Rape & Sexual Assault

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I. INTRODUCTION

Rape law has been reshaped and expanded, particularly since the 1970s, due to increasing awareness of the prevalence of sexual violence. In the last decade, the #MeToo movement,[1] the stalling of the 2019 Violence Against Women Reauthorization Act in the Senate,[2] former USA Gymnastics Doctor Larry Nassar's prison sentence of up to 175 years for sexual abuse,[3] the uncovering of high rates of sexual assault on college campuses,[4] and the confirmation of Supreme Court Justice Brett Kavanaugh despite allegations of sexual assault[5] have contributed to increased public awareness of the topic of sexual assault. Despite certain legislative reforms, lawmakers and courts continue to struggle with sensitive issues in the prosecution of rape cases and protecting survivors who bring charges.

In Part I, this Article will present statistics on the frequency of sexual assault. It will address some of the typical characteristics of perpetrators and statutory definitions and interpretations of rape at both the federal and state levels. Part II.A will examine the criminal prosecution of rape through pre-trial issues, including DNA testing, maintaining rape survivor privacy in the media, and issues faced by selected groups including spousal rape survivors, military rape survivors, Native American survivors, and students on college campuses. Part II.B will focus on trial issues in criminal cases, particularly the admissibility of evidence, rape shield laws, and the admissibility of defendants' past sex crimes. Part III will examine how civil laws have developed to provide rape survivors with more protections.

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1. Nadia Khomami, *#MeToo: How a Hashtag Became a Rallying Cry Against Sexual Harassment*, GUARDIAN (Oct. 20, 2017, 1:13 PM), https://www.theguardian.com/world/2017/oct/20/women-worldwide-use-hashtag-metoo-against-sexual-harassment.

2. H.R. 1585, 116th Cong. (2019) (placed on the Senate Calendar on Apr. 10, 2019).

3. *See* Will Hobson, *Larry Nassar, Former USA Gymnastics Doctor, Sentenced to 40-175 Years for Sex Crimes*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/sports/olympics/larry-nassar-former-usa-gymnastics-doctor-due-to-be-sentenced-for-sex-crimes/2018/01/24/9acc22f8-0115-11e8-8acf-ad2991367d9d_story.html.

4. *See* Richard Perez-Pefia, *1 in 4 Women Experience Sex Assault on Campus*, N.Y. TIMES (Sept. 21, 2015), https://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html.

5. *See* Clare Foran & Stephen Collinson, *Brett Kavanaugh Sworn in as Supreme Court Justice*, CNN (Oct. 6, 2018, 8:02 PM), https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html.

A. DEFINITION OF SEXUAL ASSAULT AND RAPE[6]

The common law crime of rape is subsumed under federal law as the crime of aggravated sexual abuse.[7] Federal law concerning rape, like many laws at the state level, is gender-neutral and does not distinguish between vaginal and other forms of penetration.[8] An individual is guilty of this offense if they "knowingly

6. Statutes, news articles, and even academic writings use the terms "sexual assault" and "rape" interchangeably. Although there is a difference between the two terms, they are often conflated. *Rape & Sexual Assault*, CENTRE CTY. WOMEN'S RESOURCE CR. (2013), http://ccwrc.org/about-abuse/about-sexual-violence/rape-sexual-assault/; *see Sexual Assault*, RAPE, ABUSE & INCEST NAT'L NETWORK (last visited Oct. 3, 2019), https://www.rainn.org/articles/sexual-assault.

7. 18 U.S.C.A. § 2241 (West, Westlaw through P.L. 116-56).

8. *Id*. There are also many states (and D.C.) with gender-neutral statutes regarding rape and sexual assault that do not differentiate between different types of penetration or mention gender. *See* ALASKA STAT. ANN. § 11.41.410 (West, Westlaw through the 2019 1st Reg. Sess. through 1st Spec. Sess. of the 31st Leg.); ARIZ. REV. STAT. ANN. § 13-1406 (West, Westlaw through legislation effective through the 1st Reg. Sess. of the 54th Leg. (2019)); CAL. PENAL CODE § 261 (West, Westlaw through Ch. 291 of 2019 Reg. Sess.); COLO. REV. STAT. ANN. § 18-3-402 (West, Westlaw through Laws effective Sept. 1, 2019 of the 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-70 (West, Westlaw through July 23, 2019); 11 DEL. CODE ANN. tit. 11, § 773 (West, Westlaw through ch. 210 of the 15th Gen. Assemb. Revisions to 2019 Acts by the Del. Code Revisors were unavailable at the time of pub.); D.C. CODE ANN. § 22-3002 (West, Westlaw through Aug. 31, 2019); FLA. STAT. ANN. § 794.011 (West, Westlaw through 2019 1st Reg. Sess. of the 26th Leg. in effect Mar. 13, 2017); HAW. REV. STAT. ANN. § 707-730 (West, Westlaw through Act. 286 of the 2019 Reg. Sess.); IDAHO CODE ANN. § 18-6101 (West, Westlaw through the 2019 1st Reg. Sess. of the 65th Leg.); 720 ILL. COMP. STAT. ANN. § 5/11-1.20 (West, Westlaw through P.A. 101-66 of the 2019 Reg. Sess.); IND. CODE ANN. § 35-42-4-1 (West, Westlaw through all legis. of the 2019 1st Reg. Sess. of the 121st Gen. Assemb.); IOWA CODE ANN. § 709.1 (West, Westlaw through immediately effective legis. signed as of Sept. 22, 2019 from the 2019 Reg. Sess.); KAN. STAT. ANN. § 21-5503 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before July 1, 2019); KY. REV. STAT. ANN. § 510.010 et. seq. (West, Westlaw through the 2019 Reg. Sess.); LA. STAT. ANN. § 14:41 (Westlaw through the 2018 3d Exec. Sess.); ME. REV. STAT. ANN. tit.17-A, § 253 (Westlaw through emergency legis. through the 2019 1st Reg. Sess. of the 129th Leg. (2019)); MASS. GEN. LAWS ANN. ch. 265, § 22 (West, Westlaw through Ch. 66 of the 2019 1st Ann. Sess.); MINN. STAT. ANN. § 609.342 (West, Westlaw through Oct. 1 of the 2019 Reg. Sess.); MONT. CODE ANN. § 45-5-503 (West, Westlaw through chapters effective Sept. 30, 2019, 2019 Sess.); NEB. REV. STAT. ANN. § 28-319 (West, Westlaw through legis. effective Sept. 22, 2019 of the 1st Reg. Sess. of the 106th Leg. (2019)); N.H. REV. STAT. ANN. § 632-A:1 et. seq. (Westlaw through Ch. 178 of the 2019 Reg. Sess.); N.J. STAT. ANN. § 2C:14-2 (West, Westlaw through L.2019, c. 246 and J.R. No. 20); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); N.D. CENT. CODE ANN. § 12.1-20-03 (West, Westlaw through the 66th Gen. Assembly effective through Jan. 1, 2020); OHIO REV. CODE ANN. § 2907.02 (West, Westlaw through 2019 File 1 to 14 of the 133d Gen. Assemb. (2019-2020)) (found unconstitutional in part by *In re* D.B., 950 N.E.2d 528 (Ohio 2011)); OR. REV. STAT. ANN. § 163.375 (West, Westlaw through the 80th Leg. Assemb. of the 2019 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); 18 PA. STAT. AND CON. STAT. ANN. § 3121 (West, Westlaw through end of the 2019 Reg. Sess.) (validity of subsection (e)(2) called into doubt by Graham v. Florida, 560 U.S. 48 (2010)); S.C. CODE ANN. § 16-3-652 (Westlaw through the 2019 Sess., subject to technical revisions by the Code Comm'r as authorized by law before official publication); S.D. CODIFIED LAWS § 22-22-2 (Westlaw through laws of the 2019 Reg. Sess. effective through Sept. 22, 2019, Executive Orders, 19-1, and Supreme Court Rule 19-15); TENN. CODE ANN. § 39-13-503 (West, Westlaw through the 2019 1st Reg. Sess. of the 111th Tenn. Gen. Assemb.); TEX. PENAL CODE ANN. § 22.011 (West, Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.); UTAH CODE ANN. § 76-5-402 (West, Westlaw through 2019 Gen. Sess.); VT. STAT. ANN. tit. 13, § 3252 (West, Westlaw through Reg. Sess. of the 2019-20 Vt. Gen. Assemb. (2019)); WASH. REV. CODE ANN. § 9A.44.040 (West, Westlaw through all laws from the 2019

cause[s] another person to engage in a sexual act (1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so."[9] An individual is also guilty of aggravated sexual abuse if they "knowingly (1) render[s] another person unconscious and thereby engage[s] in a sexual act with that other person; or (2) administer[s] to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby (A) substantially impairs the ability of that other person to appraise or control conduct; and (B) engage[s] in a sexual act with that other person; or attempt[s] to do so."[10] An individual who knowingly engages in a sexual act with another person under the age of twelve years or attempts to do so is guilty of aggravated sexual abuse.[11] Federal law also defines rape, sexual assault, aggravated sexual conduct and abusive sexual conduct under the United States Uniform Code of Military Justice.[12] The definitions in the Uniform Code are similar to the definitions and interpretations of aggravated sexual abuse under federal law.[13]

States use a variety of terms to encompass the crime of rape, including rape, sexual assault, sexual battery, and sexual misconduct.[14] Historically, rape was

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Reg. Sess. of the Wash. Leg.); W. VA. CODE ANN. § 61-8B-3 (West, Westlaw through legis. of the 2019 Reg. Sess., effective through Aug. 7, 2019); WIS. STAT. ANN. § 940.225 (West, Westlaw through 2019 Act 5, published May 4, 2019); WYO. STAT. ANN. § 6-2-302 (West, Westlaw through the 2019 Gen. Sess. of the Wyo. Leg.). Several states use both male and female pronouns. *See* ALA. CODE § 13A-6-60 et. Seq. (Westlaw through Act 2019-540 of the 2019 Reg. Sess.); ARK. CODE ANN. § 5-14-103 (West, Westlaw through the end of the 2019 Reg. Sess. of the 92d Ark. Gen. Assembly); MICH. COMP. LAWS ANN. § 750.520b (West, Westlaw through P.A.2019, No. 47 of the 2019 Reg. Sess., 100th Leg.); MISS. CODE ANN. § 97-3-95 (West, Westlaw through laws from the 2019 Reg. Sess. effective upon passage as approved through Jan. 1, 2020); MO. ANN. STAT. § 566.030 (West, Westlaw through the end of the 2019 1st Reg. Sess. of the 100th Gen. Assemb., pending changes received from the Revisor of Statutes); NEV. REV. STAT. ANN. § 200.366 (West, Westlaw through current legis. operative or effective up to and including July 1, 2019); N. Y. PENAL LAW § 130.35 (McKinney, Westlaw through L.2019, ch. 256); OKLA. STAT. ANN. tit. 21, § 1111 et. seq. (West, Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Leg. (2019)); 11 R.I. GEN. LAWS § 11-37-2 (West, Westlaw through Ch. 310 of the 2019 Reg. Sess. (2019)); VA. CODE ANN. § 18.2-61 (West, Westlaw through the 2019 Reg. Sess.). Some states may use gender-neutral pronouns, but specify that rape or sexual assault involve "vaginal" penetration, and categorize other forms of penetration as separate crimes. *See* MD. CODE ANN., CRIM. LAW § 3-301 (West, Westlaw through the 2019 Reg. Sess. of the Gen. Assemb.); N.C. GEN. STAT. ANN. §§ 14-27.21, 14-27.26 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess., including through 2019-163, of the Gen. Assemb., subject to changes made pursuant to the direction of the Revisor of Statutes). Georgia has a statute that is not gender-neutral and requires vaginal penetration. *See* GA. CODE ANN. § 16-6-1 (West, Westlaw through the 2019 leg. sess. of the Gen. Assemb.).

9. 18 U.S.C.A. § 2241(a) (West, Westlaw through P.L. 116-56).

10. *Id*. at § 2241(b).

11. *Id*. at § 2241(c). The prosecution is not required to prove that the defendant was aware that the other party was under twelve years old. *Id*. at § 224l(d).

12. 10 U.S.C.A. § 920 art. 120 (West, Westlaw through P.L. 116-56).

13. *Id*.

14. *See, e.g*., CONN. GEN. STAT. ANN. § 53a-70 (West, Westlaw through July 23, 2019) (Connecticut defines rape as "sexual assault in the first degree" and is described as when a person compels another to engage in sexual intercourse by "the use of force" or by "threat of force."); TENN. CODE ANN. §§ 39-13-

defined as "unlawful carnal knowledge of a woman by a man, forcibly and against her will or without her consent" and required the penetration of the female sex organ by the male sex organ as an element of the crime.[15] In recent decades, state legislatures have changed the traditional definition of rape and other sexual crimes to encompass gender-neutral treatment, broadened the definition of intercourse to include all types of sexual penetration, and abolished the marital rape exemption.[16]

All states and the District of Columbia have expanded their definitions of rape and sexual assault.[17] Most definitions now include anal and oral penetration, and

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502, 503 (West, Westlaw through the 2019 1st Reg. Sess. of the 111th Gen. Assemb.) (Tennessee uses the term "aggravated rape" and describes it as unlawful sexual penetration of a victim accompanied by bodily harm, force or coercion with a weapon and/or the defendant is aided or abetted by another person). Tennessee and Connecticut law contrast a great deal in their definitions of rape, and what may be considered a crime in one state, may not be in another. Additionally, both states explicitly mention use of force or coercion, and Tennessee requires a defendant have a weapon, which may not be present in many sexual assault cases. *See* CONN. GEN. STAT. ANN. § 53a-70 (West, Westlaw through July 23, 2019); TENN. CODE ANN. §§ 39-13-502, 503 (West, Westlaw through the 2019 1st Reg. Sess. of the 111th Gen. Assemb.).

15. Joel E. Smith, Annotation, *Validity and Construction of Statute Defining Crime of Rape to Include Activity Traditionally Punishable as Sodomy or the Like*, 3 A.L.R. 4th 1009 (1981).

16. David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 321 (2000).

17. Alletta Brenner, Note, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J. L. & GENDER 503, 511–12 (2013); *see also* ALA. CODE §§ 13a-6-61, 13a-6-62 (West, Westlaw through Act 2019-540 of the 2019 Reg. Sess.); ALASKA STAT. ANN. §§ 11.41.410, 11.41.420, 11.41.425, 11.41.427 (West, Westlaw through the 2019 1st Reg. Sess. through 1st Spec. Sess. of the 31st Leg.); ARIZ. REV. STAT. ANN. § 13-1406 (West, Westlaw through legis. effective through the 1st Reg. Sess. of the 54th Leg. (2019)); ARK. CODE ANN. § 5-14-103 (West, Westlaw through the end of the 2019 Reg. Sess. of the 92nd Ark. Gen. Assemb.); CAL. PENAL CODE § 261 (West, Westlaw through Ch. 291 of 2019 Reg. Sess.); COLO. REV. STAT. ANN. § 18-3-402 (West, Westlaw through Laws effective Sept. 1, 2019 of the 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-70 (West, Westlaw through July 23, 2019); DEL. CODE ANN. tit. 11, § 773 (West, Westlaw through ch. 210 of the 150th Gen. Assemb. Revisions to 2019 Acts by the Del. Code Revisors were unavailable at the time of pub.); D.C. CODE ANN. §§ 22-3002, 22-3003, 22-3004, 22-3005, 22-3006 (West, Westlaw through Aug. 31, 2019); FLA. STAT. ANN. § 794.011 (West, Westlaw through the 2019 1st Reg. Sess. of the 26th Leg. in effect through Mar. 13, 2017); GA. CODE ANN. §§ 16-6-1, 16-6-5.1 (West, Westlaw through the 2019 Leg. Sess. of the Gen. Assemb.); HAW. REV. STAT. ANN. §§ 707-730, 707-731, 707-732, 707-733 (West, Westlaw through Act. 286 of the 2019 Reg. Sess.); IDAHO CODE ANN. § 18-6101 (West, Westlaw through the 2019 1st Reg. Sess. of the 65th Leg.); 720 ILL. COMP. STAT. ANN. § 5/11-1.20, 5/11-1.30 (West, Westlaw through P.A. 101-66 of the 2019 Reg. Sess.); IND. CODE ANN. §§ 35-42-4-1, 35-42-4-8 (West, Westlaw through all legis. of the 2019 1st Reg. Sess. of the 121st Gen. Assemb.); IOWA CODE ANN. §§ 709.2, 709.3, 709.4, 709.11 (West, Westlaw through immediately effective legis. signed as of Sept. 22, 2019 from the 2019 Reg. Sess.); KAN. STAT. ANN. §§ 21-5503, 21-5505 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before July 1, 2019); KY REV. STAT. ANN. §§ 510.040, 510.050, 510.060 (West, Westlaw through the 2019 Reg. Sess.); LA. STAT. ANN. §§ 14:41, 14:42, 14:42.1, 14:43, 14:43.1, 14:43.2, 14:43.3 (Westlaw through the 2018 3d Ex. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 253 (Westlaw through emergency legis. through the 2019 1st Reg. Sess. of the 129th Leg. (2019)); MD. CODE ANN., CRIM. LAW §§ 3-303, 3-3043-307, 3-308 (West, Westlaw through the 2019 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 265, § 22 (West, Westlaw through Ch. 66 of the 2019 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 750.520b (West, Westlaw through P.A. 2019, No. 47 of the 2019 Reg. Sess., 100th Leg.); MINN. STAT. ANN. § 609.342 (West, Westlaw through Oct. 1 of the 2019 Reg. Sess.); MISS. CODE

most allow for more than just the male sex organ to be the penetrating object.[18] Many states define sexual assault as any penetration, however slight, and do not require ejaculation by the perpetrator.[19] Still, in some states, penetration with

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ANN. §§ 97-3-71, 97-3-95 (West, Westlaw through laws from the 2019 Reg. Sess. effective upon passage as approved through Jan. 1, 2020); MO. ANN. STAT. §§ 566.030, 566.031, 566.061, 566.093 (West, Westlaw through the end of the 2019 First Reg. Sess. of the 100th Gen. Assemb., pending changes received from the Revisor of Statutes); MONT. CODE ANN. §§ 45-5-503, 45-5-502 (West, Westlaw through ch. effective Sept. 30, 2019, 2019 Sess.); NEB. REV. STAT. ANN. §§ 28-319, 28-320 (West, Westlaw through legis. effective Sept. 22, 2019, of the 1st Reg. Sess. of the 106th Leg. (2019)); NEV. REV. STAT. ANN. § 200.366 (West, Westlaw through current legis. operative or effective up to and including July 1, 2019); N.H. REV. STAT. ANN. §§ 632-A:2, 632-A:3, 632-A:4 (West, Westlaw through Ch. 178 of the 2019 Reg. Sess.); N.J. STAT. ANN. §§ 2C:14-2, 2C:14-3, (West, Westlaw through L.2019, c. 246 and J.R. No. 20); N.M. STAT. ANN. §§ 30-9-11, 30-9-12 (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); N.Y. PENAL LAW §§ 130.20, 130.25, 130.30, 130.35, 130.50, 130.52, 130.95 (McKinney, Westlaw through L.2019, ch. 256); N.C. GEN. STAT. ANN. §§ 14-27.20, 14-27.30 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess., including through 2019-163, of the Gen. Assemb., subject to changes made pursuant to the direction of the Revisor of Statutes); N.D. CENT. CODE ANN. §§ 12.1-20-03, 12.1-20-04 (West, Westlaw through the 66th Gen. Assemb. effective through Jan. 1, 2020); OHIO REV. CODE ANN. §§ 2907.02, 2907.03, 2907.05, 2907.06 (West, Westlaw through 2019 File 1 to 14 of the 133d Gen. Assembly (2019-2020)) (found unconstitutional in part by In re D.B., 950 N.E.2d 528 (Ohio 2011)); OKLA. STAT. ANN. tit. 21, § 1114 (West, Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Leg. (2019)); OR. REV. STAT. ANN. §§ 163.375, 163.365 (West, Westlaw through the 80th Leg. Assembly of the 2019 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); 18 PA STAT. AND CON. STAT. ANN. §§ 3121, 3123, 3124.1, 3125 (West, Westlaw through end of the 2019 Reg. Sess.) (validity of § 312l(e)(2) called into doubt by Graham v. Florida, 560 U.S. 48 (2010)); 11 R.I. GEN. LAWS §§ 11-37-2, 11-37-4 (West, Westlaw through Ch. 310 of the 2019 Reg. Sess. (2019)); S.C. CODE ANN. §§ 16-3-651, 16-3-652, 16-3-653, 16-3-654 (West, Westlaw through the 2019 Sess., subject to technical revisions by the Code Comm'r as authorized by law before official pub.); S.D. CODIFIED LAWS § 22-22-1 (West, Westlaw through laws of the 2019 Reg. Sess. effective through Sept. 22, 2019, Executive Orders, 19-1, and Supreme Court Rule 19-15); TENN. CODE ANN. §§ 39-13-502, 39-13-503, 39-13-504, 39-13-505 (West, Westlaw through the 2019 1st Reg. Sess. of the 111th Tenn. Gen. Assemb.); TEX. PENAL CODE ANN. §§ 22.011, 22.021 (West, Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.); UTAH CODE ANN. § 76-5-402 (West, Westlaw through 2019 Gen. Sess.); VT. STAT. ANN. tit. 13, §§ 3252, 3253, 3254 (West, Westlaw through Reg. Sess. of the 2019-20 Vt. Gen. Assemb. (2019)); VA. CODE ANN. § 18.2-61 (West, Westlaw through the 2019 Reg. Sess.); WASH. REV. CODE ANN. §§ 9A.44.040, 9A.44.050, 9A.44.060 (West, Westlaw through all laws from the 2019 Reg. Sess. of the Wash. Leg.); W. VA. CODE ANN. §§ 61-8B-3, 61-8B-4, 61-8B-5 (West, Westlaw through legis. of the 2019 Reg. Sess., effective through Aug. 7, 2019); WIS. STAT. ANN. § 940.225 (West, Westlaw through 2019 Act 5, published May 4, 2019); WYO. STAT. ANN. §§ 6-2-302, 6-2-303, 6-2-304 (West, Westlaw through the 2019 Gen. Sess. of the Wyo. Leg.).

18. *See, e.g.*, NEB. REV. STAT. ANN. § 28-318(6) (West, Westlaw through the 1st Reg. Sess. of the 106th Leg. (2019)); N.H. REV. STAT. ANN. § 632-A: l(V) (West, Westlaw through Ch. 178 of the 2019 Reg. Sess.); N.J. STAT. ANN. § 2C:14-1 (West, Westlaw through L. 2019, c. 246 and J.R. No. 20); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); N.Y. PENAL LAW § 130.00 (McKinney, Westlaw through L.2019, chs. 315); S.C. CODE ANN. § 16-3-651 (West, Westlaw through the 2019 Sess., subject to technical revisions by the Code Comm'r as authorized by law before official pub.).

19. *See, e.g.*, N.H. REV. STAT. ANN. § 632-A:1 (West, Westlaw through Ch. 178 of the 2019 Reg. Sess.); N.M. STAT. ANN. § 30-9-11 (West, Westlaw through the 1st Reg. Sess., 54th Leg.); N.D. CENT. CODE ANN. § 12.1-20-02 (West, Westlaw through the 66th Gen. Assemb. effective through Jan. 1, 2020); 11 R.I. GEN. LAWS § 11-37-1 (West, Westlaw through Ch. 310 of the 2019 Reg. Sess.); TENN. CODE ANN. § 39-13-501 (West, Westlaw with laws from the 2019 1st Reg. Sess. of the 111th Tenn. Gen. Assemb.); WIS. STAT. ANN. § 940.225 (West, Westlaw through 2019 Act. 5, published May 4, 2019).

anything other than the male sex organ may not constitute rape.[20] In the very public criminal case against Brock Turner in California, Turner was not convicted as a "rapist" under state law.[21] California defines rape as "an act of sexual intercourse" and because Turner penetrated the survivor with his fingers, he was convicted on three felony counts of sexual assault instead of rape.[22]

Like with definitions of sexual assault, states differ on the elements of a sexual assault claim. Several states specify that survivors do not have to prove physical resistance,[23] and some states explicitly do not require corroboration for rape claims.[24] Most states have provisions that ban sexual contact that is coerced, physically forced, or that the perpetrator knew was not consented to.[25] A few states affirmatively define consent.[26] At least two states allow the trier of fact to consider the absence of resistance when determining if there was consent.[27] In 2019, North Carolina became the last state to allow an individual to withdraw their consent once the sexual act began.[28]

Some states have also retained gender-specific rape and sexual assault laws despite movement over the last four decades to make sexual assault laws gender-neutral, acknowledging the possibility of female, male, and non-binary

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20. *See, e.g.*, IDAHO CODE ANN. § 18-6101 (West, Westlaw through the 2019 1st Reg. Sess. of the 65th Leg.) (describing that only penetration with a penis can be defined as rape).

21. Kirsten Salyer, *Why We Can't Call Brock Turner a "Rapist,"* TIME (June 9, 2016), http://time.com/4362949/stanford-sexual-assault-not-rape/.

22. *Id. See* CAL. PENAL CODE § 261 (West, Westlaw through Ch. 291 of 2019 Reg. Sess.). The media aspect of Turner's case is discussed *infra* Part II.A.2.b.

23. *See, e.g.*, FLA. STAT. ANN. § 794.011 (West, Westlaw through the 2019 1st Reg. Sess. of the 26th Leg. in effect through Mar. 13, 2017); OHIO REV. CODE ANN. § 2907.02(C) (West, Westlaw through Files 1 to 14 of the 133rd Gen. Assemb. (2019-20)); NEB. REV. STAT. ANN. § 28-318 (West, Westlaw through legis. effective Sept. 22, 2019, of the 1st Reg. Sess. of the 106th Leg. (2019)).

24. *See, e.g.*, S.C. CODE ANN. § 16-3-657 (West, Westlaw through the 2019 Sess., subject to technical revisions by the Code Comm'r as authorized by law before official pub.); WYO. STAT. ANN. § 6-2-311 (West, Westlaw through the 2019 Gen. Sess. of the Wyo. Leg.).

25. *See, e.g.*, TEX. PENAL CODE ANN. § 22.011 (West, Westlaw through end of the 2019 Reg. Sess. of the 86th Leg.); UTAH CODE ANN. § 76-5-406 (West, Westlaw through the 2019 Gen. Sess.); VT. STAT. ANN. tit. 13, § 3252(a) (West, Westlaw through the Reg. Sess. of the 2019-20 Vt. Gen. Assemb. (2019)).

26. *See* NEB. REV. STAT. ANN. § 28-318 (West, Westlaw through legis. effective Sept. 22, 2019, of the 1st Reg. Sess. of the 106th Leg. (2019)) ("Without consent means: . . ."); WASH. REV. CODE ANN. § 9A.44.010 (West, Westlaw through the 2019 Reg. Sess.); WIS. STAT. ANN. § 940.225 (West, Westlaw through 2019 Act 5, published May 4, 2019).

27. OR. REV. STAT. ANN. § 163.315 (West, Westlaw through the 80th Leg. Assemb. of the 2019 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); VA. CODE ANN. § 18.2-67.6 (West, Westlaw through the End of 2016 Reg. Sess. and includes 2017 Reg. Sess. cc. 1 to 3, 32, 62, 82, 147, 156, 180, 181,197, 287, & 314).

28. Mariel Padilla, *North Carolina Lawmakers Pass Bill to Close Sexual Assault Loopholes*, N.Y. TIMES (Nov. 1, 2019), https://www.nytimes.com/2019/11/01/us/north-carolina-sexual-assault-loophole.html; AJ Willingham, *North Carolina's the Only State with a Law that Says Once a Sexual Act Begins, You Can't Withdraw Consent*, CNN (June 2, 2019, 3:44 AM), https://www.cnn.com/2019/06/02/health/north-carolina-rape-consent-bill-563-trnd/index.html?no-st=1570116340; *see* State v. Way, 297 N.C. 293, 297 (N.C. 1979) ("If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape . . .").

survivors.[29] Three percent of American men have experienced an attempted or completed rape.[30] Men already face unique barriers to reporting, such as concern about being called homosexual and the societal pressure to appear masculine;[31] laws that do not acknowledge their victimization may reinforce the stereotype that men cannot be raped.[32] Gender-specific rape laws have been widely discounted because they fail to account for the physical or psychological trauma suffered by forms of non-consensual penetration not exclusive to a female victim and male perpetrator.[33]

B. STATISTICS

The statistics concerning sexual assault are alarming and warrant legal remedies for sexual assault survivors. The number of sexual assault and rape survivors has increased in recent years.[34] Every seventy-three seconds, someone in the United States is sexually assaulted.[35] Of these survivors, nine out of ten victims are female, and sixty-nine percent are under the age of thirty-five.[36] People with disabilities and Native Americans are both two times more likely than the general population to be survivors of sexual assault and rape,[37] and almost half of transgender individuals have or will be sexually assaulted in their lifetime.[38] An estimated 63,000 children are sexually abused each year, and ninety-three percent of such juvenile survivors know their attackers.[39] In fact, approximately eighty

29. Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259, 1266 (2011) (listing Alabama, Georgia, Idaho, Indiana, Kansas, Missouri, and North Carolina as states that still define rape in gender-specific terms) (Alabama, Idaho, Indiana, Missouri have since updated their definitions of rape to be gender inclusive).

30. *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/victims-sexual-violence (last visited Jan. 19, 2020).

31. Capers, *supra* note 29, at 1274.

32. *See Male Sexual Victimization Myths and Facts*, VICTIM SERVS. OF LEEDS & GRENVILLE, https://victimservices.wordpress.com/2015/08/05/male-sexual-victimization-myths-and-facts/ (last visited Sept. 27, 2019). *See also* Maxwell Clarke, *Myths About Male Rape*, S. E. CTR. AGAINST SEXUAL ASSAULT & FAMILY VIOLENCE (Aug. 2001), www.secasa.com.au/pages/myths-about-male-rape/.

33. *See The Facts of Male Survivorship*, MALE SURVIVOR, https://malesurvivor.org/the-facts-of-male-survivorship/ (last visited Sept. 27, 2019).

34. RACHEL E. MORGAN & BARBARA A. OUDEKERK, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2018, at 15 (2019) (reporting an increase in victims of rape or sexual assault from 204,000 in 2015 to 347,000 in 2018).

35. *Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://rainn.org/statistics (last visited Jan. 19, 2020).

36. *Scope of the Problem: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/scope-problem (last visited Jan, 19, 2020); *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/victims-sexual-violence (last visited Jan, 19, 2020).

37. MICHAEL R. RAND & ERIKA HARRELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME AGAINST PEOPLE WITH DISABILITIES, 2007 at 1 (2009); *Victims of Sexual Violence: Statistics*, *supra* note 30. Special issues faced by Native American survivors are discussed *infra* Part II.A.

38. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016).

39. *Children and Teens: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/children-and-teens (last visited Jan 19, 2020).

percent of all sexual assaults are committed by someone the survivor knows.[40] Statistically, the attacker is most likely to be white, older than the age of thirty, and have at least one prior criminal conviction.[41]

Of these sexual assaults and rapes, about seventy-seven percent go unreported to the police, and of the twenty-three percent that are reported, less than one percent lead to a felony conviction.[42] Survivors often do not report rape for various reasons, including the fear of not being believed, guilt, shame, humiliation, lack of trust in the justice system, and fear of retribution.[43] Despite misconceptions that false reporting of rape is frequent,[44] only about two to ten percent of reports to police are false.[45]

After a survivor decides to file a police report, much of what happens next is out of their control. Less than ten percent of rapes reported to police will be referred to a prosecutor.[46] Law enforcement agencies and prosecutors act as "gatekeepers," determining whether sexual assault charges are to be brought.[47] Prosecutors have sole discretion as to whether or not to pursue charges.[48] Research shows that prosecutors usually only take cases they are reasonably sure they can win,[49] because the prosecutor's performance is measured by a ratio of convictions to acquittals.[50] Although the decision to pursue a case is influenced by a number of factors including the seriousness of the crime and the strength of the evidence, prosecutors are also influenced by stereotypes about rape and rape survivors.[51] Some of these myths include that a woman "asked" to be raped or that she invited it because of how she was dressed.[52] The stereotypes extend to perpetrators of rape as well, like that men cannot help themselves because of their

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40. *Perpetrators of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, http://www.rainn.org/get-information/statistics/sexual-assault-offenders (last visited Jan. 19, 2020).

41. *Id.*

42. *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/criminal-justice-system (last visited Jan. 19, 2020).

43. *Reporting of Sexual Violence Incidents*, NAT'L INST. OF JUSTICE (OCT. 25, 2010), http://www.nij.gov/topics/crime/rape-sexual-violence/pages/rape-notification.aspx.

44. *False Reporting*, NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf.

45. *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2015), https://www.nsvrc.org/sites/default/files/2015-01/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

46. *The Criminal Justice System: Statistics*, *supra* note 42.

47. Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J. L. & FEMINISM 1, 42 (2015).

48. *See* 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, 6–7 (2007).

49. UNIV. OF KY. CTR. FOR RESEARCH ON VIOLENCE AGAINST WOMEN, TOP TEN THINGS ADVOCATES NEED TO KNOW (2010), https://opsvaw.as.uky.edu/sites/default/files/Top_Ten_Things_Advocates_Need_to_Know.pdf.

50. Stickels et al., *supra* note 48, at 10.

51. CASSIA SPHON & KATHARINE TELLIS, POLICING & PROSECUTING SEXUAL ASSAULT: INSIDE THE CRIMINAL JUSTICE SYSTEM 3 (2014), https://www.rienner.com/uploads/526055ba401ff.pdf; UNIV. OF KY. CTR. FOR RESEARCH ON VIOLENCE AGAINST WOMEN, *supra* note 49.

52. Hannah Brenner et al., *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 531 (2016); *see also Myths and Facts About Sexual Violence*, GEO. L.J., https://

biology.[53] All of these stereotypes are harmful, and when they are internalized, they affect how these cases are handled in the criminal justice system.[54] Many of these myths consider the survivor's characteristics such as age, occupation, education, and "risk-taking behavior," and a prosecutor is less likely to pursue charges if the survivor has what the prosecutor considers a "questionable reputation or moral character."[55] Even when cases are prosecuted, they often fail to reach a guilty finding.[56] It is estimated that out of every 1,000 rapes, 995 rapists will walk free, and only forty-six of those estimated 1,000 rapists will even be arrested.[57]

II. CRIMINAL LAW

Most survivors of sexual assault do not participate in the criminal justice system, due in large part to the fact that many survivors do not report to the police.[58] Only 230 of 1,000, or about 23%, of sexual assaults are reported to the police.[59] Female college students have an even lower reporting rate of 20%.[60] Those who do participate in the criminal justice system will often have cases that do not go to trial because of insufficient evidence[61] or plea deals offered to perpetrators.[62] For the small number of cases that do make it to trial, issues preventing effective rape prosecution include: the lack of initial DNA testing for rape survivors; the current DNA rape kit back-log; invasive and arduous processes in collecting evidence; and the admittance of evidence through rape shield laws.[63] This section will examine these pre-trial and trial issues, and the methods that courts and legislatures have adopted in order to address them.

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www.law.georgetown.edu/your-life-career/health-fitness/sexual-assault-relationship-violence-services/myths-and-facts-about-sexual-violence/ (last visited Sept. 30, 2019).

53. Brenner, *supra* note 52, at 531.

54. *Id*. at 532.

55. Stickels et al., *supra* note 48, at 8–9.

56. *See* UNIV. OF KY. CTR. FOR RESEARCH ON VIOLENCE AGAINST WOMEN, *supra* note 49 (stating that "even when charges are filed, the legal system often downgrades or drops felony rape charges for guilty pleas on other crimes").

57. *The Criminal Justice System: Statistics*, *supra* note 42.

58. PATRICIA TJADEN & NANCY THOENNES, NATL INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 34 (2013), https://www.ncjrs.gov/pdffiles1/nij/210346.pdf (finding that 80.9% of rape survivors do not report their rape to the police).

59. *The Criminal Justice System: Statistics*, *supra* note 42.

60. *Id*.

61. *See* Krista M. Anderson, *Twelve Years Post* Morrison: *State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors*, 36 HARV. J. L. & GENDER 223, 232–33 (2013).

62. *See generally* LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), *available at* https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

63. *See infra* Parts II.A.i.1-3.

A. PRE-TRIAL ISSUES

1. DNA Evidence

DNA evidence is currently admissible in nearly every state and federal court.[64] This scientific advancement has been met with exuberance by the legal community, even hailed as one of the greatest crime-fighting breakthroughs since the advent of cross-examination.[65] In 1998, the FBI's National DNA Index System (NDIS) was established under the DNA Identification Act, allowing comparisons of DNA profiles on a national level between participating laboratories.[66] Currently, all fifty states, the District of Columbia, the U.S. Army, the FBI, and Puerto Rico participate in the NDIS program.[67] The NDIS is just one part of the Combined DNA Index System (CODIS), the DNA system operating on the national level, which contains DNA profiles contributed by federal, state, and local participating forensic laboratories.[68] All DNA profiles are initially processed at the local level and advance through the state up to the national level, which allows states and local agencies to operate their own databases according to their specific legislative requirements.[69] The electronic DNA information systems maintain both the Forensic Index, which contains information gathered from a crime scene or a victim, and the Offender Index, which contains profiles of individuals convicted of sex offenses and other violent crimes.[70] These indexes can be cross-referenced to identify perpetrators.[71] In addition, forensic profiles can be cross-referenced to identify strings of crimes perpetrated by the same individual.[72]

The impact of DNA has been instrumental in the increasing identification and conviction of sexual assault suspects. After a sexual assault by a stranger, evidence of blood, semen, skin, saliva, perspiration, and fingernails are collected from the victim's body in an effort to obtain the perpetrator's DNA.[73] This

64. Milli Kanani Hansen, *Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 COLUM. HUM. RTS. L. REV. 943, 948 (2011).

65. *See generally* People v. Wesley, 533 N.Y.S.2d 643, 644 (N.Y. Cty. Ct. 1988), *aff'd*, 633 N.E.2d 451, 457 (N.Y. 1994) (holding that the results of DNA and fingerprints are all admissible evidence). *But cf.* Brown v. Farwell, 525 F.3d 787, 789–90, (9th Cir. 2008) (holding that admission of DNA evidence was due process violation when match probability is diminished because of victim's young age), *rev'd sub nom.*, McDaniel v. Brown, 558 U.S. 120 (2010).

66. Jennifer Graddy, *The Ethical Protocol for Collecting DNA Samples in the Criminal Justice System*, 59 J. Mo. B. 226, 230 (2003); *Frequently Asked Questions on CODIS and NDIS*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

67. FED. BUREAU OF INVESTIGATION, *supra* note 66.

68. *Id.*

69. *See CODIS Brochure*, FED. BUREAU OF INVESTIGATION (Nov. 7, 2013), https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-brochure-2010.

70. FED. BUREAU OF INVESTIGATION, *supra* note 66.

71. *See id.*

72. *See id.*

73. *See id.*

information is then entered into the database that the department uses to determine if it matches with a suspected or known criminal.[74]

Despite these advances, several hurdles limit the effectiveness of DNA evidence as a tool in cases of sexual assault. Many survivors choose not to undergo an exam for physical evidence, or decline to turn the evidence over to police.[75] Laboratories lack the capacity to analyze such a tremendous amount of evidence, and local jurisdictions and state law enforcement agencies have had difficulty processing sexual assault kits ("rape kits") in a timely manner.[76] The federal government and many states have adopted special rules concerning statutes of limitations and collection of evidence from suspects to improve the effectiveness of DNA evidence.

a. Availability of DNA Evidence. Collecting physical evidence from a sexual assault survivor is an intensive process, often taking several hours.[77] Survivors are encouraged to refrain from bathing, showering, using the restroom, changing clothes, combing hair or cleaning up the area before undergoing an examination.[78] Under the Violence Against Women and Department of Justice Reauthorization Act of 2005, states must ensure that survivors have access to an exam free of charge or with a full reimbursement, even if the survivor decides not to cooperate with law enforcement investigators.[79] A "Jane Doe Rape Kit" enables a victim to have forensic evidence collected without revealing identifying information, giving survivors the option of choosing to report the crime at a later date.[80] A sexual assault survivor "bill of rights" was also signed into law on Oct. 7, 2016, and allowed for survivors to have more power over rape kits in federally prosecuted sexual assault cases.[81] In these cases, survivors have a right to have a

74. *See id.*

75. *See* Katherine A. Muldoon et al., *Achieving Just Outcomes: Forensic Evidence Collection in Emergency Department Sexual Assault Cases*, 35 EMERGENCY MED. J. 746, 748 (2018), https://emj.bmj.com/content/emermed/35/12/746.full.pdf?casa_token=NfFJ2mxhiTkAAAAA:xDICu3_sX_x8Zo4ZRxYzv3gNlMfqVffaRr4xtQkc5lRKZoJKMt0iDlRKi9BFprguYaW0N7VYkEJNFQ.

76. U.S. DEP'T OF JUST. OFF. ON VIOLENCE AGAINST WOMEN, ELIMINATING THE RAPE KIT BACKLOG: A ROUNDTABLE TO EXPLORE A VICTIM-CENTERED APPROACH 7 (May 11–12, 2010), https://victimsofcrime.org/docs/dna-resource-center-documents/eliminating-the-rape-kit-backlog—a-roundtable-to-explore-a-victim-centered-approach-(2010).pdf?sfvrsn=6 [hereinafter ELIMINATING THE RAPE KIT BACKLOG].

77. *What Is a Sexual Assault Forensic Exam?*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/articles/rape-kit, (last visited Jan. 19, 2020) [hereinafter "RAINN"].

78. *Id.*

79. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162 § 3, 119 Stat. 2960 (2006).

80. RAINN, *supra* note 77; *Unreported/Anonymous Sexual Assault Kits*, NAT'L CTR. FOR VICTIMS OF CRIME, https://victimsofcrime.org/our-programs/dna-resource-center/untested-sexual-assault-kits/unreported-sexual-assault-kits (last visited Oct. 7, 2019).

81. Survivors' Bill of Rights Act of 2016, Pub. L. No. 114-236; Molly Redden, *Groundbreaking Rape Survivors' Bill of Rights Expected to be Signed by Obama*, THE GUARDIAN (Sept. 29, 2016, 7:30 AM), https://www.theguardian.com/us-news/2016/sep/29/rape-survivors-bill-obama-congress.

rape kit stored, free of charge, until the statute of limitations in the case expires and will be notified in writing before the kit is destroyed.[82]

Despite these efforts, many survivors choose not to undergo an exam. Researchers believe that such exams can be triggering for survivors of recent assaults.[83] A 2018 study found that 64% of patients in sexual assault cases who were eligible for an exam completed one.[84] Of those who completed the exam, fewer than 30% subsequently released the evidence to the police.[85] Survivors were more likely to release the evidence to the police when they were unsure about the identity of the assailant or when the assault took place outdoors;[86] this may be because those survivors are less likely to fear being "shamed" for the assault.[87]

b. Rape Kit Backlog. Increased awareness of the potential for DNA evidence to help solve cases has led to a higher demand for DNA testing.[88] There is no uniform definition of a backlog; the National Institute of Justice (NIJ), for example, defines "backlogged" as those cases that remain untested for more than thirty days after being submitted to a crime laboratory, but acknowledges that this definition excludes additional cases in which the evidence has not even been submitted to a laboratory by law enforcement.[89] While the precise number of unanalyzed sexual assault kits nationwide is unknown,[90] 145,000 untested rape kits have been identified across the country.[91] A 2007 NIJ survey found that 43% percent of the nation's law enforcement agencies have a computerized system for tracking forensic evidence that is in their inventory or in their crime lab's records.[92] Furthermore, the study revealed that 18% of unsolved alleged sexual assaults that occurred from 2002 to 2007 contained forensic evidence that was still in police custody and had not been submitted to a crime lab for analysis.[93] Recent efforts have been made to help reduce the current backlog of rape kits in the United States; in 2015, U.S. Senators John Cornyn (R-TX) and Patrick Leahy

82. Redden, *supra* note 81.

83. Linda Carroll, *Police Get Rape Kits in Small Percentage of Cases*, REUTERS (Aug. 7, 2018), https://www.reuters.com/article/us-health-sexual-assault/police-get-rape-kits-in-small-percentage-of-cases-idUSKBN1KS2JQ.

84. Muldoon et al., *supra* note 75.

85. *Id.*

86. *Id.*

87. Carroll, *supra* note 83.

88. ELIMINATING THE RAPE KIT BACKLOG, *supra* note 76, at 15.

89. *Id.* at 10.

90. Nancy Ritter, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases*, NAT'L INST. OF JUST. iii (2011), https://www.ncjrs.gov/pdffiles1/nij/233279.pdf.

91. *Where the Backlog Exists and What's Happening to End It*, END THE BACKLOG, www.endthebacklog.org/backlog/where-backlog-exists-and-whats-happening-end-it (last visited Oct. 7, 2019); *see also Untested Evidence in Sexual Assault Cases*, NAT'L INST. OF JUST. (Mar. 17, 2016), https://nij.ojp.gov/topics/articles/untested-evidence-sexual-assault-cases (describing the results of efforts to address the backlog in Detroit and Houston).

92. ELIMINATING THE RAPE KIT BACKLOG, *supra* note 76, at 59.

93. Ritter, *supra* note 90, at 3.

(D-VT) introduced the Justice for All Reauthorization Act which would help to test these rape kits and increase compensation for crime victims.[94] President Barack Obama signed the bill on Dec. 16, 2016, and it was enacted into law.[95]

Previously, in an effort to alleviate the rape kit backlog, the Debbie Smith Act was enacted in 2004 as part of the Justice for All Act.[96] The Debbie Smith Act required the Attorney General to take an exact count of the rape kit backlog, authorized $15 million a year until 2008 to test offender DNA samples, and authorized another $75 million a year through 2007 to test crime scene evidence.[97] The goals of the Debbie Smith Act were to alleviate the rape kit backlog, strengthen laboratory equipment supplies, and bolster inadequate staffing, and keep up with the growing amount of offender samples to be tested.[98] The Act also authorized grants for states to carry out DNA analyses of evidence from crime scenes and to incorporate that information into state databases that are linked to NDIS.[99] The Act was reauthorized in 2008 and 2014,[100] but expired on Sept. 30, 2019 after the House and Senate failed to reconcile competing pieces of reauthorization legislation.[101]

The Sexual Assault Forensic Evidence Registry (SAFER) Act, H.R. 1523 was incorporated into the Violence Against Women Reauthorization Act of 2013[102] to reduce rape kit backlogs nationwide by incentivizing local jurisdictions to audit rape kits awaiting processing, hire and train staff to handle the backlog, and establish a national database of every individual rape kit result.[103] As of 2016, thirty

94. Justice for All Reauthorization Act of 2016, Pub. L. No. 114-324, 130 Stat. 1948.

95. *All Actions* S. *2577—114th Congress (2015–2016)*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/2577/all-actions (last visited March 27, 2017); *see also* Justice for All Reauthorization Act of 2016, Pub. L. No. 114-324, 130 Stat. 1948.

96. *See* Press Release, Rep. Carolyn B. Maloney, Maloney's Legislation to Stop Rape Crimes (Oct. 3, 2003), https://maloney.house.gov/media-center/press-releases/maloneys-legislation-stop-rape-crimes (Debbie Smith was raped in the woods behind her Virginia home and waited six years to find out that her assailant's DNA profile matched that of a DNA profile of a recently convicted felon); U.S. DEP'T OF JUSTICE, OFF. FOR VICTIMS OF CRIME, FACT SHEET: THE JUSTICE FOR ALL ACT (April 2006), https://www.ovc.gov/publications/factshts/justforall/fs000311.pdf.

97. *Debbie Smith Act Legislation*, REP. CAROLYN B. MALONEY, https://maloney.house.gov/sites/maloney.house.gov/files/documents/olddocs/DebbieSmith/Legislation.html (last visited Oct. 19, 2016).

98. *See id.*

99. *Id.*

100. Debbie Smith Reauthorization Act of 2014, Pub. L. No. 113-182, Stat. 1918 (West, Westlaw).

101. Tom Jackman, *Advocates Implore Congress to Reauthorize Funds for Backlogged DNA Rape Kits Before Sept. 30 Expiration*, WASH. POST (Sept. 7, 2019, 6:00 AM), https://www.washingtonpost.com/crime-law/2019/09/07/advocates-implore-congress-reauthorize-funds-backlogged-dna-rape-kits-before-sept-expiration/; RAINN Policy (@rainnaction), TWITTER (Oct. 1, 2019, 11:51 AM), https://twitter.com/rainnaction/status/1179061376934957056.

102. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Stat. 127; *see also* Julia Dahl, *President Obama Signs Violence Against Women Act*, CBS NEWS (Mar. 7, 2013, 2:42 PM), http://www.cbsnews.com/news/president-obama-signs-violence-against-women-act/.

103. *See* Press Release, Rep. Carolyn B. Maloney, Reps. Maloney and Poe Introduce Bipartisan Bill to Reduce Rape Kit Backlog, (Apr. 13, 2011), https://maloney.house.gov/ media-center/press-releases/reps-maloney-and-poe-introduce-bipartisan-bill-reduce-rape-kit-backlog.

states have introduced or implemented measures to address their backlogs.[104] As a result of these efforts, some states have begun to show success at clearing their backlogs.[105]

c. Statutes of Limitations in the DNA Era. The advances in DNA have affected the statutes of limitations of sexual assault[106] in certain jurisdictions. Some states

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104. *See Where the Backlog Exists and What's Happening to End It*, *supra* note 91; *Forensic Biology Backlogs and Untested Assault Evidence*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/Documents/cj/StateBacklogsOfForensicEvidence.pdf (last visited Oct. 9, 2019) (California, Colorado, Connecticut, Hawaii, Illinois, Maine, Michigan, and Texas have passed measures addressing sexual assault evidence issues).

105. Nick Evans, *Ohio Clears Backlog of Untested Rape Kits*, WOSU (Feb. 23, 2018), https://radio.wosu.org/post/ohio-clears-backlog-untested-rape-kits#stream/0%C2%A0; Editorial, *Virginia Catches Up on Untested Rape Kits*; THE FREE LANCE-STAR (May 6, 2019), https://www.fredericksburg.com/opinion/editorials/editorial-virginia-catches-up-on-untested-rape-kits/article_624069d4-0bf8-573d-9c23-847d852ee0ec.html; Ali Watkins, *Old Rape Kits Finally Got Tested. 64 Attackers Were Convicted.*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/nyregion/rape-kit-tests.html.

106. ALA. CODE §§ 15-3-1, 15-3-2, 15-3-5 (West, Westlaw through Act 2019-540 of the 2019 Reg. Sess.); ALASKA STAT. ANN. § 12.10.010 (West, Westlaw through Sept. 14, 2019 of the 2019 1st Reg. Sess. and 2019 1st Spec. Sess. of the 31st Leg.); ARIZ. REV. STAT. ANN. § 13-107 (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); ARK. CODE ANN. § 5-1-109 (West, Westlaw through the end of the 2019 Reg. Sess. of the 92nd Ark. Gen. Assemb.); CAL PENAL CODE §§ 799–801, 803 (West, Westlaw with urgency legis. through Ch. 524 of 2019 Reg. Sess.); COLO. REV. STAT. ANN. §16-5-401 (West, Westlaw through Laws effective Sept. 1, 2019 of the 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 54-193 (West, Westlaw through 2019 Jan. Reg. Sess. and the 2019 July Spec. Sess.); DEL. CODE ANN. tit. 11, § 205 (West, Westlaw through 218 of the 150th Gen. Assemb. Revisions to 2019 Acts by the Del. Code Revisors were unavailable at the time of pub.); D.C. CODE ANN. § 23-113 (West, Westlaw through Sept. 11, 2019); FLA . STAT. ANN. § 775.15 (West, Westlaw with chapters from the 2019 1st Reg. Sess. of the 26th Leg.); GA. CODE ANN. §§ 17-3-1, 17-3-2.1 (West, Westlaw through acts passed during the 2019 Sess. of the Gen. Assemb.); HAW. REV. STAT. ANN. § 701-108 (West, Westlaw through Act 286 of the 2019 Reg. Sess.); IDAHO CODE ANN. §§ 19-401, 19-402 (West, Westlaw with all legis. of the 2019 1st Reg. Sess. of the 65th Idaho Leg.); 720 ILL. COMP. STAT. ANN. 5/3-5, 5/3-6 (West, Westlaw through P.A. 101-66 of the 2019 Reg. Sess.); IND. CODE ANN. § 35-41-4-2 (West, Westlaw with all legis. of the 2019 1st Reg. Sess. of the 121st Gen. Assemb.); IOWA CODE ANN § 802.2 (West, Westlaw with legis. from the 2019 Reg. Sess, subject to changes made by Iowa Code Editor for Code 2020.); KAN. STAT. ANN. § 21-5107 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before July 1, 2019); KY. REV. STAT. ANN. § 500.050 (West, Westlaw through the end of the 2019 Reg. Sess.); L.A. CODE CRIM. PROC. ANN. art. 571–572 (West, Westlaw through the 2019 Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 8 (West, Westlaw through the 2019 1st Reg. Sess. and Ch. 531 of the 1st Spec. Sess. of the 129th Leg.); MD CODE ANN. CTS. & JUD. PROC. § 5-106 (West, Westlaw through all legis. from the 2019 Reg. Sess. of the Gen. Assembly); MASS. GEN. LAWS ANN. ch. 277, § 63 (West, Westlaw through Ch. 81 of the 2019 1st Annual Sess.); MICH. COMP. LAWS ANN. § 767.24 (West, Westlaw through P.A.2019, No. 51 of the 2019 Reg. Sess., 100th Leg.); MINN. STAT. ANN. § 628.26 (West, Westlaw with legis. through Oct. 1, 2019 from the 2019 Reg. and 1st Spec. Sess.); MISS. CODE ANN. § 99-1-5 (West, Westlaw with laws from the 2019 Reg. Sess. effective upon passage as approved through Jan. 1, 2020); MO. ANN. STAT. §§ 556.036, 556.037 (West, Westlaw current through the end of the 2019 1st Reg. and 1st Extra. Sess. of the 100th Gen. Assemb.); MONT. CODE ANN. § 45-1-205 (West, Westlaw through the 2019 Sess.); NEB. REV. STAT. ANN. § 29-110 (West, Westlaw through the end of the 1st Reg. Sess. of the 106th Leg. (2019)); NEV. REV. STAT. ANN. §§ 171.083, 171.085, 171.095 (West, Westlaw through 80th Reg. Sess. (2019)); N.H. REV. STAT. ANN. § 625:8 (West, Westlaw through Ch. 345 of the 2019 Reg. Sess.); N.J. STAT. ANN. § 2C:1-6 (West, Westlaw through L.2019, c. 266 and J.R. No. 2l); N.M. STAT. ANN. §§ 30-1-8, 30-1-9.1, 30-1-9.2 (West, Westlaw through the end of the 1st Reg. Sess. of the 54th Leg. (2019)); N.Y. CRIM. PROC. LAW § 30.10 (Westlaw through L.2019, c.

have extended their statutes of limitations to accommodate for DNA evidence.[107] Currently, the federal statute of limitations for sexual offenses is five years, and state statutes of limitations for rape range from six to fifteen years.[108] As of 2016, twenty-one states do not have any statute of limitations for prosecuting felony sexual assault, and twenty-seven states have enacted some form of a DNA exception that allows for the tolling of a statute of limitation extension where DNA evidence is the basis for prosecution.[109] Even though under federal law rape has a statute of limitations of five years, use of DNA description is sufficient to allow

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360); N.C. GEN. STAT. ANN. § 15-1 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess., including through 2019-163, of the Gen. Assemb., subject to changes made pursuant to the direction of the Revisor of Statutes); N.D. CENT. CODE ANN. §§ 29-04-02.1, 29-04-03.1, 29-04-03.2, 29-04-02 (West, Westlaw through Jan. 1, 2020, from the 66th Gen. Assemb.); OHIO REV. CODE ANN. § 2901.13 (West, Westlaw through Files 1 to 14 of the 133rd Gen. Assemb. (2019-20)); OKLA. STAT. ANN. tit. 22, § 152 (West, Westlaw through the 1st Reg. Sess. of the 57th Leg. (2019)); OR. REV. STAT. ANN. § 131.125 (West, Westlaw through laws enacted in the 2018 Reg. Sess. and 2018 Spec. Sess. of the 79th Leg. Assemb.); 42 PA. CONS. STAT. ANN. § 5552 (West, Westlaw through end of the 2019 Reg. Sess. Act 72); R.I. GEN. LAWS ANN. § 12-12-17 (West, Westlaw through Ch. 310 of the 2019 Reg. Sess.); S.D. CODIFIED LAWS §§ 22-22-1, 23A-42-2 (West, Westlaw through 2019 Sess. Laws, Exec. Order 19-1, and Supreme Court Rule 19-18); TENN. CODE ANN. § 40-2-101 (West, Westlaw with laws from the 2019 1st Reg. Sess. of the 111th Tenn. Gen. Assemb.); TEX. CODE CRIM. PRO. ANN. art. 12.01 (West, Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.); UTAH CODE ANN. §§ 76-1-301, 76-1-302 (West, Westlaw through 2019 Gen. Sess.); VT. STAT. ANN. tit. 13, § 4501 (West, Westlaw through Acts of the Reg. Sess. of the 2019-20 Vt. Gen. Assemb. (2019)); VA. CODE ANN. § 19.2-8 (West, Westlaw through the End of the 2019 Reg. Sess.); WASH. REV. CODE ANN. § 9A.04.080 (West, Westlaw with all legis. from the 2019 Reg. Sess. of the Wash. Leg.); W. VA CODE ANN. § 61-11-9 (West, Westlaw with legislation through the 2019 Reg. Sess. and with laws of the 2019 1st Extra. Sess. approved through Aug. 7, 2019); WIS. STAT. ANN. § 939.74 (West, Westlaw through 2019 Act 5, published May 4, 2019). South Carolina and Wyoming have no statute of limitation for any criminal prosecution. *See Statutes of Limitations*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://apps.rainn.org/policy/compare/statutes.cfm (last visited Jan. 30, 2020).

107. *See State by State Guide on Statutes of Limitations*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/state-state-guide-statutes-limitations (last visited Jan. 30, 2020).

108. Katherine L. Prevost O'Connor, *Eliminating the Rape-kit Backlog: Bringing Necessary Changes to the Criminal Justice System*, 72 UMKC L. REV. 193, 202 (2003); *see also* 18 U.S.C.A. § 3297 (West, Westlaw through P.L. 116-63). In most federal cases in which DNA implicates an identified person in a felony, "no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period." *Statutes of Limitations*, *supra* note 107.

109. *Statutes of Limitations*, *supra* note 107. Most states have different approaches for dealing with the statute of limitations when DNA is involved. *Id*. For example, "Illinois extended the statute of limitations from five years to ten years for sexual assault crimes," while "Arkansas extended the statute of limitations to fifteen years for rape" in cases of DNA evidence. O'Connor, *supra* note 108, at 203 (citing Amy Dunn, Note, *Criminal Law-Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete?*, 23 U. ARK. LITTLE ROCK L. REV., 839, 857 n. 148, 858 n. 153 (2001)). Florida "eliminate[ed] the statute of limitations" entirely in cases of rape when the incident is "reported to authorities within seventy-two hours of the crime." *Id*. (citing Dunn at 857 n. 151). California "eliminate[d] the statute of limitations in rape crimes where DNA evidence has been preserved, but requires" prosecution to begin within one year of the defendant's identification. *Id*. (citing Dunn at 857-58 n. 152). Nevada and New Jersey "have completely eliminated the statute of limitations for the crime of rape" and, "[a]s with murder, rape prosecution can commence whenever the rapist is identified." *Id*. (citing Dunn, *supra*, at 857 n. 149, 150).

an indictment to proceed, thereby preventing the statute of limitations from running.[110] Additionally, prosecutors have begun issuing John Doe warrants as a means of charging unnamed defendants with rape before the statute of limitations has expired.[111] When the defendant's identity becomes known, the prosecution can commence and the statute of limitations is satisfied.[112]

d. DNA Collection After Maryland v. King. In June of 2013, the Supreme Court found that it is not a violation of the Fourth Amendment for law enforcement officers to take a cheek swab of an arrestee for a serious offense in order to analyze his or her DNA and compare it to DNA from unsolved crimes.[113] Alonzo Jay King's DNA was taken following his 2009 arrest on assault charges, which ultimately linked him to an unsolved rape from 2003.[114] The Court held that DNA collection and analysis is an advancement of the current fingerprinting process used during booking and is another means of identification of an arrestee.[115] Under the Maryland system, if the cheek swab matches an unsolved crime in the federal CODIS database, the laboratory will notify the police of that match.[116]

Prior to the Court's decision in *Maryland v. King*, twenty-eight states and the federal government had adopted laws for DNA collection similar to those in Maryland.[117] However, since *King*, at least one court has not followed the ruling based on state law grounds, ruling that a suspicionless DNA search after finding probable cause violated the state of Vermont's Constitution.[118]

2. Sexual Assault Cases in the Media

The Supreme Court has consistently held that the media has a First Amendment right to both acquire and publish information about criminal prosecutions. The First Amendment requires that the public (including the media) be given sufficient information about to permit individual citizens to engage in informed discussion of governmental affairs.[119] Only a state interest of the highest order may prevent a newspaper from publishing truthful information it has lawfully obtained (including the name of a sexual assault survivor).[120] However, courts, states and the federal government have all recognized concerns of trial

110. FED. R. CRIM. P. 7(c)(l).

111. O'Connor, *supra* note 108, at 202.

112. An argument could be made that the elimination or extension of statutes of limitations are better options to circumventing problems caused by the rape kit backlog than are John Doe warrants, which have constitutional implications involving the rights of the defendant. *See* O'Connor, *supra* note 108, at 203–04.

113. Maryland v. King, 569 U.S. 435, 465 (2013).

114. Keagan D. Buchanan, *The Twenty-First Century Fingerprint: Previewing Maryland v. King*, 4 CALIF. L. REV. CIRCUIT 38, 43 (2013).

115. *King*, 569 U.S. at 451.

116. Buchanan, *supra* note 114, at 41–42.

117. *Id.* at 39.

118. *See* State v. Medina, 102 A. 3d 661, 683 (Vt. 2014).

119. Globe Newspaper Co. v. Superior Ct. for Norfolk Cty., 457 U.S. 596, 605 (1982).

120. Florida Star v. B.J.F., 491 U.S. 524, 541 (1989).

fairness and privacy (to both the survivor and accused) arising from the public release of information concerning an alleged sexual assault. This section will discuss these concerns and the steps various entities have taken to address them.

a. Media Treatment of Survivors. Privacy is often very important to rape survivors, not only because rape may be stigmatizing, but also because survivors may wish to avoid retaliation by the perpetrator if their rape becomes public.[121] Confidentiality and privacy concerns partially explain the high number of unreported sexual assault crimes.[122] The Supreme Court, while acknowledging that the media has a First Amendment right to publish the names of rape survivors when appropriate, has established a three-part balancing test to determine whether it is acceptable to publish private information about a rape survivor in a particular case.[123] The factors include: (1) whether the newspaper lawfully obtained truthful information about a matter of public significance; (2) whether imposing liability on a defendant furthers a state interest of the highest order; and (3) the timidity and self-censorship which may result from holding the media liable.[124] Many states have adopted procedures that keep the name of a sexual assault survivor from the media and the public by replacing it with initials or a pseudonym in court proceedings.[125] Some commentators have argued that putting a survivor's name in a news story aids in decreasing the stigma of rape, in that it puts a face to the name;[126] however, most advocates agree that social change should not be happening by "outing" these survivors through the media.[127]

Other procedures that are sometimes used to protect the privacy of the survivor include closing the courtroom to the public during their testimony[128] and preventing

121. K. Anderson, *supra* note 61, at 228.

122. *See id.*; *see also* Ariel Levy, *Trial by Twitter*, THE NEW YORKER (Nov. 3, 2013), http://www.newyorker.com/reporting/2013/08/05/130805fa_fact_levy (reporting that a teenager raped in Steubenville was harassed on social media after her rapists were found guilty); *Case Will Not Be Retried, but Civil Trial Pending*, ESPN (Sept. 2, 2004, 9:46 AM), http://espn.go.com/nba/news/story?id=1872740 (noting that rape survivor had refused to participate in criminal case after receiving death threats because she accused a famous basketball player, Kobe Bryant, of rape); Ramin Setoodeh, *Nate Parker's Rape Accuser Committed Suicide in 2012: Her Brother Speaks Ou*t, VARIETY (Aug. 16, 2016, 1:43 PM), http://variety.com/2016/film/news/nate-parkers-accuser-committed-suicide-in-2012-her-brother-speaks-out-exclusive-1201838508/ (telling the story of the reported rape survivor of actor Nate Parker, and her eventual depression, drug addiction, and suicide).

123. *Florida Star*, 491 U.S. at 534–35.

124. *Id.*

125. Doe No. 2 v. Kolko, 242 F.R.D. 193, 195 (E.D.N.Y. 2006); *see* CAL. PENAL CODE § 293.5 (West 2017.); TEX. CODE CRIM. PROC. ANN. Art. 57.02 (West 2007.); State v. Molnar, 829 A.2d 439, 446 (Conn. App. Ct. 2003) (upholding use of pseudonym for sexual assault victim).

126. Sonali Kohli, *The Feminist Argument for Naming Rape Survivors in the Media*, QUARTZ (Apr. 7, 2015), https://qz.com/377515/the-feminist-argument-for-naming-rape-survivors/.

127. *Naming Victims in the Media*, NAT'L ALL. TO END SEXUAL VIOLENCE (last visited Nov. 19, 2019), https://www.endsexualviolence.org/where_we_stand/naming-victims-in-the-media/.

128. Kovaleski v. State, 103 So. 3d 859, 861 (Fla. 2012); *see also* State v. Rollins, 752 S.E. 2d 230, 237 (N.C. Ct. App. 2013).

the public release of a videotape of a rape.[129] The Colorado Supreme Court held in *People v. Bryant* that Colorado rape shield laws protect the privacy of a rape survivor's sexual history, reasoning that a rape survivor's sexual history is more private than their name.[130] The court in *Bryant* upheld a district court order that prohibited media outlets from revealing the contents of the transcribed *in camera* proceedings in order to protect the state's interest in a fair trial.[131] Despite this protection, the survivor decided not to participate in the trial after her identity was revealed, and prosecutors dropped the case.[132] However, in 2016, courts in New Hampshire struggled with the question of deciding whether to unseal records about a survivor's sexual past in a case involving the rape and murder of a 19-year-old woman in 2012.[133] The defense filed an appeal to the conviction and the evidence involving the survivor's sexual history was "disputed" in what critics are referring to as a loophole in the court process, but the Supreme Court of New Hampshire affirmed the ruling of the trial court in not allowing evidence of prior interest in certain sexual activity to be valid arguments for the defendant.[134] The Crime Victims Rights Act, passed in 2004, guarantees survivors of crimes the right to be treated with "respect for the victim's dignity and privacy" and aims to give survivors a greater role in the criminal justice process.[135] In the age of social media, privacy rights have become particularly attenuated and legislatures should continue to look for more effective ways to protect survivors' privacy.

Media attitudes towards survivors have come under greater scrutiny in recent years, especially after the highly-publicized Duke lacrosse rape case.[136] Proponents of a survivor-based approach to covering sexual assault and rape

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129. Anderson v. Blake, 469 F.3d 910, 915 (10th Cir. 2006) (holding that a video depicting a rape is within the personal right to privacy). *But see* Anderson v. Suiters, 499 F.3d 1228, 1236–37 (10th Cir. 2007) (holding that media airing a videotape of a rape was "a matter of legitimate public interest" because only the survivor's calves and feet were visible, there were multiple accusations against the rapist, and he was a prominent attorney in the community); Shattuck-Owen v. Snowbird Corp., 16 P.3d 555, 559 (Utah 2000) (holding that an employer who showed a videotape of a rape to twelve to thirteen people did not invade survivor's privacy because most of the people needed to see it in order to investigate).

130. People v. Bryant, 94 P.3d 624, 634–38 (Colo. 2004) (citing Michigan v. Lucas, 500 U.S. 145 (1991)). *See infra* Part II.B.i for a full discussion on rape shield laws.

131. *Id*. at 638. In *Bryant*, the court reporter mistakenly sent the transcripts of *in camera* proceedings electronically to seven media entities using an electronic mail list for subscribers to public proceeding transcripts as opposed to the electronic mailing list for those authorized to receive transcripts of in camera proceedings. *Id*. at 626.

132. *Case Will Not Be Retried, but Civil Trial Pending*, *supra* note 122.

133. Laura Bassett, *Rape Victim's Parents Fight to Keep Her 'Sexual History' Private After Her Murder*, HUFFPOST (Aug. 8, 2016), https://www.huffpost.com/entry/lizzi-marriott-rape-shield-laws_n_57bb591de4b03d51368a0905.

134. State v. Mazzaglia, 152 A.3d 167, 173 (N.H. 2016).

135. 18 U.S.C.A. § 377l(a)(8) (West, Westlaw through P.L. 116-91).

136. Meredith Bollheimer, *Duke Lacrosse, Universities, the News Media, and the Legal System: A Review of Howard M. Wasserman's Institutional Failures*, 39 J.C. & U.L. 229, 229–30 (2013).

cases encourage journalists to be aware of the "power of language" and how small words and language suggesting the nonconsensual nature of an assault can make a difference in the public's reading of the case.[137] Under a new suggested approach, in the case of the Duke lacrosse team, reference to the complainant as having been hired to perform as an exotic dancer at the party would be acceptable, but referring to her throughout an article as "the exotic dancer" would not.[138]

b. Media Treatment of the Accused. Generally, the media is given a large amount of discretion in determining what is "newsworthy" enough to publish in regards to stories about criminal defendants.[139] Legally, the media has the authority to publish the mugshot and the name of someone accused of any crime in most states under the First Amendment.[140] The Second Restatement of Torts specifically mentions that arrest reports, birthdates, and pleadings filed in a lawsuit are not private facts and can be published freely;[141] however, libel concerns may be an issue if private facts are published falsely or given in a "false light."[142] The accused does have privacy rights and protection from the media when it comes to parts of his or her trial, including the names of members of the jury, some pieces of evidence, and other confidential matters.[143]

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137. *Reporting On Sexual Violence: A Guide For Journalists*, MINN. COALITION AGAINST SEXUAL ASSAULT 1, 5 (2013), http://www.tricountywomenscentre.org/uploads/5/7/6/6/5766610/2013media manual.pdf (last accessed Oct. 11, 2019). The guide also stresses using neutral language and staying away from the word "allegedly" and instead using "reportedly," as well as making the survivor the center of the story, even if not mentioned by name. *Id.*

138. *See* Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 259–60, 272 (2007). *But see* Jack Shafer, *Trial by Newspaper: The New York Times & the Duke Rape Case*, SLATE (Apr. 20, 2006), http://www.slate.com/id/2140319 (criticizing the New York Times' avoidance of reporting that the survivor was hired from an "escort service"); Kathleen Parker, *Breathing While White*, ORLANDO SENTINEL (May 17, 2006), articles.orlandosentinel.com/2006-05-17/news/PARKER17X_1_lacrosse-mayer-conventional-wisdom ("Too easily we convict alleged perps in the court of public opinion when they fit our templates of good/bad. Black strippers good (because they can't help it); white athletes bad (because they're white)").

139. Gilbert v. Med. Econ. Co., 665 F.2d 305, 307 (10th Cir. 1981).

140. *See generally* Becky Yerak, *Lawsuit: Mug Shot Website Posts Incomplete Records So Sister Site Can Solicit 'Takedown' Fees*, CHICAGO TRIBUNE (March 13, 2017, 8:28 AM), http://www.chicagotribune.com/business/ct-mug-shot-websites-0312-biz-20170310-story.html; *see also* Michael McLaughlin, *Mug Shot Websites Face Lawsuit Alleging Violations of Arrestee Publicity Right*, HUFFPOST (Jan. 14, 2014, 5:38 PM) https://www.huffpost.com/entry/mug-shot-websites-lawsuit-publicity-rights_n_2472607.

141. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b, g (Am. Law Inst. 1977).

142. *Id.*

143. *See*, Bridges v. California, 314 U.S. 252 (1941); Jaime N. Morris, Note, *The Anonymous Accused: Protecting Defendants' Rights in High Profile Criminal Cases*, 44 B.C. L. REV. 901 (2003).

The media can be responsible for shaping treatment of individuals accused of sexual assault and rape.[144] A recent example is Brock Turner, a twenty-year-old man convicted in California courts of sexually assaulting an unconscious woman; the survivor's anonymous letter addressing Turner and her experiences following the assault went viral in 2016.[145] After going viral, the letter sparked outrage from the general public[146] and a large amount of coverage from the media.[147] A letter from Turner's father defending his crimes also prompted discontent among the public and the media.[148] Some of the critique from the media and advocates involved both the withholding of Turner's mugshot after his conviction and use of a photo of Turner in a suit and tie by the media throughout the case coverage.[149] Under California law, mugshots are public record, but in the case of Brock Turner, the photos were not made public until after a formal request was made to Stanford University, where Turner was a student.[150] The media therefore used pictures from his time as a student and a swimmer, which some critics believe

144. *See* Annie-Rose Strasser & Tara Culp-Ressler, *How the Media Took Sides In the Steubenville Rape Case*, THINK PROGRESS (Mar. 18, 2013, 1:15 PM), https://thinkprogress.org/how-the-media-took-sides-in-the-steubenville-rape-case-e92589afbadf/ (suggesting that, perhaps because of the lack of details about the 16-year-old rape survivor, the media focused on the accused and how they were "promising students").

145. Katie J.M. Baker, *Here Is the Powerful Letter the Stanford Victim Read Aloud To Her Attacker*, BUZZFEED (June 3, 2016, 4:17 PM), https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra.

146. Marina Koren, *Telling the Story of the Standard Rape Case*, ATLANTIC (June 5, 2016), http://www.theatlantic.com/news/archive/2016/06/stanford-sexual-assault-letters/485837/. Public outrage over the perceived leniency of the sentence imposed on Turner later led to the recall of the judge in the case; opponents of the recall described it as an attack on judicial independence. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html.

147. *See* Mel Robbins, *Show Rape Victim's Letter to Your Son*, CNN (Sept. 2, 2016), http://www.cnn.com/2016/06/07/opinions/stanford-rape-case-letter-robbins/; *see also* Alanna Vagianos, *Read the Gut-Wrenching Letter to Brock Turner from His Victim's Sister*, HUFFPOST (June 13, 2016, 2:21 PM), https://www.huffpost.com/entry/read-the-gut-wrenching-letter-to-brock-turner-from-his-victims-sister_n_575ec6dee4b0ced23ca89cad.

148. Emma Gray, *This Letter from the Stanford Sex Offender's Dad Epitomizes Rape Culture*, HUFFPOST (June 6, 2016, 1:07 PM), https://www.huffpost.com/entry/brock-turner-dad-letter-is-rape-culture-in-a-nutshell_n_57555bace4b0ed593f14cb30; John Bacon, *Dad to Dad: Open Letter Blasts Father of Stanford Rapist*, USA TODAY (June 8, 2016, 10:50 AM), https://www.usatoday.com/story/news/nation/2016/06/08/dad-dad-open-letter-blasts-father-stanford-rapist/85591394/.

149. Stassa Edwards, *After Some Delay, Brock Turner's Sentencing Photo Has Been Released*, JEZEBEL (June 6, 2016, 2:40 PM), http://jezebel.com/you-wont-see-brock-tumers-mugshot-anytime-soon-1780816819; *see also* Anna Swartz, *How Stanford Sex Offender Brock Turner's Mugshot Exposes a Double Standard in the Media*, MIC (June 7, 2016), https://www.mic.com/articles/145488/how-stanford-rapist-brock-turner-s-mugshot-exposes-a-double-standard-in-the-media.

150. Alex Johnson, *After Months of Requests, Mugshots of Stanford Rapist Brock Turner Emerge*, NBC NEWS (June 7, 2016, 12:37 AM), http://www.nbcnews.com/news/us-news/after-months-requests-mugshots-stanford-rapist-brock-turner-finally-emerge-n586936.

made him look sympathetic, as did the frequent media mention of his highly-ranked school, Stanford, and his athletic accomplishments.[151]

Other critics of the media's coverage express concern that media attention can create prejudice against the accused. These critics worry that the media can "convict" those who are accused in the eyes of the public, even if they are exonerated in court.[152] This was realized in the case of Rolling Stone printing a story alleging rape culture and sexual assault at the University of Virginia, only for it later to be found false.[153] Many sites, some run through newspapers and other media sources, post all publicly available mugshot photos and charge up to $1,000 to take them down.[154] In 2013, Google attempted to crack down on such sites by changing its algorithm to make them less prominent in search results.[155] In 2018 it was reported that many of these sites have developed new search engine optimization tactics to get around those restrictions, prompting some observers to call for further action on Google's part.[156] Also in 2013, several payment processing systems (including MasterCard and PayPal) announced that they would no longer process payments for such sites.[157] Some advocates for those who have been accused of crimes argue that the accused, like survivors, should remain anonymous in the media until convicted.[158] However, with current public record laws regarding arrests and mugshots, this hardly seems possible and it may be up to the media to consider how and when details of those accused are released and the impact of that timing.[159]

c. Non-Disclosure Agreements. In recent years, activists, journalists and elected officials have drawn increased attention to the use of non-disclosure

151. Edwards, *supra* note 149; *see also* Naomi LaChance, *Media Continues to Refer to Brock Turner as a "Stanford Swimmer" Rather Than a Rapist*, INTERCEPT (Sept. 2, 2016, 1:45 PM), https://theintercept.com/2016/09/02/media-continues-to-refer-to-brock-turner-as-a-stanford-swimmer-rather-than-a-rapist/.

152. *See* T. Rees Shapiro, *'Our Worst Nightmare': New Legal Filings Detail Reporting of Rolling Stone's U-Va. Gang Rape Story*, WASH. POST (July 2, 2016, 8:14 PM), https://www.washingtonpost.com/news/grade-point/wp/2016/07/02/our-worst-nightmare-new-legal-filings-detail-reporting-of-rolling-stones-u-va-gang-rape-story/.

153. *Id.*

154. Tracie Powell, *Some News Sites Suffer from an Online Mugshot Crackdown*, COLUM. JOURNALISM REV. (Oct. 14, 2013), https://archives.cjr.org/behind_the_news/news_mugshot_sites.php.

155. *Id.*

156. Olivia Solon, *Haunted by a Mugshot: How Predatory Websites Exploit the Shame of Arrest*, GUARDIAN (June 12, 2018, 3:01 AM), https://www.theguardian.com/technology/2018/jun/12/mugshot-exploitation-websites-arrests-shame.

157. Powell, *supra* note 154.

158. *See Stuart Hall Case Fuels Debate on Anonymity for Sexual Assault Defendants*, HUFFPOST (Feb. 5, 2013, 4:12 PM), http://www.huffingtonpost.co.uk/2013/05/02/stuart-hall-case-fuels-debate_n_3203085.html; Morris, *supra* note 143.

159. *See generally Police Records: A reporter's State-by-State Guide to Law Enforcement Records*, REP. COMMITTEE FOR FREEDOM OF THE PRESS (2008), https://www.rcfp.org/access-police-records.

agreements to suppress reports of sexual assault by prominent figures.[160] Many commentators have argued that use of such agreements permits abusers to continue to find further targets and encourages continue abuse.[161] Others argue that such non-disclosure agreements help survivors ensure their privacy, move on from the assault, and gain recompense from their assailant.[162]

Between January 2018 and June 2019, twenty-six states considered laws to limit use of non-disclosure agreements in instances of sexual assault or harassment; twelve states adopted new laws.[163] New Jersey adopted the most far-reaching bill, which renders such agreements unenforceable.[164]

3. Special Groups

Several groups of survivors warrant particular attention with regard to criminal prosecution due to the unique challenges presented in their cases. Subsection 3.a will cover marital rape and the so-called marital rape exceptions that many states still have in place. Subsection 3.b will focus on military personnel and recently introduced legislation. Subsection 3.c will focus on Native Americans and the jurisdictional challenges in prosecuting non-Native Americans. Subsection 3.d will cover campus sexual assault including government responses.

a. Marital Rape. Approximately ten to fourteen percent of married heterosexual women in the United States are raped by their husbands.[165] Marital rape in effect did not exist in legal codes or the common law until the late twentieth century. Until that time, many rape laws specified that women were incapable of being raped by their husbands thus making marriage an absolute defense to rape.[166] Nebraska became the first state to rescind its immunity from prosecution for marital rape in 1976.[167] By 1993, all states had abolished the marital rape

160. *See, e.g.*, Mark Townsend, *Ex-Weinstein Assistant Calls for Ban on Contracts to Silence Harassment Victims*, GUARDIAN (Aug. 26, 2018, 2:00 AM), https://www.theguardian.com/film/2018/aug/26/former-weinstein-assistant-urges-ban-contracts-silence-harassment-victims.

161. Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws.*, PEW (July 31, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws.

162. Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html.

163. *Id.*

164. N.J. STAT. ANN. § 10:5-12:7 (West through L. 2019, c. 266 and J.R. No. 21).

165. Christine Ferro, Jill Cermele, & Ann Saltzman, *Current Perceptions of Marital Rape: Some Good and Not-So-Good News*, 23 J. INTERPERSONAL VIOLENCE 764, 765 (2008) (citing Raquel Kennedy Bergen, *Marital Rape: New Research and Directions*, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN (2006)). Some scholars have asserted that marital rape is largely understudied, even though there is evidence it is still prevalent in our culture. *See id.*

166. Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105, § 2[a] (1983). The model code keeps the common law definition: "sexual intercourse with a female not his wife." MODEL PENAL CODE § 213.1 (West, Westlaw through 2016 Annual Meeting of Am Law Inst.).

167. Jessica Klarfeld, *A Striking Disconnect: Marital Rape Laws Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1830 (2011).

exception to recognize marital rape as a crime.[168] While legally most states treat marital or spousal rape identically to any other type of rape, eleven states still provided some form of marital immunity in their legislation as of 2019,[169] typically for sexual assault that does not involve penetration, force, or great bodily harm.[170] In Ohio, for instance, the law has two subsections for rape: one for offenders who are not the survivor's spouse and one for offenders who are the survivor's spouse.[171] The section for someone who is the survivor's spouse notes that a person must experience "force or threat of force" in the rape, which creates challenges for an individual who has been raped while drugged or intoxicated and thus does not experience force or threat of force.[172] Ohio has twice attempted to close this loophole by eliminating the requirement for proof of threat or violence if the couple is married or living together; both attempts have failed.[173] In 2017, Maryland closed their marital rape loophole by removing a provision of the law that required a survivor to prove use of force.[174] In 2019, Minnesota repealed a law that protected a defendant from prosecution if they and the survivor cohabitated and had a voluntary sexual relationship or were married.[175] Where the couple lived apart, the defendant had been protected from criminal prosecution unless either they or the survivor had applied for legal separation or dissolution of the marriage.[176]

The continued differences in marital and non-marital rape statutes can best be understood to derive from a state's desire to protect marital privacy, promote marital harmony and reconciliation, and assume aligned interests of husband and wife.[177] State laws present additional hurdles that married sexual assault survivors

168. Monica Steiner, *Marital Rape Laws*, CRIM. DEF. L., http://www.criminaldefenselawyer.com/marital-rape-laws.html (last visited Oct. 13, 2019).

169. Mattie Quinn, *Marital Rape Isn't Necessarily a Crime in 12 States*, GOVERNING (Apr. 10, 2019, 4:00 AM), https://www.governing.com/topics/public-justice-safety/gov-marital-rape-states-ohio-minnesota.html. Those states are Connecticut, Idaho, Iowa, Michigan, Mississippi, Nevada, Ohio, Oklahoma, Rhode Island, South Carolina and Virginia. *Id.*

170. Brian Patrick Byrne, *These 13 States Still Make Exceptions For Marital Rape*, VOCATIV (July 28, 2015, 3:50 PM), https://www.vocativ.com/215942/these-13-states-still-make-exceptions-for-marital-rape/index.html. The marital rape "loophole" can include immunity from prosecution for rapes that take place inside a marriage, higher standards of proof, or a required force element. *Id.*

171. Samantha Allen, *Marital Rape Is Semi-Legal in 8 States*, DAILY BEAST (Apr. 14, 2017, 10:36 AM), http://www.thedailybeast.com/articles/2015/06/09/marital-rape-is-semi-legal-in-8-states.html (citing OHIO REV. CODE ANN. § 2907.02 (West, Westlaw through all laws of the 131st Gen. Assemb. (2015 no-16)), *unconstitutional as applied by In re* D.B., 950 N.E.2d 528, 528 (Ohio 2011) as applied to a child under the age of thirteen who engages in sexual conduct with another child under thirteen).

172. *Id.*

173. Julie Carr Smyth, *Ohio Democrats Make Latest Attempt To Close Marital Rape Loophole*, WOSU PUB. MEDIA, (May 6, 2019), https://radio.wosu.org/post/ohio-democrats-make-latest-attempt-close-marital-rape-loophole#stream/0.

174. Quinn, *supra* note 169.

175. Brendan O'Brien, *Minnesota Governor Signs Law Making Marital Rape Illegal*, REUTERS, (May 2, 2019), https://www.reuters.com/article/us-minnesota-law-rape/minnesota-governor-signs-law-making-marital-rape-illegal-idUSKCN1S82EE.

176. *Id.*

177. Klarfeld, *supra* note 167, at 1826–27.

must overcome in proving their cases; such hurdles can include shorter reporting windows for survivors, reduced sentences for the accused, and variances in requisite mental state.[178]

b. Military Personnel. Over the last few years, the military has committed to stopping sexual assault among its ranks, but reports and studies show no improvement. According to the Department of Defense, the estimated prevalence of past-year sexual assault among activity duty female service members increased approximately two percent between fiscal years 2016 and 2018, to 6.2% of all active duty female service members between ages seventeen and twenty-four.[179] Reporting rates remained the same during the period; an estimated one in three service members who experienced sexual assault report to the Department.[180] Active duty women continued to report at a higher rate than active duty men—thirty-eight percent compared to seventeen percent.[181] Of those women who did report, twenty-one percent experienced some kind of retaliation including administrative, social, and other forms of professional retaliation, if and when they did report sexual assault.[182] One in three survivors are discharged after reporting—typically within seven months of filing the report.[183] However, in 2018, approximately seventy-five percent of survivors of sexual assault in the military said they were satisfied with the support they received from the military after reporting.[184]

There are two options for survivors seeking to report sexual assault in the military: restricted and unrestricted reports. A restricted report is confidential and does not trigger investigations or command involvement; a survivor can choose to convert a restricted report into an unrestricted report at any time.[185] An unrestricted report triggers an official law enforcement investigation and enlists the chain of command.[186] Since 2015, there has been a twenty-two percent increase in unrestricted sexual assault reports but convictions have dropped by sixty percent.[187] In 2018, only 5.3% (307 reports) of cases were tried by court-martial and 1.9% of offenders (108 cases) in all cases filed were convicted of a nonconsensual

178. *Id.* at 1833.

179. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2018 4 (2019), https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [hereinafter DEPARTMENT OF DEFENSE 2018 REPORT]. For male service members, this number remained relatively unchanged. *Id.*

180. *Id.* at 4.

181. *Id.*

182. *Id.* at 20.

183. DEP'T OF DEF. INSPECTOR GENERAL, EVALUATION OF THE SEPARATION OF SERVICE MEMBERS WHO MADE A REPORT OF SEXUAL ASSAULT (2016), https://media.defense.gov/2016/May/09/2001714241/-1/-1/1/DODIG-2016-088.pdf.

184. DEPARTMENT OF DEFENSE 2018 REPORT, *supra* note 179, at 16.

185. *Restricted v. Unrestricted Reports*, U.S. MARINE CORPS CMTY. SERVS. (2016), https://usmc-mccs.org/articles/restricted-vs-unrestricted-reports-know-your-options/.

186. *Id.*

187. *Facts on United States Military Sexual Violence*, PROTECT OUR DEFENDERS (July 2019), https://www.protectourdefenders.com/wp-content/uploads/2019/07/MSA-Fact-Sheet-190724_FINAL.pdf.

sex offense.[188] Article 32 of the Uniform Code of Military Justice (UCMJ) requires all charges and allegations to be thoroughly investigated by the military before they can be referred to a general court-martial.[189] Some advocates argue this process, in which the Federal Rules of Evidence do not apply, can deter survivors and witnesses from corning forward by subjecting them to intense cross-examination and bringing about fears of retaliation.[190] UCMJ Article 32 states that, "a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial."[191] Article 32 allows a person accused of rape to cross-examine the survivor.[192] Thus, unlike in a civilian criminal case, where cross-examination is not allowed before trial, one of the greatest obstacles for military sexual assault survivors who pursue justice in the military is overcoming Article 32.[193] The purpose of the Article is to avoid trials on unfounded accusations.[194] At an Article 32 hearing there is no judge and the rules of evidence do not apply.[195] Instead, an impartial investigation officer must determine if there is probable cause that a crime was committed.[196] There have been improvements for survivors of sexual assault, including a limit on some of the cross-examinations by defense attorneys affecting survivors.[197] Seeking to improve the process further, Sen. Kirsten Gillibrand has introduced the Military Justice Improvement Act as an amendment to the National Defense Authorization Act each year since 2013.[198] S.1789, introduced in 2019, would give independent military prosecutors, rather than military commanders, the authority to investigate and pursue prosecution of sexual assault.[199] Sen. Gillibrand's bill has not received a vote since 2015.[200]

188. *Id*.

189. 10 U.S.C.A. § 832(a)(l) (West, Westlaw through Pub. L. No. 116-91).

190. *See* Michael Waddington, *Court Martial: Process and Procedure*, 246 N.J. LAW 16, 19 (2007); Mark Thompson, *Military Sexual Assault Victims Discharged After Filing Complaints*, TIME (May 18, 2016), http://time.com/4340321/sexual-assault-military-discharge-women/ (describing a woman who felt her complaints were not taken seriously and that the process was hard to navigate).

191. 10 U.S.C.A. § 832(a)(l) (West, Westlaw through Pub. L. No. 116-91).

192. Waddington, *supra* note 190, at 19.

193. *See id*. (explaining that the primary purpose of Article 32 hearings is to weed out unsubstantiated claims).

194. *Id*.

195. *Id*.

196. *Id*.

197. Mathew B. Tully, *Changes to Sexual Assault Investigations*, MIL. TIMES, (Apr. 20, 2015), http://www.militarytimes.com/story/military/crime/2015/04/20/sexual-assault-investigations-changes/259219/.

198. Rebecca Kheel, *Gillibrand Reintroduces Proposal to Confront Military Sexual Assault*, THE HILL (June 13, 2019), https://thehill.com/policy/defense/448402-gillibrand-reintroduces-proposal-to-confront-military-sexual-assault.

199. Military Justice Improvement Act, S. 1789, 116th Cong. (2019).

200. Kheel, *supra* note 198.

In December 2014, Congress passed the Fiscal Year 2015 National Defense Authorization Act (NDAA), which included changes to Article 32 hearings.[201] Instead of pretrial investigations, the NDAA provides for preliminary hearings that are limited to: (1) determining whether there is probable cause to believe an offense has been committed and the accused committed the offense; (2) determining whether the convening authority has court-martial jurisdiction over the offense of the accused; (3) considering the form of charges; and (4) recommending the disposition that should be made of the case.[202] The 2020 NDAA includes provisions for combatting sexual assault including new rules for training and survivor support.[203] The NDAA as passed also mandates development of a military-wide database system to track and share information on criminal cases.[204] The bill also makes sexual harassment a standalone criminal offense.[205]

United States v. Mangahas imposed a five-year statute of limitations on the military's ability to prosecute rapes that occurred between the fall of 1986 and the fall of 2006.[206] Historically, under military law, any crime must be prosecuted within five years.[207] In 1986, Congress exempted any crime that was punishable by death from that statute of limitations, a change which included rape.[208] In 2006, Congress clarified the legislation to say that rape could be prosecuted "at any time without limitation."[209] The events giving rise to *Mangahas* occurred in 1997, when rape was implicitly included in the statute of limitations exemption.[210] The court found that the death penalty was unconstitutional for cases of rape and that therefore the pre-1986 five-year statute of limitations should apply to cases between 1986 and 2006 (before Congress clarified the law).[211] In response to this ruling, Harmony's Law, H.R. 2388, was introduced and would allow the Office of General Counsel of the House of Representatives to file an

201. Carl Levin and Howard P. "Buck" McKean National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014).

202. Zachary Spilman, *2013 Changes to the UCMJ—Part 4: Article 32*, NAT'L INST. OF MILITARY JUSTICE CAAFLOG (Jan. 9, 2014), http://www.caaflog.com/2014/01/09/2013-changes-to-the-ucmj-part-4-article-32/#more-25429.

203. Ellen Mitchell, *Senate Defense Bill Would Make Military Sexual Harassment Standalone Crime*, THE HILL (May 23, 2019, 3:01 PM), https://thehill.com/homenews/senate/445276-senate-defense-bill-would-make-military-sexual-harassment-stand-alone-crime.

204. *Id.*

205. *Id.*

206. United States v. Mangahas, 77 M.J. 220 (C.A.A.F. 2018); Dan Lamothe, *New Court Ruling Jeopardizes Military's Ability To Pursue Old Rape Cases*, WASH. POST (Feb. 24, 2018, 8:00 AM), https://www.washingtonpost.com/news/checkpoint/wp/2018/02/24/new-court-ruling-jeopardizes-militarys-ability-to-pursue-old-rape-cases/.

207. *Id.*

208. *Id.*

209. 10 U.S.C. § 843 (West, Westlaw through P.L. 116-91).

210. Lamothe, *supra* note 206.

211. *Mangahas*, 77 M.J. *at* 224–25.

amicus brief in any case in which *U.S. v. Mangahas* is invoked in a defendant's appeal.[212] It does not remove the statute of limitations.[213]

c. Native Americans. Since the Supreme Court ruled in 1978 that tribal courts lacked criminal jurisdiction over non-Native Americans, tribes have struggled to hold non-Native Americans accountable for sexual assault against Native Americans.[214] This is important as the vast majority of sexual violence against Native Americans are perpetrated by non-Native persons.[215] The Violence Against Women Act (VAWA) Reauthorization Act of 2013 addressed this jurisdictional issue by allowing Native American women who are assaulted on reservations by non-Native Americans to remove their case to tribal courts through "Special Domestic Violence Criminal Jurisdiction" (SDVCJ).[216] Under SDVCJ, a non-Native American defendant maintains his or her right to a jury trial from the community and has the same protections as a state or federal court, such as the right to a public defender, licensed judge, and proceedings under rules of criminal procedures.[217] The defendant can petition a federal court for review of the judgment.[218] This law went into effect on March 7, 2015.[219]

Prior to general enactment, five tribes—the Confederated Tribes of the Umatilla Indian Reservation in Oregon, the Pascua Yaqui Tribe in Arizona, the Tulalip Tribes of Washington, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana, and the Sisseton Wahpeton Oyate of the Lake Traverse reservation in North and South Dakota—were granted accelerated approval by the U.S. Department of Justice to exercise SDVCJ through a voluntary "Pilot Project."[220] The Pilot Project participants joined with forty other tribes to

212. H.R. 2388, 116th Cong. (2019).

213. *Id.*

214. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); *see also* Felicia Fonseca, *Violence Against Women Act: Tribes Have New Authority Over Non-Natives*, CHRISTIAN SCI. MONITOR (Feb. 7, 2014), https://www.csmonitor.com/USA/Latest-News-Wires/2014/0207/Violence-Against-Women-Act-Tribes-have-new-authority-over-non-natives.

215. Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 901(a)(3) (2019). Ninety-six percent of female and eighty-nine percent of male survivors report being victimized by a non-Native American perpetrator. *Id.*

216. Fonseca, *supra* note 214; Violence Against Women Reauthorization Act of 2013, H.R. 11, 113th Cong. § 904(a)(6) (2013).

217. NAT'L CONG. OF AM. INDIANS, CONSIDERATIONS IN IMPLEMENTING VAWA'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION AND TLOA'S ENHANCED SENTENCING AUTHORITY: A LOOK AT THE EXPERIENCE OF THE PASCUA YAQUI TRIBE 12, 16, 52 (2014), https://connect.appa-net.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f172aa06-1ace-afaf-938b-2847728d0526&forceDialog=0.

218. *Id.* at 16.

219. Lauren Kelly, *The Human Rights Impacts of VAWA 2013: A True Victory for Native American Women?*, 11 DISCUSSIONS 29 (2015), http://humanrights.fhi.duke.edu/wp-content/uploads/2014/05/Kelly-The-Human-Rights-Impacts-of-VAWA-2013.pdf.

220. NAT'L CONG. OF AM. INDIANS, SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT 4 (2015), *available at* http://www.ncai.org/attachments/NewsArticle_VutTUSYSfGPRpZQRYzWcuLekuVNeeTAOBBwGyvkWYwPRUJOioqI_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf [hereinafter NAT'L CONG. OF AM. INDIANS PILOT REPORT]; Jennifer Bendery, *At Last,*

develop best practices for implementing SDVCJ.[221] In order to be applicable for SDVCJ, a tribe must comply with VAWA's particular requirements, including amending tribal law to meet proposed codes and procedures, hiring new judges, and diverting funds for public defenders.[222] These requirements force many institutional changes that a tribe may not have the resources to execute as tribal law enforcement is often under-funded compared to their non-tribal counterparts.[223] Additionally, SDVCJ only applies to cases of domestic violence between Native Americans and non-Native Americans who are married or in an intimate relationship and excludes crimes between strangers.[224]

The 2019 VAWA Reauthorization Act (H.R. 1585)[225] expanded tribal jurisdiction to sexual violence, sex trafficking, stalking, child abuse, and violence against tribal law enforcement attempting to enforce these provisions.[226] Additionally, H.R. 1585 included provisions for facilitating communication and coordination between federal, state, and local law enforcement to address missing and murdered Native American women.[227] As of September 2019, the Senate had declined to vote on the 2019 VAWA Reauthorization leaving these additional protections unimplemented.[228]

In 2016, Congress passed a sexual assault survivor "bill of rights" requiring that survivors be informed of their rights and the progress of their rape kits.[229] The law affects cases on a federal level that involve maritime law, interstate issues, sex crimes in the military or in prisons and also covers tribal nations—allowing for members of tribes to access these certain rights.[230]

d. Campus Sexual Violence. A 2014 report by the White House Task Force to Protect Students from Sexual Assault documented that one in five female college students will experience sexual assault during her college career.[231] The same

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Violence Against Women Act Lets Tribes Prosecute Non-Native Domestic Abusers, HUFFPOST (Mar. 6, 2015, 5:52 PM), https://www.huffpost.com/entry/vawa-native-americans_n_6819526.

221. NAT'L CONG. OF AM. INDIANS PILOT REPORT, *supra* note 220, at 2 (detailing stories of defendants being charged with domestic violence assault or threatening and showing only one case of rape in the case studies examined).

222. Kelly, *supra* note 219, at 18–19.

223. *Id.* at 18.

224. *Id.* at 12.

225. Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Congress (2019).

226. Lacina Tangnaqudo Onco, *Victory: The Violence Against Women Act Passes House with Tribal Provisions*, FRIENDS COMMITTEE ON NATIONAL LEGISLATION (Apr. 4, 2019), https://www.fcnl.org/updates/victory-the-violence-against-women-act-passes-house-with-tribal-provisions-2036.

227. *Id.*

228. Press Release, Comm. on Indian Aff., On Violence Against Women Act Anniversary, Udall Calls for Senate Vote on VAWA with Tribal Provisions, Public Safety Bills (Sept. 13, 2019), https://www.indian.senate.gov/news/press-release/violence-against-women-act-anniversary-udall-calls-senate-vote-vawa-tribal.

229. Survivors' Bill of Rights Act, *supra* note 81.

230. *Id.*

231. WHITE HOUSE TASK FORCE, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 5 (2014), *available at* https://www.justice.gov/

study found six percent of college males were survivors of either attempted or completed sexual assault.[232] Most sexual assaults on college campuses are never reported, even though seventy-five to eighty percent of female survivors know the person who committed the assault.[233] Many survivors choose not to report because they believe the incident was a personal matter (twenty-six percent of students) or feared a reprisal (twenty percent of students).[234] The aftermath of sexual abuse impacts the survivor's ability to cope with academic, social, and personal responsibilities.[235] Some survivors are forced to encounter their assailant on a daily basis, including in classrooms and libraries, which can aggravate existing trauma.[236] Research shows that sexual assault survivors are about six times more likely than the general population to develop PTSD, three times more likely to experience a major depressive episode, twenty-six times more likely to abuse drugs, and thirteen times more likely to abuse alcohol.[237]

i. Government Response. Activism addressing sexual assault on college campuses exploded when Angie Epifano, a former student at Amherst College in Massachusetts, wrote an article reporting what she perceived to be poor treatment from Amherst following the report of her sexual assault.[238] Angie was raped by

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archives/ovw/page/file/905942/download [hereinafter NOT ALONE REPORT]. When the report was released, there was some uproar regarding the accuracy of the statistic of one in five women being assaulted. Morgan Baskin, *Controversial 1-in-5 Sexual Assault Statistic Validated in New National Survey*, USA TODAY, (Sept. 21, 2015), https://www.usatoday.com/story/college/2015/09/21/controversial-1-in-5-sexual-assault-statistic-validated-in-new-national-survey/37406649/. The statistic was later validated by a separate report on sexual assault on campus, but some critics still say that the definition of "sexual assault" used by surveys like this from the White House Task Force are overinclusive by including both "stalking" and "nonconsensual penetration" in the same umbrella of "sexual assault." *Id.*

232. NOT ALONE REPORT, *supra*, note 231, at 5. In a report by the American Association of Universities (AAU), rates of sexual assault and misconduct were highest among undergraduate females and those identifying as transgender, genderqueer, non-conforming, questioning, and as something not listed on the survey. *See also* DAVID CANTOR ET AL., REPORT ON THE AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, WESTAT (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

233. NOT ALONE REPORT, *supra* note 231, at 6–7; *See* CANTOR ET AL., *supra* note 232, at 34 (noting that people most often know their offender as an acquaintance); RAINN, PERPETRATORS OF SEXUAL VIOLENCE: STATISTICS, https://www.rainn.org/statistics/perpetrators-sexual-violence (last visited Jan. 14, 2020).

234. LYNN LANGTON & SOFI SINOZICH, RAPE AND SEXUAL ASSAULT AMONG COLLEGE-AGE FEMALES, 1995–2013, BUREAU OF JUSTICE STATISTICS, https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

235. *The Realities of Sexual Assault on Campus*, BESTCOLLEGES.COM, http://www.bestcolleges.com/resources/preventing-sexual-assault/ (last visited Oct. 9, 2019).

236. Andrea Pino, *The Second Rape: Battling PTSD and Betrayal*, HUFFPOST (Jan. 23, 2013), https://www.huffpost.com/entry/the-second-rape_b_3655062.

237. Dean Kilpatrick, *The Mental Health Impact of Rape*, NAT'L VIOLENCE AGAINST WOMEN PREVENTION RES. CTR. MED. UNIV. S.C., https://mainweb-v.musc.edu/vawprevention/research/mentalimpact.shtml (last visited Oct. 9, 2019).

238. Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012, 12:07 AM), http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college; Rosemary Kelly & Shaina Mishkin, *Angie Epifano Profile: How One Former Amherst Student Sparked A Movement Against Sexual Assault*, HUFFPOST, (June 2, 2013), http://www. https://www.huffpost.com/entry/angie-epifano-profile_n_3353941. *See generally* THE HUNTING GROUND (The

someone she knew while her neighbors were next door unaware of what was occurring one room over. It was not until after meeting with a school counselor, attempting suicide, and a stay in the psychiatric ward, that she finally discussed her rape.[239] Angie reported her assault to a school counselor who informed her that she was unable to switch dorms and encouraged her to report it for statistical reasons, even though no disciplinary action would be taken.[240] Angie's story shows that university students can report to their schools in lieu of or in addition to reporting to the police, but the schools' responses can be unsatisfactory.[241] Some of the schools named by students as mishandling such cases included Amherst College, the University of North Carolina, Wesleyan University, Yale University, Swarthmore College, and Occidental College.[242]

Through legislation, the federal government has attempted to increase standards of campus response, disciplinary proceedings, and prevention education; Title IX of the Education Amendments of 1972 states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[243] The Department of Education's guidance documents and the Supreme Court's decisions broadened Title IX's scope to cover sexual harassment and sexual violence.[244] The guidelines require schools receiving federal financial assistance to take the necessary steps to prevent sexual assault on their campuses and to respond promptly and effectively when an assault is reported.[245] The Department of Education stated in their 2011 "Dear Colleague" letter that sexual assault is a form of sex discrimination, and colleges that do not handle sexual assault complaints properly may be in violation of Title IX.[246]

Weinstein Company ed., 2015) (depicting the stories of students who allege they were sexually assaulted on their college campuses); JON KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN (2015) (detailing the 350 sexual assaults investigated by the Department of Justice which were reported to, and poorly handled by, the Missoula police).

239. Epifano, *supra* note 238.

240. *Id*.

241. Kelly & Mishkin, *supra* note 238.

242. Richard Perez-Pena & Ian Lovett, *2 More Colleges Accused of Mishandling Assaults*, N.Y. TIMES (Apr. 18, 2013), https://www.nytimes.com/2013/04/19/education/swarthmore-and-occidental-colleges-are-accused-of-mishandling-sexual-assault-cases.html; *see also* Andrea Pino, *Rape, Betrayal, and Reclaiming Title IX*, HUFFPOST (Apr. 29, 2013).

243. 20 U.S.C.A. § 1681(a) (West, Westlaw through P.L. 115-22).

244. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that student-on-student sexual harassment could violate a student's right to an equal education, although the school must first meet a high "deliberate indifference" standard); Alexander v. Yale Univ., 631 F.2d 178, 182, 185 (2d Cir. 1980) (holding student who alleged sexual harassment by faculty member violated her rights under Title IX and could sue Yale University); LETTER FROM RUSSLYNN ALI, ASST. SEC. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, TO COLLEAGUE (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter DEP'T OF EDUC. Letter 2011].

245. DEP'T OF EDUC. Letter 2011, *supra* note 244.

246. *Id.; see also*. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (2016 Ed.), *available at* http://www2.ed.gov/admins/lead/safety/handbook.pdf (offering information on

Angie's story, and the many others that followed,[247] indicate that schools often inadequately address claims of sexual assault made by their students. However, in 2018 Secretary Betsy DeVos proposed new standards by which sexual assault would be handled on college campuses, reversing a number of Obama-era sexual misconduct policies.[248] Secretary DeVos characterized the rules as balancing the rights of both victims and the accused, letting attorneys cross-examine accusers and changing what constitutes sexual harassment in the first place.[249] These rules condemn those who commit sexual violence, all the while "ensuring a fair grievance process."[250] The new standards would consider fewer allegations of sexual harassment and would enable colleges and universities ro only initiate investigations for properly reported allegations.[251] In response, proponents suggest that the presumption of innocence allows for both parties to see all of the evidence presented and make trials more fair, so that if a school is biased against one party they are at risk of being found discriminating on the basis of sex.[252]

In response to the growing concern of violence on college campuses and the rape and murder of a Lehigh University student by another student, Congress passed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).[253] This law requires all colleges and universities that receive federal funding to share information about crime on campus as well as the school's efforts to improve campus safety.[254] Schools comply by reporting annual statistics on crimes on their campuses and developing prevention programs.[255] However, recent studies indicate the numbers of sexual assault reports that universities receive are misrepresented in the data the schools provide to the

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how institutions can comply with the changes the Violence Against Women Reauthorization Act of 2013 made to the Clery Act).

247. *See* Richard Perez-Pena, *College Groups Connect to Fight Sexual Assault*, N.Y. TIMES (Mar. 19, 2013), https://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html; Emanuella Grinberg, *Ending Rape on Campus: Activism Takes Several Forms*, CNN (Feb. 12, 2014, 11:35 AM), https://www.cnn.com/2014/02/09/living/campus-sexual-violence-students-schools/index.html (detailing students' accounts of reporting their assaults on campus); *see also* Jennifer Ludden, *Student Activists Keep Pressure On Campus Sexual Assault*, NPR (Aug. 26, 2014, 4:59 AM), http://www.npr.org/2014/08/26/343352075/student-activists-keep-sexual-assault-issues-in-the-spotlight.

248. Laura Meckler, *Betsy DeVos Releases Sexual Assault Rules She Hails as Balancing Rights of Victims, Accused*, WASH. POST (Nov. 16, 2018), https://www.washingtonpost.com/local/education/betsy-devos-releases-sexual-assault-rules-she-hails-as-balancing-rights-of-victims-accused/2018/11/16/4aa136d4-e962-11e8-a939-9469f1166f9d_story.html.

249. *Id.*

250. *Id.*

251. *Id.*

252. Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, THE NEW YORKER (Feb. 1, 2019), https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault.

253. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 101-542, Title II, § 204(a), 104 Stat. 2385 (codified at 20 USCA § 1092(f)(18) (2012)).

254. *Id.*

255. THE CLERY CTR., http://clerycenter.org/ (last visited Oct. 9, 2019).

government.[256] This is compounded by the general underreporting of rape on college campuses.[257] One example is the disparity between Ohio State University's 2014 data of twenty-two reported rapes and the actual number of students who claim to have reported rape: 271.[258] These disparities may be caused in part by the school's failure to recognize rapes involving their students that occurred in off-campus residences, or that their numbers do not include confidential reports made by students to university counselors.[259] Regardless of the cause, the undercounting of these reports only increases the schools' failures to recognize the gravity of the issue and address the claims of individual survivors.[260]

The Clery Act was amended in 2013 by the Campus Sexual Violence Elimination Act (SaVE), enacted as part of the Violence Against Women Act (VAWA) Reauthorization.[261] SaVE aims to reduce the prevalence of sexual violence on college campuses by improving transparency, accountability, education, and collaboration.[262] SaVE requires incidents of domestic violence, dating violence, sexual assault, and stalking to be disclosed annually in campus crime statistics reports.[263] Additionally, the Act clarifies minimum standards for institutional disciplinary procedures, ensuring that survivors receive a prompt, fair, and impartial investigation and resolution.[264] Colleges and universities are required to provide programming for students, faculty, and staff on the prevention of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking.[265] The Campus Accountability and Safety Act (CASA) was introduced in 2015 to protect students, increase accountability, and expand transparency at colleges and universities.[266] CASA would allow the Department of Education to impose a civil penalty on schools violating or failing to carry out Title IX requirements regarding sexual violence.[267] Advocates for this tool argue that it would be more effective than OCR's current abilities to remove federal funds from a school.[268] CASA would also require schools to designate one or more confidential advisors to whom survivors can report and provide a training

256. Madison Pauly, *Here's What's Missing From the Stats on Campus Rape*, MOTHER JONES, (Oct. 8, 2015), http://www.motherjones.com/politics/2015/10/campus-crime-statistics-undercount-sexual-assaults.

257. *See supra* Part I.B.

258. Pauly, *supra* note 256.

259. *Id.*

260. *Id.*

261. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Stat. 127.

262. *See Summary of the Jeanne Cleary Act*, CLERY CTR., https://clerycenter.org/policy-resources/the-clery-act/ (last visited Jan. 6, 2020).

263. *Id.*

264. *Id.*

265. *Id.*

266. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015).

267. *Id.*

268. *See e.g.* Anna Merod, *Sexual Assault Survivors Now Have a Basic Federal Bill of Rights*, MSNBC (May 24, 2016, 7:07 PM), http://www.msnbc.com/msnbc/sexual-assault-survivors-now-have-basic-federal-bill-rights.

program for school employees involved in implementing the student grievance procedures.[269] CASA repeatedly failed to pass Congress but was reintroduced in 2019.[270]

ii. Campus Response and Reform. A school may trigger disciplinary proceedings under Title IX and the U.S. Department of Education Handbook on reporting sexual assault when a student is sexually assaulted and reports the assault to the school.[271] Media attention has focused on the inadequacies of disciplinary boards in ensuring protection and justice for survivors.[272] College disciplinary boards are largely independent from the criminal justice system and often have their own procedural and substantive rules.[273] Colleges do not have to report certain violations to the police and have been criticized for imposing light sanctions for sexual assault and other violent crimes.[274] However, while members of college disciplinary boards may lack legal training and the boards themselves may lack procedural safeguards of the criminal justice system, colleges are in a unique position to address immediate concerns of the survivor, including moving either party to different housing, allowing a complainant to drop or change classes without penalty, prohibiting the accused from contacting the complainant, and other measures that may greatly impact the survivor's day-to-day life.[275] For some survivors, reporting to a college or university may be the only option, and the education system can address these situations by working as an advocate for the survivor in ways that the criminal justice system cannot.[276]

Opponents to campus sexual assault reform argue that campus procedures violate the due process rights of the accused.[277] By not having survivors face their accuser, opponents argue that there is a violation of the Confrontation Clause.[278] However, this feature is not unprecedented. Scholar Michelle Anderson argues that college procedures for sexual assault cases are similar to allegations of

269. DEP'T OF EDUC. LETTER 2011, *supra* note 244, at 8.

270. *See* Julia Dallas, *Act for Sexual Violence Prevention on College Campuses Reintroduced to U.S. Congress*, DAILY AT THE UNIV. OF WA. (May 29, 2019), http://www.dailyuw.com/news/article_b3e6d914-81b5-11e9-84ac-3f5fb02268fd.html.

271. *See* Erica Coray, Note, *Victim Protection or Revictimization: Should College Disciplinary Boards Handle Sexual Assault Claims?*, 3 B.C. J.L. & SOC. JUST. 59, 64 (2016).

272. *See* Eliza Gray, *This Is the New Frontier in the Fight Against Campus Rape*, TIME (June 5, 2015), https://time.com/3910602/campus-rape-sexual-assault-california-law/.

273. *Id*.

274. Collin Binkley et al., *College Disciplinary Boards Impose Slight Penalties for Serious Crimes*, COLUMBUS DISPATCH (Nov. 23, 2014), https://www.dispatch.com/article/20141123/news/311239845.

275. Coray, *supra* note 271, at 79–80.

276. *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/ (last visited Oct. 9, 2019).

277. *See* Cory J. Schoonmaker, Note, *An "F" In Due Process: How Colleges Fail When Handling Sexual Assault*, 66 SYRACUSE L. REV. 213, 215 (2016); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 53 (2013).

278. *See id*.

campus cheating, hazing, or arson.[279] Therefore, Anderson argues, if opponents take issue with how sexual assault cases are handled on campus, they must also advocate for increased due process rights for all accused students of various crimes.[280] Anderson advises campuses to consider protecting the Fifth Amendment rights of accused students who are subject to campus disciplinary proceedings and may be prosecuted afterward for criminal actions.[281]

Further, the preponderance of the evidence standard required by OCR troubles opponents, who would prefer campuses to adopt higher standards of proof.[282] Advocates argue that Title IX requires colleges to address sexual assault as a civil rights matter, and OCR legally justifies requiring schools to use a civil standard instead.[283]

A survivor has two additional options when schools do not adequately address their claim: (1) the survivor can file a complaint with the Department of Education Office of Civil Rights (OCR), or (2) the survivor can file a case in court against the educational institution itself.[284] Both routes come with their own attendant difficulties. OCR complaints have a lower burden of proof (preponderance of the evidence) than complaints filed in court, making it less burdensome on the survivor to initially bring their case.[285] However, OCR's enforcement rate is very low, and the process is often very lengthy.[286] There were twenty-four complaints about colleges mishandling sexual assault cases between 1998 and 2008.[287] Of those, OCR found that only five colleges violated Title IX, and OCR did not punish any of those schools.[288] During the 2013-2014 fiscal year, OCR received 854 complaints regarding sexual or gender harassment and sexual violence.[289] During this same period, OCR completed ninety Title IX investigations related to sexual violence, including K-12 and higher education institutions.[290] Nine percent of all complaints received by OCR during this fiscal year were related to sexual violence.[291] As of June 2016, there were 246 ongoing

279. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1985 (2016).

280. *Id*. at 1986.

281. *Id*. at 1989.

282. Schoonmaker, *supra* note 277, at 215.

283. Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 B.Y.U. EDUC. & C.J. 143,149 (2013).

284. *See Title IX*, END RAPE ON CAMPUS, http://endrapeoncampus.org/title-ix/ (last visited Feb. 1, 2020).

285. *See* DEP'T OF ED LETTER 2011, *supra* note 244, at 10.

286. Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases: Feeble Watchdog Leaves Students at Risk, Critics Say*, CTR. FOR PUB. INTEGRITY (last updated Mar. 26, 2015, 4:42 PM), http://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0.

287. *Id*.

288. *Id*.

289. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, PROTECTING RIGHTS, ADVANCING EQUITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 28, 31 (Apr. 2015), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf.

290. *Id*. at 29.

291. *Id*.

investigations by OCR into the management of sexual assault reports of 195 colleges and universities.[292]

OCR's target time frame for completing investigations is 180 days; however, in 2014, completion for an individual investigation took an average of 1,469 days—more than four years.[293] As of 2015, the estimated average was 940 days—just about two and half years.[294] Student activists created a website titled "Know Your IX," encouraging students to report their schools.[295] More students across universities and colleges are coming forward with reports of sexual assault, which, according to advocates, is a positive trend that highlights the work still left to be done and brings issues to the forefront that in the past may have not been reported.[296]

In 2018, the first ever class action lawsuit was introduced against Michigan State University with the potential to reverse the outcome of many future cases.[297] The case involves a man accused of sexually assaulting a woman who had previously denied his advances.[298] If successful, the class action could affect hundreds of survivors and make the system more fair and equitable.[299] As stated above, Secretary DeVos's standards would allow the accused to face their accuser in court and directly question them.[300] This is acting off of a decision made in the Sixth Circuit, determining that an accused person has the right to face their accuser in court.[301] DeVos proposed revoking popular rules that advocates said protected victims in the Obama Administration, allowing the new ones to apply retroactively.[302]

iii. The Legal System's Response. Survivors bringing cases against their college or university must prove that: (1) their college or university is a Title IX funding recipient; (2) an appropriate person knew about the sexual assault; (3) that person was deliberately indifferent to the discrimination; and (4) the discrimination was so severe, pervasive and objectively offensive that it effectively

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292. Tyler Kingkade, *There Are Far More Title IX Investigations Of Colleges Than Most People Know*, HUFFPOST (June 16, 2016, 4:49 PM), https://www.huffpost.com/entry/title-ix-investigations-sexual-harassment_n_575f4b0ee4b053d433061b3d.

293. Jake New, *Justice Delayed*, INSIDE HIGHER ED (May 6, 2015), https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lasted-more-4-years.

294. *Id.*

295. *Learn About Know Your IX*, KNOW YOUR IX, https://www.knowyourix.org/about/ (last visited Jan. 6, 2020).

296. Nick Anderson, *These Colleges Have the Most Reports of Rape*, WASH. POST (June 7, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/06/07/these-colleges-have-the-most-reports-of-rape/.

297. Jeremy Bauer-Wolf, *Suit Seeks to Protect Students Accused of Sexual Assault*, INSIDE HIGHER ED (July 23, 2019), https://www.insidehighered.com/news/2019/07/23/lawyer-attempts-first-ever-class-action-lawsuit-college-students-accused-sexual.

298. *Id.*

299. *Id.*

300. Meckler, *supra* note 248.

301. Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018).

302. Meckler, *supra* note 248.

barred access to an educational opportunity or benefit.[303] Critics of the "deliberate indifference" standard argue that it focuses too much on what the school actually knew rather than focusing on whether an unequal educational environment existed.[304] Of the few cases that met these standards, one case involves a student raped by a student-athlete whom the school knew had engaged in sexual misconduct in the past.[305] Even after the school administration found out about the rape, it delayed expelling the perpetrator until months later.[306] In another case, a football coach was found to be deliberately indifferent when he allowed his student-athletes to participate in an unsupervised host program for visiting high school students, despite learning that the same student-athletes had committed a sexual assault during recruiting week.[307] Most other cases have not been successful.[308]

One crucial development with positive implications for survivors is the application of Title IX to study abroad programs. In *King v. Board of Control*, the

303. Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1293 (11th Cir. 2007); *see also* Doe v. Univ. of Ala. in Huntsville, 177 F. Supp. 3d 1380, 1393 (N.D. Ala. 2016) (adding fifth requirement that plaintiff prove that discrimination effectively barred her access to education, opportunity, or benefit); Kinsman v. Florida State Univ. Bd. of Trustees, No. 4:15CV235-MW/CAS, 2015 WL 11110848, at *4, 2015 U.S. Dist. LEXIS 180599, at *2-4 (N.D. Fla. Aug. 12, 2015) (following four steps from *Williams* and denying FSU's motion to dismiss because the school's failure to offer any safety precautions and senior athletics officials' failure to investigate alleged rape by student in their charge may have constituted deliberate indifference).

304. Catherine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2090–91 (2016).

305. *Williams*, 477 F.3d at 1299.

306. *Id.*

307. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007); *see also* Doe v. Sch. Bd. of Broward Cty., 604 F.3d 1248, 1260 (11th Cir. 2010) (reversing summary judgment because fact issues existed concerning high school's deliberate indifference when students had reported two prior sexual misconduct incidents with teacher who sexually harassed Doe); Doe v. Univ. of Ala. in Huntsville, 177 F. Supp. 3d at 1393–94 (holding that student alleged deliberate indifference when university police discouraged her from pursuing criminal prosecution, disciplinary board recommended that student-athlete be expelled, university did not inform victim that student-athlete had appealed his expulsion, and assistant provost's decision to impose lesser sanctions on appeal was motivated by his support for the university hockey team); Rex v. W. Va. Sch. of Osteopathic Med., 119 F. Supp. 3d 542, 551 (S.D. W. Va. 2015) (holding that plaintiff had Title IX claim when medical school had no procedures in place at the time of her rape, leaving her to seek out support from unprepared WVSOM officials); McGrath v. Dominican Coll. of Blauvelt, N.Y., 672 F. Supp. 2d 477, 488 (S.D.N.Y. 2009) (holding mother of student successfully stated a Title IX violation after school refused to engage in dialogue with student after she was raped or take any steps to make her feel safe); S.S. v. Alexander, 177 P.3d 724, 740 (Wash. Ct. App. 2008) (finding student had raised a jury question of deliberate indifference where school did not discipline her rapist and offered only repeated mediation as an alternative remedial measure).

308. *See, e.g.*, Doe v. Univ. of the Pac., 467 F. App'x 685, 688 (9th Cir. 2012) (holding that a school was not deliberately indifferent when they did not investigate a prior rape involving the same assailants because the victim did not want to proceed and expelled one of victim's assailants and suspended the other two); Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1348 (M.D. Ga. 2007) (finding that school was not liable under Title IX because they did not have actual knowledge that a male student would rape female student); J.B. v. Lawson State Cmty. Coll., 29 So.3d 164, 174–75 (Ala. 2009) (holding that the school was not deliberately indifferent for not investigating a close relationship between a coach and student before the coach raped the student).

court found that Title IX should be applied extraterritorially.[309] In this case, several female students were sexually harassed while participating in a university's study abroad program.[310] As the sexual harassment occurred while the students were abroad, the supervisors were apathetic to the harassment or engaged in the harassment themselves, and the students were forced to leave the program early to avoid further harassment.[311] The university argued that Title IX did not apply because of the presumption against extraterritorial application of law.[312] However, the court stated, "equality of opportunity in study abroad programs, unquestionably mandated by Title IX, requires extraterritorial application of Title IX."[313]

Even when action is taken by campus disciplinary boards, such as expulsion and notification to state authorities, survivors may not find justice in the legal system due to the trauma they endure throughout the process.[314] For example, in the Vanderbilt University football case, two former football players were found guilty by a jury of aggravated rape, attempted aggravated rape, and aggravated sexual battery charges after raping an unconscious student and documenting it on their cellphones.[315] The case took two years, with the survivor attending each day of the trial and testifying.[316] The prosecutor retried the case, and the two former football players were again found guilty; one of the players was sentenced to seventeen years in prison with no possibility of parole,[317] and another was sentenced to fifteen years of imprisonment, the minimum sentence for rape.[318] Overall, the survivor had to endure three trials over nearly three years, with a large amount of media scrutiny.[319] Survivor advocates fear that the mistrial might have the effect of discouraging other survivors from coming forward with their own claims.[320]

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309. King v. Bd. of Control, 221 F. Supp. 2d 783, 791 (E.D. Mich. 2002).

310. *Id*. at 784.

311. *Id*. at 784–85.

312. *Id*. at 786.

313. *Id*. at 791.

314. *See, e.g*., Jason Molinet, *Juror 'Misconduct' Forces Mistrial in Case of Disgraced Vanderbilt Football Players Convicted of Rape: Judge*, N.Y. DAILY NEWS (June 23, 2015, 10:37 PM), https://www.nydailynews.com/news/crime/mistrial-declared-vanderbilt-football-rape-case-judge-article-1.2268793.

315. *Id*.

316. Stacey Barchenger, *Judge Grants Mistrial in Vanderbilt Rape Case*, TENNESSEAN (June 24, 2015, 10:14 AM), https://www.tennessean.com/story/news/crime/2015/06/23/judge-rules-vanderbilt-rape-mistrial/29135323/.

317. Alex Medeiros, *Former Vanderbilt Football Player Gets 17 Years in Rape Case*, CNN (Nov. 5, 2016), http://www.cnn.com/2016/11/05/us/vanderbilt-rape-case/.

318. Stacey Barchenger, *Batey Sentenced to 15 Years in Vandy Rape Case*, TENNESSEAN (July 14, 2016, 5:56 PM), https://www.tennessean.com/story/news/2016/07/14/cory-batey-faces-least-15-years-friday-sentencing/86953944/; *Former Vanderbilt Football Player Again Convicted of Rape*, CHI. TRIB. (June 19, 2016, 12:05 AM), https://www.chicagotribune.com/nation-world/ct-vanderbilt-football-player-convicted-rape-20160618-story.html.

319. Emily Crockett, *After 3 Years and 3 Trials, Another Ex-Vanderbilt Football Player Convicted in Gang Rape*, VOX (June 20, 2016, 2:20 PM), https://www.vox.com/2016/6/20/11978010/vanderbilt-rape-brandon-vandenburg-convicted-again.

320. Barchenger, *supra* note 316.

As public awareness of campus sexual violence increases, pressure is being applied on colleges and universities, as well as the government, to address prevention and response measures. The measures focus on educating students, staff, and faculty members to recognize acts of sexual violence, providing adequate support mechanisms for survivors, and increasing transparency within the system as a whole.[321]

iv. Affirmative Consent Issues. Across state statutes, the idea of consent has been either ill-defined or not defined at all.[322] Seven states clearly define "consent," and fourteen states detail the requirements of acting without consent of the victim.[323] This has resulted in recent state efforts to implement the concept of "affirmative consent" into law through educational codes.[324] In California, for post-secondary institutions to receive state funds for student financial assistance, they must adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking that applies both on and off campus.[325] This new policy includes an affirmative consent standard to determine whether both parties gave consent to sexual activity, and neither lack of protest or resistance, nor silence, constitutes consent.[326] The California statute states that consent can be revoked at any time and a past sexual or dating relationship between the two parties should not be a dispositive indicator of consent.[327] The statute provides a list of scenarios that do not meet the affirmative consent standard, including: the victim being asleep, intoxicated, or unable to communicate because of a mental or physical condition.[328]

In New York, every educational institution must now include a definition of affirmative consent as part of its code of conduct.[329] Here, consent is defined as "a

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321. *See What Should My School Be Doing?*, KNOW YOUR IX, http://www.knowyourix.org/campus-action/ what-should-my-school-be-doing/ (last visited Jan. 7, 2020).

322. *See* David DeMatteo et al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL'Y & L. 227, 227 (2015); Beatrice Diehl, Note, *Affirmative Consent in Sexual Assault: Prosecutors' Duty*, 28 GEO. J. LEGAL ETHICS 503, 503–05 (2015).

323. DeMatteo et al., *supra* note 322, at 232; *see also* 10 U.S.C.A. § 920(g)(7) (West, Westlaw through P.L. 116-91) ("freely given agreement"); CO. REV. STAT. ANN. § 18-3-401 (West, Westlaw through laws effective July 1, 2019) ("cooperation in act or attitude"); D.C. CODE ANN. § 22-3001 (West, Westlaw through Nov. 26, 2019) ("freely given agreement"); FLA. STAT. ANN. § 794.011 (West, Westlaw through the 2019 1st Reg. Sess. of the 26th Leg. in effect through Mar. 13, 2017) ("intelligent, knowing, and voluntary"); MINN. STAT. ANN. § 609.341 (West, Westlaw through Jan. 1, 2020 of the 2019 Reg. Sess.) ("freely given present agreement"); VT. STAT. ANN. tit. 13, § 3251 (West, Westlaw through Law Acts of the Reg. Sess. of the 2019-20 Vt. Gen. Assembly) ("voluntary agreement"); State v. Adams, 880 P.2d 226, 234 (Haw. Ct. App. 1994) ("voluntary agreement"); State v. Blount, 770 P.2d 852, 855 (Kan. Ct. App. 1989) ("voluntary agreement"); State *ex rel*. M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) ("affirmative and freely-given permission").

324. DeMatteo, *supra* note 322, at 236.

325. CAL. EDUC. CODE § 67386 (West 2020, Westlaw through Ch. 870 of 2019 Reg. Sess.).

326. *Id*.

327. *Id*.

328. *Id*.

329. N.Y. EDUC. LAW § 6441 (West, Westlaw through L.2019, ch. 747).

knowing, voluntary, and mutual decision among all participants to engage in sexual activity."[330] The New York statute contains many of the same provisions as the California statute, but the New York statute also states that consent does not vary based upon a person's sex, sexual orientation, gender identity, or gender expression.[331] Further, approximately a dozen states, including New Jersey and New Hampshire, have bills pending to require that colleges in their respective states enact affirmative consent standards.[332]

Opponents to affirmative consent laws argue that the "Yes Means Yes" requirement goes beyond the definition of consent used in courts of law.[333] Further, opponents argue that "Yes Means Yes" laws are untenable because "there is not an implicit requirement to 'carry permission slips'" for sexual intercourse.[334] Supporters argue that while affirmative consent laws will not end rape on college campuses overnight, the laws are a positive response to "a status quo that has proved to be an all-too-powerful tool for sexual predators, because it enables them to claim to see consent in everything except continuous, unequivocal rejection."[335] Advocates argue that the "No Means No" standard presumes all individuals want to be sexually penetrated, at any time, with any person, until and unless they verbalize that they do not.[336] Further, while critics argue that the affirmative consent standard detracts from the spontaneity of sexual encounters and can become confusing for young people,[337] supporters contend that "Yes Means Yes" does not require only verbal communication; consent can emanate from both words and actions.[338] Affirmative consent places men and women on a level playing field because "sexual encounters should be based on mutual desire and enthusiasm."[339] "Yes Means Yes" can help remove the rape culture often found on college campuses, and, if tailored to each person and situation, it can help all individuals realize sexual satisfaction.[340]

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330. *Id*.

331. *Id*.

332. M. Anderson, *supra* note 279, at 1980–81.

333. *Id*. at 1996 (citing Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html.

334. Erick Kuylman, Note, *A Constitutional Defense of "Yes Means Yes"—California's Affirmative Consent Standard in Sexual Assault Cases on College Campuses*, 25 S. CAL. REV. L. & SOC. JUST. 211, 222 (2016) (quoting Nicholas J. Little, *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, 1347 (2005)).

335. *Id*. at 217.

336. Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 670 (2016).

337. Jennifer Medina, *Sex Ed Lesson: 'Yes Means Yes,' But It's Tricky*, N.Y. TIMES (Oct. 14, 2015), http://www.nytimes.com/2015/10/15/us/california-high-schools-sexual-consent-classes.html.

338. Schulhofer, *supra* note 336, at 667.

339. Wendy Adele Humphrey, *"Let's Talk About Sex": Legislating and Educating on the Affirmative Consent Standard*, 50 U.S.F. L. REV. 35, 62 (2016).

340. Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428, 491–92 (2016) (noting that if an individual with intellectual disabilities frequently smiles, then smiling should not be considered a form of affirmative consent for sexual behavior).

There are challenges implementing and enforcing affirmative consent regimes. For example, a student involved in the class action case against Michigan State argues that the victim kissed John Doe that night and agreed to go home with him, giving him the wrong idea that consent was given.[341] This demonstrates that even with regimes that teach consent, what one may think is consent in the moment is hard to pin, and there is no way to keep track of what actually happened. "Yes Means Yes" tailors consent to every situation which creates challenges. For example, in the scenario above, it gives the accused a platform to explain why he or she believed to have consent based on a few specific body language signals. Body language is not a clear and defined area of interpretation; there are nebulous readings of body language.

B. TRIAL ISSUES

Previously, defense attorneys were allowed to ask rape survivors about their sexual history during a rape trial.[342] These questions would be extensive and intrusive.[343] As a result of this invasion of privacy, many sexual assaults and rapes went unreported and unprosecuted.[344] The women's movement fought to end that practice in the 1970s, and now all fifty states have enacted laws regarding trial practices that are more protective of survivors' privacy and encourage reporting.[345] The trial issues section will focus on issues in criminal cases, particularly the admissibility of evidence and rape shield laws. The first section will review the various rape shield laws that states have adopted which limit the admissibility of evidence related to complainants' prior sexual conduct. The second section will review state laws regarding the admissibility of defendants' past sex crimes.The third section will review the admissibility of survivors' or defendants' sexually transmitted disease status. The fourth section will discuss the admissibility of survivors' medical records. The fifth section will review the admissibility of social media evidence.

1. Rape Shield Laws

Rape shield laws prohibit or limit the use of evidence of a complainant's prior sexual conduct.[346] These laws are intended to encourage survivors to report rape crimes and to ensure fair trials for rape offenses by preventing a defense attorney from asking a survivor about their sexual history.[347] Typically, during a trial, there will be a rape shield hearing.[348] These hearings will allow the court to

341. Bauer-Wolf, *supra* note 297.

342. People v. Abbot, 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838) (posing the questions, "are we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? that [sic] the triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew?"); *see also* Brett Erin Applegate, Comment, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 911 (2013).

343. Applegate, *supra* note 342, at 911.

344. *Id*.

345. *Id*. at 910–11.

346. 75 C.J.S. *Rape* § 96 (2019).

347. Applegate, *supra* note 341, at 911.

348. *Id*. at 910–11.

decide the admissibility of information about prior sexual conduct in the trial.[349] State rape shield statutes, while varied from state to state, have a presumption against the admissibility of evidence.[350]

It is essential to limit evidence related to a survivor's sexual history for two reasons. First, information about a survivor's sexual history can embarrass the survivor.[351] Second, this information can be prejudicial to the prosecutor's case due to societal views on sexuality. This can have a particular impact on cases where women are the survivors because of societal view on women and sexuality.[352] Historically, a woman was thought to be more likely to have consented to sexual acts if she had a history of being sexually active in other instances.[353] Rape shield laws focus on preventing the survivor from having to discuss their sexual history and trying to eliminate some of the stigma associated with sexual activity.[354]

Rape shield statutes apply to any sexual misconduct.[355] This includes statutory rape and child molestation, both of which do not allow consent as a defense.[356] However, the statutes often will not apply to criminal prosecutions of crimes in which sexual offenses are peripherally involved, such as kidnapping with the intent to commit sexual assault.[357]

State rape shield laws can be divided into five categories according to the structure of the rape shield protections:

> *a. The Federal Approach*: These statutes are modeled after the Federal Rules of Evidence Rule 412. These statutes require the exclusion of evidence pertaining to a survivor's prior sexual conduct. However, these statutes include an exception expressly requiring the admission of evidence if its exclusion would violate a defendant's constitutional rights.[358]

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349. *Id.*

350. *Id.*

351. FED R. EVID. 412 advisory committee's note (West, Westlaw Including Amendments Received Through Oct. 1, 2019).

352. *Id.*

353. *See* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 714 (1995).

354. *Id.*

355. FED R. EVID. 412(a) (West, Westlaw through 1-1-20).

356. *See* WIS. STAT. ANN. § 972.11 (West, Westlaw through 2019 Act 5, published May 4, 2019) (does not bar cross-examination of alleged statutory rape survivor concerning prior false claim that they have been forcibly raped); Clardy v. McKune, 89 Fed. App'x. 665, 673 (10th Cir. 2004) (finding that ruling survivor's past sexual abuse inadmissible under the rape shield law did not violate defendant's Sixth Amendment rights).

357. *See* United States v. Galloway, 937 F.2d 542, 548–49 (10th Cir. 1991) (finding Rule 412 did not apply when the prosecution argued that the defendant's purpose in kidnapping his eighteen-year-old girlfriend was sexual abuse because defendant was not charged with any crime listed under the rule); *see also* State v. Montoya, 2014-NMSC-032, 333 P.3d 935, 943 (N.M. 2014) (allowing cross examination of a survivor about her and defendant's long-standing sexual relationship and history of engaging in "make-up" sex after arguments because it was relevant to defendant's defense to kidnapping charge, specifically a lack of intent to sexually assault survivor).

358. *See* CONN. GEN. STAT. ANN. § 54-86f (West, Westlaw through Gen. Statutes of Connecticut, Revision of 1982, Effective 2015, Current through July 2019); D.C. CODE § 22-3022 (West, Westlaw

b. The Legislated Exceptions Approach: These statutes, again, require the exclusion of evidence pertaining to the survivor's prior sexual conduct. However, these statutes include explicit statutory exceptions under which evidence of a survivor's sexual history will be admissible.[359] These exceptions vary from state to state. Approximately half of the nation's rape shield statutes fall into this category.[360]

c. The Judicial Discretion Approach: These laws allow judges wide discretion to admit or reject evidence of the survivor's prior sexual conduct based on the relevance and prejudicial value of the evidence.[361]

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through August 31, 2019); 725 ILL. COMP. STAT. ANN. § 5/115-7 (West, Westlaw through P.A. 101-66); OR. REV. STAT. ANN. § 40.210 (West, Westlaw with emergency legis. through Ch. 13 of the 2019 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); S.D. CODIFIED LAWS § 19-19-412 (West, Westlaw with laws of the 2019 Reg. Sess., Executive Orders, 19-1 and Supreme Court Rule 19-18); FED. R. EVID. 412 (West, Westlaw including amendments through September. 1, 2019); MIL. R. EVID. 412 (2016); HAW. R. EVID. 412 (West, Westlaw through Act 286 of the 2019 Reg. Sess.); IOWA CODE ANN. 5.412 (West, Westlaw with amendments received and effective through Jun. 1, 2019); ME. R. EVID. 412 (West, Westlaw with amendments received through Jul. 1, 2019); N.D. R. EVID. 412 (West, Westlaw with amendments received through Sept. 1, 2019); TENN. R. EVID. 412 (West, Westlaw with amendments received through Aug. 1, 2019) *amended by* 2019 Tenn. Court. Order 0004 (C.O. 0004); TEX. R. EVID. 412 (West, Westlaw with amendments received through Aug. 1, 2019); UTAH R. EVID. 412 (West, Westlaw with amendments received through Jul. 15, 2019).

359. *See, e.g.*, ALA. R. EVID. 412 (West, Westlaw with amendments received through July 15, 2019).

360. *See* ARIZ. REV. STAT. ANN. § 13-1421 (West, Westlaw through legis. effective 2019 of the 1st Reg. Sess. of the 54the Leg. (2019)); FLA. STAT. ANN. § 794.022 (West, Westlaw with ch. from the 2019 1st Reg. Sess. of the 26th Leg.), *unconstitutional as applied by* Johnson v. Moore, 472 F. Supp. 2d 1344, 1344 (M.D. Fla. 2007); IND. CODE ANN. § 35-37-4-4 (West, Westlaw with all legis. of the 2019 1st Reg. Sess. of the 121st Gen. Assemb. effective through Jul. 1, 2018); MD. CODE ANN., CRIM. LAW § 3-319 (West, Westlaw through legis. from the 2019 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 233, § 21B (West, Westlaw through Ch. 66 of the 2019 1st Annual Sess.); MICH. COMP. LAWS ANN. § 750.520j (West, Westlaw through P.A.2019, No. 51 of the 2019 Reg. Sess., 100th Leg.); MINN. STAT. ANN. § 609.347 (West, Westlaw with legis. through Oct. 1, 2019 of the 2019 Reg. Sess.); MO. ANN. STAT. § 491.015 (West, Westlaw approved through the end of 2019 1st Reg. Sess. Of 100th Gen. Assemb.); MONT. CODE ANN. § 45-5-511 (West, Westlaw through ch. effective through the 2019 Sess.); N.H. REV. STAT. ANN. § 632-A:6 (West, Westlaw through Ch. 320 of the 2019 Reg. Sess.); N.J. STAT. ANN. § 2A:84A-32.1 (West, Westlaw through L.2019, c.246 and J.R.No.20); OH REV. CODE ANN. § 2907.02 (West, Westlaw through 2019-2020 Files 1 to 18 of the 133rd Gen. Assemb. (2019-20)), *unconstitutional as applied by In re* D.B., 950 N.E.2d 528, 528 (Ohio 2011); OKLA. STAT. ANN. tit. 12, § 2412 (West, Westlaw with enacted leg. of the 1st Reg. Sess. of the 57th Leg. (2019)); 18 PA. CONS. STAT. ANN.§ 3104 (West, Westlaw through end of the 2019 Reg. Sess. Act 72); S.C. CODE ANN. § 16-3-659.1 (West, Westlaw through the 2019 sess., subject to technical revisions by the Code Comm'r as authorized by law before official pub.); VT. STAT. ANN. tit. 13, § 3255 (West, Westlaw through Acts of the Reg. Sess. of the 2019-20 Vt. Gen. Assemb. (2019)); VA. CODE ANN. § 18.2-67.7 (West, Westlaw through the End of 2019 Reg. Sess.); W. VA. CODE ANN. § 61-8B-ll (West, Westlaw with legislation of the 2019 Reg. Sess. effective through Aug. 7, 2019), *unconstitutional as applied by* State v. Varlas, 787 S.E.2d 670, 670 (W. Va. 2016); WIS. STAT. ANN. § 972.11 (West, Westlaw through 2019 Act 5, published May 4, 2019); ALA. R. EVID. 412 (West, Westlaw with amendments received through Jul. 15, 2019); KY. R. EVID. 412 (West, Westlaw with amendments received through Apr. 1, 2019); LA. CODE EVID. ANN. art. 412 (West, Westlaw through the 2019 3rd Extraordinary Sess.).

361. *See* ALASKA STAT. ANN. § 12.45.045 (West, Westlaw through the 2019 1st Reg. Sess. through 1st Spec. Sess. of the 31th Leg.); ARK. CODE ANN. § 16-42-101 (West, Westlaw through the end of the 2019 Reg. Sess. of the 92nd Ark. Gen. Assemb.); IDAHO CODE ANN. § 18-6105 (West, Westlaw with all legis. of the 1st Reg. Sess. of the 65th Leg.); KAN. STAT. ANN. § 21-5502 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Jul. 1, 2019) (allowing

d. The Hybrid Approach: These statutes merge the legislated exceptions and judicial discretion models.[362] The hybrid approach enumerates the legislated exceptions but allows judges to use discretion to make additional exceptions based on the relevancy of the evidence.

e. The Evidentiary Purpose Approach: Under these statutes, the legislature differentiates between evidence of past sexual conduct that is used by the defense to prove consent or to impeach the survivor's credibility.[363] Only California, Delaware, Nevada, and Washington follow this model.[364]

a. The Federal Approach. Ten states and the District of Columbia take a Federal Approach because they model their statutes after Rule 412 of the Federal Rules of Evidence.[365] The federal approach-based statutes have three common features. First, the statutes prohibit admitting evidence of a survivor's sexual history unless the evidence falls into one of the several legislated exceptions.[366] Second, these statutes allow for the admission of the survivor's sexual history with the defendant if that history is offered to prove consent.[367] Third, the federal approach-based statutes also include a constitutional provision that allows for

prosecutor to introduce evidence of a survivor's sexual history under any circumstances); MISS. CODE ANN. § 97-3-68 (West, Westlaw with laws from the 2019 Reg. Sess. effective upon passage as approved through Jan. 1, 2019); R.I. GEN. LAWS ANN. § 11-37-13 (West, Westlaw through ch. 310 of the 2019 Reg. Sess.); WYO. STAT. ANN. § 6-2-312 (West, Westlaw through the 2019 Gen. Sess. of the Wyo. Leg.); N.M. R. EVID. 11-412 (West, Westlaw with amendments received through Sept. 1, 2019).

362. COLO. REV. STAT. ANN. § 18-3-407 (West, Westlaw through laws effective Sept. 1, 2019 of the 2019 Reg. Sess.); N.Y. CRIM. PRO. § 60.42 (West, Westlaw through L.2019, ch, 316).

363. *See, e.g.*, CAL. EVID. CODE § 782 (West, Westlaw with urgency legislation through Ch. 524 of 2019 Reg. Sess.) (allowing introduction of evidence of past sexual conduct to impeach credibility); NEV. REV. STAT. ANN. §§ 48.069, 50.090 (West, Westlaw through 80th Reg. Sess. (2019)) (allowing introduction of evidence of past sexual conduct to prove consent).

364. CAL. EVID. CODE § 782 (West, Westlaw with urgency legislation through Ch. 524 of 2019 Reg. Sess.); DEL. CODE ANN. tit. 11, § 3508 (West, Westlaw through ch. 218 of the 150th Gen. Assembly (2019-2020)); NEV. REV. STAT. ANN. § 50.090 (West, Westlaw through 80th Reg. Sess. (2019)); WASH. R. EVID. 412 (West, Westlaw with amendments received through Aug. 15, 2019).

365. FED. R. EVID. 412 (West, Westlaw including amendments received through Oct. 1, 2019); CONN. GEN. STAT. ANN. § 54-86f (West, Westlaw through Gen. Stats. of Conn., Revision of 1958, revised to 2019 Reg. Session); D.C. CODE § 22-3022 (West, Westlaw through 2019); 725 ILL. COMP. STAT. ANN. 5/115-7 (West, Westlaw through P.A. 101-66); OR. REV. STAT. ANN. § 40.210 (West, Westlaw through Ch. 376 of the 2019 Reg. Sess., pending classification of undesignated material and text revision by the Or. Reviser); S.D. CODIFIED LAWS § 19-19-412 (West, Westlaw with laws of the 2019 Reg. Sess., Executive Orders, 19-1 and 17-2, and Supreme Court Rule 19-18); N.D. R. EVID. 412 (West, Westlaw with amendments received through Sept. 1, 2019); HAW. R. EVID. 412 (West, Westlaw through Act 286 of the 2019 Reg. Sess.); TENN. R. EVID. 412 (West, Westlaw with amendments received through Aug. 1, 2019); Tex. R. EVID. 412 (West, Westlaw with amendments received through Aug. 1, 2019); UTAH R. EVID. 412 (West, Westlaw with amendments received through Jul. 15, 2019).

366. M. Anderson, *supra* note 279, at 83.

367. FED. R. EVID. 412(b)(l)(B).

evidence to be admitted if the exclusion of the evidence would violate constitutional principles.[368]

Federal Rule of Evidence 412 states that evidence offered to prove a survivor "engaged in other sexual behavior" or to prove a survivor's "sexual predisposition" is not admissible in criminal or civil proceedings.[369] However, there are exceptions to the federal rule regarding the admissibility of evidence in both criminal and civil cases. In criminal cases, there are three exceptions. First, evidence of sexual behavior is admissible if it proves someone other than the defendant was the source of semen, injury, or other physical evidence. Second, evidence of past sexual contact between the survivor and defendant is admissible to prove consent. Third, evidence of sexual conduct is admissible if the exclusion of the evidence would violate the defendant's constitutional rights.[370] In civil cases, there is one exception to the rule. Evidence of a survivor's sexual behavior or sexual predisposition is admissible if the probative value of the evidence substantially outweighs both the danger of harm to any survivor and the danger of unfair prejudice to any party. Evidence of a survivor's reputation is admissible only if the survivor has placed it in controversy.[371]

The first exception to the federal rape shield law is that evidence of the survivor's sexual behavior can be used in a criminal case "if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence."[372] The Advisory Committee notes for the federal rape shield law indicate that this exception is designed to afford the defendant an opportunity to prove another person was responsible.[373] However, there is a limitation to this exception. Evidence may still be excluded if it does not comply with Federal Rules of Evidence 401 or 403.[374] For example, in *U.S. v. Seibel*, the court held that it was not an abuse of discretion for the district court to prohibit evidence of someone else's semen on the survivor's bedspread.[375] The court stated that, because the prosecution had not alleged that the defendant's semen was on the survivor's bed, it was not relevant.[376] The court, therefore, limited the use of this exception to the rule.

368. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-86f (4) (West, Westlaw through Gen. Stats. of Conn., Revision of 1958, revised to 2019 Reg. Sess.).

369. FED R. EVID. 412(a).

370. FED R. EVID. 412(b)(1).

371. FED R. EVID. 412(b)(2). *See, e.g.*, J.W. v. City of Oxnard, No. CV 07-06191 CAS(SHK), 2008 WL 4810302, at *4, 2008 U.S. Dist. LEXIS 91366, at *8 (C.D. Cal. Oct. 27, 2008) (holding that the probative value of defendant's evidence of the survivor's sexual history, survivor's knowledge of sexual terminology, and physical evidence of semen unrelated to the defendant did not substantially outweigh the unfair prejudice to the survivor, and therefore was not admissible).

372. FED. R. EVID. 412(b)(l)(A).

373. FED. R. EVID. 412, advisory committee's note to 1994 amendment, subdiv. b.

374. *Id.* at advisory committee's notes.

375. United States v. Seibel, 712 F.3d 1229, 1235 (8th Cir. 2013).

376. *Id.*

The second exception to the federal shield in a criminal case is the admission of sexual history with the defendant if that history is offered to prove consent.[377] All state legislatures or courts have adopted this exception.[378] This exception can have a serious impact on rape or sexual assault trials because often rape happens by someone who is a current or former intimate partner.[379] For example, forty-five percent of female survivors were raped by a current or former partner.[380] This exception, therefore, leads to the suggestion that rape is more likely to be consensual if a survivor has had previous sexual relations with the defendant.[381]

There is a limitation to this exception as defendants do not have an absolute right to the admission of evidence of a past sexual relationship with the survivor. In 1991, the Supreme Court held that the preclusion of sexual history was constitutional where the survivor had a prior sexual relationship with the defendant. The Court, in upholding the exclusion of evidence, reversed the Michigan decision that found that the preclusion of sexual history was unconstitutional when the survivor had a prior sexual relationship with the defendant.[382] In *Michigan v. Lucas*, the defendant was accused of raping his ex-girlfriend.[383] The defendant sought to introduce evidence of their past sexual relationship.[384] The trial court denied him the opportunity to introduce the evidence because of procedural errors.[385] As a result, he was convicted.[386] The court of appeals overturned the district court's decision, holding that the exclusion of evidence of a past sexual relationship between a defendant and complainant was always unconstitutional.[387] In reversing the court of appeals, the Supreme Court noted that the state rape shield statute represents a valid legislative determination that protects rape survivors against "surprise, harassment, and unnecessary invasions of privacy."[388] Though this case demonstrated that defendants do not have an absolute right to the admission of evidence of a past sexual relationship with the survivor, the underlying message was that that consent is more likely when there is a past relationship. This message remains and is a cause for concern when the evidence is admissible.

The third exception for criminal cases allows for the admission of evidence "when its exclusion would violate the defendant's constitutional rights."[389] This

377. FED. R. EVID. 412(b)(l)(B).
378. M. Anderson, *supra* note 279, at 118.
379. *National Statistics*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE (NCADV), http://ncadv.org/ learn-more/statistics (last visited Oct. 3, 2016) (citing prevalence and characteristics of sexual violence, stalking, and intimate partner violence).
380. *Id*.
381. M. Anderson, *supra* note 279, at 122.
382. Michigan v. Lucas, 500 U.S. 145, 153 (1991).
383. *Id*.
384. *Id*. at 147.
385. *Id*.
386. *Id*. at 148.
387. *Id*.
388. *Id*. at 150.
389. FED. R. EVID. 412 (b)(l)(c).

allows defendants to introduce evidence that would not fall into any of the other excepted categories and enables the statutes to survive potential constitutional challenges. Despite the flexibility afforded by the constitutional exception, judicial discretion is still is bound by the policy concerns underlying rape shield statutes.[390] Thus, "[t]he right to present relevant testimony is not without limitation . . . [i]t may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[391] In addition, the evidence that defendants seek to introduce under the constitutional exception must have a direct bearing on the disposition of the case.[392]

The constitutional exception provides a response to the common criticism around rape shield laws. From the time of their enactment, rape shield laws have drawn criticism for hindering a defendant's ability to mount a strong defense and for infringing upon a defendant's Sixth Amendment right to confront the witnesses.[393] The constitutional exception provides an answer to this criticism by allowing the evidence to be introduce if it would violate the defendant's constitutional rights.

The constitutional exception leaves judges with the impression that they must approach the rape shield cases with extra caution.[394] In fact, courts "routinely misinterpret and exaggerate the scope of the defendant's constitutional right to inquire into the complainant's sexual history, particularly when the complainant is deemed promiscuous with the defendant or others."[395]

The Supreme Court interpreted the constitutional exception broadly in *Olden v. Kentucky*.[396] In *Olden*, the Court held that the constitutional exception to the rape shield laws required that the survivor testify in the case. The Court, in holding that the survivor was required to testify, reversed the state court's refusal to allow the defendant, accused of rape, to cross-examine the survivor about her sexual relationship with the corroborating witness.[397] The Court held that the defendant had a right to introduce evidence showing that the survivor had a motivation to lie about the rape. The Court found significant that the survivor was dating and

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390. Kerry C. O'Dell, *Evidence in Sexual Assault*, 7 GEO. J. GENDER & L. 819, 832 (2006).

391. Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

392. FED. R. EVID. 403.

393. Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 711, 712, 770 (1995) (excluding prior false accusations of rape is "hopefully unconstitutional" because false accusations "reveal[] flaws in character—a ruthless disregard of the truth and a willingness to use sexual allegations unjustly").

394. *See* Lewis v. Wilkinson, 307 F.3d 413, 422 (6th Cir. 2002) (citing constitutional concerns as the rationale for disregarding Ohio's rape shield statute, even though permitting cross-examination could lead to the admission of the survivor's sexual history with other men).

395. M. Anderson, *supra* note 279, at 56.

396. Olden v. Kentucky, 488 U.S. 227, 231 (1988); *see also* Nevada v. Jackson, 133 S. Ct. 1990, 1994 (2013) (per curiam) (declining to extend *Olden* to allow criminal defendants to introduce *extrinsic evidence* for impeachment purposes; Confrontation Clause is satisfied when defense can expose inconsistences through cross-examination).

397. *Olden*, 488 U.S at 232.

living with one of the witnesses who testified that he saw her get out of the defendant's car after the rape.[398] The Court noted that since the survivor's testimony was critical to the case and that the corroborating witness was dating the survivor, the importance of the admission of evidence outweighed the survivor's right to privacy.[399] The Court held that excluding the survivor's testimony to the case would violate the defendants' constitutional rights. Thus, though the case was ultimately remanded, the defendant was able to invoke and use the constitutional exception to the rape shield law.

b. Legislated Exceptions Approach. The legislated exceptions approach to the rape shield laws require the exclusion of evidence pertaining to the survivor's prior sexual conduct but provide explicit statutory exceptions under which evidence of a survivor's sexual history will be admissible.[400] Approximately half of the nation's rape shield statutes fall into this category.[401] The states that follow the legislated exceptions approach have state specific statutes. While each state can determine their own specific exceptions, there are some common exceptions. Most of the states under this approach allow for both the admission of evidence regarding the survivor's previous sexual conduct with the defendant as well as evidence to show that someone other than the defendant was responsible for

398. *Id.*

399. *Id.* at 233.

400. *See, e.g.*, ALA. R. EVID. 412 (West, Westlaw with amendments received through July 15, 2019).

401. *See* ARIZ. REV. STAT. ANN. § 13-1421 (West, Westlaw through legis. effective 2019 of the 1st Reg. Sess. of the 54th Leg. (2019)); FLA. STAT. ANN. § 794.022 (West, Westlaw with ch. from the 2019 1st Reg. Sess. of the 26th Leg.), *unconstitutional as applied by* Johnson v. Moore, 472 F. Supp. 2d 1344, 1344 (M.D. Fla. 2007); IND. CODE ANN. § 35-37-4-4 (West, Westlaw with all legis. of the 2019 1st Reg. Sess. of the 121st Gen. Assemb. effective through July 1, 2018); MD. CODE ANN., CRIM. LAW § 3-319 (West, Westlaw through legislation from the 2019 Reg. Sess. of the Gen. Assembly); MASS. GEN. LAWS ANN. ch. 233, § 21B (West, Westlaw through Ch. 66 of the 2019 1st Annual Sess.); MICH. COMP. LAWS ANN. § 750.520j (West, Westlaw through P.A.2019, No. 51 of the 2019 Reg. Sess., 100th Leg); MINN. STAT. ANN .§ 609.347 (West, Westlaw with legis. through Oct. 1, 2019 of the 2019 Reg. Sess.); MO. ANN. STAT. § 491.015 (West, Westlaw approved through the end of 2019 1st Reg. Sess. of 100th Gen. Assemb.); MONT. CODE ANN. § 45-5-511 (West, Westlaw through ch. effective through the 2019 Sess.); N.H. REV. STAT. ANN. § 632-A:6 (West, Westlaw through Ch. 320 of the 2019 Reg. Sess.); N.J. STAT. ANN. § 2A:84A-32.1 (West, Westlaw through L.2019, c.246 and J.R.No.20); OH REV. CODE ANN. § 2907.02 (West, Westlaw through 2019–2020 Files 1–18 of the 133rd Gen. Assemb. (2019-20)), *unconstitutional as applied by In re* D.B., 950 N.E.2d 528, 528 (Ohio 2011); OKLA. STAT. ANN. tit. 12, § 2412 (West, Westlaw with enacted leg. of the 1st Reg. Sess. of the 57th Leg. (2019)); 18 PA. CONS. STAT. ANN. § 3104 (West, Westlaw through end of the 2019 Reg. Sess. Act 72); S.C. CODE ANN. § 16-3-659.1 (West, Westlaw through the 2019 Sess., subject to technical revisions by the Code Comm'r as authorized by law before official pub.); VT. STAT. ANN. tit. 13, § 3255 (West, Westlaw through Acts of the Reg. Sess. of the 2019–2020 Vt. Gen. Assemb. (2019)); VA. CODE ANN. § 18.2-67.7 (West, Westlaw through the end of 2019 Reg. Sess.); W. VA. CODE ANN. § 61-8B-ll (West, Westlaw with legis. of the 2019 Reg. Sess. effective through Aug. 7, 2019), *unconstitutional as applied by* State v. Varlas, 787 S. E.2d 670, 670 (W. Va. 2016); WIS. STAT. ANN. § 972.11 (West, Westlaw through 2019 Act 5, published May 4, 2019); ALA. R. EVID. 412 (West, Westlaw with amendments received through Jul. 15, 2019); KY. R. EVID. 412 (West, Westlaw with amendments received through Apr. 1, 2019); LA. CODE EVID. ANN. art. 412 (West, Westlaw through the 2019 3d Extraordinary Sess.).

physical evidence, including pregnancy, semen, injury, or disease.[402] Other common legislated exceptions include allowing the admission of evidence where there is 1) a pattern of prior sexual conduct by the survivor, 2) evidence of motive to fabricate the rape, 3) evidence offered to prove the defendant had a reasonable belief in the complainant's consent, and 4) evidence of prior false allegations by the complainant.[403]

Under the legislated exceptions approach, unless the evidence falls into one of the exceptions, it is inadmissible. The number of exceptions in state rape shield statutes under this approach varies from state to state. For example, Alabama only allows evidence to be admitted if the court finds that such past sexual behavior directly involved the participation of the accused.[404] The Alabama exception allows for the admission of less evidence than, for example, Maryland, which allows evidence to be admitted under four provisions that range from supporting a claim that the survivor has an ulterior motive to the impeachment of the survivor's prior sexual conduct.[405]

The following will outline three common exceptions found in state legislated exceptions statutes. These include i) patterns of behavior and/or prostitution, ii) prior false accusations of sexual assault by the survivor, and iii) prior accusations of sexual abuse.

i. Pattern of Behavior and/or Prostitution. Some rape shield statutes have an exception for evidence showing a complainant's distinctive pattern of sexual behavior that closely mirrors the encounter with the defendant.[406] This exception is designed to allow evidence that is relevant to the question of consent or defendant's reasonable belief that complainant consented. This is based on the theory

402. *E.g.*, OKLA. STAT. ANN. tit. 12, § 2412 (West, Westlaw with emergency effective provisions through Reg. Sess. of the 57th Leg. (2019)); KY. R. EVID. 412 (West, Westlaw with amendments received through Apr. 1, 2019).

403. M. Anderson, *supra* note 279, at 82-83; *see e.g.*, MINN. STAT. ANN. § 609.347 (West, Westlaw with legislation through Oct. 1, 2019 of the 2019 Reg. Sess.) (stating if survivor has previously fabricated sexual assault allegations, evidence of survivor's previous sexual conduct can be admitted to establish a common scheme or plan of similar sexual conduct).

404. ALA. R. EVID. 412 (West, Westlaw with amendments received through Jul. 15, 2019).

405. MD. CODE ANN. CRIM. LAW § 3-319 (West, Westlaw through legislation from the 2019 Reg. Sess. of the Gen. Assembly).

406. *See* FLA. STAT. ANN. § 794.022 (West, Westlaw through 2019 1st Reg. Sess. of the 26th Leg.), *unconstitutional as applied by* Johnson v. Moore, 472 F. Supp. 2d 1344 (M.D. Fla. 2007); MINN. STAT. ANN. § 609.347 (West, Westlaw through Oct. 1, 2019 the 2019 Reg. Sess.); OKLA. STAT. ANN. tit. 12, § 2412 (West, Westlaw through the 1st Reg. Sess. of the 57th Leg. (2019)); N.C. R. EVID. 412 (West, Westlaw through the end of the 2018 Reg. Sess., with the addition of S.L. 2018-145 from the 2018 Reg. and Extra Sess. and through 2019-163 of the Gen. Assemb.); TENN. R. EVID. 412 (West, Westlaw with amendments received through Aug. 1, 2019), *amended by* 2019 Tenn. Court Order 0004 (C.O. 0004); Gagne v. Booker, 680 F.3d 493, 515 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 481 (2012) (holding that a trial court did not abuse its discretion for refusing to admit evidence that the survivor had engaged in group sex with one of the defendants before on a pattern of behavior theory because the third party was different and she was dating the defendant when she engaged in group sex); *see also* Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL. REV. 1461, 1469 (2012).

that if a survivor had engaged in a certain kind of behavior in the past, then the survivor was more likely to have consented to the behavior again.[407] Defendants also have attempted to seize on the admissibility of patterns of behavior in order to put forth evidence regarding the victim's prior history of prostitution.[408] Evidence that the complainant has engaged in prostitution may be admissible on the question of consent if the defendant was aware of this activity.[409]

ii. Prior False Accusations of Sexual Assault. Often rape shield statutes have an exception for evidence showing prior false accusation of sexual assault. For example, Massachusetts, New Jersey, Rhode Island, and Virginia allow evidence of prior false accusations.[410]

The complainant's prior accusation of sexual abuse that have been proven false can sometimes be used to attack the complainant's credibility.[411] However, there is a limitation to the use of this evidence. Every state under this approach, except Rhode Island, requires a demonstration that a prior rape claim was false before it is admissible.[412] States vary on how to make that determination. Some states only allow a prior false rape claim if it is required by the Confrontation Clause; some states require the defendant to prove by a preponderance of the evidence that it was false; some states require defendants to prove by more than a preponderance of the evidence it was false; and other states still impose a reasonableness standard.[413] In weighing admissibility, some states include a requirement that the evidence is only admissible if there is a pattern of prior false rape claims or similarities between the two crimes.[414]

A recent Supreme Court case may force states to be stricter about letting in prior false rape claims as evidence.[415] In *Nevada v. Jackson*, a defendant appealed

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407. *See* Brewer v. United States, 559 A.2d 317, 321 (D.C. 1989), *cert. denied*, 493 U.S. 1092 (1990).

408. *Id.* at 320 (holding exclusion of evidence of survivor's alleged history with prostitution was not an abuse of discretion because "[t]he time is long past when a defendant charged with rape could put his survivor on trial").

409. *See* State v. DeJesus, 856 A.2d 345, 354 (Conn. 2004) (finding evidence of complainant's prior history of prostitution and defendant's knowledge of prior history was admissible on question of consent), *overruled by* Connecticut v. Wright, 135 A.3d 1 (Conn. 2016) (holding that the word "material," as used in the rape shield law, refers to an evidentiary, rather than constitutional, standard of materiality). *But see* Bryant v. United States, 859 A.2d 1093, 1104 (D.C. 2004) (finding complainant's activities as a prostitute after the event in question were inadmissible because the prejudicial effect outweighed the probative nature of the evidence).

410. VA. CODE ANN. 2-608(e) (West, Westlaw with amendments received through Oct. 15, 2019); N. J. R. EVID. 608(b) (West, Westlaw with amendments received through Nov. 15, 2019); Commonwealth v. Nichols, 37 Mass. App. Ct. 322, 337 (1994).

411. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1421 (West, Westlaw through the 1st Reg. Sess. of the 54th Leg. (2019)); OKLA. STAT. ANN. tit. 12, § 2412 (West, Westlaw through the 1st Reg. Sess. of the 57th Leg. (2019)); VT. STAT. ANN. tit. 13, § 3255 (West, Westlaw through Acts of the of the Reg. Sess. of the 2019–2020 Vt. Gen. Assemb. (2019)).

412. Applegate, *supra* note 342, at 907 (citing State v. Oliveira, 576 A.2d 111,113 (R.I. 1990)).

413. *Id.* at 907–09.

414. *Id.* at 910.

415. *See* Nevada v. Jackson, 133 S. Ct. 1990 (2013).

his rape conviction because he had not been allowed to use police witnesses to cast doubt on the victim's past accusations that he had raped her.[416] The Court did not allow the admission of this evidence. In this decision, the Court overturned the Ninth Circuit, which had held that excluding prior false rape claims violated a defendant's constitutional right to present a defense.[417] Generally though, courts do allow evidence of prior false rape claims.[418]

iii. Prior Accusations of Sexual Abuse Related to Children. Courts rarely admit evidence of prior sexual abuse without clear purpose.[419] However, evidence of sexual abuse by a third party is admissible if it serves as an alternate explanation for a child's injuries or is otherwise directly responsive to a claim by the prosecution.[420] Therefore, often evidence of prior accusation of sexual abuse is not admissible unless it is in relation to cases where the survivor is a child. Children cannot effectively consent to sexual contact and are generally assumed to be without knowledge of sexual activity.[421] Defendants may seek to introduce evidence that an underage complainant was sexually abused by a third party to explain that injuries or sexual knowledge are not attributable to the defendant or that there is the possibility that the defendant was misidentified.[422] For evidence of a child complainant's prior sexual conduct to be admissible, the defendant must provide sufficient proof that the child gained knowledge of the sexual detail contained in the child's testimony in some manner other than having suffered the defendant's alleged conduct.[423]

c. The Judicial Discretion Approach. Eight states have enacted statutes that give judges discretion on the admissibility of evidence based on its relevance and possible prejudicial effect.[424] Statutes that follow this model allow for the most

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416. *Id.* at 1991.

417. *Id.* at 1994.

418. *See, e.g.*, Sussman v. Jenkins, 636 F.3d. 329, 358–59 (7th Cir. 2011); Redmond v. Kingston, 240 F.3d 590, 591-92 (7th Cir. 2001); Averilla v. Lopez, 862 F. Supp. 2d 987, 997 (N.D. Cal. 2012); State v. Davis, 186 S.W.3d 367, 374 (Mo. Ct. App. 2005).

419. *Id.*

420. *See, e.g.*, State v. Jackson, 177 P.3d 419, 424 (Kan. Ct. App. 2008).

421. *See* Jeff Welty, *Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*, ADMIN. JUST. BULL. (Aug. 2009), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aojb0904.pdf.

422. *Id.*

423. *See* People v. Summers, 818 N.E.2d 907, 913 (Ill. App. Ct. 2004); *see also* Payne v. State, 600 S.E.2d 422, 424 (Ga. Ct. App. 2004) (admitting evidence that survivor had watched a pornographic movie). *But see* State v. Smith, 894 So.2d 564, 568 (La. Ct. App. 2005) (finding that survivor's prior sexual abuse by paternal grandfather was inadmissible due to its prejudicial nature and the statute's 72-hour time limitation regarding all prior sexual conduct).

424. ALASKA STAT. ANN. § 12.45.045 (West, Westlaw through emergency legis. through Sept. 14, 2019 of the 2019 1st Reg. Sess.); ARK. CODE ANN. § 5-14-103(d)(2) (West, Westlaw through the end of the 2019 Reg. Sess. of the 90th Ark. Gen. Assemb.); IDAHO CODE ANN. § 18-6105 (West, Westlaw with immediately effective legis. through Apr. 11, 2019 the 2019 1st Reg. Sess. of the 65th Leg.); KAN. STAT. ANN. § 21-5502 (West, Westlaw through laws enacted during the 2019 Reg. Sess. of the Kan. Leg. effective on or before Jul. 1 ,2019); MISS. CODE ANN. § 97-3-68 (West, Westlaw with laws from the

judicial discretion of all forms of rape shield statutes.[425] Despite this broad discretion, the case law in these states supports rules that are similar to those found in other states.[426] For example, courts generally exclude prior accusations of sexual abuse unless proven false.[427] Likewise, evidence of sexual abuse by a third party is generally inadmissible unless it serves as an alternate explanation for a child's injuries or is otherwise directly responsive to a claim by the prosecution.[428]

For example, in Alaska, the rape shield statute does not specify exceptions or situations in which evidence should generally be admitted by the court. Rather, the statute states that if the court determines the evidence regarding the witness's sexual conduct is relevant and the probative value of such evidence is not outweighed by unfair prejudice or the risk of confusion of the issues, then the court shall make an order to admit the evidence.[429] Other than requiring the judge to weigh the probative value and potential prejudicial effect of the evidence, the statute does not offer other judicial guidelines.

d. The Hybrid Approach. The hybrid approach enumerates the legislated exceptions but allows judges to use discretion to make additional exceptions based on the relevancy of the evidence.[430] This approach is adopted by five states, including New York and Colorado. It can be argued that such statutes admit any evidence based on relevancy; however, the legislated exceptions provide more guidance for judges to determine what qualifies as relevant.[431] If a defendant seeks to admit evidence that is not categorically proscribed by the legislated exceptions, it is up to the defendant to make an adequate showing of relevancy.[432] The level of relevancy sufficient to overcome the presumptive inadmissibility of

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2019 Reg. Sess. effective upon passage as approved through Jan. 1, 2020); R.I. GEN. LAWS ANN. § 11-37-13 (West, Westlaw through ch. 310 of the 2019 Sess.); WYO. STAT. ANN. § 6-2-312 (West, Westlaw through the 2019 Gen. Sess. of the Wyo. Leg.); N.M. R. EVID. 11-412 (West, Westlaw with amendments received through Sept. 1, 2019).

425. *Id.*

426. Helim Kathleen Chun & Lindsey Love, *Rape, Sexual Assault & Evidentiary Matters*, 14 GEO. J. GENDER & L. 585, 595 (2013).

427. *See* Covington v. State, 703 P.2d 436, 442 (Alaska Ct. App. 1985); Cruz v. State, No. 49247, 2008 WL 6062125, at *5 (Nev. Aug. 13, 2008); Abbott v. State, 138 P.3d 462, 475 (Nev. 2006) (allowing past allegations to be admitted to evidence because defendant proved their falsity by preponderance of the evidence); Brown v. State, 807 P.2d 1379, 1381 (Nev. 1991).

428. *See, e.g.*, State v. Jackson, 177 P.3d 419, 424 (Kan. Ct. App. 2008).

429. ALASKA STAT. ANN. § 12.45.045 (West, Westlaw through emergency legis. through Sept. 14, 2019 of the 2019 1st Reg. Sess. through 1st Spec. Sess. of the 31st Leg.).

430. COLO REV. STAT. ANN. § 18-3-407 (West, Westlaw through laws effective Sept. 1, 2019 of the 2019 Reg. Sess. (2017)); N.Y. CRIM. PROC. LAW § 60.42 (West, Westlaw through L. 2019, chs. 360); *see also* O'Dell, *supra* note 389, at 832 (listing the three other states as Maryland, Arizona, and North Carolina).

431. Courts in New York admit "relevant" evidence when in the "interests of justice." *See* N.Y. CRIM. PROC. LAW § 60.42 (McKinney, Westlaw through L.2017, chs. 1 to 23).

432. *See* People v. Wright, 829 N.Y.S.2d 377, 378 (N.Y. App. Div. 2007) (holding that the evidence of the complainant's prior sexual conduct did not fit any of the statutory exceptions and that the defendant did not provide any proof that the evidence was probative); People v. Williams, 614 N.E.2d 730, 734–35 (N.Y. 1993).

evidence is fact-based and therefore varies significantly from court to court.[433] One New York court concluded that evidence including the clothing that the survivor wore on the night of the sexual assault and the survivor's journal, poem, and letters did not meet the relevancy threshold to be admissible because they were "remote in time, irrelevant, or were precluded by the Rape Shield Law."[434] Another New York court determined that similar evidence was not protected by the Rape Shield Law because it was not "sexual conduct" evidence within the meaning of the law; the evidence ultimately was deemed inadmissible because the defendant's theories of relevancy were too far-fetched.[435]

Often, there are state rape shield that laws that allow for the admission of evidence if the survivor is engaged in sex work. The issue with the admissibility of this evidence is that individuals who work in prostitution are often targets for sex crimes, including crimes of sex trafficking.[436] States are slowing beginning to protect survivors engaged in sex work by protecting sex trafficking survivors. For example, California,[437] the District of Columbia,[438] and New York codified a protection for sex trafficking survivors, removing the discretion of the court to control the scope of the evidence.[439]

The New York statute permits, as an exception, evidence that a survivor engaged in sex work in the past three years.[440] In 2019, New York proposed, but did not pass, a bill that would amend the Rape Shield Statute to protect all sex workers by excluding such evidence.[441] In sex trafficking prosecutions, key witnesses are often trafficked survivors and charges of sex trafficking will often involve the survivor's prior sexual history.[442]

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433. *See* M. Anderson, *supra* note 279, at 84–85.

434. People v. Brown, 806 N.Y.S.2d 262, 266 (N.Y. App. Div. 2005).

435. People v. Contreras, 848 N.Y.S.2d 650, 652 (N.Y. App. Div. 2008); *see also* Contreras v. Artus, 778 F.3d 97, 109 (2d Cir. 2015) (denying Contreras's habeas corpus petition in part because exclusion of the evidence was not based on unreasonable determination of the facts). For Colorado cases, *see* People v. Harris, 43 P.3d 221, 226 (Colo. 2002) (holding evidence that a rape survivor engaged in consensual sexual intercourse four days prior to the rape was properly excluded and not relevant to the issue of whether the sexual encounter between defendant and survivor was consensual); People v. Garcia, 179 P.3d 250, 255 (Colo. App. 2007) (holding evidence of the survivor's alleged rape fantasy that she and defendant had acted out several times was material and relevant).

436. Karin S. Portluck, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404 (2007).

437. CAL. EVID. CODE § 1161(b) (West 2019).

438. D.C. CODE § 22-1839 (West 2019).

439. N.Y. CRIM PROC. LAW § 60.42 (McKinney 2019).

440. N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 2019) (noting that evidence is permitted if the survivor has been convicted of an offense under section 230.00 of the penal law within three years prior to the sex offense). *But see* People v. Smith, 27 A.D.3d 242 (N.Y. App. Div. 2006) (finding that the rape Shield Law was properly applied to prevent questioning because there was no evidence presented that the survivor had been convicted of prostitution).

441. Alexandra Villarreal, *New York to Consider Changing Rape Shield Law to Protect Sex Workers*, GUARDIAN (Nov. 30, 2018), https://www.theguardian.com/us-news/2018/nov/30/new-york-rape-shield-law-sex-trafficking-workers.

442. SPONSOR MEMO, S. BILL 5070 (2017–2018), NY State Senate (2018), https://www.nysenate.gov/legislation/bills/2017/s5070/amendment/original.

e. The Evidentiary Purpose Approach. The evidentiary purpose approach determines the admissibility of a survivor's sexual history based on the purpose for which the evidence is introduced at trial.[443] The states that apply this approach divide the evidence of sexual conduct into two categories: (1) evidence to prove consent; and (2) evidence to attack the credibility of the survivor.[444] In California and Delaware, evidence of sexual history offered to attack the survivor's credibility is admissible.[445] In Nevada and Washington, evidence of sexual history offered to prove consent is admissible upon a showing of relevance that is not substantially outweighed by prejudice.[446]

A survivor's credibility is commonly at issue in sexual assault cases because these cases typically involve one person's word against another's.[447] As described in California's rape shield statute, evidence pertaining to the survivor's credibility may be admitted if the judge conducts a hearing in camera and concludes that the probative value of impeaching evidence substantially outweighs the prejudicial and other effects.[448] Prior complaints of rape are not included as evidence of past sexual conduct and thus may not be used as evidence under California's rape shield statute.[449] This exception has been utilized sparingly and mostly in cases where the survivor has a prior sexual history of prostitution.[450]

2. Defendant's Past Sex Crimes

Federal Rule of Evidence 404(b) severely limited the circumstances under which a defendant's past crimes are admissible as evidence.[451] However, in 1994,

443. M. Anderson, *supra* note 279, at 85.

444. CAL. EVID. CODE § 782 (West 2019); DEL. CODE ANN. tit. 11, § 3508 (West 2019); NEV. REV. STAT. ANN. § 50.090 (West 2019); WASH. REV. CODE ANN. § 412 (West 2019).

445. *See* CAL. EVID. CODE § 782 (West 2019); DEL. CODE ANN. tit. 11, § 3508 (West 2019); M. Anderson, *supra* note 279, at 85.

446. *See* NEV. REV. STAT. ANN. §§ 48.069, 50.090 (West 2019); WASH. REV. CODE ANN. § 9A.44.020 (West 2019); M. Anderson, *supra* note 279, at 85; *see also* Washington v. Posey, 167 P.3d 560, 565 (Wash. 2007) (holding evidence of an e-mail from survivor's computer suggesting that she would have consented to violence and rape was inadmissible under the rape shield laws because the e-mail described only potential sexual mores and not actual sexual mores).

447. *See, e.g.*, California v. Chandler, 65 Cal. Rptr. 2d 687, 690 (Cal. Ct. App. 1997); Sydney Janzen, *Amending Rape Shield Laws: Outdated Statutes Fail to Protect Victims on Social Media*, 48 J. MARSHALL L. REV. 1087, 1090 (2015) (noting that sexual assault cases often focus on the survivor and their behavior, rather than the defendant's, seemingly placing blame for the rape on the survivor).

448. *See* CAL. EVID. CODE § 782 (West 2019); California v. Bautista, 163 Cal. Rptr. 4th 762, 783 (Cal. Ct. App. 2008); *Chandler*, 65 Cal. Rptr. 2d at 690. *But see* California v. Mestas, 159 Cal. Rptr. 3d 534, 540 (Cal. Ct. App. 2013) (holding that the trial court did not abuse its discretion when it refused to hold an evidentiary hearing on past sexual conduct of survivor because the allegations had very little probative value).

449. California v. Tidwell, 78 Cal. Rptr. 3d 474, 481 (Cal. Ct. App. 2008).

450. *See id.*

451. *See* FED. R. EVID. 404(b); *see generally* FED. R. EVID. 413–415 and advisory committee notes; *see also* George Fisher, FEDERAL RULES OF EVIDENCE 2013–2014 STATUTORY & CASE SUPPLEMENT 80, 80–95 (3d ed. Supp. 2013).

Rules 413, 414 and 415 were added to the Federal Rules of Evidence.[452] Rule 413 allows a court in a sexual assault case to admit evidence that the defendant committed any sexual assaults, previous, subsequent, or concurrent, other than the one or ones at issue in the current case.[453] Rule 414 permits evidence that the defendant committed any child molestations other than the one or ones at issue in an ongoing child molestation case.[454] Rule 415 allows the court to admit evidence that the party committed any sexual assault or child molestation other than the one currently at issue in a civil case involving a claim for relief based on sexual assault.[455] At the federal level, in at least two cases, courts allowed evidence of past sexual misconduct, even if uncharged or the past charges were dismissed.[456] As of 2015, of the forty-four states that have adopted rules of evidence based on the Federal Rules of Evidence, only four (Alaska, Arizona, Nebraska, and Oklahoma) have a rule comparable to Rule 413, and only three (Alaska, Arizona, and Oklahoma) have a rule comparable to Rule 414.[457] Of the six states that have not adopted the Federal Rules of Evidence, four (California, Georgia, Illinois, Kansas) have explicit rules allowing evidence of the defendant's prior sexual assault or child molestation when the defendant is accused of sexual assault and one state (Virginia) has a provision allowing such evidence when the defendant is accused of a sexual offense involving a child.[458]Although these additions to the Federal Rules of Evidence are progressive, judicial discretion in enforcement can sometimes take the bite out of these provisions. For example, in *United States v. Guardia*, Guardia, a gynecologist, was charged with sexually abusing two women during their gynecological examinations.[459] The government moved to introduce the testimony of four other women who alleged that Guardia had similarly abused them during their examinations.[460] The court decided not to admit the testimony of these four other survivors because of the high risk of jury confusion.[461] The court of appeals explained that this decision is "within the sound discretion of the

452. Rosanna Cavallaro, *Federal Rules of Evidence 413-415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31, 34 n.9 (2007).

453. FED. R. EVID. 413(a).

454. FED. R. EVID. 414(a).

455. FED. R. EVID. 415(a).

456. *See* United States v. Reynolds, 720 F.3d 665, 671 (8th Cir. 2013); United States v. Johnson, 458 F. App'x 727, 729 (10th Cir. 2012); *see also* United States v. Schaffer, No. 12-CR-430 (ARR), 2014 WL 1515799, at *11 (E.D.N.Y. April 18, 2014), *aff'd*, No. 15-2516, 2017 WL 992504 (2d Cir. Mar. 15, 2017).

457. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE Art. IV (Matthew Bender 2d ed. 2016).

458. CAL. EVID. CODE § 1108 (West 2019); GA. CODE ANN. §§ 24-4-412, 24-4-413, 24-4-414 (West 2019); 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2019); KAN. STAT. ANN. § 60-455(d) (West 2019); VA. CODE ANN. § 18.2-67.7:1 (West 2019).

459. United States v. Guardia, 135 F.3d 1326, 1327 (10th Cir. 1998).

460. *Id*. at 1327.

461. *Id*. at 1331.

court" under the abuse of discretion standard.[462] The court also said that Rule 413 marked "a sea change in the federal rules' approach to character evidence."[463] Though the Supreme Court has never dealt with the constitutionality of Federal Rules of Evidence 413 or 414, the Seventh, Ninth, and Tenth Circuits have rejected Due Process Clause and Fifth Amendment equal protection claims against them.[464]

3. Sexually Transmitted Disease Status

Courts have struggled with whether to allow evidence of a survivor or defendant's sexually transmitted disease (STD) status. In *Fells v. State*, the Supreme Court of Arkansas weighed the probative value of the complainant's HIV-positive status against the prejudicial effect of that evidence and found that presentation of a rape survivor's HIV status should be denied under the state's rape shield law.[465] Fells was accused of raping a woman with whom he had no prior relationship.[466] He argued that the sexual contact was consensual and sought to introduce the woman's HIV-positive status as evidence that the woman had only claimed rape to avoid being charged for exposing Fells to the HIV virus.[467] Fells claimed that HIV status should not be protected by rape shield laws because it has no relation to the complainant's prior sexual activity.[468] The court, however, held that because of the highly stigmatized public opinion of HIV-positive persons and the fact that most members of the public view the HIV virus as a sexually transmitted disease, it would be difficult, if not impossible, for a jury to divorce the fact of the complainant's HIV-positive status from her sexual behavior.[469]

On the other hand, at least three courts have held that a defendant's STD status is admissible in a sexual assault trial.[470] In *State v. Jacobs*, the Supreme Court of North Carolina determined that the facts that the survivor had contracted Trichomonas vaginalis and the Herpes simplex virus should have been admissible at trial.[471] The survivor's father, who was accused of having raped her twice per

462. *Id.*; *see also* United States v. Joubert, 778 F.3d 247 (1st Cir. 2015); United States v. Erramilli, 788 F.3d 723, 729 (7th Cir. 2015) (holding district court did not abuse its discretion because "probative value of Erramilli's prior sexual assaults was substantial and the danger of unfair prejudice was low").

463. *Guardia*, 135 F.3d at 1331; *see also Joubert*, 778 F.3d 247; *Erramilli*, 788 F.3d 723.

464. United States v. Stokes, 726 F.3d 880, 896 (7th Cir. 2013); United States v. LeMay, 260 F.3d 1018, 1027 (9th Cir. 2001); United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998).

465. Fells v. State, 207 S.W.3d 498, 502 (Ark. 2005).

466. *See id.* at 501.

467. *Id.* at 501–02.

468. *Id.* at 502; *see also* ARK. CODE ANN. § 16-42-101 (West 2019); *see generally* Jamie Goss Dempsey, Fells v. State*: Good Decision on Procedural Grounds, Dangerous Precedent for Future Application of Arkansas's Rape Shield Statute*, 59 ARK. L. REV. 943, 963 (2007).

469. *Fells*, 207 S.W.3d at 507.

470. State v. Jacobs, 811 S.E.2d. 579, 583 (N.C. 2018); White v. State, 259 S.W.3d 410, 415 (Ark. 2007); Commonwealth v. Thevenin, 603 N.E.2d 222, 226 (Mass. App. Ct. 1992). *But see* State v. Ozuna, 316 P.3d 109 (Idaho Ct. App. 2013) (upholding exclusion of survivor's sexually-transmitted disease status).

471. *Jacobs*, 811 S.E.2d. at 579.

week for about three years, tested negative for Trichomonas vaginalis and the Herpes simplex.[472] The court explained that the evidence should have been admissible under a narrow exception to the Rape Shield Statute which depends on whether the evidence at issue is "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant."[473] The court concluded that the STD evidence diminished the likelihood that the defendant committed the crime for the three-year period and therefore should have been admissible.[474]

Some legislatures have addressed testing a defendant for HIV after they are accused of a sexual assault.[475] Tennessee has a statute that requires HIV testing of anyone charged with a sex crime even when the survivor does not request it.[476] Virginia allows a hearing to be held on whether probable cause exists as to whether the defendant committed a sexual assault before the defendant is tested for HIV.[477] Washington has explicitly found that testing a defendant for HIV in a sexual assault case is constitutional both in permissive (at the request of the survivor) and mandatory contexts.[478] In 2012, the Vermont Supreme Court upheld a statute that allowed for testing of defendants of sex crimes for HIV status and other STDs, explaining that the testing can pose a psychological benefit to the survivor that outweighs the defendant's privacy interest.[479]

4. Survivor's Medical Records

State and federal courts have varied in their approaches to survivor's physiological and medical records. These differing approaches concern the requirement of survivors to undergo a psychological exam, access to the survivor's psychological records, and the scope of the victim-counselor privilege. In 1940, John Henry Wigmore, an influential legal scholar, wrote, "No judge should ever let a [sex-offense] charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."[480] Though this view is no longer typical, some defendants continue to pursue this line of thought by compelling survivors to undergo a psychological exam.[481]

472. *Id*. at 582.
473. *Id*.
474. *Id*.
475. TENN. CODE ANN. § 39-13-521(a) (West 2019); VA. CODE ANN. § 18.2-62(A) (West 2019).
476. TENN. CODE ANN. § 39-13-52l(a) (West 2019).
477. VA. CODE ANN. § 18.2-62(A) (West 2019).
478. *In re* Juveniles A, B, C, D, E, 847 P.2d 455, 462 (Wash. 1993).
479. State v. Handy, 44 A.3d 776, 785 (Vt. 2012).
480. John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, in EVIDENCE 322–23 (George Fisher ed., 2013).
481. Jenny M. Flanigan, *Once, Twice, Three Times a Victim: Why a Defendant in a Sexual Assault Case Has No Right to Compel Physical Examinations*, 113 W. VA. L. REV. 621, 631 (2011). *But see* State v. Berriozabel, 243 P.3d 352, 365 (Kan. 2010) (holding the defendant could not compel rape survivor to undergo a psychological exam because her testimony was consistent and showed no signs of mental instability or lack of veracity).

Some states require the defendant to show that evidence from an examination of the survivor would exonerate him or her.[482] Other states use a compelling needs standard that "loosely balance[s] the defendant's interest in the evidence against the burden that the examination would impose on the complainant."[483] Kentucky alone uses a material assistance test under which a defendant can compel an examination when it would assist with his trial preparation.[484] At least two state courts have held that the court does not have the authority to force a complaining witness in a sexual assault case to undergo a physical exanimation.[485] Two other state courts have held that compelling rape survivors to submit to psychiatric exams was not allowed, due in part to privacy concerns of rape survivors.[486]

If the court declines to compel a survivor to get a psychological test, a defendant may still try to access a rape survivor's existing psychological records; for example, one court in Utah did not allow a defendant access to records of a survivor's therapy session because the defendant did not show that there would be relevant evidence in them.[487] Meanwhile, the Ninth Circuit overturned a rape conviction because the prosecution did not turn over the victim's psychiatric records that suggested that the victim may have "misperceived what was happening" and that she had a tendency to lie.[488] In response to the potential for defendants to access psychological records, forty states and the District of Columbia have recognized an explicit victim-counselor testimonial privilege.[489] California was the first state to recognize this privilege in 1980.[490] Judge Arabian, an avid supporter of this provision in California, explained why it is so important that those conversations be privileged: "Rape counselors are supportive personnel whose primary role is to advise the victim. The idea that they should be subjected to cross-examination while the defense probes for inconsistencies in the victim's statements, is repellent."[491]

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482. Flanigan, *supra* note 481, at 627–28.

483. *Id.*

484. *Id.*

485. People v. Lopez, 800 N.E.2d 1211, 1216–17 (Ill. 2003); State v. Stephens, 724 S.W.2d 141, 144–45 (Tex. Ct. App. 1987).

486. Nobrega v. State Commonwealth, 628 S.E.2d 922, 925 (Va. 2006). *But see* State v. Eddy, 321 P.3d 12, 16–17 (Kan. 2014) (holding that totality of circumstances determines whether compelling circumstances justify psychological evaluation of survivor); *In re* Michael H., 602 S.E.2d 729, 733 (S.C. 2004) (holding that "an absolute bar"' on the consideration of psychological evaluations of survivors "ignores the necessary balance which must be sought between a complainant's privacy rights and a defendant's right to a fair trial").

487. State v. Blake, 63 P.3d 56, 62 (Utah 2002).

488. United States v. Gray, 52 F. App'x 945, 947 (9th Cir. 2002).

489. *See generally* CONFIDENTIALITY INST., SUMMARY OF U.S. STATE LAWS RELATED TO ADVOCATE CONFIDENTIALITY (Jan. 2014).

490. Kellie Wingate Campbell, *Victim Confidentiality Laws Promote Safety and Dignity*, 69 J. MO. B. 76, 79 (2013).

491. *Id.*

The scope of the victim-counselor privilege varies from state to state.[492] Absolute privilege states—including Alaska and Pennsylvania—prohibit disclosure under all circumstances except for the explicit consent of the victim.[493] Semi-absolute states—including Hawaii, Utah, and Minnesota—make explicit exceptions to a general standard of non-disclosure when disclosure is in the public interest.[494] Qualified privilege states—including California and Iowa–determine whether disclosure is permitted on a case-by-case basis, balancing the weight of the defendant's need to bring in the evidence against the victim's need to keep the evidence out.[495] Additionally, courts have struggled with whether evidence obtained by a medical professional about a rape during a medical session is admissible.[496] Under Rule 801, hearsay is a statement made out of court, offered in evidence to prove the truth of the matter asserted.[497] While hearsay evidence is generally inadmissible,[498] there is an exception to hearsay under Federal Rule of Evidence 803(4) for statements made for medical diagnosis or treatment.[499] Some states have held that where evidence exists to support a finding that a statement made by a survivor to a forensic nurse was for dual medical and forensic purposes, the testimony is admissible.[500]

In Maryland, two cases have potentially made it more difficult for prosecutors to pursue cases in which the survivor delays reporting and getting examined after a rape.[501] The ruling by the Court of Special Appeals in *Coates v. State* restricts the admissibility of statements made to medical professionals in prosecutions for second-degree rape, second-degree sexual offense, and child abuse to only those made for purposes of medical diagnosis or treatment.[502] The complainant, a nine-year-old girl, disclosed details about how she had been sexually assaulted to her pediatric nurse practitioner during an examination; she also identified the defendant as her assailant.[503] This examination took place fourteen months after the last occurrence of sexual assault and was unrelated to treatment of any medical problems related to the abuse.[504] In its ruling, the court contrasted this case with an earlier case, *Webster v. State*, in which the court allowed testimony about statements made by a survivor to a nurse during an examination that took place immediately after the defendant was caught inappropriately touching the survivor.[505]

492. *See generally* CONFIDENTIALITY INST., *supra* note 489.
493. *Id.*
494. *Id.*
495. *Id.*
496. *See* Coates v. State, 930 A.2d 1140 (Md. Ct. Spec. App. 2007), *aff'd*, 405 Md. 131 (Md. 2008).
497. FED. R. EVID. 801(c).
498. FED. R. EVID. 802.
499. FED. R. EVID. 803(4).
500. *See* State v. Vigil, 810 N.W.2d 687, 697–98 (Neb. 2012); State v. Grant, 776 N.W.2d 209, 215–16 (N.D. 2009); State v. Payne, 694 S.E.2d 935, 942 (W. Va. 2010).
501. *Coates*, 930 A.2d 1140.
502. *Id.* at 1162–63.
503. *Id.* at 1148–49.
504. *Id.* at 1162.
505. *Id.* at 1163.

The court noted that, in *Webster*, both the physical examination conducted and the questions asked by the nurse directly pertained to the injury suffered.[506] In contrast, in *Coates*, the questions asked by the nurse concerning the details of the sexual abuse and the identity of the defendant werenot related to a medical purpose[507] and were, instead, asked in furtherance of an "overarching investigatory purpose."[508] Thus, the testimony was not admissible.[509]

In *Davis v. Petito*, the same court held that a five-year-old complainant's statements to her therapist concerning what, if any, sexually abusive acts transpired between her and her father eleven months earlier also did not fall within the scope of the hearsay exception.[510] The court stated that only statements taken and given in contemplation of medical treatment or diagnosis are embraced by the hearsay exception, and the patient's subjective intent is relevant in determining whether the exception applies.[511] The court found that the complainant in this case did not understand that she was making the statements for the purpose or diagnosis in contemplation of medical treatment.[512] The factors the court emphasized in its decision were the lack of physical symptoms, the length of time between the onset of any symptoms and the visit to the therapist, and a lack of evidence about the purpose of the therapy visit.[513]

Cases like *Davis* and *Coates* that limit the ways in which victim testimony may be admitted under the hearsay exception make it more difficult to prosecute sexual assault in certain jurisdictions. Barring this type of testimony can punish victims for waiting to seek medical treatment, regardless of how honest they are in answering questions asked by their health care providers.[514]

5. Social Media Evidence

The use of social media as evidence first gained media attention during the Steubenville rape case in 2012. In the Steubenville case, police analyzed tweets in order to determine who to interview while investigating the case.[515] During the trial, the prosecutor used text messages, cell phone pictures and videos to demon

506. *Id*. at 1156.

507. *Id*. at 1162. The court identified questions such as, "How many times did [Coates] do that to you?" and "Did you see 'anything come out of his private'?" as not relevant to any medical treatment. *Id*. The identity of the defendant was not in question when the nurse was interviewing the complainant. *Id*.

508. *Id*.

509. *Id*. at 1163.

510. Davis v. Pepito, 14 A.3d 692, 716 (Md. Ct. Spec. App. 2011), *rev'd on other grounds*, 39 A.3d 96 (Md. 2012).

511. *Id*. at 713.

512. *Id*. at 716.

513. *Id*. at 715.

514. Because of the psychological effects of rape, it is not unusual for survivors to delay reporting rapes. *See* Juliane Kippenberg, *Seeking Justice*, HUMAN RIGHTS WATCH (Mar. 7, 2005), http://www.hrw.org/en/node/11816/section/7.

515. Levy, *supra* note 122.

strate the perpetrators' commission of multiple sexual assaults.[516] The social media evidence was essential to the prosecution's case because the survivor was too intoxicated to recall the assaults.[517] Other prosecutors have used social media as a means to show inappropriate communication between the defendant and the victim.[518] As quickly as prosecutors have begun to use social media evidence to bolster their rape cases, defense attorneys have turned to social media as a means by which to discredit rape survivors and to appeal cases based on the admission of such evidence; in particular, defendants often try to admit Facebook and Myspace pages into evidence in order to demonstrate the survivor's promiscuity, illegal activity, and emotional state after the sexual assault.[519] Several courts across several jurisdictions have declined to admit this evidence because it does not survive the prejudicial-probative analysis under Federal Rule of Evidence 403.[520] To be admitted into trial, social media evidence must meet the same requirements as any other evidence: it must be relevant, authentic, not hearsay, and its probative value must outweigh its unfair prejudicial effect.[521] The best way to obtain social media evidence is to make specific discovery requests that

516. *Id.*; *see also* Cara Richardson, *Text Messages Key Evidence in Steubenville Rape Trial*, USA TODAY (Mar. 13, 2013), http://www.usatoday.com/story/news/nation/2013/03/14/ohio-football-rape-trial/1987471/.

517. Levy, *supra* note 122.

518. *See* United States v. Browne, 834 F.3d 403, 413 (3d Cir. 2016) (holding that a conversation in a chat group on Facebook Messenger with defendant and survivor was admissible); Smith v. State, 136 So. 3d 424, 436 (Miss. 2014) (holding that admission into evidence of unauthenticated Facebook messages allegedly sent by defendant was harmless error); State v. Mrza, 926 N.W.2d 79, 87 (Neb. 2019) (holding that a Snapchat message exchange between defendant and survivor was admissible) ; People v. Fielding, No. C062022, 2010 WL 2473344, at *5 (Cal. Ct. App. June 18, 2010) (allowing evidence of Myspace messages in which defendant told survivor she wanted to have sex with him); Simmons v. Commonwealth, No. 2012-SC-000064-MR, 2013 WL 674721, at *3 (Ky. Feb. 21, 2013) (allowing evidence of sexually suggestive Facebook messages between defendant and survivor, who was a minor).

519. *See* Israel v. State, 141 So. 3d 95, 101 (Ala. Crim. App. 2013); Prater v. State, 402 S.W.3d 68, 71 (Ark. 2012); State v. Corwin, 295 S.W.3d 572, 577-79 (Mo. Ct. App. 2009), *abrogated by* Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. 2010); State v. Townsend, 208 N.C. App. 571, 706 S.E.2d 841 (N.C. Ct. App. 2010); Ryder v. State, No. 14-18-00148-CR, 2019 WL 3228143, at *10 (Tex. App. July 18, 2019).

520. *Israel*, 141 So. 3d at 101 (holding that comments about a rape survivor's dating life on Facebook were inadmissible because they were irrelevant to whether the defendant raped her); *Prater*, 402 S.W.3d at 74 (ruling that photos of a rape survivor enjoying herself were not admissible because they had no relevance to whether the rape occurred); Truitt v. Commonwealth, No. 2007-SC-000376-MR, 2008 WL 4691629, at *3 (Ky. Oct. 23, 2008) (holding survivor's Myspace pages in which she listed her sexual activity was not admissible because it was not about the defendant); *Townsend*, 706 S.E.2d at *4 (holding that photos on Facebook of survivor making gang signs, smoking marijuana, and wearing revealing clothing were not admissible); *Corwin*, 295 S.W.3d at 577–78 (holding that rape survivor's comments on Facebook about excessive drinking and receiving unknown bruises from drinking were not relevant to current rape case). *But see In re* K.W., 666 S.E.2d 490, 494–95 (N.C. Ct. App. 2008) (holding that survivor's Myspace page on which she stated she was not a virgin was admissible for impeachment evidence after she testified she was a virgin, but it was harmless error because it would not have changed the trial's outcome).

521. Monique Leahy, *Facebook, Myspace, Linkedln, Twitter, and Other Social Media in Trials*, 122 AM. JUR. TRIALS 421 § 4 (2011).

connect the particular media requested to one of the parties of the case.[522] However, social media companies have been reluctant to respond to subpoenas.[523]

In order to authenticate social media evidence, witnesses can testify that they authored the evidence in question, such as an email or Facebook message.[524] In *People v. Clevestine*, a New York court held that evidence of electronic communications between a defendant and sexual assault victims was authenticated because both victims testified that they had written the message, an investigator testified that he retrieved the conversations from the hard drive of the computer used by the victims, the social networking site confirmed the messages had been exchanged between the two accounts, and the defendant's wife testified that she saw explicit conversations on the defendant's site account on their computer.[525] In the Eleventh Circuit, parties need only testify that they participated in the interactions in question to authenticate the social media evidence.[526]

However, there is concern about social media accounts being "hacked" (accessed by people other than the person identified on the account).[527] Given the proliferation of social media platforms over the past decade[528] and the growing number of people who use them,[529] it is likely that more appellate decisions will have to analyze the admissibility of this type of evidence in sexual assault cases.

Notably, social media evidence is increasingly being used to discredit victims' testimony in civil cases; for example, *Melissa* G. *v. North Babylon Free School District* is a 2015 sexual assault case that dealt with the use of social media evidence.[530] When Melissa was fifteen years old and attending school at North Babylon, she was repeatedly raped by a teacher, Daniel Cuesta, who was employed by the school district.[531] After testifying in a criminal case against Cuesta, Melissa sued the school district and Cuesta for damages for injuries

522. John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 S.M.U. SCI. & TECH. L. REV. 465, 473–74 (2011).

523. *Id*. at 472.

524. *See* Griffin v. State, 19 A.3d 415, 427 (Md. 2011) (holding that the state did not properly authenticate a social networking site when they did not ask the witness to confirm it was her page, even though it had her picture, location, and birthdate).

525. People v. Clevenstine, 891 N.Y.S. 2d 511, 514 (N.Y. App. Div. 2009); *see also* Tienda v. State, 358 S.W.3d 633, 642 (Tex. Crim. App. 2012) (holding that circumstantial evidence was sufficient to establish a *prima facie* claim showing that the defendant was the author of the social network posts).

526. United States v. Macaluso, 460 F. App'x 862, 870 (11th Cir. 2012); *see also* Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 MISS. C. L. REV. 185, 216-17 (2012) (discussing the different standards courts use to authenticate electronic evidence).

527. Orenstein, *supra* note 526, at 220–21.

528. Browning, *supra* note 522, at 466 (noting that Facebook and Twitter, two of the most popular social media sites, were founded in 2004 and 2006, respectively).

529. Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RES. CTR., http://www.pewinternet.org/20 15/10/08/social-networking-usage-2005-2015/ (last visited Jan. 19, 2020) (finding that as of October 2015, sixty-five percent of online adults use social networking sites).

530. Melissa "G" v. North Babylon Union Free School Dist., 6 N.Y.S.3d 445, 445 (N.Y. Sup. Ct. 2015).

531. *Id*. at 447.

including "[r]epeated sexual injury and assault; emotional distress, mental distress . . . alienation of affections, loss of enjoyment of life, [and] post-traumatic stress disorder."[532]

In response to her complaint, defendants submitted printed pages from Melissa's Facebook account that depicted her engaging in various recreational activities, and generally looking happy.[533] Defendants urged the court to force Melissa to turn over "all postings, status reports, e-mails, photographs and videos posted on her web page to date."[534] Defendants reasoned that the Facebook postings were necessary to rebut Melissa's testimony that she had trust issues, anxiety attacks, and relationship trouble with her boyfriend caused by the sexual abuse.[535] The court ordered that Melissa produce all of the information that defendants had requested because it was probative to her alleged injuries and the defendants' theory that the allegations of injuries were false.[536] While this holding indicates that the court believes that postings and pictures on Facebook are at least a somewhat accurate indicator of whether someone is suffering or happy, in a brief moment of self-awareness, the court added, "this Court is mindful that '[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress.'"[537]

As widespread use of social media increases, especially among young adults,[538] courts will continue to grapple with the issues presented by social media evidence in rape and sexual assault cases. Beyond the effects such evidence will have on the dispositions of these cases (either to the benefit or detriment of the victim), the ease with which social media evidence can be disseminated has the potential to confront and rebut pervasive rape myths by providing brutal and undeniable visuals that depict the reality of rape and sexual assault.[539]

III. CIVIL LAW

It is often difficult for rape survivors to achieve justice in the criminal arena due to lack of control in pursuing a case and the difficulty of getting a conviction.[540] Many rape survivors have turned to civil cases to achieve justice, particularly because civil cases require a lower standard of proof: preponderance of the

532. *Id*.
533. *Id*.
534. *Id*.
535. *Id*.
536. *Id*. at 449–50.
537. *Id*.
538. Perrin, *supra* note 529 (finding that ninety percent of young adults between the ages of 18 and 29 use social media platforms).
539. Holly Boux & Courtenay Daum, *At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge the "Real" Rape Myth in the Criminal Justice System*, 2015 U. ILL. J.L. TECH. & POL'Y 149, 185–86 (2015).
540. *See* TJADEN & THOENNES, *supra* note 58, at 33 (finding that thirty-seven percent of reported rapes resulted in prosecution and, of those prosecutions, only forty-six percent resulted in convictions).

evidence, as opposed to guilty beyond a reasonable doubt.[541] Additionally, civil cases give rape survivors more control over the trial process.[542] In criminal law, a rape survivor does not have their own lawyer; in fact, they are merely a witness in the state's case against the rapist.[543] Unfortunately, the state's interests are not always aligned with those of the survivor. While the remedies in civil cases may be more measured, the civil system offers the survivor more autonomy.

However, the civil system is not perfect. Rape shield laws do not generally protect civil litigants,[544] and courts are not always sympathetic to the privacy rights of survivors in civil suits.[545] Furthermore, the civil system remains tied to the criminal system in many ways, requiring either convictions or higher burdens of proof for much of the injunctive relief to be available to survivors, especially when rape has resulted in pregnancy. These requirements lessen the autonomy of the survivor in civil cases, as they are still dependent on the outcome of the criminal case to obtain relief.

A. CHILD CUSTODY IN RAPE CASES

Because rape often goes unreported and unprosecuted, it is difficult to accurately calculate the number of rape-induced pregnancies.[546] Studies estimate that between 17,000 and 32,000 rape-induced pregnancies occur in the United States every year.[547] Despite the socially-constructed narrative of the "pregnant raped-woman prototype," in which a rape-induced pregnancy is seen as a continuation of the rape, and rape victims are thus expected to despise and terminate the fetus,[548] approximately 50 percent to 73 percent of rape-induced pregnancies are carried to term, and somewhere between 32.3 percent to 64 percent of rape survivors choose to keep and raise their children.[549]

However, in some jurisdictions, an absence of legal protections for rape survivors may leave a woman who chooses to keep a rape-induced pregnancy

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541. Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 S.M.U. L. REV. 55, 68 (2006).

542. Myka Held, *A Constitutional Remedy for Sexual Assault Survivors*, 16 GEO. J. GENDER & L. 445, 468 (2015).

543. *Id*. at 461.

544. Bublick, *supra* note 541, at 76.

545. *See, e.g*., Doe v. Shakur, 164 F.R.D. 359, 362 (S.D.N.Y. 1996) (holding that a rape survivor did not have the right to use a pseudonym in a civil case because she had chosen to pursue litigation). *But see* Doe v. Cabrera, 307 F.R.D. 1, 10 (D.D.C. 2014) (holding that a rape victim could proceed anonymously in a civil suit against her alleged attacker, a professional baseball player, through pretrial proceedings).

546. Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 520 (2014).

547. *See id*.; *Parental Rights and Sexual Assault*, NAT'L CONF. ST. LEGS., http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx (last visited Jan. 19, 2020).

548. *See* Shauna R. Prewitt, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827 (2010).

549. *Id*. at 829.

"tethered" to the man who raped her.[550] For example, in Massachusetts, survivor H.T. sued the state in federal court for ordering her convicted rapist (who raped H.T. when he was twenty and she was fourteen) to initiate family court proceedings that allowed him visitation with his and H.T.'s child.[551] The survivor had no desire to maintain contact with her rapist, but the state's order forced her to do so.[552] H.T.'s suit against Massachusetts was eventually dismissed on Eleventh Amendment grounds.[553]

While many states do have some form of child-custody laws for rape-induced pregnancy, states laws vary greatly with regards to the ability of survivors to access them and the amount of rights they leave to the rapist. Thirty-seven states provide for the termination of all parental rights for rapists,[554] while the remaining twelve states and the District of Columbia restrict custody and visitation rights.[555] One state lacks any specific laws restricting the parental rights of rapists.[556]

Despite the growth of state laws terminating and restricting the parental right of rapists, there is still a debate among states as to whether child custody laws in instances of rape should require a criminal conviction for rape or simply evidence

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550. *Id*. at 831.

551. Dahlia Lithwick, *A Spectacularly Awful Week in Rape*, THE SLATE (Aug. 29, 2013), https://slate.com/human-interest/2013/08/montana-massachusetts-rape-cases-when-judges-cant-get-even-the-easy-cases-right-were-in-trouble.html.

552. *Id*.

553. Tyler v. Massachusetts, 981 F. Supp. 2d 92, 95–96 (D. Mass. 2013).

554. These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, Wisconsin, and Wyoming. *See Parental Rights and Sexual Assault*, *supra* note 547; ALA. CODE § 12-15-319; ALASKA STAT. § 25.23.180; ARIZ. REV. STAT. § 25-416; ARK. STAT. ANN. § 9-10-121; COLO. REV. STAT. §§ 19-5-105.5, 19-5-105.7; CONN. GEN. STAT. §§ 17A-111B, 17A-112, 45A-717; FLA. STAT. § 39.806; GA. CODE §§ 19-8-10, 19-8-11; HAWAII REV. STAT. § 571-61; IDAHO CODE § 16-2005; IND. CODE § 31-35-3.5-1; IOWA CODE § 232.116; KAN. STAT. § 38-2269; LA. CHILD. CODE § 1004; ME. REV. STAT. ANN. TIT. 19-A, § 1658; ME. REV. STAT. ANN. TIT. 22, § 4055; MD. FAMILY LAW CODE ANN. § 5-1402; MICH. COMP. LAWS § 722.1445; MISS. CODE § 93-15-119; MONT. CODE ANN. § 41-3-609; NEB. REV. STAT. § 43-292; NEV. REV. STAT. § 128.105; N.H. REV. STAT. ANN. § 170-C:5-A; N.M. STAT. § 32A-5-19; N.C. GEN. STAT. § 7B-1111; N.D. CENT. CODE § 27-20-44; OHIO REV. CODE § 3109.50; OKLA. STAT. TIT. 10A, § 1-4-904; OR. REV. STAT. § 419B.510; PA. CONS. STAT. TIT. 23, § 2511; S.C. CODE § 63-7-2570; TENN. CODE ANN. § 36-1-113; TEX. FAM. CODE § 161.007; VT. STAT. ANN. TIT. 15, § 665; WASH. REV. CODE § 13-34-132; WIS. STAT. ANN. § 48.415; WYO. STAT. § 14-2-309.

555. These states are California, Delaware, District of Columbia, Illinois, Kentucky, Massachusetts, New Jersey, New York, Rhode Island, South Dakota, Utah, Virginia, and West Virginia. *See Parental Rights and Sexual Assault*, *supra* note 547; CAL. FAM. CODE § 3030; DEL. CODE TIT. 13, § 724A; D.C. CODE § 16-914(K); ILL. REV. STAT. CH. 750, § 46/622; KY. REV. STAT. § 403.322; MASS. GEN. LAWS ANN. CH. 209C, § 3; N.J. STAT. ANN. § 9:2-4.1; N.Y. DOM. REL. § 240; R.I. GEN. LAWS § 15-5-16; S.D. CODIFIED LAWS § 25-4A-20; UTAH CODE ANN. § 76-5-414; VA. CODE § 20-124.1; W. VA. CODE § 48-9-209A.

556. This state is Minnesota. *See Parental Rights and Sexual Assault*, *supra* note 547; *Termination of Rapists' Parental Rights*, RAPE, ABUSE, AND INCEST NAT'L NETWORK (Dec. 2017), https://apps.rainn.org/policy/compare/parental-rights.cfm.

of rape in order to trigger termination or restriction of the perpetrator's parental rights.[557] Twenty-six states and the District of Columbia require a conviction in order for any restrictions to apply.[558] Only twenty states allow for termination of all parental rights without explicitly requiring a conviction, and many of these states establish a clear and convincing evidence standard for termination of parental rights.[559] High evidentiary standards or a requirement for criminal conviction prevent many survivors from realistically accessing these laws designed for their benefit.

In 2013, Representative Debbie Wasserman Schulz from Florida introduced the Rape Survivor Child Custody Act, H.R. 2772.[560] This bill initially failed and was reintroduced.[561] The portion of the bill that enumerates Congress's findings poignantly articulates the gravity of the issue:

> (1) Men who father children through rape should be prohibited from visiting or having custody of those children. (2) According to several studies, it is estimated that there are between 25,000 and 32,000 rape-related pregnancies annually in the United States. (3) A substantial number of women choose to raise their child conceived through rape and, as a result, may face custody battles with their rapists . . . (6) Rape is one of the most under-prosecuted serious crimes, with estimates of criminal conviction occurring in less than 5 percent of rapes . . . (9) Currently only 6 States have statutes allowing rape survivors to petition for the termination of parental rights of the rapist based on clear and convincing evidence that the child was conceived through rape. (10) A rapist pursuing parental or custody rights causes the survivor to have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, and can make it more difficult for her to recover. (11) These traumatic effects on the mother can severely negatively impact her ability to raise a healthy child. (12) Rapists may use the threat of pursuing custody or parental rights to coerce survivors into not prosecuting rape, or otherwise harass, intimidate, or manipulate them.[562]

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557. *See* Katy Hall & Chris Spurlock, *Worst States For Pregnant Rape Victims (Infographic)*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/pregnant-rape-abortion_n_2552183.

558. These states are Alabama, Arizona, Arkansas, California, Delaware, District of Columbia, Kansas, Louisiana (for termination of rights), Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *See Parental Rights and Sexual Assault*, *supra* note 547; *Termination of Rapists' Parental Rights*, *supra* note 556.

559. These states are Alaska, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Maine, Maryland, Michigan, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Texas, Vermont, and Washington. *See Parental Rights and Sexual Assault*, *supra* note 547; *Termination of Rapists' Parental Rights Laws*, *supra* note 556.

560. H.R. 2772, 113th Cong. (2013–2014).

561. *H.R. 2772 (113th): Rape Survivor Child Custody Act*, GovTRACK, https://www.govtrack.us/congress/bills/113/hr2772 (last visited Jan. 19, 2020).

562. *Id.*

Since May 2015, the Rape Survivor Child Custody Act provides fiscal incentives for states that enact laws that give rape victims the right to revoke the parental rights of their rapists.[563] Importantly, the bill employs a "clear and convincing" evidence standard, but does not specify whether or not the rapist must be convicted in a criminal proceeding before losing their rights.[564] It is currently unclear to what extent states will respond to these incentives and how courts will interpret the clear and convincing evidence standard.

Even where survivors do wish to terminate their pregnancies, many states are restricting their ability to do so by removing the "rape and incest exception" from abortion restrictions. These exceptions, even if disfavored in pro-life circles, have been relatively commonplace since the 1980s.[565] Since early 2019, nine states have passed increasingly restrictive bans on abortion; six of them provide no exceptions, even in the case of rape.[566] Two other states, Georgia and Utah, allow an exception for rape, but only where the doctor has confirmed that the rape was reported to the police.[567] While abortions due to rape are uncommon,[568] the removal of these exceptions create additional tethers between the survivor and the rapist, especially where states then have lax laws on restricting a rapist's parental or custodial rights.

B. CIVIL PROTECTION ORDERS

Given that many rape cases are not prosecuted, civil protection orders provide survivors with another means to ensure their safety and prevent stalking, further violence, intimidation, and contact with their abuser.[569] The availability of civil protection orders is important because the protection they provide can be obtained upon a preponderance of the evidence rather than a higher evidentiary standard.[570] These orders can also remove the assailant from the survivor's life,[571] which may make it easier for the survivor to recover from the rape. Many states allow survivors of sexual assault to obtain civil protection orders or restraining orders. Unfortunately, several states use a domestic violence model for civil

563. 34 U.S.C.A. § 21303 (West, Westlaw through P.L. 116-63).

564. *Id.*; *see* Hall & Spurlock, *supra* note 557.

565. *See* Mary Ziegler, *The End of the Rape and Incest Exception*, THE NEW YORK TIMES (Jun. 11, 2019), https://www.nytimes.com/2019/06/11/opinion/abortion-rape-incest-exception.html.

566. The states removing the rape exception are Alabama, Kentucky, Louisiana, Mississippi, Missouri, and Ohio. *See* Mara Gordon and Alyson Hurt, *Early Abortion Bans: Which States Have Passed Them?*, NPR (Jun. 5, 2019, 3:08 PM), https://www.npr.org/sections/health-shots/2019/06/05/729753903/early-abortion-bans-which-states-have-passed-them.

567. *Id.*

568. *See* Alia E. Dastagir, *Rape and Incest Account for Hardly Any Abortions. So Why Are They Now A Focus?*, USA TODAY (May 24, 2019, 10:30 AM), https://www.usatoday.com/story/news/nation/2019/05/24/rape-and-incest-account-few-abortions-so-why-all-attention/1211175001/.

569. Hayley Jodoin, *Closing the Loophole in Massachusetts Protection Order Legislation to Provide Greater Security for Victims of Sexual Assault: Has Massachusetts General Laws Chapter 258e Closed It Enough?*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 102, 109–10 (2012).

570. *Id.* at 112; *see also* J.M. v. Briseno, 949 N.E.2d 779, 785–86 (Ill. App. Ct. 2011).

571. Jodoin, *supra* note 569, at 112.

protection orders, which often means that only survivors who had an intimate partner relationship, intrafamily relationship, or certain limited types of interpersonal relationships with their rapist can obtain a civil protection order against them.[572] A few states allow a protection order if the rapist has been charged with a crime.[573] Illinois, Washington, and Colorado are three of the few states that allow any rape survivor to obtain a protection order, regardless of their connection to their rapist.[574]

The District of Columbia has also construed its civil protection order statute to include rapes that are not perpetrated by those with whom the survivor was in an intimate, intrafamily, or certain interpersonal relationship, despite the statute not explicitly providing for this.[575] In *A.R. v. FC.*, a woman was raped by her ex-boyfriend's friend.[576] The trial court denied her a civil protection order because she had not been in an intimate relationship with the rapist.[577] However, on appeal, the court found that "D.C. Code sections l6-1001(12) and 16-1003(a) permit[ted] *any* person who allege[d] that he or she [wa]s the victim of stalking, sexual assault, or sexual abuse to apply for civil protection; there was no requirement that such a person had a prior relationship with the alleged offender."[578] The court held that prior intimate relationships between the survivor and the rapist were not required for the survivor to obtain protection. On the other hand, the court was not willing to go so far as to require an attacker to move. In *Salvattera v. Ramirez*, the D.C. Court of Appeals stayed a civil protection order against the survivor's attacker, who was her neighbor and lived in a different unit within the same apartment complex.[579] Because the order would have forced Salvattera to vacate his apartment, the appellate court held that the trial court did not have such authority under D.C. Code section 16-1005(c).[580] These cases highlight how the protection of sexual assault victims whose relationships to their attackers do not neatly fit within the statutorily-defined relationship categories remains precarious and unclear.

Civil protection orders are important for many survivors, even those who do not have a romantic relationship with their attacker; in *A.R. v. F.C.*, for example, the likelihood that A.R. may have still been forced to interact with F.C. in the absence of a civil protection order was high.[581] These interactions could be non-

572. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2019); 12 R.I. GEN. LAWS ANN. § 12-29-2 (West 2019).

573. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-40e (West 2019); IOWA CODE ANN. § 664A.3 (West 2019); MASS. GEN. LAWS ANN. 258e § 1 (West 2019).

574. *See, e.g.*, COLO. REV. STAT. ANN. § 13-14-103 (West 2019); 740 ILL. COMP. STAT. ANN. 22/201 (West, through P.A. 101-115); WASH. REV. CODE ANN. § 7.90.020 (West 2019).

575. A.R. v. F.C., 33 A.3d 403, 408 (D.C. 2011).

576. *Id.* at 404–05.

577. *Id.* at 405.

578. *Id.* at 408–09 (emphasis added; internal quotations omitted).

579. Salvattera v. Ramirez, 105 A.3d 1003, 1004 (D.C. 2014).

580. *Id.* at 1006.

581. *See generally A.R.*, 33 A.3d 403.

violent but still re-traumatizing, or they could result in more violence and abuse to A.R. This is not only true for cases like *A.R. v. F.C.*; civil protection orders are also crucial for survivors who are being stalked by their rapists[582] and victims of campus or date rape. In an Illinois case, a law student who was raped by a fellow law student obtained a civil protection order so she would not have to see her attacker in class.[583] Many states are implementing and enforcing sexual assault-specific protection orders that do not require the victim and abuser to have had a prior relationship in order to respond to the many situations, like A.R.'s above, that do not fit neatly into a domestic abuse schematic.[584]

C. CIVIL CAUSES OF ACTION

Congress tried to create a federal civil cause of action against gender violence in 1994.[585] The Supreme Court ruled this law unconstitutional in *United States v. Morrison* because gender-based violence is not an economic activity, and the federal government cannot regulate non-economic activity under the commerce clause.[586] Some states, however, have created a civil cause of action for sexual assault.[587] California and Illinois have adopted the Violence Against Women Act model that was overturned at the federal level.[588] "Statutes modeled after the VAWA federal remedy provide advantages not typically found in traditional tort actions: (1) they award attorney's fees and costs to a prevailing plaintiff, and (2) they provide an extended statute of limitations. All the model statutes provide for punitive damages, and injunctive and declaratory relief."[589] Taking a similar approach, twelve states and the District of Columbia have adopted civil remedies for gender and sex bias.[590]

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582. Matthew J. Breiding et al., *Prevelance And Characteristics Of Sexual Violence, Stalking, And Intimate Partner Violence Victimization—National Intimate Partner And Sexual Violence Survey, United States, 2011*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL (Sept. 5, 2014), https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf (finding that 15.2% of women and 5.7% of men experience stalking).

583. J.M. v. Briseno, 949 N.E.2d 779, 779–80 (Ill. App. Ct. 2011).

584. *See generally* AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, SEXUAL ASSAULT CIVIL PROT. ORDERS (CPOS) BY STATE (Apr. 8, 2015), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/migrated_charts/SA%20CPO%20Final%202015.pdf.

585. 42 U.S.C.A. § 13981, *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

586. *Id*. at 617.

587. K. Anderson, *supra* note 61, at 239–40.

588. *Id*.

589. *Id*.

590. *Id*. at 241; CAL. CIV. CODE § 52.4 (West 2019) (gender violence); D.C. CODE ANN. § 22-3704 (West 2019) (prejudice against sex and gender identity); 740 ILL. COMP. STAT. ANN. 82/10 (West through P.A. 101-115) (gender-related violence); IOWA CODE ANN. §§ 729A.2, 729A.5 (West 2019) (hate crime including sex); MASS. GEN. LAWS ANN. ch. 12, § 11I (West 2019) (violation of constitutional rights); MICH. COMP. LAWS ANN. § 750.147b (West 2019) (ethnic intimidation, including gender); MINN. STAT. ANN. § 611A.79 (West 2019) (bias offenses, including sex); NEB. REV. STAT. ANN. § 28-113(3) (West 2019) (criminal offense because of sex); N.J. STAT. ANN. 2A:53A-21 (West, Westlaw through L.2019, c. 266 and J.R. No. 21) (injury due to gender); N.C. GEN. STAT. ANN. § 99D-1 (West 2019) (interference with constitutional civil right, Title IX); 9 R.I. GEN. LAWS ANN. § 9-1-2 (West 2019) (crime even if not prosecuted); VT STAT. ANN. tit. 13 §1455(a) (West 2019) (hate-motivated crimes including sex); WASH. REV. CODE. ANN. § 9A.36.083 (West 2019) (malicious harassment, including gender hate crime).

These laws tend to be under-utilized.[591] The number of civil cases filed by sexual assault survivors has increased dramatically in the last thirty years.[592]

For those states that do not have a civil cause of action, survivors can sue for torts, such as intentional infliction of emotional distress, battery, and negligence.[593] These cases can be a source of empowerment, as in *Martinmaas v. Englemann*, where a doctor charged with sexually assaulting multiple patients was acquitted of all charges, but the survivors, in a consolidated civil suit, won $450,000 each in damages .[594] However, cases requesting monetary damages in civil cases can also lead to reputational injury for survivors, leading to a stereotype that many survivors are merely falsifying a rape claim to extort money from a perpetrator.[595] Furthermore, in jurisdictions that use comparative fault, survivors may be re-victimized when they are blamed in part for their assault.[596]

In addition, many perpetrators do not have the financial assets to benefit a rape survivor pursuing a civil case.[597] Thus, many survivors now use civil law to sue third parties that exposed the survivors to injury, or failed in preventing the injury to occur, such as employers, religious institutions, and hotels.[598] In these cases, the outcome turns on whether the court thinks the sexual assault was reasonably

591. K. Anderson, *supra* note 61, at 242.

592. Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1373 (2010).

593. Bublick, *supra* note 541, at 70–72.

594. *See* Martinmaas v. Englemann, 612 N.W.2d 600 (S.D. 2000).

595. *See* T.R. Reid, *Rape Case Against Bryant is Dropped*, WASH. POST (Sept. 2, 2004), https://www.washingtonpost.com/archive/politics/2004/09/02/rape-case-against-bryant-is-dropped/8a4eba10-e8f8-43e8-b3d7-7b687679cee7/ (noting that Kobe Bryant's defenders said the rape survivor had only accused him of rape to make money, and quoting someone who said, "I think she was just trying to get some money out of Kobe.").

596. *See* Beul v. ASSE Int'l, Inc., 233 F.3d 441, 450 (7th Cir. 2000) (upholding a jury verdict that sixteen year old foreign exchange student was 41% responsible for rape by host father); Storts v. Hardee's Food Sys., Inc., No. 98-3285, 98-3320, 2000 WL 358381, at *2 (10th Cir., Apr. 6, 2000) (upholding a jury verdict that assigned survivor 30% fault for approaching two unknown men in a parking lot without looking to see if there were others in the parking lot); Wassell v. Adams, 865 F.2d 849, 852 (7th Cir. 1989) (upholding a jury verdict that assigned 97% of the blame to a rape victim who opened her hotel door to a rapist); Knkla v. Syfus Leasing Corp., 928 F. Supp. 1328, 1330 (S.D.N.Y. 1996) (upholding jury verdict that assigned rape survivor 40% of the blame for being raped by a stranger who got into her hotel room because the door was broken); Martin v. Prime Hospitality Corp., 785 A.2d 16, 22–23 (N.J. Super. Ct. App. Div. 2001) (holding that it was an error not to allow evidence of victim's fault in drinking to excess to reduce recovery); Malone v. Courtyard by Marriott Ltd. P'ship, 659 N.E.2d 1242, 1246 (Ohio 1996) (upholding a jury verdict that found survivor was 51% responsible for her rape because she had drinks with the rapist, invited him to her room, and did not ask for help despite many opportunities to do so).

597. K. Anderson, *supra* note 61, at 243–44 (noting that since insurance companies cover companies, third party defendants offer a more certain, and likely larger, monetary outcome).

598. *See, e.g.*, Baker v. Booz Allen Hamilton, Inc., 358 F. App'x 476, 478 (4th Cir. 2009) (employer); Ehrens v. Lutheran Church, 385 F.3d 232, 233 (2d Cir. 2004) (religious institution); Girden v. Sandals Int'l, 67 F. App'x 27, 27–28 (2d Cir. 2003) (hotel/employer); Melissa G. v. N. Babylon Union Free Sch. Dist., 6 N.Y.S.3d 445, 447 (N.Y. Sup. Ct. 2015) (school district that employed petitioner's rapist).

foreseeable by the third-party defendant.[599] The application of the law in determining third-party liability for rape has been uneven.[600] Though tort claims are limited and do not offer a perfect solution for rape survivors, they at least offer an alternative means of legal recourse.[601]

IV. CONCLUSION

Rape and sexual assault remain pervasive aspects of American society. As the discussions above have demonstrated, rape and sexual assault continue to overwhelmingly affect women, qualifying as crimes of gendered violence. While these issues have begun to permeate mainstream conversation, like other instances of violence against women, rape and sexual assault have typically been considered "private" issues and have been comparatively ignored or glossed over. Despite some growth in this field of law, rapes and sexual assaults remain underprosecuted, and survivors face significant impediments both before and after trials.

However, actions taken by activists and some lawmakers have begun to change how rape and sexual assault are handled in the legal system. Raising awareness of the rape kit backlog, for example, has led to attempts to increase collection and use of DNA evidence during investigations and trials. Additionally, shifting societal standards have resulted in a repeal of many laws preventing causes of action for marital rape. This continuing trend of activism and awareness is evolving the criminal system's approach to rape and sexual assault. Should survivors choose to pursue any civil courses of action, much of the state law, including protection of the survivor's identity, is constantly shifting. Survivors face many barriers in protecting themselves against their rapists, primarily due to high evidentiary standards or outdated conceptions of who relies on civil protection orders. However, this too has begun to change, seen through the increase in states allowing full termination of parental rights, even within the last two years. As society begins to become more comfortable talking about rape and sexual assault, continued research, advocacy, activism, and education are necessary to prevent the progress that has been made from stalling, and to improve those areas that have not yet seen much progress.

599. Chamallas, *supra* note 592, at 1378.

600. *Id*. at 1374.

601. Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, VAWNET 7 (Sept. 2009, 3:17 PM), https://vawnet.org/material/civil-tort-actions-filed-victims-sexual-assault-promise-and-perils.