

## The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform

Ilene Seidman & Susan Vickers<sup>†</sup>

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### I. INTRODUCTION

In the past thirty years there has been a movement in the law seeking gender equality in sex and sexual relations. The treatment of crimes specifically targeting women, sexual assault and domestic violence, has been at the core of this gender equality movement. The rape reform movement has succeeded in lobbying for significant revisions in antiquated and gender-biased rape statutes. Specifically, state and federal legislatures have enacted rape shield laws, provided for privileged protection of rape counseling records, repealed marital rape exceptions, eliminated evidentiary corroboration requirements and cautionary instructions regarding the absence of corroboration, and abolished the statutory “reasonable mistake of fact” defense.<sup>1</sup>

Although these reforms represent significant steps towards an appropriate response to rape, many of these statutory reforms, which focus primarily on rape victims’ existence within the criminal justice system, have been a profound disappointment.<sup>2</sup> Few commentators can point to any data suggesting that criminal rape reform laws have deterred the commission of rape, increased

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<sup>†</sup> Ilene B. Seidman is Associate Clinical Professor of Law, Suffolk University Law School, Boston, Massachusetts, and Of Counsel to the Victim Rights Law Center. Susan H. Vickers is Founding and Executive Director of the Victim Rights Law Center, Boston, Massachusetts. The authors are extremely grateful to our research assistants Marisa Tagliareni, of Suffolk University Law School, and Michelle Kalowski, of Northeastern University School of Law, for their outstanding assistance in this project, as well as their insights, patience and good humor. Thanks also to our colleagues Professor Lois Kanter, Professor Jeffrey Pokorak, Professor Bill Berman, Professor James Rowan, and the staff of the Victim Rights Law Center for their insights and support.

Some portions of this Article were based on *Beyond the Criminal Justice System: Transforming Our Nation’s Response to Rape*, an attorney practice guide published by the Victim Right’s Law Center, supported by grant number 2001-VF-GX-009 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings and conclusions expressed in that document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

1. See generally Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN’S L.J. 127 (1996).

2. See David P. Bryden, *Forum on the Law of Rape*, 3 BUFF. CRIM. L. REV. 317, 320-21 (2000); Hunter, *supra* note 1, at 134, 140, 155-56; Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 128-30 (1999).

its prosecution, or increased conviction rates.<sup>3</sup> In short, the “outcomes” of the criminal justice system—arrest, indictment, and conviction—have remained fairly constant.

Why have these reforms failed to produce changed outcomes? Scholars point to the fact that societal attitudes, including those of many key decision-makers in the criminal justice system, have not kept pace with statutory reform.<sup>4</sup> While laws about rape have changed, attitudes about sexual autonomy and gender roles in sexual relations have not. The vast majority of people—including law enforcement personnel, judges and potential jurors—remain conflicted about what constitutes “consensual” sex.<sup>5</sup> They are ambivalent about placing criminal sanctions on “non-violent” sexual assault or, for that matter, anything short of violent penetration that results in physical injuries.<sup>6</sup> Jurors, prosecutors and police are confused about the boundary line between sex and rape.<sup>7</sup>

The result of our society’s ambivalence and confusion about sexual autonomy and gender roles in sex is that rape victims, especially acquaintance rape victims, continue to encounter the same hurdles that they did thirty years ago.<sup>8</sup> These hurdles include the centralizing of the victim’s dress, behavior and state of mind,<sup>9</sup> the brutalizing attack on her privacy by the threat of public use

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3. See CASSIA SPOHN & JULIA HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT, 77-104 (1992) (finding no change in number of reports, indictments, and convictions in majority of jurisdictions studied); Stacy Futter & Walter R. Mebane Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN’S L.J. 72, 83-85 (2001) (discussing various empirical studies of rape law reform impact).

4. See SPOHN & HORNEY, *supra* note 3 at 173.

5. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 2 (1998).

6. *Id.*

7. *Id.* at 95-98.

8. Rape victims will encounter additional difficulties when the defense’s theory is based on one of consent, which constitutes the vast majority of cases. Seventy-eight percent of rape victims are assaulted by someone they know, and the most common defense in these cases is consent. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, A PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2, 5 (Nov. 1998), available at <http://www.ncjrs.org/pdffiles1/nij/183781.pdf>.

9. See SUSAN ESTRICH, REAL RAPE 45-46 (1987); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1196 (1997) (noting “officials deny justice to women who have engaged in nonmarital sex, or other ‘improper’ activities such as heavy drinking or hitchhiking”); Gary D. LaFree et al., *Jurors’ Responses to Victims’ Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 401 (1985) (stating jurors with conservative notions regarding appropriate female behavior tend to find defendant not guilty if the victim allegedly violated conservative notions of “proper” female behavior, such as drinking or committing adultery). Estrich cites *Barker v. Commonwealth*, 95 S.E.2d 135, 137 (Va. 1956), a case in which a woman accepted a ride from two male strangers at a bus station instead of waiting for the bus. ESTRICH, *supra*, at 45-46. The men later hit her and forced her to have intercourse. *Id.* She later paid for additional gas and did not complain until a friend asked her why she was not on the bus. *Id.* The court was troubled not only by the woman’s delay in complaining, but also by her acceptance of the ride in the first place, stating:

[I]t is improbable and contrary to human experience for an innocent and chaste woman to permit two

of rape crisis, medical, and therapy records,<sup>10</sup> the continuing ability of the defense to litigate the character, conduct and mental health of the victim in an effort to prove consent or motive to lie,<sup>11</sup> and the continuing view that victims should demonstrate a set of behaviors consistent with someone who has really suffered the trauma of assault.<sup>12</sup> Jurors still expect evidence of fresh complaints by victims with accompanying hysteria and torn clothes, as well as other indicia of resistance even when resistance is not a statutory element.<sup>13</sup>

This Article proposes an agenda for the next thirty years of rape law reform. Part I briefly reviews the first wave of rape law reform. In Part II, this Article proposes the establishment of the right to independent civil representation for rape victims. Part III of this Article recommends the reconceptualization of the legal response to rape, focusing on a victim's most basic human needs in the first few months after assault. Part III further addresses the core areas of civil legal needs that are crucial to a victim's healing, safety and well-being immediately following an assault. Part IV proposes the establishment of an affirmative standard for consent and the elimination of force as a necessary element to the crime. Finally, Part V advocates the establishment of a national database to track criminal justice outcomes in sexual assault cases to enable future reforms based on reliable data.

## II. THE FIRST WAVE OF RAPE REFORM (1970-2000)

In the wake of demands for equal rights for women under the law and tighter criminal justice controls during the 1970s, reform of rape laws became a legislative priority.<sup>14</sup> As a result, over the next thirty years, every state in the

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strange men to introduce themselves to her in a public place and after one of them had hugged her and felt her legs to voluntarily ride with them as far as she did.

*Id.*

10. Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 284 (1995) (discussing that “[i]t was likely that sexual assault survivors viewed foregoing legal action as a tradeoff for receiving effective counseling treatment”).

11. Bryden & Lengnick, *supra* note 9, at 1367 (stating defendants seek to portray victims as troubled to discredit victim's testimony and reinforce their fabricated charge); Joo, *supra* note 10, at 2, 25, 38.

12. SCHULHOFER, *supra* note 5, at 4.

13. See Bryden & Lengnick, *supra* note 9, at 1196 (declaring juries often conform to system norms by blaming victims and acquitting defendant rapists).

14. See Futter & Mebane, *supra* note 3, at 75. Before the first wave of reform, the traditional common-law approach to rape had persisted for hundreds of years. Rape was primarily seen as a crime of theft of a father or husband's property, thus rendering it impossible for a father or husband to rape his daughter or wife under the law. *Id.* at 74. The traditional definition of rape, “unlawful carnal knowledge of woman by force and against her will,” remained widespread until the beginning of the rape reform movement in the early 1970s. *Id.* at 75. Most, if not all, jurisdictions placed additional burdens on victims to demonstrate that they resisted to the utmost, demonstrated active and forceful lack of consent, that their prior sexual conduct could not have reasonably suggested consent to the defendant, and that physical evidence corroborated their claims.

The introduction of the Model Penal Code in 1962 was the first attempt to modernize rape law. MODEL PENAL CODE § 3.1 (1962). The Model Penal Code defined rape as follows: “A male who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force, or by threat of

country and the District of Columbia redrafted their rape statutes in some way.<sup>15</sup> Though the reforms were not identical, they each focused almost exclusively on the victim's role within the criminal justice system.<sup>16</sup> These criminal justice reforms fell into four categories: (1) redefinition of the offense (repealing spousal exemptions and abolishing specific gender roles for the accuser and accused); (2) evidentiary reforms (elimination of corroboration requirements, enactment of rape shield statutes); (3) reforms in statutory age requirements; and (4) reforms in statutory structures (grading of offenses according to severity of force and resulting injuries).<sup>17</sup>

The intent of this massive legal reform was both symbolic and substantive. On a symbolic level, the overarching goal was to alleviate the rape victim's second class status within the criminal justice system in order to make the treatment of rape victims, the overwhelming majority of whom are female, more consistent with that of other victim-witnesses in the system.<sup>18</sup> The substantive goals were to deter occurrence, increase the likelihood that victims will report the crime and cooperate with law enforcement, reduce the intense credibility attacks on victims during investigation and at trial, and increase rates of prosecution and conviction.<sup>19</sup>

Sadly, it now appears that by any available measure, the reforms have had no significant substantive impact. No major scholar in the area of rape law and rape reform has argued that these reforms have produced significant results.<sup>20</sup> Perhaps most disheartening is that trial, appellate and state supreme courts are still arguing over the same old ground: the meaning of consent, degrees of force, the victim's role as an active or passive participant in the event, and the victim's privacy.<sup>21</sup>

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imminent death, serious bodily injury, extreme pain or kidnapping to be inflicted on anyone." *Id.* While the Model Penal Code specifically sought to shift the focus from the victim to the accused, resistance remained an implicit requirement, and the code remained focused on non-consent. *Id.* Force was not defined, but the threat of force had to be lethal or extremely serious. *Id.* The Model Penal Code also contained a corroboration requirement. *Id.* § 213.1. The Code retained the centuries-old notion that in matters of sex (if not others), women were or could be vengeful liars, and the code therefore required the presence of "fresh complaints." See Futter & Mebane, *supra* note 3, at 3.

15. Futter & Mebane, *supra* note 3, at 79.

16. Futter & Mebane, *supra* note 3, at 79.

17. Futter & Mebane, *supra* note 3, at 3.

18. Spohn, *supra* note 2, at 121.

19. Spohn, *supra* note 2, at 121.

20. Futter & Meban, *supra* note 3, at 81.

Although their reasoning differs, legal scholars generally agree that the reforms have not been successful. Three of the most prominent legal scholars in the area of rape reform law are Catherine Mackinnon, Susan Estrich, and Lynne Henderson [all of whom conclude that rape reforms to this point have largely failed].

*Id.*

21. See Bryden & Lengnick, *supra* note 9, at 1196 (arguing "men who control the justice system are irrationally obsessed with the dangers of false rape accusations"); see also ESTRICH, *supra* note 9, at 42-43 (suggesting "the underlying theme [in the criminal justice system surrounding rape] is distrust of women").

Given that significant statutory reforms have failed to produce significant changes in rape outcomes within the criminal justice process, should we give up on the law as an instrument for addressing social attitudes about rape? Are social and cultural prejudices about the devious at worst and ambivalent at best nature of female sexuality and the deeply held, unstated belief that men are inherently aggressive and violent in expressions of their own sexuality too tenacious to legislate against?<sup>22</sup> Should lawyers get out of the way and leave the “real” work to therapists, educators, and sociologists? If we have faith that the law can be used as a tool for healing victims of sexual assault, we must answer no to these questions.

The reforms of the past thirty years have reached the limits of their success, and a second wave of reform is badly needed. The agenda suggested in this Article arises from our study of rape laws, and rape law reform, and from our experience representing or supervising the representation of over 600 sexual assault victims in Massachusetts. We believe our work with rape survivors provides a clear and distinctive roadmap to the work that is crucial to their healing, safety, and well-being that has national applicability and is strongly supported by social science research.

### III. CHANGE THE DOMINANT PARADIGM OF RESPONSE TO RAPE BY RECONCEPTUALIZING THE RIGHTS AND REMEDIES AVAILABLE TO RAPE VICTIMS OUTSIDE THE CRIMINAL JUSTICE SYSTEM

The failure of rape law reform is in part the result of an almost exclusive focus on the criminal justice process. Rape victims deserve more from the legal system than just a prosecution.<sup>23</sup> Rape causes a tidal wave effect on a victim’s life. The profound emotional, physical, economic, and social harm to the victim affects a broad range of life activities impacted by civil law. The goal of refocusing the legal response to rape should be to prevent the acute trauma of rape from triggering a long-term, downward economic and social

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22. Perhaps our disappointment in the results of reform lies in the mistaken belief that the reforms of the past thirty years would produce radical, rather than incremental, changes in social attitudes as well as in the application of law. One notable exception is rape shield laws which have had impact in deterring the irrelevant introduction of prior sexual history now routinely upheld by judges, but nonetheless subject to debate again as a result of the Kobe Bryant case. For instance, Massachusetts’ rape shield law governs the admissibility of evidence of a victim’s sexual conduct, and requires that certain evidence shall not be admissible in criminal proceedings. MASS. GEN. LAWS ch. 233, § 21B (2004). Evidence of the victim’s reputation for promiscuity or sexual conduct is not admissible under the statute, however, the statute is subject to certain exceptions including the victim’s sexual history with the accused and evidence of specific sexual conduct with someone other than the accused when it is relevant to explain the presence of “any physical feature, characteristic, or condition of the victim.” *Id.*

23. Even if outcomes were successful, because over half of all rape prosecutions are either dismissed before trial or result in an acquittal, focusing legal remedies exclusively on the criminal justice system is not adequate. MAJORITY STAFF OF THE SENATE JUDICIARY COMMITTEE, VIOLENCE AGAINST WOMEN: THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE (May 1993), available at <http://www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponsetoRape/full-text>.

spiral for the victim, and to preserve the integrity of the victim's privacy and social relations.

The most obvious place where the criminal justice process is inextricably tied to civil remedies is the area of victim's compensation. Most victim compensation statutes require some form of involvement with the criminal justice system in order for the victim to pursue a compensation claim.<sup>24</sup> Placing the availability of civil remedies in the hands of the criminal justice process causes real harm to victims and is terrible social policy for at least three reasons.

First, rape is the least reported, least indicted, and least convicted non-property felony in America.<sup>25</sup> Second, the criminal justice process is too slow and poorly equipped to protect against the immediate devastating consequences of assault.<sup>26</sup> Third, many victims simply do not view the criminal justice system as one that will provide them with protection.<sup>27</sup> These victims will forego the criminal process and will unwittingly deprive themselves of civil remedies that should be available to them to stabilize their daily lives, protect their privacy, and ensure their emotional and physical safety.

#### A. Hierarchy of Rape Victims' Legal Needs

Abraham Maslow's hierarchy of human needs provides a vantage point from which to reconceptualize the legal system's response to rape. Maslow's theory suggests that unsatisfied needs exist in a predictable, sequential and universal hierarchy that motivate humans to act.<sup>28</sup> The most primal needs cited by Maslow are physiological: air, food, drink, shelter, warmth, sex, and sleep.<sup>29</sup> The second level of needs include safety and security, protection from elements, order, law, limits and stability.<sup>30</sup> The third level includes

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24. For example, in Michigan, the commission operating the Victim's Compensation Fund notifies the prosecuting attorney of the county in which the crime occurred upon receipt of the claim. MICH. COMP. LAWS §§ 18.351-18.368 (2004). The commission defers the proceedings until the criminal prosecution has concluded. *Id.*

25. TIMOTHY C. HART & CALLIE RENNISON, U.S. DEP'T OF JUSTICE, REPORTING CRIME TO THE POLICE 5 (Mar. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rcp00.pdf>. Between 1992 and 2000, only 31% of rapes or sexual assaults were brought to the attention of the police compared with 57% of robberies and 55% of aggravated assaults. *Id.*

26. In Massachusetts, for example, it can take two or more years for a case to move from indictment to trial alone. This figure does not account for pre-indictment investigation, or post-conviction appeals, which can add years to the process. VICTIM RIGHTS LAW CENTER, BEYOND THE CRIMINAL JUSTICE SYSTEM: TRANSFORMING OUR NATION'S RESPONSE TO RAPE: A PRACTICAL GUIDE TO REPRESENTING SEXUAL ASSAULT VICTIMS ch. 9 at 16 (2003).

27. See *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539, 622 (1992) (noting how many victims find themselves forced to "reveal intimate, painful details [of their assault] to different prosecutors and different judges").

28. ABRAHAM MASLOW, MOTIVATION AND PERSONALITY 15 (1954).

29. *Id.*

30. *Id.* at 18.

belongingness, love, work group, family, affection and relationships.<sup>31</sup> The fourth includes social esteem, self-esteem, achievement, mastery, independence, status, dominance, prestige and managerial responsibility.<sup>32</sup> The fifth and highest level of need in the hierarchy is self-actualization, which includes realization of personal potential, self-fulfillment and the seeking of justice and personal growth.<sup>33</sup>

Maslow's conceptual framework articulates perfectly what we have seen in practice. The vast majority of rape victims' basic need for economic stability, emotional security, and physical safety take precedence over criminal justice remedies, which offer deeper meaning, vindication, and self-actualization. In our experience representing sexual assault victims, this appears to be especially true during the first six months after the assault.<sup>34</sup>

What the legal system offers victims should, therefore, be designed to meet their most immediate needs: preventing the traumatic economic and psychological downward spiral that frequently begins within the first six months after assault. As Maslow's theory suggests, what little the criminal justice process actually offers victims does not meet their primary needs at the time it is offered, and does not protect them from the most traumatic and devastating consequences to their well-being after the assault. We have identified eight core areas of civil legal needs that affect the well-being and recovery of rape victims. These needs are consistent with our experience representing victims and with Maslow's hierarchy of needs.

### 1. Privacy

For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot. Privacy imperatives begin with the very fact of the assault, and in small, enclosed communities, the privacy imperative is even more acute. For example, on high

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31. *Id.* at 20.

32. MASLOW, *supra* note 28, at 21.

33. MASLOW, *supra* note 28, at 22.

34. In the current dominant legal paradigm, however, such "basic" needs of victims are at best placed at the periphery of our legal response to rape, and, at worst, such needs are conceptualized as a "personal" rather than "legal" problem. We hypothesize that this acute disjuncture between what victims are seeking and what the criminal justice system is offering somewhat accounts for failure of rape law reform over the last thirty years. In 1996, more than two-thirds of rape/sexual assaults committed in the United States remained unreported. CHERYL RINGEL, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1996: CHANGES 1995-96 WITH TRENDS 1993-96, at 3 (Nov. 1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv96.pdf>. Because the criminal justice system offers remedies to victims (vindication, meaning, and sense of justice) consistent with "higher" level needs, and fails to offer solutions for any more basic needs, it makes sense that many victims do not engage the criminal justice system immediately after an assault. *See generally* Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventative Law Into Law School Curriculum*, 5 PSYCHOL. PUB. POL'Y & L. 1123 (1999) (describing victims' use of criminal justice system).

school and college campuses it is exceedingly difficult to contain the gossip that is usually generated by an allegation of rape. University rape victims are painfully aware of the devastating impact of gossip that accompanies the reporting of a sexual assault. As a result, university students have an extraordinarily low reporting rate.<sup>35</sup> Approximately 5% of university students who experience a sexual assault report it to campus or non-campus police.<sup>36</sup> Victims understand that they have much to lose in making public disclosures. This was recently confirmed when Harvard University acknowledged that their existing way of handling peer-on-peer rape complaints often caused more harm than good to the victim.<sup>37</sup> The social division, resulting in harassment and isolation caused by public disclosure, particularly in peer-on-peer assault, can cause irreparable educational harm.

Once rape is reported, the victim's privacy is vulnerable in sadly familiar ways. Protection of medical, psychiatric, and rape crisis center records is crucial from the minute the victim seeks medical care and counseling. Outside of the criminal justice process, privacy violations may easily occur in relation to employment, education, housing, and financial compensation.<sup>38</sup> Further, there is a complex interaction between the criminal justice and civil systems that must be taken into account.<sup>39</sup> For example, in a suspected drugging case, victims often do not recall whether sexual penetration occurred and therefore toxicology testing can be vital to determining what happened.<sup>40</sup> Comprehensive toxicology testing, however, will detect the presence of all substances, medications and drugs both illegal and legal.<sup>41</sup> If a victim regularly takes an anti-depressant, uses marijuana, cocaine, or prescription drugs, these substances will appear in the analysis and expose the victim in ways unintended by the toxicology analysis.<sup>42</sup>

Protecting privacy in the criminal, civil, and educational realms should be at the center of all representation of sexual assault victims. The next wave of rape law reform should focus on meaningful privacy protections that can be invoked

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35. BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000), available at <http://www.ncjrs.org/pdffiles1/nij/182369.pdf>.

36. *Id.*

37. See David White, *Harvard's New Sex Harassment Policy: Brilliance at Last*, YALE DAILY NEWS (New Haven, Conn.), Sept. 17, 2002. In 2002, Harvard University changed its sexual assault policy to require students filing complaints to bring to the school's disciplinary board sufficient corroborating evidence of misconduct before it will investigate. White, *supra*.

38. See Family Education Rights and Privacy Act, 20 U.S.C. § 1232g (2001). For example, if the victim is involved in an education-related case, the Family Education Rights and Privacy Act and individual school regulations may require parties involved in disciplinary matters to keep material confidential. *Id.*

39. *Id.*

40. See KRISTIN LITTLE, U.S. DEP'T OF JUSTICE, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS ADULTS/ADOLESCENTS 99-104 (Sept. 2004), available at <http://www.ncjrs.org/pdffiles1/ovw/206554.pdf>.

41. *Id.*

42. *Id.*

both within and outside of the criminal justice process.

## 2. *Immigration Status*

Immigration status is a gate keeping issue for rape victims. Immigrant victims face greater actual and perceived barriers to obtaining the civil remedies that assist in recovery (safety protections, medical assistance, counseling, housing, and employment benefits) particularly if the victim does not have legal status.<sup>43</sup> Fear and misinformation prevent many non-citizen victims from applying for and receiving the public benefits they are qualified to receive as a result of a sexual assault.<sup>44</sup> This problem arises particularly because of non-citizen victims' fear of the "public charge" grounds for inadmissibility.<sup>45</sup>

A sexual assault and its attendant consequences can disrupt or alter a victim's immigration status. For example, if the victim is in the country on a student visa and she drops out of school as a result of the assault, she may lose her legal status and be forced to leave the country. Similarly, a victim's immigration status may be linked to her employment status. Immigrants with employment-based visas are at risk of being deported or losing legal status if they miss work as a result of an assault. If a victim is in danger of losing her employment as a result of a sexual assault, she may also be in jeopardy of losing her immigration status.<sup>46</sup> Maintaining immigration status is of primary

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43. Leslye E. Orloff et al., *With No Place To Turn: Improving Legal Advocacy For Battered Immigrant Women*, 29 FAM. L.Q. 313, 315 (1995).

44. *Id.* Despite perception and information to the contrary, some public services are available to individuals without any status qualification, meaning that providers should not inquire into a client's immigration status or require a social security number in order to provide services. Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 C.F.R. §§ 3613-3616 (2001). According to the Attorney General, available services include: free emergency Medicaid and mental health, disability, or substance abuse treatment necessary to protect life or safety; free crisis and counseling services; free violence and abuse prevention/protection services; free emergency shelter and transitional housing assistance; victim compensation; and other services provided by non-profit charitable organizations. *Id.*

45. See Immigration and Nationality Act, 8 U.S.C. § 1182 (2003). The United States may prohibit non-citizens currently applying for green cards (permanent resident status), or Green Card holders who have traveled abroad for six months or longer from entering the United States if they fail to meet the admissibility criteria set out in the Immigration and Nationality Act, which includes the likelihood of becoming a "Public Charge." *Id.* The Department of Homeland Security uses a "prospective test" when determining whether a non-citizen will become a public charge, taking into consideration all circumstances, including age, health, family status, assets, education, and skills. 8 U.S.C. § 212(a)(4)(B)(i) (2001). If a victim uses benefits on a temporary basis only, it is unlikely that she will be denied admission based on the "public charge" criteria. 8 U.S.C. §§ 1641-1642 (2004). More detailed information on public benefits can be found at the National Immigration Law Center's website at [www.nilc.org](http://www.nilc.org) (last visited Feb. 14, 2005).

46. VICTIM RIGHTS LAW CENTER, *supra* note 26, ch. 8 at 6. There are new adjunctive immigration status possibilities for victims of sexual assault related to their involvement with the criminal justice system. See Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The federal government has created a new visa specifically for victims of sexual abuse, trafficking, and many other crimes. *Id.* Under the Victims of Trafficking and Violence Prevention Act of 2000, the U-Visa is available to

concern to immigrant rape victims. Law reform should focus on creating avenues for immigrant assault victims to petition for change of status or to maintain status, despite the life-altering consequences of assault.

### 3. *Access to Medical and Counseling Benefits that Preserves Privacy and Financial Welfare*

Sexual assault causes profound medical and emotional harm to victims, resulting in significant financial cost.<sup>47</sup> Costs of basic necessary medical care after an assault can be as high as four thousand dollars.<sup>48</sup> Counseling and prescription drugs such as anti-depressants, and drugs for prophylactic HIV treatment and prevention of sexually transmitted disease are costly. Further, accessing medical insurance for HIV prophylaxis, or treatment of depression and Post Traumatic Stress Disorder can lead to long-term disqualification for life insurance and other insurances. In order to ease the financial burden that a rape victim will incur, civil attorneys must provide the victim with referrals to confidential, free medical and counseling care, as well as medical and disability coverage through employer benefit plans, government benefits such as unemployment compensation, victim's compensation, school health plan compensation and tuition remission, and state and federal disability benefits.

### 4. *Access to Protective Orders*

Within the criminal justice process, the courts may issue stay-away orders at the time of arrest or arraignment. Rape victims may also use civil protective orders to insulate themselves from many of the negative social and economic impacts of rape, as well as to provide for limited restitution of direct costs associated with rape. In addition, their speed and limited scope make stay-away orders less burdensome for victims to secure and, therefore, more likely to be sought.<sup>49</sup>

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victims who report the crime to law enforcement officials and cooperate in criminal investigations. *Id.* Victims who have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity," including "sexual assault, abusive sexual contact, and felonious assault," are eligible for the three year visa and can receive work authorization. *Id.*; see also National Lawyer's Guild, *National Immigration Project Training Materials*, at <http://www.nationalimmigrationproject.org> (last visited Feb. 21, 2005) (providing additional information on visas and sample forms).

47. See generally JUDITH HERMAN, *TRAUMA AND RECOVERY* (1997).

48. Lori A. Post et al., *The Rape Tax: Tangible and Intangible Costs of Sexual Violence*, 17 J. INTERPERSONAL VIOLENCE 773, 778 (2002).

49. See *Frizado v. Frizado*, 651 N.E.2d 1206, 1211 (Mass. 1995) (describing legislative purpose in creating layman friendly procedures). Protective order hearings in particular may be speedier and more victim-friendly than other avenues for holding the accused accountable. They tend to be resolved within two weeks, instead of the one to two years of a criminal prosecution or the two to four months of a school or employment disciplinary process. Filing procedures, court personnel, and hearings for protective orders are often more victim-friendly than criminal procedures and other types of protection orders because the legislature drafted Massachusetts General Laws chapter 209A with victims (albeit domestic violence victims) in mind, and also because the rules of evidence are applied with flexibility to allow plaintiff/victims, and defendants, to speak

Unfortunately, most civil restraining order statutes across the country<sup>50</sup> require a degree of relationship (marriage, substantial dating relationship, blood relative) that makes such orders not readily available or strategically advisable for stranger or acquaintance rape victims.<sup>51</sup> As a result, many victims are left without remedies that are designed to be easily secured on a pro se basis, because they do not have a substantive ongoing relationship with their assailant.<sup>52</sup>

A key area for legislative reform should be the enactment of statutes creating civil sexual assault restraining orders. Currently, a few states have enacted statutes specifically designed to provide civil protective orders to sexual assault victims in the absence of a substantive relationship with the alleged perpetrator.<sup>53</sup> The absence of such statutes leaves victims with inadequate alternatives. In Massachusetts, for example, a sexual assault victim may seek injunctive relief in Superior Court.<sup>54</sup> Similar injunctive remedies are available

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freely. In Massachusetts, for example, there is no right to a jury trial in Chapter 209A proceedings, and while there is a general right to cross-examination, the judge may limit cross-examination for good cause. *See id.* at 1210-11.

50. For example, the Alaska statute pertaining to civil restraining orders protects household members, including “adults or minors who live together or have lived together . . . who are dating or have dated . . . who are engaged in or have engaged in a sexual relationship . . . who are related to each other up to the fourth degree of consanguinity.” ALASKA STAT. § 18.66.990 (Michie 2004).

51. *See* MASS. GEN. LAWS ch. 209A, § 1 (2004) (requiring familial or intimate relationship). Under chapter 209A, household and family members include

persons who: 1) are or were married to one another; 2) are or were residing together in the same household; 3) are or were related by blood or marriage; 4) having a child in common . . . ; or 5) are or have been in a substantive dating or engagement relationship.

*Id.*

52. The National Women’s Study found that 22% of rape victims were assaulted by someone they had never seen before or did not know well, and an additional 29% were assaulted by non-relatives, such as friends and neighbors. D. KILPATRICK ET AL., NATIONAL VICTIM CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 25 (Apr. 1992).

53. *See* CAL. CIV. PROC. CODE § 527.6 (West 2004) (allowing person who suffered harassment to seek temporary restraining order and injunction prohibiting harassment); *see also* FLA. STAT. ch. 784.046 (2004). The Florida statute states that a victim of sexual violence or the parent or legal guardian of a minor child who is living at home and who is the victim of sexual violence has standing in the circuit court to file a sworn petition for an injunction for protection against sexual violence on his or her own behalf or on behalf of the minor child. FLA. STAT. ch. 784.046(2)(a).

54. MASS. R. CIV. P. 65(a) (describing procedural process). The standard for an *ex parte* temporary restraining order (TRO) is:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if it clearly appears from specific facts shown by an affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.

*Id.* The next level, a preliminary injunction, requires more from the requesting party before the court will issue the order. *Id.* R. 65(b)(1). A court will not issue a preliminary injunction without weighing the moving party’s claim and their chance of success on the merits. *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 550 N.E.2d 1361, 1370 (Mass. 1990) (recognizing public interest weighed by court as fourth factor); *Packaging Indus. Group, Inc. v. Cheney*, 405 N.E.2d 106, 111-12 (Mass. 1980); *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 31 (Mass. App. Ct. 1986).

in every state in the nation.<sup>55</sup> Enforcement mechanisms, however, are cumbersome for the victim and offer significantly less protection in case of a violation than the abuse prevention orders available to domestic violence victims.<sup>56</sup>

### 5. Access to Safe Housing

In our experience, we have found that many sexual assaults take place in or near the victim's home. As a result, many victims feel the need to vacate their homes, move to different dorms, or relocate to different housing projects. Yet, for the most part, rape victims are not specifically protected from lease termination actions, nor do they have specific emergency transfer or admission rights in public housing.<sup>57</sup> Although the domestic violence movement has made significant strides in this arena for victims of domestic violence, sexual assault victims with housing crises have minimal legal options and protections.<sup>58</sup> Therefore, housing access and relocation is a crucial area for legislative reform to provide sexual assault victims with, at least, the protections that have been afforded victims of domestic violence.

### 6. Education

The incidence of sexual assault is disturbingly high in both universities and high schools, and results in a massive barrier to equal access to education.<sup>59</sup> The United States Department of Justice estimates that thirty-five out of every 1,000 undergraduate females are sexually assaulted every year.<sup>60</sup> In Boston alone, that translates into an estimated 3,500 college victims yearly based on the current student population of approximately 100,000 female students.<sup>61</sup>

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55. See, e.g., ALA. CODE § 30-5-1 (2004); ALASKA STAT. § 18.66.990; CAL. FAM. CODE § 6211 (West 2004); GA. CODE ANN. § 19-13-1 (2004).

56. The requirements for preliminary injunctive relief are: 1) the likelihood of success on the merits; 2) the risk of irreparable harm to the plaintiff if the injunction is not issued; and 3) the absence of irreparable harm to the defendant if the injunction is granted. *Alexander & Alexander*, 488 N.E.2d at 26. For example, in Massachusetts, if the defendant violates the preliminary injunction, the plaintiff has two remedies: civil enforcement or criminal enforcement. Violation of a preliminary injunction is contempt of court. The procedures for civil contempt are described in detail in the Massachusetts Rules of Civil Procedure 65.3. A finding of civil contempt must be based on a "clear and undoubted disobedience of a clear and unequivocal command." *Peggy Lawton Kitchens, Inc. v. Hogan*, 532 N.E.2d 54, 55 (Mass. 1989).

57. See CODE OF MASS. REGS. tit. 760 § 5.09 (2002) (stating priorities for receiving Massachusetts public housing).

58. Eliza Hurst, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL'Y 131, 148 (2003) (stating "throughout the country, lawyers, policymakers and social workers are beginning to make safe housing more accessible to victims of domestic violence").

59. See FISCHER, *supra* note 35, at 11.

60. See FISCHER, *supra* note 35, at 11.

61. U.S. CENSUS BUREAU, 2002 AMERICAN COMMUNITY SURVEY PROFILE: POPULATION AND HOUSING PROFILE: BOSTON, MA (2002), available at <http://www.census.gov/acs/www/Products/Profiles/Single/2002/ACS/Narrative/385/NP38500US11221120.htm> (estimating 213,000 enrolled in college in Boston,

The figures are no less staggering for high school students. One in ten high school students in Boston report being victims of sexual assault every year.<sup>62</sup> Forty-seven percent of the sexual assault reports received by the Boston Police Sexual Assault Unit involve victims aged seventeen and younger.<sup>63</sup>

Pursuant to Title IX of the Civil Rights Act,<sup>64</sup> the Jeanne Clery Campus Safety Act,<sup>65</sup> and the Family Education Rights and Privacy Act,<sup>66</sup> educational institutions have specific duties regarding the prevention of and response to on campus sexual assault.<sup>67</sup> Further, using third party liability theories, colleges and universities may be held civilly liable for intentional torts committed on their campuses, by or against their students.<sup>68</sup>

In our experience, we have found that physical safety, privacy protections, maintenance of some semblance of educational stability, housing as it pertains to both victim and perpetrator, class and exam schedules, employment and work-study maintenance, tuition-loss prevention, and financial aid loss are all immediate issues student rape victims face.

A peer sexual assault causes an especially severe threat to the victim's education. Educational institutions must be accountable for protecting victims' educational stability, privacy, and right to receive special education services.<sup>69</sup> The alarming rate of assault on high school and college campuses, and the resulting loss of educational stability for victims, creates the need for enforcement and expansion of the educational rights of rape victims, including the aggressive application of Title IX to institutions that turn a blind eye to campus conditions in which peer-on-peer rape and gang rape thrive.

### 7. *Obtaining and Maintaining Employment*

A rape victim's employment is likely to suffer major disruptions after a sexual assault. Absenteeism may sky rocket, and productivity often plummets.<sup>70</sup> An assault by a co-worker or at a work location will usually

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approximately half female).

62. MASS. DEP'T OF PUBLIC EDUC., YOUTH RISK BEHAVIOR SURVEY (2001), available at <http://www.doe.mass.edu/lss/yrbs99/toc.html>.

63. SEXUAL ASSAULT UNIT, BOSTON POLICE DEP'T, AGE OF SEXUAL ASSAULT VICTIMS IN BOSTON IN 2001, available at <http://www.ci.boston.ma.us/police/pdfs/VAge2001.pdf>.

64. 20 U.S.C. § 1681 (2004).

65. 20 U.S.C. § 1092 (1998).

66. 20 U.S.C. § 1232g (2001).

67. *E.g.*, 20 U.S.C. § 1092(f) (2002) (codifying Cleary Act campus security policy and campus crime statistics disclosure requirement).

68. *See Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 337 (Mass. 1983). Colleges must act "'to use reasonable care to prevent injury' to their students 'by third persons whether their acts were accidental, negligent, or intentional.'" *Id.* at 337 (quoting *Carey v. New Yorker of Worcester, Inc.*, 245 N.E.2d 420, 422 (1969)).

69. *See* 20 U.S.C. § 1232g.

70. *See generally* Rebecca Smith et al., *Unemployment Insurance and Domestic Violence: Learning From Our Experiences*, 1 SEATTLE J. FOR SOC. JUST. 503 (Fall/Winter 2002).

trigger an even more acute employment crisis that, without legal intervention, will likely result in resignation or termination of the victim.<sup>71</sup> For those victims who were assaulted by assailants unrelated to work, the medical and psychological impact of rape often trigger less acute, but nevertheless employment threatening crises, with employers subjecting the employee to warnings and often dismissal.<sup>72</sup>

Legal interventions are critical to protect the victim's privacy rights and insure continued employment. One remedy currently available entitles a victim, who needs time off from work to seek medical attention, to job-protected leave under the federal Family and Medical Leave Act or similar state laws.<sup>73</sup> Furthermore, disabilities caused by rape or sexual assault may qualify victims for protection from discrimination, as well as reasonable accommodation in the workplace under the Americans with Disabilities Act.<sup>74</sup> Some victims may also qualify for unemployment compensation.<sup>75</sup>

Victims who have lost wages or employment as a direct result of an assault may apply for victim compensation in many states.<sup>76</sup> Victim compensation, however, usually requires cooperation with law enforcement and often becomes a fund of last resort. For example, if compensation for lost wages is available through some other source, such as worker's compensation or unemployment insurance, the victim will be deemed ineligible for victim's compensation.<sup>77</sup>

If the assault is directly related to employment (i.e., when the assailant is a co-worker or the assault takes places at work), a victim may need and be entitled to more protection in her work environment. Sexual assault at work, and an employer's failure to remedy or protect against that assault, may constitute sexual harassment in violation of federal and state law prohibiting

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71. See generally *id.*

72. See generally *id.*

73. See 29 C.F.R. § 825.114 (2004); Robin R. Runge et al., *Domestic Violence as a Barrier to Employment*, 34 CLEARINGHOUSE REV. 552, 554 (2001).

74. 42 U.S.C. § 12112 (2004). A disability is defined as any impairment that "substantially limits a major life activity," such as walking, standing, thinking, lifting, or taking care of one's self. *Id.* § 12102. Victims are also protected under the Americans with Disabilities Act even if they are only *perceived* as being disabled, regardless of whether they have some actual disability. *Id.* The Americans with Disabilities Act requires that the employer provide reasonable accommodations to the victim, so long as she is able to perform the essential function of her job. *Id.* § 12112. A modified work schedule, transfer to a different location, and changes in the workspace or equipment all qualify as reasonable accommodation. *Id.* Employers cannot discriminate against qualified employees who request such accommodations. *Id.*

75. See MASS. GEN. LAWS ch. 151A, § 25(e) (2004). In Massachusetts, for example, an employee who leaves work or is discharged from her job because of domestic violence is eligible for unemployment compensation. *Id.* Although the statute is intended to benefit battered women, the definition of "domestic violence" is broad enough to include many victims of sexual assault. See *id.* § 1 (g 1/2) (defining domestic violence as "abuse committed against an employee"). The statute specifically provides benefits to victims who have been in a "dating or engagement relationship" with the assailant. *Id.* The statute also defines "abuse" as "(1) attempting to cause or causing physical harm; (2) placing another in fear of imminent serious physical harm; (3) causing another to engage involuntarily in sexual relations by force, threat or duress." *Id.*

76. See CAL. GOV'T. CODE § 13950-67 (West 2004).

77. *Id.*

sex discrimination in the workplace.

#### 8. *Financial stability*

The loss of wages, cost of health care and counseling, loss of tuition, expenses of moving, and the loss of financial support if the assailant is a spouse are among the staggering economic consequences of rape. Advocacy for the victim to prevent these losses may include insurance claims against third parties, application for disability, unemployment, other public benefits or insurance programs, actions for child support, applications under victim compensation statutes, as well as tort claims against assailants, employers, hosts, landlords, universities and others.<sup>78</sup>

The simplest financial remedy could be a claim under a state victim compensation fund if the requirements of the compensation statute have been met. State victim compensation schemes cover medical, dental and counseling expenses; lost wages; lost homemaker services; and lost financial support for dependants of victims of homicide.<sup>79</sup> Most compensation schemes do not cover lost tuition, relocation and housing expenses, and lost work due to non-physical injuries, such as mental health harms.<sup>80</sup> While victim's compensation statutes can offer much needed temporary financial relief immediately after an assault, their almost exclusive tie to the criminal justice process renders them useless to many victims. Legislative reform should untie these remedies and provide an alternate route for victims to obtain such compensation.

#### IV. ESTABLISHMENT OF A VICTIM'S RIGHT TO INDEPENDENT LEGAL COUNSEL WITHIN THE CRIMINAL JUSTICE SYSTEM AND FOR THEIR CIVIL LEGAL NEEDS

Rape victims need counsel to represent their civil legal needs within the criminal justice system and in the educational disciplinary process. In the first six months following an assault, the victim's cognitive, behavioral and physical faculties are under extreme stress and the rape often triggers acute medical

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78. See Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1428 (1999) (describing comparative apportionment approach to assigning fault in civil rape actions). Civil tort actions against assailants are based on theories of assault and battery, rape, sexual harassment, infliction of emotional distress, and other torts as defined by law. Remedies in such actions can include compensatory damages, including medical expenses, lost wages and earning capacity, pain and suffering, and equitable relief. In some cases punitive damages, are allowed. See MASS. GEN. LAWS ch. 151B, § 9. Victims also have a right of action against third parties who owe them a duty of care and who failed, by their negligence, to prevent the assault. Such cases are generally referred to as negligent security or premises liability cases. Bublick, *supra*, at 1428. A court may impose liability on owners or operators of convenience stores, universities and colleges, commercial landlords, bus stations, hospitals, high schools, restaurants, bars, parking lots, hotels, and other third parties if the victim can establish that a legal duty existed to protect individuals from foreseeable violent acts.

79. See CAL. GOV'T CODE § 13950-67.

80. *Id.*

conditions.<sup>81</sup> During the acute physiological stress time (zero to six months), the victim's most vital legal interests are at stake.

Managing the complex array of civil and criminal issues that impact a victim after an assault challenges even the most experienced attorney. In the case of a physically and emotionally compromised victim, the task becomes virtually impossible. This is particularly true for the vast majority of victims who are younger than twenty-four at the time of the assault and often lack independent resources.<sup>82</sup> Moreover, it is precisely the physiological symptoms associated with rape—memory impairment, depression, use of alcohol, panic attacks, and avoidance of rape related stimuli—that make rape victims less credible in the eyes of decision makers and impair their ability to sustain themselves in any judicial process.<sup>83</sup>

The victim's role in the criminal justice process is the subject of increasing legislation and debate. Thousands of relatively recent legislative enactments provide victims with various rights pertaining to restitution, privacy, the right to be informed in matters of trial and sentencing, and the right to make statements of victim impact at sentencing.<sup>84</sup> Thirty-two states have enacted victim's rights amendments to their Constitutions, and a Victims Rights Constitutional Amendment has been proposed in the United States Congress.<sup>85</sup>

If victims are going to succeed in enforcing their current rights under existing law, they need legal representation.<sup>86</sup> Navigating the criminal justice system is a difficult and complex task for any layperson. Moreover, victims' interests in the process cannot be left to prosecutors, because prosecutors' interests lie solely in successfully prosecuting the case on behalf of the state.<sup>87</sup>

The potential conflict between victims and prosecutors is most profoundly apparent in the realm of privacy rights. Courts across the country have

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81. HERMAN, *supra* note 47, at 57-58. Mental health symptoms directly caused by both violent and non-violent rape include: post-traumatic stress disorder, depression, insomnia, panic attacks, increased use of drugs and alcohol, and increased suicidal ideation. *Id.* Medical harms/conditions directly associated with rape in the weeks and months following an assault can include treatment for pregnancy and sexually transmitted diseases. *Id.*

82. VICTIM RIGHTS LAW CENTER, *supra* note 27, ch. 1 at 3. We urge that empirical social science research be undertaken with a control group to assess whether or not having legal counsel makes a long term difference in the social and economic life expectancy of the victim. Empirical information is critical to the next wave of law reform—that is also why we call for a national database on criminal justice outcomes on rape complaints.

83. HERMAN, *supra* note 47, at 68-69.

84. John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victims Rights in the Courts*, 33 MCGEORGE L. REV. 689, 690 (2002) (explaining trends supporting criminal victim's rights).

85. *Id.*

86. See generally Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

87. See Gillis & Beloof, *supra* note 84, at 695 (discussing adequacy of prosecutorial enforcement). "[B]ecause conflicts between victims and prosecutors are commonplace, prosecutorial enforcement alone is inadequate." *Id.*

acknowledged that the state's interests often conflict with the victim's privacy interests, and this conflict may arise for several reasons.<sup>88</sup> In some instances, the prosecution may want evidence from the victim's personal life to strengthen their case, while the victim wishes to keep her personal life private, despite the impact on prosecution.

The more common conflict is a practical one. In order to adequately protect a rape victim's privacy rights, an attorney must take a full inventory of the "negative facts" about the victim. Negative facts routinely include sensitive information about the victim's mental health treatment, drug or alcohol history, and sexual history.

Pursuant to the holding in *Brady v. Maryland*,<sup>89</sup> prosecutors who complete an inventory of the victim's history are required to provide the defense with exculpatory information learned from the victim during the process.<sup>90</sup> While it is possible for a prosecutor to complete such an inventory, the fate of the case as well as the victim's privacy is at risk.<sup>91</sup> Given that prosecutors are compromised in their ability to represent rape victims' privacy rights, non-lawyer rape crisis advocates have been struggling alone for years to protect rape victims once the criminal process begins.<sup>92</sup> While non-lawyer rape advocates have played the largest and most vital role in protecting these rights, their role is obviously limited.<sup>93</sup> Therefore, it is critical that victims' lawyers are present in the courtroom at the preliminary stages of the process, if privacy protections have any meaning for rape victims.<sup>94</sup> Further, when viewed in the larger context of the victim's entire "negative fact" picture, the issue of psychiatric and rape crisis counseling records is often only one front where the battle for the victim's privacy is waged.

Although each victim's recovery follows a distinct path, we have found that a majority of victims experience the most acute trauma related symptoms in the first three months following the assault, followed by stabilization in the next three months. Furthermore, sexual assault victims make a clear distinction between "defensive" legal actions that help to stabilize their personal lives and

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88. *Commonwealth v. Oliveira*, 780 N.E.2d 453, 457 (Mass. 2002); *Commonwealth v. Neumyer*, 731 N.E.2d 1053, 1058 (Mass. 2000).

89. *Brady v. Maryland*, 373 U.S. 83 (1963).

90. *Id.* at 87.

91. *Id.*

92. See generally Lois Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253 (2005).

93. See generally *id.*

94. Ensuring compliance with the *Bishop-Fuller* protocol is an essential element in protecting the victim's privacy in Massachusetts. The protocol involves five stages: (1) privilege determination; (2) relevancy determination; (3) access to relevant material; (4) disclosure of relevant communications; and (5) trial. *Commonwealth v. Bishop*, 416 Mass. 169, 181-83 (1993) (identifying five stage process for release of privileged records created by court); *Commonwealth v. Fuller*, 423 Mass. 216, 226-27 (1996) (modifying stage two and requiring *Bishop* protocol to apply to defendant's request for access to any privileged records including rape counselor records).

“offensive” legal actions that seek to hold the perpetrator accountable. Often, in the initial crisis stage after the assault, victims take the necessary steps to protect their safety, privacy, immigration status, education, housing, and employment, and to preserve their financial stability. Victims are far less likely to file police reports, follow through on a criminal complaint process, seek university disciplinary action, or initiate a tort suit.<sup>95</sup> Therefore, legal efforts to stabilize the victim should be focused on what the victim actually needs, and not merely what the legal system currently offers. Representation in these victim focused areas requires independent counsel exclusively committed to the interests of the victim.

#### V. DEFINE CONSENT

Elimination of force as a statutory element of rape is essential to the reformation of rape laws. After thirty years of law reform, society still expects rape to be a horrifically violent crime. If the limited report, arrest, indictment, prosecution, and conviction rates serve as a benchmark, despite the redrafting of virtually every rape law in the nation, rape by anything other than physical violence with attendant physical harm still appears to be tolerated by law enforcement. While efforts to stratify rape into aggravated and lesser offenses began this process, further steps are needed towards codifying degrees of offenses that are more nuanced and eliminating the requirement of physical force entirely.

Stephen Schulhofer, in his book *Unwanted Sex: The Culture of Intimidation and the Failure of the Law*, first articulated the concept that interference with sexual autonomy, whether enabled by force, threats, abuse of trust, exploitation of psychological or physical incapacity, intoxication, or exploitation of psychological or economic power or authority should be illegal, and should be codified and incorporated into the statutory framework.<sup>96</sup> Reform minded legislators have largely failed to incorporate into reform statutes the concept that bodily integrity, or sexual autonomy, is not measured by “freedom from fists,” but rather by a continuum of conduct in which physical force is one extreme example.<sup>97</sup> The crime of sexual coercion may in fact be less egregious than one in which an invasion of sexual autonomy is accompanied by fists, but the invasion of an individual’s physical integrity by coercion should be recognized as an assault, just as coercion is recognized as a factor in other crimes, such as obtaining property by fraud and indecent assault and battery.

Further, it is crucial that silence be eliminated as an indicator of consent, and that consent be defined, as it is in other areas of the law in which consent is an

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95. See RINGEL, *supra* note 35, at 8 (stating more than two-thirds of rape/sexual assaults committed in United States remain unreported).

96. SCHULHOFER, *supra* note 5, at 99-113.

97. SCHULHOFER, *supra* note 5, at 99-113.

element. "Consent is the defense most likely to result in an acquittal, and it is the defense most commonly used in acquaintance rape cases."<sup>98</sup> Yet most state legislatures have still failed to define consent.<sup>99</sup> Indeed, the victim's behavior (drinking alcohol), dress (wearing tight clothes), and conduct (voluntarily entering a room with the defendant and permitting the door to be closed) will remain at the center of a criminal trial as long as juries are allowed to consider an undefined consent or implied consent standard.

The failure of current consent standards, at the root of the failure of criminal justice rape reforms, perpetuates the most vexatious issue in rape law for both victims and defendants: the distinction between seduction and assault.<sup>100</sup> The difference is not as complicated as the past thirty years suggest. First, consent ought to be verbal and in the affirmative, eliminating the defense of implied consent altogether. The law should not assume that women are or must be coy about sex. Women cannot be viewed as consenting merely by their conduct, appearance, reaction, or silence. Women must directly and explicitly express their sexual desire or agreement to have intercourse in a given situation, and men must respond accordingly. Instead of assuming that a woman's sexual ambivalence indicates consent, the law should assume that sexual ambivalence means no. Let us legislate the right of women to express sexual desire, by making the direct verbal expression of desire or agreement to sex necessary to establish affirmative consent, and by defining a lack of verbal expression of affirmative desire or agreement to sex as a dispositive lack of consent.<sup>101</sup>

The presence of alcohol in large numbers of acquaintance rape cases exacerbates the problem. The majority of sexual assaults on college campuses involve alcohol or drugs.<sup>102</sup> In a study of college gang rapes, researchers found that every case involved the use of alcohol.<sup>103</sup> Not surprisingly, courts consider a victim's intoxication differently than intoxication by accused assailants. Courts view women who drink, especially those who drank with their assailants, as more likely to be sexually available and contributorily negligent in the subsequent assault.<sup>104</sup> Society believes that men who drink suffer from impaired judgment, which may legitimately cause them to misread social cues from a woman.

The law does not clarify the confusion between rape that occurs under the influence of alcohol and consensual encounters between intoxicated

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98. Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 128 (1994).

99. SCHULHOFER, *supra* note 5, at 31-32.

100. SCHULHOFER, *supra* note 5, at 31-32.

101. See generally Kramer, *supra* note 98, at 149 (proposing modified version of consent legislation already adopted in Canada); Lani Ann Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993) (advocating requirement of verbal consent).

102. Kramer, *supra* note 98, at 116.

103. Kramer, *supra* note 98, at 116.

104. Kramer, *supra* note 98, at 121-22.

participants. As one commentator states, "If you pour liquor on it, it's not a crime."<sup>105</sup> The victim is alleged to be either sober enough to have resisted if consent really was not present, or too drunk to remember what actually happened.

There is no bright line test that defines precisely how much alcohol or drugs result in a person's inability to consent to sex. Every jurisdiction in the country except Massachusetts, Georgia, and the Uniform Code of Military Justice, however, has attempted some statutory reform on the issue of consent and intoxication.<sup>106</sup> Many universities recognize the ubiquitous presence of alcohol in campus acquaintance assaults and have amended their codes of conduct to deem consent as presumptively absent in the presence of alcohol.<sup>107</sup> The Model Penal Code (MPC) states that actual consent is not legal consent if "it is given by a person who by reason of youth, mental disease or defect, or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature of harmfulness of the conduct."<sup>108</sup> The MPC requires, however, that the alleged assailant administered the intoxicant for no consent to be presumed.<sup>109</sup> Some states have adopted the MPC language but eliminated the requirement that the defendant administered the intoxicant.<sup>110</sup> Louisiana, for instance, draws a distinction between cases where the intoxication was independent of the assailant ("simple rape") and where assailant administered the intoxication ("forcible rape").<sup>111</sup>

While there is no bright line test for determining how much alcohol or drugs inhibits a person's ability to consent, there must be a bottom line. If implied consent is eliminated as a defense and mere submission without affirmative permission is no longer adequate to demonstrate consent, what standard is reasonable in the presence of intoxication? We propose that if alcohol is present, non-consent must be presumed unless the woman makes an explicit

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105. Kramer, *supra* note 98, at 124.

106. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 156-57 (2002) (evaluating statutes by jurisdiction).

107. See NORTHEASTERN UNIVERSITY, CODE OF STUDENT CONDUCT LEVEL I GRIEVOUS VIOLATIONS, Violation 5 (2002). The Code as amended in July 2002, states:

[R]ape . . . is defined as the oral, anal or vaginal penetration by an inanimate object, penis, or other bodily part, without consent. 'Consent' means a voluntary agreement to engage in sexual activity proposed by another . . . . 'Consent' requires mutually understandable and communicated words and/or actions demonstrating agreement to participate in proposed sexual activity. 'Without consent' may be communicated by words and/or actions demonstrating unwillingness to engage in proposed sexual activity. For instance, the act of penetration will be considered without consent if the victim was unable to give consent because of a condition of which the offending student was or should have been aware, such as drug and /or alcohol intoxication, coercion, and/or verbal or physical threats, including being threatened with future harm.

*Id.*

108. MODEL PENAL CODE § 2.11(3)(b) (defining ineffective consent).

109. *Id.*

110. See LA. REV. STAT. ANN. §§ 14:42.1, 14.43 (West 2004).

111. *Id.*

verbal statement that she wishes to engage in sexual intimacy that includes penetration. Women do not have to be cold sober to engage in consensual sexual intimacy, but they ought to be sober enough to say yes. If a woman is not sober enough to say yes, then no consent should be presumed.

These concepts of consent in sexual assault are not unique, and other areas of the law in which consent plays a central role are instructive. The law of search and seizure requires consent to be explicit and affirmative, and consent cannot be implied from the circumstances or conduct of the subject.<sup>112</sup> In order to obtain consent for a search, police must specifically request it from the individual or the court.<sup>113</sup> Even when consent is affirmatively given, the court may determine that the police obtained consent through coercion based on age, education, lack of understanding of rights, or by wearing down the subject in a repetitive or psychologically coercive manner.<sup>114</sup> The law suggests that the power differential between law enforcement and the subject require extensive precautions to protect the subject from the state's exertion of such power, which necessitates a knowing and explicit agreement by the subject to be searched. Silence and ambivalence do not constitute consent under the Fourth Amendment.<sup>115</sup>

Consent to police interrogation pursuant to the Fifth Amendment and under *Miranda* similarly requires an explicit and affirmative statement of consent by the subject.<sup>116</sup> Consent cannot be implicit and cannot be indicated by silence to meet the requirements of the Fifth Amendment.<sup>117</sup> Circumstantial evidence indicating that the subject was aware of his right to refuse interrogation cannot be used to demonstrate consent, and consent cannot be based on the subject's behavior.<sup>118</sup> While some commentators criticize the *Miranda* approach to consent to sex as impractical, these commentators have taken too broad a view of the analogy.<sup>119</sup> Likening an entire date to a police interrogation, Schulhofer rejects the approach because it does not permit a woman to change her mind during the course of the date.<sup>120</sup> A seemingly more appropriate analogy to interrogation is the initiation of intercourse, when issues of physical and psychological power and the possibility of coercion become significantly

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112. SCHULHOFER, *supra* note 5, at 72. During a police interrogation, a suspect's consent to talk about the crime is considered involuntary if he first says "no" but changes his mind because police cajolery or questioning persuaded him to speak. *Id.*

113. See Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 WIS. WOMEN'S L.J. 37, 70-72 (1996) (discussing consent to searches under Fourth Amendment).

114. *Id.*

115. *Id.*

116. *Id.* at 72.

117. Kasubhai, *supra* note 113, at 72.

118. Kasubhai, *supra* note 113, at 72.

119. SCHULHOFER, *supra* note 5, at 72-74 (comparing use of *Miranda* in police interrogation to consent in sexual assault cases); Bryden, *supra* note 2, at 391-92 (evaluating need for reform in rape law).

120. SCHULHOFER, *supra* note 5, at 72-74 (criticizing application of *Miranda* rules to sexual interactions).

present. Silence and ambivalence do not constitute consent under the Fifth Amendment.

As Susan Estrich has discussed, in other areas of criminal law, submission does not equate with consent.<sup>121</sup> For example, consent in the form of passive submission fails as a defense to robbery, unless the owner of the property actively participates in the theft.<sup>122</sup> Similarly, criminals can commit trespass and battery against submissive victims.<sup>123</sup> As Estrich points out, the frequently claimed excuse that consensual sex constitutes part of everyday life and therefore cannot be subjected to such nuanced scrutiny does not explain the disparity in the law that permits submission to pass for consent in the rape context but not in other contexts.<sup>124</sup> Other everyday events include visiting (trespass with consent), philanthropy (robbery with consent), and surgery (battery with consent).<sup>125</sup> The fact that women are expected to be sexually submissive permits the violation of their sexual and physical integrity, while the law protects their more highly prized wallets and homes by holding that silence and ambivalence do not constitute consent to robbery, trespass, invasion of property or battery.

In contract law, passive submission ordinarily does not constitute acceptance of an offer.<sup>126</sup> Usually, only where the parties had a prior contractual relationship, will acceptance be inferred from silence or submission.<sup>127</sup> Otherwise, words, either written or oral, provide the indicia of the existence of the contract.<sup>128</sup> While cultural resistance impedes the notion of sexual intimacy as a contractual relationship, the public widely understands and accepts the idea of contractual offer and acceptance as a two party affirmative communication. Silence and ambivalence do not constitute consent to enter into a contract.

Consent to medical treatment is another area of the law where, unlike rape law, consent and the conditions of consent have been relatively well-defined.<sup>129</sup> This area of law has developed on the premise that medical treatment without consent constitutes a form of battery, an unwanted physical invasion of personal physical autonomy.<sup>130</sup> The doctrine provides a bright line test for consent, requiring affirmation by more than mere silence or deduction from

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121. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1126 (1986) (noting unique burden on rape victim to prove nonconsent).

122. *Id.*

123. *Id.*

124. *Id.*

125. Estrich, *supra* note 121, at 1126.

126. See RESTATEMENT (SECOND) OF CONTRACTS § 69 (2004).

127. *Id.*

128. See RESTATEMENT (SECOND) OF CONTRACTS § 30; Katherine E. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 688-89 (1999) (noting words necessary to manifest consent in contract context).

129. Kasubhai, *supra* note 113, at 68-70.

130. Kasubhai, *supra* note 113, at 68.

circumstances or behavior.<sup>131</sup> Further, prior consent to treatment does not impute current consent, requiring an affirmative statement of consent for every incident of treatment.<sup>132</sup> Silence and ambivalence do not constitute consent to medical treatment.

These analogies confirm that silence and ambivalence may only substitute for consent in the area of rape, where the absence of non-consent is a proxy for actual consent. This derives from the centuries old idea, certainly once true, that women cannot affirmatively consent to sex outside of marriage without fear of being labeled whores. Our cultural norm no longer endorses this idea. Many, if not most women are free to have sex outside of marriage if they choose to do so. Once we acknowledge that women can choose sex, we can acknowledge that they can also reject it. Consent under the law then must be defined in a way that potential victims and defendants can easily understand and interpret.

We propose that for “legally safe sex” to take place, consent must take the form of an affirmative and unequivocal verbal “yes” to sexual intercourse. Critics have maligned this proposition and deemed it unworkable in the context of sexual behavior on the theory that sexual intimacy is a runaway train that can be stopped for nothing as rational as a yes.<sup>133</sup> We disagree and point to the highly visible and largely successful public health campaign to promote condom use as a result of the AIDS epidemic.<sup>134</sup> Getting people about to engage in intercourse to stop and think about safe sex was once thought to be impossible. The concept and practice of safe sex has become part of the everyday landscape of sex. Getting an affirmative “yes” before engaging in sexual intercourse is no more an imposition on sexual expression than condom use, and the same public health strategies used to normalize the concept of safe sex can be employed to establish the principle that sex without an affirmative yes is unwanted, and therefore, illegal.

In 1996, Antioch College issued a sexual offense prevention policy that attempted to define nonconsensual sexual conduct.<sup>135</sup> Consent to sex is defined

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131. Kasubhai, *supra* note 113, at 68.

132. Kasubhai, *supra* note 113, at 69-70.

133. SCHULHOFER, *supra* note 5, 272-73.

134. See generally Lesley Stone & Lawrence O. Gostin, *Using Human Rights to Combat the HIV/AIDS Pandemic*, 31 HUM. RTS. MAG. 2 (2004), available at <http://www.abanet.org/irr/hr/fall04/pandemic.htm>.

135. SEXUAL OFFENSE PREVENTION & SURVIVOR'S ADVOCACY PROGRAM, ANTIOCH COLLEGE, ANTIOCH COLLEGE SURVIVAL GUIDE, available at [http://www.antioch-college.edu/Community/survival\\_guide/campus\\_resources/sopsap.htm](http://www.antioch-college.edu/Community/survival_guide/campus_resources/sopsap.htm) (last visited Feb. 15, 2005) (identifying and discussing Antioch College's Sexual Offense Prevention Policy). Antioch College's Sexual Offense Prevention Policy states that:

- All sexual contact and conduct between any two (or more!) people must be consensual;
- Consent must be obtained verbally before there is any sexual contact or conduct;
- Silence is never interpreted as consent;
- If the level of sexual intimacy increases during an interaction (i.e., if two people move from kissing while fully clothed, which is one level, to undressing for direct physical contact, which is another level), the people involved need to express their clear verbal consent before

as “the act of willingly and verbally agreeing to engage in specific sexual behavior.”<sup>136</sup> The policy emphasizes the use of explicit verbal communication in request for and acceptance of an offer of sex, while it expressly prohibits silence as a form of consent.<sup>137</sup> In addition, the policy states that such requests for and assent to intimacy must be renewed at every stage as intimacy increases.<sup>138</sup> While the policy has been maligned as unworkable in the contemporary sexual environment, we agree with the fundamental principle of the policy: to be consensual, intimacy must be accompanied by an affirmative and verbal assent. We disagree, however, with the apparent equality of all acts of sexual touching or contact as set forth in the Antioch policy. We propose, instead, that to be consensual, affirmative verbal consent must be obtained immediately prior to an act of penetration, which eliminates the most maligned part of Antioch’s policy as well as the possibility that one party is acting on prior given consent that has since been withdrawn.

#### VI. ESTABLISHMENT OF A NATIONAL DATABASE FOR MANDATORY STATE REPORT, ARREST, PROSECUTION AND CONVICTION FIGURES

The first multi-state empirical study of the impact of rape reforms was performed in 1985.<sup>139</sup> In the few studies that have been conducted since then, researchers have concluded that these reforms have not had a significant or relevant impact on any reports, prosecutions, or convictions.<sup>140</sup> In fact, only one study has found statistically significant increases in arrests and reduction in the variability of arrest outcomes.<sup>141</sup> The failure of law enforcement and other agencies, including universities, to accurately disclose reports and outcomes

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moving to that new level;

- If one person wants to initiate moving to a different level of sexual intimacy in an interaction, that person is responsible for getting the consent of the other person(s) involved before moving to that level;
- If you have a particular level of sexual intimacy before with someone, you must still be sure there is consent each and every time;
- If you have a sexually transmitted disease, you must disclose this fact to a potential partner before engaging sexually;
- If anyone asks you to stop a particular kind of sexual attention or behavior, you must stop it immediately no matter what your intentions are with the attention.
- Don’t ever make assumptions about consent; assumptions can hurt someone and get you in trouble. Consent must be clear and verbal (i.e., saying, “Yes, I want to kiss you, too.”).

*Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See Futter & Mebane, *supra* note 3, at 83-85.

140. See *supra* note 2 and accompanying text.

141. Futter & Mebane, *supra* note 3, at 111. This study found that “defining sex crimes on a single continuum, subjecting spouses and cohabitants to prosecution, limiting the admissibility at trial about the victim’s past sexual history with the defendant . . . and denying a mistake of incapacity defense all led to an increase of ‘actual’ rapes” that were investigated by the police. *Id.*

and to make this information available to the public, however, significantly hampers our ability to understand the actual results of past reforms, and the likely success of those proposed in the future. Therefore, we propose the institution of a national sexual assault database, similar to the Hate Crimes Statistics Act, in which states must report yearly numbers of actual reports, arrests, prosecutions and conviction rates for all sexual assault crimes.<sup>142</sup>

## VII. CONCLUSION

The past thirty years have seen a sea of change in sexual assault laws, but the promise of these initiatives has been largely unfulfilled. As long as the impact of legislative change is virtually unknown by the public, our ability to move forward with creative solutions to century old problems will continue to be impeded. To correct this, law enforcement efforts in the area of sexual assault must be accurately reported and subject to public scrutiny and analysis. In addition, sexual attitudes that have damaged the implementation of progressive rape law reform, particularly as to the concepts of consent and implied consent, must be challenged and refuted. The crimes encompassed by sexual assault should be redefined for an era when woman can take responsibility for their sexual choices, and where affirmative verbal consent to sex is a realistic and clear alternative to unclear and gender stereotyped guessing. The ubiquitous presence of alcohol in sexual assault must also be addressed definitively and in a manner that is free from double standards and gender bias. Finally, sexual assault victims should be understood as suffering from a myriad of brutal consequences that impact their civil wellbeing and may be remedied by the civil law, as well as put them at risk of re-victimization by the criminal justice process. Lawyers must step forward and take up their struggle.

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142. 18 U.S.C. §§ 241, 245, 247 (2004); 42 U.S.C. § 3631 (2004) (giving FBI jurisdiction pertaining to hate crimes). Congress enacted the Hate Crimes Statistics Act of 1990 to mandate the gathering of statistics about crimes motivated by bias against a person's race, religion, sexual orientation, or origin. See UNIFORM CRIME REPORTING PROGRAM, FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS OF 1999, available at <http://www.fbi.gov/ucr/99hate.pdf>.