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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.*

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#### INTRODUCTION

Rape has existed since the earliest civilizations.<sup>1</sup> The oldest written laws criminalizing rape are found in the Code of Hammurabi, which predates the birth of Jesus.<sup>2</sup> The early American colonists adopted the English definition of rape as “the carnal knowledge of a woman, forcibly and against her will.”<sup>3</sup> 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.<sup>4</sup> Under this traditional definition, the male perpetrator had to penetrate the female victim by use of

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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 Model 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.<sup>5</sup>

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.<sup>6</sup> On average, a sexual assault occurs every ninety-eight seconds in the United States.<sup>7</sup> As a result, sexual violence, the risk of sexual violence, and the fear of violence are omnipresent for American women.<sup>8</sup> However, the classic rape narrative described above is the exception rather than the norm.<sup>9</sup>

Studies have suggested that nearly one in five women living in the United States have been raped during their lifetimes.<sup>10</sup> It is estimated that nearly 1.3 million women are raped each year.<sup>11</sup> 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://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://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf) [<https://perma.cc/23SU-U9MW>].

acquaintance and not a stranger lurking in the shadows;<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> Rape victims often feel that if their rape does not fit within the classic rape narrative then they will not be believed.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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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 than 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,<sup>20</sup> resistance,<sup>21</sup> reporting,<sup>22</sup> and chastity requirements.<sup>23</sup> Many of these hurdles were rooted in sexist norms. Thus, feminist rape reformers sought to abolish those norms<sup>24</sup> and to reform rape laws so that the rate of rape convictions would increase.<sup>25</sup> 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.”<sup>26</sup> They eliminated resistance and corroboration requirements in most jurisdictions<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> Some have argued for further reform in the form of affirmative consent laws.<sup>30</sup> Others have contended that criminal law reforms should be abandoned in favor of social shaming.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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

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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.<sup>35</sup> 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.”<sup>36</sup> 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.<sup>37</sup> 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.”<sup>38</sup> 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.<sup>39</sup> Despite that success, feminist

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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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> Generally, women are more likely than men to get an STD,<sup>44</sup> and female rape victims are even more likely to acquire an STD because of the lower likelihood of condom use.<sup>45</sup> It is estimated that the risk of acquiring chlamydia can be as high as 16 percent<sup>46</sup> while the risk of acquiring

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

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.<sup>52</sup> A woman who has PID is at increased risk of an ectopic pregnancy and has a one in five chance of becoming infertile.<sup>53</sup> 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.<sup>54</sup>

### B. Economic Consequences of Rape

“The estimated lifetime cost of rape [i]s \$122,461 per victim . . . .”<sup>55</sup> In addition to medical costs, rape victims take time off from work, report diminished performance, job loss, and inability to obtain work.<sup>56</sup> Thus, rape disrupts employment prospects for victims. Researchers have linked the employment disruption to the toll that rape takes on mental health.<sup>57</sup> 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.<sup>58</sup> The combination of taking time off from work and diminished performance often leads to job loss.<sup>59</sup>

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.”<sup>60</sup> 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.”<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> Typical public health tools include detection, treatment, counseling, education, and surveillance.<sup>66</sup> With respect to education, public health campaigns tend to employ a variety of strategies, including social marketing efforts and public

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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.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>

In their efforts to curb the rate of AIDS infections, public health professionals realized that the stigma surrounding an AIDS diagnosis hampered prevention efforts.<sup>70</sup> Thus, they began to focus on destigmatizing both people living with AIDS and behaviors associated with AIDS.<sup>71</sup> By contrast, in the tobacco context, public health professionals sought to stigmatize tobacco use<sup>72</sup> by creating an environment that was hostile to smoking.<sup>73</sup> 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

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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](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.”<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> Between 2006 and 2009, the average number of new infections in the United States was between 48,600 and 56,000.<sup>77</sup> Former United Nations Secretary General Ban Ki-Moon stated that stigma is a chief reason why the AIDS epidemic continues to devastate societies worldwide.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> Since the 1980s, AIDS has been viewed as largely spreading through volitional behaviors such as sodomy, prostitution, and intravenous drug use.<sup>81</sup> Many viewed such behaviors as sinful and thus had little trouble favoring

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](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.<sup>82</sup> Further, many believed that HIV was a “gay disease.”<sup>83</sup> Indeed, AIDS became known also as “gay compromise syndrome,”<sup>84</sup> “gay cancer,”<sup>85</sup> and “GRID” (or “Gay-Related Immune Deficiency”).<sup>86</sup>

Second, stigma is often associated with conditions that are believed to be fatal and incurable.<sup>87</sup> AIDS was often believed to be a fatal condition, and a diagnosis was viewed as the equivalent of a death sentence.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

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.”<sup>91</sup> A British politician, and advisor to

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.”<sup>92</sup> 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.<sup>93</sup> 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,<sup>94</sup> denied jobs,<sup>95</sup> shunned by family and friends, and victimized by targeted physical violence.<sup>96</sup> Public opinion polls from the 1980s revealed widespread fear of AIDS with many people supporting quarantine.<sup>97</sup> Further, many Americans favored allowing employers to require an AIDS blood test and firing school employees with AIDS.<sup>98</sup>

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

[www.nytimes.com/books/00/07/16/specials/buckley-aids.html](http://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).<sup>99</sup>

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.<sup>100</sup> For example, in 1832, the public viewed cholera as punishment from God for being promiscuous, intemperate, or lazy.<sup>101</sup> 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.<sup>102</sup> Instead, the public properly understood and grasped that cholera was spread by bacteria and could be eliminated by better sanitation practices.<sup>103</sup>

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.<sup>104</sup> Researchers recognized that without effective remedies against discrimination, individuals infected with HIV would be reluctant to come forward for testing and care.<sup>105</sup> Public health campaigns thus sought to educate the public and prevent discrimination.<sup>106</sup>

For instance, nonprescription syringe users were recruited for a study to try to destigmatize HIV/AIDS with the goal of increasing screenings.<sup>107</sup> 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.<sup>108</sup> They completed a pre-video survey that included an HIV stigma assessment, viewed the video, and then repeated the HIV stigma

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

In another study, physical therapy students in the variable group were presented with a four-hour educational unit on HIV/AIDS.<sup>113</sup> Their attitudes toward people living with AIDS were tested before and one week after completion of the unit study.<sup>114</sup> 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.<sup>115</sup>

To further educate and inform, public health officials sought to destigmatize HIV/AIDS through enforcing and expanding disability, privacy, confidentiality, and informed-consent laws.<sup>116</sup> The fruits of their efforts ranged from state and local prohibitions on discrimination<sup>117</sup> to recognizing HIV status as a disability under the ADA.<sup>118</sup> 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.<sup>119</sup> 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

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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](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).<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup> 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.”<sup>124</sup> In 1604, King James of England noted that tobacco was “hatefull to the Nose, harmefull to the braine [and] daungerous to the Lungs.”<sup>125</sup> 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.<sup>126</sup> The 1964 Surgeon General’s report was issued

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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.<sup>127</sup>

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.<sup>128</sup> The Cigarette Labeling Act vested federal regulators with exclusive control over all aspects of cigarette promotion, labeling, and advertising.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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

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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”<sup>134</sup> and create a culture where smokers are viewed negatively.<sup>135</sup>

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.<sup>136</sup> 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.”<sup>137</sup>

The specific interventions utilized included: (1) raising taxes on tobacco products;<sup>138</sup> (2) limiting exposure to secondhand smoke in public places, workplaces, outdoor venues, and, in some instances, even private residences;<sup>139</sup> (3) curtailing the advertising and promotion of tobacco products, especially to youth;<sup>140</sup> and (4) initiating litigation against the industry for the public costs associated with tobacco-related illnesses.<sup>141</sup> 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.<sup>142</sup> Many reported that they enjoy smoking less now that they are relegated to smoking outside and in designated areas.<sup>143</sup> Further, almost all

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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.<sup>144</sup>

Nearly nine out of ten current adult smokers began smoking before the age of eighteen.<sup>145</sup> 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.<sup>146</sup> Thus, the most successful intervention models build skills needed to resist negative influences.<sup>147</sup> 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.<sup>148</sup> Overall, denormalization strategies have been successful in reducing tobacco use.<sup>149</sup>

### 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.<sup>150</sup> Sexist gender norms were woven into the fabric of rape law in the form of often insurmountable obstacles to prosecution such as

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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://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<sup>151</sup> and corroboration<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup> 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.”<sup>157</sup> Figuratively, stigmas are marks carried by individuals. Such markings denote that the marked individual is a criminal, deviant, or otherwise

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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 injuries, 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.<sup>158</sup> Generally, stigmatized individuals view themselves as being different and have less power and access to resources than do normal individuals.<sup>159</sup>

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

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

Until the 1970s, women did not publicly speak of rape.<sup>172</sup> They lacked safe places to talk and often spiraled into a cycle of anxiety, depression, and despair.<sup>173</sup> The first rape crisis centers were started and opened by women in 1970<sup>174</sup> 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

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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://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](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.<sup>175</sup> Additionally, the first rape speak-out was held in New York City in 1971.<sup>176</sup> 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,<sup>177</sup> which led to the much-publicized feminist maxim that “rape is a crime of violence.”<sup>178</sup> 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.<sup>179</sup> 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.”<sup>180</sup>

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.<sup>181</sup> As a result of efforts by reformers, courts and legislatures began to eliminate resistance requirements.<sup>182</sup> 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.<sup>183</sup> While eliminating formal legal barriers to prosecution and

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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.<sup>184</sup>

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).<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup>

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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](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.<sup>188</sup> 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.<sup>189</sup> Reformers believed that rape shield laws would make trials less traumatic for victims and also prevent juror sexism from influencing verdicts.<sup>190</sup> Rape shield laws were intended to counter the myth that rape victims want to be raped.<sup>191</sup>

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.<sup>192</sup> 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.<sup>193</sup> 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<sup>194</sup> for threat of force.<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup> 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.<sup>198</sup> 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

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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.<sup>199</sup> Although understandable, this limited focus has increased stigma for male rape victims and perpetuated notions of females as vulnerable victims.<sup>200</sup> 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.<sup>201</sup> In 2008, it was reported that one in thirty-three men in the United States have been the victim of rape or attempted rape.<sup>202</sup> A myopic focus on men raping women reinforces dominant social constructs of men being aggressors and powerful and women being vulnerable and weak.<sup>203</sup> 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 perpetrators 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,<sup>204</sup> men's dominant position in society,<sup>205</sup> and the way men are socialized.<sup>206</sup>

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.<sup>207</sup> The focus on male aggressors unintentionally delegitimizes men who are victims of sexual violence.<sup>208</sup> As a result, society has come to embrace the message that rape

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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.”<sup>209</sup> 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.<sup>210</sup>

As rape reform advocates have sought to combat rape myths about women,<sup>211</sup> rape myths about men have flourished. For instance, jokes about prison rape abound.<sup>212</sup> 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.<sup>213</sup> For example, in the highly publicized Stanford rape case, Brock Turner, the perpetrator, raped a woman who was unconscious.<sup>214</sup> His father wrote the judge asking for leniency<sup>215</sup> 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.”<sup>216</sup> Judge Aaron Persky sentenced Turner to six months in jail and three years’ probation, noting that prison would have a “severe impact” on Turner.<sup>217</sup> The light sentence sparked a national outcry and, ultimately, led to Judge Persky being recalled by California voters.<sup>218</sup>

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

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.<sup>219</sup> Additionally, women raped by acquaintances have higher levels of psychological distress and appear to take longer to recover than women raped by strangers.<sup>220</sup>

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.”<sup>221</sup> Philosopher Joan McGregor has opined that that “the seriousness of rape derives from the special importance we attach to sexual autonomy.”<sup>222</sup> If rape is about punishing the perpetrator for violating the right to be free from unwanted sexual contact,<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup> Rape stereotypes

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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 Illene 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.<sup>227</sup> 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.<sup>228</sup> 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.<sup>229</sup> 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.<sup>230</sup> 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.”<sup>231</sup> 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

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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.”<sup>232</sup> 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.”<sup>233</sup> Benicio Del Toro adds that “if she can’t consent, then it is rape.”<sup>234</sup> 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.<sup>235</sup> Saldana states, “Consent: if you don’t get it, you don’t get it.”<sup>236</sup> Earlier, Hutcherson highlights that sex without consent is “rape.”<sup>237</sup> 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.”<sup>238</sup>

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.<sup>239</sup> 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=xLdElev5qqc> [<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 Adler, *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/SUBX-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.<sup>240</sup>

Multiple in-person bystander-education programs for sexual assault and interpersonal violence prevention have emerged over the past few decades.<sup>241</sup> 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.<sup>242</sup> Participants are educated about prevalence rates, indicators of high-risk situations, and how they, as bystanders, can promote safety.<sup>243</sup>

Such programs engage community members by challenging the acceptability of sexual assault and helping participants recognize high-risk situations and respond constructively.<sup>244</sup> 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.

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[<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.<sup>245</sup> More alarming, it is estimated that about 50 percent of transgender individuals are sexually abused or assaulted at some point in their lives.<sup>246</sup> 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,<sup>247</sup> 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.<sup>248</sup> In 2015, the Komen Foundation raised over \$117 million, not including “Race for the Cure” donations.<sup>249</sup> 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.<sup>250</sup>

With a little over \$6 million, RAINN focused on hotlines, educating college students, and promoting PSAs.<sup>251</sup> 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

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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](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](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://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.<sup>252</sup> 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.<sup>253</sup>

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.<sup>254</sup> 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.<sup>255</sup> Additionally, women are often depicted partially nude and engaging in sexual behaviors in music videos and video

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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.<sup>256</sup> 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.”<sup>257</sup>

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.<sup>258</sup> 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.<sup>259</sup>

### 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.<sup>260</sup> Second, researchers conducting a qualitative study of police investigators’ perceptions of the legitimacy of rape cases found that believing in rape myths

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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://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.<sup>261</sup> 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).<sup>262</sup> 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.<sup>263</sup> Similarly, police are more skeptical when the victim lacks bruises or other noticeable evidence of physical trauma.<sup>264</sup>

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.<sup>265</sup> 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.<sup>266</sup>

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

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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.”<sup>268</sup> While research as to the efficacy of these programs is limited,<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup> However, the enhanced training neither improved their knowledge of sexual assault investigation nor did it change their level of endorsement of rape myths.<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup> 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.<sup>275</sup> Until

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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.<sup>276</sup> 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.<sup>277</sup>

One-dose interventions have been criticized as having a limited ability to produce sustained change.<sup>278</sup> Unsurprisingly, several studies have found that programs with a longer duration are effective at improving rape attitudes.<sup>279</sup> Researchers have also found that programs are most effective if they target single-gender audiences.<sup>280</sup> 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.<sup>281</sup> 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 programming that includes using peer theatre presentations,<sup>282</sup> bystander-intervention

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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,<sup>283</sup> and academic courses,<sup>284</sup> 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.<sup>285</sup> 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.<sup>286</sup> 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.<sup>287</sup> Thus, efforts to decrease the rate of youth smoking focused on challenging the assumption that smoking was cool and desirable.<sup>288</sup> 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.<sup>289</sup> Interventions based on the social-influence-resistance model focus on building skills necessary to resist

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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.<sup>290</sup>

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.<sup>291</sup> 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.<sup>292</sup> 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.<sup>293</sup> 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.<sup>294</sup>

While many states have some sort of curriculum for high school students, the California Healthy Youth Act expands the instruction to middle school students.<sup>295</sup> The new law mandates that schools must provide information about sexual harassment and assault, healthy relationships, and body image.<sup>296</sup> 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.<sup>297</sup>

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.<sup>298</sup> 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

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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://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://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.<sup>299</sup> For instance, antismoking campaigns have their strongest impact if they are implemented before youth begin to smoke, which is typically during middle school.<sup>300</sup> Thus, public health advocates pushed for introducing antismoking campaigns in elementary school.<sup>301</sup> 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.<sup>302</sup> 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.<sup>303</sup> 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.”<sup>304</sup> 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.”<sup>305</sup>

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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.<sup>306</sup> 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.<sup>307</sup> 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.<sup>308</sup>

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.<sup>309</sup> 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.<sup>310</sup> 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.<sup>311</sup>

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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.<sup>312</sup> 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.<sup>313</sup>

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.<sup>314</sup> 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.<sup>315</sup> During this wait, victims are not allowed to eat, drink, or urinate so as not to destroy physical evidence of the assault.<sup>316</sup> 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.<sup>317</sup>

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,<sup>318</sup> researchers have found that less than 50 percent of sexual assault victims receive information about the risk of

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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.<sup>319</sup> Similarly, a disturbing percentage of victims do not receive antibiotic prophylaxis to reduce the likelihood of sexually transmitted diseases.<sup>320</sup> Finally, emergency room personnel often lack training in rape forensic exams, which leads to incorrect performance of collection procedures.<sup>321</sup>

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.<sup>322</sup> The aim of a SANE was to provide care that addressed the victims' emotional needs as well as their health concerns.<sup>323</sup> SANEs are registered nurses who receive specialized training in the treatment of sexual assault victims,<sup>324</sup> 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.<sup>325</sup> 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.<sup>326</sup>

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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.<sup>327</sup> Generally, a few examination rooms in the emergency room are set aside for use by SANES.<sup>328</sup> When a sexual assault victim presents to the emergency room, the sexual assault victim is taken to a room dedicated for SANES.<sup>329</sup> If a SANE is not immediately available, one is paged and usually reports within thirty minutes.<sup>330</sup> 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.<sup>331</sup>

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.<sup>332</sup> 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<sup>333</sup> and recover more quickly.<sup>334</sup> Further, the forensic exams and evidence collection kits provided by SANE programs are more thorough and complete than those provided by standard emergency rooms.<sup>335</sup> SANE programs often utilize special forensic equipment such as colposcopes which can detect microlacerations, bruises,

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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.<sup>336</sup> 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.<sup>337</sup> Studies suggest that SANE programs increase prosecution of sexual assault cases because the quality of forensic evidence obtained can provide corroborating evidence of nonconsent.<sup>338</sup> 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.<sup>339</sup> 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.<sup>340</sup>

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.<sup>341</sup> Although this number might sound large, less than 15 percent of emergency departments have a SANE program,<sup>342</sup> and the existing SANE programs often struggle financially.<sup>343</sup> Funding sources for SANE programs varies widely and often comes from disparate sources, including governmental funds, hospitals donations, and nonprofit fundraising.<sup>344</sup> In a survey, 72 percent of SANE directors cited funding as a concern.<sup>345</sup> 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

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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.<sup>346</sup> Twenty years later, Congress enacted the Victims of Crime Act of 1984 (“VOCA”),<sup>347</sup> 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.<sup>348</sup> By 1992, as a result of federal funding, every state had enacted a victim compensation program.<sup>349</sup>

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.<sup>350</sup> The benefits and requirements vary from state to state,<sup>351</sup> 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

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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.<sup>352</sup>

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.<sup>353</sup> Many sexual violence victims report feeling guilt or shame, which can delay reporting.<sup>354</sup> 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.<sup>355</sup>

While some victims delay reporting, many more never report at all.<sup>356</sup> 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,<sup>357</sup> fear of reprisal from the perpetrator or others,<sup>358</sup> shame or guilt,<sup>359</sup> self-blame,<sup>360</sup> ambiguity regarding the assault,<sup>361</sup> 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”<sup>362</sup> or that the police would not take them seriously.<sup>363</sup>

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.<sup>364</sup> 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.<sup>365</sup> 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.<sup>366</sup> Further, victims of sexual assaults are more likely to continue living in poverty and are at greater risk for further victimization.<sup>367</sup>

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,<sup>368</sup> 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.<sup>369</sup> These prior-criminal-acts provisions

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362. Martie Thompson et al., *Reasons for Not Reporting Victimization 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/vnvp0610.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.").