for the CCSAO at the Chicago Children's Advocacy Center. Ms. Milleville was also a First Chair Trial Specialist in the Sexual Assault and Domestic Violence Division where she tried numerous sexual assault cases. Ms. Milleville also worked as an Assistant State's Attorney in the Community Prosecutions Division where she worked with the community and law enforcement to make a difference in the prosecution of cases which impacted the safety of the community. Ms. Milleville has tried hundreds of cases over the course of her 26 years as a prosecutor, including sexual assault, domestic violence including murder, home invasion, and hate crimes. Ms. Milleville presents to other Assistant States Attorneys, law enforcement and advocates on charging considerations in sexual assault cases and on how to speak with victims in a

trauma-informed manner as part of a forty-hour training which is presented by the Cook County State's Attorney's Office bi-annually. Additionally, she has trained for the Chicago Police Department on how the felony review process relates to law enforcement investigations on sexual assault cases. Ms. Milleville is a member of several State Boards including the Children's Justice Task Force and the Sex Offender Management Board.

A License to Abuse:

Sexual Assaults Committed by Licensed Professionals

Annette Milleville
Deputy Supervisor, Sexual Assault and Domestic Violence Division
Cook County State's Attorney's Office

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When someone visits a licensed professional, he/she is confident that the licensed professional will protect and care for them. Consequently, sexual abuse or assault committed **by a licensed professional** has a **unique personal effect** on a victim when their **trust is violated**.

More women are speaking out about sexual assaults and abuse committed by licensed professionals. **What took so long?**

The Psychology of Not Reporting

- "Sexual assault is likely **the most under-reported crime** in the United States. About two-thirds of female sexual assault victims do not report to the police, and many victims do not tell anyone. Sexual assault is a **terrifying and humiliating** experience."

- "Women choose not to report for a variety of reasons — fear for their **safety**, being in **shock**, fear of **not being believed**, feeling **embarrassed** or **ashamed**, or expecting to be **blamed**."

(Source: American Psychological Association, https://www.apa.org/news/press/releases/2018/09/report-sexual-assault)

Trauma from Sexual Assault

- 94% of women who are raped experience symptoms of **post-traumatic stress disorder** (PTSD) during the two weeks following the rape.
- 33% of women who are raped **contemplate suicide**.
- 38% of victims of sexual violence experience **work or school problems**.
- 37% experience **family/friend problems**.

(Source: Rape, Abuse & Incest National Network, https://www.rainn.org/statistics/victims-sexual-violence)

- The percentage of physicians who commit sexual assault is small, but since many of these doctors are **repeat-offenders**, they can likely abuse many patients, sometimes over the course of several years or decades.
- Only **1 in 4 women** who are sexually assaulted by physicians go to the police, so the number of assaults is likely **underestimated**.
- Rarely was the person who reported the abuse a colleague of the physician or staff member at his practice. Typically the **whistleblower was the patient**.
- It's possible that patients who have been violated **will feel guilty** that they either encouraged this behavior or allowed it to occur.

(Source: MedPage Today, *When Docs Sexually Violate Patients,* January 25, 2019)

Examples:

17 women sued Columbia University and its affiliated hospitals claiming they failed to intervene when Robert Hadden, MD, a former ob/gyn at New York-Presbyterian, sexually assaulted them during office visits.

(Source: *CBS News*, https://www.cbsnews.com/news/columbia-university-hospital-doctor-robert-hadden-sexual-abuse-lawsuit/)

Dozens of men filed similar suits against Ohio State University alleging that former wrestling team doctor Richard Strauss, MD, sexually abused them while the administration ignored his misconduct.

(Source: *CNN*, https://www.cnn.com/2018/07/17/us/ohio-state-class-action-lawsuit-strauss/index.html)

What Makes Sexual Assault by Licensed Professionals Unique?

- Victim is often **alone** in the room.
- Victim is **trusting** of licensed professional.
- Victim is **unsuspecting** in the moment.
- Victim is often **partially clothed**.
- Victim may be extremely **relaxed** or **anxious**.
- Victim may be **unsure** if conduct performed was part of treatment or a sexual assault.
- Victim may have their **eyes closed**.

- Victims may **not understand if** they were sexually assaulted.

- The licensed professional may already be touching the sensitive areas for a medical purpose.

People v Ricardo Arze

- Q: Was this anything like the first Pap smear you had?
- A: No
- Q: What was different?
- A: Just him feeling around. It started like it was suppose to be something normal, but as he kept going he started asking questions like how was I feeling and I thought something was wrong with me. That is why I went there.

- Victims may be **confused** as to why they were assaulted.

- The licensed professional might divert attention to legitimate medical or physical issues during or after sexual conduct.

People v. Ricardo Arze

Q What happened after you -- what happened after that?

A After I spoke with him in regards to why I was there, I left. I took the bus home that day. And I remember going to the movies later with a guy that I was dating then, and I -- we went to see some movie, and I hadn't told anybody anything yet.

But I just felt uncomfortable the whole day, and so I told him. I said I think -- I think my doctor did something to me that wasn't right. And so he had told me maybe you should tell somebody. I didn't.

- Victims may be **embarrassed** or ashamed to report.
- The victim may experience an unexpected physiological reaction to the licensed provider's conduct.

A At that point, as I am lying there with my eyes closed, I am thinking to myself like, "Oh, my God, is he doing what I think he is doing, what it feels like he is doing," and so I am fighting with myself in my head trying to understand is this what I am really feeling, I know this is what I am feeling because I know this is what I am feeling. He was touching my clitoris in a very sexual way and moving his fingers in and out of my vagina very sexually.

Trial, P v Bruce Smith
January 14, 2013

- Victims may fear that **no one would believe** their word over the word of a licensed professional if they did report.
- Often, there are no other people in the room, or the people in the room were unaware of the conduct.
- The victim may think they are the only one to experience this conduct.

Once a victim has decided to tell others that a licensed professional has sexually assaulted or abused them, where do they go and who do they tell?

Licensing Boards:

Reporting to state licensing boards may be the first step for a victim.

Illinois Department of Financial and Professional Regulation (IDFPR)

- A victim can file a complaint in person, by phone, by mail, or by going to the IDFPR website.
- Victims are also encouraged to contact law enforcement.
- IDFPR can take disciplinary action (e.g. revocation, suspension, fines) or non-disciplinary action (e.g. warning letter, counseling, administrative fee).
- Anonymous complaints are investigated.
- The process is governed by Illinois' confidentiality statute.

(Source: Illinois Department of Financial and Professional Regulation, https://www.idfpr.com/About/FAQ.asp)

- Each state has their own licensing board which will conduct an investigation.
- In some instances, licensing boards may not follow up on all restrictions placed on licensed professionals.
- Licensing boards may lack the funds and resources to make sure any restrictions placed on the licensed professional are enforced in daily practice.

Law Enforcement Investigations:

Reporting to law enforcement may be an additional step for the victim.

- Once reported to law enforcement, victims can face an uphill battle: often it is their word against the word of the licensed professional.
- There are ways for law enforcement to develop evidence.

Additional Evidence

- Sexual assault kits
- Interviews of staff/outcry witness
- Search warrants
- Records from licensing boards
- Personnel records from hospitals, clinics, etc.
- Finding other victims who made complaints or reports about the offender

Process

- Once the investigation is concluded in Illinois, the case is submitted to the State's Attorney's Office to determine if there is enough evidence to charge as a felony.
- If **yes**, the defendant is arrested and the legal process begins.
- If **no**, victim should be encouraged to seek counseling, continue with licensing board complaint, but status of case can change if more evidence is developed.

Case Study:
Dr. Bruce Smith, OBGYN Practicing in Chicago

People v. Bruce Smith, Timeline

5/1/2000: sexual assault V1, police report made

8/2/2002: sexual assault of V2, police report made

8/8/2002: evidence from V2 received by lab

9/30/2002: sexual assault of V3, police report made

5/24/2005: lab rules out V2's boyfriend as source of DNA

5/17/2010: DNA from Smith swab matches V2's kit

People v. Bruce Smith, Timeline

"…informed victim that he would perform an internal exam…asked her to remove her underwear…she felt vaginal penetration from his penis…while her legs were in the stirrups, the offender's hands were behind her legs…felt a rocking movement…victim was stunned, scared…could not physically or verbally act out…"

(V2 Incident Report, 8/2/2002)

People v. Bruce Smith, Timeline

"…she went in for a routine pelvic exam…offender penetrated victim's vagina with his fingers…offender then locked door…pulled out his penis, put on a condom, and penetrated victim until ejaculation…she was afraid to report sooner."

(V3 Incident Report, 9/30/2002)

Pre-Trial Motions

- Discovery
- Other Crimes Evidence
- Expert Witness
- Motions in Limine

Motions in Limine may include barring reference to:

- Media coverage (if any).
- Any prior sexual activity or reputation of the victim of the sexual offense (725 ILCS 5-115-7).
- Potential punishment or possible sentences.
- Expert witnesses and unrelated civil judgments against them.
- Any evidence of testing for sexually transmitted diseases or infections.

Evidence of Other Crimes

725 ILCS 5/115-7.3, **Evidence in certain cases**

(b) the defendant is accused of various sex offenses in Illinois (not listed) evidence of the defendant's commission **of another offense or offenses** may be admissible and may be considered for its bearing on any matter to which it is relevant.

(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

(1) the proximity in time to the charged or predicate offense;

(2) the degree of factual similarity to the charged or predicate offense; or

(3) other relevant facts and circumstances

The Illinois Supreme Court decided in the case of *People v. Shannon Donoho*, 204 Ill.2d 159, 788 N.E.2d 707 (2003) that the statute includes the use of other crimes evidence to prove a defendant's propensity to commit sex crimes.

Expert Opinion Letter – Bruce Smith

I am basing the following opinions on my personal detailed review of these documents.

[redacted] presented to her attending obstetrician, Dr. Bruce S. Smith, on August 2, 2002 for evaluation of her pregnancy with complaints of pelvic pressure. She allowed Dr. Smith to evaluate her condition by cooperating with his request to perform a pelvic and uterine examination as part of this evaluation. She consented to his instructions to disrobe from the waist down and to place her feet in stirrups while lying supine on an examining table. Subsequently, [redacted] described the performance of this exam which included an episode of clitoral stimulation followed by penile penetration, while Dr. Smith gripped her legs by holding her thighs.

[redacted]'s allegations that Dr. Smith performed a sexual act by penetrating her vagina with his penis are supported by the forensic evidence. His DNA was isolated from the semen that was obtained from the vaginal swab specimens that were collected during the examination of her vagina, performed at the University of Chicago Hospital subsequent to the described incident in Dr. Smith's office.

It is my opinion, that the types of manipulations and physical acts that [redacted] was subjected to during her examination by Dr. Smith were completely inappropriate, completely beyond the standards of acceptable obstetrical practices and ethical medical care, and without the consent of [redacted]

Please feel to contact me if you require further clarification or additional information.

Trial

- Testimony may be very difficult for the victim
- Important for the victim to feel supported during the trial by:
- Family or friends
- Advocate
- Attorney
- Victim Witness Specialist

Defendant Testimony

People v. Bruce Smith, Defendant Testimony

Q At some point -- while you were doing your internal examination, did there come a point when you were done with your examination?
A Yes.
Q And what did you do at that point?
A I started to remove my hand from her vagina.
Q And what happened at that point?
A At that point she placed her hand under the sheet and grabbed my hand while I was removing it from her vagina.
Q Your hand was underneath the sheet or over the sheet?
A The sheet pretty much ended at her knees, so her hand was under the sheet grabbing my hand as I was leaving her vagina.
Q Where was her hand on your hand?
A It was approximately right over my hand and wrist.
MS. SILVA: If the record could reflect Mr. Smith has put his left hand over his right hand.
THE COURT: That will be noted.

Q At that point when she grabbed your hand, what happened next?
A She pushed it back into the vagina.
Q And what did you do at that point?
A I attempted to pull it back out. She pushed it back in, and then she was pushing it in and out of the vagina.
Q Approximately how many times do you think that happened?
A It happened maybe five or six times.
Q And was she saying anything during this time?
A She didn't say anything, but she did make some sounds, moaned sort of.
Q At that point were you putting her hand in her vagina, or was she guiding your hand?
A She was guiding my hand.

Closing Argument

People v. Bruce Smith, Closing Argument (State)

Trust; the relationship between patient and a doctor is built on trust.

Trust; that any interaction between that patient and her doctor is for the benefit of the patient.

Trust; that any physical examination conducted by that doctor on that patient is for the benefit of the patient, not the doctor.

Trust; the trust that a woman has for her doctor is what allows her to disrobe, to get on an examination table, to place her feet in stirrups and lie there exposed and vulnerable, trust.

On August 2nd of 2002, [redacted] had every reason to trust Bruce Smith. He was her doctor. He was her gynecologist, he had delivered her third child and now he was seeing her through her pregnancy, her high risk pregnancy.

So when Bruce Smith told [redacted] that it was time for an internal pelvic examination, she trusted him, and she disrobed, and she got on that table and she lied there with her eyes closed exposed

and vulnerable. And Bruce Smith (indicating) abused his patient's trust, he violated [redacted] trust and then he violated her body. Bruce Smith raped his patient, [redacted] right there

Trust

People v. Ricardo Arze, Closing Argument (State)

fear

courage

Fear. Fear that she would not be believed silenced [redacted] as this defendant sexually assaulted her on an examination room table. Fear as to what her husband would do if he found out

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silenced her for two and a half more years after this defendant sexually assaulted her on the examination room table. It's the reaction that he was hoping for. He was betting on fear and silence and that she wouldn't be believed. And for two and a half years, it looked like he was winning that battle.

But in the end, he lost. Because [redacted] found her courage. She found it in September 2007, when she went down to the [redacted] Police Department. She found it again last Wednesday when she walked into this courtroom. She took the oath to tell the truth and she sat there and told you all exactly what this defendant did to her.

She found her courage. And when she found her courage, what she did was expose this man for what he is. She tore the mask off Dr. Ricardo Arze so that you could see the predator in him. Because that's exactly what he was. A predator, a cunning, intelligent successful predator.

He was able to isolate his prey -- identify, isolate and victimize. And that's how he did it. Identifying them is simple. They come to him.

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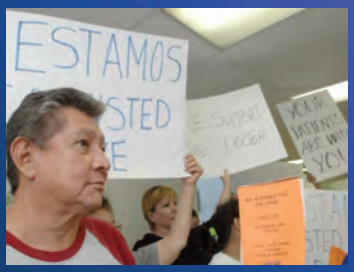
Jury Instructions

The word "consent" means a freely given agreement to the act of sexual penetration in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the defendant shall not constitute consent. I.P.I. Criminal No. 11.63A
People's Instruction No. ___

Sometimes, media coverage may favor the accused and vilify the victim(s).



Prosecutions may result in findings of guilty or not guilty.

Dr. Bruce Sylvester Smith

Ex-Chicago Gynecologist Sentenced To 18 Years For Raping Patient

How do I describe the feeling of nasty and dirty, never being able to wash that feeling away, never being able to wash him away? How do I describe feeling lonely and empty inside although my family and friends all around me?

And what about that thing that I feel? It is like an endless knot in the pit of my belly. It never goes away. It never goes away. How do I describe to you, Judge, that feeling?

I am afraid and paranoid all of the time. I am afraid to be seen by a doctor. Not just men but women too. I'm not only afraid for myself but my children as well.

[redacted] was my doctor, my obstetrician, my gynecologist, and I trusted him. I put the health and care of myself and the health and care of my unborn child in his hands. But he violated that trust, and he abused his position. He violated me in the worst way possible.

This trial may have finally come to an end, but it will never truly be the end for me.

Victim Impact Statement by T.T.
December 10, 2013

Chicago Tribune

QUESTIONS? CALL 1-800-TRIBUNE | WEDNESDAY, DECEMBER 11, 2013 | BREAKING NEWS AT CHICAGOTRIBUNE.COM

Ex-doctor sentenced for rape

Gynecologist assaulted patient, practiced medicine 9 more years

BY STEVE SCHMADEKE
Tribune reporter

Tuesday she still struggled to describe the pain after taking the witness stand.

scribe to you, judge, that feeling?

"I am afraid and paranoid all the time," she continued. "I am afraid to be seen by a doctor, not just men (but) women too."

The former physician

claims accused of sex crimes had received from police, prosecutors and state regulators. He continued to practice medicine for almost seven years after the attack, even as sexual as-

tenced him to 18 years in prison.

The Tribune review found that at least 16 registered sex offenders held physician or chiropractor licenses and none had their licenses revoked after being

"I'm just so happy that justice has been served, finally."

SOUTH SIDE

Ex-gynecologist gets 18 years for raping patient

BY DUMMANA HUSSAIN
Criminal Courts Reporter

A former gynecologist was sentenced to 18 years in prison Tuesday for raping his pregnant patient while performing an exam on her in his South Side office.

"How do I describe the feeling of nasty and dirty, never being able to wash that feeling away, never being able to wash him away?" the victim said of the actions of Bruce Sylvester Smith.

The woman said since the Aug. 2, 2002, incident, she is afraid to go to the doctor's office.

The sexual assault and its nightmarish aftereffects have "left an endless knot in the pit of my belly," the woman said as Smith, 60, looked down in Cook County Judge Clayton Crane's courtroom.

"It never goes away."

". . . I am afraid and paranoid all of the time . . . Bruce Smith was my doctor, my obstetrician, my gynecologist and I trusted him. I put the health and care of myself and the health and care of my unborn child in his hands,

Dr. Bruce Sylvester Smith

but he violated that trust and he abused his position. He violated me in the worst way possible."

Smith, who testified early last year that the sex was consensual, is a "liar," prosecutors said.

"He blamed her for it," Assistant State's Attorney Annette Milleville said.

All rapes are horrible, but this attack was more horrendous given that Smith was the victim's doctor and was in his care when she was assaulted, Milleville said.

Smith, of the 500 block of West Cullerton, hid behind the aura of being a professional and violated the trust the victim had in him.

"He shattered [that trust] into a million pieces in the most despicable manner," the prosecutor said.

Smith chose not to say anything in court before he was sentenced.

But Assistant Public Defender Armando Sandoval spoke on Smith's behalf describing how the father of five grew up poor and enlisted in the U.S. Army and worked as a teacher before putting himself through medical school.

Because of his legal troubles, Smith's second marriage ended, Sandoval told the judge in hopes of Smith avoiding the maximum 30-year sentence.

Although the rape took place in 2002, Smith wasn't arrested in the case until 2010, when prosecutors admitted "mistakes were made" in the investigation; Smith 's DNA sample was never taken after the woman immediately reported the attack to police.

Smith's medical license was suspended for nine months in 2009 after several women came forward, accusing him of sexual misconduct.

One woman said he acted inappropriately toward her, hugging her and telling her she was attractive, said Lisa Stephens, the former chief of medical prosecutions with the Illinois Department of Financial and Professional Regulation.

Ultimately, Smith's license was revoked in 2011, according to the Illinois Department of Financial and Professional Regulation.

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Chicago Tribune

WEDNESDAY, DECEMBER 11, 2013

Ex-doctor sentenced for rape

Gynecologist assaulted patient, practiced medicine 9 more years

By Steve Schmadeke
Tribune reporter

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...crime accused of sex crimes had received from police, prosecutors and state regulators. He continued to practice medicine for almost seven years after the attack, even as sexual as-

...toward him to 30 years in prison.

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Doctor practiced as complaints piled up

Continued from Page 1

by the state at all.

DNA evidence that would eventually lead prosecutors to charge Smith with two counts of criminal sexual assault was collected right after the 2002 rape but was never sent for testing until after the Tribune chronicled the litany of complaints against Smith.

The state didn't suspend his license until 2009 — almost nine years after receiving the first complaint from another woman who said she was raped during an exam. A total of seven women filed complaints — three of whom told authorities Smith had sexually assaulted them — before the state moved to discipline him.

His state license was revoked in 2011 — for substandard postoperative care unrelated to the sexual assault charges. He is no longer board-certified to practice medicine.

The victim at the heart of the criminal charges against Smith had previously testified at an administrative hearing that she was eight months pregnant at the time of 2002 exam at Smith's South Side office. She was lying on an examination table with her legs in stirrups when Smith grabbed her legs and penetrated her.

"I was afraid when I realized what he was doing, yes. He's a doctor, and he's down there with my baby," the woman, who worked as a teacher assistant, told authorities, according to a transcript of the hearing.

Immediately after leaving the office, the woman called her sister, who contacted a rape hotline. At a counselor's urging, the woman underwent a rape exam at the University of Chicago Hospitals the day of the assault. Days later she filed a complaint with Chicago police.

According to evidence presented at the five-day jury criminal trial in January, the prosecutor who initially reviewed the case in 2003 declined to press charges pending further evidence. The former head of medical prosecutions with the Illinois Department of Financial and Professional Regulation, Lisa Stephens, testified Tuesday that "to her knowledge" the agency closed its case at that time.

Meanwhile, the rape kit that had been taken sat untested for years. Shortly after the newspaper story ran in 2010, a detective had it sent to a lab and it came back as a DNA match to Smith, leading to the charges.

Smith — who practiced at Chicago's Kennedy Medical Service Corp. and Michael Reese Hospital before launching a Streator-based practice, Cameo Women's Healthcare — testified at trial that he was called to a police station in March 2003 and interviewed by a detective and a prosecutor.

At the time, he denied there had been sexual intercourse because he was afraid of ruining his career and marriage, he testified. But at trial Smith testified that he had consensual sex with his patient, telling jurors she grabbed his hand and forced him into a sexual act.

On Tuesday, Assistant State's Attorney Annette Milleville told Judge Clayton Crane that those "preposterous lies" and Smith's history of sexual misconduct while in a position of power called for him to receive the maximum 30-year sentence.

"He thought he could hide behind the closed door of the exam room. He thought he could hide behind the lab coat and scrubs. He thought he could hide behind a piece of paper that was his medical license," Milleville said. "But he can't hide anymore."

Smith's attorney, Armando Sandoval, said his client served in the Army and was a former high school science teacher in Queens who is twice divorced with five children and no previous criminal record.

Other complaints received by the state from female patients included one who said Smith rubbed his private area outside his pants and touched her buttocks, ripped the sheet off a half-naked teenage girl and tried to kiss her, and drew a picture of a vibrator on the sheet covering another woman after soliciting an affair from her.

One former patient who went public with her allegations against Smith said he raped her during a pelvic exam in 2000 when she was 19 and her legs were in stirrups. Tameka Stokes said she broke down crying as she left the exam room and a nurse immediately called police. A rape exam did not turn up Smith's semen. Prosecutors declined to press charges.

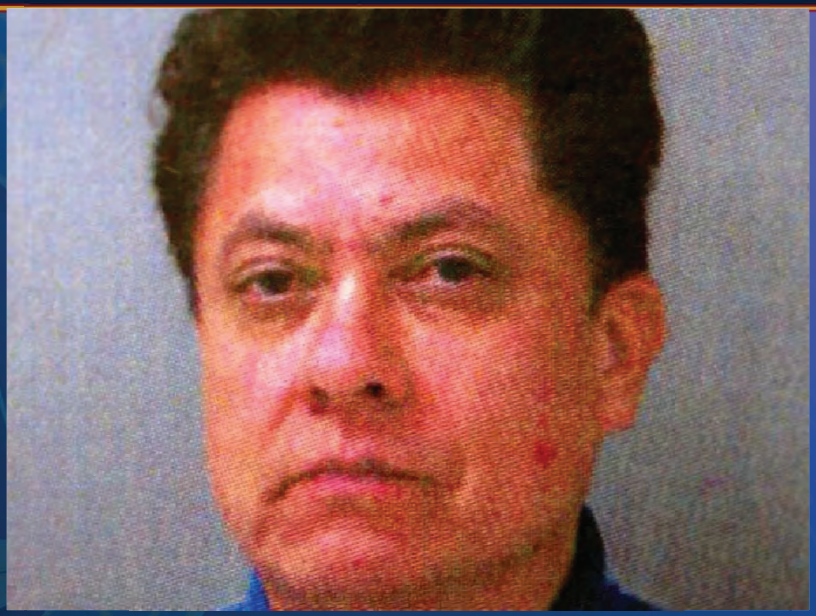
"You go into the doctor trusting them, thinking they'll do the right thing for you and you come out feeling humiliated like that's been taken away from you," Stokes told authorities during a 2008 state hearing.

On Tuesday, the one victim whose allegations led to Smith's conviction took the witness stand to read from her victim impact statement.

"How do I describe the feeling of nasty and dirty, never being able to wash that feeling away, never being able to wash him away?" she said. "I put the health and care of myself and the health and care of my unborn child in his hands, but he violated that trust and he abused his position. He violated me in the worst way possible."

sschmadeke@tribune.com

(Source: *Chicago Tribune*, Dec 11, 2013)



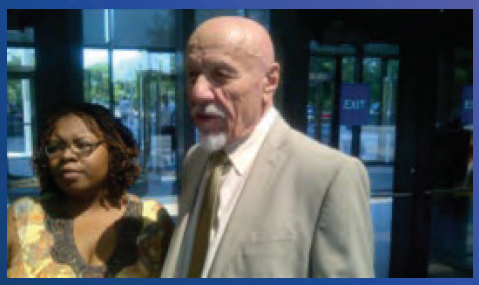
Dr. Ricardo Arze

Former Doctor Sentenced to 13 Years For Raping Patient

Dentist acquitted in 2nd case of fondling allegations, will get license back

"An 81-year-old Northwest Side orthodontist accused of fondling a teenage girl while he was adjusting her braces in 2011 was acquitted Wednesday, a month after he was cleared of committing a similar assault against another patient."

(Source: *Chicago Tribune*, Aug 1, 2012)



Masseur found not guilty in salon sex-assault case

- "Masseur accused of sexually assaulting an Ohio woman during a massage at a Gold Coast salon was found not guilty Wednesday by a Cook County judge.
- Dino Botello, 31, of Chicago was charged with criminal sexual assault, criminal sexual abuse and unlawful restraint for allegedly kissing and groping the woman in Kiva Salon, 196 E. Pearson St, during a hot-stone massage in December.
- After the verdict, the 33-year-old woman wept loudly and screamed at Botello, "You're a monster." He and his family hurried from the courtroom.
- During a one-day bench trial in Circuit Court, the victim testified that she was halfway through her massage when Botello assaulted her. She testified that she asked him to stop. He asked her if she was sure she wanted him to stop and then asked that she not tell anyone about the incident, the woman said.
- "He said things like this only happen in the movies [and] sorry, he couldn't help himself based on how my body reacted," said the woman, who wept during most of her testimony. "He gave me his card and said if I ever needed any services in the future and kissed me on my forehead."
- Assistant State's Attys. Annette Milleville and John Carroll argued that Botello had a pattern of taking advantage of unsuspecting women who were left naked and vulnerable on his massage table.
- A second woman, who came forward after she learned of the first incident, testified that she was the victim of a similar assault.
- The Texas woman said Botello told her that he was having sexual problems with his girlfriend and that "from the way my body responded, he knew it wasn't [his fault]."
- But Botello's attorney, Elliot Samuels, said the women's stories were not credible because they did not cry out during the assaults or immediately come forward afterward to say they had been assaulted.
- The Ohio woman did not initially tell salon employees or the friend who had accompanied her that she has been fondled, according to testimony. The Texas woman gave Botello a $26 tip."

(Source: *Chicago Tribune*, September 27, 2007)

Regardless of the result of prosecution, the impact of a prosecution can extend beyond criminal findings.

- Victims may feel empowered
- License may be revoked/suspended
- Provides law enforcement a record to be considered for any future bad acts
- May result in licensed specialist becoming too expensive to insure

Illinois

January 1, 2021, 720 ILCS5/11-0.1 **"Unable to Give Knowing Consent" definition:**

A victim is presumed "unable to give knowing consent" when the victim:

Is a client or patient and the accused is a health care provider or mental health care provider and the sexual conduct or sexual penetration occurs during a treatment session, consultation, interview or examination

Illinois

Licensing Statutes:

- When a licensed health care worker has been **convicted of a criminal battery** against any patient **in the course of patient care or treatment**, including any offense based on **sexual conduct**, the license shall be **permanently revoked** without a hearing.

(Source: 20 Ill. Comp. Stat. Ann. 2105/2105-165)

- Illinois **requires an initial background check** with fingerprinting for licensing.

(Source: Atlanta Journal-Constitution, http://doctors.ajc.com/states/)

New York

Criminal Statutes:

- N.Y. Penal Law § 130.05(3) A person is deemed **incapable of consent** when he or she is:
  - (h) a client or patient and the actor is a **health care provider** or mental health care provider charged with [rape/sexual assault] and the **act of sexual conduct occurs during a treatment session,** consultation, interview, or examination…
- However, New York state law **does not require** license revocation for any type of sexual misconduct or convictions.

(Source: AJC, http://doctors.ajc.com/states/new_york_sex_abuse/)

This is more than a domestic issue, it is an international issue.

Fugitive Brazilian 'rapist doctor' arrested in Paraguay

Ahmed Adel: "virginity test" doctor acquitted in Egypt

Irish doctor flees after rape of elderly patient accusation

TOP NEWS

Russian doctor rapes patient during Breast Surgery

Gujarat doctor on run after being accused of rape held in Mumbai

NEW ZEALAND

Doctor charged with rape

Potential Legislative Change: Criminal Statutes

- Prohibiting a defense of consent where sexual contact with patient occurred during treatment, examination, or consultation. (New York, Illinois)
- As the New York Department of Health notes, “A patient cannot give meaningful consent to sexual contact due to the position of trust and disparity of power in the physician-patient relationship.”

Potential Legislative Changes: Licensing Statutes

- Requiring criminal background checks before and during licensing (Delaware)
- Requiring automatic and permanent license revocation for felony sex offenders (Illinois)
- Requiring gender parity for board seats (Iowa)
- Exploring gender parity for administrative law judges
- Requiring caregivers and staff to report conduct to licensing board (Australia)

CEOs of Best Outcomes

- **C**ollaborative dialogue for all agencies with the victim.
- **E**ncourage continuous support of the victim.
- **O**pportunity for victim's input and concerns to be expressed and responded to throughout the process. Opportunity to continue to work to change laws to hold licensed professionals accountable when they abuse and assault.

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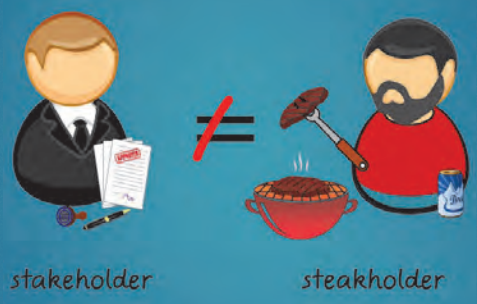
Legislating Cultural Change: Improving Response To Sexual Assault Survivors in Illinois

Cordelia Coppleson
Assistant Attorney General
Office of the Illinois Attorney General

Where do you start?

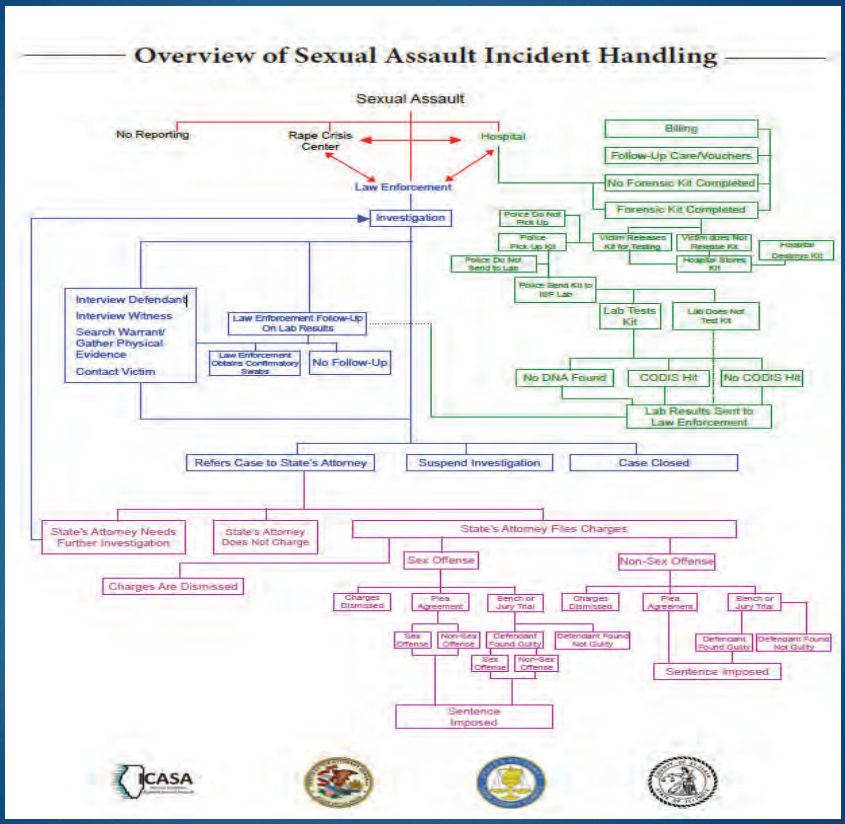


Stakeholders

Joint Sexual Assault Working Group

- Attorney General Lisa Madigan
- Cook County State's Attorney Anita Alvarez
- St. Clair County State's Attorney Brendan Kelly
- Illinois Coalition Against Sexual Assault Executive Director Polly Poskin

http://www.illinoisattorneygeneral.gov/



Goals:

- Trauma Informed
- Victim Centered
- Reduced Re-victimization
- Cohesive services
- Increased reporting
- Improved Police Response

Sexual Assault Incident Procedure Act: Sec 10

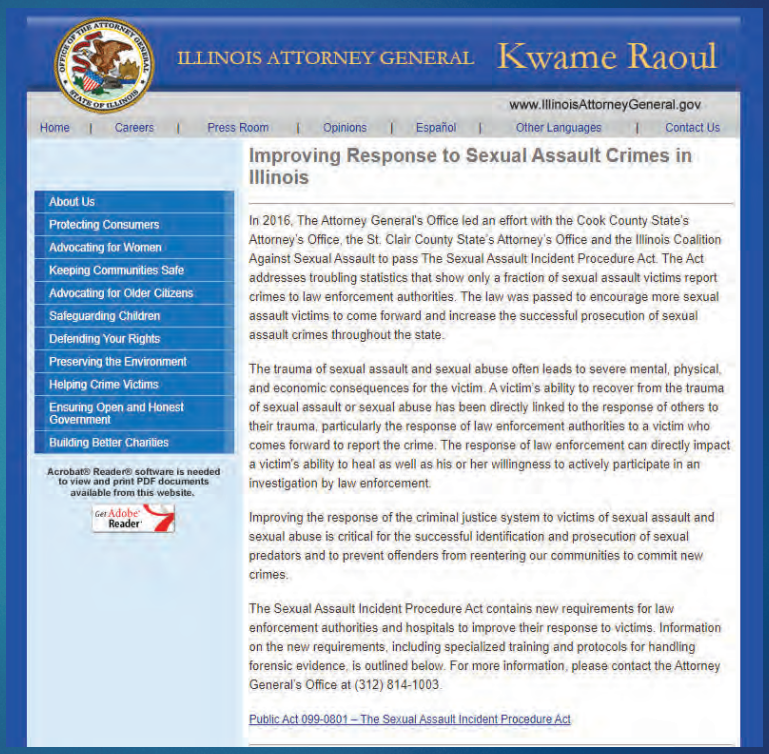
- "**Evidence-based, trauma-informed, victim-centered**" means policies, procedures, programs, and practices that have been demonstrated to minimize re-traumatization associated with the criminal justice process by recognizing the presence of trauma symptoms and acknowledging the role that trauma has played in a sexual assault or sexual abuse victim's life and focusing on the needs and concerns of a victim that ensures compassionate and sensitive delivery of services in a nonjudgmental manner.

Sexual Assault Incident Procedure Act: Sec 15

- July 1, 2017:
  - Comprehensive guidelines for creation of a law enforcement agency policy on evidence-based, trauma-informed, victim-centered sexual assault response and investigation
  - Developed by OAG, ILETSB, ISP
- January 1, 2018:
  - LE agency develop, adopt and implement written policies regarding procedures for incidents of sexual assault
    - Consult with other LE agencies, Advocates, SANEs
  - Mandatory sexual assault and sexual abuse response training

Our Website

Our Website



ILLINOIS ATTORNEY GENERAL Kwame Raoul

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- Safeguarding Children
- Defending Your Rights
- Preserving the Environment
- Helping Crime Victims
- Ensuring Open and Honest Government
- Building Better Charities

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Improving Response to Sexual Assault Crimes in Illinois

In 2016, The Attorney General's Office led an effort with the Cook County State's Attorney's Office, the St. Clair County State's Attorney's Office and the Illinois Coalition Against Sexual Assault to pass The Sexual Assault Incident Procedure Act. The Act addresses troubling statistics that show only a fraction of sexual assault victims report crimes to law enforcement authorities. The law was passed to encourage more sexual assault victims to come forward and increase the successful prosecution of sexual assault crimes throughout the state.

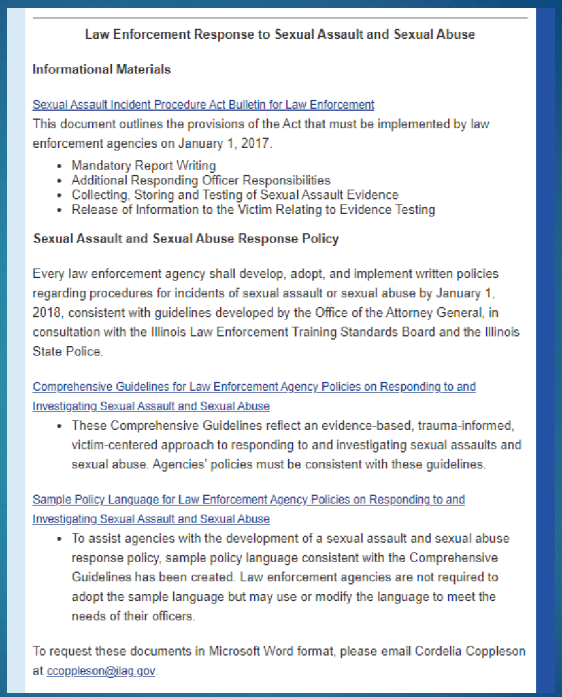
The trauma of sexual assault and sexual abuse often leads to severe mental, physical, and economic consequences for the victim. A victim's ability to recover from the trauma of sexual assault or sexual abuse has been directly linked to the response of others to their trauma, particularly the response of law enforcement authorities to a victim who comes forward to report the crime. The response of law enforcement can directly impact a victim's ability to heal as well as his or her willingness to actively participate in an investigation by law enforcement.

Improving the response of the criminal justice system to victims of sexual assault and sexual abuse is critical for the successful identification and prosecution of sexual predators and to prevent offenders from reentering our communities to commit new crimes.

The Sexual Assault Incident Procedure Act contains new requirements for law enforcement authorities and hospitals to improve their response to victims. Information on the new requirements, including specialized training and protocols for handling forensic evidence, is outlined below. For more information, please contact the Attorney General's Office at (312) 814-1003.

Public Act 099-0801 – The Sexual Assault Incident Procedure Act

Our Website



Law Enforcement Response to Sexual Assault and Sexual Abuse

Informational Materials

Sexual Assault Incident Procedure Act Bulletin for Law Enforcement
This document outlines the provisions of the Act that must be implemented by law enforcement agencies on January 1, 2017.

- Mandatory Report Writing
- Additional Responding Officer Responsibilities
- Collecting, Storing and Testing of Sexual Assault Evidence
- Release of Information to the Victim Relating to Evidence Testing

Sexual Assault and Sexual Abuse Response Policy

Every law enforcement agency shall develop, adopt, and implement written policies regarding procedures for incidents of sexual assault or sexual abuse by January 1, 2018, consistent with guidelines developed by the Office of the Attorney General, in consultation with the Illinois Law Enforcement Training Standards Board and the Illinois State Police.

Comprehensive Guidelines for Law Enforcement Agency Policies on Responding to and Investigating Sexual Assault and Sexual Abuse

- These Comprehensive Guidelines reflect an evidence-based, trauma-informed, victim-centered approach to responding to and investigating sexual assaults and sexual abuse. Agencies' policies must be consistent with these guidelines.

Sample Policy Language for Law Enforcement Agency Policies on Responding to and Investigating Sexual Assault and Sexual Abuse

- To assist agencies with the development of a sexual assault and sexual abuse response policy, sample policy language consistent with the Comprehensive Guidelines has been created. Law enforcement agencies are not required to adopt the sample language but may use or modify the language to meet the needs of their officers.

To request these documents in Microsoft Word format, please email Cordelia Coppleson at ccoppleson@ilag.gov.

Our Website

Forms

Victim notices to be provided by law enforcement per the Sexual Assault Incident Procedure Act:

Mandatory Notice for Survivors of Sexual Assault (P.A. 99-0801 – Form A)

- Pursuant to 725 ILCS 203/25(a), at the time of first contact with a victim, a law enforcement officer shall advise the victim of the information on this form, written in a language appropriate for the victim or in Braille, or communicate this information in the appropriate sign language.

Arabic Korean Polish Russian Simplified Chinese Spanish Tagalog Traditional Chinese Urdu

Mandatory Notice of Victim's Right to Information Regarding Sexual Assault Evidence (P.A. 99-0801 – Form B)

- Pursuant to 725 ILCS 203/35(c), this form must be provided by a law enforcement officer to a victim who has signed a consent form to test evidence at the hospital, either at the hospital or during the investigating officer's follow-up interview. This form must also be provided to a victim who signs a consent form to test sexual assault evidence at the law enforcement agency or with the assistance of a rape crisis advocate.

Arabic Korean Polish Russian Simplified Chinese Spanish Tagalog Traditional Chinese Urdu

Storage and Future Testing of Sexual Assault Evidence (P.A. 99-0801 – Form C)

- Pursuant to 725 ILCS 203/30(e), this form shall be provided by a law enforcement officer to a victim who has not signed a consent form to test evidence at the hospital, either at the hospital or during the investigating officer's follow-up interview.

Arabic Korean Polish Russian Simplified Chinese Spanish Tagalog Traditional Chinese Urdu

Confirmation of Transfer of Sexual Assault Report to Law Enforcement Agency Having Jurisdiction (P.A. 99-0801 – Form D)

- Pursuant to 725 ILCS 203/20(c), a law enforcement agency which receives a report of an incident occurring in another jurisdiction must prepare a written report and send the report to the agency having jurisdiction in person or via fax or email within 24 hours.
- Pursuant to 725 ILCS 203/20(d), the law enforcement agency that receives a report from another jurisdiction must confirm receipt in person or via fax or email within 24 hours.

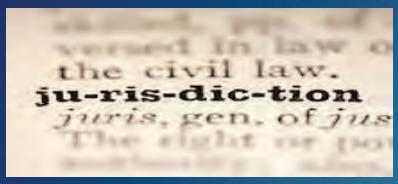
To request these documents in Microsoft Word format, please email Cordelia Coppleson at Cordelia.Coppleson@ilag.gov.

Guidelines

(1) dispatcher or call taker response;
(2) responding officer duties;
(3) duties of officers investigating sexual assaults and sexual abuse;
(4) supervisor duties;
(5) report writing;
(6) reporting methods;
(7) victim interviews;
(8) evidence collection;
(9) sexual assault medical forensic examinations;
(10) suspect interviews;
(11) suspect forensic exams;
(12) witness interviews;
(13) sexual assault response and resource teams, if applicable;
(14) working with victim advocates;
(15) working with prosecutors;
(16) victims' rights;
(17) victim notification; and
(18) consideration for specific populations or communities.

Increased Reporting: Mandatory Report Writing:

- LE shall complete a written police report, regardless of where the incident occurred, when:
  - Victim discloses sexual assault/abuse
  - Information provided by hospital or medical personnel
  - Information from a witness who personally observed sexual assault/abuse or attempted sexual assault/abuse



Jurisdiction

- Agency taking report must submit report to agency with jurisdiction via fax or email within 24 hours
- Within 24 hours of receiving report, agency with jurisdiction shall submit a written confirmation notice to notifying agency
- No LE officer shall require a victim of sexual assault or sexual abuse to submit to an interview
- No LE agency may refuse to complete a written report as required by this Section on any ground
- LE agencies shall ensure that officers responding have completed required training

Third Party Reporting:

- A victim of sexual assault/abuse may give a person consent to provide information about the assault/abuse to a law enforcement officer and the officer shall complete a written report unless:
  - Person fails to provide victim's name and contact information
  - Person fails to affirm the consent of the victim

Victim Notice:

- At the time of first contact with the victim, LE shall advise the victim about:
  - Medical attention and preserving evidence including photographs and clothing
  - Victims will not be billed for hospital emergency and medical forensic services
  - Evidence can be collected up to 7 days
  - Location of nearby hospitals providing exams and whether or not they employ any SANEs
  - Summary of Civil No Contact Order
  - LE name and badge number
  - Referral to accessible service agency
  - Information for the appropriate jurisdiction if indicated
- Transportation to hospital and/or circuit judge
- http://www.illinoisattorneygeneral.gov/index.html

Release and Storage of Evidence:

- LE shall take custody of evidence collected within 5 days
  - If this does not occur, hospital can contact the State's Attorney who will contact LE within 72 hours of notification and request that LE take immediate custody of evidence
- Date and time when evidence collected and submitted to the lab should be documented in the report
- No law enforcement agency having jurisdiction may refuse or fail to send sexual assault evidence for testing that the victim has released for testing

Release and Storage of Evidence:

- Victim will have10years (or10 years from the age of 18) to sign a written consent to release evidence
- Nothing limits storage to only 10 years
- Illinois has NO SOL for Child or Adult Sex Assault and Sexual Abuse Cases

Release of Information:

- Upon request of the victim who consented for evidence testing, LE shall provide:
  - Date the evidence was sent to the forensic lab
  - Test results including:
    - If DNA profile was obtained
    - If DNA profile developed has been searched in CODIS
    - If association was made to an individual in CODIS
    - If drugs were detected in the urine/blood sample for DFSA
- Notifications shall occur within 7 days

Training Mandates

- Cadets at basic law enforcement academies by July 1, 2018
- Tele-communicators by January 2019
- Officers who investigate sexual assaults by January 1, 2019 and every 3 years thereafter
- First responders by January 1, 2020 and every 3 years thereafter

DNA Evidence

- ISP laboratory will now send LE and State's Attorney in writing of test results when there is a "hit"
- Submit annual inventory of all sexual assault cases in custody of law enforcement agencies
- Post quarterly report on website reflecting

number of SA submissions from every LE agency

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Rape Messaging

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ARTICLES

RAPE MESSAGING

*Alena Allen**

When feminists began advocating for rape reform in the 1970s, the rape message was clear: rape was not a crime to be taken seriously because women lie. After decades of criminal law reform, the legal requirement that a woman vigorously resist a man's sexual advances to prove that she was raped has largely disappeared from the statute books, and, in theory, rape shield laws make a woman's prior sexual history irrelevant.

Yet, despite what the law dictates, rape law reforms have not had a "trickle-down" effect, where changes in law lead to changes in attitude. Women are still believed to be vindictive shrews so police continue to code rape allegations as "unfounded," and prosecutors continue to elect not to prosecute many rape cases. To many, "no" can sometimes still mean "yes."

In short, criminal law reforms have only marginally succeeded at deterring rape and increasing conviction rates for rape. At the same time, criminal law reforms have entrenched gender norms and endorsed the message that acquaintance rapes are less worthy of harsh punishment. This Article argues against further ex post criminal law reforms and posits that efforts should shift to ex ante public health interventions. This Article draws from recent successful experiences with public health interventions in destigmatizing AIDS and denormalizing tobacco and advocates for a robust public health campaign to denormalize rape. It presents a detailed proposal for changing rape messaging, denormalizing rape, and ensuring better outcomes for victims.

* Director of Diversity and Associate Professor of Law, University of Memphis Cecil C. Humphreys School of Law. J.D., Yale Law School; B.A., Loyola University New Orleans. Many thanks to the faculties of the University of Memphis and the University of Arkansas-Fayetteville. I am especially grateful for the extensive comments from Lee Harris and Boris Mamlyuk. This paper benefited from excellent research support provided by Howard Bailey.

INTRODUCTION

Rape has existed since the earliest civilizations.[1] The oldest written laws criminalizing rape are found in the Code of Hammurabi, which predates the birth of Jesus.[2] The early American colonists adopted the English definition of rape as "the carnal knowledge of a woman, forcibly and against her will."[3] Until as recently as 2013, the Federal Bureau of Investigation (FBI) used this definition of rape in the Uniform Crime Reports, and many states relied on this definition in formulating the elements of rape.[4] Under this traditional definition, the male perpetrator had to penetrate the female victim by use of

1. According to Greek legend, many Greek women were raped during the fall of Troy, including Cassandra, the daughter of the king of Troy. *See* Cyril J. Smith, *History of Rape and Rape Laws*, 60 WOMEN LAW. J. 188, 188 (1974).

2. *See id.* at 189 (noting that the Code of Hammurabi was written in the early part of the seventeenth century before Christ).

3. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 209 (1893). The Modal Penal Code (MPC) follows the common law by limiting liability for rape to a "male who has sexual intercourse with a female not his wife." MODEL PENAL CODE § 213.1(1) (2017). In addition, the MPC requires either "force" or threat of "imminent death, serious bodily injury, [or] extreme pain or kidnapping." *Id.* § 213.1(1)(a).

4. *See Frequently Asked Questions About the Change in the UCR Definition of Rape*, FBI (Dec. 11, 2014), https://ucr.fbi.gov/recent-program-updates/new-rape-definition-frequently-asked-questions [https://perma.cc/4RZT-LYZP] (noting that the "carnal knowledge" definition would no longer be used beginning on January 1, 2013). The revised definition is: "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." *Id.*

force or threats of force, and the female victim had to strenuously resist and express her nonconsent.[5]

This traditional definition of rape is premised upon the classic rape narrative in which a woman is walking alone at night, is beaten and dragged into a dark alley or abandoned house, and is eventually raped by a gun-toting or knife-wielding man despite her screams of "no" and valiant attempts to escape.[6] On average, a sexual assault occurs every ninety-eight seconds in the United States.[7] As a result, sexual violence, the risk of sexual violence, and the fear of violence are omnipresent for American women.[8] However, the classic rape narrative described above is the exception rather than the norm.[9]

Studies have suggested that nearly one in five women living in the United States have been raped during their lifetimes.[10] It is estimated that nearly 1.3 million women are raped each year.[11] The typical rape is committed by an

5. *See, e.g.*, Territory v. Nishi, 24 Haw. 677, 682 (1919) ("The term 'rape' imports not only force and violence on the part of the man, but resistance on the part of the woman. There must be force, actual or constructive, and resistance. In the absence of proof of resistance consent is presumed. Mere general statements of prosecutrix that she resisted are not sufficient, but the specific acts of resistance must be shown."); Reynolds v. State, 42 N.W. 903, 904 (Neb. 1889) ("[V]oluntary submission by the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape."); *see also* Brown v. State, 106 N.W. 536, 538 (Wis. 1906) ("Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.").

6. *See* Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 645 (2010) (noting that the classic rape narrative is "woven from a racist and sexist mythology specific to American history").

7. *Statistics*, RAINN, http://www.rainn.org/statistics [https://perma.cc/45KU-N5JX] (last visited Nov. 15, 2018); *see also* Alanna Vagianos, *30 Alarming Statistics That Show the Reality of Sexual Violence in America*, HUFFINGTON POST (Apr. 6, 2017), https://www.huffingtonpost.com/entry/sexual-assault-statistics_us_58e24c14e4b0c777f788d24f [https://perma.cc/Y4UQ-W8HV] (noting that an estimated 17,700,000 women have been victims of rape in the United States since 1998).

8. *See, e.g.*, JUDITH L. HERMAN, TRAUMA AND RECOVERY 33 (1992) ("Rape, battery, and other forms of sexual and domestic violence are so common a part of women's lives that they can hardly be described as outside the range of ordinary experience."); *see also* SUSAN BROWNMILLER, AGAINST OUR WILL: WOMEN AND RAPE 15 (1975) (opining that, instead of being an aberration, rape has historically been used by men to dominate and oppress women).

9. *See* Anderson, *supra* note 6, at 645–46 (describing the typical acquaintance rape).

10. A 2011 survey conducted by the Centers for Disease Control and Prevention (CDC) estimated that 19.3 percent of U.S. women have been raped at some point during their life. *See* Matthew J. Brieding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, CDC (Sept. 5, 2014), https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm [https://perma.cc/56DM-T4VR].

11. This number includes women who have experienced complete forced penetration, women who have experienced attempted forced penetration, and women who have experienced alcohol- or drug-facilitated complete forced penetration. *See* MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 3 (2011), https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf [https://perma.cc/23SU-U9MW].

acquaintance and not a stranger lurking in the shadows;[12] it occurs in the victim's home or in the home of a friend or a relative—not in a dark alley or abandoned property.[13] The typical rapist does not wield a gun or knife but instead a charming smile that persuades the victim to let his or her guard down.[14]

Thus, in many ways, the criminal definition of rape is based on a rape narrative that is much different than the typical rape. Because most rapes do not fit into the violent-stranger-perpetrator paradigm, many instances of rape are never reported.[15] Rape victims often feel that if their rape does not fit within the classic rape narrative then they will not be believed.[16] And particularly those who are raped by an acquaintance often experience shame, humiliation, and guilt, and fear that police and juries will be skeptical of their stories.[17] Even when a rape is reported to law enforcement, chances are slim that the rapists will be convicted because rape victims are often persuaded to drop their complaint by police.[18] Even if a rape is investigated, it is still unlikely that it will be tried because prosecutors are very selective in the rape cases that they choose to prosecute and prefer to try classic rape narratives.[19]

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12. A recent report by the Department of Justice (DOJ) found that 78 percent of rape perpetrators were a family member, intimate partner, friend, or acquaintance of the victim. U.S. DEP'T OF JUSTICE, NCJ 240655, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, at 1 (2013), https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf [https://perma.cc/GX4U-Z8ZA]. About 34 percent of all rape or sexual assault victimizations were committed by an intimate partner (former or current spouse, girlfriend, or boyfriend) and 38 percent by a friend or acquaintance. *Id.* Strangers committed about 22 percent of sexually violent crimes. *Id.*

13. The DOJ reported that between 2005 and 2010, 55 percent of rapes occurred at or near the victim's home with another 12 percent occurring at or near the home of a friend or relative. *See id.* at 4.

14. Only about 11 percent of rapists use a weapon. *See id.* at 5.

15. *See, e.g.*, U.S. DEP'T OF JUSTICE, NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000, at 2 (2002), https://www.bjs.gov/content/pub/pdf/rsarp00.pdf [https://perma.cc/7LXE-UU4Y] (finding that 63 percent of completed rapes were not reported to the police); *see also* LEE MADIGAN & NANCY GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 3 (1991) (finding that 90 percent of rapes go unreported). *See generally* Leslie Gise & P. Paddison, *Rape, Sexual Abuse, and Its Victims*, 11 PSYCHIATRIC CLINICS N. AM. 629 (1988) (estimating that between 50 percent and 90 percent of rapes and sexual assaults are never reported).

16. *See, e.g.*, Amy Dellinger Page, *Gateway to Reform?: Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008) (surveying 891 police officers and reporting that 53 percent of these officers believed that up to 50 percent of alleged rape victims lied about being raped).

17. In a landmark study, scholars Kalven and Zeisel found that jurors in rape cases were more likely to acquit defendants. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 249–57 (Univ. of Chi. Press Phoenix ed. 1986). Jurors admitted to weighing the victim's character and provocative conduct. *Id.*

18. *See, e.g.*, S. REP. NO. 103-138, at 50 (1994) ("Crimes against women are often treated differently and less seriously that other crimes. Police may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters . . . .").

19. John W. Stickels et al., *Elected Texas District and County Attorneys' Perceptions of Crime Victim Involvement in Criminal Prosecutions*, 14 TEX. WESLEYAN L. REV. 1, 9 (2007) (noting that prosecutors are "more likely to use stereotypes about rape and rape victims to determine which sexual assault cases to take seriously" and that "prosecutors are less likely to

Although the sexual victimization of women was ignored for centuries, feminist rape reformers began mobilizing in the 1970s to challenge rape myths and advocate for legal reform. Prior to the 1970s, rape laws made it difficult for prosecutors to obtain convictions for rape because many state laws contained corroboration,[20] resistance,[21] reporting,[22] and chastity requirements.[23] Many of these hurdles were rooted in sexist norms. Thus, feminist rape reformers sought to abolish those norms[24] and to reform rape laws so that the rate of rape convictions would increase.[25] Yet, at the heart of their crusade was a desire to have rape victims be believed and to reform the criminal justice system so that rape would be viewed as a serious violent crime worthy of punishment.

In some ways, feminist rape reformers were successful. For example, their reforms placed stranger rapes, which fit into the classic rape narrative, "on the same footing as other violent crimes."[26] They eliminated resistance and corroboration requirements in most jurisdictions[27] and successfully advocated for the passage of rape shield laws, which prevent evidence of a victim's past sexual history from being introduced at trial.[28] Yet, despite

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pursue a sexual assault case when rape victims have a history of risk-taking behavior, such as hitchhiking, drinking, or drug use").

20. *See, e.g.*, Davis v. State, 48 S.E. 180, 181–82 (Ga. 1904) (noting that "[t]he law is well established, since the time of Lord Hale, that a man should not be convicted of rape on the testimony of the woman alone, unless there are some concurrent circumstances which tend to corroborate her evidence").

21. *See, e.g.*, State v. Hoffman, 280 N.W. 357, 358 (Wis. 1938) (holding that "there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated" (quoting Brown v. State, 105 N.W. 536, 538 (Wis. 1906))).

22. *See* Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. REV. 441, 446 (1996) (describing the "hue and cry" rationale as requiring victims to cry out immediately and promptly report being victimized).

23. *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 785 (1986) (noting that, prior to the passage of rape shield laws, the "majority of courts . . . permitted the defense counsel to elicit evidence solely of the complainant's reputation for chastity in the community").

24. For example, SlutWalk is a recent movement that focuses on not judging women for being overtly sexual. *See SlutWalk Toronto*, FACEBOOK, https://www.facebook.com/pg/SlutWalkToronto/about/ [https://perma.cc/DQK2-4JBD] (last visited Nov. 15, 2018). The mission is described as follows:

> We are tired of being oppressed by slut-shaming; of being judged by our sexuality and feeling unsafe as a result. Being in charge of our sexual lives should not mean that we are opening ourselves to an expectation of violence, regardless if we participate in sex for pleasure or work. No one should equate enjoying sex with attracting sexual assault . . . . Join us in our mission to spread the word that those . . . who experience sexual assault are not the ones at fault, without exception.

Id.

25. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1158 (1986) (noting that "increasing conviction rates was a stated purpose of law reform").

26. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 594 (2009).

27. Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 986–87 (2008).

28. *See generally* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV 51 (2002).

these victories, criminal law reforms have not yielded a substantial increase in rape prosecutions or convictions of acquaintance rapes.

Much has been written about the limited success of the rape reform movement.[29] Some have argued for further reform in the form of affirmative consent laws.[30] Others have contended that criminal law reforms should be abandoned in favor of social shaming.[31] Still others believe that reliance on the criminal justice system ultimately harms rape victims and that reformers should disengage reform efforts from the system altogether.[32] Although many critiques have been written, most have overlooked public health as a viable alternative to criminal reform. This Article seeks to illuminate how public health can be leveraged to effectively reduce the prevalence of rape.

This Article proffers the idea that rape is such a traumatic crime that the bulk of reform efforts should be reallocated to ex ante interventions. Exhaustive campaigns to reform criminal law will likely continue to be only marginally effective because most of those efforts are focused on ex post reforms aimed at increasing conviction rates and making the rape trial less traumatic for the victims. These efforts are almost certain to fail because convictions do not simply hinge on the letter of the law but also upon the willingness of factfinders to faithfully apply the law.[33] Potential jurors are often skeptical of victims who allege acquaintance rape, and this skepticism is unlikely to change regardless of the wording of the law.[34] Additionally, trials are naturally adversarial. As such, with or without reforms, trial is likely to be a traumatic experience for the victim.

Therefore, this Article posits that reforms should pivot from ex post legal reforms of criminal law to ex ante denormalizing reforms based on existing public health models. In essence, this Article argues that the societal change rape reformers hoped to achieve has not materialized, and, thus, a new approach is needed. Part I of this Article explains why rape should be viewed as a public health issue. It discusses the scope of public health and frames rape as a public health issue. Part II of this Article discusses how destigmatization and denormalization strategies have been used by public

29. Beverly J. Ros, *Does Diversity in Legal Scholarship Make a Difference: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 852 (1996) ("The statutory changes wrought in the 1970s and 1980s have not had the dramatic impact on rape prosecutions that was anticipated by the reformers.").

30. *See generally, e.g.*, Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993); Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665 (2016); Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 442 (2016) (noting that "an estimated 14,000 institutions of higher education have adopted disciplinary standards that codify an affirmative definition of sexual consent").

31. *See generally* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663 (1999).

32. *See* Gruber, *supra* note 26, at 153.

33. *See* KALVEN & ZEISEL, *supra* note 17, at 12–32.

34. *See, e.g.*, Hannah McGee et al., *Rape and Child Sexual Abuse: What Beliefs Persist About Motives, Perpetrators, and Survivors?*, 26 J. INTERPERSONAL VIOLENCE 3580, 3586 (2011) (finding that 40.2 percent of the study's 3210 participants believed that accusations of acquaintance rape were often false, which indicates that a large minority of potential jury members are predisposed to a verdict of not guilty in the case of rape).

health advocates to address the AIDS epidemic and to reduce tobacco use. It explains the goal of destigmatization and denormalization and provides a glimpse of how each strategy has been successfully employed. Part III analyzes how the ex post criminal law reforms have been largely unsuccessful and discusses how myopic attempts to destigmatize rape victims have had pronounced unintended consequences. It argues that the existing ex post criminal-reform framework is an ineffective strategy for addressing the rape crisis. Part IV presents denormalization as the superior public health strategy for reducing the prevalence of rape. It provides a detailed blueprint that focuses on primary prevention, screenings, and coping and recovery.

I. RAPE AS A PUBLIC HEALTH ISSUE

Throughout history, recognition of the importance of the field of public health to the health of populations has waxed and waned. Even the definition of public health has evolved over time.[35] In 1920, Charles-Edward Amory Winslow articulated the classic definition of public health as, "the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts . . . and the development of the social machinery which will ensure . . . a standard of living adequate for the maintenance of health."[36] The Winslow definition laid the foundation for a robust field that has evolved to also address social ills.

Geoffrey Vickers, a famous British systems scientist, also famously defined public health. His definition reflects an understanding that population health is interconnected with social, economic, political, and medical factors.[37] Vickers noted, "The landmarks of political, economic, and social history are the moments when some condition passed from the category of the given into the category of the intolerable. . . . [T]he history of public health might well be written as a record of successive redefinings of the unacceptable."[38] Thus, in Vickers's view, public health blends knowledge with social values to shape responses to problems that require collective action after such problems have crossed the line between acceptability and unacceptability.

As a result of advocacy by feminists and changing social norms, stranger rape has come to be viewed as unacceptable.[39] Despite that success, feminist

35. *See generally, e.g.*, Mark A. Rothstein, *Rethinking the Meaning of Public Health*, 30 J.L. MED. & ETHICS 144 (2002) (discussing various definitions of public health and arguing that the increasingly broad definitions for public health do not provide a practical framework for evaluating policy).

36. C.-E. A. Winslow, *The Untilled Fields of Public Health*, 2 MOD. MED. 23, 30 (1920).

37. *See* Geoffrey Vickers, *What Sets the Goals of Public Health?*, 1 LANCET 599, 600 (1958).

38. *Id.*

39. *See, e.g.*, Ginia Bellafante, *Rape by Strangers*, N.Y. TIMES (Jan. 22, 2016), https://www.nytimes.com/2016/01/24/nyregion/rape-by-strangers-new-york-city.html

reformers have not been successful in denormalizing acquaintance rape into the unacceptable. Yet, the health and economic consequences of rape occur regardless of whether the perpetrator is a stranger or acquaintance. In contrast to criminal law reforms which are activated after the commission of a rape, public health intervention strategies focus primarily on preventing sexual abuse from occurring in the first place.[40] Given the significant health and economic consequences of rape, the primary goal of the rape reform movement should be to reduce the prevalence of rape.

A. Health Consequences of Rape

Although not routinely characterized this way, the sheer prevalence of rape, combined with its health consequences, make rape a quintessential public health issue.[41] Rape victims are at risk for sexually transmitted diseases (STDs), pregnancy, posttraumatic stress disorder (PTSD), depression, substance abuse, suicidal ideation, repeated sexual victimization, and physical injury.[42] The risk of acquiring an STD, for example, varies depending on the whether there was anal or vaginal penetration, the violence of the assault, the number of assailants, and the susceptibility of the victim to infection.[43] Generally, women are more likely than men to get an STD,[44] and female rape victims are even more likely to acquire an STD because of the lower likelihood of condom use.[45] It is estimated that the risk of acquiring chlamydia can be as high as 16 percent[46] while the risk of acquiring

[https://perma.cc/RV4P-U897] (noting that 1970s and 1980s feminism recalibrated our understanding of rape, making "any discussion of rape by a stranger seem benighted").

40. *See infra* Part III.

41. *See* BLACK ET AL., *supra* note 11, at 1 (noting that over 18 percent of American women—or roughly 23 million—have been raped).

42. *See* Rebecca Campbell, *The Psychological Impact of Rape Victims: Experiences with the Legal, Medical and Mental Health Systems*, 63 AM. PSYCHOLOGIST 702, 703 (2008).

43. *See, e.g.*, Cynthia H. Miller, *Preventing STDS After Sexual Assault: A Guide for Clinicians*, MEDSCAPE TODAY (Mar. 2, 2014), https://www.medscape.com/viewarticle/822563 [https://perma.cc/9JF2-WFZL]. *See generally* Carole Jenny et al., *Sexually Transmitted Diseases in Victims of Rape*, 322 NEW ENG. J. MED. 713 (1990).

44. *See 10 Ways STDs Impact Women Differently from Men*, CDC (Apr. 2011), https://www.cdc.gov/std/health-disparities/stds-women-042011.pdf [https://perma.cc/P5CK-C9F4] (explaining that "[t]he lining of the vagina is thinner and more delicate than the skin on a penis, so it's easier for bacteria and viruses to penetrate"); *see also* Gail Bolan et al., *Gender Perspectives and STDs*, *in* SEXUALLY TRANSMITTED DISEASES 117, 121 (3d ed. 1999) (opining that women's increased susceptibility to STDs is likely due to semen remaining inside the female body for some time after unprotected sex).

45. Craig Wolff, *Rapists and Condoms; Is Use a Cavalier Act or a Way to Avoid Disease and Arrest?*, N.Y. TIMES (Aug. 22, 1994), https://www.nytimes.com/1994/08/22/nyregion/rapists-and-condoms-is-use-a-cavalier-act-or-a-way-to-avoid-disease-and-arrest.html [https://perma.cc/43SY-KNQQ] (reporting that national statistics on the subject are scant but that a rape counselor in San Francisco indicated that, based on her cases, about 15 to 20 percent of rapists use condoms).

46. *See* Miller, *supra* note 43 (estimating that the likelihood of acquiring chlamydia after a single rape is between 3 and 16 percent).

gonorrhea can be as high as 26 percent.[47] The risk of acquiring pelvic inflammatory disease (PID) and bacterial vaginosis is about 11 percent,[48] while the risk of acquiring trichomoniasis is about 7 percent.[49] In addition, rape victims have an increased risk of acquiring HIV during a rape because trauma is more likely.[50] As a result, the Centers for Disease Control and Prevention (CDC) recommends that sexual assault victims receive STD preventive medications or prophylaxis.[51]

Bacterial STDs are treatable with antibiotics. However, if treatment is not obtained, bacterial diseases can cause serious harm to women. Chlamydia and gonorrhea are often asymptomatic and if left untreated can lead to PID.[52] A woman who has PID is at increased risk of an ectopic pregnancy and has a one in five chance of becoming infertile.[53] Lastly, rape victims who are of childbearing age may become pregnant. It is estimated that 5 percent of rapes end in pregnancy for women who are of childbearing age.[54]

B. Economic Consequences of Rape

"The estimated lifetime cost of rape [i]s $122,461 per victim . . . ."[55] In addition to medical costs, rape victims take time off from work, report diminished performance, job loss, and inability to obtain work.[56] Thus, rape disrupts employment prospects for victims. Researchers have linked the employment disruption to the toll that rape takes on mental health.[57] Rape

47. *See generally* Matthew W. Reynolds et al., *Epidemiologic Issues of Sexually Transmitted Diseases in Sexual Assault Victims*, 55 OBSTETRICAL & GYNECOLOGICAL SURV. 51 (2000).

48. *See* Miller, *supra* note 43.

49. *Id. But see* Reynolds, *supra* note 47, at 53–54 (estimating the risk between 0 and 19 percent).

50. During consensual vaginal sex the risk of HIV transmission is about 0.1–0.2 percent. *See* Joyce S. Kuo, *HIV Prophylaxis in Sexual Assault*, MEDSCAPE TODAY (Feb. 2, 2017), https://emedicine.medscape.com/article/2141935-overview [https://perma.cc/7J7E-YTP4]. The risk increases to 0.5 percent to 3 percent during anal sex. *Id.*

51. *See, e.g.*, Kimberly A. Workowski et al., *Sexually Transmitted Diseases Treatment Guidelines, 2010*, CDC (Dec. 17, 2010), https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5912a1.Htm [https://perma.cc/FX2W-FMFZ].

52. *See id*.

53. *See* Bolan et al., *supra* note 44, at 123.

54. *See* Melissa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristic from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 321 (1995).

55. Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTATIVE MED. 691, 697 (2017). The economic burden of rape amounts to nearly $3.1 trillion, an estimate which includes "$1.2 trillion (39 percent of total) in medical costs; $1.6 trillion (52 percent) in lost work productivity among victims and perpetrators; $234 billion (8 percent) in criminal justice activities; and $36 billion (1 percent) in other costs, including victim property loss or damage." *Id*.

56. *See* Rebecca M. Loya, *Rape as an Economic Crime: The Impact of Sexual Violence on Survivors' Employment and Economic Well-Being*, 30 J. INTERPERSONAL VIOLENCE 2793, 2808 (2015).

57. About 12 percent of total mental health care costs is spent on crime victims. *See* Mark Cohen & Ted Miller, *The Cost of Mental Health Care for Victims of Crime*, 13 J.

victims report diminished performance at work because of trouble concentrating due to anxiety, PTSD, and dissociation.[58] The combination of taking time off from work and diminished performance often leads to job loss.[59]

After losing their job, rape victims are often unable to find another job. One rape advocate explained that many rape victims have "been so traumatized that they just can't function well at work."[60] She continued, "There is fear, there is embarrassment, there is shame, there's all these negative things that you can think of, that they can't mentally go back to work."[61] Thus, the experience of rape will often cause a permanent trajectory shift that negatively impacts income, occupation, and economic stability over the course of the victim's life.[62] Unsurprisingly, studies have found that rape victims were more than twice as likely to be unemployed than women who had not experienced a sexual assault.[63]

Thus, experiencing rape has long-term health and economic consequences for the victim that persist long after the rape has occurred. Given the trajectory shifts associated with rape, resources should focus on prevention of rape and adopt public health strategies that focus on prevention, screening, coping, and recovery.

II. PUBLIC HEALTH MESSAGING

Public health focuses on health at the population level. Instead of focusing on the treatment of medical conditions on a case-by-case basis, public health examines trends in health, illness, and injury to understand their causes and develop and implement interventions to address them.[64] It is accepted that the government will use its coercive powers to affect behaviors of individuals that are injurious to the health and well-being of others.[65] Typical public health tools include detection, treatment, counseling, education, and surveillance.[66] With respect to education, public health campaigns tend to employ a variety of strategies, including social marketing efforts and public

INTERPERSONAL VIOLENCE 93, 102 (1998). The cost of mental health services per rape victim exceeds $2400. *Id.*

58. *See* Loya, *supra* note 56, at 2803.

59. Low-wage workers and hourly workers are at greater risk for job loss. *See id.* at 2803–04.

60. *See id.* at 2804.

61. *See id.*

62. *See id.* at 2805.

63. Christina A. Byrne et al., *The Socioeconomic Impact of Interpersonal Violence on Women*, 67 J. CONSULTING & CLINICAL PSYCHOL. 362, 365 (1999).

64. *See* Geoffrey Rose, *Sick Individuals and Sick Populations*, *in* PUBLIC HEALTH ETHICS: THEORY, POLICY, AND PRACTICE 33, 34 (Ronald Bayer ed., 2007) (discussing the difference between individual-centered etiology used in clinical medicine—which seeks the causes of cases—and population-focused etiology used in public health—which seeks the causes of incidence).

65. *See generally, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that states have the authority to enforce compulsory-vaccination laws to ensure public health and safety).

66. See Joan R. Cates et al., *Prevention of Sexually Transmitted Diseases in an Era of Managed Care: The Relevance for Women*, 8 WOMEN'S HEALTH ISSUES 169, 179 (1998).

service announcements (PSAs), as well as more restrictive measures, including advertising restrictions, mandated penalties for possession, taxes that increase the cost of consuming certain products, and fines.[67]

Over the past few decades, public health has shifted from focusing almost exclusively on communicable diseases to trying to eliminate and reduce behaviors and circumstances that harm health.[68] In combatting the AIDS epidemic and tobacco use, the field of public health was confronted with unique challenges that were not amenable to its typical tools of mandatory vaccination, treatment, quarantine, and isolation.[69]

In their efforts to curb the rate of AIDS infections, public health professionals realized that the stigma surrounding an AIDS diagnosis hampered prevention efforts.[70] Thus, they began to focus on destigmatizing both people living with AIDS and behaviors associated with AIDS.[71] By contrast, in the tobacco context, public health professionals sought to stigmatize tobacco use[72] by creating an environment that was hostile to smoking.[73] In short, they worked to denormalize tobacco use. The tobacco experience is a useful model of how to use public health messaging, advertising restrictions, and taxation to denormalize conduct. As one public health researcher noted, "The campaign to stigmatize smoking was a great success, turning what had been considered simply a bad habit into

67. *See generally, e.g.*, Leonard A. Jason et al., *Effects of Youth Tobacco Access and Possession Policy Interventions on Heavy Adolescent Smokers*, 6 INT'L J. ENVTL. RES. & PUB. HEALTH 1 (2009) (evaluating the effectiveness of restrictions on minor possession, use, or purchase of tobacco); Jennifer L. Pomeranz, *Taxing Food and Beverage Products: A Public Health Perspective and a New Strategy for Prevention*, 46 U. MICH. J.L. REFORM 999 (2013) (discussing proposals to tax specific individual products, nutrients, and ingredients in order to combat obesity).

68. *See* Lawrence O. Gostin et al., *The Future of the Public's Health: Vision, Values, and Strategies*, 23 HEALTH AFF. 96, 97 (2004) (noting that the "public health system is undergoing a remarkable transition, moving from discrete interventions to address infectious diseases to broad social, cultural, and economic reforms to address the root causes of ill health").

69. *See* Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 215–16 (2012) (discussing the tools traditionally used in the field of public health).

70. *See, e.g.*, Jonathan Mann, Dir., Global Programme on AIDS, World Health Org., Global AIDS: Epidemiology, Impact, Projections, Global Strategy, Remarks at the World Summit of Ministers of Health on Programmes for AIDS Prevention (Jan. 26, 1988), *in* AIDS: PREVENTION AND CONTROL 3, 10–11 (1988), http://apps.who.int/iris/bitstream/handle/10665/40765/9241561157_eng.pdf [https://perma.cc/K3P8-VHMW] ("A supportive social environment includes tolerance towards and avoidance of discrimination against those who are infected. . . . There is no public health rationale for isolation, quarantine, or other discriminatory measures . . . . Discrimination and fear will undermine an entire national information and education programme. Thus discrimination itself can endanger public health.").

71. *See* Gregory M. Herek & Eric K. Glunt, *An Epidemic of Stigma: Public Reactions to AIDS*, 43 AM. PSYCHOLOGIST 886, 890 (1988).

72. *See* Jennifer Stuber et al., *Smoking and the Emergence of a Stigmatized Social Status*, 67 SOC. SCI. & MED. 420, 427 (2008) (investigating the sources of smoker-related stigmatization as perceived by current and former smokers).

73. *See generally* David Hammond et al., *Tobacco Denormalization and Industry Beliefs Among Smokers from Four Countries*, 31 AM. J. PREVENTATIVE MED. 225 (2006).

reprehensible behavior."[74] The lessons learned in both the HIV/AIDS and tobacco contexts are useful in forging interventions to reduce the prevalence of rape.

A. Destigmatization of HIV Status

In 1981, a new immune deficiency syndrome presented in homosexual men in New York City, Los Angeles, and San Francisco.[75] Within a few years, the modes of transmission were identified as sexual contact, the sharing of contaminated needles, and from mother to baby, either in utero or through breast-feeding.

Currently, only 30 percent of the approximately 1.2 million people in the United States living with HIV/AIDS are successfully treated.[76] Between 2006 and 2009, the average number of new infections in the United States was between 48,600 and 56,000.[77] Former United Nations Secretary General Ban Ki-Moon stated that stigma is a chief reason why the AIDS epidemic continues to devastate societies worldwide.[78] In an op-ed, he argued that, because of stigma, people do not get tested and, if tested and found positive, do not seek treatment.[79]

AIDS stigma became salient for three reasons. First, illnesses such as AIDS are likely to be stigmatized if the illness is perceived as having been transmitted voluntarily through socially undesirable behaviors.[80] Since the 1980s, AIDS has been viewed as largely spreading through volitional behaviors such as sodomy, prostitution, and intravenous drug use.[81] Many viewed such behaviors as sinful and thus had little trouble favoring

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74. Daniel Callahan, *Obesity: Chasing an Elusive Epidemic*, 43 HASTINGS CTR. REP., Jan.–Feb. 2013, at 34, 38.

75. Carlos del Rio & James W. Curran, *Epidemiology and Prevention of Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus Infection*, *in* 1 MANDELL, DOUGLAS, AND BENNETT'S PRINCIPLES AND PRACTICE OF INFECTIOUS DISEASES 1635, 1635 (7th ed. 2010); *see also Kaposi's Sarcoma and* Pneumocystis *Pneumonia Among Homosexual Men—New York City and California*, 30 MORBIDITY & MORTALITY WKLY. REP. 305, 305 (1981). A large majority of HIV diagnoses are still among gay and bisexual men. *See HIV Among Gay and Bisexual Men*, CDC, at 1 (Sept. 2018), https://www.cdc.gov/hiv/pdf/group/msm/cdc-hiv-msm.pdf [https://perma.cc/ZW2K-C6GW] (finding that, in 2016, 67 percent of all new HIV diagnoses were among either gay or bisexual men).

76. *See generally* Jaime L. Mignano et al., *Preparing the Future: An Interprofessional Approach to Prepare Future Health and Service-Delivery Professionals to Attain an AIDS-Free Generation*, 4 J. INTERPROFESSIONAL EDUC. & PRACTICE 1 (2016).

77. World Health Org. [WHO], *Global HIV/AIDS Response: Epidemic Update and Health Sector Progress Towards Universal Access*, at 41 (2011), http://apps.who.int/iris/bitstream/handle/10665/44787/9789241502986_eng.pdf [https://perma.cc/VX77-SDTJ].

78. Ban Ki-Moon, Opinion, *The Stigma Factor*, WASH. TIMES (Aug. 6, 2008), https://www.washingtontimes.com/news/2008/aug/6/the-stigma-factor/ [https://perma.cc/LUM4-RRPU].

79. *Id.*

80. *See* Larry Gostin, *Public Health Strategies for Confronting AIDS: Legislative and Regulatory Policy in the United States*, 261 JAMA 1621, 1621 (1989) (emphasizing that the main groups tending to have HIV are "disfavored populations," making society less accepting of the disease and those people living with it).

81. *See* Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1018–19 (1989).

discriminatory measures targeted at people afflicted with HIV/AIDS. A survey seeking to better understand public perception of AIDS found that about half of the respondents believed that people with AIDS were responsible for their illness.[82] Further, many believed that HIV was a "gay disease."[83] Indeed, AIDS became known also as "gay compromise syndrome,"[84] "gay cancer,"[85] and "GRID" (or "Gay-Related Immune Deficiency").[86]

Second, stigma is often associated with conditions that are believed to be fatal and incurable.[87] AIDS was often believed to be a fatal condition, and a diagnosis was viewed as the equivalent of a death sentence.[88] Finally, stigma is most often associated with an illness that is contagious or is perceived to pose a risk to others. In the AIDS context, public perceptions were based on unrealistic fears and overestimation of the risks posed by casual contact.[89] A survey conducted in 1999 found that between 41 and 50 percent of respondents believed that HIV could be spread by sharing a drinking glass, being sneezed on, or using a public toilet.[90]

People are more likely to favor isolation and harsh regulations when they feel like the illness threatens them or others. For example, in 1986, prominent conservative social commentator William F. Buckley proposed that "[e]veryone detected with AIDS should be tattooed in the upper forearm, to protect common-needle users, and on the buttocks, to prevent the victimization of other homosexuals."[91] A British politician, and advisor to

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82. *See* Gregory M. Herek et al., *HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991–1999*, 92 AM. J. PUB. HEALTH 371, 372 (2002).

83. *See* Gregory M. Herek & John P. Capitanio, *AIDS Stigma and Sexual Prejudice*, 42 AM. BEHAV. SCIENTIST 1130, 1140–42 (1999) (describing a 1997 survey that found that many equated AIDS with sex between men—40 percent of respondents believed that a man could get AIDS simply by having sex with an uninfected man).

84. Robert O. Brennan & David T. Durack, Letter to the Editor, *Gay Compromise Syndrome*, 2 LANCET 1338, 1338 (1981).

85. *See* Lou Chibbaro Jr., *'Gay Cancer' Focus of Hearing*, WASH. BLADE (Apr. 16, 1982), http://digdc.dclibrary.org/cdm/compoundobject/collection/p16808coll24/id/8052/rec/1 [https://perma.cc/436B-HR2J].

86. Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES (May 11, 1982), https://www.nytimes.com/1982/05/11/science/new-homosexual-disorder-worries-health-officials.html [https://perma.cc/Y39H-QV75].

87. Gregory M. Herek, *Thinking About AIDS and Stigma: A Psychologist's Perspective*, 30 J.L. MED. & ETHICS 594, 596 (2002).

88. *See generally, e.g.*, Michael L. Closen & Scott H. Isaacman, *The Duty to Notify Private Third Parties of the Risk of HIV Infection*, 21 J. HEALTH & HOSP. L. 295 (1988); Arnold P. Peter & Heriberto Sanchez, *The Therapist's Duty to Disclose Communicable Diseases*, 14 W. ST. U. L. REV. 465 (1987).

89. *See* Gregory M. Herek & John P. Capitanio, *AIDS Stigma and Contact with Persons with AIDS: Effects of Direct and Vicarious Contact*, 27 J. APPLIED SOC. PSYCHOL. 1, 30 (1997) (discussing the stigma associated with AIDS and finding that direct contact with people who have AIDS increases empathy).

90. *See* Herek et al., *supra* note 82, at 373. *See generally* D. A. Lentine et al., *HIV-Related Knowledge and Stigma—United States, 2000*, 49 MORBIDITY & MORTALITY WKLY. REP. 1062 (2000).

91. *See* William F. Buckley Jr., Opinion, *Crucial Steps in Combating the Aids Epidemic; Identify All Carriers*, N.Y. TIMES (Mar. 18, 1986), https://archive.nytimes.com/

Margaret Thatcher, argued that the only way to stop AIDS was "to screen the entire population regularly and to quarantine all carriers of the disease for life."[92] Their views were not uncommon and highlight the fact that initially discriminating against and favoring isolation of people with AIDS was socially acceptable in the 1980s.

There is a plethora of evidence that people with HIV/AIDS faced various forms of discrimination. Such discrimination served to deter people from being tested and seeking treatment.[93] Press accounts beginning in the early 1980s reported stories of people with AIDS or people who associated with individuals afflicted with AIDS being evicted from their homes,[94] denied jobs,[95] shunned by family and friends, and victimized by targeted physical violence.[96] Public opinion polls from the 1980s revealed widespread fear of AIDS with many people supporting quarantine.[97] Further, many Americans favored allowing employers to require an AIDS blood test and firing school employees with AIDS.[98]

Thus, for public health officials to be successful in reducing the prevalence of HIV/AIDS and increasing treatment rates, they had to find a way to combat stigma. Their action plan was comprised of four component parts: information and education (directed at improving the attitudes toward people living with HIV/AIDS), counseling (providing support groups for encouraging positive behavior), coping-skills acquisition (teaching coping

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www.nytimes.com/books/00/07/16/specials/buckley-aids.html [https://perma.cc/L33K-S632].

92. *See* Christopher Monckton, *The Myth of Heterosexual AIDS*, AM. SPECTATOR, Jan. 1987, at 30.

93. Gregory M. Herek, *AIDS and Stigma*, 42 AM. BEHAV. SCIENTIST 1106, 1110–11 (1999) ("The widespread expectation of stigma, combined with actual experiences with prejudice and discrimination, exerts a considerable impact on [people with HIV] . . . . It affects many of the choices that [they] make about being tested and seeking assistance for their physical, psychological, and social needs.").

94. The term "courtesy stigma" was coined by Erving Goffman to describe the partners, family members, and close friends of stigmatized individuals who then become stigmatized by virtue of association. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 30–31 (1963); *see also* Philip Shenon, *A Move to Evict AIDS Physician Fought by State*, N.Y. TIMES (Oct. 1, 1983), https://www.nytimes.com/1983/10/01/nyregion/a-move-to-evict-aids-physician-fought-by-state.html [https://perma.cc/2RVX-DZQ6] (reporting that a physician faced eviction because tenants "were frightened of the AIDS patients and felt the nature of the doctor's practice would lower their apartment values").

95. Complaint at 7–8, Doe v. Rice, No. 08-cv-1678 (PLF) (D.D.C. Dec. 22, 2008).

96. In 1992, a national survey of people with HIV/AIDS found that almost a quarter of respondents had experienced violence in their communities because of their HIV status. *See* NAT'L ASS'N OF PEOPLE WITH AIDS, HIV IN AMERICA: A PROFILE OF THE CHALLENGES FACING AMERICANS LIVING WITH HIV 6 (1992).

97. Between 28 percent and 51 percent of respondents reported favoring quarantine of individuals with AIDS. *See* SUSAN M. BLAKE & ELAINE BRATIC ARKIN, AIDS INFORMATION MONITOR: A SUMMARY OF NATIONAL PUBLIC OPINION SURVEYS ON AIDS: 1983 THROUGH 1986, at 223 (1988).

98. *See id.* (finding that over 40 percent of respondents favored AIDS testing in the employment context and firing school employees with AIDS).

mechanisms to those affected), and contact with affected groups (increasing the interaction between affected groups and the general public).[99]

Information campaigns are a key component of public health responses to stigma. Historically, the stigma associated with some conditions declined dramatically when the public was informed about and understood the etiology.[100] For example, in 1832, the public viewed cholera as punishment from God for being promiscuous, intemperate, or lazy.[101] However, by 1866, due to an increased scientific understanding of the disease and public health campaigns, the public no longer associated cholera with divine punishment.[102] Instead, the public properly understood and grasped that cholera was spread by bacteria and could be eliminated by better sanitation practices.[103]

In the AIDS context, public health officials grappled with the tension between tracking and monitoring the afflicted to protect the public and educating and destigmatizing the afflicted.[104] Researchers recognized that without effective remedies against discrimination, individuals infected with HIV would be reluctant to come forward for testing and care.[105] Public health campaigns thus sought to educate the public and prevent discrimination.[106]

For instance, nonprescription syringe users were recruited for a study to try to destigmatize HIV/AIDS with the goal of increasing screenings.[107] Participants in the variable group were shown a ten-minute video that was developed to: (1) normalize HIV and HIV testing, (2) increase education about HIV and HIV testing, and (3) promote HIV testing and HIV status awareness.[108] They completed a pre-video survey that included an HIV stigma assessment, viewed the video, and then repeated the HIV stigma

99. Lisanne Brown, Kate Macintyre & Lea Trujillo, *Interventions to Reduce HIV/AIDS Stigma: What Have We Learned?*, 15 AIDS EDUC. & PREVENTION 49, 52–53 (2003).

100. *See* CHARLES E. ROSENBERG, THE CHOLERA YEARS: THE UNITED STATES IN 1832, 1849, AND 1844, at 149 (rev. ed. 1987).

101. *See* Herek, *supra* note 87, at 600.

102. *See id.*

103. *See id.*

104. *See generally* Herek & Glunt, *supra* note 71 (discussing how AIDS stigma hampered and shaped public health interventions).

105. PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC REPORT 119 (1988).

106. *See, e.g.*, ASS'N OF STATE & TERRITORIAL HEALTH OFFICIALS, GUIDE TO PUBLIC HEALTH PRACTICE: AIDS CONFIDENTIALITY AND ANTI-DISCRIMINATION PRINCIPLES 11 (1988); *see also* INST. OF MED., NAT'L ACAD. OF SCIS., CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH, HEALTH CARE, AND RESEARCH 19 (1986); Am. Med. Ass'n Bd. of Trs., *Prevention and Control of Acquired Immunodeficiency Syndrome: An Interim Report*, 258 JAMA 2097, 2101–02 (1987).

107. Alexis V. Rivera et al., *Factors Associated with HIV Stigma and the Impact of a Nonrandomized Multi-Component Video Aimed at Reducing HIV Stigma Among a High-Risk Population in New York City*, 27 AIDS CARE 772, 772–73 (2015) (finding that subjects who viewed an educational video were less likely to report HIV blame and HIV shame postvideo, compared to those in the nonvideo control group).

108. *See id.*

assessment.[109] Participants in the control group completed one survey and did not watch the video.[110] Pre-video differences in HIV stigma assessment were not present between the control and variable groups.[111] However, at the conclusion of the study, those who watched the video were significantly less likely to report HIV stigma.[112]

In another study, physical therapy students in the variable group were presented with a four-hour educational unit on HIV/AIDS.[113] Their attitudes toward people living with AIDS were tested before and one week after completion of the unit study.[114] The group that participated in the HIV/AIDS educational unit showed increased knowledge about HIV/AIDS, increased willingness to treat people with HIV/AIDS, and generally more positive views toward people with HIV/AIDS.[115]

To further educate and inform, public health officials sought to destigmatize HIV/AIDS through enforcing and expanding disability, privacy, confidentiality, and informed-consent laws.[116] The fruits of their efforts ranged from state and local prohibitions on discrimination[117] to recognizing HIV status as a disability under the ADA.[118] These efforts ultimately yielded tangible results.

For example, the share of the public who reported that they would be "very comfortable" working with someone who has HIV increased from about one-third in 1997 to roughly one-half in 2011.[119] There have also been striking declines since the early years of the epidemic in the share of the public expressing the view that AIDS is a punishment (from 43 percent in 1987 to 16 percent in 2011) or that it is people's own fault if they contract the disease

109. *See id.*
110. *See id.*
111. *See id.* at 774.
112. *See id.* at 773.
113. Sharon L. Held, *The Effects of an AIDS Education Program on the Knowledge and Attitudes of a Physical Therapy Class*, 73 PHYSICAL THERAPY 156, 156–58 (1992).
114. *Id.* at 159.
115. *Id.* at 159–62.
116. *See, e.g.*, CONN. GEN. STAT. § 19a-583 (2017); DEL. CODE ANN. tit. 16, § 1203(a) (2018); FLA. STAT. § 381.004(2)(d)–(g) (2018); 410 ILL. COMP. STAT. 305/9 (2018); IOWA CODE § 141A.9 (2018); KY. REV. STAT. § 214.625(5) (2018); LA. REV. STAT. ANN. § 40:1300.14 (2017); ME. REV. STAT. tit. 5, § 19203 (2017); MASS. GEN. LAWS ch. 111, § 70F (2017); MONT. CODE ANN. § 50-16-1013 (2018); N.H. REV. STAT. ANN. §§ 141-F:7–:8 (2018); N.M. STAT. ANN. § 24-2B-6 (2018); N.Y. PUB. HEALTH LAW § 2782 (2018); OR. REV. STAT. §§ 433.045, 433.075 (2018); TEX. HEALTH & SAFETY CODE ANN. § 81.103 (2017); VA. CODE ANN. § 32.1-36.1 (2018); W. VA. CODE §§ 16-3C-1, 16-3C-3 (LexisNexis 2018); WIS. STAT. § 252.15 (2016).
117. *See, e.g.*, NEB. REV. STAT. § 20-168 (2018). The Nebraska Individual Rights Act prohibits discrimination in public and private employment, housing, education, and public accommodations on the basis that the individual discriminated against "is suffering or is suspected of suffering from human immunodeficiency virus infection or acquired immunodeficiency syndrome." *Id.*
118. Bragdon v. Abbott, 524 U.S. 624, 655 (1998).
119. THE HENRY J. KAISER FAMILY FOUND., HIV/AIDS AT 30: A PUBLIC OPINION PERSPECTIVE 8 (2011), http://kaiserfamilyfoundation.files.wordpress.com/2013/07/8186-hiv-survey-report_final.pdf [https://perma.cc/3RVC-YWXL].

(from 51 percent in 1987 to 29 percent in 2011).[120] In addition, the public is better informed about transmission. In a recent survey, 27 percent of respondents reported believing that HIV/AIDS could be transmitted from sharing a drinking glass with an infected person, down from 44 percent in 1985.[121] Recently, more favorable public sentiment and awareness has fostered increased testing and decreased prevalence. Findings show that annual HIV diagnoses in the United States fell by 19 percent between 2005 and 2014 (from 48,795 to 39,718 per year), while the rate of testing increased slightly.[122]

While there is still room for improvement, over the past few decades AIDS stigma has been reduced and public awareness and understanding about AIDS has increased. In addition, the outlook for people living with HIV/AIDS has increased. The life expectancy for someone diagnosed with AIDS at twenty years of age has increased to seventy-eight.[123] Thus, the AIDS destigmatization interventions have had demonstrable success in decreasing stigma and creating conditions in which people feel comfortable getting tested.

B. Denormalization of Tobacco Use

Tobacco is inextricably linked with the history of the United States. Christopher Columbus noted the addictive qualities of tobacco shortly after making landfall in the Americas. He wrote that "it was not within [the crews'] power to refrain from indulging in the habit."[124] In 1604, King James of England noted that tobacco was "hatefull to the Nose, harmefull to the braine [and] daungerous to the Lungs."[125] Yet, it was not until 1957 that the U.S. Surgeon General publicly opined that tobacco could be linked to some cancers and, in 1964, issued a report indicating a link between cigarette smoking and lung cancer.[126] The 1964 Surgeon General's report was issued

120. *Id.*

121. Further, only 17 percent believed that HIV/AIDS could be transmitted by using a toilet seat after someone with HIV/AIDS. *See* WASH. POST & HENRY J. KAISER FAMILY FOUND., 2012 SURVEY OF AMERICANS ON HIV/AIDS 13 (2012), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8334-f.pdf [https://perma.cc/VY7D-PEED]. In 1985, 35 percent of people believed that toilet seat transmission was possible. *Id.*

122. The decrease was largely attributable to dramatic declines in prevalence within several populations, including heterosexuals, people who inject drugs, and African Americans. *See U.S. Statistics*, HIV.GOV, https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics [https://perma.cc/9X9E-7QQH] (last visited Nov. 15, 2018).

123. Robert Preidt, *Life Expectancy with HIV Nears Normal with Treatment*, CBS NEWS (May 11, 2017), https://www.cbsnews.com/news/life-expectancy-with-hiv-nears-normal-with-treatment/ [https://perma.cc/RQ8H-PBJX].

124. RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 9 (1996).

125. KING JAMES I OF ENGLAND, A COUNTERBLASTE TO TOBACCO (1604).

126. *See generally* U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. HEALTH SERV. PUBL'N NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

at a time when tobacco consumption was widespread, with 50 percent of U.S. men and 35 percent of women reporting tobacco use.[127]

In response to the report, Congress enacted the Cigarette Labeling and Advertising Act (the "Cigarette Labeling Act") in 1965, which required warning labels on all cigarette packages distributed in the United States.[128] The Cigarette Labeling Act vested federal regulators with exclusive control over all aspects of cigarette promotion, labeling, and advertising.[129] In 1970, the Public Health Cigarette Smoking Act was signed into law by Richard Nixon and effectively banned the advertising of cigarettes on television and radio.[130] Prior to the Cigarette Labeling Act's passage, tobacco companies had spent millions of dollars on advertising and promoting cigarettes such that, in the minds of many Americans, cigarettes were inextricably linked with athletic prowess, social success, and sexual attraction.[131] Thus, the task of trying to reduce consumption of tobacco products was Herculean.

Public health advocates have spent the ensuing decades pursuing an aggressive denormalization strategy to reduce consumption of tobacco products.[132] A tobacco denormalization approach is unique in that it encourages tobacco-related stigma rather than working to mitigate stigma, as in prevention and treatment efforts focused on HIV/AIDS.[133] In the tobacco context, denormalization strategies attempt "to change the broad social norms around using tobacco—to push tobacco use out of the charmed circle

127. *See* Ronald Bayer, *Stigma and the Ethics of Public Health: Not Can We but Should We*, 67 SOCIAL SCI. & MED. 463, 466 (2008).

128. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331–1341 (2012)). The Act took effect on January 1, 1966. *Id.* § 11, 79 Stat. at 294. The Act's declaration of policy and purpose is set forth in § 1331 and notes that the purpose is to adequately inform the public that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes. 15 U.S.C. § 1331 (2012).

129. Lee Gordon & Carol A. Granoff, *A Plaintiff's Guide to Reaching Tobacco Manufacturers: How to Get the Cigarette Industry off Its Butt*, 22 SETON HALL L. REV. 851, 861 (1992) (explaining that the purpose of the legislation was to "mandate the printing of a uniform warning on all packages of cigarettes sold in the country about the hazards of cigarette smoking and to protect the national economy by permitting the manufacture and sale of cigarettes to continue").

130. Pub. L. No. 91-222, 84 Stat. 87 (1970) (amending the Federal Cigarette Labeling and Advertising Act).

131. *See generally* Pamela M. Ling & Stanton A. Glantz, *Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence from Industry Documents*, 92 AM. J. PUB. HEALTH 908 (2002) (discussing advertising strategies of tobacco companies).

132. *See* Tamar M. J. Antin et al., *Tobacco Denormalization as a Public Health Strategy: Implications for Sexual and Gender Minorities*, 105 AM. J. PUB. HEALTH 2426, 2426 (2015) (noting that the "success of tobacco denormalization is widely accepted").

133. *See generally* Richard Parker & Peter Aggleton, *HIV and AIDS-Related Stigma and Discrimination: A Conceptual Framework and Implications for Action*, 57 SOC. SCI. & MED. 13 (2003) (explaining that the majority of the empirical research on stigma in relation to HIV and AIDS has tended to focus on the beliefs and attitudes of the public and advocating for structural interventions so that discrimination and stigmatization are no longer tolerated).

of normal, desirable practice to being an abnormal practice"[134] and create a culture where smokers are viewed negatively.[135]

Two main types of denormalization strategies have been identified. Social denormalization strategies include limiting where smoking may take place, restricting how tobacco products may be sold and advertised, and informing the public about the dangers of secondhand smoke through media campaigns.[136] At the other end of the spectrum, tobacco industry denormalization strategies focus specifically on the tobacco industry and its conduct and seek to "raise people's awareness of the responsibility of the tobacco industry for tobacco-related disease, and to expose the industry's manipulative tactics."[137]

The specific interventions utilized included: (1) raising taxes on tobacco products;[138] (2) limiting exposure to secondhand smoke in public places, workplaces, outdoor venues, and, in some instances, even private residences;[139] (3) curtailing the advertising and promotion of tobacco products, especially to youth;[140] and (4) initiating litigation against the industry for the public costs associated with tobacco-related illnesses.[141] These interventions have been successful in denormalizing tobacco use and creating a stigma around tobacco use. For instance, researchers have found that over 80 percent of adult smokers believe that society disapproves of smoking.[142] Many reported that they enjoy smoking less now that they are relegated to smoking outside and in designated areas.[143] Further, almost all

134. CAL. DEP'T OF HEALTH SERVS./TOBACCO CONTROL SECTION, A MODEL FOR CHANGE: THE CALIFORNIA EXPERIENCE IN TOBACCO CONTROL 3 (1998), http://dhhs.ne.gov/publichealth/TFN%20Docs/Model%20for%20Change%20the%20California%20Experience.pdf [https://perma.cc/L9CW-N6XP].

135. *See, e.g.*, Deborah Ritchie et al., *"But It Just Has That Sort of Feel About It, a Leper"—Stigma, Smoke-Free Legislation and Public Health*, 12 NICOTINE & TOBACCO RES. 622, 625 (2010) (noting that smokers who are forced to smoke in designated areas feel a sense of isolation and use labels like "leper" and "outcast" to describe their treatment).

136. Anne M. Lavick, *Denormalization of Tobacco in Canada*, 5 SOC. MARKETING Q. 82, 82 (1999).

137. *See* Hammond et al., *supra* note 73, at 225–26.

138. *See, e.g.*, Frank J. Chaloupka et al., *Policy Levers for the Control of Tobacco Consumption*, 90 KY. L.J. 1009, 1019 (2001) (noting that a number of state governments have increased tobacco taxes to promote public health and fund programs that reduce tobacco use).

139. *See, e.g.*, Jean C. O'Connor et al., *Preemption of Local Smoke-Free Air Ordinances: The Implications of Judicial Opinions for Meeting National Health Objectives*, 36 J.L. MED. & ETHICS 403, 406 (2008) (discussing challenges to state and local legislation banning indoor smoking).

140. *See, e.g.*, Lisa K. Goldman & Stanton A. Glantz, *Evaluation of Antismoking Advertising Campaigns*, 279 JAMA 772, 773–76 (1998) (discussing and analyzing eight antismoking advertising strategies).

141. *See generally, e.g.*, Graham E. Kelder Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63 (1997) (discussing the success of the waves of tobacco litigation).

142. Geoffrey T. Fong et al., *The Near-Universal Experience of Regret Among Smokers in Four Countries: Findings from the International Tobacco Control Policy Evaluation Survey*, 6 NICOTINE & TOBACCO RES. 341, 348 (2004).

143. *See* Ritchie et al., *supra* note 135, at 625 (discussing the impact of denormalization interventions on how smokers felt about themselves).

smokers are acutely aware of the negative aspects of tobacco use, including the negative health impacts and addictive nature. As a result, most regret beginning to smoke.[144]

Nearly nine out of ten current adult smokers began smoking before the age of eighteen.[145] Thus, a tremendous amount of energy has been directed at youth smoking prevention policy. In designing effective interventions to prevent youth from smoking, researchers have sought to understand the social context in which most kids smoke. Researchers have found that attitudes of parents, friends, and peers toward smoking, whether or not friends or peers smoke, and whether or not a parent or other family member smokes are all significantly associated with youth smoking behavior.[146] Thus, the most successful intervention models build skills needed to resist negative influences.[147] Other less successful models simply provide information about the health risks and negative social consequences of smoking or programs that attempt to associate choosing not to smoke with having a healthy self-esteem.[148] Overall, denormalization strategies have been successful in reducing tobacco use.[149]

III. RAPE MESSAGING

Criminal rape laws in late nineteenth-century to early twentieth-century America were part of a larger state effort to police sexuality, entrench male domination over women through chastity, and enforce white racial supremacy.[150] Sexist gender norms were woven into the fabric of rape law in the form of often insurmountable obstacles to prosecution such as

144. *See* Fong et al., *supra* note 142, at 347–48 (finding that over 80 percent of smokers are aware of the negative consequences of smoking and often have tried unsuccessfully to quit).

145. *Youth and Tobacco Use*, CDC, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm [https://perma.cc/2QDA-BAEF] (last visited Nov. 15, 2018).

146. *See generally* PETER D. JACOBSON ET AL., COMBATING TEEN SMOKING: RESEARCH AND POLICY STRATEGIES (2001).

147. *See* William H. Bruvold, *A Meta-Analysis of Adolescent Smoking Prevention Programs*, 83 AM. J. PUB. HEALTH 872, 873 (1993).

148. See Paula M. Lantz et al., *Investing in Youth Tobacco Control: A Review of Smoking Prevention and Control Strategies*, 9 TOBACCO CONTROL 47, 48 (2000).

149. *See generally* Antin et al., *supra* note 132.

150. *See* Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 179 (2006) ("Rape law was used to police the sexual—to police virginity, chastity, and monogamy—and to police through the sexual—to enforce gender and racial hierarchies as well as codes of public morality.").

resistance[151] and corroboration[152] requirements. These corroboration requirements placed specific credibility burdens on rape victims and legally cemented sexism by presuming the rape victim to be untruthful unless the prosecution presented evidence independent of her testimony.

Such laws also reflected the entrenched caricature of the lying, vindictive shrew.[153] The vindictive shrew image assumes that women are jealous creatures who desire to make men suffer for leaving or mistreating them and fabricate rape stories as revenge.[154] Taken together, these laws criminalized the classic rape narrative of a violent attack on a chaste woman by a stranger whom she vigorously resists and communicated a message that most rapes were not worthy of criminal sanctions. As a result, women who were raped felt silenced because sharing their rape risked shame and humiliation.[155] Thus, feminist rape reforms sought to change rape messaging, destigmatize rape, and empower victims.

A. Destigmatizing Rape

Historically, the meaning of stigma has included two central concepts: immutability and negativity.[156] Stigma can be defined as "an enduring condition, status, or attribute that is negatively valued by a society and whose possession consequently discredits and disadvantages an individual."[157] Figuratively, stigmas are marks carried by individuals. Such markings denote that the marked individual is a criminal, deviant, or otherwise

151. *See, e.g.*, State v. Dizon, 390 P.2d 759, 764 (Haw. 1964) ("Passive or tacit resistance is insufficient to constitute the crime. In other words, the resistance must be in good faith, real, active and not feigned or pretended."); People v. Scott, 95 N.E.2d 315, 317 (Ill. 1950) (reversing a rape conviction where the defendant induced the victim to enter his apartment under false pretenses, beat her for ten minutes, threatened her with death and subsequently had intercourse with her for five hours during which she exhibited no resistance). The *Scott* court held that it is "fundamental that voluntary submission by the woman while she has power to resist, no matter how reluctantly yielded, amounts to consent." 95 N.E.2d at 317.

152. Generally, a conviction for rape required evidence in addition to the victim's testimony—for example, physical injures, torn clothing, or other evidence of a physical struggle. *See* Anderson, *supra* note 6, at 650–51.

153. *See* Dominic Abrams et al., *Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity*, 84 J. PERSONALITY & SOC. PSYCHOL. 111, 111–25 (2003); *see also* Shay Arthur, *Panola County Deputy Accused of Raping Officer*, WREG MEMPHIS (Mar. 10, 2018, 7:21 AM), https://wreg.com/2018/03/09/panola-county-deputy-accused-of-raping-officer/ [https://perma.cc/3KLC-YLJ2] (reporting that the alleged rapist opined that the victim made the rape allegation because "she wanted to keep a good clean reputation and that's the only thing I can think of" and "[t]he fact that I said something to someone and it made her mad").

154. *See* John Dwight Ingram, *Date Rape: It's Time for "No" to Really Mean "No,"* 21 AM. J. CRIM. L. 3, 7 (1993).

155. Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner [https://perma.cc/XTZ5-S8M5].

156. *See* Herek, *supra* note 87, at 594–95 (noting that the term stigma "derives from the same Greek roots as the verb 'to stick,' that is, to pierce or tattoo").

157. *See id.* at 595.

deserving of ostracism and condemnation.[158] Generally, stigmatized individuals view themselves as being different and have less power and access to resources than do normal individuals.[159]

It is not uncommon for rape victims to view themselves as disconnected, powerless, and anxious.[160] Publicly alleging rape often subjects the rape victim to victim-blaming, smear campaigns, and harassment.[161] American society has tolerated rape for centuries.[162] It also has tolerated isolating, humiliating, and vilifying women who report rape.[163] Women who report being raped are often not believed.[164] Mistrust of women has been linked to biblical tradition[165] and is well documented.[166] The belief that women lie, in particular about sex, is widespread.[167]

Historically, rape victims have found little solace in law enforcement and mental health professionals. Besides trying to persuade women to drop their complaints, police officers routinely lose files or find allegations to be

158. *See id.*

159. *See generally* GOFFMAN, *supra* note 94.

160. *In re* Pittsburgh Action Against Rape, 428 A.2d. 126, 138 (Pa. 1981) (Larsen, J., dissenting) (noting that rape victims feel an "acute and severe loss of control" in addition to shame, guilt, depression, and anger).

161. *See, e.g.*, Jessica Valenti, *We Can't End Rape Stigma by Forcing All Victims to Identify Themselves*, GUARDIAN (Apr. 8, 2005), https://www.theguardian.com/commentisfree/2015/apr/08/end-rape-stigma-anonymity-victims [https://perma.cc/2WSW-PMMR].

162. *See, e.g.*, Lilia Melani & Linda Fodaski, *The Psychology of the Rapist and His Victim*, *in* RAPE: THE FIRST SOURCEBOOK FOR WOMEN 82, 84 (New York Radical Feminists eds., 1974) (noting that "[w]e live in a culture that, at best, condones and, at worst, encourages women to be perennial victims, men to be continual predators, and sexual relations to be fundamentally aggressive").

163. *See* Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 177 (1992).

164. *See* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 586–89 (1997) (describing how rape victims are blamed and juries' disregard of harm to women who defy societal expectations). *See generally* McGee et al., *supra* note 34.

165. *See, e.g.*, 1 *Timothy* 2:11–:14 ("Let a woman learn quietly with all submissiveness. I do not permit a woman to teach or to exercise authority over a man; rather, she is to remain quiet. For Adam was formed first, then Eve; and Adam was not deceived, but the woman was deceived and became a transgressor.").

166. *See, e.g.*, Marybeth Hamilton Arnold, *"The Life of a Citizen in the Hands of a Woman": Sexual Assault in New York City, 1790 to 1820*, *in* PASSION & POWER 35, 40 (1985) (quoting an eighteenth century defense lawyer in a rape trial, "[a]ny woman who is not an abandoned Prostitute will appear to be averse to what she inwardly desires; a virtuous girl on the point of yielding will not appear to give a willing consent"); *see also* Alice Sebold, *HERS; Speaking of the Unspeakable*, N.Y. TIMES MAG. (Feb. 26, 1989), https://www.nytimes.com/1989/02/26/magazine/hers-speaking-of-the-unspeakable.html [https://perma.cc/2VC2-65SQ] (reporting that "[w]omen disassociate themselves from rape because the vast majority of people still believe that a woman who has been raped is filthy, better off dead, irrational, or got what she was looking for").

167. For example, the drafters of the Model Penal Code argued that the prompt-complaint doctrine was necessary to protect against the possibility that "unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations to a vindictive complainant." MODEL PENAL CODE § 213.6 cmt. (1980); *see also* Martha R. Burt, *Rape Myths and Acquaintance Rape*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 31, 33 (Andrea Parrot & Laurie Bechhofer eds., 1991) (noting the continuing belief that some "women like to be treated violently and that force is sexually stimulating to women").

"unfounded."[168] Mental health professionals have studied women's fabrication of rape and theorized about women's desire to be raped.[169] In addition, prosecutors too often exercise their discretion not to pursue rape cases because conviction rates are so low.[170] When a prosecutor does elect to prosecute a rape case, the process of a rape trial often reinforces isolation and the stigma of rape.[171]

Until the 1970s, women did not publicly speak of rape.[172] They lacked safe places to talk and often spiraled into a cycle of anxiety, depression, and despair.[173] The first rape crisis centers were started and opened by women in 1970[174] and provided emotional support, counseling and a place where women could tell their stories and be believed. These centers focused on combatting stigma and the myth that women who are raped bear some

168. There is a long history of police departments wrongly coding cases as "unfounded." *See* Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALT. SUN (June 27, 2010), http://www.baltimoresun.com/news/bs-md-ci-rapes-20100519-story.html [https://perma.cc/55Y2-E5WS] (exposing the Baltimore Police Department's practice of substantially undercounting reported rapes); Laura Maggi, *NOPD Downgrading of Rape Reports Raises Questions*, NOLA.COM (Sept. 29, 2009), https://www.nola.com/news/index.ssf/2009/07/nopd_downgrading_of_rape_repor.html [https://perma.cc/X3C6-4L8A] ("More than half the time New Orleans police receive reports of rape or other sexual assaults against women, officers classify the matter as a noncriminal 'complaint.'"); Michael Matza, *Victims' Testimony at Congressional Hearing Show "Chronic Failure" in Rape Investigations*, PHILA. INQUIRER (Sept. 15, 2010, 3:01 AM), http://www.philly.com/philly/news/local/20100915_Victims__testimony_at_congressional_hearing_show__quot_chronic_failure_quot__in_rape_investigations.html [https://perma.cc/EF2K-KUCC] ("Philadelphia police had severely underreported rapes for decades through the 1990s, a problem brought to light by Inquirer investigative reporting . . . ."); *see also* Associated Press, *Prosecution Seen as Unlikely in 228 Rape Cases in Oakland*, N.Y. TIMES (Nov. 13, 1990), https://www.nytimes.com/1990/11/13/us/prosecution-seen-as-unlikely-in-228-rape-cases-in-oakland.html [https://perma.cc/9K7V-R5AW] (reporting that the police in Oakland, California classified numerous complaints of rape as "unfounded" and that, upon reinvestigation, 79 of 112 rapes did occur).

169. *See, e.g.*, Sandra Sutherland & Donald Scherl, *Patterns of Response Among Victims of Rape*, 40 AM. J. ORTHOPSYCHIATRY 503, 503 (1970) ("The victim's adjustment following sexual assault has received little attention in the literature. Specific references to the young woman most frequently discuss the possibility of her conscious or unconscious participation in the incident."); *see also* DAVID ABRAHAMSEN, THE PSYCHOLOGY OF CRIME 163, 165 (1960) ("[T]he offender needs an outlet for his sexual aggression and finds a submissive partner who unconsciously invites sexual abuse and whose masochistic needs are being fulfilled.").

170. *See* Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1326 (2005) (observing that "prosecutors seek the 'ideal' rape victim to maximize their chance of achieving a conviction.").

171. Charles Laurence, *Words Heal Rape Victim*, CHI. SUN-TIMES, Jan. 31, 1999, at 33.

172. *See generally* SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE (1982).

173. Adult women who have been raped are thirteen times more likely to attempt to kill themselves. NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 7 (1992); *see also* Dean G. Kilpatrick et al., *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHOPSYCHIATRY 658, 661 (1979) (finding that women who have been raped show more "phobic anxiety, paranoid ideation, and psychoticism").

174. Janet Gornick et al., *Structure and Activities of Rape Crisis Centers in the Early 1980s*, 31 CRIME & DELINQUENCY 247, 249 (1985).

responsibility for the rape.[175] Additionally, the first rape speak-out was held in New York City in 1971.[176] Over time, rape crisis centers and speak-outs spread across the country, which provided a forum for women to share, heal, and be empowered.

The overtly sexist elements of rape law were targeted by feminist rape reformers who sought to reform rape law and educate the public about sexual assault stereotypes. Susan Brownmiller fought for rape to be deemed a "real" crime and taken seriously,[177] which led to the much-publicized feminist maxim that "rape is a crime of violence."[178] Susan Estrich's advocacy focused on exposing various "myths," like that of the chaste lady, sex object, and vindictive shrew, which are inherent in the elements of rape law.[179] Estrich believed that eliminating the bias produced by rape myths required more than just formal equality between rape and other crimes; it required "some change in public attitude."[180]

Despite some variations in focus, almost all rape reformers focused on ex ante reforms and embraced the idea that elimination of the legal barriers that formally differentiated rape from other crimes was necessary.[181] As a result of efforts by reformers, courts and legislatures began to eliminate resistance requirements.[182] Eradication of the formal obstacles helped produce significant legal and social changes regarding rape. These reforms changed the message and acknowledged that some rapes were indeed worthy of punishment.

As a legal matter, eliminating the obstacles to prosecution put stranger rapes involving force on the same footing as other violent crimes. Current rape law rarely permits, and modern juries rarely support, acquittal of a violent stranger rapist based on lack of physical resistance or corroboration.[183] While eliminating formal legal barriers to prosecution and

175. *See, e.g.*, JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 118 (1981) (discussing a study in which "most respondents . . . saw women's behavior and/or appearance as the second most frequent cause of rape").

176. About three hundred women met in a small church and forty women shared vivid details about being raped. *See* FLORA DAVIS, MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960, at 310 (1991).

177. *See* BROWNMILLER, *supra* note 8, at 377.

178. *See id.*

179. *See* Estrich, *supra* note 25, at 1090.

180. *See id.* at 1181.

181. *See generally* CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT (1992) (describing the role that feminist groups, including the National Organization for Women, played in lobbying state legislatures to reform rape law).

182. Only eight states require the victim to resist. ALA. CODE § 13A-6-60(8) (2018); DEL. CODE ANN. tit. 11, § 761(j)(1) (2018); IDAHO CODE §§ 18-6101(4)–6108(4) (2018); LA. REV. STAT. ANN. §§ 14:41–:43 (2018) (requiring resistance for aggravated rape but not for forcible or simple rape); MO. REV. STAT. § 556.061(12)(a) (2016); NEB. REV. STAT. §§ 28-318(8)(b)–(c), 28-318(9)(a) (2018); WASH. REV. CODE § 9A.44.010(6) (2018); W. VA. CODE ANN. § 61-8B-1(1)(a) (LexisNexis 2018). Sixteen states do not formally require resistance, but define elements of force and consent as requiring the victim to be "incapable of resisting," "unable to resist," or "prevented from resisting."

183. Generally, irrespective of the crime, criminal law tends to be harsher when crimes are committed by strangers. *See, e.g.*, Carissa B. Hessick, *Violence Between Lovers, Strangers,*

publicizing the violent nature of rape did much to shape society's condemnation of rapes that fall within the classic rape narrative, it did far less to advance the cause of the majority of rape victims, who are acquainted with their rapist.[184]

A study of Travis County, Texas, found that the probability of indictment was much higher in stranger rape cases (58 percent) than in acquaintance-rape cases (29 percent).[185] Of the rape cases that were dismissed, 50 percent involved acquaintances, 38 percent persons who had just recently met, and only 12 percent were stranger rape cases.[186] This is likely because society is still willing to condone acquaintance rapes. This willingness is founded upon lingering sexist beliefs. For example, many people still believe that women who dress and behave in sexual ways deserve to be raped.[187]

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and Friends, 85 WASH. L. REV. 344, 349 (2007) (noting that the commonly held view among criminal law scholars "is that the criminal law is most likely to become involved, to proceed aggressively, and to be penal in style when the parties are strangers; it is least likely to become involved and most likely to be lenient and conciliatory when they are intimates"); *see also* Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking over Time*, 38 LAW & SOC'Y REV. 105, 107–08 (2004) (noting that "studies using bivariate analyses have consistently found that violence between intimates is treated more leniently by criminal justice officials than violence that occurs between strangers"; however, "the effect of victim-defendant relationship on court outcomes is less clear in more rigorous multivariate analyses that enable researchers to control for the effects of other legal (e.g., prior criminal record, offense seriousness) and extralegal (e.g., race, age) factors").

184. *See, e.g.*, Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS NEWSHOUR (Dec. 11, 2014), https://www.pbs.org/newshour/education/four-five-acts-campus-sexual-assault-go-unreported-police [https://perma.cc/8R3G-XL9H] (explaining that the massive underreporting of campus rape is significantly attributable to the fact that victims "know in our society that the only rapes that are taken seriously are those committed by strangers and are significantly violent"); *see also* John F. Decker & Peter G. Baroni, *No Still Means "Yes": The Failure of the Non-Consent Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1101 (2013) ("Despite a seeming trend toward rejecting antiquated force requirements and embracing non-consent standards for sex crimes, the reality is far from progressive. First, many states still require a showing of forcible compulsion or a victim's incapacity to consent for a sex crime conviction.").

185. Robert A. Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 VA. L. REV. 357, 379 (1978). Similarly, a study of assault cases in Los Angeles revealed that "non-stranger cases [were] dismissed three times as often as stranger-to-stranger cases." NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NON-STRANGER VIOLENCE: THE CRIMINAL COURT'S RESPONSE 2 (1983) ("Court officials are cited as believing that [non-stranger violence] cases do not appropriately belong in the criminal courts.").

186. *See* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1214 (1997).

187. *See, e.g.*, Ed Pilkington, *SlutWalking Gets Rolling After Cop's Loose Talk About Provocative Clothing*, GUARDIAN (May 6, 2011), https://www.theguardian.com/world/2011/may/06/slutwalking-policeman-talk-clothing [https://perma.cc/T37F-BZZD] (noting that Michael Sanguinetti, a cop who spoke to law schools in Toronto, became the catalyst for a worldwide anti-victim-blaming movement when he addressed a group of ten students and said: "I've been told I'm not supposed to say this—however, women should avoid dressing like sluts in order not to be victimized"); Barbara Walsh, *Jury Acquits Man of Rape, Cites Woman's Clothing*, SUN SENTINEL (Oct. 5, 1989), http://articles.sun-sentinel.com/1989-10-05/news/8902020477_1_verdict-juror-georgia-woman [https://perma.cc/AK2T-WFTE] (reporting the remarks of a juror after acquitting a defendant who had been charged with

Similarly, the vindictive shrew myth has remained ever present at acquaintance-rape trials, which leads jurors to demand evidence of corroboration despite elimination of the formal requirement. In addition, courts routinely allow evidence of a complainant's sexual history on the theory that a woman who has consented to sex once is more likely to have consented to sex at the time of the alleged rape.[188] Faced with these hurdles, reformers pivoted and began advocating for transformation in two main areas of the law: evidentiary prohibitions (shield laws) and actus reus standards. Reformers wanted to alter the message such that people would collectively embrace the idea that a woman's prior sexual history was irrelevant and that the only relevant inquiry is, simply, did the woman consent. They wanted to shift the scrutiny from the victim to the rapist.

Generally, rape shield laws create specific rules prohibiting the defense from presenting evidence of complainants' past sexual conduct or "precipitation" evidence, like dress, but most of these laws contain significant exceptions.[189] Reformers believed that rape shield laws would make trials less traumatic for victims and also prevent juror sexism from influencing verdicts.[190] Rape shield laws were intended to counter the myth that rape victims want to be raped.[191]

The second major reform focused on pushing for affirmative-consent laws. Without such reforms, jurors are free to choose what amount and kind of evidence supports an inference of consent or nonconsent.[192] Defining rape as sex in the absence of affirmative consent produces two tangible benefits:

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knifing, beating with a rock, and raping a woman dressed in a lace skirt and wearing no underwear: "The way she was dressed with that skirt, you could see everything she had. She was advertising for sex.").

188. *See* Anderson, *supra* note 28, at 54 ("Consent was also, in practice and effect, transferable to other parties; if a woman consented to sexual intercourse with men to whom she was not married, she was deemed *indiscriminate* in her sexual life. As a result, her sexual consent lost its differentiated and unique nature and she was considered to have functionally consented to sex with others.").

189. There are typically three exceptions. *See* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 844–45 (2013). First, such evidence may be admitted when offered as proof that someone other than the defendant committed the rape. *Id.* Second, if the defendant raises consent as a defense, then evidence of specific instances of the alleged rape victim's sexual behavior with the defendant may be admitted to prove consent or by the prosecution. *Id.* Finally, such evidence is admissible if the exclusion of such evidence "would violate the defendant's constitutional rights." *Id.*

190. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 798 (1986) ("Specifically, reformers contended that [rape shield] legislation . . . would encourage victims to report rapes and cooperate in the prosecution of their assailants. In addition to shielding the complainant from humiliating and harassing inquiry, restricting the admissibility of evidence of unchastity would prevent juror misuse of such evidence.").

191. Katharine K. Baker, *Once a Rapist?: Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 583 (1997) (discussing that proponents of rape shield legislation wanted to counter the "tendency of juries to believe that rape victims consented to the alleged acts").

192. *See, e.g.*, Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2181 (1995) (arguing that consent should mean "affirmative permission clearly signaled").

(1) it places the burden of communication properly on the person desiring the sex, and (2) it focuses jurors' attention on whether consent was expressed in that particular sexual encounter instead of focusing on other evidence like the victim's dress. In advocating for affirmative-consent laws, reformers also lobbied for the creation of new offenses. Experience had shown that jurors were reluctant to convict defendants for rape, which carried penalties ranging from execution to twenty years in prison, unless the woman suffered bodily harm.[193] So, after successful lobbying, many state laws were reformed to sort rape cases by "degrees" based on level of force, threat of force, or proxies[194] for threat of force.[195] These lesser charges reduced the penalty for "nonviolent rapes" in hopes that more convictions would result.

B. Consequences of Destigmatization

Early rape reform advocates confronted a cruel landscape where rape victims who had the courage to come forward were too often blamed and disbelieved. They were confronted with a justice system that did not take rape seriously. Thus, it is not surprising that early reformers utilized a two-prong approach of (1) increasing public awareness about the prevalence of violence against women to end rape stigma, and (2) reforming criminal law to make it easier to secure rape convictions.[196] This approach can be characterized as being focused on rape victims ex post. Reformers wanted to create an environment where the pain and trauma of rape victims would be acknowledged and the perpetrators would be brought to justice.

Yet, their attempts to destigmatize rape victims and increase convictions rates have been only marginally successful.[197] In addition, their advocacy has led to a string of unintended consequences. When public health advocates combatted AIDS stigma, they sought to humanize people living with HIV/AIDS. They focused on increasing awareness of how the disease was transmitted and targeted the perception that people with HIV/AIDS deserved their punishment.[198] Notably, public health advocates did not focus on one particular group of people living with HIV/AIDS. Instead, they sought to paint an image of a disease that affected a wide range of people.

Unfortunately, the rape reform advocates, perhaps because many of them were feminists, approached expanding awareness through the lens of women

193. *See* Ros, *supra* note 29, at 845.

194. Proxies for forcible compulsion include physical harm, the presence of a dangerous weapon, commission of another crime, mental incapacity or youth of the victim. *See, e.g.*, MD. CODE. ANN., CRIM. LAW §§ 3-303 to -304 (2018); WIS. STAT. § 940.225 (2016).

195. *See, e.g.*, N.Y. PENAL LAW §§ 130.25, 130.30, 130.35 (2018) (delineating three different degrees of rape).

196. *See* Schulhofer, *supra* note 192, at 2188.

197. Recent estimates suggest that out of 1000 rapes about 310 are reported, 57 actually lead to arrests, 11 are referred for prosecution, and 7 are ultimately convicted. *See The Vast Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/G8FE-K6BA] (last visited Nov. 15, 2018).

198. *See generally* Herek, *supra* note 87, at 596 (discussing combatting AIDS-related stigma).

being victimized by men and misogynistic social norms.[199] Although understandable, this limited focus has increased stigma for male rape victims and perpetuated notions of females as vulnerable victims.[200] Sexual violence is a systemic problem in this country, and it is not limited to women. A national survey conducted in 2011 reported that men and women had a similar prevalence of nonconsensual sex in the previous twelve months: 1.27 million women compared to 1.267 million men.[201] In 2008, it was reported that one in thirty-three men in the United States have been the victim of rape or attempted rape.[202] A myopic focus on men raping women reinforces dominant social constructs of men being aggressors and powerful and women being vulnerable and weak.[203] Moreover, a myriad of theories have developed over the years to explain why men are sexually violent toward women. This robust body of literature has entrenched the view of men as perpetuators of violence against women. The dominance of the gender-based violence narrative has been supported by research showing that violence has been linked to men's very nature,[204] men's dominant position in society,[205] and the way men are socialized.[206]

This narrative is mainstream and rarely questioned. Thus, men who are victimized by rape or sexual assault contradict hegemonic definitions of male sexuality that require men to be sexually dominant.[207] The focus on male aggressors unintentionally delegitimizes men who are victims of sexual violence.[208] As a result, society has come to embrace the message that rape

199. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 182 (1989) ("[R]ape law affirmatively rewards men with acquittals for not comprehending women's point of view on sexual encounters."); *see also id.* at 177 ("The deeper problem [with rape law] is that women are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive.").

200. *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1265 (2011) (explaining that "the real problem is that in arguing for reform, many feminist scholars have inadvertently legitimized and contributed to the very gender distinctions of which they have been so critical").

201. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 3 (2011).

202. BUREAU OF JUSTICE STATISTICS, NCJ 227777, CRIME VICTIMIZATION 2008, at 4 (2009), https://www.bjs.gov/content/pub/pdf/cv08.pdf [https://perma.cc/3DGP-597G].

203. *See, e.g.*, Katie Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 762 (2011) (asserting that "sexual violence is perpetuated by a patriarchal system where men hold higher status and have greater power than women").

204. *See, e.g.*, Randy Thornhill & C. T. Palmer, *Why Men Rape*, 40 SCIENCES 30, 30 (2000) (arguing that rape is a "biological phenomenon that is a product of the human evolutionary heritage").

205. *See, e.g.*, JULIA R. SCHWENDINGER & HERMAN SCHWENDINGER, RAPE AND INEQUALITY 129–40 (1983) (arguing that gender inequality fosters rape).

206. *See generally* JAMES W. MESSERSCHMIDT, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY (1993).

207. *See generally* Leslee R. Kassing et al., *Gender Role Conflict, Homophobia, Age, and Education as Predictors of Male Rape Myth Acceptance*, 27 J. MENTAL HEALTH COUNSELING 311 (2005).

208. *See* MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 9 (1997) (explaining that men are expected to be sexually in control and that "[w]hen

victims are female. Even when rapes are perpetrated by strangers and accompanied by violence, male-victim rape is often classified as "unfounded" and "unsubstantiated."[209] Thus, male rape victims, like female acquaintance-rape victims, are reluctant to come forward and report rape for fear of not being believed or taken seriously.[210]

As rape reform advocates have sought to combat rape myths about women,[211] rape myths about men have flourished. For instance, jokes about prison rape abound.[212] Yet, it is not only male victims who have been harmed by the feminist rape reforms. Women have also been harmed.

Beyond reinforcing the stereotype of women as victims, categorizing rape claims by force creates a paradigm where forcible rape is deemed more real or more worthy of punishment than acquaintance-rape cases.[213] For example, in the highly publicized Stanford rape case, Brock Turner, the perpetrator, raped a woman who was unconscious.[214] His father wrote the judge asking for leniency[215] and stated that his son should not do jail time for the sexual assault, which he referred to as "the events" and "20 minutes of action" that were "not violent."[216] Judge Aaron Persky sentenced Turner to six months in jail and three years' probation, noting that prison would have a "severe impact" on Turner.[217] The light sentence sparked a national outcry and, ultimately, led to Judge Persky being recalled by California voters.[218]

The belief that acquaintance rapes are less serious is not uncommon, yet studies of rape victims suggest just the opposite. Researchers have found that acquaintance-rape victims suffer more psychological damage than stranger rape victims because self-blame is higher when a woman is raped by

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this does not occur, when men are raped by other men, society tends to silence and erase them rather than acknowledge the vulnerability of masculinity and manhood").

209. *See* Capers, *supra* note 200, at 1298.

210. *See generally* Karen G. Weiss, *Male Sexual Victimization: Examining Men's Experiences of Rape*, 12 MEN & MASCULINITIES 275 (2010).

211. *See generally* Edwards et al., *supra* note 203, at 762 (discussing the prevalence of various rape myths, including that women enjoy rape and ask to be raped).

212. *See* Capers, *supra* note 200, at 1274 (noting that "assumptions about prison rape . . . are so embedded in popular culture—jokes about dropping the soap or about a cellmate named 'Bubba'").

213. SUSAN ESTRICH, REAL RAPE 15–20 (1987).

214. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 16, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html [https://perma.cc/4N24-7958].

215. *Id.*

216. *Id.*

217. *See* Erin Donaghue, *Judge on Stanford Attacker's Consent Claims: "I Take Him at His Word,"* CBS NEWS (June 15, 2016), https://www.cbsnews.com/news/brock-turner-ex-swimmer-judge-in-stanford-sex-assault-case-i-take-him-at-his-word/ [https://perma.cc/6NBV-7VDE]. The maximum sentence allowable was 14 years. *Id.* Judge Persky also noted that Turner did not use a weapon and was not a danger to others. *Id.*

218. Jacqueline Thomsen, *Judge in Brock Turner Sentencing Recalled*, HILL (June 6, 2018), https://thehill.com/homenews/state-watch/390923-judge-in-brock-turner-sentencing-appears-to-be-recalled [https://perma.cc/BV3T-4FMY] (reporting that a judge had not been successfully recalled in more than eighty-five years and that 59 percent of California voters voted in favor of the recall).

an acquaintance.[219] Additionally, women raped by acquaintances have higher levels of psychological distress and appear to take longer to recover than women raped by strangers.[220]

Rape is currently considered distinct from battery because the act deprives the victim of sexual autonomy. One noted scholar has argued that the "central value protected by sexual offense provisions is sexual autonomy . . . the violation of which represents a unique, not readily comparable, type of harm to the victim."[221] Philosopher Joan McGregor has opined that that "the seriousness of rape derives from the special importance we attach to sexual autonomy."[222] If rape is about punishing the perpetrator for violating the right to be free from unwanted sexual contact,[223] then the penalty attached to rape should be uniform regardless of whether force is used or not. Classifying rapes without force as less severe minimizes the suffering experienced by the victim and sends a message that their harm is not as worthy of punishment. As the vast majority of rapes are acquaintance rapes, and about 68 percent of victims do not have physical injuries, most rape victims are sent this message, which undermines the seriousness of rape as a crime.[224] Moreover, the current rape messaging has not been effective and has caused unintended consequences; it is time to change rape messaging.

IV. MESSAGING RAPE AS A PUBLIC HEALTH ISSUE

Rape reform has not yielded the success that reformers hoped. There is no evidence to suggest that rape reform laws have reduced the incidence of rape, increased its prosecution, or increased the conviction rate.[225] The lack of overall success of criminal rape reform is at least some evidence that legal reform alone is not enough to change societal norms.[226] Rape stereotypes

219. *See generally* Patricia A. Frazier & Lisa M. Seales, *Acquaintance Rape Is Real Rape*, *in* RESEARCHING SEXUAL VIOLENCE AGAINST WOMEN: METHODOLOGICAL AND PERSONAL PERSPECTIVES 54 (Martin D. Schwartz ed., 1997).

220. Bonnie L. Katz, *The Psychological Impact of Stranger Versus Nonstranger Rape on Victims' Recovery*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 251, 267 (Andrea Parrot & Laurie Bechhofer eds., 1991).

221. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 187 (2002).

222. Joan McGregor, *Force, Consent, and the Reasonable Woman*, *in* IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 231, 236 (Jules L. Coleman & Allen Buchanan eds., 1994).

223. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 99 (1998) (theorizing that rape deprives the victim of "the freedom . . . to decide whether and when to engage in sexual relations").

224. *See generally* Judith E. Tintinalli et al., *Clinical Findings and Legal Resolution in Sexual Assault*, 14 ANNALS OF EMERGENCY MED. 447 (1985).

225. *See* IIlene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 468 (2005).

226. SCHULHOFER, *supra* note 223, at 11, 44 (describing how criminal law reforms have had little effect on juries who continue to treat verbal resistance as not being sufficient to prove nonconsent and on prosecutors who continue to decline to try cases without physical evidence of resistance).

and myths are still pervasive.[227] Such myths are just as salient at pretrial stages, yet rape shield laws only protect against prejudice at the trial level. Police still notoriously fail to thoroughly investigate allegations of rape, and neither rape shield nor affirmative consent laws have changed this.[228] Rape law cannot function as a strong deterrent when conviction rates are so low, and low conviction rates provide little incentive for victims to report rape.[229] Thus, the time has come to look beyond criminal law.

Public health law has a long history of using messaging to change societal norms and beliefs. Core functions of the field of public health include surveillance of population health and well-being, monitoring and responding to health hazards and emergencies, protecting health through regulations, health promotion and education, and disease prevention. A public health approach to rape requires that the majority of intervention be focused on prevention and health. To prevent rape, public perception of what constitutes rape needs to be fundamentally expanded and changed, and current criminal law reforms, such as those eliminating resistance as an element of rape, do not reflect society's understanding of rape.[230] Thus, resources must be allocated to change public perception of rape.

A. Denormalizing Rape

To denormalize rape, social norms and perception of acceptable behaviors must be altered. In the tobacco context, public health advocates sought to "push tobacco use out of the charmed circle of normal desirable practice to being an abnormal practice."[231] Similarly, with respect to rape, public health advocates need to target the glorification of practices that make rape more likely. A successful denormalization strategy must be multifaceted and should include a broad public awareness campaign that focuses on expanding the public's conception of what constitutes sexual assault, sexual assault

227. *See, e.g.*, Martha Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL., 217, 223–29 (1980); Dianne Cyr Carmody & Lekeshia M. Washington, *Rape Myth Acceptance Among College Women: The Impact of Race and Prior Victimization*, 16 J. INTERPERSONAL VIOLENCE 424, 428–34 (2001); Renae Franiuk et al., *Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case*, 14 VIOLENCE AGAINST WOMEN 287, 293 (2008) (finding that, in covering the Kobe Bryant rape trial, 65 percent of newspaper articles perpetuated at least one myth about sexual assault, with "she's lying" being the myth most commonly perpetuated).

228. *See generally* Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV 1197 (2014) (providing a comprehensive discussion of tactics that police departments use to undercount rape including, coding rapes as lesser crime or noncriminal events).

229. Thomas A. Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims (or Learning from Our Mistakes: Abandoning a Fundamentally Prejudiced System & Moving Toward a Rational Jurisprudence of Rape)*, 18 BUFF. J. GENDER L. & SOC. POL'Y 73, 77, 89 (2010) (discussing the barriers to prosecution that make it difficult for rape victims to come forward).

230. *See, e.g.*, IDA M. JOHNSON & ROBERT T. SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS 98 (1997) (noting that 40 percent of men and 18 percent of women feel that resistance is necessary to determine rape); WILLIAMS & HOLMES, *supra* note 175, at 115; *see also* SCHULHOFER, *supra* note 223, at 38–39, 43–46.

231. *See* Hammond et al., *supra* note 73, at 225.

education in schools (including colleges), increasing the portrayal of women in nonsexualized roles, and depicting a variety of healthy sexual relationships in the media.

1. Increasing Public Awareness

Increasing public awareness about the prevalence of sexual violence, providing the public with an accurate understanding of sexual violence, and informing the public about how to avoid situations involving sexual violence is a crucial step in changing cultural norms. Increasing awareness should occur both through governmental interventions and also through the work of charitable organizations.

One of the key ways in which the government increases awareness is through PSAs. In 2014, the Obama White House produced a PSA targeting acquaintance rape "on college campuses, at bars, at parties, even at high schools."[232] In the PSA, Steve Carell announces that it is happening to "our sisters and our daughters," and Daniel Craig adds that it is happening to "our wives and our friends."[233] Benicio Del Toro adds that "if she can't consent, then it is rape."[234] Zoe Saldana, John Cho, Matt McGorry, Minka Kelly, Jessica Szohr, Josh Hutcherson, Jesse Metcalfe, and the band Haim appear in a different PSA emphasizing the need for consent.[235] Saldana states, "Consent: if you don't get it, you don't get it."[236] Earlier, Hutcherson highlights that sex without consent is "rape."[237] The PSA invites people to take the pledge: "To RECOGNIZE that non-consensual sex is sexual assault. To IDENTIFY situations in which sexual assault may occur. To INTERVENE in situations where consent has not or cannot be given. To CREATE an environment in which sexual assault is unacceptable and survivors are supported."[238]

The PSAs are designed to normalize the view that sex without consent is rape. The PSAs are also designed to foster a culture of shared responsibility, specifically through bystander intervention. Increasingly, in addition to PSAs, the government and nonprofit organizations are funding community-based prevention efforts involving bystander education to reduce the prevalence of sexual violence.[239] Bystanders are third-party witnesses to the

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232. *See* The Obama White House, *1 Is 2 Many PSA: 60 Second*, YOUTUBE (Apr. 29, 2014), https://www.youtube.com/watch?v=xLdElcv5qqc [https://perma.cc/Z6M2-SKXJ].

233. *Id.*

234. *Id.* Vice President Joe Biden, President Barack Obama, Seth Meyers, and Dulé Hill also appear in the PSA. *Id.*

235. Charlotte Atler, *Watch Josh Hutcherson, Zoe Saldana and Haim in a New Sexual Assault PSA*, TIME (Sept. 1, 2015), http://time.com/4018553/josh-hutcherson-zoe-saldana-haim-sexual-assault-psa/ [https://perma.cc/5UBX-GFPL].

236. *Id.*

237. *Id.*

238. One can sign up to take the pledge. IT'S ON US, https://www.itsonus.org/ [https://perma.cc/44FE-E5EG] (last visited Nov. 15, 2018).

239. *See, e.g.*, *Bystander Intervention: Anyone Can Intervene and Make a Difference*, MICH. ST. U., https://msu.edu/ourcommitment/news/2017-08-30-bystander-intervention.html

problem of sexual assault; they are neither perpetrators nor victims. The bystander-education approach to sexual assault prevention encourages responsive bystander behaviors to spread responsibility for safety to members of the broader community.[240]

Multiple in-person bystander-education programs for sexual assault and interpersonal violence prevention have emerged over the past few decades.[241] These programs are typically offered in the college setting but are also increasingly being offered in community centers across the country. Although specific components and audiences of these bystander-education programs vary, they share common goals. Bystander programs seek to promote prosocial attitudes and behaviors related to both sexual assault and helping others.[242] Participants are educated about prevalence rates, indicators of high-risk situations, and how they, as bystanders, can promote safety.[243]

Such programs engage community members by challenging the acceptability of sexual assault and helping participants recognize high-risk situations and respond constructively.[244] They may also empower participants to view themselves as capable of helping others and meaningfully contributing to the creation of an inclusive, safe community. While PSAs and bystander-education programs are useful tools when used effectively, it is imperative that advocates use them responsibly. Thus, sexual assault PSAs and bystander-intervention programs should seek to broaden society's notions of who victims are. Too often the victim of sexual assault is depicted as a white female. Thus, in redefining the conduct that constitutes sexual assault, awareness campaigns also need to focus on creating empathy for a variety of victims including women of color, men, and transgender men and women.

[https://perma.cc/3SUL-R4AJ] (last visited Nov. 15, 2018) (noting that a $38,000 grant from the state of Michigan made the training possible).

240. *See* VICTORIA L. BANYARD ET AL., RAPE PREVENTION THROUGH BYSTANDER EDUCATION: BRINGING A BROADER COMMUNITY PERSPECTIVE TO SEXUAL VIOLENCE PREVENTION 28 (2005), https://www.ncjrs.gov/pdffiles1/nij/grants/208701.pdf [https://perma.cc/9QDH-VGB8] ("Using a bystander model increases community receptivity and support for intervening against sexual violence . . . . The bystander role gives all participants and indeed all community members a specific role with which they can personally identify and adopt in preventing the community problem of sexual violence.").

241. A sampling of these programs, including "Bringing in the Bystander," "interACT," "SCREAM (Students Challenging Realities and Educating Against Myths)," "Mentors in Violence Prevention (MVP)," "The Men's Project," "The Men's Program," and "The Women's Program," are compiled online by the educational organization Culture of Respect. CULTURE OF RESPECT, https://cultureofrespect.org/ [https://perma.cc/3UD8-MAF8] (last visited Nov. 15, 2018).

242. *See* BANYARD ET AL., *supra* note 240, at 19–30.

243. Victoria L. Banyard et al., *Sexual Violence Prevention Through Bystander Education: An Experimental Evaluation*, 35 J. COMMUNITY PSYCHOL. 463, 464 (2007) (describing the bystander approach to combat sexual violence).

244. *See generally* Sarah McMahon & Victoria L. Banyard, *When Can I Help?: A Conceptual Framework for the Prevention of Sexual Violence Through Bystander Intervention*, 13 TRAUMA, VIOLENCE & ABUSE 3 (2012).

One of the Obama era PSAs directly implored viewers to stop sexual violence against women. Constantly depicting women as victims is not empowering to women and stigmatizes men who are victims of sexual violence. It reinforces gender stereotypes, which only reinforce rape myths. The term "rape" itself has such gendered connotations that using "sexual violence" is a better alternative. With researchers estimating that about 2.1 million men have experienced rape at some point in their lifetime, awareness campaigns must emphasize that sexual violence can strike anyone regardless of gender.[245] More alarming, it is estimated that about 50 percent of transgender individuals are sexually abused or assaulted at some point in their lives.[246] Thus, it is also important to make sure that the public is aware that sexual violence is not limited to heterosexual relationships. Future messaging should depict sexual violence as something that can happen regardless of gender or sexual orientation.

Increasing awareness and messaging cannot fall to the government alone. April was officially deemed "Sexual Assault Awareness Month" in the United States in 2001,[247] yet April is not synonymous with sexual assault like October is synonymous with breast cancer awareness. The Susan G. Komen Foundation, the largest charity devoted to breast cancer, has invested $800 million in breast cancer research and $1.6 billion in screening and education programs since its inception in 1982.[248] In 2015, the Komen Foundation raised over $117 million, not including "Race for the Cure" donations.[249] In contrast, the Rape, Abuse, and Incest National Network (RAINN), the nations' largest anti-sexual-violence organization, raised just over $6 million that same year.[250]

With a little over $6 million, RAINN focused on hotlines, educating college students, and promoting PSAs.[251] While RAINN allocated its resources in a responsible manner, its resources are too small to have a large-scale impact. The model used by breast cancer advocates in partnering with

245. Kathleen C. Basile et al., *Prevalence and Characteristics of Sexual Violence Victimization Among U.S. Adults, 2001–2003*, 22 VIOLENCE & VICTIMS 437, 441 (2007).

246. *See generally* Gretchen P. Kenagy, *The Health and Social Service Needs of Transgender People in Philadelphia*, 8 INT'L J. TRANSGENDERISM 49 (2005).

247. *History of Sexual Assault Awareness Month*, NSVRC, https://www.nsvrc.org/saam/history [https://perma.cc/A5N5-AGGV] (last visited Nov. 15, 2018).

248. *See* Michele Munz, *After Support Drops for Komen, New Director Visits St. Louis to Bring Focus to Mission*, ST. LOUIS POST-DISPATCH (Nov. 7, 2013), http://www.stltoday.com/lifestyles/health-med-fit/health/after-support-drops-for-komen-new-director-visits-st-louis/article_4661ef89-1b40-57bf-b32e-fb511935af58.html [https://perma.cc/AJ2P-FBUA]. For a discussion of the impact that breast cancer advocates have had on patient care, see Alena Allen, *Dense Women*, 76 OHIO ST. L.J. 847, 853 (2015), which notes that breast cancer advocates have successfully "harnessed personal stories, organization, and money" to promote awareness about the importance of early detection in the fight against breast cancer.

249. SUSAN G. KOMEN FOUND., FISCAL YEAR 2015 ANNUAL REPORT 14 (2015), http://ww5.komen.org/uploadedFiles/_Komen/Content/About_Us/Financial_Reports/SGK-2015-Annual-Report-printer.pdf [https://perma.cc/B4GJ-8LX2].

250. *Annual Impact Report 2015: Fiscal Year 2015*, RAINN, https://www.rainn.org/files/where-your-money-goes/Report_FY15.pdf [https://perma.cc/8VCY-EPLZ] (last visited Nov. 15, 2018).

251. *See id.*

retailers and companies to promote their message should be mirrored by sexual-violence-awareness advocates.[252] Effecting real cultural change requires monetary resources, and RAINN and similar organizations lack sufficient resources to create a cultural movement. Moreover, far too little research is devoted to assessing the long-term effects of sexual-violence-prevention programs and such research is vital to creating lasting cultural change. Thus, it is imperative that advocates find ways to increase funding for such messaging and research.

2. Diversifying Media Portrayals

Media portrayals of sexuality deserve scrutiny. Researchers have long noted that media portrayals of women influence perceptions and treatment of women. In *Gender Advertisements*, Erving Goffman analyzed the ways in which the media constructs masculinity and femininity. In a detailed analysis of more than five hundred advertisements, Goffman compared and contrasted women's lowered heads with men's straight-on gazes, men's strong grasps versus women's light touches, and women's over-the-top emotional displays with men's reserved semblances. He concluded that the relationship between men and women was characterized by male power and female subordination akin to a parent-child relationship.[253]

In addition, many researchers have found that women are sexually objectified in the media. An American Psychological Association study found that youth are exposed to a massive amount of media portrayals that sexualize women and girls.[254] An analysis of photographs from *Maxim* and *Stuff* (two popular men's magazines) found that 80.5 percent of the women were depicted as sexual objects.[255] Additionally, women are often depicted partially nude and engaging in sexual behaviors in music videos and video

252. For example, the Susan G. Komen Foundation partners with a host of companies and retailers, including, for example, Bank of America, Kitchen Aid, and New Balance. *Meet Our Partners*, SUSAN G. KOMEN FOUND., https://ww5.komen.org/Meet-Our-Partners/ [https://perma.cc/5RZQ-KCHK] (last visited Nov. 15, 2018).

253. *See generally* ERVING GOFFMAN, GENDER ADVERTISEMENTS (1979).

254. AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 2 (2007). According to the American Psychological Association:

> [S]exualization occurs when a person's value comes only from his or her sexual appeal or behavior, to the exclusion of other characteristics . . . [or] a person is sexually objectified—that is, made into a thing for others' sexual use, rather than seen as a person with the capacity for independent action or decision making.

Id. at 1.

255. *See* Erin Hatton & Mary Nell Trautner, *Equal Opportunity Objectification?: The Sexualization of Men and Women on the Cover of* Rolling Stone, 15 SEXUALITY & CULTURE 256, 266 (2011) (finding that, in the 2000s, 17 percent of men were sexualized (a 55 percent increase) and 83 percent of women were sexualized (an 89 percent increase) and that nonsexualized images of women dropped from 56 percent in the 1960s to 17 percent in the 2000s, while nonsexualized images of men dropped only slightly from 89 percent in the 1960s to 83 percent in the 2000s); Mee-Eun Kang, *The Portrayal of Women's Images in Magazine Advertisements: Goffman's Gender Analysis Revisited*, 37 SEX ROLES 979, 994–95 (1997).

games.[256] The American Psychological Association has warned that "[t]he sexualization of girls may not only reflect sexist attitudes, a societal tolerance of sexual violence, and the exploitation of girls and women but may also contribute to these phenomena."[257]

Thus, advocates must work to ensure that the public is exposed to healthy images of men and women. Fortunately, public outcry over depictions of women and girls has slowly brought some change. For instance, Lego has launched a line of female scientists in response to negative feedback it received from creating a line aimed at girls that was pink and used ultrathin mini-figures.[258] Additionally, Dove has used "real women" in its commercials and ads since 2005 and is known for showing women of varying shades, ages, and body types in its commercials.[259]

3. Educating Law Enforcement

Police officers have a unique role in securing justice for sexual assault victims. When a victim reports a crime, police officers' job as first responders requires them to interview the victim, write the report, follow up with the investigation, and decide whether or not to present a case to the prosecutor's office. Thus, the way that police respond to a victim powerfully affects both the adjudication of sexual assault cases and the experiences of the victim within the criminal justice system. As police make the initial decision about whether a crime occurred and, if so, how to classify it, they have a significant gatekeeping role.

Research about police officers' beliefs about sexual assault have yielded a number of troubling findings. First, research reveals that a disconnect exists between what the law currently defines as sexual assault and what police personally believe is necessary to constitute a sexual assault.[260] Second, researchers conducting a qualitative study of police investigators' perceptions of the legitimacy of rape cases found that believing in rape myths

256. *See generally, e.g.*, Jane D. Brown, *Sexy Media Matter: Exposure to Sexual Content in Music, Movies, Television, and Magazines Predicts Black and White Adolescents' Sexual Behavior*, 117 PEDIATRICS 1018 (2006); Matthew B. Ezzell, *Pornography, Lad Mags, Video Games, and Boys: Reviving the Canary in the Cultural Coal Mine*, *in* THE SEXUALIZATION OF CHILDHOOD 7 (2009); Linda Kalof, *The Effects of Gender and Music Video Imagery on Sexual Attitudes*, 139 J. SOC. PSYCHOL. 378 (1999).

257. *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 254, at 2.

258. *See* Lauren Gambino, *Lego to Launch Female Scientists Series After Online Campaign*, GUARDIAN (June 4, 2014), https://www.theguardian.com/lifeandstyle/2014/jun/04/lego-launch-female-scientists-series [https://perma.cc/UL8A-FZLE].

259. *See* Nina Bahadur, *Dove 'Real Beauty' Campaign Turns 10: How a Brand Tried to Change the Conversation About Female Beauty*, HUFFINGTON POST (Jan. 21 2014), https://www.huffingtonpost.com/2014/01/21/dove-real-beauty-campaign-turns-10_n_4575940.html [https://perma.cc/L9R6-YRJQ].

260. Rebecca Campbell & Camille R. Johnson, *Police Officers' Perceptions of Rape: Is There Consistency Between State Law and Individual Beliefs?*, 12 J. INTERPERSONAL VIOLENCE 255, 255, 267–68 (1997) (finding that 51 percent of the officers provided definitions of sexual assault that mixed old legal definitions with some victim-blaming views instead of the current legal definition).

negatively impacts police officers' credibility assessments of victims.[261] Based on interviews with investigators and observations of their work, researchers concluded that decisions regarding whether a rape claim was "legitimate" were based on judgments regarding the victim's credibility (e.g., whether the victim reported promptly and was cooperative during the investigation), evidence regarding consent (e.g., use of force by the perpetrator and resistance by the victim), the seriousness of the offense (e.g., whether the attack involved physical injuries or weapons), and victim characteristics (e.g., age, race, and socioeconomic status).[262] Victims who dress provocatively, use alcohol or drugs, and who engage in risky sexual behavior are often viewed as less credible and more blameworthy by police officers.[263] Similarly, police are more skeptical when the victim lacks bruises or other noticeable evidence of physical trauma.[264]

Third, researchers have found that police officers mistakenly believe that false allegations of sexual assault are commonplace. For example, even though studies have shown that the number of false sexual assault complaints are similar to those of other crimes, a study of police attitudes toward sexual assault victims found that more than half of the officers believed that a large percentage of sexual assault complaints are false.[265] Despite research findings that police believe rape myths and routinely code allegations of rape and sexual assault as "unfounded," there has been very little research conducted in the United States about the impact of training on law enforcement's response to sexual assault.[266]

There are a variety of training programs for police officers that typically involve a combination of lecture, discussion, and interactive exercises.[267] These programs tend to cover "crisis intervention, victim response, and interview techniques, as well as legal and procedural issues pertaining to

261. Vicki McNickle Rose & Susan Carol Randall, *The Impact of Investigator Perceptions of Victim Legitimacy on the Processing of Rape/Sexual Assault Cases*, 5 SYMBOLIC INTERACTION 23, 27 (1982).

262. *Id.*

263. *See, e.g.*, Regina A. Schuller & Anna Stewart, *Police Responses to Sexual Assault Complaints: The Role of Perpetrator/Complainant Intoxication*, 24 LAW & HUM. BEHAV. 535, 545 (2000) ("The more intoxicated the officers perceived the complainant to be, the less credible they found her claim. Moreover, the more intoxicated they viewed the complainant to be, the less blame they attributed to the perpetrator . . . .").

264. *See, e.g.*, Shirley Feldman-Summers & Gayle C. Palmer, *Rape as Viewed by Judges, Prosecutors, and Police Officers*, 7 CRIM. JUST. & BEHAV. 19, 33 (1980).

265. Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008). Although the actual incidence of false sexual assault complaints is estimated to be between 1 and 4 percent, the police officers in the study rated this percentage much higher. *Id.* Ten percent of the officers believed that between 51 and 100 percent of women lie about being raped. *Id.* Fifty-three percent of the officers indicated that between 11 percent and 50 percent of women give false reports of rape. *Id.*

266. Kimberly A. Lonsway et al., *Police Training in Sexual Assault Response: Process, Outcomes, and Elements of Change*, 28 CRIM. JUST. & BEHAV. 695, 696 (2001) (noting that "[o]nly a handful of police training programs for sexual assault response have been described in the scholarly literature" and that most of these studies are decades old).

267. *Id.* at 697.

arrest, charging . . . , evidence collection, and prosecution."[268] While research as to the efficacy of these programs is limited,[269] two relatively recent studies suggest that increased training has a positive impact.

In the first study, police officers who received basic training were compared to officers who received an additional three-and-a-half hours of specialized sexual assault training.[270] The officers who participated in the training were more likely than their basic training colleagues to use specific techniques recommended in the training program for sensitive and effective sexual assault response.[271] However, the enhanced training neither improved their knowledge of sexual assault investigation nor did it change their level of endorsement of rape myths.[272] In the second study, researchers found that officers who were provided specialized training on victim sensitivity and the role of alcohol in sexual assault cases had lower rape-myth-acceptance scores than officers who received training on how to properly investigate sexual assault.[273] This suggests that officers need training beyond the simple mechanics of how to adequately investigate sexual assault.

Based on available research, ongoing, enhanced training about sexual assault should be provided to police officers. Training should include not only proper investigative procedure but also the role of alcohol in sexual assaults and how to interact with victims. Police training should extend beyond a lecture and discussion and be interactive. Police officers should engage in simulation exercises in which they apply the preferred techniques for engaging and evaluating victims of sexual assault.[274] Where feasible, police departments should have units dedicated to sexual assault staffed by officers who are dedicated to working constructively with victims. Finally, police officers should be trained to arrest sexual assault suspects based on probable cause, not based on whether they believe that evidence meets a standard of proof beyond a reasonable doubt.

4. Educating College Students

Although this number has been debated, studies suggest that up to one in five women are sexually assaulted during their undergraduate years.[275] Until

268. *Id.* (footnote omitted).
269. *Id.*
270. *Id.* at 710.
271. *Id*.
272. *Id.*
273. Molly Smith et al., *Rape Myth Adherence Among Campus Law Enforcement Officers*, 43 CRIM. JUST. & BEHAV. 539, 549 (2016).
274. *See* Lonsway et al., *supra* note 266, at 724–25 (discussing the fact that police officers have the opportunities to practice physical skills, such as shooting, but often do not have the opportunity to practice interviewing skills).
275. *Sexual Violence: Facts at a Glance*, CDC (2012), https://www.cdc.gov/violenceprevention/pdf/sv-datasheet-a.pdf [https://perma.cc/2HA2-FJG4]; *cf.* Christopher Krebs & Christine Lindquist, *Setting the Record Straight on '1 in 5,'* TIME (Dec. 15, 2014), http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/ [https://perma.cc/49XZ-SYRU] (discussing the ways in which the statistic may be misleading, including highlighting that the statistic does not include both assaults and attempted assaults).

recently, most colleges addressed sexual assault by focusing on the victim's actions prior to the assault. Prevention measures were geared mostly toward women and focused on warning of the dangers of walking in deserted areas alone, advocated going on dates in public areas with big crowds, encouraged drink safety, discouraged binge drinking, and taught self-defense.[276] The message conveyed by such programming was that sex assaults will happen, but they are less likely if women take certain sensible precautions.

Although imparting knowledge about how to avoid being a victim is laudable, it is more important for colleges and universities to denormalize rape. One way to denormalize rape is to focus on challenging rape myths. Addressing rape myths is important not only because they represent problematic attitudes, but also because they have been identified as an explanatory predictor in the actual perpetration of sexual violence, or proclivity to rape.[277]

One-dose interventions have been criticized as having a limited ability to produce sustained change.[278] Unsurprisingly, several studies have found that programs with a longer duration are effective at improving rape attitudes.[279] Researchers have also found that programs are most effective if they target single-gender audiences.[280] Few studies have evaluated whether professionally led or peer-led programming is more effective, and the one that did found professionally led programming to be more effective.[281] Because the best practices are unknown, studies should be conducted to ascertain the most effective way for colleges to denormalize rape through programming.

Based on the best available data, colleges should develop programing that includes using peer theatre presentations,[282] bystander-intervention

276. Alycia Johnson et al., *Stopping Sexual Assault on Private College Campuses: Impact Evaluation of a Prevention and Awareness Intervention Conducted with Community Partners at a Christian University*, 7 J. HEALTH EDUC. TEACHING 23, 25–26 (2016).

277. Shelly Schaefer Hinck & Richard W. Thomas, *Rape Myth Acceptance in College Students: How Far Have We Come?*, 40 SEX ROLES 815, 828–29 (1999).

278. Kimberly A. Lonsway, *Preventing Acquaintance Rape Through Education: What Do We Know?*, 20 PSYCHOL. WOMEN Q. 229, 252–53 (1996).

279. *See, e.g.*, Linda A. Anderson & Susan C. Whiston, *Sexual Assault Education Programs: A Meta-Analytic Examination of Their Effectiveness*, 29 PSYCHOL. WOMEN Q. 374, 382 (2005). *See generally* Elizabeth A Yeater & William O'Donohue, *Sexual Assault Prevention Programs: Current Issues, Future Directions, and the Potential Efficacy of Interventions with Women*, 19 CLINICAL PSYCHOL. REV. 739 (1999).

280. Catherine J. Vladutiu et al., *College- or University-Based Sexual Assault Prevention Programs: A Review of Program Outcomes, Characteristics, and Recommendations*, 12 TRAUMA, VIOLENCE & ABUSE 67, 69 (2011).

281. *See* Anderson & Whiston, *supra* note 279, at 383.

282. *See, e.g.*, Sarah McMahon et al., *Utilizing Peer Education Theater for the Primary Prevention of Sexual Violence on College Campuses*, 55 J.C. STUDENT DEV. 78, 79–80 (2014).

programs,[283] and academic courses,[284] which have all been shown to be successful at reducing beliefs in rape myths and increasing empathy for rape victims. These programs are examples of primary rape-prevention programs that seek to alter the negative underlying attitudes, behaviors, and practices that are believed to contribute to the incidence of rape, as well as focusing on positive behaviors students can engage in to challenge rape-supportive beliefs.[285] Institutions should also offer secondary prevention programs that focus on groups that have historically perpetrated rape myths. In the college setting, members of fraternities and athletes are at "high risk" for committing rape on college campuses.[286] Thus, institutions should offer special programming geared specifically toward those groups. Finally, institutions should educate students and faculty about the importance of counseling and the availability of other resources for victims of sexual violence.

5. Educating Youth

Arriving on a college campus should not mark the first time that students are introduced to concepts of sexual violence. Rather, efforts to denormalize sexual violence should begin much earlier. In the tobacco context, researchers realized very quickly that peer groups, media, and advertising play a strong role in the decision to begin smoking.[287] Thus, efforts to decrease the rate of youth smoking focused on challenging the assumption that smoking was cool and desirable.[288] Although most of the tobacco prevention programs were focused on elementary and middle school kids, the lessons learned are useful in the context of sexual violence. A meta-analysis of different intervention models found that the social-influence-resistance model was the most effective model for youth.[289] Interventions based on the social-influence-resistance model focus on building skills necessary to resist

283. *See, e.g.*, Jennifer Katz & Jessica Moore, *Bystander Education Training for Campus Sexual Assault Prevention: An Initial Meta-Analysis*, 28 VIOLENCE & VICTIMS 1054, 1063–64 (2013).

284. *See generally, e.g.*, Elena L. Klaw et al., *Challenging Rape Culture Awareness, Emotion and Action Through Campus Acquaintance Rape Education*, 28 WOMEN & THERAPY 47 (2005).

285. Angela M. Borges et al., *Clarifying Consent: Primary Prevention of Sexual Assault on a College Campus*, 36 J. PREVENTION & INTERVENTION COMMUNITY 75, 86 (2008).

286. *See, e.g.*, Gordon B. Forbes et al., *Dating Aggression, Sexual Coercion, and Aggression-Supporting Attitudes Among College Men as a Function of Participation in Aggressive High School Sports*, 12 VIOLENCE AGAINST WOMEN 441, 449 (2006); Sarah K. Murnen & Marla H. Kohlman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 SEX ROLES 145, 155 (2007).

287. *See* David B. Portnoy et al., *Youth Curiosity About Cigarettes, Smokeless Tobacco, and Cigars: Prevalence and Associations with Advertising*, 47 AM. J. PREVENTIVE MED. 76, 82–83 (2014).

288. *See* Hammond et al., *supra* note 73, at 225.

289. *See* Gilbert J. Botvin, *Preventing Drug Abuse in Schools: Social and Competence Enhancement Approaches Targeting Individual-Level Etiologic Factors*, 25 ADDICTIVE BEHAVIORS 887, 889–91 (2000). *See generally* JACOBSON ET AL., *supra* note 146.

negative influences, including assertiveness training, decision-making skills, and teaching kids to recognize advertising tactics.[290]

Recently, schools have begun to introduce programs aimed at preventing sexual violence. About twenty-five states have legislation requiring education about sexual violence in high school.[291] For example, the Fairfax County, Virginia, public school system recently updated its high school curriculum to include lessons on sexual consent and more thorough instruction on sexual assault generally.[292] One of the training videos features three women discussing being raped by an acquaintance. Additionally, Massachusetts introduced a program called "Mentors in Violence Prevention" in many high schools.[293] The program focuses on young men and women not as potential perpetrators or victims, respectively, but as empowered bystanders who can confront abusive peers—and support abused ones.[294]

While many states have some sort of curriculum for high school students, the California Healthy Youth Act expands the instruction to middle school students.[295] The new law mandates that schools must provide information about sexual harassment and assault, healthy relationships, and body image.[296] In addition, the curriculum must positively affirm gay, lesbian, bisexual, and transgender people, and requires that curriculum surrounding affirmative consent be taught in high school health classes.[297]

Intuitively, it makes sense to introduce discussions about boundaries and consent around puberty. Experts have called for multilevel strategies that include students, parents, and peers in middle school and high school.[298] Interventions that provide information over the course of years—rather than a few days or weeks—are likely to be more successful at changing cultural

290. *See* Brian R. Flay, *Psychosocial Approaches to Smoking Prevention Programs: A Review of Findings*, 4 J. HEALTH PSYCHOL. 449, 450–51 (1985) (explaining that school programs should ideally focus on the negative short- and long-term health effects of smoking, negative social consequences, peer norms and peer pressure, resistance and refusal skills, and media literacy as it relates to tobacco marketing and advertising).

291. Tovia Smith, *To Prevent Sexual Assault, Schools and Parents Start Lessons Early*, NPR (Aug. 9, 2016, 4:48 AM), https://www.npr.org/2016/08/09/487497208/to-prevent-sexual-assault-schools-and-parents-start-lessons-early [https://perma.cc/XL2V-LSWQ].

292. Moriah Balingit, *In the Fight Against Sexual Assault, This School District Is Teaching About Consent*, WASH. POST (June 21, 2016), https://www.washingtonpost.com/local/education/in-the-fight-against-sexual-assault-this-school-district-is-teaching-about-consent/2016/06/20/21158ed4-330f-11e6-8ff7-7b6c1998b7a0_story.html [https://perma.cc/8JDL-H68H].

293. *See* Smith et al., *supra* note 273, at 549 (discussing the Massachusetts program and noting that the Patriots organization joined with the state to create the program).

294. *Id.*

295. Jane Meredith Adams, *California Students Are Getting an Education on Sexual Assault*, HUFFINGTON POST (July 24, 2016), https://www.huffingtonpost.com/entry/california-sexual-assault-law_us_579a2104e4b0d3568f8647eb [https://perma.cc/8NBY-JCCV].

296. *Id.*

297. *Id.*

298. *See* Sarah DeGue et al., *A Systematic Review of Primary Prevention Strategies for Sexual Violence Perpetration*, 19 AGGRESSION & VIOLENT BEHAV. 346, 359 (2014).

norms.[299] For instance, antismoking campaigns have their strongest impact if they are implemented before youth begin to smoke, which is typically during middle school.[300] Thus, public health advocates pushed for introducing antismoking campaigns in elementary school.[301] Similarly, in the context of sexual violence, youth must be targeted while they are most malleable. Youth as young as first grade can and should be taught the language and skills of empathy and consent. They should be taught to be sensitive to the needs of others and how to ask for permission or consent in age-appropriate ways.

However, great care must be taken to create programs that do not reinforce stereotypes. Thus, the curriculum needs to foster a culture where a victim is anyone who has their right to be free from unwanted bodily touching invaded. Kids should be taught to recognize that victims and perpetrators can be male or female. Drawing specifically from lessons learned in the tobacco context, interventions need to teach kids how to recognize situations in which sexual violence may occur, promote healthy relationships, and teach them how to be assertive when they see sexual violence occurring. To date, only two programs—"Safe Dates" and "Shifting Boundaries"—have proven to be effective in preventing sexual violence.[302] Thus, more funding is needed to create new, effective programs and to monitor the continued effectiveness of the existing programs.

Finally, sex education in schools presents an opportunity to educate kids about consent.[303] The American Psychological Association has noted that a "central way to help youth counteract distorted views presented by the media and culture about girls, sex, and the sexualization of girls is through comprehensive sexuality education."[304] Sexual education should teach youth to have a discussion about boundaries before engaging in sexual activity. To do this, kids must be taught how to effectively express their own personal boundaries. Moreover, sex education classes should teach youth that it is their responsibility "to elicit, honor, and abide by their partner's sexual boundaries."[305]

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299. *See generally* Ida E. Berger & Andrew A. Mitchell, *The Effect of Advertising on Attitude Accessibility, Attitude Confidence, and the Attitude-Behavior Relationship*, 16 J. CONSUMER RES. 269 (1989).

300. Erkki Vartiainen et al., *Fifteen-Year Follow-Up of Smoking Prevention Effects in the North Karelia Youth Project*, 88 AM. J. PUB. HEALTH 81, 83–84 (1998).

301. M. R. Crone et al., *Does a Smoking Prevention Program in Elementary Schools Prepare Children for Secondary School?*, 52 PREVENTIVE MED. 53, 53 (2011) (noting the importance of using interventions with ten- to twelve-year-old children before they are most apparently facing the temptation to experiment with tobacco).

302. *See* DeGue et al., *supra* note 298, at 359.

303. *See* Michelle J. Anderson, *Sex Education and Rape*, 17 MICH. J. GENDER & L. 83, 104–09 (2010) (discussing how sex education should evolve to focus on helping youth to define their sexual boundaries and giving them guidance about navigating discussions about sex with their sexual partner).

304. AM. PSYCHOLOGICAL ASS'N, *supra* note 254, at 36.

305. Anderson, *supra* note 303, at 107.

B. Mitigating Consequences of Rape

Rape is one of the most severe of all traumas. Studies have shown that rape victims suffer multiple, long-term negative outcomes such as PTSD, depression, substance abuse, suicidal ideation, repeated sexual victimization, and chronic physical health problems.[306] Rape victims have extensive post-assault needs and may seek assistance from a variety of sources. Approximately 26 to 40 percent of victims report the assault to the police, 27 to 40 percent seek medical care and medical forensic examinations, and 16 to 60 percent obtain mental health services.[307] If victims do not receive needed services or are treated insensitively when seeking services, then health professionals may magnify feelings of powerlessness, shame, and guilt. When this happens, researchers have described the experience as a "second rape," a secondary victimization to the initial trauma.[308]

Rape myths and prejudices have pervaded not only criminal justice responses to sexual assault but also the responses of crisis programs and health-care providers.[309] Currently, provisions of services to rape and sexual assault victims are skewed toward stranger rapes, despite the fact that most rape and sexual assault victims know the perpetrator. At a time of tremendous vulnerability and need, sexual assault victims too often turn to their communities for help and are further hurt. Although some victims have positive experiences, secondary victimization is a widespread problem that happens, in varying degrees, to many victims of sexual assault who seek post-assault care.[310] Which sexual assault victims receive services, and the quality of care received, too often reflects privilege and discrimination. For example, victims who belong to ethnic minority groups and economically disempowered individuals are more likely to have difficulty obtaining help.[311]

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306. *See generally, e.g.*, Dean G. Kilpatrick et al., *Rape-Related PTSD: Issues and Interventions*, 24 PSYCHIATRIC TIMES 50 (2007); Mary Koss et al., *Depression and PTSD in Survivors of Male Violence: Research and Training Initiatives to Facilitate Recovery*, 27 PSYCHOL. WOMEN Q. 130 (2003).

307. *See, e.g.*, Rebecca Campbell et al., *Responding to Sexual Assault Victims' Medical and Emotional Needs: A National Study of the Services Provided by SANE Programs*, 29 RES. NURSING & HEALTH 384, 385 (2006); Sarah E. Ullman, *Mental Health Services Seeking in Sexual Assault Victims*, 30 WOMEN & THERAPY 61, 64 (2007).

308. *See, e.g.*, Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences in Military and Civilian Social Systems*, 29 PSYCHOL. WOMEN Q. 97, 103 (2005) (finding that most rape victims who sought help from the military or civilian legal or medical systems reported that this contact made them feel guilty, depressed, anxious, distrustful of others, and reluctant to seek further help).

309. *See* Rebecca Campbell et al., *Community Services for Rape Survivors: Enhancing Psychological Well-Being or Increasing Trauma?*, 67 J. CONSULTING & CLINICAL PSYCHOL. 847, 848 (1999).

310. *See generally* Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261 (1999).

311. *See generally* PATRICIA MARTIN, RAPE WORK: VICTIMS, GENDER, AND EMOTIONS IN ORGANIZATION AND COMMUNITY CONTEXT (2005).

Although prevention efforts to eliminate rape are clearly needed, it is just as important to consider how further trauma among those already victimized can be prevented. In response to growing concerns about the community response to rape, new interventions and programs have emerged that seek to improve services and prevent secondary victimization, but funding of these programs needs to be boosted.

1. Increase Funding for SANE Programs

Prior to the rape reform movement of the 1970s, victims of sexual assault were often denied care in hospitals.[312] As a result, rape reform advocates sought to provide sexual assault victims with access to care. In 1992, the Joint Commission for the Accreditation of Healthcare Organizations made it mandatory for hospitals to develop and implement procedures for the treatment of victims of sexual assault and abuse.[313]

Nonetheless, the emergency room remains inhospitable to sexual assault victims. When victims of sexual assault present to the emergency room at their local hospital, they are often triaged.[314] If the rape does not result in significant physical injuries, a victim of sexual assault faces long wait times, and because less than a third of sexual assault victims present with physical injuries, most rape victims endure a long, arduous wait.[315] During this wait, victims are not allowed to eat, drink, or urinate so as not to destroy physical evidence of the assault.[316] When victims are finally seen by emergency room doctors, they tend to perform invasive rape examinations without adequately explaining the procedure to victims, which can be retraumatizing.[317]

More troubling, numerous studies have found that fewer than half of rape victims treated in hospital emergency room receive basic medical services. For example, while most sexual assault victims receive a medical exam and forensic evidence collection kit,[318] researchers have found that less than 50 percent of sexual assault victims receive information about the risk of

312. Linda E. Ledray & Sherri Arndt, *Examining the Sexual Assault Victim: A New Model for Nursing Care*, 32 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERVICES 7, 7 (1994) (noting that it was not uncommon for hospitals to turn away rape victims and that many lacked a rape protocol).

313. Judith McFarlane et al., *Identification of Abuse in Emergency Departments: Effectiveness of a Two-Question Screening Tool*, 21 J. EMERGENCY NURSING 391, 391 (1995).

314. Kristin Littel, *Sexual Assault Nurse Examiner Programs (SANE): Improving the Community Response to Sexual Assault Victims*, OVC BULL., Apr. 2001, at 1, 2 (noting that rape victims will often wait as long as four to ten hours in the ER).

315. Linda Ledray, *The Sexual Assault Nurse Clinician: A Fifteen-Year Experience in Minneapolis*, 18 J. EMERGENCY NURSING 217, 217 (1992).

316. *See* Littel, *supra* note 314, at 2.

317. *See* Rebecca Campbell, *What Really Happened?: A Validation Study of Rape Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55, 64 (2005) (finding that after going to the ER most rape survivors stated that they felt depressed (88 percent), nervous or anxious (91 percent), violated (94 percent), distrustful of others (74 percent), and reluctant to seek further help (80 percent)).

318. Rebecca Campbell, *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE, 1239, 1239–59 (2001).

pregnancy or are offered emergency contraception.[319] Similarly, a disturbing percentage of victims do not receive antibiotic prophylaxis to reduce the likelihood of sexually transmitted diseases.[320] Finally, emergency room personnel often lack training in rape forensic exams, which leads to incorrect performance of collection procedures.[321]

The poor quality of care received by sexual assault victims in emergency rooms was the catalyst for the creation and expansion of Sexual Assault Nurse Examiner (SANE) programs, the first of which was established in Memphis.[322] The aim of a SANE was to provide care that addressed the victims' emotional needs as well as their health concerns.[323] SANEs are registered nurses who receive specialized training in the treatment of sexual assault victims,[324] including training in forensic-evidence collection, sexual assault trauma response, forensic techniques using special equipment, expert-witness testimony, assessment and documentation of injuries, identifying patterned injury, and maintenance of the chain of evidence.[325] To obtain certification from the International Association of Forensic Nurses, registered nurses must have two years of experience and complete training that involves a forty-hour didactic component and a clinical preceptorship with an experienced SANE.[326]

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319. *See, e.g.*, Annette Amey & David Bishai, *Measuring the Quality of Medical Care for Women Who Experience Sexual Assault with Data from the National Hospital Ambulatory Medical Care Survey*, 39 ANNALS EMERGENCY MED. 631, 635–36 (2002) (finding that 20 to 28 percent of sexual assault victims were offered emergency contraception at hospitals); Campbell, *supra* note 317, at 63 (finding that 28 to 38 percent of sexual assault victims were offered emergency contraception).

320. *See, e.g.*, Sue Rovi & Noa'a Shimoni, *Prophylaxis Provided to Sexual Assault Victims Seen at US Emergency Departments*, 57 J. AM. MED. WOMEN'S ASSOC. 204, 204 (2002) (reviewing ER data and finding that prophylaxis antibiotics were not prescribed in 62.5 percent of all cases); Jeanette D. Straight & Pamela C. Heaton, *Emergency Department Care for Victims of Sexual Offense*, 64 AM. J. HEALTH-SYS. PHARMACY 1845, 1845, 1847 (2007) (finding that sexual assault victims did not receive antibiotics in nearly 70 percent of the cases reviewed).

321. *See* Stacey Beth Plichta, *The Emergency Department and Victims of Sexual Violence: An Assessment of Preparedness to Help*, 29 J. HEALTH & HUM. SERVICES ADMIN. 285, 298 (2006) (finding that only 66 percent of ER departments correctly performed all ten components of a sexual assault forensic exam).

322. *See, e.g.*, *History and Development of SANE Programs*, OFF. JUST. PROGRAMS, https://www.ovcttac.gov/saneguide/introduction/history-and-development-of-sane-programs/ [https://perma.cc/49VV-N5NH] (last visited Nov. 15, 2018).

323. Rebecca Campbell et al., *The Effectiveness of Sexual Assault Nurse Examiner (SANE) Programs: A Review of Psychological, Medical, Legal, and Community Outcomes*, 6 TRAUMA, VIOLENCE & ABUSE 313, 314 (2005).

324. *See* U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS 59 (2013), https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf [https://perma.cc/SBP9-325J].

325. *See generally, e.g.*, Jennifer L. Orr, *The Role of the Forensic SANE Nurse in Pediatric Sexual Assault*, 27 J. LEGAL NURSE CONSULTING 16 (2016).

326. Tammy Bimber, *The Medical/Legal Aspects of Sexual Assault Nurse Examiner (SANE) Programs in Emergency Departments*, 25 J. LEGAL NURSE CONSULTING 32, 32–33 (2014).

The typical SANE program is housed in an emergency room and staffed by trained sexual assault nurse examiners.[327] Generally, a few examination rooms in the emergency room are set aside for use by SANEs.[328] When a sexual assault victim presents to the emergency room, the sexual assault victim is taken to a room dedicated for SANEs.[329] If a SANE is not immediately available, one is paged and usually reports within thirty minutes.[330] In addition, many SANE programs coordinate with rape crisis centers so that a victim advocate can be present for the exam and provide emotional support.[331]

The primary mission of a SANE program is to meet the immediate needs of the sexual assault victim by providing compassionate, culturally sensitive, and comprehensive forensic evaluation and treatment by a trained professional nurse.[332] Studies suggest that SANE programs are incredibly successful in a myriad of dimensions. Rape victims who are treated by a SANE receive more thorough medical care[333] and recover more quickly.[334] Further, the forensic exams and evidence collection kits provided by SANE programs are more thorough and complete than those provided by standard emergency rooms.[335] SANE programs often utilize special forensic equipment such as colposcopes which can detect microlacerations, bruises,

327. *See id.* at 33 (noting that 90 percent of SANEs operate in emergency rooms).

328. *See* Courtney E. Ahrens et al., *Sexual Assault Nurse Examiner (SANE) Programs: Alternative Systems for Service Delivery for Sexual Assault Victims*, 15 J. INTERPERSONAL VIOLENCE 921, 930–32 (2000) (describing SANE programs).

329. *Id.*

330. *Id.*

331. Littel, *supra* note 314, at 3.

332. *See* Rebecca Campbell et al., *Organizational Characteristics of Sexual Assault Nurse Examiner Programs: Results from the National Survey of SANE Programs*, 1 J. FORENSIC NURSING 57, 57 (2005).

333. For example, in one study, researchers examined medical charts before and after the implantation of a SANE program. Frances Derhammer et al., *Using a SANE Interdisciplinary Approach to Care of Sexual Assault Victims*, 26 J. ON QUALITY IMPROVEMENT 488, 490 (2000). Prior to the SANE program only about 11 percent of sexual assault victims received a complete physical exam, but after the SANE program was implemented 95 percent of assault victims received a completed exam. *Id.* at 495.

334. In a study of the Memphis SANE program, researchers found that 50 percent of victims in their study were able to return to their usual vocation within one month, and, in three to six months, 85 percent felt secure alone in public areas. Abiodun Solola et al., *Rape: Management in a Noninstitutional Setting*, 61 OBSTETRICS & GYNECOLOGY 373, 375 (1983). After 12 months, more than 90 percent of the survivors were entirely free of their initial assault-related anxieties and emotional discomposure. *Id.*

335. In a Colorado-based study, researchers tested the differences between SANE and non-SANE kits. *See* Valerie Sievers et al., *Sexual Assault Evidence Collection More Accurate When Completed by Sexual Assault Nurse Examiners: Colorado's Experience*, 29 J. EMERGENCY NURSING 512, 513–14 (2003). This study compared 279 kits collected by SANE nurses and 236 by doctors and non-SANE nurses on ten quality control criteria, and found that in nine of these ten categories, the SANE-collected kits were significantly better. *Id.* The kits collected by SANE nurses were significantly more likely than kits collected by physicians to include the proper sealing and labeling of specimen envelopes, the correct number of swabs and other evidence (pubic hairs and head hairs), the correct kind of blood tubes, a vaginal motility slide, and a completed crime lab form. *Id.*

and other injuries.[336] And although the exam process is more lengthy, SANE programs provide a full explanation of the process before the exam and ongoing descriptions and explanations throughout the exam.[337] Studies suggest that SANE programs increase prosecution of sexual assault cases because the quality of forensic evidence obtained can provide corroborating evidence of nonconsent.[338] Finally, with respect to medical care, studies have shown that SANE programs consistently offer better care at a lower cost. SANEs prescribe emergency contraception and preventative antibiotic treatment at much higher rates than emergency room doctors.[339] The cost of a physician conducting a forensic exam is approximately $1200 whereas the cost of a SANE conducting the exam ranges from $300 to $450.[340]

The success of SANE programs in improving the care of sexual assault victims has spurred expansion. Recent estimates suggest that there are over six hundred SANE programs nationwide, housed mostly in hospitals.[341] Although this number might sound large, less than 15 percent of emergency departments have a SANE program,[342] and the existing SANE programs often struggle financially.[343] Funding sources for SANE programs varies widely and often comes from disparate sources, including governmental funds, hospitals donations, and nonprofit fundraising.[344] In a survey, 72 percent of SANE directors cited funding as a concern.[345] When SANE programs rely on grants or government funding, they encounter problems when state or federal budgets are slashed or if they lose support from politicians. Similarly, when SANE programs are funded by hospitals, they face funding difficulties when they lose support from hospital administration.

Thus, funding for existing SANE programs needs to be prioritized, stabilized, and increased to sustain existing programs and begin new ones, as SANE programs are integral to mitigating the long-term health and economic impact of sexual violence on victims. SANEs form collaborative relationships with police departments, rape crisis centers, victims' services centers, and prosecutors' offices to facilitate a more streamlined and less traumatizing experience for victims. By decreasing the trauma associated

336. Littel, *supra* note 314, at 13.

337. *See* Rebecca Campbell et al., *A Participatory Evaluation Project to Measure SANE Nursing Practice and Adult Sexual Assault Patients' Psychological Well-Being*, 4 J. FORENSIC NURSING 19, 19 (2008).

338. Littel, *supra* note 314, at 7.

339. Campbell et al., *supra* note 307, at 385 (finding that such services are provided by SANEs at rates of 90 percent or higher).

340. *See* Bimber, *supra* note 326, at 33.

341. Linda Ledray, *Expanding Evidence Collection Time: Is It Time to Move Beyond the 72-Hour Rule? How Do We Decide?*, 6 J. FORENSIC NURSING 47, 47 (2010).

342. Bimber, *supra* note 326, at 34.

343. *See generally* Shana L. Maier, *Sexual Assault Nurse Examiners' Perceptions of Funding Challenges Faced by SANE Programs: "It Stinks,"* 8 J. FORENSIC NURSING 81 (2012) (discussing the funding challenges encountered by SANE programs).

344. *See generally, e.g.*, Debra D. Hatmaker et al., *A Community-Based Approach to Sexual Assault*, 19 PUB. HEALTH NURSING 124 (2002) (discussing the funding of the community-based Athens-Clarke County Sexual Assault Nurse Examiners (ACC-SANE) program).

345. *See* Maier, *supra* note 343, at 87.

with sexual assault, SANEs reduce the likelihood of permanent trajectory shifts for victims.

2. Expand Access to Victim Compensation Programs for Sexual Assault Victims

Victim compensation programs reimburse victims of rape and other violent crime for expenses such as medical care, mental health counseling, lost wages, and even sometimes emotional pain and suffering. California became the first state to enact a victim compensation program in 1964.[346] Twenty years later, Congress enacted the Victims of Crime Act of 1984 ("VOCA"),[347] which established a federal office responsible for developing the rights of victims and providing supplementary federal funding for state victim assistance programs through a newly created Crime Victims Fund. Beginning in 1986, states qualified for VOCA funding if their compensation programs satisfied certain statutory requirements.[348] By 1992, as a result of federal funding, every state had enacted a victim compensation program.[349]

The underlying theory behind victim compensation programs is that the state is responsible for protecting the public against crime and, therefore, has a moral duty to compensate victims because every crime represents a failure by the state to protect the victim.[350] The benefits and requirements vary from state to state,[351] and funding for such programs typically comes from fines, penalties, and forfeitures in state and federal criminal cases. Victim compensation programs generally require that the victim: (1) report the crime promptly to law enforcement; (2) cooperate with police and prosecutors in the investigation and prosecution of the case; (3) submit a

346. *See* Leonard McGee, *Crime Victim Compensation*, 5 J. CONTEMP. L. 67, 69 (1978).

347. Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended at 42 U.S.C. §§ 10601–10604 (2012)).

348. A crime-victims program is eligible for funding if it: (1) includes victims of drunk driving and domestic violence among eligible recipients; (2) promotes victim cooperation with law enforcement authorities; (3) certifies that VOCA grants will not be used to supplant state funds otherwise available to provide crime victim compensation; (4) makes compensation awards to victims who are nonresidents of the state on the same basis as it would to residents; (5) provides compensation to victims of federal crimes; (6) provides compensation to residents of the state who are victims of compensable crimes; (7) does not deny compensation to any victim because of that victim's familial relationship to the offender, or because she is related to, or cohabitates with, the offender; (8) prohibits compensation to any person who has been convicted of an offense under federal law with respect to any time period during which the person is delinquent in paying a fine, other monetary penalty, or restitution imposed for the offense; and (9) complies with VOCA administrative program requirements. 42 U.S.C. § 10602(b)(1)–(6) (2012).

349. In 1992, Maine became the last state to enact a victims compensation program. *See* ME. REV. STAT. ANN. tit. 5, § 316-A (2017).

350. Pablo J. Drobny, *Compensation to Victims of Crime: An Analysis*, 16 ST. LOUIS U. L.J. 201, 204 (1971).

351. LISA NEWMARK ET AL., THE NATIONAL EVALUATION OF STATE VICTIMS OF CRIME ACT ASSISTANCE AND COMPENSATION PROGRAMS: TRENDS AND STRATEGIES FOR THE FUTURE I (2003), https://www.urban.org/sites/default/files/publication/59536/410924-The-National-Evaluation-of-State-Victims-of-Crime-Act-Assistance-and-Compensation-Programs-Trends-and-Strategies-for-the-Future-Full-Report-.PDF [https://perma.cc/LZ72-RL2C].

timely application to the compensation program; (4) have a loss not covered by insurance or some other collateral source; and (5) be innocent of criminal activity or significant misconduct that caused or contributed to the victim's injury or death.[352]

Although these requirements are reasonable for most serious crimes, they are unduly burdensome for victims of sexual violence. Requiring the prompt reporting of the assault is a significant impediment to obtaining needed funds for many victims.[353] Many sexual violence victims report feeling guilt or shame, which can delay reporting.[354] In explaining why sexual violence victims delay reporting, an expert opined that:

> It may be hard for a victim to do anything that reminds them of the circumstances of the assault and simple tasks may become impossible. . . . Some find it too hard to talk about what happened, and thus they may delay reporting the events and not tell anyone, even those who love them.[355]

While some victims delay reporting, many more never report at all.[356] It is well documented that many sexual assault victims never report the assault for a variety of reasons including: fear of being blamed for the victimization,[357] fear of reprisal from the perpetrator or others,[358] shame or guilt,[359] self-blame,[360] ambiguity regarding the assault,[361] and thinking that

352. *See, e.g.*, 42 U.S.C. § 10602(b)(8) (prohibiting payments to those who had been convicted of a federal criminal offense).

353. For example, in *Doe v. Fischetti*, a rape victim who failed to report the rape until three years after the crime was denied compensation despite her testimony and the testimony of a witness whom she had told about the rape. 676 N.Y.S.2d 262, 263 (App. Div. 1998).

354. *See, e.g.*, State v. Roles, 832 P.2d 311, 319 (Idaho Ct. App. 1992) (allowing expert testimony "to explain the delay in reporting the incident and the delay in AB's efforts to flee."). *See generally* State v. Kinney, 762 A.2d 833 (Vt. 2000) (holding that a prosecutor could call an expert to testify that it is not unusual for sexual assault victims to delay reporting due to feelings of guilt and shame).

355. *See* Fiona L. Mason, *Rape—Myth and Reality: A Clinician's Perspective*, 50 MED. SCI. & L. 116, 118 (2010).

356. W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 623, 623 (2007) (noting that "only about one-third of rape victims reported the crime to police, making rape the most underreported of all violent crimes"); *see also* Gise & Paddison, *supra* note 15, at 629 (discussing estimates of the underreporting of rape).

357. *See* Janice Du Mont et al., *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466, 468–69 (2003) (discussing that fear of the attribution of blame by others or of not being believed, particularly when having engaged in "high risk behaviors," has also been linked to deciding not to report the assault to police).

358. U.S. DEP'T OF JUSTICE, *supra* note 12, at 7.

359. Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 FEMINIST CRIMINOLOGY 286, 287 (2010) (noting that "[v]ictims who are ashamed or anticipate disapproval from others will be hesitant to disclose sexual victimization and especially reluctant to report their incidents to the police").

360. Du Mont et al., *supra* note 357, at 468 (noting that "nonreporting has been ascribed to intrapsychic processes such as self-blame").

361. Alan M. Gross et al., *An Examination of Sexual Violence Against College Women*, 12 VIOLENCE AGAINST WOMEN 288, 297 (2006) (finding that "only 15% of women who submitted to unwanted sexual intercourse because they felt their partner's level of sexual arousal made it useless to try to stop his advances considered this an act of rape").

the assault is "not serious enough"[362] or that the police would not take them seriously.[363]

Access to appropriate care is particularly critical to victims who are living in poverty or on the cusp of poverty. Rape can have serious long-term medical, psychological, and economic consequences without timely interventions.[364] Victims of sexual assault tend to lack resources. Demographic characteristics—such as being in a racial minority group, unemployed, a student, young, unmarried, and living in poverty—are correlated with higher rates of victimization.[365] Researchers have found that women in the lowest income bracket, with annual household incomes of less than $7500, are sexually victimized at about six times the rate of women in households earning $75,000 or more annually.[366] Further, victims of sexual assaults are more likely to continue living in poverty and are at greater risk for further victimization.[367]

Thus, victim compensation programs should amend guidelines with respect to prompt reporting and cooperation with police for victims of sexual assault. There are a myriad of reasons why sexual assault victims delay or fail to report,[368] and whether the assault is quickly reported or not should not impede a victim's ability to obtain necessary care. Victim compensation programs should amend guidelines to allow approval of applications by sexual assault victims to be given based upon evidence other than a police report to establish that a sexual assault has occurred. Factors sufficient to establish that a sexual assault has occurred should include, but not be limited to, medical records documenting injuries consistent with allegations of sexual assault, mental health records, or that the victim received a forensic sexual assault examination.

Further, many victim compensation programs interpret the innocent victim requirement very broadly such that victims are precluded from compensation if they have a prior criminal record.[369] These prior-criminal-acts provisions

362. Martie Thompson et al., *Reasons for Not Reporting Victimizations to the Police: Do They Vary for Physical and Sexual Incidents?*, 55 J. AM. C. HEALTH 277, 279 (2007) (finding that the most commonly cited reason for victims of sexual assault not reporting their victimization was that the incident was "not serious enough").

363. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATS., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010, at 4 (2012), https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf [https://perma.cc/J9K5-7EXC] (finding that 13 percent of rape victims did not report the incident because of a belief that the police would not help).

364. *See supra* notes 41–63 and accompanying text.

365. *See generally* Christina A. Byrne et al., *The Socioeconomic Impact of Interpersonal Violence on Women*, 67 J. CONSULTING & CLINICAL PSYCHOL. 362 (1999).

366. Callie Marie Rennison, Opinion, *Privilege Among Rape Victims*, N.Y. TIMES (Dec. 21, 2014), https://www.nytimes.com/2014/12/22/opinion/who-suffers-most-from-rape-and-sexual-assault-in-america.html [https://perma.cc/NX3U-VWEK].

367. See E. Anne Lown et al., *Interpersonal Violence Among Women Seeking Welfare: Unraveling Lives*, 96 AM. J. PUB. HEALTH 1409, 1409 (2006).

368. *See supra* notes 356–63 and accompanying text.

369. *See, e.g.*, ARK. CODE ANN. § 16-90-712(5) (LexisNexis 2018) (excluding "any claimant who has been convicted of a felony involving criminally injurious conduct"); MISS. CODE ANN. § 99-41-17(1)(j) (2016) (barring "any claimant or victim who has been under the actual or constructive supervision of a department of corrections for a felony conviction within

should not be applicable to victims of sexual assault. It is of utmost important that states create environments in which victims have access to care after a sexual assault. Victim compensation programs provide an already-established avenue to ensure that victims of sexual violence get needed care.

CONCLUSION

Sexual violence has reached epidemic proportions in this country. To reduce the incidence of sexual violence, the conversation needs to shift from a gendered conversation about how to reform criminal law to increase the rate of rape convictions to a gender-neutral discussion about how to change cultural norms about what constitutes sexual violence. Criminal law has largely failed in changing cultural norms. Thus, sexual violence victims' advocates should focus their energy and resources on expanding public health interventions targeted at reducing the incidence of sexual violence rather than focusing on increasing conviction rates for rapists. Through various interventions, including public service announcements, education, and awareness campaigns, society can be taught to view sexual relations differently. Efforts should primarily focus on sexual assault prevention and secondarily on improving care and access to care for victims.

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five (5) years prior to the injury or death for which application has been made"); WYO. STAT. ANN. § 1-40-106(c) (LexisNexis 2018) ("Any person who perpetrates any criminal act on the person of another or who is convicted of a felony after applying to the division for compensation is not eligible or entitled to receive compensation under this act.").

Seeking Consent and the Law of Sexual Assault

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ABSTRACT

This article focuses on two neglected aspects of rape law. First, its tendency to *presume* sexual consent across a range of social contexts, overlooking the fact that much social life is predicated on a presumption *against* sexual contact. Second, its tendency to ignore a critical empirical fact: that an overwhelmingly large number of sexual assaults occur during the first-ever sexual contact between the specific parties involved—what I term "First Encounters." The relationship between these two facets of rape law is crucial. Whereas much of social life operates with an underlying presumption that people have not consented to sex with others unless they have given clear signals to that effect—particularly in relationships that have never before been sexual—rape law does the opposite and presumes consent where it has never existed. This disconnect constitutes our greatest overlooked opportunity for meaningful rape law reform.

Accordingly, rape law has been framed around the wrong questions. The right question, particularly in First Encounters, is whether the accused *sought* the victim's consent. The wrong questions—those focused on the presence of force, or the victim's reaction to the assault—are based on an underlying presumption that consent was present if force or lack of consent cannot be proven. Any legal presumption of consent to sex contrasts sharply with how people think of their own sexual agency and how they negotiate consensual sexual relationships in real life. I therefore argue for statutory reform that focuses the analytical lens on whether, and how, a sexual assault defendant sought the other party's consent to the encounter. I propose the offense of committing first-time sexual penetration or contact without *seeking* consent. In the absence of prior sexual contact between parties, the law should presume nonconsent.

INTRODUCTION

This article focuses on two neglected aspects of rape law. First, its tendency to *presume* sexual consent across a range of social contexts, overlooking the fact that much social life is predicated on a presumption *against* sexual contact. Second, its tendency to ignore a critical empirical fact: that an overwhelmingly large number of sexual assaults occur during the first-ever sexual contact between the specific parties involved—what I term "First Encounters." The relationship between these two facets of rape law is crucial. Whereas much of social life operates with an underlying presumption that people have not consented to sex with others unless they have given clear signals to that effect—particularly in relationships that have never before been sexual—rape law does the opposite and presumes consent where it has never existed. This disconnect constitutes our greatest overlooked opportunity for meaningful rape law reform.

Accordingly, rape law has been framed around the wrong questions. The right question, particularly in First Encounters, is whether the accused *sought* the victim's consent. The wrong questions—those focused on the presence of force, or the victim's reaction to the assault—are based on an underlying presumption that consent was present if force or lack of consent cannot be proven. Any legal presumption of consent to sex contrasts sharply with how people think of their own sexual agency and how they negotiate consensual sexual relationships in real life. I therefore argue for statutory reform that focuses the analytical lens on whether, and how, a sexual assault defendant sought the other party's consent to the encounter. I propose the offense

of committing first-time sexual penetration or contact without *seeking* consent. In the absence of prior sexual contact between parties, the law should presume nonconsent.

The Article proceeds in five parts. Part One sets out the central arguments about the prevalence of a presumption of consent in rape law and the overlooked importance of the First Encounters case. I focus analysis on the law's tendency to presume consent to sex, explaining where this presumption came from, how it continues to operate today, and why it is problematic.

Part Two introduces a proposal for statutory reform—a form of affirmative consent designed to apply specifically to First Encounter cases and which criminalizes the act of engaging in first-time sexual contact or penetration without first seeking the other person's consent. This "seeking consent" approach focuses the fact-finder's attention on the accused's conduct rather than the victim's while also respecting the victim's sexual agency.

Part Three analyzes a range of sexual assault cases in order to demonstrate that the seeking consent approach is a useful corrective to courts' common practice of overlooking critical First Encounter dynamics and ignoring the sexual agency of victims. Judicial opinions that have trivialized the harm of sexual assault and produced absurd results come out differently under the proposed approach.

Part Four shows how my proposal builds upon the affirmative consent debate. It gives an overview of the statewide statutory landscape around affirmative consent, demonstrating that support for the idea is building across constituencies, despite critics' objections. It also demonstrates that the seeking consent framework proposed here helps to shift the analysis of consent onto the perpetrator's actions in *seeking* consent and away from the victim's actions in *giving* it. Part Five offers additional justifications for the seeking consent approach.

PART ONE: PRESUMING CONSENT TO SEX

Courts have presumed consent to sex in rape law, both historically and today. This section demonstrates the linkages between the presumption of consent and the resistance requirement, and how this presumption stubbornly persists today. It then introduces the idea of First Encounter sexual assault and places this dynamic under the microscope, demonstrating how common such cases are, how courts have largely missed their significance, and why it is important to embrace these cases as learning tools capable of informing legislative change. Finally, the section problematizes the presumption of consent and proposes an alternative: a presumption of *nonconsent* in First Encounter sexual assault.

A. The Presumption of Consent

In 1886 a Nebraska widow, age 58, lived alone in a shanty.[1] One day, a man shoveled her snow and carried firewood in for her.[2] He then asked for sex.[3] She refused.[4] He responded by throwing her down onto the bed and having sexual intercourse with her, apparently against her will and with force.[5] The victim testified:

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*Acknowledgements to come.
[1] *Matthews v. State*, 27 N.W. 234, 234 (Neb. 1886).
[2] *Id.*at 234.
[3] *Id.*
[4] *Id.*
[5] *Id.*at 234-35.

> "I got away from him once. Then he got me back the second time, he being strong and I being so weak,—wanting something to eat and fright together, I had not much strength…I tried to get away the second time, but could not get away. He kept me till he got satisfaction."[6]

The defendant was convicted, but the Nebraska supreme court overturned the conviction, holding that what had happened was not rape because the victim's testimony failed to show such resistance "as would constitute the offense."[7] The court further explained: "[a]ll that she testified to may be true, and still the act not have been against her will."[8] In other words, the court concluded that the victim did not resist enough, and therefore the sex was likely consensual. In arriving at this holding, the court admitted its concern that women might pursue "illicit intercourse" for pleasure and then later claim it was rape when her behavior became known.[9]

But what it ignored was the evidence—the lack of any indication of prior acquaintance between the parties, the coercive circumstances facing the victim, with a man in her home who was larger and stronger than she was, and the fact that her nearest neighbors lived about a quarter of a mile away.[10] The court presumed that she may have, or actually did, consent to sex.

Fast forward to today. Most states have eliminated resistance as an element of rape, but the requirement of resistance, and the corresponding presumption of consent if resistance is absent, persists. Nebraska's current sexual assault statute defines first degree sexual assault as, *inter alia*, sexual penetration without the consent of the victim.[11] But the statutory definition of "without

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[6] *Id.*at 235.
[7] *Id.* at 236, 237.
[8] *Id.*
[9] *Id.*
[10] The nearest neighbors resided eighty rods away. *Id.* at 234. A rod is 16.5 feet.
[11] NEB. REV. STAT. § 28-319(1)(a).

consent" requires the victim to *express* that lack of consent through words or conduct.[12] Evidence of resistance is no longer required, as it was in 1886, as proof that the victim did everything in her power to oppose the act; rather "[t]he victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent."[13] The statute simply does not recognize nonconsent unless it is clearly expressed.

Nebraska's current law is more enlightened than the 1886 version, but it reveals that the resistance requirement persists. In the absence of words or conduct indicating a clear unwillingness to have sex, the court presumes that the victim consented. Professor Tuerkheimer views this type of approach as creating a "new resistance requirement."[14] She points out that requiring "an expression of nonconsent" is "incompatible with an understanding of women as sexual agents….The new resistance requirement makes women's sexual availability the default."[15]

This presumption of consent, and its corresponding default position that a complaining victim is sexually available, ignores a real-world reality that is both simple and critical: most human beings do not consent to sex with the vast majority of the people with whom they come into contact. Rather, a presumption *against* sexual contact and sexual availability exists in most human relationships. Although sexual contact may be commonplace, most people have sex with a fairly limited universe of partners—one that excludes most of their acquaintances and family

[12] NEB. REV. STAT. § 28-318(8)(a).
[13] NEB. REV. STAT. § 28-318(8)(b).
[14] Deborah Tuerkheimer, *Sexual Agency and the Unfinished Work of Rape Law Reform*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE, 166, 173-74 (Cynthia Grant Bowman & Robin West, eds., 2018) (hereinafter "*Sexual Agency*").
[15] *Id.* at 174.

members. Why then should the law presume that a person is sexually available to anyone who comes along?

To put it simply, a victim of unwanted sexual touching should not have to take affirmative steps to assert their right to be left alone.[16] The burden of resistance that courts have placed on victims for dozens of years is simply wrong, because it ignores this core facet of social life and allows the court to reason from a standpoint of presuming the victim's sexual availability.

There are many contexts in which humans interact with a clear understanding that the interaction is nonsexual and will foreseeably, and often undoubtedly, remain so. A mutual presumption of nonconsent to sex fuels the trust that undergirds a plethora of rewarding and functional nonsexual relationships, such as those between parents and children, doctors and patients, and service workers and their clients. Rape law therefore must be modified to recognize how important the presumption of nonconsent is to society and to respect the role that this presumption should play in adjudicating sexual assault.

That rape law has overlooked the societal presumption of nonconsent to sex has not gone unnoticed by scholars. Writing in 1987, Susan Estrich observed that "[i]n spite of the law's supposed celebration of female chastity, a woman's body was effectively presumed to be offered at least to any appropriate man she knows, lives near, accepts a drink from, or works for. The resistance requirement imposed on her the burden to prove otherwise."[17] The Nebraska widow found herself in this position. A man shoveled snow and carried firewood for her, and that was enough for the court to see consent to sex.

Professor MacKinnon similarly noted that "[t]he crime of rape is defined and adjudicated from the male standpoint, *presuming* that forced sex is sex and that consent to a man is freely

[16] For an expansion of this point, *see generally* Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. OF GENDER & L 395, 405 (2012).

[17] SUSAN ESTRICH, REAL RAPE 41 (1987).

given by a woman."[18] Professor Tuerkheimer has similarly observed that there is a "[t]elling judicial inclination to posit, needlessly, the presence of consent—and to do so under unlikely circumstances. In dicta, judges manifest deep skepticism of non-consent in the absence of force. *The effect is a legal presumption of perpetual consent*."[19] This approach—presuming consent to sex—ignores the sexual agency of anyone who is on the receiving end of unwanted sexual touching.[20]

When courts presume consent to sex, they give the accused a legal advantage that he does not enjoy when negotiating relationships in daily life. Professor Schulhofer has noted the disconnect between how actual consent develops and what the law presumes. He has argued that without an affirmative consent requirement, "[t]he law would, in effect, be assuming that people are always receptive to sexual intercourse (at any time, with any person), until they do something to revoke that permission. That is hardly an accurate description of ordinary life."[21] And yet courts' tendency to presume consent has persisted for decades. It is time for these critical observations about the presumption of consent to shape statutory reform.

B. The Link Between the Resistance Requirement and the Presumption of Consent

The tendency of the law to presume consent to sex is linked, historically, to the resistance requirement, by which a woman was deemed to have consented to sex if she did not resist.[22] This approach to rape was set in motion prior to the twentieth century. The earliest versions of

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[18] CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 180 (1989) (emphasis added).
[19] Deborah Tuerkheimer, *Rape On and Off Campus*, 1, 16 EMORY L. J. (2015) (emphasis added).
[20] *See* Deborah Tuerkheimer, *Sexual Agency*, *supra* note 14 at 173-74.
[21] Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335 (2017) (hereinafter ("*Reforming*").
[22] *Devoy v. State*, 99 N.W. 455, 456 (Wis. 1904).

the resistance requirement mandated that the woman resist "to the utmost."[23] An 1897 Georgia case illustrates this standard: "In order that the offense might constitute rape, she must have resisted with all her power, and kept up that resistance as long as she had strength. Opposition to the sexual act by mere words is not sufficient….[t]here must be the utmost reluctance and resistance."[24] If such resistance is not present, the court presumes consent.

Devoy v. State, a 1904 Wisconsin decision, illustrates this principle. The seventeen-year-old victim met one of the defendants at a July 4th dance.[25] He then led her to an isolated area, where they were approached by a friend of the defendant.[26] The men aided one another in having sexual intercourse with the victim; each did so twice before she was able to get away.[27] The victim testified that her hands were not free, that one defendant had his hand over her mouth, and that she kept silent because they threatened harm if she did not.[28] She also testified that she tried to push them off and fought them the whole time.[29]

Most of the opinion is spent analyzing the victim's actions rather than the defendants,' and her actions are found wanting.[30] The court faults the victim for not calling for help and finds "[a]

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[23] Corey Yung, *Rape Law Gatekeeping*, 58 B.C.L. REV. 205, 212. (2017). Yung documents the use of this standard in some states through at least 1973. *Id.* But the pace of change varied; Colorado, as one example, had abandoned the rule of utmost resistance by 1925. *Magwire v. People*, 235 P. 339, 340 (Colo. 1925).

[24] *Mathews v. State*, 29 S.E. 424, 426 (Ga. 1897). In Mathews, an adult male forced a 16-year-old girl to consent to sex with him. Because she ultimately consented as a result of the application of force, the man was convicted not of rape, but of fornication and adultery. *Id.* Numerous cases demonstrate the use of the utmost resistance standard. *See, e.g., Oleson v. State*, 9 N.W. 38, 39 (Neb. 1881) ("…it must appear that she resisted to the extent of her ability."); *Whittaker v. State*, 7 N.W. 431, 433 (Wis. 1880) ("Any consent of the woman, however reluctant, is fatal to a conviction. The passive policy will not do…There must be the utmost reluctance and resistance."); *Connors v. State*, 2 N.W. 1143, 1147 (Wis. 1879) ("…voluntary submission by the woman while she has the power to resist, however reluctantly yielded, deprives the act of an essential element of rape.").

[25] *Devoy v. State*, 99 N.W. 455, 455 (Wis. 1904). The opinion states that the victim was "within two months of eighteen years of age." *Id.*

[26] *Id.* at 455.

[27] *Id.* at 455, 455-56.

[28] *Id.* at 455-56, 457. One defendant displayed a pocket knife; he also allegedly said that if she did not keep silent she "knew what he would do to her." *Id.* at 457.

[29] *Id.* at 457.

[30] *Id.* at 455, 456-57.

want of the utmost resistance on her part."[31] As a result, there was no rape and she was presumed to have consented to sex with both men.[32] The court apparently saw little point in considering other circumstances that suggested an *unwillingness* to have sex, such as the fact that the victim had just met the first defendant, that the other was entirely unknown to her, and that she was outnumbered.

Susan Estrich has observed that although courts have historically treated women as "passive and powerless" in relation to a range of legal matters—such as voting, professional identity, and property ownership, the law also demanded that women be "strong and aggressive and powerful" in relation to repelling a sexual assault.[33] There was simply no willingness to consider the possibility that a man could force sex on a woman by terrifying or overpowering her into submission. The result was that courts presumed the victim's consent to sex unless she resisted to the utmost. As the New York Court of Appeals put it in 1874, "[if] a woman, aware that [the sex act] will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant?"[34] In short, the law insisted that women actively and vigorously resist unwanted sex. In doing so, courts enabled a broad range of sexual aggression.

In addition to the concern that women might actually be enjoying sex that they later called rape, other courts expressed the concern that men could easily have their reputations ruined by women fabricating rape claims.[35] The Nebraska supreme court admitted that it presumed assertive action would be forthcoming from a genuine rape victim: "[t]he law presumes that a

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[31] *Id.* at 457.
[32] *Id.*
[33] ESTRICH, *supra* note 17 at 31.
[34] *People v. Dohring*, 59 N.Y. 374 (N.Y. 1874).
[35] *Matthews v. State*, 27 N.W. 234, 236 (Neb. 1886). ("The reason for this rule is apparent, as probably but comparatively few women would admit that they gave their assent to illicit intercourse. If the mere refusal to give express assent was sufficient to establish the crime of rape, a very large proportion of the cases of illicit intercourse, no doubt, could be brought under that head….) Also quoted in *Mathews v. State*, 29 S.E. 424, 426 (Ga. 1897).

woman who has suffered the indignity and brutality of a rape will not submit in silence to the wrong, but will at once take the necessary steps to bring the offender to justice.[36]

During the mid-twentieth century the resistance requirement softened, presumably out of a recognition that utmost resistance might result in the victim's loss of life.[37] The Colorado supreme court noted, in 1925, that the old rule of "resistance to the utmost" had been "repudiated by the more modern and enlightened authorities, which require only such resistance as age, mental and physical condition, and surrounding facts and circumstances, demand to make opposition reasonably manifest."[38]

Colorado applied this softened resistance requirement in the 1959 case *People v. Futamata*, although the new standard was not much help to the victim. In *Futamata*, the jury acquitted a defendant who laid in wait for the victim while she walked from her home to her outhouse in the middle of the night, then repeatedly struck her over the head with a large rock, dragged her to a car, and demanded sex.[39] The victim, having sustained several blows to her head, did not have the strength to resist the defendant and felt that if she did so, he would kill her.[40] She therefore complied—she removed her clothes when ordered to do so and "submitted to the defendant's advances."[41] The fact that the parties had had no prior sexual contact and that the defendant abducted the victim from her home in the middle of the night were not enough to persuade the

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[36] *Matthews v. State*, 27 N.W. 234, 237 (Neb. 1886).

[37] A number of cases describe circumstances where the victim fears for her life if she does not cooperate. *See, e.g. People v. Rincon-Pineda*, 538 P.2d 247, 249 (Ca. 1975). This softening of the resistance requirement followed the tightening of the resistance requirement in the early twentieth century and was tied to the introduction of the Model Penal Code's efforts to reform rape law in the early 1960s. *See* STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 19-29 (1998). (hereinafter "UNWANTED SEX").

[38] *Magwire v. People*, 235 P. 339, 340 (Colo. 1925).

[39] *People v. Futamata*, 343 P.2d 1058, 1059 (Colo. 1959).

[40] *Id.*

[41] *Id.*

jury that a rape had occurred; apparently her cooperation with the defendant was fatal.[42] As MacKinnon has noted, "'[t]o the extent an accused knows a woman and they have sex, her consent is inferred."[43] In this case, the defendant "knew" the victim in that he had seen her around the YMCA, where they both worked.[44] The court thus absurdly saw consent when he abducted her in the middle of the night, using force, and compelled her to submit to sex.

After the 1970s, states moved to relax the resistance requirement even further, recognizing that a victim might not be able to resist at all if she was sufficiently overcome with fear. California abolished the resistance requirement through a 1980 statutory reform that defined rape to include an act of sexual intercourse accomplished "against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another."[45] This modification removed most references to resistance and created a path to a rape conviction, without resistance, through proof that the victim experienced a reasonable fear sufficient to overcome her will.[46]

Other states made similar modifications at this time. For instance, Georgia has held, since 1976, that lack of resistance induced by fear is the functional equivalent of force.[47] Similarly, Hawaii retained the resistance requirement, but its supreme court gave a more nuanced explanation of resistance in 1980, stating that "earnest resistance" was a relative term that had to be measured by all of the circumstances surrounding the alleged assault.[48] It elaborated:

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[42] The jury in *Futamata* had to wrestle with somewhat confusing jury instructions, which the Colorado supreme court held were erroneous because of certain internal contradictions. *Id.* at 1061-62. Despite these contradictions, it is striking that the jury found the defendant's actions to have been taken without the necessary force, and without adequate resistance from the victim, in a context where she was abducted from her home in the middle of the night.

[43] MACKINNON, *supra* note 18 at 176.

[44] Nothing in the opinion suggests that the victim and defendant had ever spoken prior to the assault. *People v. Futamata*, 343 P.2d 1058, 1059 (Colo. 1959).

[45] *People v. Griffin*, 94 P.3d 1089, 1094 (Cal. 2004).

[46] *Id.*

[47] *Curtis v. State*, 223 S.E.2d 721, 723 (Ga. 1976).

[48] The Hawaii statute defined force in relation to what was necessary to overcome the victim's "earnest resistance." *State v. Jones*, 617 P.2d 1214, 1217 (Haw. 1980).

> [r]esistance may appear to be useless, and may eventually prove to be unavailing, *but there must have been a genuine physical effort on the part of the complainant to discourage and to prevent her assailant from accomplishing his intended purpose*….This is not to say, however, that the woman threatened with the violation of her person is required to take unnecessary risks. All the law requires is that her fear must have been reasonable, and that it was this fear which impelled her to submit without resisting to the degree of which she was capable.[49]

Each of these softened resistance requirements retained the presumption that the victim consented to sex if she could not meet the demands of the statute. Whether in California, Georgia, or Hawaii, a victim either had to resist or had to prove that she was too afraid to do so. In addition, her resistance would have to appear reasonable to the fact-finder.[50] If she could not meet the requisite standard, the court would presume that the sex was not against her will, and the defendant would be acquitted. The result was that a conviction continued to rest on the victim's response to sexual assault rather than on the perpetrator's actions, with her consent presumed in the absence of clear evidence to the contrary. Most courts continued to embrace a resistance requirement through the end of the 1990s.[51]

Susan Estrich has noted the illogic of embracing a presumption of consent to sex rather than the opposite presumption: "[a] system of law that truly celebrated female chastity, which is the system that these judges purported to uphold, should have erred on the side of less sex and

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[49] *Id.* at 1217 (emphasis added).

[50] Courts have often struggled to grasp the terror that rape victims face and have found many victims' fear to be unreasonable. *See* ESTRICH,, *supra* note 17 at 30-41; SCHULHOFER, UNWANTED SEX, *supra* note 37 at 50-51; Robin West, *The Difference in Women's Hedonic Lives*, 3 WISC. WOMEN'S L. J. 81, 95 (1987).

[51] SCHULHOFER, UNWANTED SEX, *supra* note 37 at 31.

presumed nonconsent in the absence of affirmative evidence to the contrary. The resistance test accomplished exactly the opposite. Chastity was celebrated but consent was presumed."[52]

Courts typically are not troubled by the continuing presumption that consent to sex exists, but a 1907 Idaho decision is a rare example of a court that *did* identify and problematize this issue. In *State v. Neil*, a traveling salesman met a woman at a dance for the first time; he later offered to walk her home and tried to rape her on the way.[53] She fought him off, and he was convicted of assault with intent to commit rape.[54] In affirming his conviction, the Idaho supreme court focused its analysis squarely on the actions of the perpetrator rather than the victim.[55] When the appellant's lawyer cited caselaw requiring "utmost resistance," the court gave this critical response:

> "To our minds the trouble with a number of these authorities is that they reverse the order of the inquiry. They go about inquiring into the kind, character, and nature of the fight put up by the woman, rather than the nature of the assault and evident and manifest purpose and intent of the assailant. For the purpose of reaching the conclusions announced in some of these cases, it is necessary to assume that, in the first place, a man has a right to approach a woman, lay hold on her person, take indecent liberties with her, and that, unless she "kicks, bites, scratches, and screams" to the "utmost of her power and ability," she will be deemed to have consented, and indeed to have invited the familiarity. Such is neither justice, law, nor sound reason."[56]

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[52] ESTRICH, *supra* note 17 at 31.
[53] *State v. Neil*, 90 P. 860, 860 (Idaho 1907).
[54] *Id.* at 861.
[55] *Id.* at 862 ("When the charge is assault with intent to commit the crime of rape, the intent must be judged and determined by the conduct of the party committing the assault.")
[56] *Id.* (citations omitted).

This opinion appears progressive in its focus on the conduct of the perpetrator rather than the victim, and in its observation that a perpetrator does not have the right to approach a victim, demand sex, and have the law look on with approval unless his victim resists. But this progressive stance appears to be the exception rather than the rule, even today. Despite the fact that most people do not consent to sex with the large majority of the other individuals in their lives, the law continues to presume that they do.

C. The Stubborn Persistence of the Presumption of Consent Today

The large majority of American jurisdictions have eliminated the physical resistance requirement, but the presumption of consent tied to this requirement continues in many guises. First, some jurisdictions in fact continue to require physical resistance. Idaho defines rape as occurring, *inter alia*, "[w]here the victim resists but the resistance is overcome by force or violence,"[57] although it also recognizes that fear or futility can make resistance impossible.[58] Absent physical resistance or an acceptable excuse for its absence, Idaho law sees consent and lawful sexual contact, not rape.

Second, many states continue to follow the approach of providing that acquiescence or submission arising from fear is sufficient to provide the lack of consent or the force necessary for a sexual assault conviction.[59] This approach is more favorable to victims and prosecutors than the overt requirement of physical resistance, but it still demands something from victims in order

[57] IDAHO CODE ANN. § 18-6101(4).
[58] IDAHO CODE ANN. § 18-6101(5-6).
[59] CAL. PENAL CODE §§ 261, 262, 266(c), CONN. GEN. STAT. ANN. § 53a-70, HAW. REV. STAT. ANN. § 707-733, KAN. STAT. ANN. § 21-5503, MONT. CODE. ANN. § 45-5-511, VT. STAT. ANN. § 3252.

to obtain a conviction—a showing of sufficient fear. In the absence of that fear, this approach does not classify unwanted sexual touching as a crime. Thus, the law recognizes a sexual violation because of the secondary effect of the victim's fear, rather than recognizing the primary wrong—the violation of the victim's sexual agency.

Third, as we have seen, some jurisdictions have substituted a verbal resistance requirement for the old physical resistance approach.[60] These jurisdictions continue to presume that the victim consented to sex unless there is at least some manifestation of lack of consent.[61] A mere "no" will usually suffice to express lack of consent, but if she says nothing the court will presume that she consented. As Professor Tuerkheimer has noted, where there is a verbal resistance requirement, the victim's sexual availability is the default.[62] A person who is not sexually available is expected to express at least verbal resistance.

New York is one example. The New York Penal Code defines lack of consent as arising, *inter alia*, from circumstances, at the time of the penetration or other sexual conduct, where "the victim *clearly expressed* that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances (emphasis added)."[63] A person who does not or cannot "clearly express" her lack of consent is presumed to have consented. Ambiguity is thus construed, against the victim, as consent.

Fourth, still other jurisdictions require resistance through judicial interpretation despite the elimination of the resistance requirement from the relevant statute. Alabama's rape statute no

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[60] Tuerkheimer, *Sexual Agency supra* note 14 at 173-74.

[61] See, e.g. NEB. REV. STAT. ANN. § 28-318(8), 319(1) (West) ; N.Y. PENAL LAW. § 130.05(2)(d) (West); UTAH CODE ANN. §76-5-402(1), 406(1) (West 2015).

[62] Tuerkheimer, *Sexual Agency supra* note 14 at 174.

[63] N.Y. PENAL LAW. § 130.05(2)(d) (West). Legislation is currently pending in New York that would modify the definition of consent to add an affirmative consent clause. *Id.*

longer contains a resistance requirement, but courts have interpreted the statutory "forcible compulsion" language as, *inter alia,* "[p]hysical force that overcomes earnest resistance."[64] Judges sometimes have difficulty letting go of the obsolete resistance requirement. In *People v. Iniguez,* discussed more fully in Part Three, the California court of appeals overturned the defendant's conviction based, in part, on its observation that the victim failed to scream for help despite the fact that her aunt was sleeping nearby and likely would have awoken and come to the victim's aid.[65] The California supreme court reinstated the conviction after pointing out the resistance requirement had been abolished, and thus placing a burden on the victim to cry out was contrary to the law.[66] But for the state's appeal, the defendant would have been acquitted by the imposition of a resistance requirement on the victim long after it had been eliminated from the statute.

Fifth, police play a gatekeeping role in selecting which sexual assault complaints to refer to prosecutors. [67] They may require evidence of resistance in order to investigate and take a case forward, even in the absence of a statutory requirement.[68] When Megan Rondini reported a rape to police in Tuscaloosa, Alabama, her interviewing officer expressed skepticism because she had not sufficiently resisted, in his view. During the interview he said to her, "Look at it from my

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[64] *Compare* ALA. CODE §13A-6-61(1)(West 2021) ("forcible compulsion does not require proof of resistance by the victim"); *to Higdon v. State,* 197 So.3d 1019, 1021 (Ala. 2015) ("Forcible compulsion" [means] "[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person").

[65] *People v. Iniguez*, 872 P.2d 1183, 1189 (Cal. 1994).

[66] *Id.* The court also noted that it was "sheer speculation" for the court of appeals to conclude that the defendant would have "responded to screams by desisting the attack, and not by causing [the victim] further injury or death." *Id.* at 1190.

[67] Yung, *supra* note 23 at 207, 219-21, 227-28.

[68] Grace Galliano et al., *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates*, 8 J. OF INTERPERSONAL VIOLENCE 107, 107 (1993), https://time.com/wp-content/uploads/2014/11/galliano.pdf. Vandervort also notes that law enforcement "often fails to fulfill the promise of law reform initiatives undertaken to reduce the high incidence of sexual assault." Vandervort, *supra* note 16 at 398. Accordingly, changes to the law do not always make their way into practice.

side….You never kicked him, hit him, tried to resist him, physically pushed him away, anything like that."[69]

In sum, courts and law enforcement personnel continue to presume that victims consented to sex unless there is a clear indication to the contrary. They do so by requiring physical or verbal resistance, force sufficient to overcome the victim's will, or fear on the part of the victim. The resistance requirement also persists in judicial opinions that demand such resistance even when the relevant statute does not, and in the actions of police officers who do not take victims seriously without evidence of resistance. Jurisdictions taking any of these approaches still operate with a requirement that a nonconsenting victim must indicate her opposition in some way. If she does not, the court presumes that she consented, and the law fails to hold culpable those perpetrators who violate the societal presumption of nonconsent. By not recognizing this presumption, and the sexual agency that it protects, the law under-criminalizes sexual assault.

D. The Ubiquitous First Encounter Sexual Assault and the Presumption of Consent

No statistics exist on how frequently sexual assault occurs during the first sexual contact between victim and accused because crime surveys and researchers typically do not ask this question.[70] Nevertheless, First Encounter sexual contact is likely the most common and yet

[69] Megan Rondini Police Interview Tr. 37 (Jul. 2, 2015) (on file with author); *see also* John Archibald, *Alabama turns rape victims into suspects*, AL.com (Jun. 25, 2017), https://www.al.com/opinion/2017/06/alabama_turns_rape_victims_int.html.

[70] Since 2001, the National Crime Victimization Survey has asked whether sexual assault victims were attacked by someone unknown to them, a casual acquaintance, or someone they knew well, but it does not ask whether the attack was the first instance of sexual contact between those involved. NCVS Basic Screen Questionnaire, 2001-2019, National Crime Victimization Survey, Bureau of Justice Statistics, https://bjs.ojp.gov/data-collection/ncvs#surveys-0 (last visited Sep. 8, 2021).

unexplored feature of the abundant sexual assault case law.[71] When considered alongside the societal presumption of nonconsent, First Encounter sexual assault has very important implications for improving the law's effectiveness by challenging us to consider how the presumption of nonconsent was overcome.[72]

I use the term "First Encounter" to refer to any sexual contact that occurs for the first time between the relevant parties. For example, if unwanted sexual penetration is at issue, the conduct in question is a First Encounter if the victim had never before experienced sexual penetration with the accused, even if she engaged in kissing or other intimate contact with him. Thus, the use of this terminology assumes that a form of lesser sexual or intimate contact does not constitute consent to a more serious form.

Some of the most discussed cases in criminal law are First Encounters, and yet that feature is not usually part of the conversation.[73] In *State v. Rusk*, the victim agreed to give the defendant a ride home (at his request) shortly after meeting him, for the first time, at a bar.[74] Before she did so, she made it clear that she was not at all interested in sex.[75] The defendant then coerced her into coming up to his apartment by taking her car keys, caused her to fear for her life by choking her, and then raped her.[76] In *Commonwealth v. Berkowitz*, the victim, a college student, went to the accused's dorm room while she was looking for his roommate; the defendant then initiated a

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[71] Every sexual assault case described in this article is a First Encounter, giving the reader a robust sense of how common these cases are.

[72] This is not to suggest that all sexual assault includes this dynamic. Certainly many sexual assaults occur in the context of an ongoing relationship, and often such relationships feature multiple sexual assaults as well as other forms of violence. My focus here, however, is on the numerous cases that involve the first instance of sexual contact between victim and accused.

[73] *Rusk*, *Berkowitz*, and *M.T.S.*, discussed here, are all frequently included in criminal law casebooks. See, e.g. ASHDOWN, BACIGAL, & GERSHOWITZ, CRIMINAL LAW: CASES AND COMMENTS (10th ed. 2017); DRESSLER AND GARVEY, CASES AND MATERIALS ON CRIMINAL LAW (8th ed. 2019); JOSEPH E. KENNEDY, CRIMINAL LAW: CASES, CONTROVERSIES AND PROBLEMS (1st ed. 2019); LEE & HARRIS, CRIMINAL LAW: CASES AND MATERIALS (4th ed. 2019); ARNOLD H. LOEWY, CRIMINAL LAW: CASES AND MATERIALS (4th ed. 2020).

[74] *Rusk v. State*, 424 A.2d 720, 721 (Md. 1981).

[75] *Id.*

[76] *Id.* at 721, 722.

sexual encounter that resulted in a rape complaint.[77] Victim and accused were known to one another and the accused claimed that they had flirted, but they had no prior sexual contact.[78] In New Jersey's pivotal case *State in the Interest of M.T.S.,* victim and accused had lived in the same house for a period of time, but there was no evidence of prior sexual contact.[79]That all of these cases involved First Encounters is not addressed in the respective opinions.

Additionally, each of the cases discussed in this Article *supra* feature First Encounter dynamics. The victim in *Devoy*, the 1904 Wisconsin case, had just met one of the perpetrators at a dance while his co-conspirator was a stranger to her.[80] Futamata's victim was an acquaintance from the YMCA, but they had never spoken.[81] Iniguez's victim had just met him the evening before her wedding.[82] Megan Rondini knew her assailant from around town but had never had sexual contact with him.[83] These cases illustrate that the First Encounter dynamic is easy to spot across decades of case law.[84] In other words, this method of sexual assault remains effective and does not get old, so long as courts ignore it.

That sexual assault very often arises in a context where the alleged assault is the first-ever sexual contact between victim and accused contrasts with the oft-repeated mantra that many

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[77] *Com. v. Berkowtiz*, 641 A.2d 1161, 1163 (Pa. 1994). Berkowitz's rape conviction was reversed because, although the penetration occurred without the victim's consent, the court found an absence of forcible compulsion. *Id.* at 1165, 1166. His indecent assault conviction was affirmed because that crime required a lack of consent but no force. *Id.* at 1166. Subsequently, Pennsylvania criminalized sexual penetration without consent and without force. PA. CONS. STAT. §3124.1. ("Except as provided in §3121 (relating to rape) or § 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.")

[78] *Com. v. Berkowtiz*, 609 A.2d at 1341.

[79] *State ex rel. M.T.S.*, 609 A.2d 1266, 1267, 1268 (N.J. 1992). In *M.T.S.*, the New Jersey supreme court held that the only force required under the rape statute was the force inherent in the sexual act. *Id.* at 1277.

[80] *Devoy*, 99 N.W. at 455. *See* notes 25-32 and accompanying text.

[81] *Futamata*, 343 P.2d at 1059. *See* notes 39-44 and accompanying text.

[82] *Iniguez*, 872 P.2d at 1184. *See* notes 158-66 and accompanying text.

[83] Katie Baker, *A College Student Accused A Powerful Man Of Rape. Then She Became A Suspect*, BUZZFEED NEWS (Jun. 22, 2017).

[84] As another example, Deborah Tuerkheimer analyzed nine sexual assault cases in *Rape On and Off Campus.* Six of these were First Encounters involving adult victims. Of the three cases involving juvenile victims, two were not First Encounters because they involved fathers who repeatedly molested their daughters. The third involved a sixteen-year-old victim experiencing second encounter sexual contact with the perpetrator. *See generally* Tuerkheimer, *supra* note 19.

sexual assault cases cannot be prosecuted because they boil down to "he said, she said." This apparent conundrum is a product of our failure to focus the investigation on the actions of the accused and to frame the law to reflect the realistic dynamics of sexual assault. Many First Encounter sexual assaults feature sexually aggressive behavior between people who have recently met or who have no prior sexual contact. In such cases, the presumption of nonconsent to sexual contact has never before been mutually set aside, and yet the perpetrator makes little or no effort to seek the victim's consent before initiating sexual contact. The victim is caught off guard as a result, responding with shock or fear that impedes her or his ability to react.

The presumption of nonconsent that precedes many sexual assaults is evident in the case law in other ways as well. There are numerous fact patterns where the parties share a definition of the situation as one that is *explicitly* nonsexual, such as the relationship between a parent and child, a doctor and patient, or a youth pastor and teenage congregant.[85] The assailant violates the victim's trust by touching her sexually without warning and without seeking consent. In such cases, the presumption of nonconsent is overcome unilaterally rather than mutually.

These dynamics fuel a cycle of sexual violence, with perpetrators repeatedly committing First Encounter sexual assault, surprising and traumatizing victim after victim. Courts fail to hold perpetrators accountable because existing legal frameworks neither recognize the societal presumption of nonconsent nor the significance of First Encounter sexual assault. The solution is statutory reform that focuses the analytical lens squarely on these critical but overlooked dynamics. Before turning to that proposal, the next subsection further clarifies the problems of presuming consent.

[85] *See* notes 174-80 & 186-92 and accompanying text.

E. Problematizing the Presumption of Consent

The presumption that people consent to sex unless they resist is highly problematic for several reasons. There are problems pertaining to sexual agency, victims' reactions to sexual assault, and equal protection. This subsection addresses each of these concepts in turn.

1. The Sexual Agency Problem

When courts presume consent, they presume sexual availability. And in doing so, they rob people of sexual agency—their power and prerogative to make their own choices about when and how to be sexually active, and with whom.[86] The presumption that people are perpetually available for sexual purposes, at any time and with any partner, is at odds with how most people understand their own sexual relationships and sexual access to others.[87]

As we have seen, the consent presumption stands in direct contradiction to societal social norms which presume the opposite. Law-abiding individuals do not assume that everyone around them is sexually available to them; rather, they look for clear signs of consent before proceeding with sexual contact. And they do so because respect for the sexual agency of others requires this

[86] Many scholars use the term "sexual autonomy" to describe an individual's right to decide what kind of sexual activities she wishes to pursue with other willing participants as well as the ability to avoid sexual activities that she prefers to avoid. *See, e.g.* SCHULHOFER, UNWANTED SEX, *supra* note 37 at 99. Others have argued for the term "sexual agency," rather than autonomy, as a corrective to some of the limitations of the latter term, in particular its failure to take into account the social context and power inequalities within which women make decisions about their sexuality. As Tuerkheimer puts it, "agency better contemplates the complicated, power-infused dynamics that surround sexual relations." Tuerkheimer, *Sexual Agency*, *supra* note 14 at 169-70. For a fuller discussion, *see id.* and Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999).

[87] As noted *supra*, Schulhofer argues that it is simply not the case that people are always receptive to sexual intercourse, at any time, and with any person, "until they do something to revoke that permission." Schulhofer, *Reforming*, *supra* note 21 at 345.

course of action. Courts effectively ignore sexual agency and presume that consent is present in the absence of resistance, whether verbal or physical.

This presumption places victims of sexual assault at a disadvantage, requiring them to physically resist or state their objection. Courts' presumption of consent also enables and endorses sexually predatory behavior by giving assailants the benefit of an assumption that society does not extend to them outside the courtroom. Anything a sexually aggressive person does is fine as long as the victim does not voice an objection. The lesson for the predator is to act in such a way as to accomplish his purpose before the victim can say anything—whether due to speed, surprise, or some other factor.

Another aspect of sexual agency is the ability to select one's sexual partner(s).[88] When courts presume consent, they assume that a person is equally available to anyone who comes calling, effectively erasing the person's prerogative to choose. This problem is clearly illustrated in *Futamata*, where the victim was abducted as she walked between her outhouse and her home in the middle of the night.[89] The court absurdly assumed that she was sexually available at this particular time, place, and with this partner. The court's erasure of her right to choose is startling.

2. The Frozen in Fear Problem

The expectation that people who do not want sexual contact will clearly express their objection is most problematic in relation to the numerous cases where the victim finds himself unable to articulate his lack of consent and thus appears passive. This includes cases where the victim is affected by the surprise or shock of the assault, where she finds herself frozen in fear

[88] SCHULHOFER, UNWANTED SEX *supra* note 37 at 99, 111. Schulhofer makes this argument in relation to sexual autonomy, but it applies equally to sexual agency.

[89] *People v. Futamata*, 343 P.2d 1058, 1059 (Colo. 1959).

and unable to respond, and where she is afraid of what the perpetrator will do to her if she says "no."[90]

There is a large body of literature on trauma and neurobiology which has found that victims of sexual assault often experience tonic immobility—an inability to move and respond to the assault.[91] Moreover, case law is filled with abundant examples of victims who reported that they froze in response to being sexually assaulted and as a result did not offer any meaningful resistance, whether verbal or physical, to the perpetrator.[92] That victims so frequently respond to sexual assault with a "frozen in fear" reaction is critically important in understanding the need for statutory reform. [93]

It is simply not the case that all people who are the targets of sexually aggressive individuals have the ability, in the moment, to clearly express their lack of consent. They may find themselves immobilized, terrified, or too surprised to react quickly enough. They may be afraid

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[90] I do not include, in this category, cases where the victim does not express her lack of consent due to intoxication, sleep, or some other form of incapacity, because statutes often have distinct statutory provisions addressing these situations.

[91] KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT'L., VICTIM IMPACT: HOW VICTIMS ARE AFFECTED BY SEXUAL ASSAULT AND HOW LAW ENFORCEMENT CAN RESPOND 12 (2020) ("Frozen fright and dissociation are very common experiences of sexual assault victims"); Jim Hopper, *"Reflexes and Habits" Is Much Better Than "Fight or Flight"*, JIMHOPPER.COM 3 (Feb. 12, 2021), https://www.jimhopper.com/pdf/hopper_2021_reflexes_and_habits.pdf. ("One of the extreme survival reflexes [is] tonic immobility, in which the body is literally paralyzed and muscles are rigid…."; Anna Möller et al., *Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression*, 96 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 932, 935 (2017), https://obgyn.onlinelibrary.wiley.com/doi/10.1111/aogs.13174 ("The major finding of the present study was that the experience of TI during sexual assault is common");

[92] *See, e.g.*, *Bondi v. Commonwealth*, 824 S.E.2d 512, 517-18 (Va. Ct. App. 2019) (victim reporting "[c]omplete paraly[sis]"); *State v. Rowland*, 528 S.W.3d 449, 452 (Mo. Ct. App. 2017)(victim "couldn't escape" and "froze in fear"); *State v. Janis*, 880 N.W.2d 76, 78 (S.D. 2016)(victim was "frozen"); *State v. Stevens*, 53 P.3d 356 (Mont. 2002) (victim's "mind and body were frozen"); *Suarez v. State*, 901 S.W.2d 712, 719 (Tex. App. 1995) (victim stated she "just froze"); *People v. Smolen*, 564 N.Y.S.2d 105, 106 (1990) (victim was "frozen in fear"); *State v. Bohannon*, 526 S.W.2d 861, 862 (Mo. Ct. App. 1975)(victim "froze" when defendant seized her); *Rush v. State*, 301 So.2d 297, 298 (Miss. 1974)(victim was "frozen" and "paralyzed").

[93] Some members of the ABA have criticized the notion that being frozen in fear is a common reaction to sexual assault, but the frequency with which this reaction is found across decades of case law discounts that critique. *See* Robert M. Carlson, American Bar Ass'n. Letter re ABA Proposed Resolution 114, (Aug. 8, 2019) (signed by numerous members of the ABA); Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC, (Sep. 8, 2017).

that the perpetrator will harm them if they resist, and they may also be unable to fully articulate this fear to a court. For all of these reasons, courts' tendency to presume consent to sex in the absence of a clear contrary indication results in the under-criminalization of sexual assault and the enabling of sexually predatory conduct.

3. The Equal Protection Problem

The presumption of consent is also problematic because it disproportionately impacts females. Females make up the majority of sexual assault victims, and they generally are sexually assaulted by males.[94] As such, the law's presumption of consent promotes gender bias in that it assumes that females, more often than males, are sexually available to any person who wants them—a presumption that is especially problematic given how widespread First Encounter sexual assault is. The result is the enabling of sexually predatory behavior and the underenforcement of laws against sexual assault.[95]

This section has argued that a legal presumption of consent is incompatible with the presumption of *nonconsent* which operates in the real world. As Professor Schulhofer notes,

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[94] *Sexual Violence is Preventable*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/injury/features/sexual-violence/index.html (last updated Apr. 19, 2021) ("Anyone can experience [sexual violence], but most victims are female"); PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST., U.S. DEPT. OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1, iii (2006), https://www.ojp.gov/pdffiles1/nij/210346.pdf ("[M]ost rape victims are female (almost 86 percent), and most rapists are male").

[95] Professor Tuerkheimer has argued that gender-based underenforcement of the law is a cognizable harm. *See generally* Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C.L. REV. 1287 (2016). As an example, Tuerkheimer notes that the federal investigation into rape investigation failures in Missoula, Montana was groundbreaking because it was "premised on an understanding of gender-based under-policing as an equal protection violation; one demanding a federal response." *Id.* at 1324. For further discussion of the Missoula example, see notes 200-212 and accompanying text.

> "[t]he premise of a consent requirement is that individuals do not want to be sexually penetrated unless and until they indicate that they do. Across the wide range of situations in which acquaintances and strangers encounter one another—on the street, at work, in parks, at parties, on dates—a presumption of disinterest in sexual intimacy is accurate much more often than a presumption that both individuals want to have intercourse with each other. And as a matter of first principles, it is more appropriate to assume that each individual prefers bodily privacy until he or she indicates otherwise."[96]

This contradiction between real-life and legal presumptions may explain why so many victims are shocked, enraged, and even suicidal upon learning that the law does not perceive what was done to them to be rape.[97] The law must change to recognize the same presumption operative in society at large—a presumption of *nonconsent*.

PART TWO: A PROPOSAL FOR STATUTORY REFORM: SEEKING CONSENT

This section first illustrates the value of presuming nonconsent rape adjudication applying the new standard to existing caselaw. It will then reveal a statutory reform proposal framed around a

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[96] Stephen J. Schulhofer, *Consent: What it Means and Why It's Time to Require It;* 47 U. Pac. L. Rev. 665, 670 (2016) (hereinafter *"Consent"*).

[97] It is well-established that victims of sexual assault are at higher risk of suicide than the general population. According to RAINN, the incidence of "suicidal or depressive thoughts increases after sexual violence;" "33% of women who are raped contemplate suicide," and "13% of women who are raped attempt suicide." *Victims of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/victims-sexual-violence (last visited Sep. 7, 2021). *See also Suicide Prevention: Fast Facts*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/suicide/facts/ (last visited July 24, 2021); Edward C. Chang et al., *Hope Under Assault: Understanding the Impact of Sexual Assault on the Relation between Hope and Suicidal Risk in College Students*, 34 JOURNAL OF SOCIAL AND CLINICAL PSYCHOLOGY 221, 223 (2015).

"seeking consent" standard. Part Three will then demonstrate that the proposed standard has the potential to be a powerful tool across a range of First Encounter cases.

A. Recognizing the Presumption of Nonconsent in First Encounter Sex

The violation of sexual agency that occurs in First Encounter sexual assault is unique. Such a case represents the first moment that sexual contact occurs between the actors in question, and therefore the presumption of nonconsent is intact leading up to the encounter. The lawfulness of any ensuing sexual contact should thus turn on *how* the presumption of nonconsent was abandoned. Did the parties make a mutual decision to set aside the presumption, or did the perpetrator make this decision unilaterally, either by failing to consult the victim, or ignoring her wishes?[98] The law should focus on this process, probing all of the circumstances in order to discern whether the presumption of nonconsent was overcome unilaterally or by mutual agreement.

Therefore, the relevant inquiry in a First Encounter sexual assault case is whether the perpetrator *sought* the victim's consent prior to engaging in sexual penetration or contact with her. This question can be evaluated by examining the perpetrator's actions in *seeking* consent, rather than the victim's actions in *giving* it. The value in this approach is its recognition that the societal presumption of nonconsent is present between parties who have never before shared sexual contact, and that the operative task is to analyze whether that presumption was lawfully overcome.

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[98] For instance, in *Berkowtiz*, the accused said, after the encounter, "I guess we got carried away." The victim replied, "No…*you* got carried away." *Berkowtiz*, 609 A.2d at 1340. Her comment is evidence of a unilateral abandonment of the presumption of nonconsent.

A focus on the perpetrator's actions in seeking consent eliminates the obsolete practice of determining whether a sexual assault occurred by assessing the victim's response. Her level of resistance or fear no longer matter, because the court is squarely focused on what the *perpetrator* did. This is where the attention should be, because the wrong of sexual assault does not depend on how much the victim resisted or how afraid she was. The wrong of sexual assault lies in the perpetrator's violation of the victim's sexual agency—her right to make her own decisions about her sexuality, including when and with whom to share it.

People v. Warren illustrates. In this Illinois case, the victim had been cycling in a natural area when the perpetrator found her standing alone enjoying a scenic overlook.[99] He approached her and engaged her in conversation, but when she turned to leave, he refused to let her go, saying "This will only take a minute. My girlfriend doesn't meet my needs," and "I don't want to hurt you."[100] He then picked her up, carried her into the woods, and sexually assaulted her.[101] At a bench trial the defendant was convicted of two counts of deviate sexual assault and was sentenced to six years in prison.[102]

But the Illinois court of appeals overturned his conviction, finding a lack of force or threat of force.[103] They reached this conclusion despite the size difference between the parties—he was eighty pounds heavier and thirteen inches taller than she was—and despite his behavior.[104] Indeed, the court stated, "[a]side from picking up complainant and carrying her into and out of the woods, defendant did not employ his superior size and strength."[105] The victim testified that she did not resist or call for help because of her "overwhelming fear," but the court only saw

[99] *People v. Warren*, 446 N.E.2d 591, 592 (Ill. App. Ct. 1983).
[100] *Id.* at 592.
[101] *Id.*
[102] *Id.* at 591.
[103] *Id.* at 594.
[104] *Id.* at 593.
[105] *Id.*

consent in her terror.[106] The opinion faulted her for failing to resist, as resistance was a requirement of Illinois law when the case was decided.[107] "[C]omplainant's failure to resist when it was within her power to do so conveys the impression of consent regardless of her mental state, *amounts to consent* and removes from the act performed an essential element of the crime."[108]

For unexplained reasons, the opinion does find anything wrong with an accused picking up the victim, whom he had just met, and carrying her to the site of the assault. Surely this is force. It is also coercion; adults do not normally carry one another. But the law does not capture the fundamental wrong of the defendant's conduct here—it was not the use of force to accomplish his purpose, but rather the violation of his victim's sexual agency. This violation terrified her. Illinois law no longer requires resistance, but it does require the use of force or threat of force.[109] Accordingly, it does not recognize the violation of sexual agency absent force or threat of force.

If the court was instead tasked with preserving sexual agency by analyzing the perpetrator's actions in seeking consent, the result would be very different. *Warren* was a first encounter case featuring a victim and defendant who had just met each other and were engaging in casual conversation. As such, there was a presumption of nonconsent to sexual contact present in this situation. The perpetrator had no basis for believing that the victim was open to sexual contact after a few minutes' conversation. The victim's conduct in attempting to leave the interaction is further evidence that the presumption of nonconsent remained in effect, since leaving is the opposite of what one would do if one was consenting to sexual contact. At this point, the defendant made statements that hinted at his desire for sex but did not state that desire explicitly.

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[106] *Id.*
[107] *Id.* at 594.
[108] *Id.* at 594 (emphasis added).
[109] 720 ILL. COMP. STAT. ANN § 5/11.1.20(a)(1)(West 2021).

Then, without waiting for any response from the victim, he used his greater size and strength to pick her up and carry her to a more secluded location.

Under a seeking consent standard, the court would begin by recognizing the presumption against sexual contact and would note that the victim's actions in attempting to leave reinforced that presumption. The court would then note that not only did the perpetrator fail to make his desire for sex unambiguously clear to the victim, he did not give her the opportunity to respond to his request. He impeded her effort to leave and he then picked her up and carried her to a more secluded location. His actions were a violation of her sexual agency. His conviction should have been affirmed.

B. Toward a Better Normative Standard—Seeking Consent

I have argued that a presumption of nonconsent exists in relationships where the parties have not experienced prior consensual sexual contact, and that First Encounter sexual assault complaints therefore merit particular scrutiny of whether that presumption was overcome mutually or unilaterally. The law must recognize the presumption of nonconsent and hold perpetrators accountable for breaching it without seeking and obtaining consent. As Professor Schulhofer points out, "[e]ven without making threats that restrict the exercise of free choice, an individual violates a woman's autonomy when he engages in sexual conduct without ensuring that he has her valid consent."[110] I therefore propose an offense of committing first-time sexual penetration or contact without *seeking* consent.

[110] SCHULHOFER, UNWANTED SEX *supra* note 37 at 111.

This "Seeking Consent" approach is a form of affirmative consent. But whereas the typical affirmative consent statute looks to the actions of the victim in giving consent, as we shall see in Part Five, the seeking consent approach focuses on analyzing the actions of the perpetrator. The inquiry is concerned with the overall context in which seeking consent occurred and whether it was conducive to a free and voluntary agreement on the part of the victim. In particular, did the defendant's words and actions make clear to the victim his intent to seek sexual contact? And did his words and actions evince a willingness to wait for and to respect the decision of the victim?

The Seeking Consent approach can be codified into law using a three-step approach. The first step is for the statutory framework to define sex crimes in terms of nonconsent alone rather than the presence of force. Just over half of American jurisdictions have already adopted this approach in relation to sexual penetration.[111] It is the preferable approach because restricting criminal sexual assault to situations involving force or fear does not capture the wide range of unwanted sexual contact that society finds offensive. The law should criminalize knowing, unwanted sexual contact, whether or not force or fear is present.[112]

An example of this approach is the Montana statute specifying that "[a] person who knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent commits the offense of sexual intercourse without consent."[113]

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[111] Schulhofer, *Reforming*, *supra* note 21 at 343 ("[i]n a majority of states it is finally true that nonconsent alone suffices"). For a fuller discussion of force and consent in current statutes, *see id.* at 342-44.

[112] For a full explication of this argument, *see Schulhofer, Consent*, *supra* note 100 at 669-71. Several states already using a consent standard recognize offenses involving sexual *acts* or *contact* in addition to sexual penetration, and they typically define the former terms. *See, e.g.* ALASKA STAT. ANN. §§ 11.41.410(a)(1), 11.41.420(a)(1), 11.41.470(6)(West 2021); ARIZ. REV. STAT. ANN. §§ 13-1404(A), 13-1406(A), 13-1401(3)(West 2021); NEB. REV. STAT. ANN. §§ 28-318(5), 28-319(1), 28-320(1)(West 2021); VT. STAT. ANN. §§ 3251(1), 3252(a)(West 2021).

[113] MONT. CODE ANN § 45-5-503(1). Montana's statutes also define an offense of "aggravated sexual intercourse without consent," which includes the use of force. MONT. CODE ANN § 45-5-508.

Montana prohibits other forms of nonconsensual sexual contact with similar language.[114] This approach is simple, clear and captures the wide range of offensive sexual contact that occurs.

The second step is to define consent in affirmative terms. Montana, like several other states, does so by indicating that "[t]he term 'consent' means words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."[115] This definition of affirmative consent captures the need for affirmative words or actions, but it has the limitation of defining the offense in terms of the victim's behavior rather than the accused's.

This is why a third step is necessary—the creation of an offense of engaging in first-time sexual penetration or contact without *seeking* consent. This offense would focus scrutiny on the conduct of the perpetrator in seeking the victim's consent to First Encounter sexual contact—an approach that is desirable because the criminal nature of the act should depend on the perpetrator's actions, not on the victim's response. This approach also requires the court to scrutinize First Encounter sexual contact and to recognize the presumption of nonconsent that precedes it.

A person commits the offense of "knowingly engaging in first-time sexual penetration/contact without seeking consent" when he engages in sexual penetration or contact without seeking consent from the other person. I would define "seeking consent" to mean (a) indicating, through words or actions, a person's intent to engage in sexual contact/penetration with another person and then (b) waiting until consent has been granted before initiating that contact/penetration. Seeking consent does not occur where the sexual contact/penetration happens before the other person has given consent, or where circumstances of physical or mental coercion prevent freely given consent.

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[114] MONT. CODE ANN § 45-5-502(1).
[115] *Id.* at (1)(a).

This definition of "seeking consent" requires courts to perform a two-part analysis when analyzing the defendant's culpability with respect to seeking consent. First, the court analyzes how the defendant expressed his desire for sexual contact. What words or actions did he use to indicate an intent to engage in sexual contact, and would the victim understand these words or actions to indicate a desire for sexual contact?

Second, the "waiting" portion of the definition requires the court to consider two factors in the consent-seeking process—a time factor and a space factor. The time analysis considers whether the perpetrator respected the time that the victim needed to respond meaningfully to his overture before the sexual contact began. Did the victim have a realistic opportunity to think about the implications of having sexual contact at that moment, consider whether she wanted to do so, and stop the interaction, if she so desired? Or did the defendant proceed so quickly that the victim had no chance to think, let alone respond?

The space analysis is about whether the defendant respected the victim's physical space in such a way that she could make a meaningful choice. Did the victim have the physical space to decline the defendant's advances? If the defendant was on top of her, had his hands around her neck or in her pants, had hold of her arm, or was otherwise using his physical presence to coerce or intimidate her into agreement, then she may not have had the necessary physical space to make an uncoerced decision. The relative size, strength, and ability levels of the parties is relevant to this analysis. If the accused was capable of overpowering the victim, his presence may have been intimidating to her even if he was not touching her.

The offense of "knowingly engaging in first-time sexual penetration/contact without seeking consent" can thus be broken down into the elements of (1) knowingly, (2) engaging in sexual penetration or contact, (3) with a particular person for the first time, (4) without seeking consent,

where "seeking consent" means (a) clearly and unambiguously expressing his intent to engage in sexual contact and (b) waiting until the victim has granted consent prior to proceeding. Courts would analyze both the time and the physical space dynamics of the situation in determining whether the defendant had waited for the victim's response.

It should be apparent that the victim's actual consent is not an element of the crime; this proposed offense focuses on the accused's conduct in seeking consent. The victim's actions are not analyzed because the victim is not on trial and has no obligation to indicate her desire to be left alone. Focusing the analysis on the accused is what "force" statutes do—they were designed to assess the conduct of the accused, not the victim.[116] But whereas using force to define sex crimes under-criminalizes sexual assault by failing to capture all offensive an unwanted sexual contact, the seeking consent approach casts an appropriately wider net by criminalizing all sexual contact that occurs in a First Encounter context where the perpetrator does not first seek consent.

The crime is fulfilled if the accused proceeds with first-time sexual contact without taking appropriate steps to seek consent. Consent is therefore available to the perpetrator as an affirmative defense, allowing the defendant to argue that he did not seek consent because it was already present. He would then have to prove, by a preponderance of the evidence, the presence of consent using an affirmative consent standard. That is, that the victim clearly and unambiguously expressed his or her consent through words or actions.[117] Additionally, jurisdictions should retain an offense of engaging in "sexual intercourse/contact without consent" in order to adjudicate sexual assault beyond the First Encounter context. Existing law would also

[116] ESTRICH,, *supra* note 17 at 57-62.

[117] Vandervort describes a similar framework in Canada, where the defense of "belief in consent" is available to the accused, but only if he can "point to specific words or actions by the complainant which communicated agreement to the activity in question, with him, at the time in question." Vandervort, *supra* note 16 at 402.

be relevant to assaults where the defendant *did* seek consent but is accused of sexual assault without consent, such as where the victim withdrew consent.

The chief advantage of the seeking consent offense I have proposed is that by recognizing how most people understand their own sexual relationships and sexual access to others, it introduces a degree of fairness that has been missing from rape law for decades. Because people are not perpetually available for sexual purposes, it forefronts the need to analyze how the presumption of nonconsent was overcome prior to sexual contact.

PART THREE: THE BENEFITS OF THE SEEKING CONSENT APPROACH

This section applies the seeking consent standard to a range of sexual assault cases and shows how it produces more just outcomes. Each of the cases discussed involves a First Encounter and a presumption of nonconsent that should have been recognized by the courts—dynamics overlooked when the cases were decided. These cases, taken together, demonstrate that First Encounter dynamics are ubiquitous in sexual assault cases and that the law has overlooked the usefulness of this analytical category and the accompanying presumption of nonconsent.

This section analyzes five categories of cases: (a) brief encounters where the perpetrator failed to seek to consent; (b) brief encounters where the perpetrator unilaterally shifted the dynamic from nonsexual to sexual; (c) cases where a First Encounter sexual assault occurred in the context of a relationship clearly defined as nonsexual; (d) cases involving college-age predators and victims; and (e) worst case scenarios involving serial predators who exploit First Encounter dynamics.

In many of these cases, the perpetrator's conviction was affirmed. But in each case, the seeking consent standard would have provided a fairer and more straightforward approach to analyzing the wrong of the sexual assault—the interference with the victim's sexual agency. Thus, this approach places respect for the victim's sexual agency at the forefront of the analysis.

A. The Brief Encounter

As we saw in *Devoy, Neil* and *Warren,* First Encounter sexual assault cases often feature sexually aggressive behavior between a perpetrator and a victim whom he has recently met.[118] The term "Brief Encounter" has been coined to describe cases where victim and assailant are recent acquaintances—often having met within the twenty-four hours prior to the assault –and have no prior sexual contact.[119] The term thus describes a subset of First Encounter cases—those where the sexual assault occurs within hours, or even minutes, of the parties' meeting one another for the first time. Sexual assault in the Brief Encounter context is extremely common, and sexual assault advocacy organizations are increasingly drawing attention to the Brief Encounter dynamic in sexual assault.[120]

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[118] *See* notes 25-32 (Devoy), 53-56 (Neil), and 103-12 (Warren) and accompanying text.

[119] *See, e.g.,* Aequitas, Model Response to Sexual Violence for Prosecutors (RSVP Model) 72 (2020), https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Appendices-1.9.20.pdf (describing brief encounter as "met and assaulted within 24 hours"); Elisabeth Olds, The Metropolitan Police Department's Implementation of The Sexual Assault Victim's Rights Amendment Act of 2014 (SAVRAA) 16 (2015), https://dccouncil.us/wp-content/uploads/2018/budget_responses/ATTACHMENTGGeneralQuestions26SAVRAA.pdf (describing a brief encounter as an assault committed by someone the survivor knows only through meeting them on that occasion); Kimberly A. Lonsway & Joanne Archambault, End Violence Against Women Int'l., Clearance Methods for Sexual Assault Cases 48 (2020), https://evawintl.org/wp-content/uploads/Module-10_Clearance-Methods-Module-11.27.2020.pdf (describing a brief encounter as a situation in which the victim and suspect knew each other for less than 24 hours); Sexual Assault Family Violence Investigator Course, Grant # 20700-12 89 (2020), https://www.wtamu.edu/_files/docs/sexual-assault-training (describing a brief encounter as usually occurring within 24 hours after the perpetrator and victim meet).

[120] *See supra* note 123 and accompanying text.

The seeking consent legal framework can be particularly effective here because the presumption of nonconsent is generally intact when people first meet, and signals indicating that it is being mutually abandoned would have to be particularly clear and unambiguous at this early stage of acquaintance.

People v. Carlson further illustrates the Brief Encounter dynamic and demonstrates the effectiveness of the seeking consent approach to prosecution. In *Carlson*, the defendant and victim became acquainted for the first time at a Chicago bar around St. Patrick's Day, the victim having arrived with her sister and a friend.[121] While at the bar, she and the defendant struck up a conversation, and shortly thereafter they exited the bar together to take a walk outside.[122] The victim told her sister she would return shortly.[123] Because it was raining, the perpetrator suggested they go sit in his car, and the victim agreed.[124] Once in the car, the defendant very abruptly reclined the victim's seat and began pulling off her clothes and touching her sexually.[125] The victim was shocked that her seat had suddenly reclined, but before she could react, the defendant penetrated her vagina with his fingers.[126] When asked, during cross-examination, why she did not exit the car, she responded:

> "[T]hat she "laid there like a dead fish." When asked by defense counsel why she did not try to get out of the car, she stated, 'I was frozen. I didn't know what to do. I was frozen. I couldn't move. I was terrified.' "[127]

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[121] *People v. Carlson*, 663 N.E.2d. 32, 33 (Ill. App. Ct. 1996).
[122] *Id.* at 33.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 34.

The defendant's conviction was upheld on appeal, but not before he tried to argue that there was insufficient evidence of force. [128] Although this defendant was held accountable for rape, the court relied in part on the corroborating testimony of witnesses who testified about the victim's distress after the encounter.[129]

The use of a seeking consent standard provides a more straightforward approach to prosecution, relying on the perpetrator's failure to seek consent rather than on his use of force or the victim's reaction to his conduct. Because the parties had just met for the first time and had no history of prior sexual contact, presuming nonconsent to sexual contact is the position consistent with the parties' relationship up to that point. Here, the defendant's actions reveal that he did not say or do anything to express his desire for sexual contact. The victim reported that he suddenly reclined her seat, put his hands down her pants, and pawed her "in places she did not want to be pawed."[130] Thus the defendant neither expressed his intent to seek sexual contact nor waited for the victim's response prior to touching her.[131] In addition, the time and space factors both favor culpability here. The sexual contact occurred very quickly, within moments of the victim entering the defendant's car. The defendant also violated the victim's personal space; she testified that "he stuck his fingers in my vagina" and positioned his body over her.[132] Thus, even if the defendant asked for permission to touch her sexually, she did not have a meaningful opportunity to decline because his actions interfered with the time and space she needed.

A seeking consent standard first presumes that there was no consent to sex between these recent acquaintances. It then focuses the analytical lens on the perpetrator's actions in seeking consent, finding that he failed to do anything to obtain the victim's consent prior to assaulting

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[128] *Id.* at 35, 38.
[129] *Id.* at 34, 38.
[130] *Id.* at 33.
[131] *Id.* at 33-34.
[132] *Id.* at 33-34.

her. His culpability would therefore be based on the proof that he made sexual contact with the victim without seeking her consent. Force and fear would be irrelevant. The defendant would be free to try to prove the presence of consent as an affirmative defense, but the lack of any indication of the victim's clear and unambiguous agreement to sexual contact would be fatal to that effort.

Carlson demonstrates a frequent dynamic in Brief Encounter sexual assaults—that perpetrators build enough trust with a victim to lure her into an isolated situation and then act abruptly to unilaterally violate the presumption of nonconsent. The defendant in *Carlson* built enough trust that the victim was willing to enter his car, and she testified that she was shocked and terrified when he suddenly became sexually aggressive.[133]

State v. Herzog is quite similar, although it features a defendant who initially sought consent.[134] In this Brief Encounter case from Utah, a woman met a man outside of a bar and agreed to get in his truck and head to a canyon, where they sat for a time, drinking and smoking.[135] Shortly thereafter, he suggested sex and ultimately raped her.[136] The court rejected the defendant's claim that her willingness to spend time with him meant that she had consented to sex: "One does not surrender right to refuse sexual intimacy by act of accepting another's company, or even by encouraging and accepting romantic overtures."[137] It found that sufficient

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[133] *Id.* at 34.

[134] *State v. Herzog*, 610 P.2d 1281, 1282 (Utah 1980). A similar First Encounter case is *State v. Myers*, where victim and defendant spent the day together before defendant raped victim that evening after she refused to have sex with him. 606 P.2d 250, 251-52 (Utah 1980) (holding that the law does not justify concluding that a woman who is friendly with a man, accepts food and drink from him, and hugs and kisses him, somehow loses her "right to protest against further advances the man may decide to force upon her." *Id.* at 252.

[135] *State v. Herzog*, 610 P.2d at 1282.

[136] *Id.*

[137] *Id.* at 1283.

force to render the defendant culpable was present: "the prosecutrix was held in the truck against her will and expressly threatened with violence, unless she would submit."[138]

But once again, the case can be analyzed more cleanly under a seeking consent standard. Because the parties met shortly before they drove to the canyon, we are in Brief Encounter territory and the presumption of nonconsent is intact. In contrast to *Carlson*, this defendant *did* express his desire for sex, suggesting this possibility to the victim.[139] But when the victim declined and attempted to exit the vehicle, he abandoned any pretense of waiting for an affirmative response from her: "[d]efendant thereupon seized her blouse and detained her, saying 'Don't make me violent,' and 'Don't make me force you,' and assuring her that if she cooperated she would not be hurt.[140] The defendant did not respect the victim's physical space after she declined his advances; he grabbed her by the clothing and threatened her. She thus had neither the time nor the space necessary to freely decline.

The seeking consent approach criminalizes a broader range of conduct than what is covered by a statute, such as the one here, that requires force or threat of force.[141] The defendant's conduct is problematic because he initiated sexual conduct in the absence of any freely given consent on the part of the victim, thus infringing upon the victim's sexual agency. The fact that he used force and threatened her adds to his culpability, but there would be a violation of her sexual autonomy even without force or threat. If the victim had responded to his sexual overture by changing the subject, attempting to leave, or falling asleep, the presumption against sexual contact would still be intact, and her sexual agency would be violated if he had proceeded with

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[138] *Id.*
[139] *Id.* at 1282.
[140] *Id.*
[141] *Id.* at 1283.

sexual contact without freely given permission from her. This approach respects her sexual agency whether or not he used force, and whether or not she was afraid.

B. How Perpetrators Shift the Definition of the Situation in Brief Encounters

In addition to failing to seek consent in the Brief Encounter context, perpetrators also use a tactic of abruptly, and unilaterally, shifting the definition of the situation.[142] They first build trust with a victim in circumstances where the parties share a common nonsexual definition of the situation. But once the defendant has isolated the victim, he introduces sexually aggressive behavior which his victim would not have anticipated from his prior conduct.

The seeking consent approach is designed to identify this pattern of conduct by recognizing that sexual assaults often occur in situations where there is no common definition of the situation as one that is potentially sexual. Framing the legal inquiry around what the perpetrator did to seek consent captures conduct where the perpetrator unilaterally introduces sexual contact without the other person's authorization. The next three cases illustrate this dynamic in situations where the parties understood themselves to be interacting in a context that had no sexual or romantic connotation.[143]

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[142] "Definition of the situation" is a sociological term describing the agreed upon, collective understanding of what is happening in any given situation and the roles expected of each participant. It can apply to any situation involving human interaction and explains how individuals know how to conduct themselves, for instance, in the grocery store check out line, when attending a movie, or going through airport security. *See generally*, Ashley Crossman, *Assessing a Situation, in Terms of Sociology* THOUGHTCO., https://www.thoughtco.com/situation-definition-3026244 (last updated May 30, 2019).

[143] *Carlson* and *Herzog* can be distinguished from *Arnold, Clark,* and *Jones* in the sense that the former cases involved interactions that, in the eyes of most people, could potentially have become sexual at some point. In contrast, there was no objectively apparent romantic, sexual or intimate purpose to the interactions in *Arnold, Clark,* and *Jones.*

In *Arnold v. U.S.*, the defendant was found guilty of two Brief Encounter rapes.[144] In both cases, he engaged the victim in platonic conversation to the point that she felt comfortable entering his car.[145] Shortly thereafter, his demeanor became threatening, and he raped each victim after threatening to kill her.[146] In *Clark v. State,* the defendant offered a ride to a woman unknown to him who was waiting for a bus, on her way to take her GED exam.[147] Once she was in the car, he told her he needed to make a brief stop at his apartment; he then lured her inside by claiming that someone in the apartment wanted to meet her.[148] He then raped her.[149] In *State v. Jones*, a navy serviceman engaged in casual conversation with a former roommate of his wife, after which he offered the woman a ride to go see his wife.[150] When the woman later requested a ride home, he took her to his apartment on a pretext and raped her there.[151]

In each of these cases, the victim engaged in conduct with the defendant based on a shared definition of the situation as something other than a sexual encounter. Clark's victim thought she was getting a ride to the GED testing site; Arnold's first victim believed that a neighborhood acquaintance was giving her a ride to work, while his second victim had agreed to speak to him on work-related matters.[152] Jones' victim thought he was taking her to see an apartment for rent.[153]

A seeking consent standard would capture the unlawful conduct in each of these cases without requiring proof of the victim's fear, or of force used against her. Given the low rate of successful rape prosecutions in the United States, there are undoubtedly many such cases that are

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[144] *Arnold v. U.S.*, 358 A.2d 335, 336 (D.C. 1976).
[145] *Id.* at 336-38.
[146] *Id.* at 336; 337-38.
[147] *Clark v. State*, 398 S.E.2d 377, 378 (Ga. App. 1990).
[148] *Id.* at 378.
[149] *Id.*
[150] *State v. Jones*, 617 P.2d 1214, 1217 (Haw. 1980).
[151] *Id.* at 1216.
[152] *Arnold v. US*, 358 A.2d at 335, 336-38.
[153] *State v. Jones*, 617 P.2d at 1216.

not pursued because of the absence of force or threat of force, but that include Brief Encounter dynamics similar to those described in *Arnold, Clark,* and *Jones.*[154]

C. First Encounter Sexual Assault in Manifestly Platonic Relationships

First Encounter cases often involve interpersonal dynamics where the defendant and victim are interacting in situations that they mutually understand to exclude sexual activity. Many strong relationships are built on a foundation of trust which society recognizes as excluding sexual contact—by design, and with an expectation that they will stay that way. In such relationships, the possibility of consensual sexual contact is so remote that justice requires giving the victim the benefit of the presumption of nonconsent. Unfortunately, courts have often missed this.

When a perpetrator unilaterally introduces a sexual encounter into a manifestly platonic relationship, the seeking consent standard addresses the violation of the victim's sexual agency. In such cases, the victim often does not immediately respond to the violation due to shock or surprise.

These cases occur in a range of circumstances where roles, or status differences between the parties, preclude sexual activity. Health care professionals who violate provider-patient relationships are one example of the latter. The seeking consent standard is critical in such scenarios because it recognizes and respects the decidedly nonsexual nature of the relationship prior to the assault.

[154] These cases also demonstrate that fact-finders should give especially close scrutiny to circumstances where the defendant isolates or seeks to control the victim by getting her into a vehicle.

People v. Iniguez and *State v. Janis* provide examples.[155] In *Iniguez*, a bride was raped the night before her wedding by her "aunt's" fiancé.[156] The aunt had made the bride's wedding dress, and the bride slept at the aunt's home the night before the wedding.[157] They were joined by the aunt's fiancé, who had agreed to stand in for the bride's father and walk her down the aisle, but was meeting her for the first time that evening.[158] The court noted that there "was no flirtation or any remarks of a sexual nature" between victim and defendant prior to the rape.[159] Indeed, the victim was focused on preparing for her wedding; she was shocked to wake up to find her aunt's fiancé sexually penetrating her.[160]

The defendant conceded that the victim did not consent to sexual contact, but the California court of appeals reversed his conviction because evidence of force or fear was insufficient.[161] The California supreme court reinstated his conviction, finding that the victim's testimony—that she froze and that she did not say or do anything because she was afraid the perpetrator would become violent—to be sufficient evidence of fear.[162]

This victim found justice, but only after a four year wait.[163] The delay was the result of an awkward fit between the requirements of the law and the nature of the wrong. The law allowed the defendant to challenge the jury verdict on the basis that the victim did not exhibit fear. But the presence or absence of the victim's fear is not what made this sexual penetration a crime; rather, it was the violation of the victim's sexual agency. The defendant stripped her of her agency in circumstances where she clearly wanted no sexual relationship with him and indeed

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[155] *People v. Iniguez*, 872 P.2d 1183 (Cal. 1994); *State v. Janis*, 880 N.W.2d 76 (S.D. 2016).
[156] The "aunt" was a close family friend. *People v. Iniguez*, 872 P.2d at 1184.
[157] *Id.* at 1184.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 1185.
[161] *Id.* at 1184.
[162] *Id.* at 1188.
[163] *Id.* at 1183-84.

trusted him to maintain a platonic relationship with her. The existing law did not capture the true nature of the wrong, but the seeking consent standard does. Her fear was irrelevant. Her expectation that any interaction with the defendant would remain nonsexual *was* relevant.

State v. Janis also involved a First Encounter sexual assault in close proximity to a wedding; this time, it was the groom who raped the bride's maid of honor.[164] He did so on his wedding night while the victim slept at the couple's home.[165] The evidence demonstrated that the victim was sleeping in a spare room when the bride and groom arrived and was awakened by someone penetrating her anally.[166] She testified to being frozen during the assault, passing out, and then finding the groom in bed with her the next morning.[167] *Janis* is nearly identical to *Iniguez* in relation to the defendant's total inaction in seeking consent. The defendant joined the victim in bed and penetrated her without warning; he simply ignored the need to seek consent.[168] The defendant was convicted of third degree rape on the grounds that the victim was incapable of consent due to intoxication; he claimed that she consented.[169]

In *Janis*, as in *Iniguez*, the social norms around marriage made it clear to the defendant that he was engaging in sexual penetration in the context of a relationship that was mutually defined as nonsexual and expected to remain so. The victim in *Janis* likely relied on the presumption of nonconsent when she fell asleep at her friends' home in an intoxicated state; she expected that she would be safe from unwanted sexual contact, particularly since the groom should have been with the bride on his wedding night.

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[164] *State v. Janis*, 880 N.W.2d at 77-78.
[165] *Id.* at 77-78.
[166] *Id.* at 78.
[167] *Id.*
[168] *Id.*
[169] *Id.*

Bondi v. Commonwealth provides another example of a First Encounter sexual assault within an established relationship that was expressly nonsexual. The victim, a college freshman, was sexually assaulted after baby-sitting for her high school youth minister, whom she had known as a mentor for several years.[170] When the defendant returned home on this occasion, he told the victim "I love you like a daughter but I'm also in love with you," while touching her breasts and digitally penetrating her vagina.[171] Here, the parties mutually understood their relationship to be nonsexual, and the victim relied on that understanding when she agreed to babysit for the defendant.[172] The defendant unilaterally disrupted that understanding, and he did so without seeking the victim's consent. He placed a pillow on the victim's lap and then laid down with his head on the pillow—something he had never done before.[173] He then reached under the victim's shirt, touched her breasts, then unzipped her pants and digitally penetrated her vagina.[174] He engaged in all of these actions without expressing his intentions to the victim and without waiting for any response from her before initiating sexual contact.[175]

Although the defendant's conviction was upheld under a force standard, with the court finding sufficient force because the defendant grabbed the victim's arm in order to prevent her from leaving,[176] a seeking consent standard more accurately captures the wrong—the violation of the victim's sexual agency. The defendant touched the victim sexually without seeking her consent and knowing that she understood their relationship to be nonsexual. His use of force was beside the point.

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[170] *Bondi v. Commonwealth*, 824 S.E.2d 512, 514, 515 (Va. Ct. App. 2019).
[171] *Id.* at 514, 515.
[172] *Id.* at 517 (victim saw defendant as a mentor and father figure and as one of the people that she most valued and trusted).
[173] *Id.* at 514.
[174] *Id.*
[175] *Id.* at 514-15.
[176] *Id.* at 514-15.

A presumption that a relationship is nonsexual can be very important to people interacting with superficial acquaintances in public places. Consent to sexual contact cannot develop under circumstances where the parties do not interact and thus have no opportunity to express consent. In *State v. Price*, a ten-year-old boy was sexually assaulted by a sixty-five year-old man while they both swam in a public swimming pool.[177] The man approached the boy and groped his genitals without warning.[178] Consent was an issue in this case because Montana had no statute finding children incapable of consenting to sexual groping at the time.[179]

Although the court affirmed the defendant's convictions for felony sexual assault, a lengthy dissent suggested that the boy's lack of consent was unclear, apparently on the theory that a ten-year-old might welcome sudden sexual contact from an elderly man whom he had only ever seen at the pool.[180] In fact, the defendant did nothing to seek the boy's consent – he approached him without warning and grabbed his genitals.[181] The wrongfulness of the defendant's conduct lies in his ignoring the victim's sexual agency. He grabbed the victim without warning, leaving the victim without the time or space to express his lack of consent or, for that matter, react in any way. Whether the boy consented is not the relevant question, because he was never given the opportunity to make a meaningful choice about consent. A legal standard requiring the defendant to seek the victim's consent more accurately captures this wrong than weighing whether the victim consented.

A presumption that a relationship is nonsexual is also critical to a wide range of professional relationships, such as those between health care providers and their patients. There are numerous

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[177] *State v. Price*, 622 P.2d 160, 162 (Mont. 1980).
[178] *Id.*
[179] *Id.* at 163. The state did have a statute providing that a victim under the age of sixteen could not consent to sexual intercourse, but not to lesser forms of sexual touching.
[180] *Id.* at 168-70.
[181] *Id.* at 162-63.

First Encounter sexual assaults where the shared definition of the situation is that the victim is a patient who has come to see the defendant for medical treatment or professional services. The perpetrator unexpectedly introduces a sexual element into the encounter, and the victim is too shocked to object.

In *State v. Sedia*, the defendant, a physical therapist, used his penis to vaginally penetrate a patient as she laid on an exam table.[182] The parties mutually understood that the victim was seeking physical therapy; she was not in the office for sexual purposes.[183] Similarly, *Mohajer v. Commonwealth* involved a massage therapist who "shoved" his penis into the mouth of an eighteen-year-old first-time client.[184] His conviction was affirmed, although he tried to claim that the victim consented to his actions, despite coming as they did unexpectedly, and in the middle of a massage that the victim had booked to celebrate her high school graduation.[185]

Larry Nassar is perhaps the best known physician who has abused his position in order to sexually assault his patients.[186] Not a single one of Nassar's victims went to his office seeking a sexual encounter with him. The same can be said of other physicians, such as Richard Strauss, who assaulted at least 177 male students at The Ohio State University, and gynecologist George Tyndall, who committed years of sexual assaults on patients at the University of Southern California.[187]

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[182] *State v. Sedia*, 614 So.2d 533, 534 (Fla. Ct. App. 1993).

[183] *Id.*

[184] *Mohajer v. Commonwealth*, 579 S.E.2d 359, 362 (Va. Ct. App. 2003).

[185] *Id.* at 361.

[186] Benjamin Hoffman, *Gymnastics Doctor Larry Nassar Pleads Guilty to Molestation Charges*, N.Y. TIMES (Nov. 22, 2017), https://www.nytimes.com/2017/11/22/sports/larry-nassar-gymnastics-molestation.html (Ingham County, Mich. case); Christine Hauser, *Larry Nassar Is Sentenced to Another 40 to 125 Years in Prison*, N.Y. TIMES (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/sports/larry-nassar-sentencing-hearing.html (Eaton County, MI. case); Maggie Astor, *Gymnastics Doctor Who Abused Patients Gets 60 Years for Child Pornography*, N.Y. TIMES (Dec. 7, 2017), https://www.nytimes.com/2017/12/07/sports/larry-nassar-sentence-gymnastics.html (federal case).

[187] Caryn Trombino & Markus Funk, Perkins Coie LLP, Report of the Independent Investigation: Sexual Abuse Committed by Dr. Richard Strauss at The Ohio State University 1 (2019), https://presspage-production-content.s3.amazonaws.com/uploads/2170/finalredactedstraussinvestigationreport-471531.pdf?10000; Alan Blinder,

None of the health care providers discussed here expressed their intent to seek sexual contact prior to initiating it, nor did they give their victims any opportunity to consent or decline prior to sexual contact. These cases illustrate a broader range of scenarios where perpetrators abuse a position of authority—whether that is physician, teacher, psychologist, pastor, police officer or jail warden—to seek sexual contact from those who do not have a meaningful opportunity to consent in light of the nature of the relationship between the parties.[188]

Although some states have passed statutes declaring consent invalid within certain relationships, the seeking consent standard renders some of this parsing unnecessary, instead capturing all first-time encounters where there is a violation of sexual agency due to a failure to seek consent.[189] It is impractical for legislators to identify every situation where status differences between parties render the consent of one party void. The seeking consent standard performs the needed function more effectively given how common it is for perpetrators such as Nassar, Strauss, and others in positions of power to commit First Encounter sexual assaults against multiple victims.

Officials Ignored 'Clear Evidence' of Abuse by Ohio State Doctor, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/30/sports/ohio-state-doctor-abuse.html?searchResultPosition=2; Victor Mather, *Ohio State Finds Team Doctor Sexually Abused 177 Students*, N.Y. TIMES (May 17, 2019), https://www.nytimes.com/2019/05/17/sports/ohio-state-sexual-abuse.html?searchResultPosition=4; Harriet Ryan et al., *A USC Doctor Was Accused of Bad Behavior with Young Women for Years. The University Let Him Continue Treating Students*, L.A. TIMES (May 16, 2018, 6:25 AM), https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html.

[188] New York declared people detained by police officers to be incapable of consent to sex with the detaining officer(s) after the Anna Chambers case. N.Y. PENAL LAW §130.05(j). Chambers was raped by two police officers while handcuffed and in their custody; they claimed that she consented to sex. Natasha Lennard, *NYPD Cops Who Raped Brooklyn Teen in Custody Get No Jail Time*, THE INTERCEPT, (Aug. 30, 2019). At the time, no New York statute declared people in custody to be incapable of consent under such circumstances. *Id.*

[189] *See, e.g.* ARIZ. REV. STAT. ANN. § 13-1412(A) (West, 2021)(providing for strict liability for sexual contact between a peace officer and a person in his custody); CONN. GEN. STAT. ANN. § 53a-7 (a)(6)(B) (West, 2021))(providing for strict liability when a psychotherapist has sexual intercourse with a current or former patient who is emotionally dependent on the psychotherapist); TEX. PENAL CODE ANN. § 22.011(b)(10), (b)(13) (West, 2021) (rendering consent void where the actor is a clergyman, coach, or tutor who exploits a person's dependency on the actor). Additionally, numerous scholars have debated the question of when status differentials render consent to sex void and when they do not. For a fuller discussion, *see* ANDREA DWORKIN, INTERCOURSE 124-26 (1987); MACKINNON, *supra* note 18 at 174-75; Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS, 631 (1980); & SCHULHOFER, UNWANTED SEX, *supra* note 37 at 47-59;

D. College-age Sexual Predators, First Encounters, & Failing to Seek Consent

Failing to seek consent during First Encounters is characteristic of many sexual assaults involving college students. This is not surprising, because institutions of higher education bring together large numbers of young people who are becoming acquainted for the first time. These cases, like many of the others we have examined, often begin when a perpetrator initiates sexual touching without making his intentions clear and without waiting for the victim's consent before actually touching him or her.

Berkowitz, discussed *supra*, is an example of a First Encounter case in the university context. There, when the victim entered the defendant's dorm room looking for someone, the defendant persuaded her to stay and then initiated sexual contact by kissing the victim, touching her breasts, and attempting to put his penis in her mouth.[190] He did these things without warning, and when she said "no" repeatedly, he ignored her.[191]

Brock Turner was a Stanford University freshman when he raped Chanel Miller behind a dumpster, shortly after meeting her for the first time at a campus party.[192] Miller was too intoxicated to have given consent, and she had no memory of being alone with any males and no memory of being raped by Turner.[193] Prior to assaulting Miller, Turner approached at least two

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[190] *Berkowtiz*, 609 A.2d at 1340.
[191] *Id.*
[192] Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (Jun. 6, 2016); see also CHANEL MILLER, KNOW MY NAME (2020).
[193] People's Sentencing Memorandum, *People v. Turner*, 4-5, 6-7 (Jun. 2, 2016).

other women and touched them sexually shortly after meeting them, without warning and without seeking their consent.[194]

John Krakauer provides several additional examples in his book *Missoula: Rape and the Justice System in a College Town*.[195] Krakauer gives an in-depth discussion of the justice system's disastrous handling of six separate sexual assaults on young women in Missoula between 2008 and 2012.[196] Each was a First Encounter, and most of them occurred within hours of the first meeting between victim and defendant.[197] Nowhere in Krakauer's book or in the U.S. Justice Department's report on their investigation into Missoula is there any indication that law enforcement agents were aware of and attached significance to the fact that rape is so often reported in circumstances where victim and accused have never shared prior sexual contact and often have just met.[198]

To the contrary, one police detective quoted in *Missoula* stated that "[i]t's not easy to throw people in jail when it's a 'he said, she said' scenario."[199] That comment ignores a very clear pattern—the prevalence of First Encounter offending where the parties are barely acquainted,

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[194] Hannah Knowles, *Brock Turner Trial Continues in Second Week of Testimony*, THE STANFORD DAILY (Mar. 21, 2016), https://www.stanforddaily.com/2016/03/21/brock-turner-trial-continues-in-second-week-of-testimony/ (stating that Turner tried to kiss the victim's sister despite the fact that he and the sister never spoke that evening); People's Sentencing Memorandum, *People v. Turner*, 7, 8, 14, 15 (Jun. 2, 2016) (stating that Turner twice attempted to kiss one woman and put his hands on her waist without her consent; became "touchy" with another woman at a party and touched her waist, stomach, and upper thighs without her consent; and describing Turner as a "predator who is searching for prey").

[195] JON KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN (2016).

[196] Krakauer details the cases of rape victims Keely Williams, Allison Huguet, Kelsey Belnap, Kerry Barrett, Kaitlynn Kelly, and Cecilia Washburn. *Id.* at 3, 19, 34, 51, 71 & 147. Krakauer describes three additional rapes with unnamed victims and perpetrators which also appear to be First Encounters. *Id.* at 127, 143.

[197] *Id.* at 3, 21, 38, 57, 71, 119, 143, 147, & 165.

[198] Letter from Michael W. Cotter, United States Attorney, Dist. of Montana & Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., to Royce C. Engstrom, President, Univ. of Montana (May 9, 2013) *available at* http://www.justice.gov/crt/about/spl/documents/missoulafind_5-9-13.pdf; Letter from Michael W. Cotter, United States Attorney, Dist. of Montana & Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., to John Engen, Mayor (May 15, 2013) *available at* http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf; Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div. & Michael Cotter, United States Attorney, Dist. of Montana, &, to Fred Van Valkenburg, Cnty. Attorney (Feb. 14, 2014) *available at* http://www.justice.gov/crt/about/spl/documents/missoula_ltr_2-14-14.pdf. (hereinafter "Van Valkenburg Letter").

[199] KRAKAUER, *supra* note 195 at 72.

and the perpetrator uses sexual aggression, often against intoxicated or unconscious victims. Most of the *Missoula* cases involve victims who were either asleep or heavily intoxicated at the time of the assault.[200] Several woke up to find the accused penetrating them as they slept; in one case the victim woke to violent digital penetration of her vagina and anus, and the accused would not stop even when she clearly told him to.[201]

These cases also demonstrate the value of adjudicating acquaintance rape cases under a seeking consent standard. All of the cases described in *Missoula* were First Encounters. Approaching them by presuming nonconsent and then evaluating the defendants' actions in seeking consent is revealing. In four of the cases featuring sleeping victims, each was awoken not by a polite request by the defendant for sexual activity, but by the sensation of being penetrated as she slept.[202] These perpetrators simply initiated sexual activity without communicating with the victim at all. At least two of these five victims were heavily intoxicated as well as unconscious, with the accused having played an active role in encouraging the victims' drinking prior to the sexual assault.[203]

Just one of the *Missoula* cases involved a victim who was awake and not intoxicated; she reported that a football player used his greater size and strength to physically pin her down and assault her.[204] When he sought physical intimacy with her, she repeatedly said no and asked him to go back to their agreed-upon activity of watching a movie, but he ignored her protests.[205]

Krakauer's book and the Justice Department's investigation into sexual assault in Missoula revealed substantial deficiencies in law enforcement's approach to investigating non-stranger

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[200] *Id.* at 3, 12, 19-20, 34-40, 51-53, 69.

[201] *Id.* at 64. That assault left blood on the victim's pillow, on two walls near her bed, and "all over" her sheets. *Id.* at 65. That assailant was expelled from the university but not criminally prosecuted. *Id.* at 100-01.

[202] *Id.* at 12, 19, 53, 69. A fifth victim felt a penis thrust into her mouth and then blacked out. *Id.* at 36.

[203] *Id.* at 19, 36.

[204] *Id.* at 137-38.

[205] *Id.* at 136.

sexual assault, including gender bias and other issues.[206] The seeking consent standard brings helpful clarity to the task of building strong cases for prosecution, because it focuses the analysis on the perpetrator's conduct rather than the victim's. An offender-centered investigation that frames the inquiry around seeking consent can help police to more clearly see the nonconsensual nature of the types of cases described in *Missoula*, which *repeatedly* feature perpetrators penetrating unconscious or intoxicated First Encounter victims without even attempting to seek consent.

E. Worst Case Scenarios: First Encounters and Serial Offenders

It is well known that most sexual assaults occur among acquaintances, and I have furthered argued that these assaults are very often committed in the First Encounter context by perpetrators who fail to seek consent. It is also the case that many sexual predators are serial offenders. Accordingly, when sexual predators are left to offend for long periods of time—because of poor police investigations and/or because police are skeptical of the victims—they commit a large number of assaults. Many of these are First Encounters that involve no effort to seek consent.

From the predator's standpoint, the goal is to maneuver the victim into a situation where sexual contact is possible, carry out the assault, and then move onto the next victim. We have seen several cases where predators accomplish this goal by building a basic level of trust with the victim and then unilaterally changing the definition of the situation without giving the victim the opportunity to respond before the sexual violation begins. Because predators are interested in

[206] For instance, Krakauer documents a police officer asking a victim whether she had a boyfriend and then explaining that "sometimes girls cheat on their boyfriends, and regret it, and then claim they were raped." *Id.* at 54. *See generally* Van Valkenburg Letter, *supra* note 198 (evidence of gender bias, animus towards victims, and other problems preventing the prosecution of non-stranger sexual assault).

extracting sex rather than forming on ongoing relationship with their victims, they do not need to know their victims well, just well enough to make the rape look like consensual sex to the fact-finder. As long as we ignore the significance of First Encounter sexual assault, this is not difficult.

David Lisak uses the term "undetected rapists" to describe sexual predators who evade detection for long periods of time.[207] Lisak argues that such predators use strategies that allow them to avoid detection such as grooming their victims, testing victims' boundaries, and isolating them as precursors to sexual assault.[208] Lisak's work helps to explain why some sexual predators manage to commit hundreds of assaults without being detected.[209]

Reynhard Sinaga is one example of a sexual predator who operated repeatedly in the First Encounter context, using the behaviors identified by Lisak. Sinaga is thought by police to have raped 206 men between 2005 and 2017 in Manchester, England.[210] In 2020, he was convicted of forty-eight rapes and sentenced to at least forty years in prison.[211] Each of Sinaga's rapes were Brief Encounters.[212] Sinaga's modus operandi was to find young men who were leaving the bars near his home at closing time and who were in some sort of distress—heavily intoxicated,

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[207] David Lisak, *Understanding the Predatory Nature of Sexual Violence* 1, 6-7 (2008), https://www.innovations.harvard.edu/sites/default/files/134841.pdf. *See also* notes 216-237 and accompanying text.

[208] *Lisak, supra* note 207 at 7 (arguing that undetected rapists (1) are "extremely adept at identifying 'likely' victims," testing their boundaries, and isolating them; (2) plan and premeditate their attacks; (3) typically use only the amount of violence necessary to coerce victims into submission; (4) use psychological weapons rather than physical force, and (5) "use alcohol to deliberately render victims more vulnerable to attack").

[209] *Id.* at 4-5.

[210] Helen Pidd & Josh Halliday, *'I thought, OK, he goes for drunk guys': friends and flatmates on the Reynhard Sinaga they knew*, GUARDIAN (January 25, 2020), https://www.theguardian.com/society/2020/jan/25/friends-flatmates-reynhard-sinaga.

[211] Alexandra Topping & Helen Pidd, *UK court increases minimum jail terms of two serial rapists to 40 years*, Guardian (December 11, 2020), https://www.theguardian.com/uk-news/2020/dec/11/uk-court-increases-minimum-jail-terms-of-two-serial-rapists-to-40-years-joseph-mccann-reynard-sinaga.

[212] Helen Pidd, *How serial rapist posed as a good Samaritan to lure victims*, GUARDIAN (January 6, 2020), https://www.theguardian.com/uk-news/2020/jan/06/reynhard-sinaga-serial-rapist-posed-good-samaritan-lure-men [hereinafter "*Serial Rapist*"].

without money, or needing to charge dead phone batteries.[213] Sinaga invited each victim to his apartment to charge their phones, have another drink, and sleep for a few hours.[214] The fact that he was slightly built made him appear nonthreatening to his victims.[215] Sinaga raped his victims as they slept.[216]

According to the prosecution, Sinaga selected an apartment near several bars for the express purpose of luring victims to his home at closing time.[217] He was discovered only when his last victim awoke during the assault and called police.[218] But Sinaga's conduct at that time was still poorly understood. The victim, who was a physically larger man than Sinaga, was treated as a suspect for assaulting Sinaga and was held in custody for several hours; police did not believe his statement that he had been sexually assaulted.[219] Police only grasped the true nature of the situation when they discovered video footage on Sinaga's phone of his numerous sexual assaults on sleeping men.[220]

There are numerous other examples of sexual predators who pursue multiple victims by engaging in a Brief Encounter with each one after establishing some level of trust. Harvey Weinstein assaulted numerous women who sought his help in advancing their careers in the film

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[213] Helen Pidd & Josh Halliday, *Reynhard Sinaga jailed for life for raping dozens of men in Manchester*, Guardian (January 6, 2020), https://www.theguardian.com/uk-news/2020/jan/06/reynhard-sinaga-jailed-life-drugging-raping-men-manchester [hereinafter *Sinaga Jailed*]; Pidd, *Serial Rapist, supra* note 253.

[214] Pidd & Halliday, *Sinaga Jailed, supra* note 213; Pidd, *Serial Rapist, supra* note 212.

[215] Pidd & Halliday, *Sinaga Jailed, supra* note 213; Pidd, *Serial Rapist, supra* note 212.

[216] Pidd & Halliday, *Sinaga Jailed, supra* note 213; Pidd, *Serial Rapist, supra* note 212.

[217] Katerina Vittozzi, *Reynhard Sinaga: UK's worst serial rapist handed multiple life sentences for campaign against men*, SKY NEWS (January 7, 2020, 6:53 A.M.), https://news.sky.com/story/reynhard-sinaga-serial-rapist-handed-multiple-life-sentences-for-violent-campaign-11902070; *Britain's most prolific rapist jailed for life following historic CPS prosecution*, CPS (January 6, 2020), https://www.cps.gov.uk/north-west/news/britains-most-prolific-rapist-jailed-life-following-historic-prosecution; Pidd, *Serial Rapist, supra* note 218.

[218] Pidd, *Serial Rapist, supra* note 212; Nazia Parveen, *Reynhard Sinaga victim: 'I thought I might have killed him'*, GUARDIAN (January 26, 2020, 9:15 A.M.), https://www.theguardian.com/uk-news/2020/jan/26/reynhard-sinaga-victim-i-thought-i-might-have-killed-him.

[219] Parveen, *supra* note 218.

[220] *Id.*; Pidd, *Serial Rapist, supra* note 212.

industry.[221] He would summon the women to a meeting in a hotel room and would proceed to sexually assault each one, usually in a First Encounter context.[222]

Jeffrey Epstein sought under-aged girls whom he had never met for sexual encounters, and he used co-conspirators to lure them to his home, promising to pay them hundreds of dollars for "massages."[223] But once he was alone with them, he would reveal the true purpose of the interaction by ordering them to undress and engaging in sexual contact with them during the massage.[224] The victims often did not expect to engage in any sexual activity with Epstein, and some learned that they could get paid for bringing new girls to him if they did not want to repeat the sexual experience.[225] Epstein and Weinstein both committed sexual assault repeatedly in a First Encounter context.

The case of Jonas Dick, Alexander Smith, and Jason Berlin highlights how predators can become expert at their craft when they engage in a pattern of First Encounter coercion and sexual assault without being detected by police. Dick and Smith ran an entity called "Efficient Pickup" through which they accepted fee-paying clients who wanted to learn how to "seduce" women.[226] Berlin was their student.[227] Much like Sinaga, Smith taught his students to "go to bars at closing time to find a woman and to have an apartment nearby to take her to afterward."[228] Dick and Smith approached one heavily intoxicated victim outside of a San Diego bar at closing time and

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[221] Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, NEW YORK TIMES, (Oct. 5, 2017).

[222] *Id.*

[223] *In re Courtney Wild*, 955 F.3d 1196, 1198 (Apr. 14, 2020); JULIE K. BROWN, PERVERSION OF JUSTICE: THE JEFFREY EPSTEIN STORY xi, 105-06, 108 (2021) (stating that Epstein "[d]idn't want experienced women; his preferred prey were waiflike prepubescent girls from troubled backgrounds who needed money and had little or no sexual experience). *Id.* at xi-xii.

[224] BROWN, *supra* note 223 at xi, 107-08, ; JAMES PATTERSON, FILTHY RICH 68-71 (2016).

[225] *In re Courtney Wild*, 955 F.3d 1196, 1198 (Apr. 14, 2020); BROWN, *supra* note 229 at xi, 108; PATTERSON, *supra* note 230 at 71.

[226] *People v Smith*, WL 6521853, 1 (Cal. Ct. App. 2017).

[227] *Id.* at 2.

[228] *Id.* at 4.

invited her to an apartment.[229] Once there, they gave her something to drink, and Smith and Berlin then took turns raping her as she drifted in and out of consciousness.[230] The defendants were prosecuted as a result of the victim's own efforts at investigating her case and finding online evidence of the men bragging about sexually assaulting her as well as other women.[231] The trial judge declared that the victim deserved an award for her investigatory work because:

> "But for you, he wouldn't be here…Nobody would be held accountable….In fact, worse than that, things would have gone on and there would be other victims, and it is quite possible we would have never learned about this."[232]

These cases featuring seasoned predators demonstrate the worst-case scenarios that develop when predators are left unchecked and ignored by law enforcement for long periods of time. The fact that most of the sexual assaults committed by these individuals occurred in a First Encounter context reveals a common denominator that we have been missing and the importance of a path forward that takes this dynamic into account and applies a seeking consent standard. These predators differed somewhat in terms of whether they used alcohol, drugs, or force to accomplish rape, but what they all had in common was repeatedly engaging in First Encounter sexual penetration or contact without seeking consent. Applying a legal standard that takes the First Encounter context into account and applies a seeking consent standard would focus police and prosecutors squarely on the predatory nature of this conduct.

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[229] *Id.* at 1.
[230] *Id.*
[231] *Id.* at 2; Dana Littlefield, *Rape victim did her own detective work to find her assailants*, L.A. TIMES, (Jan. 30, 2017) ("[t]he real break in this case came from the victim's own investigation.")
[232] *Id.*

Part Three has demonstrated that a large number of sexual assaults take place between acquaintances in First Encounter scenarios where the defendant initiates sexual contact or penetration without seeking the victim's consent. Despite the fact that this pattern of offending repeats itself again and again, rape law has ignored First Encounter dynamics and the ubiquity of this type of offending. Sexual predators are able to amass a large number of victims when police ignore them, leaving them to exploit First Encounter dynamics repeatedly without getting caught. In this way, offenders improve their predatory skills, gain experience in successfully evading detection, and become emboldened to commit more assaults. To remedy this inequity, rape law must recognize the presumption of nonconsent that precedes First Encounter sexual assault through the development of a crime of sexual contact without seeking consent.

PART FOUR: BUILDING UPON CURRENT AFFIRMATIVE CONSENT APPROACHES

This article's Seeking Consent proposal harmonizes with, but also goes beyond, current understandings of affirmative consent. Affirmative consent is sexual consent defined as an active expression of willingness to engage in sexual activity rather than mere passive acquiescence. As California puts it, "[a]ffirmative consent means affirmative, conscious, and voluntary agreement to engage in sexual activity." [233] Support for affirmative consent is spreading across constituencies, despite its critics.

Colleges and universities began to focus substantial attention on the problem of sexual assault on college campuses about ten years ago and have since enthusiastically embraced

[233] CAL. EDUC. CODE § 67386(a)(1) (West 2021).

affirmative consent when adjudicating sexual assault cases.[234] As of 2015, over 1,400 colleges and universities in the United States used an affirmative consent standard for sexual assault claims.[235]Certain states, including California, Connecticut, Illinois, and New York, have passed legislation requiring higher education institutions to adopt an affirmative consent standard when adjudicating sexual assault cases.[236]

Opponents of affirmative consent argue that the standard places the burden of proof upon the accused to demonstrate that he obtained consent to each sexual act, and that such a burden interferes with the accused's right to avoid self-incrimination, effectively forcing him to speak at trial.[237] In fact, the burden of proof remains with the state when an affirmative consent standard is used; the prosecutor must prove that the sexual contact took place in the absence of the victim's freely given agreement to have such contact.[238] Canada's use of affirmative consent in its criminal justice system for nearly thirty years demonstrates that it is workable in the criminal context.[239]

The American Law Institute ("ALI") declined to endorse an affirmative consent standard as part of the Model Penal Code Revision process in 2016, and the American Bar Association refused to do so in 2019.[240] In so doing, these organizations have turned away from the embrace

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[234] *See generally* Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 387, 389 YALE LAW & POLICY REV. (2015). *See also* note 241-242.

[235] Sandy Keenan, *Affirmative Consent: Are Students Really Asking*, NEW YORK TIMES (Jul. 28, 2015), https://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html#:~:text=An%20estimated%201%2C400%20institutions%20of,standards%2C%20last%20fall%2C%20followed%20by.

[236] CAL. EDUC. CODE § 67386(a)(1), (2) (West 2021); CONN. GEN. STAT. § 10a-55m(a)(1), (b)(1); 110 ILL. COMP. STAT. ANN. § 155/10(1) (West 2019); N.Y. EDUC. LAW § 6441(1) (McKinney 2021); Jillian Gilchrest, *Consent and Connecticut Law: Ensuring criminal justice keeps pace with today's culture*, CT Mirror (Oct. 20, 2020), https://ctmirror.org/category/ct-viewpoints/consent-and-connecticut-law-ensuring-criminal-justice-keeps-pace-with-todays-culture/.

[237] Alan Dershowitz, *Opinion: Innocent until proven guilty? Not under 'yes means yes.'* WASHINGTON POST (Oct. 14, 2015).

[238] *See* notes 247-259 and accompanying text.

[239] *See generally* Vandervort, *supra* note 16.

of affirmative consent in higher education, in Canada, and, increasingly, in American state legislatures. Prior to ALI's 2016 vote, some form of affirmative consent was already used in the criminal law of several states, although these state statutes vary in complexity and function.[241] Since ALI's vote, even more states have embraced affirmative consent as a criminal law requirement.

States that incorporate an affirmative definition of consent into statutory or case law use a range of approaches, and the result is rather complex terrain.[242] However, there are at least nine jurisdictions that include consent as an element of the crime of sexual assault and that define that consent in affirmative terms.[243] In each of these jurisdictions, a defendant can be held criminally liable for engaging in sexual contact in the absence of a freely given indication of consent from the victim.

New Jersey, Vermont, and Wisconsin included affirmative consent as an element of rape or sexual assault prior to 2016, the year that ALI rejected it.[244] New Hampshire also did so prior to 2016, in part through supreme court jurisprudence, and two additional jurisdictions—Minnesota

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[240] Bradford Richardson, *American Law Institute rejects affirmative consent standard in defining sexual assault,* WASHINGTON TIMES (May 17, 2016); Amanda Robert, *Contentious resolution seeking to redefine consent in sexual assault cases is postponed*, ABA JOURNAL (Aug. 12, 2019), https://www.abajournal.com/news/article/resolution-114**.** Revision to the MPC's sexual offense provisions is long overdue. *See, e.g.* Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should be Pulled and Replaced*, OHIO ST. J. OF CRIM. L. 207, 207 (2003).

[241] *See* notes 248-51 and accompanying text; *see also* Tuerkheimer, *Affirmative Consent,* 13 OHIO ST. J. CRIM. L 441, 449-451 (2016)(hereinafter, "*Affirmative Consent*").

[242] Tuerkheimer, *Affirmative Consent*, *supra* note 241 at 449-451. State affirmative consent requirements can loosely be divided into what Tuerkheimer terms "pure" and "diluted" approaches. Broadly speaking, "pure" affirmative consent jurisdictions use an affirmative consent standard to adjudicate consent as an element of the charged crime with no separate force requirement. In "diluted" jurisdictions, the affirmative consent requirement is somehow attenuated. *Id.* at 451.

[243] The nine jurisdictions are the District of Columbia, Minnesota, Montana, New Hampshire, New Jersey, Oklahoma, Vermont, Washington, and Wisconsin. See notes [.] and accompany text.

[244] For instance, Vermont's sexual assault statute reads, in part, "[n]o person shall engage in a sexual act with another person without the consent of the other person." Vt. Stat. Ann. tit. 13 § 3252(a)(1)(West 2021).

and the District of Columbia—already treated sexual contact without affirmative consent as a misdemeanor at that time.[245]

Moreover, several jurisdictions strengthened their embrace of affirmative consent since the actions by ALI and the ABA. Vermont has defined "consent" affirmatively since 2005, but effective July 2021, it clarified that the presence of ambiguity means a *lack* of consent.[246] New Jersey, in 2021, codified its 1992 supreme court holding, statutorily defining sexual assault to include sexual penetration or sexual contact without affirmative consent.[247]

Since 2016, three additional states have incorporated affirmative consent into their criminal law, with Oklahoma embracing it right around the time of ALI's rejection.[248] Montana has long defined rape as sexual intercourse without consent, but in 2017 the state incorporated an affirmative definition of consent as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."[249] In 2019, Washington state also took action. [250] The state had previously defined consent in affirmative terms, but with a requirement that lack of

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[245] MINN. STAT. §§ 609.341(4), 609.3451, 609.342 - § 609.345.; D.C. CODE ANN. §§ 22-3001, 22-3006.

[246] VT. STAT. ANN. tit. 13 § 3251(c); 2021 Vermont Laws No. 68 (H. 183), Vermont 2021 Sessions Laws, 2021-2022 Legislative Session (Westlaw). The prior version read: "Consent" means words or actions by a person indicating a voluntary agreement to engage in a sexual act. Vt. Session Laws, 2021-22 Legis. Session, No. 68, H. 183.

[247] *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992); N.J. STAT. ANN §§ 2C:14-2(a)(5), 2C:14-2(a)(6), 2C:14-2(c)(1)(indicating that lawful sexual contact requires "affirmative and freely given permission," as well as a lack of coercion) (West 2021).

[248] Effective June 2016, consent in Oklahoma has been defined as "the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter which can be revoked at any time. OKLA. STAT. TIT. 21 § 113.

[249] MONT. CODE ANN § 45-5-503.; MONT. CODE ANN § 45-5-503. 2017 Montana Laws Ch. 279 (S.B. No. 29) (Approved May 4, 2017. Eff. date Oct. 1, 2017). Montana made this legislative change in response to a federal investigation, in 2012, into rape prosecution failures in Missoula, and after publication of Jon Krakauer's 2015 book on the same topic. Gabriel Furshong, *Montana legislature grapples with sexual violence*, HIGH COUNTRY NEWS (Mar. 7, 2017). *See also* notes 235-47 and accompanying text.

[250] WASH. REV. CODE ANN. §9A.44.060(1)(a). Class C felonies carry a five year maximum prison term. WASH. REV. CODE ANN. §9A.20.021(c).

consent had to be "*clearly expressed* by the victim's words or conduct."[251] The legislature removed that requirement in 2019, effectively construing ambiguity as a lack of consent.[252]

This brief survey demonstrates that at least nine American jurisdictions have adopted an affirmative consent requirement in relation to one or more forms of sexual contact.[253] The fact that New Jersey and Vermont have recently strengthened this requirement while Montana, Oklahoma, and Washington have added one indicates that momentum for affirmative consent is building rather than subsiding, apparently unaffected by the recent rejection of the concept by ALI and the ABA.

The proposal offered here both builds on this momentum and goes beyond it. The Seeking Consent standard is a form of affirmative consent, but it goes beyond affirmative consent as it is currently understood by focusing the analysis on the perpetrator's *actions* in seeking consent rather than on the victim's actions in *giving* it. My proposal also incorporates into the analysis, for the first time, the key practice of analyzing whether the alleged assault was a First Encounter and the great potential this type of analysis holds for greater fairness in rape law.

PART FIVE: JUSTIFICATIONS FOR THE SEEKING CONSENT STANDARD

The statutory reform proposal offered here capitalizes on some very important and yet overlooked dynamics of sexual assault—namely, the frequency with which perpetrators commit

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[251] WASH. REV. CODE ANN. §9A.44.060(1)(a).

[252] " "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." WASH. REV. CODE ANN. § 9A.44.010(7): 9A.44.010.

[253] These are the District of Columbia, Minnesota, Montana, New Hampshire, New Jersey, Oklahoma, Vermont, Washington, & Wisconsin. See notes 250-258 and accompanying text.

sexual assault in the First Encounter context and without seeking consent. I have also demonstrated how the proposal could be applied across a wide range of cases, and how it fits in with existing law. I now address a few remaining questions about how the proposed standard would work: the nature of the bright line rule it creates; concerns about overcriminalization; and addressing sexual assault beyond First Encounters.

The seeking consent approach offers the advantage of a clear bright line that is easy to understand—for victims, those accused, and law enforcement authorities alike. It tells the sex initiator that before he touches another person sexually for the first time, he must seek their permission, and he must be absolutely certain that they have unambiguously indicated, through words or actions, their willingness for him to proceed. If he is not sure, he must refrain from sexual contact. The law further instructs him to expect that the law will presume that a person who has never before consented to sexual contact with him has maintained that stance, absent a clear and unambiguous indication to the contrary.

This clear bright line rule makes the law clear to everyone concerned and has the potential to greatly reduce sexual assault in the First Encounter context. It is an easy rule to learn. It will be opposed, perhaps vehemently, by those who have benefitted from society's tolerance of sexual aggression, but if we are concerned with protecting victims of all ages, genders, and races from sexual assault, this bright line is the most fair and effective way to construe sexual assault laws.

Moreover, given the serious invasion of privacy that is involved in touching someone sexually without his or her consent, as well as the long-lasting psychological trauma that can result, it is fair and just to place the burden on the person initiating the sexual contact to be sure that he has clear and unambiguous consent before acting.

To paraphrase an Idaho court writing in 1907: a person who takes the liberty of touching another person sexually without her or his consent does so "at his own risk."[254] It is the person initiating the sexual contact who has the power to avoid unlawful contact by being cautious about seeking consent in advance of touching. That person can "incur the risk and hazard" of misjudging the situation and facing the legal consequences.[255] If he is not sure, he can simply refrain from touching. That Idaho court went on to note:

> "A little of this kind of law would go a long way with some of the brutes who unfortunately bear the names of men. There would be far less illicit intercourse if there were no assaults by the seducer in the first place, and the oftener he is brought to justice the less annoyance the community will suffer from the graver offenses towards which his conduct leads."[256]

Although the "illicit intercourse" framing may no longer resonate today, this opinion effectively captures the sexual violation that we see repeatedly in First Encounter cases. These cases are not the result of miscommunication between the well-intentioned; rather, they are the result of deliberate predatory conduct and sexual aggression. The more diligent we are at identifying and prosecuting this conduct, the safer our communities will be.

The bright line offered by the seeking consent approach can also be helpful in addressing the concern that any effort to increase the prosecution of sexual assault will lead to a disproportionate emphasis on prosecuting offenders of color. The crux of the problem here is that prosecutorial discretion allows for decisions to be made on the basis of forms of bias such as

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[254] *State v. Neil*, 90 P. 860, 862 (Idaho 1907). I have paraphrased in order to avoid some of the archaic language in the original opinion.

[255] *Id.*

[256] *Id.*

race, gender, and socioeconomic status.[257] A seeking consent standard and clear bright line rule can increase the odds that prosecutors will treat all offenders similarly. This standard will make it easier to build strong cases for prosecution, and that in turn could increase the odds that prosecutors will prosecute more sex offenders across all racial lines. In short, the seeking consent approach is just, equitable, and easy to understand. For all of those reasons, it has the potential to chill a great deal of sexual assault.

There is very little danger that this proposal will result in the overcriminalization of sexual assault. Sexual assault is vastly under prosecuted, with only about three percent of those responsible being punished for their crimes. If we are to rectify this situation and the enormous public health costs of sexual assault and the mental, emotional and physical health consequences for victims,[258] we must expect prosecutions to increase dramatically under a more effective legal framework. When prosecution numbers rise, some will inevitably argue that too much sexual assault is being prosecuted. But we must judge each case on the evidence and recognize that a large increase is to be expected when rape has been under-prosecuted for so long.

There is little reason to fear that this proposal will result in a flood of prosecutions of inexperienced but well-intentioned young people. Professor Tuerkheimer's analysis of case law in existing affirmative consent jurisdictions shows that prosecutors typically do not focus on cases where miscommunication is at issue.[259] Similarly, my analysis demonstrates that First

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[257] William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, YALE L. J. 1, 27-30 (1997) (identifying prosecutors' practice of targeting impoverished defendants in order to avoid the significant legal challenges that can be brought by defendants able to hire private attorneys); BRANDON GARRETT, CONVICTING THE INNOCENT, 163-67 (2011)(examining how a lack of financial resources impedes defendants' access to expert witnesses and other resources).

[258] For a discussion of the public health costs and consequences of sexual assault and how to address them, *see generally* Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033 (2018).

[259] Deborah Tuerkheimer, *Affirmative Consent*, *supra* note 242 at 444 (concluding that "even in the affirmative consent jurisdictions, cases involving a plausible claim of a reasonable mistake are far eclipsed by cases where miscommunication is not an issue."), 445, 468 ("miscommunication appears to be far less of a concern than opponents [of affirmative consent] have suggested….").

Encounter cases featuring sexually aggressive conduct, rather than miscommunication, dominate case law. There is little reason for prosecutors to focus on more ambiguous "miscommunication" cases when First Encounter sexual aggression cases are abundant.

Although First Encounter sexual assault dominates case law, sexual assault certainly occurs within established sexual relationships as well. The First Encounter/Seeking Consent approach proposed in this Article would not apply to any situation where victim and defendant already had a prior voluntary sexual relationship. In such cases, the presumption of nonconsent would no longer be intact. Other scholars have argued that affirmative consent can be an effective standard in the adjudication of all sexual assault cases, and Professor Tuerkheimer has provided an analysis of how some states with affirmative consent statutes already do this.[260] First Encounter sexual assault is very common, however, and the application of a seeking consent standard to such cases should be particularly clear.

CONCLUSION

This Article has described a pattern of sexually predatory behavior has been repeated for decades, with courts largely missing the opportunity to hold perpetrators accountable because the law has not defined the wrong of sexual assault in terms of whether the accused sought the victim's consent prior to initiating sexual contact. In part, this oversight is because conventional rape law has taught us to focus a skeptical eye on victims rather than analyzing the conduct of those accused. We must change our focus.

[260] *Id.* at 451-67.

First Encounter cases help to illustrate how necessary it is to make this change. Rape law should presume that people generally do not consent to sexual contact with everyone they meet. The law must recognize that there is a presumption of nonconsent that must be overcome before sexual contact is lawful, mutual, and consensual. We therefore need an analytical focus that appreciates the significance of First Encounter cases and considers whether and how the perpetrator sought the victim's consent before initiating sexual contact. This approach respects the sexual agency of all persons, makes sexual assault law clearer for everyone, and can correct the under-prosecution and under-criminalization of sexual assault. We owe it to all victims of sexual assault to adopt a seeking consent standard and thereby treat sexual assault as the serious crime that it is.

Seeking Consent and the Law of Sexual Assault

Lisa Avalos, Associate Professor

Louisiana State University Law Center
Pugh Institute Symposium
March 25, 2022

Two Neglected Aspects of Rape Law

- It presumes consent when society does not.
- It ignores the significance of First Encounter Sex

How Rape Law Presumes Consent

People v. Warren, 446 N.E.2d 591 (Ill. App. Ct. 1983).

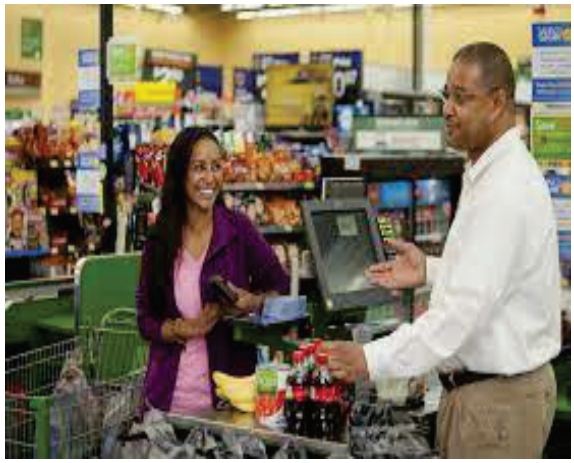
- "This will only take a minute. My girlfriend doesn't meet my needs."
- Picked her up and carried her into the woods.
- Convicted and sentenced to six years in prison.
- Conviction overturned on appeal.

People v. Warren, 446 N.E.2d 591 (Ill. App. Ct. 1983).

- Lack of force or threat of force.
- "[C]omplainant's failure to resist when it was within her power to do so conveys the impression of consent regardless of her mental state, amounts to consent and removes from the act performed an essential element of the crime."

The Presumption of Nonconsent in Everyday Life

The Presumption of Nonconsent in Everyday Life



First Encounter Dynamics

The Seeking Consent Approach

Knowingly engaging in first-time sexual penetration/contact without seeking consent

The Statutory Elements:

(1) Knowingly,

(2) engaging in sexual penetration or contact,

(3) with a particular person for the first time,

(4) without seeking consent, where “seeking consent” means

(a) clearly and unambiguously expressing his intent to engage in sexual contact and

(b) waiting until the victim has granted consent prior to proceeding.

- Time
- Space

The Fourth Element:

(4) without seeking consent, where “seeking consent” means

(a) clearly and unambiguously expressing his intent to engage in sexual contact and

(b) waiting until the victim has granted consent prior to proceeding.

- Time
- Space

People v. Warren Revisited

Implementing this Reform

- An Affirmative Defense Of Consent
- A Bright Line Rule
- Overcriminalization?

Conclusion

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