Senator Sheldon Whitehouse
530 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Whitehouse,

I would like to submit the attached materials into the record of the hearing on "Campus Sexual Assault: The Roles and Responsibilities of Law Enforcement," scheduled for December 9, 2014. I hope these materials can help provide perspective on areas of concern and room for improvement in the law enforcement framework as it intersects with campus sexual assault cases.

Specifically, I hope that any reforms to involve the police will be done to help preserve the intended parallel criminal and civil rights processes. As criminal processes can serve the interests of the community with their punitive and retributive functions, it can free the civil rights Title IX processes to do their rehabilitative and restorative work aimed at the individual.

I hope this hearing will help think critically about how to balance victim autonomy, the rights of the accused, and community safety concerns. I hope it will help us think about how to build a supportive culture that fosters reporting, while cleanly separating the lines between advocacy, investigation, and adjudication.

As a survivor and an advocate, I appreciate your work to ensure fairness and justice to all involved parties in every case.

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The Third Model of Criminal Process: The Victim Participation Model

Douglas Evan Beloof[*]

I. INTRODUCTION

It is time to face the fact that the law now acknowledges the importance of victim participation in the criminal process. Thirty-one states have chiseled victims' rights into their respective constitutions.[0] The federal government and the rest of the states have enacted numerous statutory rights for victims.[1] An amendment to the United States Constitution providing civil rights for crime victims has been proposed[2] and is the topic of authors in this symposium. There are those who resist acknowledging the existence, genuine nature, and significance of victim participation laws. The state of denial that accompanies such resistance has stood in the way of the future for too long. This is a future in which there is a state of understanding regarding victim participation laws. At the turn of the millennium,

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[0]*See infra* Appendix A; Jacqueline V. McDonald, *Developments in State Constitutional Law 1993: Victims' Rights*, 25 RUTGERS L.J. 1066, 1066–67 (1994) (citing Michigan Supreme Court case that recognized victim's right to participate); Don Siegelman & Courtney W. Tarver, *Victims' Rights in State Constitutions*, 1 EMERGING ISSUES ST. CONST. L. 163, 165 n.6 (1988) (tracing rise of victims' rights through state statutes and state constitutions).

[1]*See* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 93–194 (1999); NATIONAL VICTIM CENTER, THE 1996 VICTIM'S RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIM RIGHTS LAWS *passim* (1996) [hereinafter SOURCEBOOK]; Siegelman & Tarver, *supra* note 1, at 167 (identifying 44 state victims' rights statutes).

[2]*See* S.J. Res. 3, 106th Cong. (1999).

continued resistance to such an understanding is analogous to looking at the night sky with blinders on. Now, to navigate the criminal process, one must cast aside the blinders and look at the rest of the sky.

The inclusion of the victim as a participant has shaken conventional assumptions about the criminal process to their foundation.[3] One core assumption that has occupied the field of criminal procedure for many years is no longer true. This core assumption is that only two value systems compete with each other in the criminal process. Professor Packer identified and then labeled these two value systems the "Crime Control Model" and the "Due Process Model."[4] The Crime Control Model has as its value the efficient suppression of crime.[5] The Due Process Model has as its value the primacy of the defendant and the related concept of limiting governmental power.[6] Thirty years ago, Professor Packer stated:

> The kind of model we need is one that permits us to recognize explicitly the value choices that underlie the details of the criminal process. In a word, what we need is a *normative* model or models. It will take more than one model, but it will not take more than two.[7]

This last assertion is no longer true. Today, it takes more than two models to recognize explicitly the value choices that underlie the criminal process.

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[3]*Compare* Booth v. Maryland, 482 U.S. 496, 502–07 (1987) (holding that introduction of victim impact statement at sentencing phase of capital murder trial violated Eighth Amendment), *with* Payne v. Tennessee, 501 U.S. 808, 821–27 (1991) (holding that Eighth Amendment did not erect per se bar prohibiting capital sentencing jury from considering victim impact evidence).

[4]HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149–53 (1968) (developing and explaining two possible models of criminal process).

[5]*See id.* at 158.

[6]*See id.* at 163, 165.

[7]*Id.* at 153.

Professor Packer's Crime Control Model and Due Process Model have been modified by some and criticized by others.[8] Nevertheless, the models remain useful constellations above the sea of the criminal process. Taken together, the Crime Control Model and the Due Process Model have comprised a dominant two-model universe of values.[9] The models were created by Packer to serve at least four functions. First, the models explicitly recognize "the value choices that underlie the details of the criminal process."[10] This recognition provides a "convenient way to talk about the . . . process" that operates between the "competing demands" of the two value systems.[11] Second, the models allow us to "detach ourselves from the . . . details" of the process so we can see how the entire system may be able to deal with the various tasks it is expected to accomplish.[12] Third, the models assist in understanding the process as dynamic, rather than static. Finally, the models assist in revealing the relationship of criminal process to substantive criminal law.[13]

Professor Packer did not anticipate modern laws of formal victim participation, and did not examine historic legal traditions of victim participation that continue to this day. Thus, it is hardly surprising that his two models do not include a conceptual framework in which victim

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[8]*See, e.g.*, Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 213 (1983) (modifying Packer's models); Mirjän Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 574–77 (1973) (same); John Griffiths, *Ideology in Criminal Procedure or a Third Model of the Criminal Process*, 79 YALE L.J. 359, 367–91 (1970) (describing alternative family model approach to criminal procedure). It is not the function of this article to support or detract from these, or other, critiques.

[9]Professor Arenella has recognized the importance of Packer's two models: "Many American scholars have relied on Professor Herbert Packer's crime control and due process models to identify the competing values served by American criminal procedure." Arenella, *supra* note 9, at 209.

[10]PACKER, *supra* note 5, at 153.

[11]*Id.*

[12]*Id.* at 152.

[13]*See id.*

participation in the criminal process can be understood.[14] The mere existence of a victim participation value that is external to the two-model concept was not itself a sufficient justification for the creation of a new model.[15] For a victim model to be useful, there needed to be a consensus in law that the values underlying the victims' roles are genuine and significant.[16] This consensus in law now exists, as reflected in modern laws that create rights of participation for victims of crime in all fifty states and the federal government, and in historic traditions of victim participation that have endured to the present day.[17] However, because victim participation does not rest on the values underlying the Crime Control and Due Process Models, the two models cannot facilitate an understanding of victim participation. Laws of victim participation in the criminal process represent a shift in a dominant paradigm of criminal procedure. To reflect this shift, a third m odel—the Victim Participation Model—is needed to complement, but not to replace, Packer's two models.

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[14]*See* Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931 *passim* (1975) (delineating level and type of victim's involvement in criminal procedure, from violation to eventual conviction and punishment).

[15]Leslie Sebba noted that Packer's models took no account of the victim: "These models illuminate the relationship between the state on the one hand and the defendant on the other, but are of no assistance in determining the role of the victim vis-a-vis the two leading parties in the *dramatis personae* of the penal process." Leslie Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 231 (1982). Sebba articulated two models that did incorporate the role of the victim. The first of these models was the Adversary-Retribution Model, in which the State stands back from the confrontation between the victim and the accused. *See id.* at 231–32. This model existed at early English and American common law when the victim prosecuted the crime and the "state provide[d] the machinery for the victim himself to achieve the desired objectives." *Id.* at 232. The second model is the Social Defense-Welfare Model, which essentially reflects elimination of victim involvement in the criminal process. *See id.* at 231. In the Social Defense-Welfare Model, the State stands in the shoes of the victim in prosecuting the offense and also stands in the shoes of the defendant by compensating the victim. *See id.* at 232 (criticizing piecemeal approach to involving victims in criminal procedure).

[16]The limited role of the victim in 1975 is presented in Hall, *supra* note 15, *passim*.

[17]*See* BELOOF, *supra* note 2, at 7–25 (discussing historical background and providing explanations for including victims in criminal proceedings); SOURCEBOOK, *supra* note 2, *passim*.

In order to promote a thorough understanding of the Victim Participation Model, this Article examines the Model in several different ways. Part II reviews the values underlying the Crime Control, Due Process, and Victim Participation Models. Part III examines three procedural scenarios, cast in the setting of victim participation, to demonstrate that the present reality of the criminal process is better reflected in a three-model concept. Part IV discusses the language of the three-model concept and its differences from the language of the two-model concept. Part V examines the Victim Participation Model in the context of some procedural stages of the criminal process, including reporting crime, investigating crime, the charging process, trial, sentencing, and appeal.

II. THE VALUES UNDERLYING THE THREE MODELS

A. The Value Underlying the Crime Control Model

The primary value underlying the Crime Control Model is the efficient suppression of crime. Efficiency is the capacity to process criminal offenders rapidly. Professor Packer provides an image of the Crime Control Model:

> The image that comes to mind is an assembly-line conveyor belt which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case . . . the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file. The criminal process, in this model, is seen as a screening process in which each successive stage . . . involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion.[18]

B. The Value Underlying the Due Process Model

Underlying the Due Process Model is the value of the primary importance of the individual defendant and the related concept of limiting governmental power. Again, Professor Packer's image is helpful:

> If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process . . . . The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty. It is a little like quality control in

[18] PACKER, *supra* note 5, at 159–60.

> industrial technology. . . . The Due Process Model resembles a factory that has to devote a substantial part of its input to quality control. This necessarily cuts down on quantitative output.[19]

The value of the primacy of the defendant seeks to assure reliability in determinations of guilt.[20]

C. The Value Underlying the Victim Participation Model

The value underlying the Victim Participation Model is implicit in the language of federal and state statutes, and many state constitutions. This language includes three important concepts: fairness to the victim, respect for the victim, and dignity of the victim. Two or more of these concepts appear in the vast majority of state constitutional victims' rights provisions.[21] Five states have created constitutional civil rights for victims.[22] Twenty states recognize the importance of the victim's dignity on a *constitutional* level.[23] A separate group of ten states have expressly set forth one or more of the concepts of dignity, respect, and fairness in statutory victims' rights provisions.[24] The federal statute that grants rights of participation to victims expressly sets forth as important the concepts of dignity, fairness, and respect.[25]

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[19]*Id.* at 163, 165.

[20]*See id.* at 163–65.

[21]*See infra* Appendix A (noting that such concepts are explicitly included in 21 of 31 state constitutional victims' rights provisions).

[22]*See id.*

[23]*See id.*

[24]*See id.*

[25]*See id.*; *see also* 42 U.S.C. § 10606(b) (1994) (setting out rights of crime victims, including rights to fairness, respect, and dignity, as well as right to be notified of proceedings, right to confer with government attorneys, and right to information about conviction, sentencing, imprisonment, and release of prisoner).

Generally, these rights are rights to notice and attendance, and the right to speak to the prosecutor and the judge.[26] These rights are, by nature, due-process-like rights,[27] although other types of rights have been created.[28]

The fundamental justification for providing due-process-like rights of participation (and other types of rights) is to prevent the two kinds of harm to which the victim is exposed. The first harm is primary harm, which results from the crime itself. The other harm is secondary harm, which comes from governmental processes and governmental actors within those processes.[29] These harms place the concepts of "dignity," "fairness," and "respect" in context, and provide the fundamental basis for victim participation in the criminal process. The primary harm is a basis for victim participation in the same way that harm to an individual, coupled with a legitimate theory of the liability of another, is

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[26]*See* SOURCEBOOK, *supra* note 2, at §§ 2, 5, 10 (discussing three different rights of participation).

[27]A few jurisdictions explicitly articulate the due process nature of victim rights of participation. *See infra* Appendix A (listing Arizona, Colorado, Oklahoma, South Carolina, Tennessee, and Utah).

[28]*See id.* Generally, these other rights are rights of privacy and protection. *See* SOURCEBOOK, *supra* note 2, at §§ 4, 12.

[29]A recent United States Supreme Court case is helpful in understanding both the legitimacy and the significance of the concept of secondary harm. In *Calderon v. Thompson*, 523 U.S. 538 (1998), a five-to-four majority made the Court's plainest statement to date that victims are injured by governmental processes. The *Calderon* Court, in the context of a defendant's petition for writ of habeas corpus, implicitly recognized as legitimate the concept of secondary harm to victims. Put another way, victim harm can result from the operation of the criminal process itself. The Court stated:

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," an interest shared by the State and the victims of crime alike.

118 S. Ct. at 1501 (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)) (citation omitted). Significantly, the Court's implicit acknowledgment of and reliance upon secondary harm was made in *Calderon* absent any legislative directive that secondary harm be considered. Indeed, victims presently have no right to speedy resolution in federal habeas corpus proceedings.

the basis for standing in other legal contexts.[30] The potential for secondary harm provides a significant basis for a victim's civil rights against governmental authority.[31] The primacy of the individual victim

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[30]The most direct analogy to primary harm is the rationale of State standing in a criminal proceeding, based on the idea that the State is harmed by the crime. *See* PROSSER & KEETON, LAW OF TORTS 7 (5th ed. 1986). An indirect analogy is provided by the fact that a person physically injured by the illegal actions of another has standing as a party in a civil tort action. *See id.*; William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 654–56 (1976) (linking decline of victim's role, in part, to rise of Beccaria's view that State alone is harmed by crime). An extension of the concept of harm as a basis for victim laws of participation is that victim harm is so significant that the State breaches its social contract with citizens by excluding victims from the criminal process. Former United States Senator Mike Mansfield stated: "[T]he modern result has established the combination [in the criminal justice system] of state versus criminal. . . . Such a policy abrogates any social contract that is thought to exist between the citizen and his society." Mike Mansfield, *Justice for the Victims of Crime*, 9 HOUS. L. REV. 75, 77 (1971) (advocating social compensation programs for victims of crime). One commentator links the rise of victim participation laws to a breach of the social contract. *See* Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 PEPP. L. REV. 63, 69–73 (1984) (discussing government responsibility for victims); *see also* Kenneth O. Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 33–36 (1987) (supporting constitutional amendment similar to Bill of Rights so that victims' rights are not forgotten in variations of political climate).

[31]In those state constitutional provisions that have not explicitly identified the government as the entity from which victims need protection, protection from the government is implicit in the placement of these laws within the respective states' bills of rights. Constitutional scholars Ronald Rotunda and John Nowak write:

> Almost all of the [federal] constitutional protections of individual rights and liberties restrict only the actions of governmental entities. For example, the Bill of Rights acts as a check only on the actions of the federal government. Moreover, the provisions of the body of the Constitution that protect individual rights are limited expressly in their application to actions of either the federal or state governments.

2 RONALD ROTUNDA & JOHN NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE 352 (2d ed. 1992).

Following the logic of these scholars, victims' rights that are placed in state bills of rights are checks against governmental power even if the enabling language of many provisions does not explicitly say so. This interpretation is supported by the express language of several state constitutional amendments incorporating victims' rights. For example, the Maryland Constitution provides: "A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process." MD. CONST. art. 47(a); *see also infra* Appendix A (listing other state constitutions that recognize dignity and respect for victims).

is the value underlying the Victim Participation Model. This value is derived from the prospect of primary harm, taken together with the concept of minimizing secondary harm (governmental harm) to the victim. The value of primacy of the individual victim underlies rights of participation granted to the victim.[32]

The image of the Victim Participation Model is that of victims following their own case down the assembly line. Victims consult informally with police and prosecutor. At formal proceedings, when appropriate and in an appropriate manner, victims may speak and address the court. Victims are heard by the prosecutor and the court before pretrial dispositions are finalized. Victims may speak at sentencing and at release hearings.

The participation of the victim is designed to ensure that the interest of the individual victim in the case is promoted. A core interest of the victim is that the truth be revealed and an appropriate disposition reached. However, there is a significant limit to the victim's role. The victim cannot control the critical decisions made in the factory by grand and petit juries, prosecutors, or judges.[33] At critical stages in the factory the victim speaks to governmental actors and decision makers. Depending upon the procedural context, victim participation may

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Professor Laurence Tribe, arguing in support of the proposed amendment to the United States Constitution incorporating victims' rights, has written about the nature of the laws of victim participation as civil liberties:

> The rights in question—rights of crime victims not to be victimized yet again through the processes by which government bodies and officials prosecute, punish, and release the accused *or* convicted offender—are indisputably basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate.

A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary, 105th Cong. 11 (1997) (statement of Laurence H. Tribe, Professor of Constitutional Law, Harvard University Law School).

The concept of protection from governmental harm may adequately explain offender-oriented victims' rights, for example, a constitutional right to restitution from the offender. This is because the procedural denial of potential recompense for loss from the person who inflicted the harm is, in and of itself, perceived as a denial of due process to the victim in the criminal process.

[32]*See infra* Part V (discussing victim participation in various stages of criminal process).

[33]*See* East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1995) (finding defendant made out prima facie case for additional discovery of whether private prosecutor hired by victim's family had controlled prosecution); Person v. Miller, 854 F.2d 656, 663–64 (4th Cir. 1988) (holding participation by private counsel appropriate so long as it consists of subordinate role to government counsel).

indirectly result in greater or lesser efficiency, and victim participation may or may not conflict with the value of the primacy of the individual defendant.

A remarkable feature of victim participation in the criminal process is that participation is, to a great extent, left up to the individual victim's choice.[34] The notable exception is that a victim must appear as a witness in those cases in which the State insists on prosecution. If the victim fails to participate (except as a witness) the case does not fail, but is narrowed to a case between the State and the defendant, the two

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[34]An early, and narrow, view of the justification of victim participation was that victim participation was founded on the idea of resolving the psychological trauma of the victim. Victim participation, the argument goes, may actually increase psychological harm or at least hinder resolution. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 954–55 (1985) (describing possible harms). From the point of view of an advocate of the Victim Participation Model, there are several difficulties with this observation as a basis to exclude victims from the criminal process.

First, as laws of victim participation have since emerged, the actual basis of victims' rights laws is not narrowly circumscribed to the resolution of psychological trauma to the victim. *See, e.g.*, 1991 Ariz. Sess. Laws 229 § 2 (uncodified legislative intent of Arizona Victims' Bill of Rights) (stating that "all crime victims are provided with basic rights of respect, protection, participation, and healing of their ordeals"; this is one of the few victim participation laws to mention resolution of trauma). The resolution of psychological trauma has not emerged as the main measure of the propriety of victim participation, but is only one part of according victims fairness, dignity, and respect.

Second, because the law allows the victim to decide about whether participation in the criminal process will be beneficial or harmful to them, it is paternalistic to exclude all victims from the criminal process because some might be psychologically harmed by inclusion, particularly because victims are free to choose not to participate. The paternalistic view also focuses too narrowly within the broader issue of reduction or resolution of psychological trauma to the victim. The focus is too narrow because the view has no room for the idea that even if victims know they will be traumatized by the criminal process, they may choose to participate anyway. If given a choice, victims who may be psychologically harmed by the criminal process do not necessarily prioritize the avoidance of psychological pain over participation. Crime victims may possess a sense of responsibility to see the truth revealed and an appropriate disposition achieved. This sense of responsibility may manifest itself by victim participation in the process, regardless of any psychological pain that results from the participation. Furthermore, for some victims it may be that the inability to choose to exercise this sense of responsibility will itself result in further trauma or in a delay of resolution of existing trauma.

Third, it seems a rare and peculiar suggestion that the government actually is benefitting individuals via a denial of rights of participation in the legal process.

For a recent review of the adequacy of victims' rights in relation to the victims' emotional and physical needs, see LESLIE SEBBA, THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM 68–82 (1996).

parties who must continue to participate if there is to be a case at all. The luxury of the victim's choice whether to participate is possible because the public prosecutor retains control over critical decisions and retains central responsibility for the prosecution.[35] The absence of the victim (except as a witness) does not mean that the State becomes unable to control and pursue the prosecution of the case, but merely limits the ability of the victim to influence the prosecution and disposition of the case.

One of the central features of the concept of secondary harm as it has emerged in participation rights of victims is that secondary harm (harm from governmental processes and governmental actors within the process) may mean different things to different victims. Victim A may choose to exercise all available rights of participation, while Victim B may choose not to exercise any right of participation. Both Victim A and Victim B determine for themselves whether active participation will minimize, or contribute to, secondary harm. This choice, whether to participate, is consistent with the Victim Participation Model value of primacy of the individual victim. Implicit in victim participation laws is the idea that denying the individual victim the choice whether to participate or not participate in the criminal process is unfair to the victim, disrespectful of the victim, and a great affront to the victim's dignity.[36]

As a consequence of the victim's legal ability to choose whether to participate, at least two other general observations may be made. First, the public prosecutor will always be necessary where such choice is present, because it remains important to society to prosecute certain crimes regardless of the victim's level of participation.[37] Second, unequal procedural treatment of similarly situated criminal defendants is possible because victims are permitted to choose whether or not to informally or formally influence decision makers concerning charging or disposition,[38] and because the victim has the choice to assist or resist the position of either, or both, of the parties. One defendant may face a

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[35]*See supra* note 34 and accompanying text (discussing *East*, 55 F.3d at 1001, and *Person*, 854 F.2d at 663–64.

[36]*See infra* Appendix A (listing state constitutions and statutes that recognize value of treating victims with fairness, respect, and dignity).

[37]*See* Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 156 (1984) (recognizing that public prosecutor is practical necessity because crime victims alone cannot adequately fulfill prosecution function).

[38]*See* Payne v. Tennessee, 501 U.S. 808, 821–27 (1991) (permitting admission of victim impact statement).

victim who seeks mercy, while another defendant may face a victim who seeks a severe sanction. A third defendant may find that the victim is not participating in the criminal process except as a witness. Unequal treatment of defendants is perhaps the most compelling reason for denying victims the right to participate, because equal treatment of defendants stands against victim participation at virtually every stage of the criminal process. As a practical matter, however, equality of treatment of defendants has largely failed as an obstacle to laws of victim participation. Ascendant is the victim's choice to participate in the criminal process, descendant is equal treatment among similarly situated defendants.[39]

III. THE DYNAMIC AMONG VALUES UNDERLYING THE THREE MODELS

The Victim Participation Model poses a new challenge to the values underlying both the Crime Control Model and the Due Process Model. Legitimizing the Victim Participation Model means that the territory previously occupied by two central value systems now must accommodate a third value, that of the victim's primacy.[40] Because criminal procedure has centrally consisted of both the efficiency value of the Crime Control Model and the value of primacy of the individual defendant underlying the Due Process Model, these familiar values may be challenged when the value of the primacy of the individual victim is added to the territory. The existence of conflict depends upon the

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[39]Is a new kind of equality emerging? Professor Paul Cassell describes the nature of this equality:

> Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only *between* cases, but also *within* cases. Victims and the public generally perceive great unfairness in a sentencing system with "one side muted."

Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 477, 492–93 (footnotes omitted).

[40]The challenge is reflected by the view of state agents that victim participation laws intrude on agents' authority, and, by the view of defense attorneys that victim participation laws intrude on the position of defendants. *See* Robert C. Davis et al., *Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 501, 503–04 (1984) (explaining successes and failures of Victim Involvement Project in Brooklyn Criminal Court in New York); Andrew Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHNS J. LEGAL COMMENT. 157, 166–70 (1992) (discussing victims' conflicts with police, defense attorneys, and other criminal justice professionals).

procedural context, and in some cases, the choices of the individual victim, the individual defendant, and the public prosecutor.

Because the Victim Participation Model values the primacy of the individual victim, it will inevitably conflict with the value of efficiency underlying the Crime Control Model in some circumstances. In addition, while the Due Process Model and the Victim Participation Model both focus on the primacy of individuals, there are limits to that similarity. For three important reasons, the shared value of primacy of an individual does not result in a shared model. First, the values underlying the Victim Participation and Due Process Models are based on the primacy of two separate individuals: respectively, the individual victim and the individual accused. Second, this conflict of values is accompanied by the potential of revenge from the victim towards the defendant. Third, while the victim has experienced primary harm and may experience secondary harm, the defendant faces harm from the criminal process and formal punishment. Because of these differences, the value of primacy of the defendant may conflict with the value of primacy of the victim.

To illustrate conflicts and similarities among the three value systems, it is helpful to explore examples that illustrate the dynamic among the values underlying the three models. This Part examines the interplay of values underlying the three models: first, in the procedural choice to allow a victim to informally influence the decision not to charge; second, in the procedural choice to allow a victim the right to a speedy trial; third, in the procedural choice to allow mandatory minimum sentences to trump a victim's influence over sentencing.

A. The Interplay of Values Underlying the Victim's Influence on the Decision Whether to Charge

The first example, reflecting a reality predating modern victim laws, shows the distinction between the value of efficiency and the value of victim primacy. It is well known that adult rape victims have virtually complete control over the decision whether to charge the alleged perpetrator with a crime.[41] Suppose, hypothetically, that a female victim of an acquaintance rape goes to the hospital with a black eye and a broken nose. The victim's account and the forensic evidence reveal that a rape has occurred. Despite encouragement to prosecute from the detective, the victim advocate, and the deputy district attorney, the victim ultimately expresses a personal preference not to proceed with charging. Respecting this preference, the deputy district attorney does not charge a readily identifiable rape suspect.

Rape is a serious crime of violence. The community and the individual victim are safer with the rapist in prison. Nonetheless, in sex crimes against adults, the charging decision is, as a practical matter, almost always left up to the victim. However misguided the victim may be perceived to be, she essentially controls the choice. Even when the

[41] *See* Hall, *supra* note 15, at 951.

reasons for her choice may not be respected, her choice is respected because she is the victim. The Victim Participation Model readily explains why this is so. The rape charge is not pursued because of respect for the victim's dignity and privacy, and, relatedly, because of an understanding about secondary harm generally and specifically, the victim's desire not to be abused by the process.

In this example, values underlying the Victim Participation Model completely dominate over the value of efficiency. The Crime Control Model demands the swift suppression of crime, a goal that would be best achieved by charging and prosecuting the defendant, and, if found guilty, imposing upon the defendant a substantial period of incarceration. The Crime Control Model is simply incapable of explaining this deference to the victim. Furthermore, the Due Process Model value of the primacy of the *defendant* is completely ignored in the decision not to charge when that decision is made because of the victim's wishes. In other words, the dominant value at play in this example cannot be comprehended using the two-model concept. The Victim Participation Model value of primacy of the individual victim is needed to make sense of the prosecutor's decision not to pursue the charge.[42]

B. The Interplay of Values Underlying the Victim's Right to a Speedy Trial

The second procedural example involves the victim's right to a speedy trial. Victims have speedy trial rights in many jurisdictions.[43] However, unlike the defendant, the victim is typically not put at an advantage by delay, nor held centrally responsible for preparing the case for trial. Speedy trials are efficient.[44] As a result, the values

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[42]The Victim Participation Model is not intended to negate or minimize the utility of other existing approaches to explaining criminal procedures. For example, gender-based approaches to explaining procedures do provide insight, as can the reality of limited resources. Some may rely on a gender-based explanation that the prosecution really does not care about rape. Some may point out that the victim's decision not to proceed (and the prosecutor's decision to respect the victim's wishes) is because of the undue weight given to an inappropriate shame and stigma that accompanies rape. Finally, some may argue that the decision not to charge is at least indirectly related to limited prosecutorial resources.

[43]*See* SOURCEBOOK, *supra* note 2, at tbl.2-A. For a debate on the propriety of the victim's right to a speedy trial, compare Cassell, *supra* note 40, at 498–500, with Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 441, 470–72.

[44]*See* PACKER, *supra* note 5, at 159. Packer notes that in the Crime Control Model "[t]here must [] be a premium on speed and finality." *Id.*

underlying the Victim Participation Model and the Crime Control Model may both support a speedy trial. Nonetheless, the values underlying the shared interest in a speedy trial are significantly different. In the Crime Control Model a speedy trial is desirable for the sake of efficiency itself. In the Victim Participation Model a speedy trial is desirable because it minimizes secondary harm to the victim, and because the victim suffered the primary harm. The difference between the value of primacy of the victim and the value of efficiency is revealed by the fact that a victim may choose not to assert their speedy trial right, an option that (assuming the victim can effectively testify) the value of efficiency does not support. For example, victims who are severely traumatized by a crime may want time to heal before testifying. Such healing may not be essential to effective testimony and, in fact, an emotional witness may be much more persuasive to a jury than a rational witness.

The defendant seeks delay to prepare adequately for trial or to obtain an advantage. When a victim does not assert a speedy trial right, the victim's interest in delay supports the defendant's interest in delay. Still, the values underlying a mutual interest in delay are fundamentally different. The values underlying the victim's choice not to exercise their right to speedy trial are found in the Victim Participation Model. Delay supports the primacy of the victim. The victim's choice not to exercise the speedy trial right is consistent with promoting the value of the primacy of the individual victim.

C. The Interplay of Values in the Conflict Between the Victim Impact Statement and Mandatory Minimum Sentences

The final example involves a shooting between young men, not yet adults but old enough to be tried and sentenced as adults under mandatory minimum sentencing laws. In the example, two friends were playing with a gun, when one of the young men shot the other in the head, killing his friend instantly. These youngsters were the best of friends and their families were close. The teenage boy could credibly have been charged as an adult with a reckless homicide that, upon conviction, would result in mandatory minimum prison time. However, the victim's surviving family spoke with the prosecution, indicating that they did not want prison time for the defendant. Consequently, no homicide charges were brought and a plea to a weapons offense, which carried no mandatory minimum sentence, was the result. It is quite plausible that if these boys were not close friends, and the surviving family wanted it, then the prosecution would have sought a conviction for reckless homicide and the resulting mandatory minimum sentence. Here, it is not the value of the primacy of the defendant, but the value underlying the Victim Participation Model, that makes the difference in the treatment of the defendant. In this example, the value of primacy of the victim is reflected in respect for the family's view on fair and appropriate sanctions for the killing of their child.

Let the facts change to illustrate the conflict between the Victim Participation Model and mandatory minimum sentences. Assume that despite the wishes of the victim's family, the prosecutor pursued and secured a conviction for reckless homicide. A mandatory minimum sentence is inevitable. Because the Victim Participation Model and the Due Process Model have a principal value in common—acknowledgment of the importance of individuals—in some circumstances the models may join together to oppose other values. Thus, the values underlying the Victim Participation Model and the Due Process Model are not always in conflict. Like the surviving family in this example, a victim may seek mercy for the defendant in a victim impact statement at sentencing. Efficiency values underlying mandatory minimum sentencing schemes defy the value of the primacy of the individual defendant that underlies the Due Process Model. This is because mitigation evidence, like that offered by the victim's family, is irrelevant to the mandatory minimum sentencing decision. Less well understood is that a mandatory minimum sentencing scheme conflicts with the value of the primacy of the victim that underlies the Victim Participation Model. This is because mandatory minimum sentencing makes the victim's right to a victim impact statement irrelevant, in the sense that the victim impact statement has no potential for real impact on the decision of the sentencing authority.

What would be the result in the altered example of the tragic shooting between the young men? Of course, the victim's family would have the right to make a victim impact statement. However, in the face of a mandatory minimum sentence, the right to an impact statement will have no substance because the court will be powerless to adjust the sentence downward, and the defendant will be sentenced to a mandatory minimum term in prison. Perhaps, a majority of the public, or even a majority of victims, support mandatory minimums. Nevertheless, mandatory minimum sentences conflict with the primacy of the individual victim. Where mandatory minimums prevail, the separate values of both the primacy of the victim and the primacy of the defendant are suppressed by the value of efficient suppression of crime. While the dominance of the efficiency value explains the result, a real understanding of the values being suppressed cannot be achieved by reference to the two-model concept alone.

IV. THE LANGUAGE OF THE THREE-MODEL CONCEPT

Because the three-model concept acknowledges the existence, genuine nature, and significance of the value that underlies victim participation, the very use of three models may be seen by some to promote the legitimacy of the Victim Participation Model value of primacy of the individual victim. In defense of the three-model concept, it is the laws of victim participation, and not the model, that have already given legitimacy to victim participation. In proposing a three-model concept, the point is not to advocate for or against particular victim laws, but to provide a model helpful to understanding

what has already been, and may in the future be, legitimized by society. Despite this disclaimer, the two-model concept, without the Victim Participation Model, has been a dominant paradigm and its adherents may defend it. A defense of the two-model system involves up to three assumptions: that the value underlying the Victim Participation Model is nonexistent, that it is not genuine, and/or that it is insignificant. To defend the belief that this value does not exist or is not genuine, one must make the assumption that the value of victim primacy, reflected in the language of victim participation laws, is not actually the value being promoted by these laws. Of course, even accepting the existence and genuine nature of the value underlying victim participation, it can still be argued that the value of primacy of the individual victim is not significant enough to warrant the status of legitimacy. To reach the conclusion that the value is not significant enough for legal recognition is to reject the weight of authority provided by statutory and state constitutional civil rights for victims in favor of the view that the primary and secondary harms to the victim are not a sufficient basis for victim participation in the criminal process.

The denial of the existence, genuineness, or significance of the value underlying the Victim Participation Model for the purpose of adhering exclusively to the values of the two-model concept is distinguishable from arguing within the three-model language that a given procedure does not actually promote the value of the primacy of the individual victim. In the three-model language the argument can be made that a procedure purporting to promote the value underlying victim participation does not actually do so. Instead, the procedure may actually involve promoting the values of either efficiency or primacy of the defendant. However, unlike the two-model language, the three-model language suggests the need for a context-specific analysis of values underlying all three models. Because of the overt identification of the value of primacy of the individual victim, the distinct nature of this value, and the inclusion of this value in the conventional analytic framework, the three-model concept is more likely than the two-model concept to be useful in determining when the value of victim primacy actually is or is not being promoted in a particular procedure. Furthermore, the three-model language encompasses the notion that the values of more than one of the models may simultaneously be promoted by the same procedural choice. In the three-model language the debate becomes a discourse among recognizable values underlying the three models.

On the other hand, in the two-model language there are only two values—efficiency and primacy of the individual defendant. From the point of view of a proponent of the Due Process Model operating within the two-model language, threats to the value of primacy of the individual defendant necessarily originate from the competing value of efficiency. In the two-model language no other conclusion is possible. In the language of the two-model concept, victim interests are not recognized as independent of efficiency; yet, the values underlying victim participation do not fit within the efficiency value. Thus, in the

two-model language, efforts for procedural change that promote the value of primacy of the victim must necessarily be a "deception" from the perspective of a proponent of the Due Process Model because the only other recognized value in the two-model language (other than the value of defendant primacy) is the value of efficiency. Victim primacy is necessarily a "deception" in the two-model language because the value of victim primacy is not encompassed in, and does not "belong" in, the two-model language. In sum, the two-model language operates within such narrow conceptual parameters that there is no room in it for the idea that procedures of victim participation stand on a value of victim primacy distinct from Crime Control Model and Due Process Model values. On the other hand, in the three-model language, the value underlying the Victim Participation Model competes with the values underlying the Crime Control and Due Process Models, sometimes siding with one value system against the other.

V. THE VICTIM PARTICIPATION MODEL IN STAGES OF THE CRIMINAL PROCESS

In each procedural stage,[45] the value of the primacy of the victim involves a reckoning with the value of efficiency and the value of primacy of the defendant. To understand this reckoning further, this Part will examine the operation of the value of the primacy of the victim in selected stages of the criminal process, and the challenge to this value presented by the values of efficiency and the primacy of the defendant. This Part is separated into procedural stages of the criminal process. For each procedural stage discussed there are two distinct sections. In the first of these two sections, the "proper" role of the victim is debated from the three different perspectives of the Victim Participation Model, the Crime Control Model, and the Due Process Model. For example, the victim's proper role at trial is debated, first, from the perspective of an advocate of victim primacy; second, from the perspective of an advocate of the value of efficient suppression of crime; and finally, from the perspective of an advocate of the value of defendant primacy. It is not intended that any of the positions taken in this debate is the "right" or "correct" position. The second section in each procedural stage is a review of the present role of the crime victim in the laws of the criminal process along with the identification of any trends in the law. Neither of these two sections is intended to be comprehensive; rather, this Part is intended to provide an accessible introduction to the debate between competing values in different

[45]Professor Abraham Goldstein observed that victims might be granted standing in at least a particular procedural stage, even if total standing were not granted. *See* Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 552–53 (1982) (citing Trbovich v. United Mine Workers, 404 U.S. 528, 530, 538 (1972)).

procedural stages and a brief overview of the state of victim laws in selected procedural stages.

A. Reporting the Crime

1. Reporting and The Victim Participation Model

The individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through nonreporting. This is properly a decision for the victim. In the vast majority of cases, the victim possesses a de facto veto power over whether the criminal process will be engaged. Many victims of crime elect to exercise this veto power.[46] Exercise of the veto may reflect one or more of the following: the victim's desire to retain privacy; the victim's concern about participating in a system that may do them more harm than good; the inability of the system to effectively solve many crimes (particularly property crimes); the inconvenience to the victim; the victim's lack of participation, control, and influence in the process; or the victim's rejection of the model of retributive justice.[47]

The idea that the State is the only entity harmed by crime defies common sense.[48] It requires a leap of logic to conclude that only the State, and not the victim, is harmed by crime.[49] In the unreported crime, the victim is quite cognizant of the harm. On the other hand, the State is typically unaware of crime unless it is reported. Except in certain kinds of cases, such as homicide, the State will never even know that a crime has been committed. This reveals that while the State may be harmed in some indirect way, the victim is the person directly harmed. As a result, the victim's harm is more significant than the harm to the State.

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[46]*See* BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1994, at 83–91& tbls.91–100 (1997) (listing statistics of victims not reporting crimes).

[47]This is not an exhaustive list. *See id.*

[48]*See* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 384 (1986) ("It is the crime victim who has been directly injured by the crime committed, not the state. In a very important sense, the crime 'belongs' to the crime victim; therefore, the victim is entitled to expect the legal system to serve his interests . . . consistent with justice and fairness.").

[49]In *Linda R.S. v Richard D.*, 410 U.S. 614, 619 (1973), the Court acknowledged that victims are in fact injured by crime, but have no "judicially cognizable interest in the prosecution or nonprosecution of another." Professor Abraham Goldstein has challenged the Court's ruling as a compounding of an historical misunderstanding. *See* Goldstein, *supra* note 46, at 550.

The use of coercion to force the victim to report, for example, by criminalizing the failure to report in the case of misprision, is unwise because it adds insult to the victim's injury. Such laws threaten the victim's veto power over reporting. In addition, laws criminalizing nonreporting threaten the privacy of victims. Moreover, the victim, not the State, is the party that is directly harmed, and should thus make the ultimate decision whether to report the crime. Nonetheless, noncoercive efforts to induce or encourage the victim to report are appropriate. The victim retains veto power over reporting despite the existence of incentives. The option of reporting may become more viable for the victim in need of the particular inducement offered. Inducements to reporting may include providing resources through social services or victim compensation, allowing the victim formal or informal influence in the process, or protecting the victim's person or privacy.[50] These inducements all implicitly acknowledge that the victim is the one harmed and is worthy of respect and fair treatment.

2. Reporting and the Crime Control Model

The nonreporting victim frustrates the value of efficiency that underlies the Crime Control Model. The failure to identify and punish perpetrators is centrally a failure of the value of efficient suppression of crime to become the value exclusively and universally held by victims. Efforts to *force* the victim to report might be undertaken if it were practical, but the encouraging of reporting is mainly done by providing inducements to the victim. To the extent these inducements do not threaten the Crime Control Model value of efficient suppression of crime, the inducements are tolerated in order to promote reporting and follow-through by the victim.

3. Reporting and the Due Process Model

Any force or inducement to report that threatens the value of primacy of the individual suspect or the reliability of the process is unwise. Inducements impact the reliability of the crime report itself. For example, the offering of monetary rewards to victims for reporting crime may adversely impact reliability. Furthermore, inducements protecting the privacy or safety of the victim may suppress the value of the primacy of the individual defendant. For example, pretrial detention provides a measure of safety to the victim at the expense of important

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[50]*See* ROBERT ELIAS, THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY AND HUMAN RIGHTS 173–77 (1986) (listing possible services and reimbursement options to encourage victims to come forward).

liberty interests of the defendant.[51] Only in a legal environment where the victim neither fears prosecution for misprision or anticipates reward is the actual reporting of a crime likely to be credible.

4. The Situation and the Trend of Reporting Crime

In most jurisdictions the victim who refrains from reporting a crime is acting legally.[52] The Victim Participation Model value of primacy of the victim appears, at first blush, to dominate the reporting of crime. Probably, a significant reason for this is the impracticality of imposing controls over the victim's reporting choice. In other words, it is difficult to know to what extent the Victim Participation Model value dominates in the reporting of crime because it is a persuasive value or because little can be done practically to promote the value of efficiency in reporting. However, the fact that victims have significant influence in the decision to charge or not charge a crime suggests that victim autonomy in reporting possesses at least some component of the value of primacy of the victim. In a few jurisdictions, new laws have resurrected the criminalizing of nonreporting,[53] but these new laws are not prevalent enough to be a trend. Inducements to reporting—such as crisis counseling, victim compensation, formal and informal participation, and influence in the criminal process—are commonplace.[54]

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[51]*See* United States v. Salerno, 481 U.S. 739, 755 (1987) (holding that pretrial detention on basis of future dangerousness was permissible punishment before trial to ensure public safety).

[52]A few states have re-instituted the crime of misprision. *See* Jack Wenik, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1803–04 (1985) (proposing statute mandating witnesses of felonies report their observations). Statutes in many jurisdictions criminalize the failure of certain classes of people, such as teachers and attorneys, to report child abuse. *See* Frederica K. Lombard et al., *Identifying the Abused Child: A Study of Reporting Practices of Teachers*, 63 DET. L. REV. 657, 658 n.6 (1986) (listing statutes of all 50 states that require certain individuals to report suspected child abuse).

[53]*See* Wenik, *supra* note 53, at 1803–04.

[54]*See* ELIAS, *supra* note 51, at 172–91. Some victims' rights laws explicitly acknowledge that a reason for granting victims rights is to induce them to participate. *See, e.g.*, WASH. REV. CODE ANN. § 7.69.010 (West 1992) (recognizing "the civic and moral duty of victims . . . to fully and voluntarily cooperate with law enforcement and prosecutorial agencies"). Thus, some victim participation rights may also serve the value of efficiency, such as through enhanced crime reporting rates. Nevertheless, victim participation rights are individual rights that do not rise and fall on the success or failure of participation as an inducement.

B. Investigating the Crime

1. Investigation and the Victim Participation Model

Assuming that a victim has reported a crime, the victim should be able to obtain an official investigation. The official investigation should be competent and lawful. Additionally, the victim should be kept apprised of the investigation. If the State conducts an unlawful investigation, there should be a remedy other than suppression of evidence.[55] The victim is the person harmed by suppression of evidence and should not be denied reliable evidence in support of the quest for truth because the State has acted unlawfully.[56] It is outrageous that regulation of governmental actors should occur at the price of harming the victim's opportunity to have the truth determined in the courts.

The victim should be allowed to conduct a private investigation. However, because most victims have neither the skill nor the resources to conduct an adequate private investigation, some meaningful procedure should exist to ensure an adequate official investigation where the authorities fail or refuse to conduct one.[57] Furthermore, to minimize additional harm to the victim, the investigations of the State and the defense should intrude no more than necessary on the victim. For example, victims should not be interviewed multiple times during the investigation phase. While victims may choose to grant an interview to the defense during this phase, they should have the option of refusing one. Certain investigations should be conducted only with the victim's consent. Physical and psychological evaluations of the victim should not be allowed without the victim's consent. The victim's home and possessions, if not in the hands of the State, are improper items for a court order of inspection. To allow such evaluations and searches is to condone a re-victimization. Furthermore, such evaluations and searches will result in victim noncooperation with the criminal justice system.

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[55]*See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 *passim* (1994) (discussing Fourth Amendment's arbitrary and unfair application in several contexts and advocating change to give Amendment force without excluding evidence of crime).

[56]*See id.*

[57]*Compare* David H. Bayley & Egon Bittner, *Learning the Skills of Policing*, 47 LAW & CONTEMP. PROBS. 35, 57 (1984) (describing bias in police discretion), *with* H. Richard Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call*, 47 LAW & CONTEMP. PROBS. 15, 32–33 (1984) (defending unfettered police discretion).

2. Investigation and the Crime Control Model

Under the Crime Control Model, some accommodation to the victim is acceptable as long as it does not create significant inefficiencies. Granting victims their "wish list" of accommodations might negatively impact the efficiency of investigation. For example, granting the victims a procedure to ensure an adequate investigation would be inefficient. Officials are best able to determine which crimes have a reasonable probability of being solved.[58] Also, public policy decisions about which crimes to expend resources on are best left to the investigative agency, which reflects the priorities of the many, rather than the few. On the other hand, granting some minor accommodations to the victim, in exchange for the victim's report and follow-through with the case, can enhance the suppression of crime.

Suppression of unlawfully obtained, but relevant, evidence is very inefficient, so the Crime Control Model rejects it.[59] However, if left only with a choice between remedies, the remedy of suppression is preferable to remedies involving meaningful discipline of officers or expanded civil liability of police. This is because it is desirable that police aggressively pursue criminals. Retaining aggressive pursuit of criminals by governmental actors who may occasionally overstep the boundaries of law is of greater importance than eliminating the damage to, or termination of, those cases in which individual victims are denied an opportunity for truth finding or appropriate disposition by operation of the exclusionary rule.

3. Investigation and the Due Process Model

Under the Due Process Model, official investigations are preferable to private ones, as officials are more likely to be fair because they are more detached from the victim's harm. Officials trained in the law are less likely to engage in unlawful investigation.[60] However, if an official or a private person unlawfully obtains evidence, exclusion should be an available remedy. No other meaningful remedy is available to deter

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[58]*See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188–214 (1969) (describing prosecutorial power in United States, contrasting it with other countries, and questioning its current system of checks); PACKER, *supra* note 5, at 160 (stating that Crime Control Model is based on supposition that "screening processes operated by police and prosecutors are reliable indicators of probable guilt").

[59]*See* PACKER, *supra* note 5, at 199.

[60]*See* Henderson, *supra* note 35, at 982–96.

illegal investigations by the victim.[61] Police are unlikely to charge the victim who has illegally uncovered incriminating evidence and the suspect is unlikely to persuade a jury to award damages for such a violation.[62]

The accommodation of the victim tends to make victims clients of the State.[63] This creates the potential for conflict.[64] When victims were merely witnesses there was less collaboration between the State and the victim. Collaboration between the victim and the prosecutor may create unreliability because the prosecutor is not making a detached critical analysis of the case. The defense should have the opportunity to interview the victim and conduct any physical or psychological evaluations on the victim during investigation to ensure reliability in truth finding. The home of the victim or any property or possessions of the victim should be open to defense inspection where relevant to the case.

4. The Situation and the Trend of Investigating Crime

While the United States Supreme Court has rolled back exclusionary rule protections, this rollback has occurred where the practical deterrence of police misconduct is not achieved by the application of the exclusionary rule,[65] or where false testimony will otherwise go unchallenged.[66] The fact that a victim is denied truth finding and appropriate disposition by application of the exclusionary

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[61]*See* Burdeau v. McDowell, 256 U.S. 465, 476–77 (1921) (Brandeis, J., dissenting) (noting conflict in allowing citizen to seize evidence that public official cannot); PACKER, *supra* note 5, at 200.

[62]*See Burdeau*, 256 U.S. at 476–77.

[63]*See, e.g.*, ARIZ. R. CRIM. PROC. 39 (stating that "[t]he victim shall also have the right to the assistance of the prosecutor in the assertion of the rights enumerated in this rule or otherwise provided for by law").

[64]*See infra* note 106 and accompanying text (discussing potential conflicts between victims and prosecutors).

[65]*See, e.g.*, 1 WAYNE R. LAFAVE, SEARCH & SEIZURE, § 1.2(d), at 38–47 (3d ed. 1996) (discussing "good faith" exception to exclusionary rule).

[66]*See* Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense").

rule has not been articulated by a majority of the Court as an independent basis for not applying the exclusionary rule. However, the Court has steadfastly refused to apply the exclusionary rule to private information gathering.[67] The exceptions to nonapplication of the exclusionary rule to private investigations are: first, the suppression of coerced (and therefore unreliable) confessions obtained by private parties[68] and, second, where statutes otherwise support the remedy of exclusion.[69]

As a practical matter, there are no meaningful formal procedural mechanisms to challenge the absence or adequacy of an official investigation.[70] The most readily available access to an official investigation by a victim is via grand jury investigation,[71] and at least one jurisdiction permits a judicial investigation.[72] However, many jurisdictions render this alternative problematic by imposing legal

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[67]*See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (holding that protection against unlawful searches and seizures applies only to governmental action);1 LAFAVE, *supra* note 66, § 1.8 (discussing exclusionary rule and nonpolice searches).

[68]*See* DAVID M. NISSMAN & ED HAGEN, LAW OF CONFESSIONS, § 14:2 (2d ed. 1994) (discussing application of Due Process Clause to private citizens).

[69]*See, e.g.*, 1 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING § 7:23–26 (2d ed. 1995) (discussing suppression of private wiretapping).

[70]*See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380–81, 383 (2d Cir. 1973) (disallowing equal-protection-based and civil-rights-based challenges to failure to investigate and charge).

[71]*See* Peter Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 308–48 (1994) (discussing degrees of victims' access to grand jury).

[72]*See* State v. Unnamed Defendant, 441 N.W.2d 696, 699–702 (Wis. 1989) (upholding judicial investigation).

hurdles to grand jury access[73] or grand jury indictment.[74] While victims may conduct their own private investigation,[75] the boundaries of private investigation are delineated by laws of civil and criminal liability.

The Victim Participation Model value typically dominates when the defendant seeks discovery via the court from the victim. In most jurisdictions the ability of the defendant to discover from the victim is quite limited. The defendant had no common-law ability to interview the victim,[76] and where statutes providing for such procedures have existed, they may have fallen "victim" to victim rights legislation.[77] It is difficult to obtain an order for a psychological evaluation of a crime victim or a physical examination of the victim.[78] Jurisdictions are split

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[73]*See id*.; *In re* New Haven Grand Jury, 604 F. Supp. 453, 457–61 (D. Conn. 1985) (concluding that private prosecutorial communications with grand jury are impermissible).

[74]*See* United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (requiring signature of U.S. Attorney before "true bills" become formal indictments).

[75]*See, e.g.*, State v. Von Bulow, 475 A.2d 995, 999–1003 (R.I. 1984) (describing use of private investigator to obtain evidence). For an account of the victims' involvement in the case, see Cardenas, *supra* note 49, at 372–73.

[76]*See* Romualdo P. Eclavea, Annotation, *Accused's Right to Depose Prospective Witness Before Trial in State Court*, 2 A.L.R.4th 704, 711–22 (1980 & Supp. 1998); Gregory G. Sarno, Annotation, *Interference by Prosecution with Defense Counsel's Pretrial Interrogation of Witnesses*, 90 A.L.R.3d 1231, 1246–47 (1979 & Supp. 1998).

[77]*See, e.g.*, ARIZ. CONST. art. II, § 2.1(a)(5). This provision grants crime victims the right "to refuse an interview, deposition, or other discovery request by the defendant," *id.*, which eliminates the defendant's ability to interview the victim, pursuant to former Rule 15.3 of the Arizona Rules of Criminal Procedure, which provided for deposition upon motion in the court's discretion of "'any person,'" including the victim, when the person refused a pretrial interview and was not a witness at the preliminary hearing. *See* State *ex rel.* Baumert v. Superior Court, 651 P.2d 1196, 1197 (Ariz. 1982) (quoting former ARIZ. R. CRIM. P. 15.3).

[78]*Compare* State v. Holms, 374 N.W.2d 457, 459–60 (Minn. Ct. App. 1985) (upholding denial of motions to conduct physical and mental evaluations of victim of sexual abuse), *with* Turner v. Commonwealth, 767 S.W.2d 557, 559 (Ky. 1989) (holding that gynecological exam of four-year-old sexual abuse victim was justified where finding could potentially exonerate defendant).

as to whether defendants can conduct an examination of the crime scene if it is the victim's home and if the home is no longer in control of the state.[79]

C. The Charging Process

1. The Charging Process and the Victim Participation Model

Victims should have a veto power over whether a charge is brought. Because the victim could have vetoed the criminal charge initially by failing to report, it makes little sense to take away the victim's choice about whether or not to charge the suspect. To do so is to injure the victim for reporting the crime. The victim is in the best position to determine if the victim will be harmed by having to endure the criminal process. Also, assuming that the victim wishes to pursue charges, the victim should be able to determine what charges are appropriate. This is because the State's charging decision may involve bias against the "unworthy" victim.[80] Furthermore, the official charging decision often turns on the relationship of these biases to the public prosecutor's institutional goal of winning the case.[81] The victim is more likely than the public prosecutor to be free of bias and concerned with principles of justice. On the contrary, the State is preoccupied with winning and a host of other bureaucratic agendas.[82] Charging decisions should more accurately be centered upon whether the criminal statute was violated rather than cultural biases, the institutional value of winning, and other policy or resource rationales.

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[79]*See* State *ex rel.* Beach v. Norblad, 781 P.2d 349, 350 (Or. 1989) (granting writ of mandamus vacating trial court's order of defendant's access to victim's home, because victim was not party to case); Henshaw v. Commonwealth, 451 S.E.2d 415, 417 (Va. Ct. App. 1994) (finding no general right to discovery when premises were no longer in control of state).

[80]*See* Hall, *supra* note 15, at 946 (suggesting that victim may develop stronger relationship, and therefore more influence, with prosecutor by filing complaint instead of allowing police to file complaint).

[81]*See* Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office*, 16 L. & SOC'Y REV. 225, 225, 237 (1981–82) (citing specific case studies).

[82]*See* FRANK MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 179–280 (1969) (identifying nonexclusive list of reasons for prosecutorial charging decisions: cost to system, undue harm to suspect, availability of alternative procedures, availability of civil sanctions, and cooperation of suspect with law enforcement goals).

To achieve this goal, victims should have unrestricted access to grand juries for the purpose of informing the grand jury of crime. This would assure that marginalized victims have access to the criminal process.[83] If the prosecutor remains central to charging, then a procedure should be available to challenge the prosecutor's decision not to charge.[84] If this procedure providing for review of the prosecutor's decision not to charge results in a finding of probable cause, then the suspect should be charged and a special prosecutor appointed to prosecute the case.[85]

At the charging stage, victims should be given the choice between a punitive procedural model and a restorative justice procedural model. The victim may wish to choose victim-offender mediation over the retributive model of the formal criminal process[86] because restorative justice may lead to greater benefits for the victim.[87] In restorative justice models, the victim is a central player in the proceeding, and the emphasis is upon restoring the victim through efforts of the offender. For this reason, the public prosecutor is not a necessary part of the restorative justice process. On the other hand, the victim should be able to choose instead the formal criminal justice system, because it may better satisfy the victim's individual sense of justice. Thus, the choice between the two processes should be left to the victim.

2. The Charging Process and the Crime Control Model

Under the Crime Control Model, the victim should not be able to determine whether charges are brought and, in addition, the victim should not be central to a determination of what charges are appropriate. Efficient suppression of crime mandates that offenders be processed rapidly in the system. Furthermore, the failure to punish crime, already aggravated by the victim's failure to report, is exacerbat-

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[83]*See* Davis, *supra* note 72, at 290–91, 308–09.

[84]*See id.*; *see also* State v. Unnamed Defendant, 441 N.W.2d 696, 703–04 (Wis. 1989) (Day, J., concurring) (maintaining that procedure serves as check on prosecutorial power).

[85]*See* Commonwealth v. Benz, 565 A.2d 764, 765–68 (Pa. 1989) (upholding judicial review of prosecutor's decision not to charge as constitutional and ordering that police officer be charged with homicide).

[86]*See* Mark William Baker, Comment, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1480 (1994) (discussing advantages of victim-offender mediation).

[87]*See id.* at 1495–96, 1500–02.

ed if the victim has veto power over charging. It is efficient for the public prosecutor to bring charges by anticipating juror bias. It is efficient to gauge probabilities of winning on criteria other than the burden of proof. It is not efficient to use the system to challenge cultural bias. Where juries would perceive a victim as unworthy (or blameworthy) it is acceptable that this anticipated perception be reflected in the charging decision. A public prosecutor, as a specialist in screening cases, provides greater consistency and efficiency in charging decisions. Furthermore, even if a criminal statute is violated, there may be a myriad of public policy or resource reasons why the offense should not be charged. Because the greater good and the consolidation of power in the public prosecutor is more important than the individual victim, the prosecutor should be able to elect not to prosecute crimes. Victims should have no access, independent of the public prosecutor, to charging procedures because allowing victims such alternatives would undermine the efficient operation of public prosecution.

Restorative justice models may be appropriate, but only in the case of minor crimes where significant punitive sanctions are not available. Suppression of serious crime is more certain with a punitive incarceration model that removes the offender from society. The proper concern is not just about an individual victim, but potential victims as well. The public and the victim are both harmed by the crime, but the public interest is more important than the individual victim's interest. Thus, the prosecutor should choose when mediation is appropriate. Additionally, restorative justice models require a hearing in every case. The victim, offender, and mediator must prepare for, and attend, a mediation event because there is no plea bargaining in restorative justice. Restorative justice is a labor- and time-intensive process, and is inefficient. Finally, it is in the interest of society to morally condemn the perpetrator.[88] Restorative justice models diminish the importance of moral condemnation and incarceration, which avoids the important blame function and undermines a valuable deterrent.

3. The Charging Process and the Due Process Model

Under the Due Process Model, the value of primacy of the individual defendant in relation to governmental power dictates that punishment be minimized to serve rational sentencing purposes. Alternatives to prosecution may minimize punishment and serve the same rational sentencing purposes of deterrence and rehabilitation. The potential punishment is minimized if alternatives to incarceration are available. Restorative justice minimizes the potential for punishment and is a valuable process that may serve to rehabilitate the offender. However, the ability of a defendant to participate in victim-offender

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[88]*See* Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1291–1301 (1994) (discussing how victim offender mediation fails to provide societal catharsis).

mediation should not depend on the whim of the individual victim.[89] Rather, a defendant should be able to choose to participate in the restorative justice alternative regardless of the preference of the victim.

On the one hand, the victim should be able to choose not to charge. If the victim views punishment as inappropriate, the State should not be able to override the victim's decision not to charge. Also, giving victims the authority not to bring charges or to reduce the seriousness of the charge does not raise the potential for vindictiveness. On the other hand, allowing the victim to influence the decision to bring a charge or to influence the decision in order to obtain pursuit of the highest charge justified by law is fraught with dangers of revenge. To ensure a fair process, procedures should permit victim mercy to be considered relevant. However, procedures should not allow the victim to argue for a harsh sentence because this gives the appearance of vindictiveness and would infringe on due process. Vindictiveness is inappropriate in the criminal process, while mercy and forgiveness are welcome.[90]

The potential for vindictiveness is also the reason why victims should not have independent access to the grand jury. It is in the interest of the individual defendant to have a reduction in the initial charge where the victim is unworthy of a more serious charge, even where the law is more accurately reflected in the more serious charge. When the goal is preserving the primacy of the defendant, cases with unlikely success should not be brought. The potential of jury bias against victims should weigh in only where victim influence or jury bias minimizes potential punishment. However, potential jury bias against the defendant should never result in an enhanced charging decision that could ultimately lead to differential punishment.

4. The Situation and the Trend of the Charging Process

Currently, victims have no formal veto authority in the decision to charge. As a practical matter, however, the victim can have significant informal influence if the victim wishes not to proceed to charging or desires a lesser charge to be brought.[91] Generally, but not always, this influence diminishes with the increasing significance of the crime. Yet, even in serious cases, such as homicide, victims may influence the

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[89]*See id.* at 1282–84 (discussing need to avoid biased selection criteria in determining which defendants could participate).

[90]*See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 395–405 (1996) (making similar argument in context of sentencing).

[91]*See* MILLER, *supra* note 83, at 173 (1969); Hall, *supra* note 15, at 950–51.

severity of the charge. In a few types of cases, such as domestic violence cases, the victim's choice is not a charging consideration.[92]

Studies reveal that prosecutors are biased against certain victims in the charging decision.[93] The influence of bias in charging decisions may be moderated by two basic processes that challenge the prosecutor's negative charging decision: grand jury review and judicial review. Judicial review exists in a few jurisdictions,[94] while grand jury review is more widely available, although some jurisdictions require access through the court.[95] Defendants and victims alike face the problem of bias in the charging decision. The Due Process Model value of primacy of the defendant and the Victim Participation Model value of primacy of the victim arguably share a common goal of eliminating bias from charging. For defendant and victim, the issue of bias presents a significant and largely unresolved problem.[96]

Presently the value of efficiency dominates the charging decision. Prosecutors largely "control" the decision to present charges, and what charges to present, to the indicting authority. However, victims have significant informal influence in the charging process. There is modest experimentation with procedures for judicial review of the prosecutor's decision not to charge.[97] Otherwise, where available, grand jury access

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[92]*See Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1540 (1993) (discussing "no-drop" policies in prosecuting domestic batterers).

[93]*See* Stanko, *supra* note 82, at 225, 237 (citing statistical studies).

[94]*See* BELOOF, *supra* note 2, at 256–65. Other formal checks on the prosecutor's discretion, all of which are typically unavailable as a practical matter in the vast majority of cases, are: (1) electoral control; (2) Attorney General intervention; (3) mandamus; and (4) appointment of special prosecutors. *See id.*

[95]*See* Davis, *supra* note 72, at 308–48 (discussing degrees of victims' access to grand jury).

[96]*See* McCleskey v. Kemp, 481 U.S. 279, 286–99 (1987) (holding that black habeas corpus petitioner's statistical evidence that his race and victim's race weighed in imposition of death penalty was insufficient to show denial of equal protection); Steven L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 421–22 (1988).

[97]*See, e.g.*, Sandoval v. Farish, 675 P.2d 300, 302–03 (Colo. 1984) (upholding judicial review of prosecutor's decision); Commonwealth v. Benz, 565 A.2d 764, 765–68 (Pa. 1989) (same); State v. Unnamed Defendant, 441 N.W.2d 696, 699–702 (Wis. 1981) (same); *see also* Gittler, *supra* note 38, at 157–63 (articulating theoretical

for the victim, either directly or after judicial screening of the propriety of access, is the procedure available to challenge the prosecutor's decision not to charge.

D. Trial

1. Trial and the Victim Participation Model

Victims should be allowed to attend the trial.[98] Attendance for the person harmed is a minimum accommodation. This is because the victim has suffered the primary harm—the harm of the crime—and because the victim suffers secondary harm when the victim is exiled from the case.[99] A rule[100] that the harmed victim cannot attend the trial is bizarre. No one should be able to exclude the victim from the courtroom.[101] Cross-examination of the victim and adequate jury instructions are two ways to assure accurate truth finding.[102] No other person or entity has the same stake in the trial as the victim of the

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possibilities of victims' role in charging). For an overview of European procedures for challenging the prosecutor's charging decision, see Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Systems*, 34 WAYNE L. REV. 95, 102–24 (1987).

[98]*See* Paul Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1388–96 (stating that victims have right to be present at judicial proceedings).

[99]*See* Cassell, *supra* note 40, at 494–98.

[100]*See* FED. R. EVID. 615 (stating that "[a]t the request of a party the court shall order witnesses excluded, so that they cannot hear the testimony of other witnesses").

[101]*See Senate Judiciary Report on S.J. 44, Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*, 105th Cong., Rep. No. 105-409, at 82 (1998) (reporting additional comments of Senator Joseph Biden).

[102]*See id.*

crime.[103] Denying the significance of the victim's stake by exclusion from trial is offensive to the victim and to principles of fairness.

The fact that the victim is the person harmed entitles the victim to participate in the trial. Furthermore, the participation of the victim contributes to the truth finding function of trial. In serious (if not all) crimes, or where a victim is particularly vulnerable (such as a child[104] or mentally impaired person), or where a conflict develops between the victim and the prosecutor,[105] the victim should have the right to counsel at trial (and at other stages of the criminal process). The victim's counsel should not be under the control of the public prosecutor.[106] Once the crime is charged, representation at trial for victims of serious crimes is justified by the significance of the harm to the victim. Recognition of harm should give the victim standing at trial. The victim and victim's counsel would occupy a third table during the trial with the opportunity to engage in voir dire selection, opening statement, questioning and calling witnesses, objecting to evidence, and closing argument. The victim and victim's attorney would be subject to the same court and evidentiary rules that apply to other parties. These rules sufficiently protect against potential vindictiveness.

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[103]*See* GEORGE FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 250–51 (1995). Suggesting that victims should have the option of a role at trial, Professor Fletcher states that "it would be better to allow the third voice at trial rather than freeze out the party for whom the proceedings may carry greater positive meaning than for anyone else." *Id.* at 250.

[104]*See* Charles L. Hobson, *Appointed Counsel to Protect the Child Victim's Rights*, 21 PAC. L.J. 691, 693–98 (1990) (advocating counsel for child victims in criminal cases).

[105]For example, under the Arizona Rules of Criminal Procedure, "In any event of any conflict of interest between the state and the wishes of the victim, the prosecutor shall have the responsibility to direct the victim to the appropriate legal referral, legal assistance, or legal aid agency." ARIZ. R. CRIM. P. 39(c)(3).

[106]The defendant's due process right is the source of limits imposed on the victim's attorney. *See* Young v. United States *ex rel* Vuitton et Fils S.A., 481 U.S. 787, 790, 802–09 (1987) (holding that counsel for party benefitting from court order could not be appointed to prosecute violations of court order). However, these due process limits apply when the victim stands in the shoes of the public prosecutor, but arguably do not apply when the victim appears independently of the public prosecutor. *See id.*

2. Trial and the Crime Control Model

The significance of harm to the individual victim pales in comparison to the significance of harm to society. The victim's harm is just not significant enough to give the victim a meaningful role at trial. If the victim is allowed to hire counsel, it should only be for the purpose of assisting the prosecution. The privately funded prosecutor should be under the control of the public prosecutor at all times. Counsel for victims should only act as an extension of the public prosecutor. The victim's participation in trial is unnecessary and inefficient. It adds another party to the trial process. The public prosecutor and the defendant are capable of uncovering an adequate truth without the victim in the trial. The complete control exercised by the prosecutor would be compromised, resulting in practical problems, like the victim "opening the door" to testimony that the State wished to maintain excluded from the trial. The victim may not be adverse to the defendant, such as in some domestic violence cases. Thus, the victim may be adverse to the prosecution.

The victim may attend the proceeding and sit behind the bar. Occasionally, when the assistance of the victim is beneficial to the prosecution, the victim may sit at counsel table. Limiting the victim's role to attendance is appropriate because victim attendance does not significantly interfere with the efficiency of the prosecution. The prosecution alone should be able to exclude the victim from the courtroom.[107]

3. Trial and the Due Process Model

Victims have no business at trial, except as witnesses.[108] While it may be that, in some limited circumstances, victims would be on the "side" of the defense, in most trials they would be simply a second prosecutor. With "party" status at trial, the victim would have the opportunity to reinforce the prosecutor's case. The protections against duplication of information (such as evidentiary limits on questions "asked and answered") would be compromised. The victim may have

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[107]The Utah Rules of Evidence do not "authorize exclusion of [a] victim in a criminal trial or juvenile delinquency proceeding *where the prosecutor agrees with the victim's presence*." UTAH R. EVID. 615 (emphasis added). No other state or federal provision for victim attendance leaves this discretion to the State. *See* SOURCEBOOK, *supra* note 2, § 10 (stating that while victims regard right to attend trial as very important, most states allow victims to be excluded from trial).

[108]*See* Robert P. Mosteller, Essay, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1698–1704 (1997) (discussing danger that victims with constitutional right to be present at trial would compromise rights of defendants).

a different theory of the case than the prosecutor or defendant.[109] This could lead to jury confusion. The trial wouldn't be a fair game because the prosecution would have two "teams" to the defendant's one "team."[110] Any incremental benefit to truth finding is overshadowed by the procedural setting that is skewed against the defendant. In addition, victims should not be allowed to attend trial because their observation of the trial enables them to conform their testimony to the testimony of others. Finally, victim participation conflicts with the truth finding function because vindictiveness is likely to enter the process.[111]

4. The Situation and the Trend of Trial

Victims do not presently have party status at trial in any jurisdiction in the United States. In most state jurisdictions and in federal court, victims may hire attorneys. These privately funded prosecutors are under the control of the public prosecutor and participate at trial with the prosecutor's permission. Thus, one prerequisite for a victim's attorney to participate is the willingness of the victim's attorney to submit to the control of the public prosecutor.[112] Because public prosecutors control participation of privately funded prosecutors, the crime control value of efficiency may limit the victim's ability to meaningfully participate in trial. Currently, only wealthy victims have the ability to obtain counsel. No right to counsel presently exists for

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[109]*See* Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1605 (1996) (reviewing GEORGE FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS). According to Henderson, "[Q]uestioning by victims could lead to confusion of issues in a trial and would benefit only those victims wealthy enough to hire counsel." *Id.*

[110]*See* William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 54–59 (1996).. Despite the argument, Pizzi and Perron chronicle that in Germany victims of violent crime possess the ability to participate in trial with their own counsel. Counsel is appointed if the victim is indigent. *See id.*; *see also* Alexandra Goy, *The Victim-Plaintiff in Criminal Trials and Civil Law Responses to Sexual Violence*, 3 CARDOZO WOMEN'S L.J. 335, 335 (1996) (discussing that in Germany, victims participate directly in prosecutions for certain crimes).

[111]*See* Henderson, *supra* note 110, at 1605 (stating that "only vengeance-seeking victims would avail themselves of the process").

[112]*See* East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1995) (holding that if private prosecutor controlled prosecution, defendant's due process rights were violated); Person v. Miller, 854 F.2d 656, 662–64 (4th Cir. 1988) (holding that mere participation of victims' counsel was not reversible error).

indigent victims.[113] Although courts have the authority to appoint pro bono counsel for the victim, this has rarely been done.[114] So far, thirty states by state supreme court opinion or statute have explicitly reaffirmed the common law allowing victims to have an attorney at trial, who is under the control of the public prosecutor.[115] In the jurisdictions where privately funded prosecutors are not allowed, the Crime Control Model value of efficiency and the Due Process Model value of primacy of the defendant have prevailed.[116] However, there is no trend in this direction[117] and due process standards are not evolving in the direction of victim exclusion. The trial remains dominated by the values of efficiency and of primacy of the defendant. The victim does not participate as a party at trial. The value of primacy of the victim has made a very limited inroad into the trial process, which is reflected in the ability—in many jurisdictions—of the victim to attend the trial.[118]

E. Sentencing

1. Sentencing and the Victim Participation Model

Because the victim is the person harmed, the victim's opinion about an appropriate sentence and the information supporting the opinion should be permitted at sentencing. It is an infliction of a secondary harm upon the victim to deny the victim the right to articulate at sentencing the extent and the consequences of the primary harm. The victim should be able to present reasons in support of his opinion. These reasons include information about the victim, and the impact of the crime on the victim, the victim's family, and members of the community. Procedural restrictions are sufficient to curtail dangers

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[113]*See* BELOOF, *supra* note 2, at 359–61.

[114]*See* State v. Lozano, 616 So. 2d 73, 78 (Fla. Dist. Ct. App. 1993) (reversing lower court and appointing counsel for victims' relatives).

[115]*See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 55–58 (1995) (discussing states that prohibit privately-funded prosecutions).

[116]*See id.*

[117]*See id.*

[118]SOURCEBOOK, *supra*, note 2, § 10 (stating that 34 states currently grant victims right to attend trial).

of revenge.[119] If the judge chooses to follow the recommendation of the victim, rather than the parties, it is because the victim's recommendation was more closely aligned with the public interest than was the recommendation of the prosecution or defense.[120] The victim's opinion (and supporting rationale) is beneficial to an accurate assessment of what is in the public interest.

2. Sentencing and the Crime Control Model

Despite somewhat longer sentencing hearings due to the victim's participation, a positive effect on efficiency is realized by victim participation in sentencing. Admitting evidence of the particular harm to a victim will likely ensure an appropriate punishment, and thus promote the suppression of crime. Therefore, the admissibility of victim characteristics and victim harm should be allowed. However, victim opinion should not be allowed because the opinion diminishes the importance of, and may conflict with, the public prosecutor's opinion. Public prosecutors, and not victims, are in the best position to recommend what level of mercy or retribution is appropriate.[121] As a result, only public prosecutors (and defendants) should be able to express an opinion about sentencing.

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[119]*See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 887–90 (1996) (arguing that in context of sentencing, procedural restrictions appropriately enforced are adequate protections for defendants).

[120]*See* Randell v. State, 846 P.2d 278, 279–300 (Nev. 1993) (finding trial court "capable of listening to victim's feelings without being subjected to overwhelming influence by the victim"); Davis et al., *supra* note 41, at 505. The authors state:

> Victims' views may not always be identical to those of the community, but they probably are often closer to the public's sentiments than those of courthouse professionals, who have a substantial interest in processing cases in summary fashion and who may tend to become insensitive to the human suffering involved in the "normal crimes" they process. In the vast majority of criminal cases, those that the public never hears about, victims' opinions could add another perspective from which to view incidents brought before the court.

Id.

[121]*See* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 241–46 (1991) (arguing that victim participation results in disparate sentencing of similarly situated defendants).

3. Sentencing and the Due Process Model

The victim should only be allowed to participate at sentencing when the victim seeks mercy for the defendant.[122] This is achieved by allowing the defendant control, as part of the defendant's mitigation evidence, over whether or not the victim speaks. Otherwise, the principle that defendants should be punished equally for violation of the same statute means that victims should not participate at sentencing.[123] The random victim factor should not influence a harsher disposition.[124] This leads to unequal punishment among otherwise similarly situated convicts.[125] Only the nature of the statute violated should be relevant to punishment.[126] Furthermore, allowing the victim to speak at sentencing, unless they ask for mercy, gives the appearance of vindictiveness and opens the door for revenge to enter the process. The victim's opinion should not be allowed to intrude on the recommendations of the public prosecutor and the defendant.[127] To allow victims to participate in sentencing is to discard rational sentencing principles.[128] The substance

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[122]*See* Bandes, *supra* note 91, at 395–405 (criticizing vengeance motivations in victim impact statements).

[123]*See* Booth v. Maryland, 482 U.S. 496, 506 n.8 (1986) ("We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.").

[124]*See id.* at 504–07.

[125]*See id.*

[126]*See id.*

[127]*See* Hall, *supra* note 122, at 266 & nn.167–68.

[128]*See* Payne v. Tennessee, 501 U.S. 808, 860–64 (1991) (Stevens, J. , dissenting); Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing*, 39 AM. J. JURIS. 225, 237–40 (1994) (suggesting that compensation or victim rehabilitation would serve victims better than providing victims right to participate); Henderson, *supra* note 35, at 987–1006 (discussing irony of focusing victims' rights on end, rather than beginning of process); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 688–90 & n.29 (1994) (discussing *Payne* Court's linking of blameworthiness to harm to victim).

of the victim's participation is not necessarily a measure of the views of the community.[129]

4. The Situation and the Trend of Sentencing

All jurisdictions now allow victim impact evidence at sentencing in the form of: (1) the particular harm suffered by the victim, and (2) information about the victim as a unique individual.[130] A few jurisdictions also allow victim opinion testimony, but it is too soon to say whether the admission of the victim's opinion at sentencing is a trend.[131] The effort to limit victim participation in sentencing to evidence of mercy has failed.[132] The Due Process Model value of primacy of the defendant has lost influence in sentencing procedures. The Victim Participation Model value of primacy of the victim is significant, but curtailed in the area of victim opinion by Due Process Model and Crime Control Model values. The Crime Control Model value dominates over Due Process Model and Victim Participation Model values when the sentences are derived from mandatory minimums. An early indication is that victim impact statements will be considered as mitigation or aggravation in sentencing decisions subject to sentencing guideline schemes.[133]

F. Appeal

1. Appeal and the Victim Participation Model

The victim should be able to challenge on review decisions that ignore, limit, or deny the victim's right to participation. Absent the ability to use writs and appeals, victims' rights are without remedy, and

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[129]*See* Henderson, *supra* note 35, at 994–99 (discussing retaliatory motives of victim participation in sentencing).

[130]*See* SOURCEBOOK, *supra* note 2, § 9 ("As of 1995, every state allows victim impact evidence at sentencing.").

[131]*See, e.g.*, State v. Matteson, 851 P.2d 336, 338–40 (Idaho 1991) (permitting testimony of victim's family at sentencing); Randell v. State, 846 P.2d 278, 280 (Nev. 1993) (permitting victim's opinion at noncapital trial).

[132]*See* Payne v. Tennessee, 501 U.S. 808, 817–27 (1991) (holding that Eighth Amendment is not per se bar to victim participation).

[133]*See* State v. Heath, 901 P.2d 29, 34–35, 41–42 (Kan. Ct. App. 1995) (permitting statements of victim's family to mitigate defendant's sentence).

thus, are not rights at all. Victims should also have the ability to bring suit against governmental actors that violate the victim's civil rights.[134] Courts should be required, whenever possible, to rule on victim issues in the pretrial stage, thus enabling review.[135] Any lower court failure to enforce the rights of the victim should be redressed. This will deter future violations. Furthermore, elaboration and clarification of victim laws will only occur with appellate review.

2. Appeal and the Crime Control Model

It is inefficient to delay criminal trials or sentences while victim issues are decided. Most judges will follow victim laws without the threat of appellate review. Efficiency is more important than providing the individual victim with a remedy with which to enforce their rights. The victim's harm simply is not sufficiently important to merit appellate enforcement procedures. Civil remedies against governmental actors who violate victims' rights are inappropriate. Such a remedy will interfere with and discourage the efficient processing of criminal cases.

3. Appeal and the Due Process Model

Just as the victim has no place in the criminal courtroom, they should have no access to writs or appeals. Speedy trial rationales argue against pretrial enforcement of victims' rights, and double jeopardy rationales should prohibit appeal or writ after trial begins. The victim's remedy, if any, should be a civil suit against the governmental actors who violated the victim's rights. If a judge or prosecutor denies these rights, the remedy should be an ethical complaint to the proper authority. Fairness to the defendant requires that no criminal procedure in which the defendant is involved should be altered to accommodate remedies for the victim.

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[134]*See* Knutson v. County of Maricopa *ex rel*. Romley, 857 P.2d 1299, 1300 (Ariz. Ct. App. 1993) (refusing to allow negligence action for failure to notify victim of change in defendant's plea). However, many victim laws are accompanied by clauses that preclude the possibility of civil rights actions. *See, e.g.*, OHIO CONST. art. 1, § 10(a) ("This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding . . . and does not create any cause of action for compensation or damages against the state.").

[135]*See* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 7–14 (1990) (suggesting that pretrial rulings give government an opportunity for review without compromising defendants' rights).

4. The Situation and the Trend of Appeal

Absent statutory or constitutional authority, victims do not possess the right to appellate review.[136] Some abrogations of victims' rights are capable of review, such as when a statute grants a right to appeal on the issue or, probably, where a victim's constitutional right is abrogated. These constitutional rights exist in many states. Statutes providing appellate review of victim issues are rare. Few appeals have been taken from cases in which a victim's constitutional rights have been abrogated, so it is difficult to determine how such appeals should operate. Even where permitted, a defendant's right to speedy trial, double jeopardy, and due process will likely limit such appeals in certain circumstances.

The victim's general inability to obtain review, or, if obtaining review, the victim's failure to acquire an adequate remedy, creates perhaps the greatest single dysfunction in this emerging area of law. In many, if not most, contexts, the victim has rights without remedies. In the area of appellate review, Crime Control Model values and Due Process Model values have presented a formidable challenge to both meaningful and enforceable victim participation by suppressing the potential of appellate courts to significantly contribute to victim laws.

VI. CONCLUSION

A three-model concept that includes the Victim Participation Model is the superior method of serving the functions of Packer's models: to explicitly recognize the value choices that underlie the details of the criminal process; to provide a convenient way to talk about the operation of the process; to detach ourselves from the details of the process, so that we can see how the entire system may be able to deal with the various tasks it is expected to accomplish; to assist in understanding the process as dynamic, rather than static; and to assist in revealing the relationship of process to substantive law. The three-model concept, which includes the Victim Participation Model, is more functional than the two-model concept because the law now reflects the significance of genuine values of victim participation, while the two-model concept provides no room for the values of victim participation. Laws of victim participation are not going away; to the contrary, laws of victim participation in criminal procedure are becoming ever more prevalent. The Victim Participation Model provides an opportunity to

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[136]*See* United States v. McVeigh, 106 F.3d 325, 328–32 (10th Cir. 1997). Some states allow for appellate review of a denial of victims' rights. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-4437(A) (Supp. 1998) ("The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right guaranteed to victims under the victims' bill of rights . . . , any implementing legislation or court rules.").

understand the laws granting victims rights of participation in the criminal process.

Appendix A: The Presence of Values of Fairness, Respect, Dignity, Privacy, Freedom from Abuse, and Due Process in State Constitutions and Federal and State Statutes[137]

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[138]*See* ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16b; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 25; MD. CONST. art. XCVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8(2); N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m; 42 U.S.C. § 10606 (1994); ALA. CODE §§ 15-23-60 to -84 (1995); ALASKA STAT. § 12.61.010 (Lexis 1998); ARIZ. REV. STAT. ANN. §§ 13-4401 to -4439 (West Supp. 1998); ARK. CODE ANN. §§ 16-90-1101 to -1115 (Michie Supp. 1997); CAL. PENAL CODE §§ 679, 1102.6 (West 1999 & Supp. 1999); COLO. REV. STAT. § 24-4.1-302.5 (1998); CONN. GEN. STAT. ANN. § 54-203 (West. Supp. 1999); DEL. CODE ANN. §§ 11-9401 to -9419 (1995 & Supp. 1998); FLA. STAT. ANN. § 960.001 (West Supp. 1999); GA. CODE ANN. §§ 17-17-1 to -15 (Michie 1997 & Supp. 1998); HAW. REV. STAT. ANN. § 801D-1 (Lexis 1999); IDAHO CODE § 19-5306 (Michie Supp. 1998); 725 ILL. COMP. STAT. ANN. 120/2 (West 1992); IND. CODE ANN. § 33-14-10-3 (Lexis 1998); IOWA CODE ANN. §§ 915.1–.100 (West Supp. 1999); KAN. STAT. ANN. § 74-7333 (Supp. 1998); KY. REV. STAT. ANN. § 421.500 (Lexis 1998); LA. REV. STAT. ANN. § 46:1842 (West Supp. 1998); ME. REV. STAT. ANN. tit. 15, § 6101 (West Supp. 1998); MD. CODE ANN. § 27-760 (Lexis Supp. 1998); MASS. ANN. LAWS ch. 258B, §§ 1–13 (Lexis 1992 & Supp. 1998); MICH. COMP. LAWS ANN. §§ 28.1287(751)–(911) (Lexis 1996 & Supp. 1999); MINN. STAT. ANN. §§ 611A.01–.78 (West 1987 & Supp. 1999); MISS. CODE ANN. §§ 99-43-1 to -49 (Supp. 1998); MO. ANN. STAT. § 595.209 (West Supp. 1999); MONT. CODE ANN. §§ 46-24-101 to -213 (1997); NEB. REV. STAT. ANN. §§ 81-1848 to -1850 (Michie 1995); NEV. REV. STAT. ANN. §§ 178.569–.5698 (Michie 1997 & Supp. 1997); N.H. REV. STAT. ANN. § 21-M:8-k (Lexis Supp. 1998); N.J. STAT. ANN. § 52:4B-36 (West Supp. 1999); N.M. STAT. ANN. § 31-26-2 (Michie 1994); N.Y. EXEC. LAW §§ 640–649 (McKinney 1996); N.C. GEN. STAT. § 15A-825 (1997); N.D. CENT. CODE § 12.1-34-02 (1997); OHIO REV. CODE ANN. § 2930.01 (Anderson 1996); OKLA. STAT. ANN. tit. 19, § 215.33 (West Supp. 1999); OR. REV. STAT. § 147.410 (1991); R.I. GEN. LAWS § 12-28-2 (1994); S.C. CODE ANN. §§ 16-3-1110, -1505 (West Supp. 1998); S.D. CODIFIED LAWS §§ 23A-28C-1 to -5 (Lexis 1998); TENN. CODE ANN. § 40-38-102 (Michie 1997); TEX. CRIM. P. CODE ANN. §§ 56.01, .09 (West Supp. 1999); UTAH CODE ANN. § 77-37-1 (1995); VT. STAT. ANN. tit. 13, § 5303 (1998); VA. CODE ANN. § 19.2-11.01 (Michie Supp. 1998); WASH. REV. CODE ANN. §§ 7.69.010, .030 (West 1992 & Supp. 1999); W. VA. CODE § 61-11A-1 (1992); WIS. STAT. ANN. § 950.01 (West 1996); WYO. STAT. ANN. § 1-40-203 (Michie 1997).

Written Testimony
Presented to the Senate Judiciary Committee Hearing on
"Campus Sexual Assault: the Roles and Responsibilities of Law Enforcement"

December 15, 2014

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- *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205 (2011)
- *Campus Violence: Understanding the Extraordinary through the Ordinary,* 35 J.C. & U.L. 613 (2009)
- *"Decriminalizing" Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 483 (2012)
- *Institution-Specific Victimization Surveys: Addressing Legal & Practical Disincentives to Gender-Based Violence Reporting on College Campuses*, TRAUMA, VIOLENCE & ABUSE (in press)
- *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887 (2014).

I submit these comments from my perspective as a researcher and author of seven articles dealing with sexual violence in education and the federal laws that apply to this violence. The federal legal regimes that I have researched and analyzed include Title IX of the Education Amendments Act of 1972 ("Title IX"), the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), and United States constitutional law precedents governing the administrative due process rights of students who are accused of perpetrating sexual violence. All three of these regimes regulate the handling by educational institutions ("schools") of sexual violence[1] committed against a school's students.

None of these three legal regimes is based in criminal law, nor are they enforced by criminal courts. Rather, all are enforced by federal administrative agencies or by civil courts. However, because sexual violence often also violates state criminal laws, members of the general public, including those who serve as school officials and in law enforcement, have a tendency to conflate and confuse these federal laws with state criminal laws. I am therefore submitting these comments to remind the Judiciary Committee that law enforcement, school officials, and campus communities as a whole need to be cognizant of Title IX, the Clery Act, the administrative due process precedents, and their different requirements for schools' responses to sexual and similar forms of gender-based violence.

As Part I of these comments will review in detail, the tendency to conflate and confuse state criminal law and Title IX's civil rights approach to this violence has serious, negative implications for sexual violence victims and violates their rights under federal law. In order to avoid these negative consequences, Part II suggests several methods for keeping criminal proceedings separate from administrative and civil proceedings but also coordinating such parallel proceedings in the instances where a victim wishes to pursue both options for redress.

I. THE NEGATIVE CONSEQUENCES OF CONFLATING/CONFUSING CRIMINAL LAWS WITH TITLE IX, THE CLERY ACT, AND ADMINISTRATIVE DUE PROCESS

a. Eliminating Sexual Violence Victims' Rights to Equal Educational Opportunity

The most serious consequence of conflating and confusing the criminal law with the three federal regimes that apply to sexual violence is the elimination of sexual violence victims' rights to equal educational opportunity. This consequence results from the substitution of the procedural rights given to alleged perpetrators and victims in the criminal system for the rights of alleged perpetrators and victims under civil rights statutes, including Title IX.

Title IX prohibits schools from engaging in sex discrimination that denies the victims of that discrimination rights to an equal education. Schools are considered to have engaged in sex discrimination when they tolerate sexual violence as a form of severe sexual harassment that creates a hostile environment for students. Factors creating this hostile environment include the

[1] These comments use "sexual violence" instead of terms such as "sexual assault" or "rape" as a broad, descriptive term that is not a term of art, and which includes a wide range of behaviors that may not fit certain legal or readers' definitions of "sexual assault" or "rape." The term therefore includes "sexual assault" or "rape," as well as other actions involving physical contact of a sexual nature.

trauma caused by the violence itself and the exacerbation of that trauma by victims being required to encounter or risk encountering their assailants post-violence.

The trauma that results from sexual victimization makes it very difficult for victims to succeed in school at the same level as they did before the violence, especially in the immediate aftermath of the violence. Particularly if they are not addressed as soon after the victimization as possible, the negative health and educational consequences of sexual violence can have life-altering effects. The documented health consequences of sexual violence include increased risk of substance use, unhealthy weight control behaviors, sexual risk behaviors, pregnancy, and suicidality.[2] Common educational consequences include declines in educational performance, the need to take time off, declines in grades, dropping out of school, and transferring schools,[3] all of which have potentially devastating life-long financial consequences. The cost of rape and sexual assault (excluding child sexual abuse) to the nation has been estimated at $127 billion annually (in 2012 dollars), $34 billion more than the next highest cost criminal victimization (all crime-related deaths except drunk driving and arson).[4]

These traumatic effects are often exacerbated when victims are forced to encounter or to risk encountering their assailants repeatedly after being victimized. Many of the educational consequences listed above are at least partially caused by victims' efforts to avoid their assailants in shared classes and campus spaces, including by taking time off, not going to class, transferring or dropping out, all of which are linked to declines in educational performance and grades, which in turn can result in loss of scholarships and financial aid as well as tuition spent on classes the victims are not able to finish.

Therefore, under Title IX, although the initial violation of victims' rights are caused by their assailants, schools that tolerate those initial rights violations and do not seek to end such violations are themselves violating Title IX. The Office for Civil Rights in the Department of Education ("OCR") has developed specific directives for how schools should address discriminatory violence that has already occurred and stop violence from reoccurring. One such directive requires schools to provide "prompt and equitable" grievance procedures to students who report being victimized. "Prompt and equitable" generally means that, although schools have some flexibility in how they construct their procedures, when those procedures give a right to the accused student, the student victim must also get that right. In addition, such procedures must use a preponderance of the evidence standard of proof, the most appropriate standard of proof for a presumption-free proceeding that gives equal procedural rights to all parties because it requires just over 50% evidentiary weight in favor of one side or the other.[5]

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[2] *See* J. G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*. 286 *J. of Am. Med. Assoc.* 572 (2001).
[3] *See* R. M. Loya, *Economic consequences of sexual violence for survivors: Implications for social policy and social change* (2012) (Doctoral dissertation, Brandeis University), http://www.academia.edu/2790455/Economic_Consequences_of_Sexual_Violence_for_Survivors_Implications_for_Social_Policy_and_Social_Change.
[4] *See id;* T. Miller, M. Cohen & B. Weirsema, *Victim Costs and Consequences: A New Look* (1996), www.nij.gov/pubs-sum/155282.htm.
[5] *See Dear Colleague Letter*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html; Questions and Answers on Title IX and

In contrast to the equal procedural rights provided to sexual violence victims under Title IX's civil rights approach, the criminal justice system structurally marginalizes all victims of crime, including sexual violence victims, from its procedures and affords them few if any procedural rights. Criminal cases are structured as contests between the defendant, represented by the defendant's counsel, and the community as a whole, represented by the state and, in the proceeding itself, by the prosecutor. The victim is not a party to the case, s/he is merely a "complaining witness."[6]

Not having party status in a criminal proceeding leads to multiple inequities between the victim and the defendant, including unequal legal representation, unequal access to evidence, unequal privacy protections, unequal rights to be present in the courtroom, and an unequal standard of proof. Because the prosecutor is not the victim's lawyer, the victim has no legal representative dedicated to protecting her/his rights, and no control over the presentation of the victim's case by the prosecution. The prosecutor is likewise restricted from protecting the victim's rights by rules such as the *Brady* rule, which require the prosecutor to disclose any exculpatory evidence (evidence that may support the defendant's innocence), but do not require the defendant to disclose evidence tending to prove the defendant's guilt. Despite law reforms that have diminished these powers to a certain extent, defendants can still often demand disclosure of private information such as medical and counseling records that the victim wishes to keep private on the basis that these are exculpatory evidence relevant to the victim's credibility, a common target of attack by the defendant in the typical "word-on-word" sexual violence case with no third-party witnesses. This inequality even extends to the victim's ability to be in the courtroom because the rule on witness sequestration bars the victim from being present in the courtroom other than when s/he is on the witness stand.[7]

Finally, the "beyond a reasonable doubt" standard of proof used in criminal cases is drastically unequal, requiring 98 or 99 percent likelihood that the victim's story is accurate and credible. Even the lesser standard of "clear and convincing evidence," commonly described as somewhere between "preponderance of the evidence" and "beyond a reasonable doubt," builds significant inequality into a proceeding, since it is a significantly higher standard than the closest-to-equal preponderance standard. Moreover, while there are good reasons for the higher standards of proof in the criminal justice system, these reasons do not exist in a Title IX proceeding. The "beyond a reasonable doubt" and "clear and convincing evidence" standards provide necessary safeguards in systems where the potential penalties for convicted parties include significant jail time and for some offenses even death. Such coercive measures present powerful reasons to set a standard of proof that is most likely to avoid unjust convictions, even if it also risks many wrongful acquittals. Since schools do not have the coercive powers of the criminal system and no Title IX, Clery Act or administrative due process proceedings will result in incarceration or worse, these coercive factors cannot be a reason for abdicating our

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Sexual Violence, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[6] *See, gen'lly,* Nancy Chi Cantalupo, *"Decriminalizing" Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 483 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316533; Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary through the Ordinary,* 35 J.C. & U.L. 613 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457343.

[7] *See id.*

commitment to equality and civil rights principles.

For all of these reasons, it is downright dangerous to conflate civil rights and criminal justice approaches to sexual violence and allow criminal justice responses to dominate our collective imagination regarding how to address this violence. If we did so, we would eliminate sexual violence victims' civil rights to equality, specifically student victims' rights to equal educational opportunity. Moreover, by taking away victims' Title IX equality rights, we would also take away rights that directly address their educational needs and have the best hope of halting the devastating health, educational and financial consequences that flow from sexual victimization. The criminal justice system is not structured to address these needs and therefore survivors are less likely to report to both criminal justice officials and to authority figures in criminal justice-imitative systems, a topic to which the next section will turn.

b. Chilling Victim Reporting

A second serious consequence of conflating the criminal justice system and the administrative/civil regimes of Title IX, the Clery Act and the accused student administrative due process precedents is the likelihood that this conflation will chill victim reporting. This probability is of particular concern given the already extremely low victim-reporting rates among sexual violence victims generally and student survivors especially.

To understand why so few victims report sexual violence, it is helpful to start with Professor Douglass Beloof's analysis that "[t]he individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through non-reporting."[8] Professor Beloof includes the following reasons among the reasons why a victim might "[e]xercise the veto" on criminal systems: "the victim's desire to retain privacy; the victim's concern about participating in a system that may do [him/her] more harm than good; the inability of the system to effectively solve many crimes…; the inconvenience to the victim; the victim's lack of participation, control, and influence in the process; or the victim's rejection of the model of retributive justice."[9]

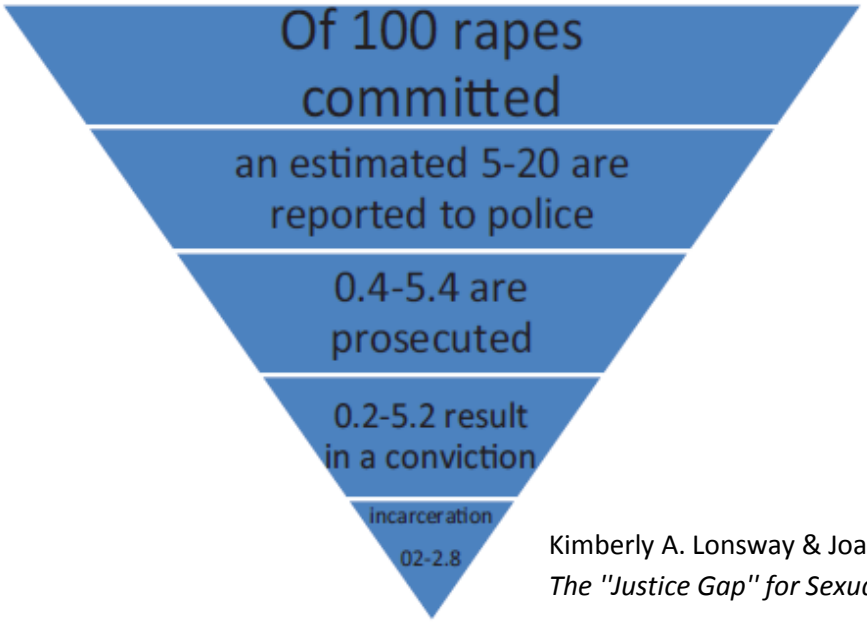
This list reiterates many of the reasons why student survivors say they do not report. For instance, in Professor Beloof's category of "the victim's desire to retain privacy," college victims state that they don't report because they do not want family or others to know[10] or to be embarrassed by publicity.[11] In addition, many student victims express concern about "the inability of the system to effectively solve many crimes" when they give reasons for not reporting such as not thinking a crime had been committed,[12] not thinking what had happened

[8] Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999).
[9] *Id.*.
[10] *See* BONNIE S. FISHER ET AL, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 24 (2000), http://www.ncjrs.gov/pdffiles1/nij/182369.pdf.
[11] *See* ROBIN WARSHAW, I NEVER CALLED IT RAPE 50 (1988); CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 13 (1993).
[12] *See* FISHER ET AL, *supra* note 10, at 23.

was serious enough to involve law enforcement,[13] and lack of proof.[14] Finally, the top reason college victims give for not reporting is fear of hostile treatment or disbelief by legal and medical authorities.[15] They also express a lack of faith in or fear of court proceedings or police ability to apprehend the perpetrator,[16] fear retribution from the perpetrator,[17] and believe that no one will believe them and nothing will happen to the perpetrator,[18] all of which relate to "the victim's concern about participating in a system that may do [him/her] more harm than good."

These reasons for not reporting also demonstrate that, like most of the American public, college victims overall think about reporting sexual violence in terms of criminal justice system responses, not in terms of their rights to equal educational opportunity under Title IX. Therefore, if we think back to Professor Beloof's discussion of the crime victim's veto, college victims' general lack of reporting is a commentary showing their collective disbelief in the effectiveness of the criminal system to address their needs.

In making this commentary, college victims join a long history of survivors who have vetoed the criminal justice system's response to sexual violence and its victims. As the following diagram summarizing Dr. Kim Lonsway's and Joanne Archambault's research shows, the vast majority of victims do not report to the criminal justice system and the majority of those who do report do not receive the one form of redress that the criminal justice system is structured to provide: incarceration of the perpetrator.



Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases*

[13] *See id.*
[14] *See id.*
[15] *See id.* BOHMER & PARROT, *supra* note 11, at 13, 63. WARSHAW, *supra* note 11, at 50.

[16] *See* BOHMER & PARROT, *supra* note 11, at 13, 63.
[17] *See id.*
[18] *See* WARSHAW, *supra* note 11, at 50; FISHER ET AL, *supra* note 10, at 23; BOHMER & PARROT, *supra* note 11, at 13, 63.

This diagram also shows that college victims' fears regarding the reactions of law enforcement and the inability of the criminal justice system to "solve" sexual violence crimes and hold the perpetrators accountable are well-justified. Although Lonsway's and Archambault's research deals with a national population, not focused on college students, other evidence confirms that college students face the same, if not worse, barriers as all sexual violence survivors. For instance, a 2011 study conducted by the *Chicago Tribune* found that of 171 sex crimes *investigated* by police involving student victims at six Midwestern universities over a five year period, only 12 arrests (7%) were made and only four convictions (2.3%) resulted.[19] Because these percentages are not based on the total number of sex crimes that occurred, but only the ones that were both reported to and investigated by police, it appears that in Illinois and Indiana at least, the criminal justice system is failing student victims even more than it is failing sexual violence victims generally.

Anecdotal evidence from the cases involving Florida State University and University of Oregon also indicate that police and prosecutors dealing with college cases are hardly free from victim-blaming attitudes. In the Florida State University case involving accusations against Jameis Winston, the most recent Heisman Trophy winner, the police's investigation was so slipshod that critical evidence was lost and the prosecutor determined he could not prosecute.[20] In the University of Oregon case involving three basketball players accused of gang-raping a freshman student, the prosecutor declined to prosecute due to the victim's past sexual history, failure to stop the violence, and lack of obvious incapacitation during the assault.[21]

All-in-all, this evidence shows that victims who exercise their veto on the criminal justice system have made a decision that the criminal system will "do them more harm than good." Such a decision is a rational, logical one not only because of the potential harm that has already been discussed, but also because the criminal justice system does victims relatively little "good" in that it does not help them meet their many trauma-induced needs post-violence. Although the criminal justice system may—for 0.02 - 5.2% of the sexual violence committed—convict and punish the perpetrator (not always with incarceration), it is simply not structured to assist the victim in the myriad areas of life that are disrupted by the violence, including her/his health, education, employment, housing, family responsibilities, and, if s/he is an immigrant, immigration status. Other than the limited compensation for which victims may qualify through state legislation and/or the federal Victims of Crime Act,[22] the criminal justice system provides minimal to no help to victims in avoiding or compensating for the $127 billion annual estimated cost that U.S. sexual violence victims collectively experience. In contrast, through Title IX's administrative and court enforcement, as well as the Clery Act's administrative enforcement, student victims can get critical educational accommodations that can help them minimize the effects of sexual trauma on their educational trajectories. Moreover, through Title IX private lawsuits, student victims can get access to monetary compensation, often compensation that far

[19] http://articles.chicagotribune.com/2011-06-16/news/ct-met-campus-sexual-assaults-0617-20110616_1_convictions-arrests-assault-cases.
[20] http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html
[21] http://www.huffingtonpost.com/2014/05/09/university-of-oregon-rape_n_5297928.html
[22] https://www.ncjrs.gov/ovc_archives/factsheets/cvfvca.htm

surpasses the minimal amounts available through crime victims compensation funds. The federal fund, for instance, states that "[m]aximum awards generally range from $10,000 to $25,000,"[23] whereas several of the publicly-disclosed Title IX settlements have been in the six- and seven-figures,[24] and a 2011 United Educators (a major insurer of educational institutions) report indicates that the average amount paid to college victims from 2005-10 by their schools for mishandling their cases was about $77,000.[25]

All of this evidence suggests that conflating the criminal justice system and the administrative/civil systems of Title IX, the Clery Act, and the administrative due process cases will diminish victims' willingness to use the administrative/civil systems. In other words, it will cause them to veto the administrative/civil regimes just as most victims have vetoed the criminal system. This will have the practical effect of eliminating options that help victims stay in school and succeed in their educations, as well as help to compensate them for the trauma that they have experienced.

c. Interfering with Schools' Abilities to Adequately Address Student Misconduct and Implement Sound Educational Policy

Conflating the criminal justice system and the administrative/civil legal regimes will also eliminate options for schools, and do so in a manner contrary to educational principles and policies that have been widely acknowledged as best practices by schools for at least 15 years, if not longer, and prior to the issuance of the current regimes of Department of Education guidance under Title IX and the Clery Act. During this time, schools and the representatives of schools have repeatedly articulated schools' obligations to treat all their students fairly, and schools have sought to achieve those principles in their policies on student misconduct. This commitment to fairness and equality has been supported by courts that have decided cases not only under Title IX but also under the U.S. Constitution's due process provisions.

Both before and after OCR issued its 2011 Dear Colleague Letter ("DCL"), school representatives clearly stated schools' commitment to fairness, equality, and evenhanded treatment of all college students. For instance, in a 2013 article on campus sexual violence, "Ada Meloy, the general counsel with the American Council on Education, which represents presidents of colleges and universities, said that … the issues "can be very difficult on a campus because of the need to be careful and fair to both the accuser and the accused."[26] Nearly a decade before, well before the 2011 DCL, another attorney for the American Council on Education stated in a *Dateline* show on campus sexual violence that: "They are both [the schools'] students and they have a moral and legal responsibility to both students."[27]

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[23] https://www.ncjrs.gov/ovc_archives/factsheets/cvfvca.htm

[24] *See* Cantalupo, *"Decriminalizing," supra* note 6, at 494, 517.

[25] https://www.ue.org/Libraries/Corporate/Student_Sexual_Assault_Weathering_the_Perfect_Storm.sflb.ashx states that 72% of $36 million dollars was paid to 54% of 262 students who sued their schools in sexual assault cases from 2005-10. The 54% was made up of accused students suing for due process violations, with the remainder being student victims. Therefore, 28% of $36 million dollars was paid to 131 student victims, equally just under $77,000 each.

[26] http://www.mcclatchydc.com/2013/08/26/200180/students-press-feds-to-get-tough.html.

[27] http://www.nbcnews.com/id/10382613/ns/dateline_nbc/t/rape-campus/#.U5kaknJdWSo.

Also well before the DCL, higher education insurers and associations were encouraging schools to adopt "best practice" student conduct policies and procedures that implemented these fairness and equality principles. For instance, in a pamphlet published by United Educators and the National Association of College and University Attorneys ("NACUA"), attorney Edward N. Stoner promotes a "model student code" that explicitly rejects the criminal system as a model for student disciplinary systems.[28] This pamphlet focuses preliminarily on three related points: 1) the goals behind student conduct policies and 2) the differences between those goals and the purposes of the criminal system, which make 3) thinking about student discipline systems in terms of the criminal law inappropriate and counterproductive.[29]

Stoner characterizes the central goal of student disciplinary systems as helping "to create the best environment in which students can live and learn… [a]t the cornerstone [of which] is the obligation of students to treat all other members of the academic community with dignity and respect—including other students, faculty members, neighbors, and employees."[30] He reminds school administrators and lawyers that this goal means that "*student victims are just as important as the student who allegedly misbehaved*" (emphasis in original),[31] a principle that "is critical" to resolving "[c]ases of student-on-student violence."[32] In doing so, he points out that this principle of treating all students equally "creates a far different system than a criminal system in which the rights of a person facing jail time are superior to those of a crime victim."[33] Therefore, he advises that student disciplinary systems use the "'more likely than not' standard used in civil situations" and avoid describing student disciplinary matters with language drawn from the criminal system.[34]

Evidence suggests that schools in fact followed the advice of United Educators and NACUA regarding student disciplinary systems, again prior to the DCL. Two studies did national surveys of schools' choices of standards of proof for their student disciplinary proceedings, one in 2002[35] and one in 2004.[36] In both surveys, while most schools did not specify their standard of proof, of those that did, the majority (80% of just over 1000 schools in 2002[37] and a majority of 64 schools in 2004) used a preponderance standard. Only 3.3% of schools in the 2002 study used a "beyond a reasonable doubt" standard,[38] and the 2004 study does not indicate that a single school used the criminal standard.[39]

Court decisions in accused student administrative due process cases have clearly supported these policy choices. In *Goss v. Lopez*, the U.S. Supreme Court considered a high

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[28] *See* EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT 12-13 (2000), *available at*: http://www.edstoner.com/uploads/UE.pdf.
[29] *See id.* at 7-11.
[30] *Id.* at 7.
[31] *Id.*
[32] *Id.* at 7-8.
[33] *Id.* at 7.
[34] *Id.* at 10.
[35] https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf, 120.
[36] *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945 (2004).
[37] https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf, 120
[38] https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf, 120
[39] *See* Anderson, *supra* note 36.

school suspension, and decided that the students were entitled to due process consisting of "*some* kind of notice and [] *some* kind of hearing."[40] The *Lopez* Court also cited approvingly to *Dixon v. Alabama State Board of Education*,[41] where for cases involving expulsion the 5th Circuit Court of Appeals required notice "of the specific charges,"[42] "the names of the witnesses [and] facts to which each witness testifies,"[43] and a hearing, "[t]he nature of [which] should vary depending upon the circumstances of the particular case."[44] Both courts have specified that these requirements fall short of "a full-dress judicial hearing, with the right to cross-examine witnesses,"[45] nor do they "require opportunit[ies] to secure counsel, to confront and cross-examine witnesses… or to call… witnesses to verify [the accused's] version of the incident."[46]

For private institutions, the requirements are even less onerous. While courts have reviewed private institutions for expelling or suspending students in an arbitrary and capricious manner,[47] most courts review private schools' disciplinary actions under "the well settled rule that the relations between a student and a private university are a matter of contract."[48] Therefore, private institutions must do what they have promised students in the school's own policies and procedures, and courts will review disciplinary actions according to the terms of the contract.[49]

Courts have consistently reiterated the distinction between disciplinary hearings and criminal proceedings,[50] and have upheld expulsions for a wide range of student behaviors, from smoking,[51] drinking beer in the school parking lot[52] and engaging in consensual sexual activity on school grounds,[53] to participating in but withdrawing, prior to discovery, from a conspiracy to shoot several students and school officials,[54] and being found by two female students in a dormitory room with two other male students and the female students' roommate, who was inebriated, unconscious, and naked from the waist down.[55] Courts have explicitly rejected many assertions of criminal due process rights by students accused of sexual violence, including rights

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[40] *See* Goss v. Lopez, 419 U.S. 565, 579 (1975).
[41] *Id.* at 576.
[42] Dixon v. Alabama State Board of Education, 294 F.2d 150, 158 (1961).
[43] *Id* at 159.
[44] *Id.* at 158.
[45] *Id.*
[46] *Lopez*, 419 U.S. at 583.
[47] *See, e.g.*, Ahlum v. Administrators of Tulane Educ. Fund, 617 So. 2d 96, 100 (La. Ct. App. 1993); Rollins v. Cardinal Stritch Univ., 626 N.W.2d 464, 469 (Minn. Ct. App. 2001).
[48] *.Dixon*, 294 F.2d at 157.
[49] *See* Centre College v. Trzop, 127 S.W.3d 562, 567 (Ky. 2004); Schaer v. Brandeis Univ., 735 N.E.2d 373, 381 (Mass. 2000); Hernandez v. Don Bosco Prep. High, 730 A.2d 365, 367 (N.J. 1999); Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 243 (D. Vt. 1994).
[50] *See* Schaer, 735 N.E.2d at 381 ("A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts"); *Brands*, 671 F. Supp. at 632 ("The Due Process Clause does not require courtroom standards of evidence to be used in administrative hearings"); Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 17 (D. Me. 2005) ("The courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial").
[51] *See* Flint v. St. Augustine High Sch., 323 So. 2d 229 (La. 1975).
[52] *See* Covington County v. G.W., 767 So. 2d 187 (Miss. 2000).
[53] *See* B.S. v. Bd. of Sch. Trs., 255 F. Supp. 2d 891 (N.D. Ind. 2003).
[54] *See* Remer v. Burlington Area Sch. Dist., 286 F.3d 1007 (7th Cir. Wis. 2002).
[55] *See* Coveney v. President & Trustees of Holy Cross College, 445 N.E.2d 136, 137 (Mass. 1983).

to an attorney,[56] discovery,[57] voir dire,[58] appeal,[59] and to know witnesses' identities and to cross-examine them.[60]

As a result of this permissive legal standard, my research has discovered only three cases where a court found a school to have violated the due process rights of a student accused of sexual violence and in only one case did the court require the institution to pay any damages.[61] This research is corroborated by earlier research conducted by Dean Michelle J. Anderson.[62] When compared to the settlements made public in several Title IX cases, the top three of which have been in the six and seven figures,[63] it is clear that schools also have liability-related reasons to make the policy choices that they have. That is, because schools risk losing much larger amounts of money from violating students' Title IX rights, they actually increase their own liability risks if they obligate themselves to criminal-justice-like procedures that the law does not require them to adopt and that make it harder to protect a student's Title IX rights. For these reasons, obligating schools to use criminal justice procedures could actually increase schools' liability risks through no fault of their own.

Despite all of this evidence that schools long ago decided—separately from enforcement of Title IX and the Clery Act and with the support of the courts—to treat all students equally, some recent cases have suggested that some schools may be tempted to use the criminal process to duck the school's responsibilities under Title IX and the Clery Act. In both the Florida State University and University of Oregon cases mentioned above, the school did not conduct its own separate Title IX investigation,[64] and in a third case involving two Dartmouth College students, where numerous articles about the criminal rape trial do not mention any attempt on Dartmouth College's part to conduct a Title IX investigation.[65] When this happens, conflation of the criminal justice response with the school's obligations under these administrative/civil legal regimes facilitates excuses for why that school cannot (in actuality, *will* not) respond internally and protect the student victims' Title IX and Clery Act rights. In addition, this conflation creates a tendency for many—schools and others—to forget that the standard of proof and the due process requirements for schools governed by these administrative/civil legal regimes are different than those in the criminal process.

For all of these reasons—protecting our commitment to equality and civil rights, encouraging victims to report so they may access services and minimize the damage to their

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[56] *See* Coveney, 445 N.E.2d at 140; *Ahlun*, 617 So. 2d at 100.
[57] *See Gomes*, 365 F. Supp. 2d at 19.
[58] *See id.* at 32.
[59] *See id.* at 33.
[60] *See* Coplin v. Conejo Valley Unified Sch. Dist., 903 F. Supp. 1377, 1383 (C.D. Cal. 1995).
[61] *See* Fellheimer, 869 F. Supp. at 247. *See also* Marshall v. Maguire, 102 Misc. 2d 697 (N.Y. Sup. Ct. 1980); Doe v. University of the South, 2011 U.S. Dist. LEXIS 35166 (E.D. Tenn. 2011).
[62] Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945, 951 (2004).
[63] *See* Cantalupo, *"Decriminalizing," supra* note 6, at 494.
[64] *See* http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html; http://www.huffingtonpost.com/2014/05/09/university-of-oregon-rape_n_5297928.html.
[65] See, e.g., http://thedartmouth.com/2014/03/28/news/parker-gilbert-16-found-not-guilty-of-rape; http://www.vnews.com/home/11335496-95/jury-clears-former-dartmouth-student-in-rape-trial; http://jezebel.com/dartmouth-wants-to-make-it-clear-theyre-taking-sexual-1553069458.

education that trauma can cause, and protecting widely-adopted educational policies and best practices—we need to vigilantly guard against conflation and confusion of the federal administrative/civil legal regimes that govern schools with the criminal justice system, which neither puts extra responsibilities on schools nor expects schools to enforce the criminal law. The following part suggests three very specific ways in which we can keep these legal systems separate and avoid this confusion.

II. PARALLEL AND COORDINATED ADMINISTRATIVE AND CRIMINAL PROCEEDINGS

All of the methods of keeping the criminal justice system clearly separate from Title IX, the Clery Act and the accused student administrative due process case law require an acceptance of parallel proceedings. Such proceedings allow a school to protect a student's Title IX and Clery Act rights regardless of whether local, non-campus law enforcement is also investigating the case or the local prosecutor's office is considering prosecuting. Ideally, when a criminal case and a Title IX proceeding are happening at the same time, both processes should be coordinated so one does not interfere with or damage the other, as long as the victim is included in the coordination so that she is fully informed of the range of options available and has an opportunity to choose how to move forward in both proceedings or to drop one or both proceedings.

The current OCR guidance makes clear that parallel proceedings are possible under Title IX and that Title IX proceedings may not be delayed or not pursued due to an ongoing criminal case.[66] In addition, similar parallel proceedings are typical in other legal areas where the same acts violate both the criminal code and a victim's rights under internal policies and/or civil rights statutes. For instance, it is common knowledge that entities such as employers or professional licensing boards need not wait to see what happens with a potential or even active criminal case before handling the case and assigning sanctions if necessary under their own internal policies and procedures. In addition, when there is both a criminal and a civil protection order proceeding occurring simultaneously, typically the counsel for both proceedings will try to coordinate the two cases. Therefore, arguments that have been advanced suggesting that it is unusual and unfair for such parallel proceedings to occur in campus sexual violence cases are not accurate.

Consistently separating criminal justice and administrative/civil processes into parallel proceedings allows each proceeding to fulfill its own purposes. As already discussed, Title IX's purpose is protecting students' equal educational opportunity, whereas the purpose of the criminal justice system is to separate criminal actors from society to protect the community as a whole, usually through incarceration. The Clery Act's original purpose was to inform consumers of higher education about the types and rates of crime on each college campus, although that purpose has expanded over the years to incorporate some of the same rights as those protected in a more comprehensive fashion by Title IX.

Allowing each of these legal regimes to fulfill their own purposes requires following several more specific recommendations, all discussed in the remainder of this Part. First, we

[66] Questions and Answers on Title IX and Sexual Violence, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS 27 (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

must allow each regime to use the most appropriate procedures for its purposes. This means that procedural rules such as the preponderance of the evidence standard, the most appropriate standard for realizing both civil rights, equality principles and educational best practices, should be retained for Title IX and Clery Act proceedings. Second, understanding that victims are a large and diverse group who have many needs and goals that often lead them to pick and choose between the various processes available to them, we should protect a diversity of options for survivors to use, as well as their ability to choose the option(s) best for them. Third, where victims choose to pursue multiple options, resulting in parallel proceedings that may interfere with each other, we should use coordination methods such as Sexual Assault Response Teams (SARTs), staff positions dedicated to serving victims and preventing this violence, and memorandums of understanding (MOUs) with actors outside of a school, including police, prosecutors, and community-based victims' advocacy organizations.

a. Retaining the "Preponderance of the Evidence" Standard of Proof

Separating administrative/civil and criminal proceedings from each other and allowing each to fulfill its distinct purposes requires that we retain the "preponderance of the evidence" standard of proof. To allow any other standard of proof would essentially substitute concerns such as unjust incarceration, which are relevant only to the criminal system, for the equality and civil rights goals of Title IX. In addition, this would set Title IX proceedings apart from other administrative/civil proceedings without a meaningful justification for doing so.

As mentioned above, the preponderance standard comes closest to procedural equality for all student parties, and this most effectively operationalizes the key civil rights assumption that the basic equality of all people precludes giving presumptions for or against any one person's account. Indeed, the preponderance standard communicates equality in that it does *not* suggest a general societal belief that one side or the other is more likely to lie or that this belief is so strong it needs to be systematically guarded against through the very design of our processes, including our choice of a standard of proof. Because campus sexual violence cases tend to be word-on-word cases which are decided largely based on the parties' credibility, using a standard of proof like "clear and convincing evidence" or "beyond a reasonable doubt" essentially signals that we, as a society, believe that those who report being sexually victimized are so *less* credible and so much *more* likely—*across the board*—to *lie* than the accused students are that we have to build our disbelief into the very *structure* of our process.

In addition, using a preponderance standard is consistent with our approaches to other civil rights claims protecting equality,[67] including under other statutes enforced by OCR and courts, other claims under Title IX itself, and claims under civil rights statutes outside of education, like Title VII of the Civil Rights Act of 1964, which prohibits sexual harassment in employment. Adopting a different standard of proof separates sexual violence victims, the majority of whom are women and girls, from the other populations who are protected from discrimination based on race, disability, age, Boy Scout membership, etc. Such a separation would mean that we as a society are comfortable with giving one group of women and girls at

[67] *See* Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU Educ. & L. J. 143 (2013). See also http://www.nwlc.org/resource/national-womens-law-center-writes-letter-support-department-educations-2011-dear-colleague-

least and arguably women and girls as a whole, never mind many men and boys who are gender-minorities, *un*equal treatment.

Moreover, as already mentioned, the preponderance standard is used in all of the regimes under which a school itself could be sued for mishandling a report of sexual violence,[68] not only in cases brought by student survivors under Title IX, but also through claims brought by accused students themselves, when alleging violations of their administrative due process rights. It is also used in sexual violence civil tort cases under state laws and in civil protection order proceedings often used to protect victims of domestic violence.[69] In those cases and many, many others, courts use the preponderance standard every day in matters that are deeply important to the parties involved and that can change the parties' lives forever, including orders to pay millions of dollars, to take children away from their parents, and in countless other ways.

Finally, requiring schools to use a different standard than a preponderance is unfair to schools. As discussed above, schools have demonstrated their preference for the preponderance standard and recognize it as a best practice. The administrative due process precedents emanating from the U.S. Supreme Court and lower courts clearly allow schools to follow these policy preferences and explicitly state that criminal law standards do not apply to accused student cases. In addition, when schools themselves are sued regarding their handling of sexual violence cases, they must defend claims that must only achieve a preponderance of the evidence themselves to require schools to pay damages up to millions of dollars. Furthermore, because of the greater liability schools face from Title IX lawsuits as opposed to accused students' administrative due process claims, schools' use of other evidence standards for their internal proceedings increases their risks for this potentially debilitating liability.

For all of these reasons, the preponderance standard should be retained as the standard by which schools conduct their administrative proceedings regarding sexual violence. To do otherwise is unfair to both survivors and schools and would communicate a particularly offensive and backward form of gender inequality.

b. Expanding Victims' Reporting Options and Respecting Their Autonomy to Choose the Best Option for Them

We should also retain the aspects of the current administrative systems that support and expand victims' options to report under circumstances that they judge will best help them meet their many, diverse needs, including recovering their health and minimizing the damage of the violence to their education. We should also avoid adding any requirements that diminish survivors' autonomy and control over their cases, understanding that this will likely chill victim-reporting by increasing the likelihood that victims will get the control they need through exercising their veto on the entire process. In general, we should seek to structure our administrative systems to encourage victims to report, understanding that our first and foremost goal for increasing reporting is helping victims to access services, because such access is critical to recovery from sexual violence and reporting is a prerequisite to such access. While increased reporting may have other goals such as providing data about the violence that can inform

[68] *See Id.*
[69] *See Id.*

prevention efforts, reaching such a goal cannot place more burdens on survivors, who are already suffering.

One way to expand student survivors' options, access to services, and autonomy is by supporting and solidifying the new, multiple-path reporting structure recently articulated by OCR, with the approval of the White House Task Force to Protect Students from Sexual Assault. Under this system, schools may designate some employees as confidential and some as non-confidential, "responsible" employees. Only the confidential employees may take a report of sexual violence from a student and not pass that report to others at the institution, particularly the school's Title IX Coordinator.[70] This approach was generally supported by victim advocates and service providers, who work with the largest numbers and greatest diversity of sexual violence survivors. A similar structure has also worked well to empower sexual violence survivors in the military.

We should also be careful not to add requirements that have the effect of diminishing survivors' options and increasing the likelihood that they will not report in order to avoid that requirement. In light of the historical victim distrust of the criminal justice system discussed above, this means avoiding any requirement that links criminal justice proceedings with administrative/civil proceedings without a survivors' informed, affirmative choice to seek that involvement and link. For instance, requiring school officials to refer reports of sexual violence to local law enforcement is likely to chill reporting by students who do not want to involve the criminal justice system in their cases. Even an opt-out provision would be insufficient because it would not depend on fully informed, affirmative action on the survivor's part and would ask victims to make a critical decision in a moment of trauma when they are likely focused on more basic needs than whether they will seek justice through the criminal system (recall that the criminal justice system is not structured to help victims with most of their most immediate needs post-violence). Providing information sufficient for a truly informed decision by a survivor, especially in a moment of trauma, is susceptible to mishandling by schools, many of whose staff currently lack the broad-based, sophisticated understanding of sexual violence and the reactions to trauma that victims often experience. Finally, such a referral conflates criminal justice and administrative/civil processes in precisely the manner that the first ten pages of these comments was devoted to criticizing.

If the mandatory referral is designed in part to increase transparency regarding the sexual violence that is occurring on campuses, the better way to increase transparency is to mandate that all schools receiving federal funds conduct victimization surveys with their students, using the same survey designed by the Department of Education or Department of Justice, administered at the same time and in the same interval with each school's students, and publishing the results in the school's campus crime report. Conducting these surveys separates information and data gathering from victim-reporting and encourages all of us to think about reporting as facilitating access to services, not about proving that sexual violence exists or has a particular scope in our society or on a specific campus.

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[70] Questions and Answers on Title IX and Sexual Violence, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. This confidentiality does not extend to reporting aggregate data for Clery Act purposes. Who reports aggregate data for the Clery Act is determined by the Clery Act's separate statutory provisions, regulations, and enforcement regime.

Mandatory surveys also eliminate barriers to innovation, including innovative methods to increase reporting. They would eliminate barriers to innovation because schools currently have incentives, born out of public image concerns, to suppress reporting, which in turn suppress innovation (institutions do not tend to create new ways to address problems they are trying to avoid acknowledging). Mandatory surveys would shift these incentives so that schools would not only not suppress victim reporting, but would encourage it. When all schools administer the same survey at the same time and in the same interval, then publish the results of that survey to the public, all are on an equal footing. Because all indications suggest that at least initially most schools will have an incidence rate close to the national average, this survey is unlikely to raise one school significantly above the others in terms of its campus climate.[71] Therefore, there would no longer be a perverse public image incentive to suppress reporting in order to look safer than other schools. In contrast, since a large gap between incidence rates and reporting rates will look suspicious, schools will now have an incentive to bring the two numbers closer together by encouraging victim reporting and/or developing prevention programs that cause victim reports to rise, incidents rates to fall, or both to occur simultaneously. These new incentives will support innovation, as schools seek to develop ever more effective practices for increasing reporting and preventing violence.

c. Coordinating Parallel Proceedings Where Necessary Through Use of SARTs, Full-time Campus-based Victims' Advocates, and MOUs

Another potential goal for the mandatory referral requirement rejected above is to encourage coordination between criminal justice and school officials. As with mandated surveys and the goal of collecting data on sexual violence, more effective methods exist for achieving such coordination. They include forming Sexual Assault Response Teams (SARTs), employing full-time victims' advocates on campus, and developing memorandums of understanding both with community-based victims' services organizations and with local law enforcement and prosecutors' offices. All of these methods allow for coordination of parallel criminal and administrative/civil proceedings without linking that coordination to victim-reporting. In addition, they accomplish this coordination before any particular case is active and are therefore in a better position to develop coordination best practices.

It bears repeating that parallel civil and criminal proceedings are quite typical throughout our legal system. As already noted, there are many examples where employers and other entities may and will take administrative or civil actions to address violations of internal policies, civil rights laws, and other civil laws, regardless of whether police have investigated or prosecutors have decided to bring criminal charges arising from the same events. Therefore, there is no reason to suggest that schools cannot investigate and resolve reports of sexual violence against their students according to their Title IX and Clery Act obligations even when police are investigating or a prosecutor has decided to prosecute. However, from the survivor's and prosecution's perspective, coordination between these parallel proceedings will likely increase the effectiveness of both actions. From the accused student/defense perspective, parallel proceedings will require accused students and their counsel to develop a strategy for defending

[71] Nancy Chi Cantalupo, *Institution-Specific Victimization Surveys: Addressing Legal & Practical Disincentives to Gender-Based Violence Reporting on College Campuses*, TRAUMA, VIOLENCE & ABUSE (in press).

only one or both depending on such factors as the strength of the evidence, the relative importance to the accused student of achieving "not guilty" verdicts or "not-responsible" school disciplinary decisions, and myriad other factors.[72] Like the parallel proceedings themselves, the development of such strategies is typical in many areas of law where parallel proceedings can and do result.

As coordination methods, SARTs, full-time campus-based victim advocates, and MOUs are superior to mandatory referral because all will tend to establish coordination before any specific case becomes active. SARTs generally gather school employees and other campus stakeholders to develop a coordinated response to sexual and related forms of gender-based violence, giving schools an opportunity to involve local law enforcement and community-based victims' advocates in that coordinated response. If a school employs its own full-time dedicated victims' services and advocacy office, that office will inevitably play a similar coordination role, either in addition to or instead of a SART. Victims' advocacy offices often act as the hub of a wheel full of different offices, facilitating victims' access to various services needed by victims, such as health care, housing, counseling, academic affairs, campus police, student conduct/Title IX coordinator, financial aid, etc. This network of relationships also means that victims' advocates are often informally coordinating a *de facto* SART.

Even if a school has a SART and/or a dedicated advocacy office, forming MOUs with local law enforcement and community victims' services organizations can improve coordination even further. In addition, if the school is too small or has other characteristics that make it impractical to hire full-time victims' services staff or form a SART, it can still enable coordination by forming these MOUs. The White House Task force has also suggested that schools develop such MOUs and has provided or is developing models for schools to use.

III. CONCLUSION

Conflating the criminal justice system with the administrative and civil law regimes of Title IX, the Clery Act, and the accused student administrative due process cases and/or not countering such conflation by others leads to several negative consequences that we want to avoid. These include eliminating sexual violence victims' rights to equal educational opportunity, chilling victim reporting, and interfering with schools' abilities to adequately address student misconduct and implement sound educational policy. We should instead be seeking to keep administrative/civil proceedings clearly separate from the criminal justice

[72] There are also ways to address concerns that might arise regarding accused students' criminal due process rights in the criminal proceeding, particularly regarding the way in which information gathered and disclosed through an administrative or civil proceeding might nullify the right of an accused student who is also a criminal defendant against self-incrimination. First, a statute can grant "use immunity" to evidence gathered in the administrative/civil proceeding. For instance, DC Code Section 16-1002, part of the subchapter setting out the rules for seeking a civil protection order in, for example, a case of domestic violence, states that, "Testimony of the respondent in any civil proceedings under this subchapter shall be inadmissible as evidence in a criminal trial or delinquency proceeding except in a prosecution for perjury or false statement." Second, even if the applicable statute does not provide use immunity, there are ways, in civil cases at least, to request, on a case-by-case basis, a stay of the civil case until the criminal case has concluded. Kimberly J. Winbush, *Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Action Involving Facts or Transactions upon which Prosecution Is Predicated -- State Cases*, 37 A.L.R.6th 511.

system, first by retaining a preponderance of the evidence standard of proof for Title IX and Clery-related administrative/civil proceedings. In addition, we should increase victims' options for reporting and support their autonomy to make the best choices for meeting their diverse needs. Finally, we should find ways for schools and criminal justice officials to coordinate their responses to sexual violence, especially when survivors decide to pursue parallel criminal and administrative/civil proceedings.

December 16, 2014

Judiciary Hearing Campus Sexual Assault: The Roles and Responsibilities of Law Enforcement

Supplemental Information from Angela Fleischer

Dear Senator Whitehouse and Senator Graham,

Thank you again for the opportunity to testify before the Crime and Terrorism Subcommittee hearing and share our programs Campus Choice and You Have Options. Upon departing, I had a couple more ideas I wanted to put forth.

- I would ask that my written statement be changed to reflect that Russell Strand is the only person who should be credited with FETI
- I want to re-emphasize how important I think it is to have a college process available as well as a law enforcement process. It is important that survivors have as much choice as possible in the avenues of help they would like to pursue.
- I believe one of the reasons survivors sometimes come forward to college officials first is because they are concerned about "ruining" someone's life by reporting to law enforcement. I urge caution around creating any kind of system where an accused student's record follows them wherever they go. Colleges need to feel empowered to keep their campus safe with suspensions, expulsions or any other disciplinary action without feeling as though they may be taking away someone's right to education. Truly, they are taking away the right to an education at that institution but not everywhere. There is also a lower standard of proof for colleges and universities (preponderance of the evidence), purposely to allow colleges to maintain a set of standards and safety for the campus community. It is important that colleges be able to maintain the ability to sanction students for violations even if they could not be proven as a crime in a court of law.
- At SOU we have a specially trained hearings board for sexual misconduct cases. There are no students on this board; they are all specially identified staff who have experience or knowledge of this field. They have also received outside training in the dynamics of sexual assault and domestic violence as well as a yearly training provided by our Assistant Director of Student Support and Intervention, for Community Standards. I think it is imperative that colleges and universities have a specially trained body of people to handle these cases.
- Lastly, we have a monthly meeting that includes our community partners to review our on campus response to sexual assault. One thought about this bill is perhaps stipulating a number of meetings between law enforcement and campuses for collaboration per year.

Once again, my thanks for the attention to this important issue.

Sincerely,

Angela Fleischer MSW, CSWA

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Ashland, OR 97520

December 16, 2014

United States Senate Committee on the Judiciary
Subcommittee on Crime and Terrorism
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Chairman Leahy, Ranking Member Grassley, Senator Whitehouse, and Members of the Senate Judiciary Committee:

We thank you for your leadership on preventing and addressing campus sexual violence. As survivors of campus sexual assault and gender-based violence, we support your efforts to protect students' right to an education free from sexual violence and reduce barriers to survivors asserting their rights through the campus system.

We are concerned that the Judiciary Committee hearing on the role of law enforcement in addressing campus sexual assault did not include the in-person testimony of any survivors. Hearing witnesses included victim advocates and law enforcement representatives. In order to compensate for this absence, we are submitting testimony (attached) of eighteen survivors discussing their experiences with law enforcement and/or why they chose not to report to law enforcement. These survivors identify as male, female, and gender non-conforming. We submit these stories in an attempt to paint a more accurate picture of survivors' various experiences of violence.

Put simply, the criminal justice system fails survivors. Many students cite concerns that the accommodations they needed to stay in school could not be obtained by the criminal justice system. In the wake of abuse, a victim's top priority might be an extension on a paper or a dorm change, services a school but not a police department can provide.

But even those who think justice is best served through trials and incarceration are disappointed in the criminal law response: it is naïve to think criminal courts are addressing campus violence any better than schools. Arrest and conviction rates are extremely low.[1] In fact, many survivors and the vast majority of researchers in this field[2] believe the criminal justice system has been historically ineffective in addressing sexual violence.

Students often face harassment and abuse from law enforcement officials. Many victims expressed concern to us about widespread mistreatment and skepticism of rape victims. One student told us that a law enforcement officer was the perpetrator of the assault she did not report.

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[1] Page, A. D. (2008). Judging Women and Defining Crime: Police Officers' Attitudes Toward Women and Rape. *Sociological Spectrum*, *28*(4), 389-411; Campbell, R. (2006). Rape Survivors' Experiences With the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference? *Violence Against Women*, *12*(1), 30-45; Logan, T., Evans, L., Stevenson, E., & Jordan, C. E. (2005). Barriers to Services for Rural and Urban Survivors of Rape. *Journal of Interpersonal Violence*, *20*(5), 591-616; Campbell, R., & Raja, S. (2005). The sexual assault and secondary victimization of female veterans: Help-seeking experiences in military and civilian social systems. Psychology of Women Quarterly, 29, 97–106.
[2] Ibid.

No wonder, then, survivors are not eager to report to the police. Reporting rates to law enforcement have stagnated at around 16% over the decade.[3] In contrast, reports of sexual assault to university officials have risen 50% over the last decade while overall campus crime has declined.[4] **This growth in campus reporting without a corresponding growth in law enforcement reporting suggests that many survivors are consciously choosing not to report to law enforcement.**

In light of these realities, we write to express our opposition to mandatory police referrals and other proposals that strengthen the criminal justice system at the expense of survivor agency. We also oppose any policies that would weaken the campus system as an option for survivors to address the violence they experience. Mandatory referrals, "opt-out" proposals, and other such policies undermine survivor control and unintentionally chill reporting.

These proposals are often articulated with the goal of promoting prosecutions and increasing penalties against offenders. However, we fear this system will instead reduce campus safety. A mandatory referral system does little to resolve survivor concerns about the flaws of the criminal justice system and as such will likely chill reporting to *any* authority. Mandatory referral systems risk dissuading survivors from coming forward to campus officials to avoid police involvement. As the White House Task Force found, survivors are more likely to report if given multiple options and control over what happens to their report. [5]

Reduced reporting would not only deprive communities of the chance to hold accountable those responsible for harms but prevent survivors from accessing the academic, housing, and employment accommodations campus survivors so desperately need – and which the criminal justice system cannot provide.

Despite the failures of the criminal justice system, some survivors do want law enforcement to handle their cases, and schools and police should coordinate to provide students with the best information about how to access the criminal justice system and what they should expect. When students are making a report, schools should inform students of all of their options, including the option to report to the police. In addition, law enforcement can play a valuable role in enforcing survivors' civil protection orders.

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[3] Massachusetts Executive Office of Public Safety and Security (2012). Analysis of College Campus Rape and Sexual Assault Reports, 2000-2011." Accessed June 12, 2014. http://www.mass.gov/eopss/docs/ogr/lawenforce/analysis-of-college-campus-rape-and-sexual-assault-reports-2000-2011-finalcombined.pdf.

[4] Robers, S., et al. (2014). "Indicators of School Crime and Safety: 2013." Accessed June 12, 2014. http://nces.ed.gov/pubs2014/2014042.pdf.

[5] The White House Task Force to Protect Students from Sexual Assault. (2014). *Not Alone*. Retrieved from http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf.

Ultimately, justice will only be served if our systems of adjudication, on and off campus, earn survivors' trust. To do so, we must provide survivors with the chance to maintain control of their reports and bring their voices to our national policy debates.

Thank you for providing us with the opportunity to share survivor testimony on this important issue.

Sincerely,

Know Your IX

(1) "I was afraid to report at all. I knew the police in the area were demeaning, disrespectful, intimidating, and insensitive (they had openly mocked and made fun of a girl who was so drunk she was on the verge of alcohol poisoning). I also know that only 3% of rapists end up in jail, so why pursue justice through a system that was clearly broken? Personally, I didn't want my perpetrators criminally punished, anyway. The only reason to report for me would be to receive academic accommodations, especially if one of them was in a class of mine. I would also want to prevent them from hurting anyone else, which clearly the legal system isn't doing."

(2) "I didn't recognize what happened to me to be sexual assault for months afterwards. Once I did, I didn't want to get the perpetrator in trouble with the police/there was nothing the police could do to her that I wanted to happen. I also didn't want to put another low-income person of color in the police system. She's in my social circle, and I worried that I would lose a lot of friendships/be ostracized from the social group if I tried to punish her through the legal system. Finally, I didn't think the police would take my case seriously, partly because of the nature of the assault and partly because we are both women."

(3) "In my college town between 2010 and 2013, there were 153 reported rapes to the police. Of these, a mere 20 even resulted in an arrest. After an arrest, there is no guarantee that there will be a conviction. Often times the arrested perpetrator will agree to a plea bargain, which is usually a charge much less severe than for rape and does not necessary mean jail time. Even in these cases, if the victim and perpetrator are both university students, the victim would still have to be on campus with the perpetrator. Given the above statistics, it is no surprise that many victims would choose not to go to the police. No one wants the emotional drain of not being believed, or having your attacker told that they won't even be arrested. Despite FBI studies that show false reports of rape are only a few percent, the arrest rates for this crime in my town are only between 10-15%, and this does not even account for the conviction rate of those arrests. It is for this reason that I chose not to press charges against the student who sexually assaulted me. I cannot imagine having to go through that entire process. In the end all I wanted was to be able to go to class and participate in university activities without having to be confronted by the student who completely dehumanized me. I cannot begin to explain the fear that a victim feels when having to be confronted by or even see their attacker. A university campus can become a minefield of fear. Victims have to plan out every move or walk across campus based on where they fear their attacker may be. Course registration turns into an anxiety ridden process in which victims are left to wait and see whether or not their attackers may or may not be in the class with them the next semester, and whether the victim will need to change their course schedule. And I want to reiterate again, that even in the rarer cases where a perpetrator is charged with a crime through the criminal system, it in no way guarantees that they would go to prison and be removed from campus. This is where reporting to campuses can become a relief for victims of sex crimes. Universities can place no contact orders, help to rearrange class schedules and living arrangements, and impose sanctions on perpetrators of sex crimes similar to the way that sanctions are imposed on those students who violate drug/alcohol policies and honor codes. This allows for victims to get a safe and equitable learning environment."

(4) "After having been raped by two different men, it is very rare that I trust men to help me anymore. It seems like most police are men, so I would definitely not trust one of them to believe me or help me after I was raped. Most of society assumes I lied about having been raped, so it's highly likely that policemen would as well."

(5) "I didn't go to the police because the abuse was from my boyfriend and he wouldn't have gone to jail because his family had way too much money for that to happen but I knew I could at least get him off campus for having an 'inappropriate sexual encounter' with me. In the hearing, which was terrifying enough (and I couldn't imagine what actual court would be like), they made the decision to keep him out of the school for 2.5 years. That's the amount of time it would take me to graduate if I took a semester off, I suppose. Frankly, I wouldn't have been able to afford a lawyer as good as his family could afford. And considering the hearing committee was throwing around phrases like 'begrudging consent,' suggesting that silence was also consent, and that it couldn't constitute rape because he stopped when I started crying, I don't think I could have emotionally handled an actual trial. Also, after some conversations with law enforcement, I realized that my experiences would not have been deemed violent enough to be taken seriously." --Siobhan McKissic

(6) "I'm currently going to a school in a big city with a long history of ignoring victims. I was struggling enough making it through classes as it was, and with no family or support system there, I didn't have the resources, energy, or faith to report my rape."

(7) "I never reported my rape to the police because I have witnessed the pain my friends have suffered in the process of reporting sexual violence to the police. After harsh interrogation by unsympathetic detectives each of them was eventually told that the case would not be taken on by the District Attorney. They were told a reasonable jury would not believe their version of events. My friends each presented more evidence than I could supply. Furthermore I do not have a 'perfect rape victim' narrative; I feared my behavior the night that I was raped and following it disqualified me from being believed. The fear that I would not be believed prevented me from telling my friends and family for years. I was not willing to tell the police who would probably not believe me, and who might even blame me. I chose to avoid pain rather than seek justice that I would not receive and I remain certain that if I were to report my rape to the police I would face re-traumatization." --Alexa Schwartz

(8) "I haven't yet because I'm afraid it will be traumatic and nothing will come from it but wasted time. There is no physical evidence and it took me months to tell anyone."

(9) "It was perpetrated by a police officer of the city my college was located in."

(10) "It was a long-term relationship, hard to prove, and very traumatizing to me. I just wanted to move on with my life after it was over. Reporting would have meant rehashing over two years of abuse. I was trying to heal not rip open those wounds. I wasn't ready for a legal battle that would end in him walking away."

(11) "Right after it happened, I was in shock and unable to take the steps to report and or deal with the situation right away. Every time I thought about it I panicked, and I needed to give it some time before I could start to process. By the time I felt more ready to address it, I was afraid I would be questioned for waiting, and I was also afraid that I would not be taken seriously, especially since I was on a date when it happened. In addition, I knew I was barely functioning in school with my personal recovery and I was afraid that an investigation or a trial would push me over the edge."

(12) "I had a meeting with a detective in which the legal options were explained to me, and they sounded awful. If I reported, the case wouldn't even move forward unless someone else decided it should, and if it did, the process would be extremely invasive and take a very long time.

Furthermore, I'm pretty sure that the law's definition of consent means my assault wouldn't even be considered sexual assault, so there wouldn't be much of a case. I don't trust the justice system to handle sexual violence even in situations where the law has clearly been broken, with tons of evidence, so I certainly don't trust it in my nebulous 'he said, she said' case. I know conviction rates are horribly low. And even if my perpetrator were convicted, I don't think time in our fucked up prison system is an appropriate consequence."

(13) "Absolutely not. I have past traumatic experiences with police as perpetrators of violence, and have no faith in them whatsoever as allies to survivors. As a feminist, I completely reject depending on perpetrators of state violence (police brutality, racial profiling, invasive body searches, privacy violations, outrageous prison conditions that themselves perpetrate much gender-based violence) as a response to interpersonal gender-based violence."

(14) "I was very confused and felt a lot of self-blame and guilt after my assault. After seeing how the court system had treated a friend of mine after she had been raped, I did not think that anyone would believe me."

(15) "Couldn't breathe, walk or speak, was having a full-blown panic attack as I ran to my friend's dorm room. The RA called the Michigan State Campus Police. I was going in and out of consciousness when they finally arrived. I was forced to go into the police car and go to the station to report the sexual abuse by my boyfriend because it happened more then once they said. I never wanted to report him because I was terrified of retaliation and further abuse at his hands. They kept asking my friends if I needed to go to the hospital, and after arguing that I was fine they stopped asking. When I arrived at the station, I was brought to a small room with video recording. The police officer came in to take down my story about the sexual violence I suffered at the hands of my boyfriend of about five months. The campus police asked me to justify my own behavior instead of focus on my abuser. They wanted to know why I didn't report it when it happened. They didn't understand the dynamics of an intimate partner violence situation. Their questions targeted me and it was like they were saying it was all my fault for what my boyfriend did to me. The police did not provide me with a sexual assault advocate to be with me during the taking of the initial police report. When the police report was finally sent to Ingham County Prosecutors they dismissed the case. The first question the prosecutor asked me when talking with me about my case was "What were you wearing, were you drunk or at a party?" Automatically it was my fault for being sexually abused by my boyfriend. She was focusing on what I did wrong to have been raped. And the final question she asked me was what time my boyfriend raped me at the University of Michigan football game. Because I couldn't give her what quarter of the football game, she thought I was lying about being raped. This all led me down a further path of depression and contributed to my severe Post Traumatic Stress Disorder that I currently live with." --Emily Kollaritsch, MSU

(16) "A detective from the town police contacted me and left me a voicemail and her contact information. I called her back, but she was on vacation. While she was on vacation, my assailant admitted (again), this time to a private investigator/lawyer, that he had entered my room drunk, laid in my bed behind me, and groped and kissed me while I was asleep. I told the detective about it and she said that she would investigate the matter further. I didn't hear from her for several weeks, so I called her back about a month later. When I got in touch with her, she said that she didn't think he would be charged with anything, though she never told me why. I don't know if it ever made it to a DA's desk."

(17) "Since the event occurred almost 2 years ago, it's been very difficult for me to confront and come to terms with what happened. I certainly place some degree of blame on myself for being in the wrong place at the wrong time, with the wrong people. Since I was not physically coerced, the incident doesn't completely align with society's definition of 'rape'. So many women are silenced and brushed off when they go to the authorities about sexual assault. I guess I felt like my story wasn't 'clear cut' enough to prevent me from being another one of those women."

(18) "A month after my 16th birthday, I found myself in a police station with my mother waiting for an hour for a detective with whom I was required to speak to arrive. Over a year ago, I had told my school counselor that I had been abused by a friend for over three years and that I didn't feel safe in school with that friend and that I was afraid he was going to hurt me. Two months prior to me sitting in the police station, I told another school counselor that I had been sexually assaulted by this friend, which triggered a report to the school psychologist, DCFS, and ultimately the police.

When I first spoke to the school counselor, she told me that she had to contact the police and that she would have to sit down with my parents and me. She then ambushed me with my parents in the room and a school vice principal, with invasive questions about my multiple assaults, things I thought were confidential. I panicked and told her that I wasn't sure what happened. But she still required me to speak with a detective at a local police station.

When my mother and I showed up to the police station, we waited for an hour before the detective came to talk with us. She was running very late. She then demanded to speak with my mother first. For an hour. Leaving me to sit in the police station by myself, shaking from fear and confusion. When it was finally my turn. She took me into the interview room and we spoke for about 2 hours. I remember her telling me that was I was describing, that he hit me multiple times, pushed me down the stairs, locked me in the closet, tied me to his bunk bed ladder and sexually assaulted me multiple times, even involving his friends occasionally, was not abuse, at least in the definitions of the state, which is objectively false. She did not make it clear that this was not a formal report, but kept calling it a conversation, so maybe I should have inferred from this language that this was not a formal report. At any rate, I shared multiple times throughout the interview with her that I reasonably feared for my safety as he had threatened me on multiple occasions. Instead of trying to help me, she used this fear to coerce me out of filing a formal report stating, 'Well if you go through with the formal report, I'll have to talk to him and witnesses, and you don't want that, right?' Because of her behavior in the interview, I left out key details, out of fear of disbelief and her inability to protect me if she decided to file a formal report. She made it seem like this was a monumental waste of her time, gave me her card, and told me to call her if he 'escalated things.' We then sat down with my mother for 10 minutes while she explained that she couldn't do anything and that was the end of it.

It was an incredibly dehumanizing process. I was not offered a break or an opportunity to speak with a trained advocate. I hope no one has to go through that experience ever again."

Article

The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform

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Abstract

Media coverage often reports "good" news about the criminal justice system's ability to effectively respond to sexual assault, concluding that the past two decades have seen an increase in rape reporting, prosecution, and conviction. The objective of this article is to examine the validity of such conclusions by critically reviewing the strengths and weaknesses of various data sources and comparing the statistics they produce. These statistics include estimates for sexual assault reporting rates and case outcomes in the criminal justice system. We conclude that such pronouncements are not currently supported by statistical evidence, and we outline some directions for future research and reform efforts to make the "good news" a reality in the United States.

Keywords

attrition, prosecution, rape

Media coverage often reports "good" news about the criminal justice system's ability to effectively respond to sexual assault. To illustrate, an editorial appeared in the *Chicago Tribune* in 2006, pronouncing, "Rape in Decline" (*Chicago Tribune* Editorial, 2006). That same year, the *Washington Post* reported, "The number of rapes per capita in the United States has plunged by more than 85% since the 1970s" (Fahrenthold, 2006). In 2009, *USA Today* trumpeted, "Reported rapes hit 20-year low" (Leinwand, 2009). The article went on to state that "[r]ape prosecutions have improved dramatically over the past two decades."

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Our objective in this article is to examine the validity of such conclusions by critically reviewing the strengths and weaknesses of various data sources, including estimates for sexual assault reporting rates and criminal justice outcomes. We conclude that such pronouncements are not supported by statistical evidence, and we outline some directions for future research and reform to make the "good news" a reality in the United States.

Are Sexual Assaults More Likely to Be Reported to Police Now Than in the Past?

As illustrated by the aforementioned headlines, media coverage often suggests that rape reporting has increased over the past few decades. In fact, this suggestion is not just offered by the media; the same conclusion is often arrived at in academic writing, such as the article published by the National Institute of Justice, which asked in the title, "Has Rape Reporting Increased Over Time?" (Taylor, 2006). The answer was clearly *yes*. "During the past three decades, women have become more likely to report rapes and attempted rapes—particularly those involving known assailants—to police" (Taylor, 2006, p. 28).

The author based this conclusion on statistics drawn from the National Crime Victimization Survey (NCVS), which is conducted by the Bureau of Justice Statistics (BJS), the statistical arm of the U.S. Department of Justice. Specifically, Baumer, Felson, and Messner (2003) conducted an analysis using NCVS data (and data from the National Crime Survey, which was the precursor to the NCVS). Examining only incidents involving a female victim and one or more male offenders, results suggested that the likelihood of a sexual assault being reported to police increased throughout the period of time from 1973 to 2000. Looking at the past 15 years, the NCVS estimate for the percentage of sexual assaults reported to police was 32% in 1995 (BJS, 2000) and 41.4% in 2008 (the most recent data available; Rand, 2009).

The credibility of these findings is bolstered by the many empirical strengths of the NCVS methodology, including the size and diversity of its sample and its combined methodology of contacting respondents both via telephone and in person. The NCVS is also conducted annually, so data can be compared across time to analyze trends. Yet there are a number of critical limitations to the methodology of the NCVS.

First, there are concerns with the screening questions that the NCVS uses for sexual assault. As described in the *Interviewing Manual* for NCVS Field Representatives published by the U.S. Census Bureau (2003), respondents are first asked the primary screening question: "Has anyone attacked or threatened you in any of these ways?" A number of crimes are then listed, including "any rape, attempted rape, or other type of sexual attack" (pp. B2-48). Clearly, it is problematic to screen respondents by asking if they have been "raped" or "sexually attacked" because many women who have experienced behaviors that meet the legal definition of sexual assault will say "no" when asked if they have been raped. In fact, "research has consistently found that a large percentage of women—typically over 50%—who have experienced vaginal, oral, or anal intercourse against their will label their experience as something other than rape" (Kahn, Jackson, Kully, Badger, & Halvorsen, 2003, p. 233; see also Littleton, Rhatigan, & Axsom, 2007).

For respondents who ask what is meant by any of these terms, the following definition is provided: "Forced sexual intercourse means vaginal, anal or oral penetration by the offender . . . including both psychological coercion as well as physical force" (pp. B3-71-72). If respondents answer "yes" to this question, they are then asked the follow-up question: "Do you mean forced or coerced sexual intercourse?" These questions thus raise a second primary concern, which is that the definition of sexual assault used by the NCVS does not conform to the legal definitions found in state penal codes or with behaviorally based definitions from social scientific research.

These and other concerns with the NCVS methodology have been well documented by others (e.g., Kilpatrick, 2004; Koss, 1996), and they have led the research field to the conclusion, "It is difficult to justify the NCVS's current measurement of rape and sexual assault given the evidence that other screening questions are more sensitive by a large order of magnitude" (Kilpatrick, 2004, p. 1231). Nonetheless, NCVS statistics are often cited as the authoritative source for rape prevalence rates. This is likely due in part to the credibility inferred by the federal government through BJS; the NCVS may thus appear to be the official source of information on the topic of criminal victimization.

Yet NCVS data are not the only source of information on reporting rates for sexual assault. A considerable amount of social scientific research has focused on the accurate measurement of rape-reporting rates through the use of screening questions that are designed to be behaviorally specific, so they do not ask a respondent if they have been raped or sexually assaulted. Rather, each question "describes an incident in graphic language that covers the elements of a criminal offense (e.g., someone 'made you have sexual intercourse by using force or threatening to harm you . . . by intercourse I mean putting a penis in your vagina')" (Fisher, Cullen, & Turner, 2000, p. 5). When this methodology is used to screen respondents for sexual assault victimization, the literature suggests that only about 5% to 20% of victims report the crime to law enforcement (Fisher et al., 2000; Frazier, Candell, Arikian, & Tofteland, 1994; Kilpatrick, Edmunds, & Seymour, 1992; Kilpatrick, Resnick, Ruggiero, Conoscenti, & McCauley, 2007; Tjaden & Thoennes, 2000).

Social scientific research also suggests that the likelihood of reporting rape has increased since the 1970s. To illustrate, Clay-Warner and Burt (2005) analyzed data from the National Violence Against Women Survey (NVAWS) and concluded that a sexual assault committed after 1990 was more likely to be reported than one committed before 1974. Their analysis also suggested, however, that reporting rates have remained essentially unchanged since 1990.

Another way of examining this question is to look at three large-scale studies that were conducted over a span of 15 years with nationally representative samples and comparable methodologies. In 1991, the National Women's Study found that 16% of all sexual assaults were reported to law enforcement (Kilpatrick et al., 1992). The NVAWS was then conducted in 1995, and it produced a slightly higher estimate of 19% (Tjaden & Thoennes, 2000). Finally, a national study conducted in 2005 found a rate of 16% (Kilpatrick et al., 2007); this was identical to the estimate reported almost 15 years earlier in the National Women's Study. This pattern of research findings thus corroborates the conclusion based on NCVS data that the likelihood of reporting a sexual assault increased from the 1960s to the 1990s but has remained stable since that time. However, estimates for the reporting rate

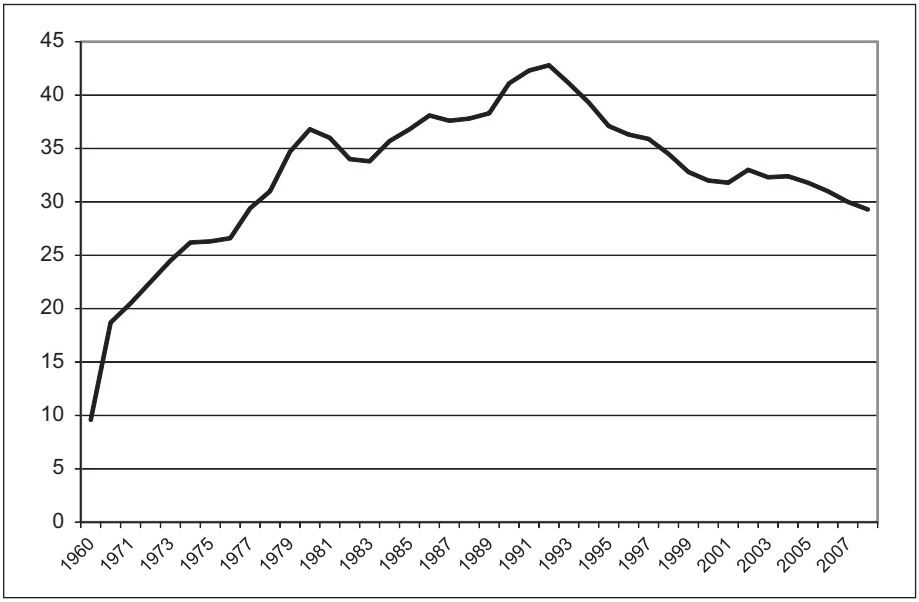

Figure 1. Forcible rapes reported to law enforcement (per 100,000 U.S. inhabitants)
Source: Uniform Crime Report statistics are reported in the *Sourcebook of Criminal Justice Statistics Online* (BJS, 2008b).

are considerably lower in these social scientific studies (16%-19%) than in the NCVS data for the same period (32%-41%). As the methods for sampling and interviewing procedures were designed to be comparable, the different estimates were likely due to the screening questions that were used.

Are More Sexual Assaults Reported to Police Now Than in the Past?

A related question is whether more sexual assaults are now being reported to law enforcement. The primary source of information to answer this question is the Uniform Crime Report (UCR) program, which is operated by the Federal Bureau of Investigation (FBI) and compiles data submitted on a voluntary basis from law enforcement agencies across the country. As illustrated in Figure 1, UCR data suggest that the number of reported forcible rapes per capita did increase dramatically from the 1960s to the 1990s, but then declined to levels that are currently comparable with the late 1970s. Specifically, the UCR's reporting rate increased from 9.6 per 100,000 U.S. inhabitants in 1960 to the peak of 42.8 per 100,000 in 1992. It then declined to 29.3 per 100,000 in 2008, the most recent data available at the time of writing (BJS, 2008b). This figure is almost identical to the rate of 29.4 that was seen in 1977, thereby justifying the conclusion on the UCR website that the rate of forcible rapes in 2008 was "the lowest figure in the last 20 years" (FBI, 2008).

However, there are a number of limitations in the UCR methodology that must be understood to properly interpret these statistics. The primary concern is the extremely narrow definition used for sexual assault. For UCR purposes, data are only collected for the crime of *forcible rape*, which, until 2012, was defined as "carnal knowledge of a female, forcibly and against her will." Both completed and attempted acts are included in UCR data. However, this definition excludes sexual assaults that are facilitated with drugs or alcohol, that involve other forms of penetration, or that are committed against a victim who is male, unconscious, severely disabled, or below the age of 12. In fact, crimes meeting this definition are likely to represent only a minority of the sexual assaults reported to most law enforcement agencies.[1]

There are also a number of organizational factors that limit the quality of information captured in UCR statistics. For example, UCR participation is voluntary for law enforcement agencies, so many do not submit data at all. UCR data, therefore, are not generalizable to the entire United States because they are not representative of all jurisdictions in the country. An additional problem is that law enforcement officers and investigators usually do not receive training in the proper use of UCR definitions and methods. Although officers and investigators are not typically the individuals responsible for the data's tabulation and submission to the FBI, they are often the ones making important determinations about how to classify reports and how to record clearance decisions. Without consistent training and supervision, there is no assurance that they are using the same definitions and criteria for making UCR clearance decisions. Moreover, there is no requirement that clearance decisions be reviewed by a second person. Without such independent review, there is no way to evaluate the reliability of the information that is submitted. The individual or organizational unit with responsibility for entering the data will vary by agency.

As a result, it is not possible to estimate—based on UCR data—how many sexual assaults have actually been reported to law enforcement. Despite these limitations, UCR statistics are often cited in the media. As with the NCVS, this is likely due in part to the strengths of the data-collection effort, including its large scope and comparability across time (at least for those jurisdictions that consistently participate in the UCR program). It is also likely attributable to the credibility afforded by the FBI's prominent support of the initiative, which may understandably lead public officials, members of the media, and the public to conclude that the UCR is the authoritative source for information on crime reporting.

Have Arrests Kept Pace With Reports?

According to UCR data, only a fraction of the reports of forcible rape to law enforcement result in arrests. This point is illustrated in Figure 2, which depicts the rate of reports versus arrests for forcible rape, per 100,000 U.S. inhabitants. The same pattern is also seen for all types of violent crime that are tracked by the UCR program; these data are provided in Figure 3.

However, there appears to be a consistently widening gap between the numbers of reports versus arrests for forcible rape, which differs markedly from the pattern seen with

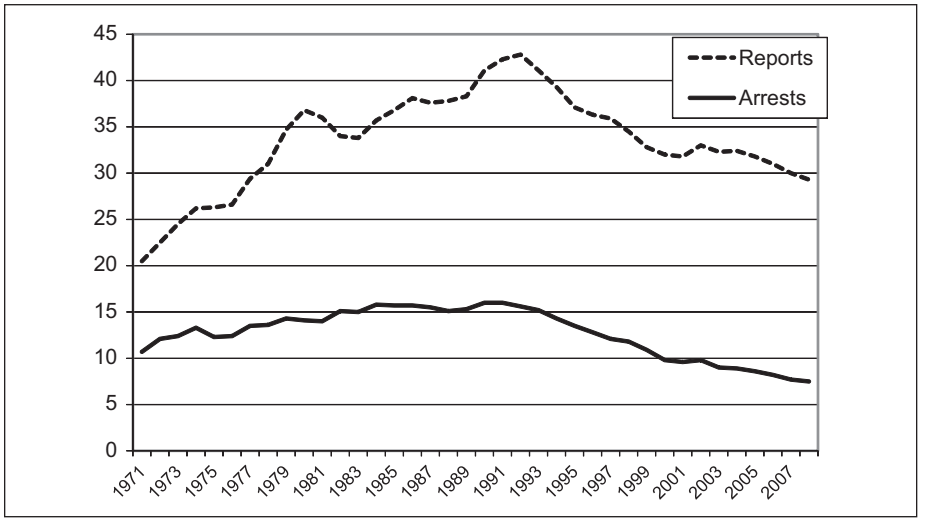

Figure 2. Rate of reports and arrests for forcible rape (per 100,000 U.S. inhabitants)
Source: Uniform Crime Report statistics are reported in the *Sourcebook of Criminal Justice Statistics Online* (BJS, 2008b).

other violent crimes included in this data-collection effort. We computed this ratio across time, simply by dividing the per capita rate of reports for forcible rape by the per capita rate of arrests for forcible rape using UCR data from 1971 to 2008 (the most recent year available at the time of writing). The pattern is visually depicted in Figure 4. As an illustration, the per capita rate for reports of forcible rape in 2008 was 29.3 per 100,000 U.S. inhabitants, and the rate for arrests was 7.5 per 100,000. This comparison of 7.5 and 29.3 translates to a ratio of 1 in 3.9 (or essentially 1 in 4) and computes to the exact percentage of 25.6%.

When this computation was made for forcible rape across time, the ratio of reports to arrests was in the 50% range in the 1970s and decreased steadily to 26% in 2008 (BJS, 2008b). In other words, the statistics suggest that about 1 in 4 forcible rapes reported to police in 2008 resulted in an arrest; the ratio was approximately 1 in 2 throughout the 1970s.[2]

Yet this pattern of consistent decline in arrest rates was not seen for other types of violent crime tracked by the UCR. In fact, the ratio of arrests to reports for all types of violent crime held remarkably steady in the time period between 1971 and 2008, with a figure of 44% in both of those years and little variation in between. The low was 36% in 1980, and the highs were 48% in 1974 and 47% in 1999. None dip as low as the 26% ratio seen for forcible rape in 2008, which continues to exhibit a consistent downward trend (BJS, 2008b).

Given the previously described problems with the UCR data collection, this pattern may simply be an artifact. It may be caused by differences across time in the sample of participating departments, the definitions and criteria used for making clearance decisions, and/or the procedures implemented by law enforcement agencies to collect data and submit it to the FBI. Clearly, caution is warranted any time conclusions are made on the basis of UCR data. However, there is no evidence for a consistent pattern of change in these

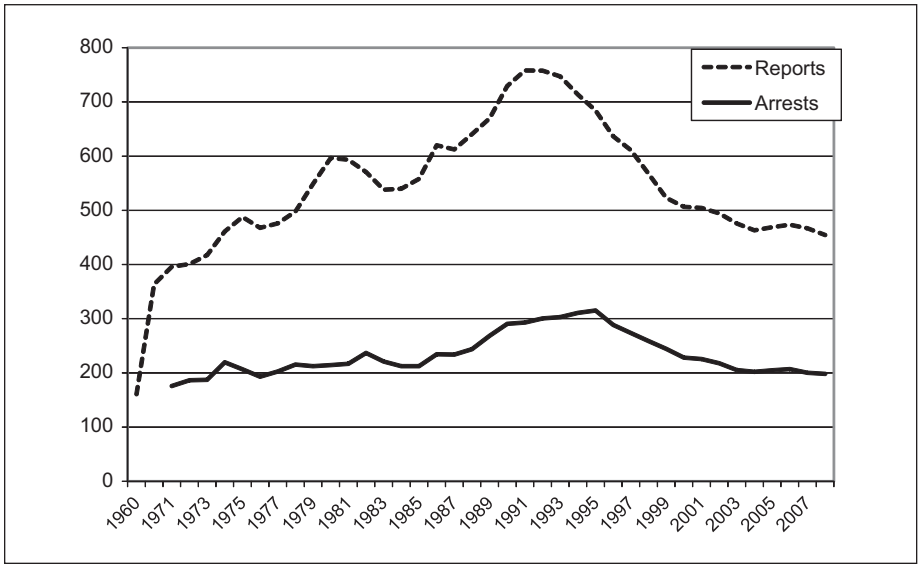

Figure 3. Rate of reports and arrests for all violent crimes (per 100,000 U.S. inhabitants)
Source: Uniform Crime Report statistics are reported in the *Sourcebook of Criminal Justice Statistics Online* (BJS, 2008b).

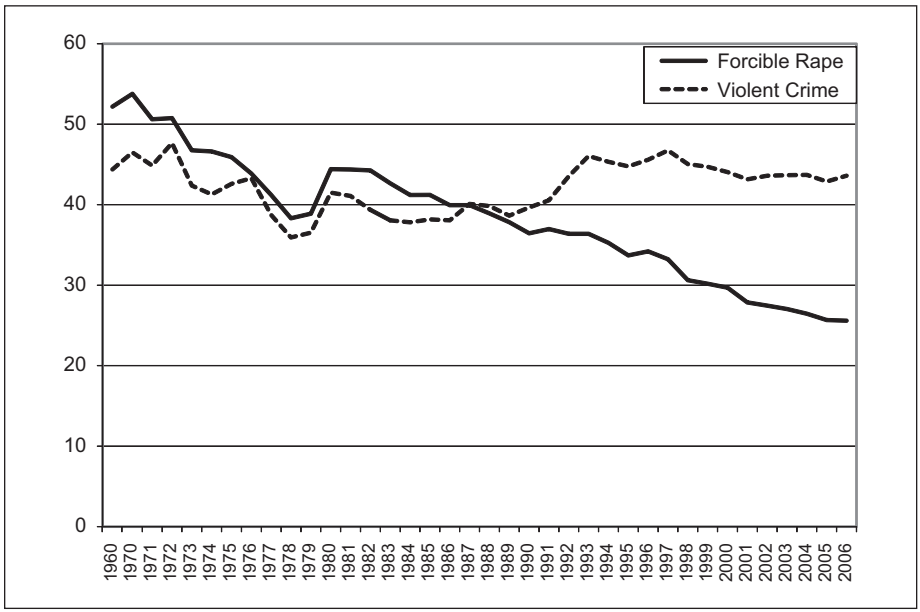

Figure 4. *Ratio of arrests to reports: Forcible rape and all violent crimes*
Source: Computations based on Uniform Crime Report statistics, as reported in the *Sourcebook of Criminal Justice Statistics Online* (BJS, 2008b).

methodological factors that would cause a continuous decline in the arrest rates for forcible rape. Therefore, it seems reasonable to speculate about the possible causes of such a pattern across time.

What Explains the Declining Arrest Rate?

There are a number of possible explanations for the declining arrest rates for forcible rape, some of which are based on the observation that fewer sexual assault reports now resemble the cultural stereotype of "real rape." The evidence suggests, for example, that a higher percentage of reported sexual assaults now involve nonstrangers, as compared with cases reported decades ago (Archambault & Lindsay, 2001; Baumer et al., 2003; Clay-Warner & Burt, 2005). Anecdotal evidence also suggests that reports made now are more likely to be for sexual assaults that are committed against a victim who is incapacitated, severely disabled, or otherwise unable to consent, as well as those from specific vulnerable populations.

At the same time, research documents that an arrest is more likely to be made in cases of sexual assault that resemble the most prominent cultural stereotype of this crime—namely, assaults that are committed by a stranger to the victim, involve a weapon, and result in physical injury of the victim (e.g., Bouffard, 2000; Jordan, 2002). This pattern is at least partly attributable to the widely held cultural perceptions of sexual assault. As documented with a substantial body of research, police officers and other members of society are frequently skeptical of reports that do not resemble the aforementioned stereotypic image (e.g., Campbell, 1995; Frazier & Haney, 1996; Kerstetter, 1990; Lonsway & Fitzgerald, 1994). This may be particularly true when the sexual assault involves factors that may cause others to see the victim as culpable, such as drug/alcohol use or involvement in other high-risk behaviors.

The research literature thus supports the conclusion that fewer sexual assault reports now resemble the stereotype of "real rape" and that these reports are less likely to result in an arrest. This conclusion is consistent with the statistical evidence demonstrating that the ratio of arrests to reports of forcible rape has declined consistently over the past few decades. Social scientific research has not generally explored the question of *why* this might be the case. However, anecdotal information provided by practitioners in the fields of law enforcement and victim advocacy may assist in the generation of hypotheses about the causes of this phenomenon.

For example, it is possible that a decreasing percentage of cases are being formally documented with a police report. Although this would not affect documented patterns of case attrition within the criminal justice system, victims would likely be surprised to learn that the information they provided was never formally recorded in a written report. This does not contribute to a climate that encourages victims of sexual assault to report the crime to law enforcement. It is also possible that fewer reports are now being coded as a crime and/or thoroughly investigated. This would mean that a greater number of sexual assaults—that were initially reported to law enforcement by the victim or someone else—would not show up in any written records. Alternatively, they might be coded with a noncriminal code (e.g., "call for service"). In either case, the report would not show up in any

formal statistics reported by the law enforcement agency. If there were systematic differences in the type of reports that moved forward, with more "difficult" cases disappearing from the process in these ways, it could certainly influence the arrest rate.

However, it is possible that a greater number of sexual assaults could be unfounded as a false or baseless report. This could be particularly concerning if the determination was made prematurely, without conducting a thorough, evidence-based investigation. Again, these reports would be excluded from any official statistics on forcible rape submitted by the law enforcement agency to the UCR program or reported in the media.

There is also the possibility that a decreasing percentage of cases are being formally referred to the prosecutor's office, with more cases presented informally to prosecutors by law enforcement investigators. Cases could thus be rejected on the basis of a single conversation, and these referrals may not be counted in any formal statistics because no arrest was made; this makes it very difficult to document or test the idea with empirical research.

Another possibility is that more cases are being cleared by exception because there is sufficient evidence to make an arrest, but the victim is unable to participate in the criminal justice process. Research suggests that the most common reason given by law enforcement for not pursuing sexual assault cases is because the victim is unwilling or unable to participate in the investigation (e.g., Frazier & Haney, 1996; Office of the City Auditor, 2007). Anecdotal information from law enforcement sources suggests that this situation may be more likely to arise when the victim and suspect know each other. Again, this hypothesis is impossible to test with published UCR data on clearance categories because they are not separated out by arrest versus exception. However, it suggests that cultural attitudes may not be the only explanation for the declining arrest rate. Rather, the decreasing likelihood of arrest may also partly reflect the wishes of victims in these cases. As nonstranger sexual assaults are more frequently reported to police, the result could be a decrease in arrest rates and an increase in other case outcomes such as exceptional clearance. However, this may not necessarily be a bad thing in a victim-centered, community response system.

Are Arrest Rates a Meaningful Indicator of Success?

It is not currently possible to determine whether the declining arrest rate (if it exists) is a good or bad thing. However, it is worth noting that the declining arrest rate may not necessarily be a bad thing if it indicates an increased willingness among law enforcement investigators to take the time to conduct a thorough, evidence-based investigation, rather than rushing to make an arrest and clear the case. For UCR purposes, a report can be cleared with an arrest if at least one suspect is arrested and the case is referred for prosecution. However, just because a case is referred for prosecution does not mean that charges are actually filed. If there is insufficient evidence—because the law enforcement investigation was inadequate—the prosecutor will not file charges and the suspect will simply be released. This can hardly be seen as a "success."

In fact, anecdotal reports from the field suggest that arrests are often made by law enforcement without conducting the type of thorough investigation that is needed to produce sufficient evidence for successful prosecution. This is because it is relatively easy for

officers to make an arrest based on a preliminary investigation of a sexual assault; the evidence only needs to support the legal standard of *probable cause*. Once this type of a field arrest is made, however, the prosecutor must typically appear in court and charge the defendant within 24 to 72 hr (depending on the jurisdiction). Yet it is almost impossible to conduct the kind of evidence-based investigation that is necessary to support successful prosecution within such a short time frame. Most sexual assault investigations will actually take weeks, if not months, to complete, depending on the course of the investigation and the laboratory work that is requested. By waiting to make an arrest of the suspect(s), law enforcement investigators can often gather the type of evidence that will meet the higher standard of proof that is needed for successful prosecution—*proof beyond a reasonable doubt*—rather than just establishing probable cause.

For this reason, arrest rates are not necessarily a good measure of success, although they are often used in this way. Rather, we argue that law enforcement performance should be evaluated based on the quality of the investigations that are conducted, regardless of outcome. Specific recommendations are offered in a later section on alternative measures of success.

How Many Reports Result in Conviction and Incarceration?

Returning to the research literature, many have asked what percentage of sexual assault reports eventually lead to a conviction or incarceration. One source of information is the Offender-Based Transaction Statistics, which were compiled by BJS from 1979 to 1990. In 1990, the data suggested that approximately 80% of those arrested for rape were prosecuted.[3] An estimated 50% of those arrested and prosecuted for rape were then convicted of a felony, and 8% were convicted of a misdemeanor. In contrast, 36% of those arrested and prosecuted for rape saw their case dismissed by the courts, 3% were acquitted, and 1% received a judgment other than a conviction or acquittal. This rate of felony conviction for rape was higher than for all violent offenses, which was 38% (Perez, 1994).[4]

These estimates generally converge with the State Court Processing Statistics, which were compiled biennially between 1988 and 2004 for felony defendants in the 75 largest counties in the United States. In 2004, the most recent data available at the time of writing suggested that a total of 54% of those charged with rape were convicted of a felony and 8% of a misdemeanor. This is quite similar to the figure for all violent crimes; the 2004 data suggested that 52% of all felony defendants charged with a violent offense were convicted of a felony and 9% of a misdemeanor (BJS, 2008a).[5]

Official data thus suggest that approximately half of those arrested and prosecuted for rape will be convicted on a felony charge (although not necessarily rape). They also suggest that once an individual is convicted of rape, incarceration is almost inevitable. The Offender-Based Transaction Statistics from 1990 indicated that 95% of those convicted of rape were incarcerated (76% in prison and 19% in jail). An identical figure of 95% was seen in the 2004 State Court Processing Statistics for the percentage of defendants convicted of rape who received a sentence of incarceration (65% in prison and 30% in jail). When this is compared with the overall category of violent offenses, it appears that rape

convictions were more likely to lead to incarceration, and incarceration was more likely to be in prison and less likely to be in jail. Specifically, 83% of defendants convicted of a violent offense were sentenced to incarceration (47% prison and 36% jail; BJS, 2008a).

Yet the key to understanding the statistics lies in the *denominator* of the equations used to compute them. The statistics cited here were computed based on the number of felony defendants who were arrested *and prosecuted* for rape. The statistics may therefore be misleading because so many reports are screened out before an arrest is made or charges filed.

Critique of Prosecution Statistics

Common sense suggests that studies of case attrition within the criminal justice system must begin with a report and end with a conviction or other formal disposition. Conviction rates are meaningless if they are computed based on a starting point where most of the attrition has already taken place. In fact, this method of calculating conviction rates creates a perverse incentive for law enforcement agencies to filter out all but the "strongest" cases—so prosecutors can achieve the high conviction rates that serve as their primary measure of performance. It also fuels practices such as the informal referrals described earlier, with prosecutors rejecting cases presented verbally by investigators without necessarily having to account for these decisions in any formal statistics. A more realistic measure of conviction rates would include in the denominator of the equation *all reports of sexual assaults received by law enforcement*—including those that did not result in an arrest or referral for prosecution (e.g., those that were unfounded or exceptionally cleared). This information is currently only available in social scientific research or from individual agencies, and it suggests (contrary to the "official" data) that only a very small percentage of sexual assault reports eventually result in a conviction.

Other concerns stem from the type of cases that are included in the federal data. The 1990 report for the Offender-Based Transaction Statistics states that "the OBTS standards use the FBI's National Crime Information Center (NCIC) offense codes" (Perez, 1994, p. 9). As the NCIC codes cover a broad range of crimes, this strategy could potentially avoid problems such as the extremely narrow definition of forcible rape that is used for UCR purposes. However, at least the text of the report does not clarify which types of sexual assault are included versus excluded using the NCIC codes. The definition used for the State Court Processing Statistics is more clearly stated. The definition of rape reportedly included "forcible intercourse, sodomy, or penetration with a foreign object" (Reaves & Smith, 1995, p. 38). However, it did not include "statutory rape or nonforcible acts with a minor or someone unable to give legal consent, nonviolent sexual offenses, or commercialized sex offenses" (Reaves & Smith, 1995, p. 38). Thus, the data set excluded some sexual assault cases that are relatively more likely to result in conviction (e.g., statutory rape and other sexual offenses involving minor victims). However, it also excluded some types of sexual assault that are commonly reported to law enforcement yet rarely result in successful prosecution (e.g., sexual assaults committed against an incapacitated victim or someone who is unable to consent due to alcohol/drug use or severe disability). To that extent, the overall conviction rates obscure the high rates of attrition that are seen for certain types of sexual assault (e.g., those where a consent defense is available).

These issues are perhaps illustrated best with an excellent report that was published in 2007, describing the results of a study of sexual assaults reported to Alaska State Troopers in 2003-2004 (Postle, Rosay, Wood, & TePas, 2007). Similar to the federal data sources described above, these authors reported that 80% of the cases "accepted" by prosecutors resulted in a conviction. Unlike the federal sources of information, however, the authors also calculated the conviction rate based on the total number of reports received, which was only 22%. Clearly, this is a more realistic measure of case attrition because it includes those cases that resulted in an arrest or referral for prosecution, as well as those that were closed using other means (e.g., declined, exceptionally cleared, closed by investigation, or unfounded). Yet this rate would likely decrease even further if it were computed separately for victims who were children versus adolescents or adults. Like other studies of attrition, this report did not separate out prosecution rates for these two groups, which likely had very different case outcomes. The findings also may not be generalizable to the rest of the United States, given the unique characteristics of the state.

Estimates From Social Science Research

Limited prosecution statistics are available from disparate sources within federal and state governments, but the information must be supplemented with research conducted independently by social scientists. As reviewed by Campbell (2005), data collected from a wide range of sources "have generated replicated, triangulated findings" (p. 56) suggesting that 7% to 27% of the sexual assaults that are initially reported to law enforcement eventually result in charges being filed, and of these reports, only 3% to 26% yield some type of conviction (also see Koss, 2006). The 22% estimate from the Alaska study is consistent with this conclusion, as it falls within the 3%-to-26% range. To that extent, data from such research provides the missing context that is needed to understand state prosecution statistics compiled by the federal government. Although federal statistics estimate that more than half of those arrested or charged with rape will be convicted, social scientific research clarifies the fact that attrition has already claimed at least half—and probably considerably more than half—of the sexual assaults that were originally reported to law enforcement.

The Full Picture of Attrition

To provide the full picture of attrition for sexual assault cases (i.e., those that "fall out" of the criminal justice system at various points before or after charges are filed), it is necessary to put together the various sources of information that were reviewed so far. (As the individual sources were cited previously in the article, they are not repeated here.) First, there is the social scientific research suggesting that about 5% to 20% of all rapes are reported to law enforcement, 7% to 27% of these reports are prosecuted, and 3% to 26% yield a conviction. Then, there is the most recent federal data from the 2004 State Court Processing Statistics, which suggest that 62% of all defendants who are arrested and prosecuted for rape will be convicted, with 54% of these convictions for a felony and 8% for

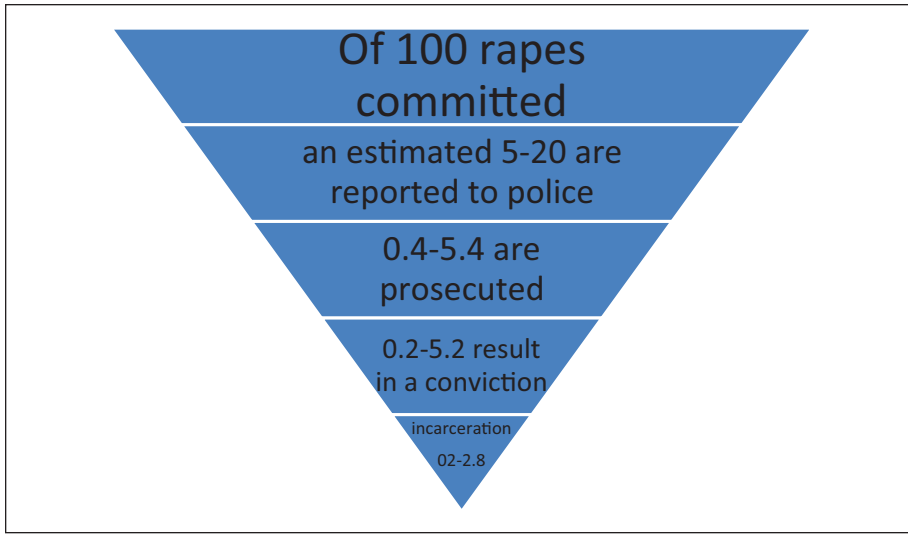

Figure 5. *Visual schematic for attrition of rape cases in the criminal justice system*
Note: This visual schematic is based on research summarized in the article, estimating that 5% to 20% of all forcible rapes are reported to law enforcement; of these reports, 7% to 27% are prosecuted and 3% to 26% yield a conviction. The 2004 State Court Processing Statistics then suggest that 62% of all defendants who are arrested and prosecuted for rape will be convicted; of these, 95% will be sentenced with incarceration (BJS, 2008a). The National Violence Against Women Survey (Tjaden & Thoennes, 2006) revealed that 17.6% of female and 3% of male respondents were raped at some time in their lives. Based on U.S. Census data, this translates to 17.7 million women and 2.8 million American men (Tjaden & Thoennes, 2006, p. 7).

a misdemeanor. Of these convictions, the data suggest that 95% will ultimately lead to a sentence of incarceration, with 65% in prison and 30% in jail.

To translate this to an illustrative computation, we have combined these estimates in a visual representation in Figure 5, using the upper bound of the range of estimates for each stage of attrition. The starting point is the commission of a forcible rape, and the funnel of attrition is demonstrated through the stages of reporting, conviction, and a sentence of incarceration. In other words, of 100 forcible rapes that are committed, approximately 5 to 20 will be reported, 0.4 to 5.4 will be prosecuted, and 0.2 to 5.2 will result in a conviction. Only 0.2 to 2.9 will yield a felony conviction. Then an estimated 0.2 to 2.8 will result in incarceration of the perpetrator, with 0.1 to 1.9 in prison and 0.1 to 0.9 in jail.

Of course, it is important to keep in mind that the definition of rape differs for many of these data sources, and most focus exclusively on forcible rape (excluding other types of sexual assault). However, even with the considerable margin of error that is inevitable when estimating such a computation based on different data sources, it is clear that only a very small minority of sexual assault cases end in a prosecution, conviction, and a sentence of incarceration.

Have Prosecution Rates Increased?

In 1993, the Senate Judiciary Committee published a report reviewing criminal justice outcomes for crimes of violence against women. In that report, they conducted a very similar computation to the one we offer here, based on the data sources that existed at the time. As a result of this analysis, they concluded that only 1.9% of all sexual assaults ultimately resulted in a sentence of imprisonment for the perpetrator (Senate Judiciary Committee, 1993). There were a number of important limitations of the study, many of which similarly influence the current enterprise. For example, the study used data from a number of different sources (as we do here), which means there are concerns stemming from differences in the definitions used for sexual assault, the criteria for including versus excluding cases in the sample, the methodology for recording and analyzing data, and any protections for data accuracy and reliability. In other words, interpreting the findings requires quite a few assumptions—and a healthy dose of faith.

The title of that report was "The Response to Rape: Detours on the Road to Equal Justice." Sadly, there is every reason to believe that the same title is equally relevant today. Federal data sources suggest that there is little or no change in the rate of prosecution, conviction, and incarceration for rape in the past two decades. For example, there are the most recent State Court Processing Statistics from 2004 suggesting that 54% of those charged with rape were convicted of a felony (BJS, 2008a). When this is compared with data from 12 years earlier, the figure for rape was identical (Reaves & Smith, 1995). Similarly, social scientific research yields no evidence that the legislative reforms have significantly increased the rates of reporting, charging, prosecution, and conviction for sexual assault (e.g., Horney & Spohn, 1990; Matoesian, 1993). Moreover, when Koss conducted the same type of computation in 2006 that the Senate Judiciary Committee did in 1993, using data from the National Violence Against Women Survey (Tjaden & Thoennes, 2000), the results suggested that only 0.35% of the rapes committed against female respondents were reported, prosecuted, and resulted in a sentence of incarceration. The decrease from 1.9% to 0.35% may not be sufficient to argue that prosecution rates have declined over the past 30 years, but it certainly challenges any suggestion that they have increased.

In fact, research suggests, "In virtually all countries where major studies have been published, the number of reported rape offences has grown over the last two decades, yet the number of prosecutions has failed to increase proportionately, resulting in a falling conviction rate" (Lovett & Kelly, 2009, p. 5). This pattern has not generally been reported in the American media, but it has been reported in other countries. In the United Kingdom, for example, the media reported on research findings by the British Home Office, indicating that only "5.7 percent of rapes officially recorded by police in England and Wales end in a conviction" (Jordan, 2008, p. A01). In Scotland, the rate was 6%, and these figures were described as the lowest conviction rates for rape in Europe ("Rape Ruling," 2004). Reporters and researchers have thus decried the fact that these high rates of attrition appear to be increasing, in a pattern that is described as a widening "justice gap." As Temkin and Krahé (2008) concluded, "To say that convictions have not kept pace with the number of recorded rapes would appear to be a massive understatement" (p. 20).

Reasons for the Pattern of Attrition

Many experts have concluded that the primary reason the legislative reforms have failed to produce changes in criminal justice outcomes is because the laws have changed but attitudes have not (e.g., Seidman & Vickers, 2005; Temkin & Krahé, 2008). However, other factors also come into play. For example, we have already described evidence suggesting that more sexual assault cases being reported to law enforcement diverge from the cultural stereotype of a "real rape." These changes could be the positive result of legislative and cultural reform. Yet research demonstrates that such cases of sexual assault are less likely to result in a conviction (e.g., Bouffard, 2000; Bryden & Lengnick, 1997; Campbell, Wasco, Ahrens, Sefl, & Barnes, 2001; Frazier et al., 1994; Kingsnorth, MacIntosh, & Wentworth, 1999; Spears & Spohn, 1997; Spohn, Beichner, Davis-Frenzel, & Holleran, 2002).

As Koss (2000) notes, this does not necessarily mean that prosecutors personally believe in the stereotypic beliefs and attitudes surrounding sexual assault. "Although prosecutors may personally reject the appropriateness of these grounds, they feel themselves positioned downstream of jurors, so they nevertheless incorporate these factors into decision making" (p. 1334). The same type of "downstream orientation" also likely influences police officers and even victims, leading to the patterns of reporting and attrition reviewed here.

Additional factors were described by a sample of British judges and barristers who were quoted by Temkin and Krahé (2008). In their interviews, they described a number of significant problems from their perspective, including poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors. This last factor is particularly enlightening; at least one judge suggested that jurors were simply unable to accept that the events they heard described in witness testimony could actually take place, especially between people who know each other. Others suggested that jurors have difficulty convicting because the penalties for sexual assault are too high. The authors note that this suggestion is supported with research indicating that mock jurors are more likely to convict in a sexual assault case if the defendant will be given a shorter sentence (Temkin & Krahé, 2008).

Yet despite their recognition of these factors, most of the judges and barristers were reportedly unwilling to accept the notion of a justice gap for sexual assault cases. At least one dismissed the idea as "nonsense" (p. 139). Instead, many blamed the high rate of attrition on a lowering of the standards for prosecution and/or the presence of women on the jury. The authors concluded that this attitude poses a significant barrier to improvement: "If the justice gap is to be reduced, it does require an acceptance among all key players of its reality" (Temkin & Krahé, 2008, p. 141).

Future Research Directions

Clearly, research is needed to document the full picture of attrition for sexual assault cases, with measures of reporting, charging, and conviction that are realistic. This may be one of the most important priorities for research in the field. However, work is also needed to

better understand why such a high rate of attrition persists and how we can reduce it. As a wider range of sexual assault crimes are reported than in the past, it is reasonable to expect that attrition might increase for a period of time. Although efforts during the "first wave" of rape reform were successful in changing laws (e.g., enacting rape shield laws and eliminating marital rape exceptions, evidentiary corroboration requirements, and cautionary instructions), a primary challenge for the "second wave" of reform is to develop and evaluate best practices for successfully investigating and prosecuting these challenging cases (Seidman & Vickers, 2005).

Alternative Measures of Success

As previously noted, arrest rates are meaningless if they are made without conducting the type of investigation that is likely to support successful prosecution. It is therefore important for future research to incorporate more meaningful indicators of success, including the total number of reported sexual assaults and the percentage of reports that are referred for prosecution and/or result in a charge or conviction. Yet case outcomes are not the only measure of success within the criminal justice system. Another indicator may be found with evidence that more police officers are conducting thorough, evidence-based investigations, regardless of the potential case outcome. This could be evaluated by determining whether officers are taking specific investigative steps, such as interviewing the victim, suspect, and witnesses; collecting evidence from the victim's/suspect's body/clothing; and collecting evidence from the crime scene(s). Another indicator of success could be establishing methods of accountability within law enforcement agencies for every sexual assault incident that is reported to them. This accountability could be assessed by determining whether all sexual assault reports are documented with a written report and investigated to the fullest extent possible.

Success in this context also means that officers are not unfounding cases based on faulty methods or reasoning, such as relying solely on the victim's initial statement or a cursory preliminary investigation. In fact, any evaluation of success should include some effort to determine whether sexual assault cases are being properly cleared using the UCR criteria. This is important because the clearance categories of unfounded and exceptionally cleared are too often used as a "dumping ground" for sexual assault cases that are viewed as dubious or difficult to investigate.

According to UCR guidelines, a crime report can be unfounded if it is determined on the basis of investigative findings to be either false or baseless. A report can only be determined to be *false* on the basis of evidence that the crime was not committed or attempted. Thus, a crime report cannot be unfounded if no investigation was conducted or if the investigation failed to prove that the crime occurred; this would be considered inconclusive or an unsubstantiated investigation (which is not a UCR category).

However, crime reports can be determined to be *baseless* if they do not meet the elements of the offense or if they were improperly coded as a sexual assault in the first place. For example, individuals sometimes report sexual acts to law enforcement that are unwanted but do not meet the elements of a sexual assault offense. One illustration would be an adult

who reports to police that they felt pressured into sexual contact, but the coercion did not meet the criteria for a forcible sexual assault. If recorded in a formal crime report, this case should be cleared as unfounded because it is baseless. If the report was not recorded in a crime report, the agency would most likely file the report as informational only.

For evaluation purposes, case files for unfounded reports could thus be reviewed to determine whether the decision was made prematurely, or if it was based on evidence from a meaningful investigation. Another measure of success could be achieved by tracking unfounded cases to determine whether they were cleared this way because they were false *versus* baseless.

Similarly, sexual assault cases that are *exceptionally cleared* could be reviewed to determine whether they meet the proper UCR criteria. This requires that the case have sufficient evidence to support an arrest and referral for prosecution, but an arrest is precluded by some factor outside law enforcement control (e.g., the victim declines prosecution). All too often, cases are exceptionally cleared because victims are reluctant to participate during the preliminary investigation and/or cannot be located for any follow-up investigation. However, this is not a sufficient basis for the case to be exceptionally cleared unless there is evidence that would otherwise be sufficient to support an arrest and referral for prosecution. These cases cannot properly be exceptionally cleared; they should remain open but inactivated. By reviewing case files, it would be possible to determine whether these UCR clearance decisions were made appropriately.

Specific Investigative Steps

Another future research objective could be to explore the role that specific investigative steps play in predicting case outcomes. For example, some of the decisions made by law enforcement explicitly determine case outcomes (e.g., the decision to unfound the case). However, other decisions are made as a result of process. For instance, a deliberate decision is made in many cases to *not* conduct any follow-up interview with the victim, *not* interview the suspect or any witnesses, and *not* seek to collect any other kind of evidence beyond the preliminary victim interview. In these cases, it is virtually impossible for the case to move forward for successful prosecution, so the range of outcomes is narrowed to unfounding, exceptional clearance, or inactivation. This decision would likely be justified based on the lack of evidence to support prosecution. However, this justification may mask the actual reasons for not investigating the case. Any future research evaluating the impact of various factors on case outcomes should therefore take into account the moderating influence of process variables, such as the specific investigative steps taken by law enforcement.

Research on Juror Decision Making

No review of the criminal justice response to sexual assault should conclude without mentioning the need for better research on juror decision making. The few studies on this subject that do exist are mostly outdated and often focus on rape trauma syndrome.

However, many experts caution against using this terminology and framework and instead recommend providing more general expert testimony that simply describes common behaviors and reactions of sexual assault victims (Boeschen, Sales, & Koss, 1998; Stefan, 1994; Torrey, 1995).

A notable exception is the recent work of Ellison and Munro (2009), which involved presenting a series of mini-trial scenarios to mock jurors and varied complainant demeanor, time of report, and physical injury. The researchers also varied whether mock jurors received educational guidance on the topic of sexual assault victimization; they found that educational guidance appeared to increase mock jurors' understanding of the dynamics of victim demeanor and delayed reporting. However, it appeared to have little impact on beliefs regarding victim injury and physical resistance. The authors concluded that such educational guidance in rape trials "represents a pragmatic, defensible and efficient means of redressing at least some of the unfounded assumptions and attitudinal biases that prevent too many victims of sexual assault from accessing justice" (Ellison & Munro, 2009, p. 379).

As so little is known about how to influence juror decision making, investigators and prosecutors can only speculate about the impact of various types of evidence, testimony, and arguments on the likelihood of conviction. Fortunately, some particularly promising directions for future research have been outlined by Temkin and Krahé (2008). These authors reviewed social scientific research indicating that people are more likely to attribute responsibility to someone for an event (such as a rape) when they (a) know more about that person as compared with the other party; (b) generate alternative courses of action that the person could have taken; and (c) know the outcome of the event in advance. To illustrate, Rempala and Bernieri (2005) conducted a study in which irrelevant biographical information (e.g., college major or city of residence) was provided to research participants about the complainant versus the defendant in a rape case.

> When biographical information was provided about the complainant, but not the defendant, just over half the participants found the alleged defendant guilty. In contrast, when biographical information was provided about the defendant, but not the complainant, 90% of participants found the defendant guilty. (p. 49)

The implications for sexual assault trials are interesting, suggesting that the victim may be the more obvious target for culpability at least in part when more detailed information is provided about the victim rather than the suspect. It is therefore possible that investigators could be taught to provide information with the same level of detail regarding the *suspect* in a sexual assault case. This would include information about how the suspect targeted the victim on the basis of vulnerability characteristics, whether the suspect provided the victim with drugs and/or alcohol, and how the suspect used specific techniques to "groom" the victim. The need for such information may be particularly critical because the suspect is not required to testify at trial—and typically will not—whereas sexual assault trials virtually always involve detailed testimony by the victim. This provocative suggestion can be explored in future research.

Some might argue that research on juror decision making should not necessarily be a high priority for future research because such a small percentage of sexual assault cases end up going to trial. However, we believe that the existence of the downstream orientation within the criminal justice system undermines this argument. If prosecutors do not believe they can persuade jurors to convict in a sexual assault case, they may charge and try fewer cases. Then as law enforcement investigators see that fewer cases are being charged and tried, they may forward fewer cases to the prosecutor's office. Finally, as fewer cases proceed through the stages of investigation and prosecution, victims may be less likely to report their sexual assault to law enforcement. Therefore, any change that is targeted at the final point in the attrition process has the potential to push for reforms all the way "upstream," even to the point of victim reporting.

Clearly, tension exists between the pressure to win cases and the need to hold offenders accountable. Research and reform efforts may therefore be needed to reformulate the perceived "convictability standard," so prosecutors file charges in a broader range of sexual assault cases. Although the short-term result of such an effort may be a decrease in convictions, it is possible that the longer term legacy would be a reduction in the justice gap for sexual assault cases. "If prosecutors dealt with actual juries to prosecute more of these cases, they might learn how to win the cases, hence expanding what is perceived as 'convictable'" (Frohmann, 1997, p. 553).

Restorative Justice

Another direction for future research within the criminal justice system is to implement and evaluate programs for restorative justice. Although such programs are often viewed as controversial, we believe questions about their efficacy, fairness, and impact on victims are ultimately empirical and deserve to be tested with rigorous social scientific research. One example is the research conducted by Koss (2006), which demonstrated positive changes in increased offender responsibility and heightened empathy for the victim using qualitative methods. This evaluation effort is ongoing, and future work will be used to determine whether there is any positive impact in victim outcomes such as increased satisfaction, reduced distress, and increased perceptions of fairness and control of the offender sanctions.

Success Outside the Criminal Justice System

Although most of the attention so far has focused on success in terms of criminal justice outcomes, future evaluation research could also incorporate alternative measures of success *outside* the criminal justice system. For many sexual assault cases, successful prosecution is not possible, so it is important to widen our definition of what constitutes success. At least equally important is the ability of a community to determine in a coordinated way which services are most needed by victims and to assist victims in accessing those services.

For example, many adults and adolescents fall through the cracks of existing community services. This includes individuals who have been victimized repeatedly, are homeless, or

have engaged in survival sex, promiscuous sex, drug use, or other criminal activity. Therefore, one example of a "best practice" is for communities to establish multidisciplinary review committees to discuss how best to provide outreach and assistance for these individuals. Another form of assistance that is often overlooked but nonetheless critically important for victims is increasing access to civil attorneys who can help address problems with housing, employment, education, and immigration status (Seidman & Vickers, 2005). Evaluation of success could thus include the assessment of these alternative forms of collaboration, outreach, and victim assistance.

Conclusion

In the present article, we offer several ideas for future research. Yet we want to note that such research will only be fruitful if it translates into meaningful reform efforts. Some of the concrete changes that are needed include eliminating the emphasis on arrest rates, evaluating case outcomes in terms of prosecution and conviction, emphasizing the quality of investigations and prosecutions regardless of case outcomes, and exploring alternative measures of success outside the criminal justice system. We remain optimistic that we can make the "good news" of increased reporting rates and decreased attrition for sexual assault cases a reality in this country.

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Notes

1. To illustrate, EVAW International led a data-collection effort in eight diverse U.S. communities as part of the "Making a Difference (MAD) Project." In these eight communities, a total of 12 law enforcement agencies submitted data on 2,059 sexual assault cases. When cases with missing data were excluded, a total of 95% involved female victims, 66% were perpetrated using "force, threat or fear," and 65% involved penile–vaginal penetration. When these three variables were combined, just less than half (49%) of all cases involved all three characteristics (Lonsway & Archambault, 2010). As the MAD project excluded cases involving child victims, however, the real percentage is likely to be far lower, suggesting that forcible rapes as defined by the UCR program represent a minority of sex crime cases.

2. Social scientific research provides a range of estimates that are generally consistent with these UCR statistics. Specifically, research estimates that 18% to 50% of the sexual assaults reported to law enforcement will result in an arrest (Frazier et al., 1994; Koss, Bachar, Hopkins, & Carlson, 2004; Spohn & Horney, 1992). However, the evidence is not sufficient to make any claims regarding trends in arrest rates across time.
3. Although the report does not define what is meant by the term *prosecuted*, it likely refers to charges being filed.
4. For more information on the Offender-Based Transaction Statistics, please see the website for the National Archive of Criminal Justice Data, maintained by the University of Michigan at http://www.icpsr.umich.edu/icpsrweb/NACJD/
5. For more information on the State Court Processing Statistics, please see the website for the National Archive of Criminal Justice Data, maintained by the University of Michigan, at http://www.icpsr.umich.edu/icpsrweb/NACJD/

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