

# SEX OFFENDER LEGISLATION AND THE ANTITHERAPEUTIC EFFECTS ON VICTIMS

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## I. INTRODUCTION

Historically, sex offenses have generated more attention and revulsion by the public and the legal system than other types of offenses.<sup>1</sup> The assumption has been that sex offenders are distinguishable from other criminals by psychopathy<sup>2</sup> or mental disorder<sup>3</sup> which, unless treated, increases their dangerousness.<sup>4</sup> The perception of sex

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1. See, e.g., John Q. La Fond & Bruce J. Winick, *Sex Offenders and the Law*, 4 PSYCHOL. PUB. POL'Y & L. 3 (1998); Leonore M.J. Simon, *Do Criminal Offenders Specialize in Crime Types?*, 6 APPLIED & PREVENTIVE PSYCHOL. 35, 36 (1997) [hereinafter Simon, *Offenders Specialize*]; Leonore M.J. Simon, *The Myth of Sex Offender Specialization: An Empirical Analysis*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 387–88, 400 (1997) [hereinafter Simon, *The Myth*]; Alan H. Swanson, *Sexual Psychopath Statutes*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 215 (1960); Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889 (1995).

2. Psychopathy has been referred to as sociopathy, dyssocial personality disorder. The current acceptable psychiatric/psychological term is antisocial personality disorder. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645, 645–46 (4th ed. 1994) [hereinafter DSM-IV]. See also Leonore M.J. Simon, *Does Criminal Offender Treatment Work?*, 7 APPLIED & PREVENTIVE PSYCHOL. 137, 141–43 (1998) (discussing what is known about the causes and treatment of antisocial personality disorder).

3. See, e.g., Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 437–39 (1995); Leonore M.J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and*

offenders, as distinct from other offenders, also has assumed that sex offenders specialize in sex crimes.<sup>5</sup> Belief in specialization of sex criminals extends to specialization in victims. For instance, child molesters and rapists are believed to specialize in child molestation and rape, respectively.<sup>6</sup> As with other crimes,<sup>7</sup> sex offenders are assumed to target strangers.<sup>8</sup> The fear of the stranger sex offender is partly a function of the sensational media attention given to stranger abduction/molestations and the lack of publicity given to molestations perpetrated by family members or friends.<sup>9</sup>

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*Dangerousness in Sex Offenders*, 18 BEHAV. SCI. & L. (forthcoming, 2000).

4. See Gordon C. Nagayama Hall & Richard Hirschman, *Conceptualizing Sexual Aggression: Progress and Future Needs*, in SEXUAL AGGRESSION: ISSUES IN ETIOLOGY, ASSESSMENT, AND TREATMENT 1, 1-3 (Gordon C. Nagayama Hall et al. eds., 1993); Patricia M. Harris, *Prison-Based Sex Offender Treatment Programs in the Post Sexual Psychopath Era*, 23 J. PSYCHIATRY & L. 555, 571 (1995); Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 159, 199 (1996) (noting that although mental disorder is the justification given for civil commitment of sex offenders, therapeutic concerns are trumped by the hope of preventing future sex crimes); Janice K. Marques et al., *Findings and Recommendations from California's Experimental Treatment Program*, in SEXUAL AGGRESSION: ISSUES IN ETIOLOGY, ASSESSMENT, AND TREATMENT, *supra*, at 197, 207 (arguing that when the goal of sex offender treatment is management or control rather than complete cure, evidence of the treatment's effectiveness in reducing recidivism is much more promising); William L. Marshall et al., *Issues in Sexual Assault*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 3, 6-7 (William L. Marshall et al. eds., 1993); W.L. Marshall, *A Revised Approach to the Treatment of Men Who Sexually Assault Adult Females*, in SEXUAL AGGRESSION: ISSUES IN ETIOLOGY, ASSESSMENT, AND TREATMENT, *supra*, at 143, 143 (finding a low rate of recidivism for treated sex offenders); Philip Witt et al., *Sex Offender Risk Assessment and the Law*, 24 J. PSYCHIATRY & L. 343, 353 (1996) (noting that a problem in assessing dangerousness of sex offenders is the fact that sex offenses are low base-rate events, and that relapse rates for sex offenders are lower than those of most other criminal offenders).

5. See, e.g., Simon, *Offenders Specialize*, *supra* note 1, at 41-43; Simon, *The Myth*, *supra* note 1, at 387-92. The assumption of specialization has reinforced the perception of sex offenders as dangerous because of the belief that sex offenders are highly likely to reoffend with another sex crime. See Simon, *supra* note 3.

6. See Simon, *Offenders Specialize*, *supra* note 1, at 42-43; Simon, *The Myth*, *supra* note 1, at 391.

7. See, e.g., Leonore M.J. Simon, *The Effect of the Victim-Offender Relationship on the Sentence Length of Violent Offenders*, 19 J. CRIME & JUST. 129, 130 (1996) [hereinafter Simon, *Sentence Length*]; Leonore M.J. Simon, *The Legal Treatment of the Victim-Offender Relationship in Crimes of Violence*, 11 J. INTERPERSONAL VIOLENCE 94, 95 (1996) [hereinafter Simon, *Legal Treatment*].

8. See Simon, *Offenders Specialize*, *supra* note 1, at 42-43; Simon, *The Myth*, *supra* note 1, at 392; Simon, *supra* note 3.

9. One example of this problem occurred in the nationally publicized case of 12-year-old Polly Klaas, who was kidnapped by a stranger on October 1, 1993 from her home in California and subsequently killed. See Jean Deitz Sexton, *Change of Venue in Klass Slaying Trial Approved*, L.A. TIMES, Sept. 19, 1995, at 3. If one reads a local newspaper anywhere, it is uncommon to read about incest or intrafamily sex offenses. Instead, the media publicizes extrafamilial sex offenses.

The fear of the stranger<sup>10</sup> fuels the majority of criminal legislation, including sex offender laws. Legislation targeting offenders who commit sex crimes typically is in response to widely publicized heinous sex crimes committed by repeat stranger offenders with extensive and varied criminal records and victims.<sup>11</sup> Washington, for example, enacted its community notification legislation after a seven-year-old Tacoma boy was lured into a wooded area by a recently released stranger sex offender who orally and anally raped the boy and then cut off his penis.<sup>12</sup> New Jersey enacted similar legislation after seven-year-old Megan Kanka was raped and murdered by a twice-convicted sex offender who, unbeknownst to Megan's parents, had moved in across the street.<sup>13</sup> Although such community notification statutes allow parents to advise children to avoid certain individuals and may facilitate community monitoring of released sex offenders, these laws could "promote a false sense of security, lulling parents and children into the big-bad-man mindset when many molesters are in fact trusted authority figures or family members."<sup>14</sup> Such statutes and the general harsher legal treatment of extrafamilial sex offenders by the courts and legislatures are part of a national trend to try to protect women and children from strangers who would prey upon them. In the cases of the least publicized sex criminals, the incest offenders, it

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10. The fear of crime is basically the fear of strangers. People fear the unknown person who commits an unpredictable and violent attack on a vulnerable and innocent victim going about routine activities. The perception that the attacker is indiscriminate in his selection of the victim and that the victim can do little to avoid attack or protect him or herself also elicits fear of the stranger. See Marc Riedel, *Stranger Violence: Perspectives, Issues, and Problems*, 78 J. CRIM. L. & CRIMINOLOGY 223 (1987).

11. See Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. (forthcoming 1999); La Fond & Winick, *supra* note 1, at 4.

12. See David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525 (1992). See also Barry Siegel, *Locking Up 'Sexual Predators'*, L.A. TIMES, May 10, 1990, at A1 (noting that the offender had a 24-year record of assaults on young people, including kidnaping and assault of two teenage girls, and involvement in the murder of a 15-year old schoolmate).

One recent legal approach for responding to sex offenders is registration and community notification laws. In 1990, Washington became the first state to enact a community notification law. WASH. REV. CODE § 4.24.5501 (1999). This statute permitted local law enforcement agencies to notify the community when sex offenders considered at high risk of reoffending moved in.

13. See *Man Charged in 7-Year-Old Neighbor's Killing*, N.Y. TIMES, Aug. 1, 1994, at B5. Another stranger case that received wide media coverage is the Polly Klaas abduction and murder in California. See *Politicians React with Calls for Stiffer Sentences*, S.F. CHRON., Dec. 7, 1993, at A4.

14. Anna Quindlen, *So What If Law Isn't Fair to Sex Offenders?; Children Come First*, CHI. TRIB., Aug. 8, 1994, at 13. For instance, a recent article in the Portland, Oregon newspaper describes a case of the implementation of the Oregon community notification statute in which parole officers notified community members of a high-risk sex offender, recently released from prison, who was preparing to move into the neighborhood. The offender had just been released from prison after serving a sentence for molesting two playmates of his young daughter. See Laura Trujillo, *Outside Sex Offender's Home, Air Swirls in Worry, Fear, Doubt*, OREGONIAN, Sept. 27, 1998, at A1. Indeed, studies indicate that more than 90% of child molestations are committed by family members and individuals known to the child victims. See *infra* text accompanying notes 21-30.

is not clear how community notification can protect children from people they trust or with whom they have a relationship.

The fear of the stranger sex criminal also may affect judicial decisions interpreting the constitutionality of such legislation. Although prior research of the legal processing of general criminal cases by the legal system suggests that stranger offenders are treated most harshly by the legal system at every stage of the proceeding,<sup>15</sup> no research has examined whether the victim-offender relationship is taken into account at the appellate level. However, the United States Supreme Court in *Kansas v. Hendricks*,<sup>16</sup> a recent decision determining that sexual predator laws are constitutional,<sup>17</sup> suggests that the Court may take a more punitive approach toward stranger crimes. The Court had before it an individual in his sixties who had been repeatedly convicted of molesting stranger children since 1955.<sup>18</sup> Before and after his

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15. See Simon, *Sentence Length*, *supra* note 7, at 130; Simon, *Legal Treatment*, *supra* note 7, at 100–04 (finding in a sample of violent offenders that nonstrangers were charged with and convicted of more serious crimes, but strangers received significantly longer sentences).

16. 521 U.S. 346 (1997).

17. Specifically, the Court upheld the Kansas Sexually Violent Predator (“SVP”) law, KAN. STAT. ANN. §§ 59-29a01 to 59-29a19 (1994 & Supp. 1998). See *Hendricks*, 521 U.S. at 371. The Kansas SVP Act permits civil commitment of an individual upon proof beyond a reasonable doubt that the individual is a sexually violent predator, which is defined as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” KAN. STAT. ANN. § 59-29a02(a) (1994 & Supp. 1998). A mental abnormality is defined as a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to commit sexually violent offenses to the degree that the person constitutes a menace to the health and safety of others. See *id.* § 59-29a02(b). For a discussion of the scientific, legal, and ethical issues that were in conflict in the *amicus* briefs filed by four psychiatric professional associations, see Leonore M.J. Simon, *Scientist v. Adversary: The Enduring Conflict*, Paper Presentation at American Psychological Association Symposium on Ethics and Laws in Conflict (Aug. 14, 1998) [hereinafter, Simon, *Scientist*] (on file with author).

18. See *Hendricks*, 521 U.S. 346. Kansas officials applied the Kansas SVP law to Leroy Hendricks, a man who had a long history of molesting children. See *id.* at 346, 353–55. In 1955, he pleaded guilty to indecent exposure after exposing his genitals to two young girls. *Id.* at 354. In 1957, Hendricks was convicted of lewdness with a young girl. In 1960, while working for a carnival, he molested two young boys. See *id.* Soon after his release from imprisonment in 1963, he was arrested for molesting a seven-year-old girl. See *id.* As a result of his molestation of this girl, Hendricks was adjudicated as a sexual psychopath under an earlier SVP Kansas law and civilly committed to a mental institution for treatment until 1965, when he was released. In 1967, Hendricks was again convicted and imprisoned for molesting another boy and girl. Hendricks performed oral sex on the 8-year-old girl and fondled the 11-year-old boy. See *id.*

In 1973, Hendricks began a prolonged period of molesting his own stepdaughter and stepson. See *id.* at 354–55. In 1984, Hendricks pled guilty to two counts of taking indecent liberties with children when he molested two 13-year-old boys. *Id.* at 353. In 1994, when Hendricks was about to be released (under parole-like terms) from his 1984 prison incarceration, he was involuntarily committed for indefinite psychiatric care and treatment under the Kansas Sexually Violent Predator Act. See *id.* at 353–54; KAN. STAT. ANN. §§ 59-

convictions for molesting strangers, he was also molesting his stepdaughter and stepson for about 4 years—acts for which it appears he was never convicted.<sup>19</sup> Although even Leroy Hendricks did not specialize in stranger victims, the *Hendricks* case suggests that the judiciary may be responding to the same fear of the stranger that the public does, believing that stranger molesters present a threat to victims in the community if not incarcerated.

This Article examines the disjuncture between sex offender legislation aimed at stranger offenders and the empirical realities of sex crimes against children and women. By examining the incongruity between legislation enacted pursuant to widely publicized but infrequent stranger sex crimes and the absence of policies to protect women and children from the more common intrafamilial and acquaintance sex criminals, the perpetuation of myths and fears of the stranger will be articulated. In turn, this Article explores how the perpetuation of these irrational fears exacerbates the trauma experienced by current victims and increases the likelihood of the future victimization of children and women.

Section II begins this process by reviewing the empirical literature on the nature and magnitude of child sexual abuse. This section illustrates the prevalence of family and acquaintance child sexual abuse and the rarity of the stranger molester. Section II also describes some of the many legal policies that show preference for the incest offender while reserving the harshest legal treatment for the stranger molester.

Empirical evidence of crimes of sexual violence against women is reviewed in Section III. The scope of the problem of rape and sexual assault is described, including the fact that sexual crimes against women are rarely perpetrated by stranger offenders. Section IV describes the problems inherent in the legal processing of rape cases. It summarizes disparate research findings that consistently show that the legal system reserves the worst condemnation for the stranger rapist, further traumatizing the acquaintance victim. Section V reviews the history and failure of rape law reform. The iatrogenic effects of current sex offender laws and policies on current and prospective victims of child sexual abuse and rape are examined in Section VI. Section VII proposes solutions for future law reform efforts that can achieve therapeutic outcomes for victims. This section includes a discussion of different paradigms of law that can be integrated to achieve therapeutic aims and minimize iatrogenic effects for children and women. Section VIII concludes with a discussion of how these issues can inform law reform efforts and can suggest areas of future research.

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29a01 to 59-29a19 (1994 & Supp. 1998). See also Simon, *Scientist*, *supra* note 17, at 6-7.  
19. *Hendricks*, 521 U.S. at 354-55.

## II. SEX CRIMES AGAINST CHILDREN: WHERE ARE ALL THE STRANGER MOLESTERS?<sup>20</sup>

Although media coverage and political and legal response focuses on the stranger sex offender, fewer than 10% of all child molestations are committed by strangers.<sup>21</sup> The majority of sex crimes committed against children<sup>22</sup> are committed

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20. The research literature uses different terms such as child sexual abuse, incest, and child molestation. See DIANA E.H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 3 (1986); Jon R. Conte & John R. Schuerman, *Factors Associated with an Increased Impact of Child Sexual Abuse*, 11 *CHILD ABUSE & NEGLECT* 201, 201 (1987); Leonore M.J. Simon et al., *Characteristics of Child Molesters: Implications for the Fixated-Regressed Dichotomy*, 7 *J. INTERPERSONAL VIOLENCE* 211, 212 (1992). These terms will be used synonymously in this Article. Also, in this Article, child molestation refers to sexual contact between adults and children when there is an age difference of five years or more. Child molestation also is used to refer to sexual contact between underage siblings when there is an age difference of five years or more.

21. See AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE SECTION, COMMISSION ON DOMESTIC VIOLENCE, CENTER ON CHILDREN AND THE LAW, AND COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, *LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS* 12 (1998) [hereinafter ABA] (finding in interviews with 600 prosecutors nationwide that only 6% of the child sexual abuse cases were committed by strangers); LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, *SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT* 2, 11 (1997); Lucy Berliner et al., *A Sentencing Alternative for Sex Offenders: A Study of Decision Making and Recidivism*, 10 *J. INTERPERSONAL VIOLENCE*, 493 (1995) (finding that 7% of child molestation cases in Washington state were committed by strangers); Jane Roberts Chapman & Barbara E. Smith, *Child Sexual Abuse: An Analysis of Case Processing*, 1987 *A.B.A. SEC. CRIMINAL JUSTICE* 35, 36 tbl.V-1 [hereinafter ABA2] (finding that 3% of child molesters were strangers); Conte & Schuerman, *supra* note 20, at 203 (finding that of 369 children seen at a sexual assault center in a medical setting, 4% of the assaults involved strangers); Simon et al., *supra* note 20, at 216-217 (finding only 4% of victims in 136 consecutive court cases involved strangers); Simon, *The Myth*, *supra* note 1, at 397 (finding that fewer than 6% of victims involved strangers). Cf. David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 *FUTURE CHILDREN* 31, 45 (1994) (summarizing adult retrospective studies that indicate that no more than 10% to 30% of molesters are strangers, with the remainder being either family members or acquaintances). Finkelhor indicates that intrafamily perpetrators constitute from one-third to one-half of all perpetrators against girls and only about one-tenth to one-fifth of all perpetrators against boys. He emphasizes that the importance of acquaintance perpetrators—especially neighbors, teachers, coaches, religious leaders, and peers—should not be obscured by an exclusive focus on family abuse. See *id.* at 46.

A problem in measuring the victim-offender relationship is the lack of standardization across studies. Many of the studies do not define the categories, and if definitions are provided, it is not always clear how or whether researchers distinguish between friend and acquaintance, acquaintance and stranger known by sight, or between complete strangers and strangers known by sight. See Simon, *Sentence Length*, *supra* note 7, at 132, 136; Simon, *Legal Treatment*, *supra* note 7, at 95-98 (providing 19 categories of possible relationships and their operational definitions to classify a sample of violent offenders). Some studies, for example, examine differences between intrafamilial and extrafamilial sexual abuse without defining how the cases are classified. See Donald G. Fischer & Wendy L. McDonald, *Characteristics of Intrafamilial and Extrafamilial Child Sexual Abuse*, 22 *CHILD ABUSE & NEGLECT* 915 (1998). Other studies define the extrafamilial category so broadly as to include

by fathers (20%), stepfathers (29%), other relatives (11%), and acquaintances of the family (30%).<sup>23</sup> Targeting the stranger offender misleads the public about the nature and magnitude of the problem and how to prevent sexual victimization of children.<sup>24</sup> The fact is that sexual abuse is common in the childhoods of at least fourteen percent of men and twenty-seven percent of women, with at least half of these cases involving family members.<sup>25</sup>

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anyone who is not a blood relative including acquaintances and strangers. See RUSSELL, *supra* note 20, at 61 (finding that 31% of a sample of 930 San Francisco women reported at least one experience of sexual abuse by a nonrelative before reaching the age of 18 years of age).

22. There are three official sources of data on the incidence of child sexual abuse cases coming to professional attention: (1) the National Incidence Study of Child Abuse and Neglect ("NIS"), a federally funded research project; (2) state child protection agencies; and (3) criminal justice system data. See Finkelhor, *supra* note 21, at 32. Each one of these data collection systems has serious limitations in giving us an accurate estimate of the incidence of child abuse. NIS figures reflect an estimate of cases known to professionals but not reported to child protection agencies. See *id.* Child protection data rely on compilations of reports to state child protection agencies that involve mainly intrafamily abuse, of which sexual abuse is the least common category (15% compared to 47% in neglect cases). *Id.* The two current national crime data systems are not capable of tracking sexual abuse because the National Crime Victimization Survey collects no data on children under 12, and the Uniform Crime Reports does not break down crimes by age of the victim (except for homicide) so that sexual assaults against adults cannot be distinguished from sexual abuse against children. *Id.* at 36.

The National Child Abuse and Neglect Data System ("NCANDS") is the primary source of national information on abused and neglected children known to state child protective services agencies. The data include statistics on child abuse and neglect. As many as 60% of the cases reported to the states are found to be unsubstantiated. For those that are substantiated, more than half (52%) involve neglect, 25% involve physical abuse, and 13% involve sexual abuse. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1995: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM 1-1 to 1-3 (1997) The nature of the data collection system of the NCANDS makes it difficult to ascertain the victim-offender relationship in reported cases and does not allow a determination of how many child victimizations occur that are not reported to child welfare agencies. See *id.* at 2-3 to 2-8. Other information that is missing from this system is the legal disposition of the reported cases such as how many fathers/stepfathers are prosecuted for sexual abuse and so on. *Id.* at 2-11. Reliance on information provided by child protection service ("CPS") agencies is fraught with serious problems because there is a uniformly low rate of CPS investigation for all abused and neglected children. Finkelhor, *supra* note 21, at 34

23. See Conte & Schuerman, *supra* note 20, at 201, 203; Simon et al., *supra* note 20, at 217. Studies of child sexual abuse are bound to have different findings as to the victim-offender relationship depending on the source of the data and classification of the relationship. In asking about sexual abuse in a sample of college students, 39% of incest incidents reported by female college students and 21% reported by males is of the brother-sister sort. See DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 89 (1979). It appears that brother/sister incest may be common but not typically studied or analyzed by the existing research.

24. A striking finding from the child sexual abuse prevalence studies is the low rate of reporting of sexual abuse to an authority, such as police or protective services. Some estimate that only three percent of childhood sexual abuse incidents are reported to police or other public agencies. See John M. Leventhal, *Epidemiology of Sexual Abuse of Children: Old Problems, New Directions*, 22 CHILD ABUSE & NEGLECT 481, 482 (1998).

25. See FINKELHOR, *supra* note 23, at 83 (finding in a survey of college students that

When the public perceives the risk to be the pedophile waiting on the street corner to lure the child into danger,<sup>26</sup> it ignores the fact that the stranger offense is a rare event, with the majority of children being sexually abused by family members and acquaintances.<sup>27</sup> The stranger child molester, however, may be even more rare than

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28% of females and 23% of males reported a sexual experience with a family member); Bruce Rind et al., *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples*, 124 PSYCHOL. BULL. 22, 29, 42 (1998) (describing the results of a comprehensive meta-analysis that statistically summarizes the findings of the majority of published and unpublished studies of child sexual abuse among college students).

In addition to child sexual abuse, many children are raped and sexually assaulted. In surveys of adult women, if women are asked at what age they were raped (or when they were first raped), over one quarter of women report being raped when they were under 14, and over one half of the women report being raped when they were under 18. See NATIONAL VICTIM CENTER AND CRIME VICTIM RESEARCH CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 3 (1992) [hereinafter RAPE IN AMERICA] (finding that a total of 61.6% of women who were raped reported their first rape as taking place when they were under 18; 29.3% of women reported being first raped when they were under 11; 32.3% reported being raped when they were between 11 and 17).

Although many researchers agree that retrospective studies yield the best estimates of lifetime prevalence of child sexual abuse, not much research has examined the memory problems inherent in such studies. For example, studies that compared individuals with officially documented and substantiated cases of childhood sexual abuse with matched controls and followed them prospectively into young adulthood find substantial underreporting of abuse (63% of individuals known to have been sexually abused prior to age 12 report it, compared to 45% of matched controls). See Cathy Spatz Widom, *Accuracy of Adult Recollections of Early Childhood Abuse*, in RECOLLECTIONS OF TRAUMA: SCIENTIFIC EVIDENCE AND CLINICAL PRACTICE 49, 50, 55 (J. Don Read & D. Stephen Lindsay eds., 1997). "Interestingly, only 16% of the sexually abused males considered their early experiences to have been sexual abuse, compared to 64% of the sexually abused females." *Id.* at 56 These retrospective self-reports may underestimate family and acquaintance sexual abuse. See *id.* at 64-65.

Retrospective self-reports of child sexual abuse provide higher estimates than official records that often rely on inadequate data collection systems. Approximately 150,000 cases of substantiated child sexual abuse come to the attention of child abuse authorities each year. Finkelhor, *supra* note 21, at 32. Because fewer than one-third of all occurring cases are currently being identified and substantiated by child protection authorities, Finkelhor estimates that approximately 500,000 new cases occur each year. See Finkelhor, *supra* note 21, at 34. Finkelhor may be correct in his estimate. Data published since his estimate from the National Incidence Studies (NIS-3) in 1993 indicate that the number of children classified as sexually abused was 217,700, up from 119,200 in 1986. See ANDREA SEDLAK & DIANE D. BROADHURST, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 3-3 tbl.3-1, 7-33, 7-35 tbl.7-35 (1996). The incidence estimates are substantially higher since CPS investigations of sexually abused children have declined by 31% since 1986. See *id.* at 7-33 tbl.7-6, 7-34 (noting that 44% of reported sexual abuse cases where investigated by CPS in 1993, down from 75% investigated in 1986).

26. See RUSSELL, *supra* note 21, at 60.

27. Neglect of the victim-offender relationship in child sexual abuse cases is not limited to the public, the media, or politicians. It is often uncommon to find an article or book on child sexual abuse that emphasizes that child sexual abuse is a crime that occurs within families or by individuals known to the children. See Jon R. Conte, *Child Sexual Abuse: Awareness and Backlash*, 4 FUTURE CHILDREN 224 (1994) (omitting any mention of the victim-offender relationship); Desmond K. Runyan, *Prevalence, Risk, Sensitivity, and Specificity: A*



statistics indicate. The majority of child molestations by family and acquaintances are not reported to the police, resulting in overestimates of the proportion of stranger molestations.<sup>28</sup>

The focus on and fear of the stranger sex offender belies the danger and harm posed by offenses committed by individuals with a relationship to the victim.<sup>29</sup> Family

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*Commentary on the Epidemiology of Child Sexual Abuse and the Development of a Research Agenda*, 22 CHILD ABUSE & NEGLECT 493 (1998) (discussing current pressing issues in the area of child sexual abuse while ignoring the preponderance of such crimes that are perpetrated by family members and acquaintances).

28. See ROBERT A. PRENTKY ET AL., U.S. DEP'T JUST., CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 1 (1997); Dean G. Kilpatrick et al., *Psychological Sequelae to Rape: Assessment and Treatment Strategies*, in BEHAVIORAL MEDICINE: ASSESSMENT AND TREATMENT STRATEGIES 473, 476 (Daniel M. Doleys et al. eds., 1982); Leventhal, *supra* note 24, at 482 (finding that only three percent of child sexual abuse incidents are reported to police or other public agencies).

There is practically no research on case processing of child molestation cases in the criminal justice system. It would be useful to know what percentage of cases reported to child protection authorities or others end up in the criminal justice system, whether extrafamilial molesters are more likely than intrafamilial molesters to be prosecuted, convicted, and sentenced to prison after controlling for the usual legal variables of crime seriousness, and prior criminal record of the offender. See Simon, *Sentence Length*, *supra* note 7, at 141. One study of prosecutors indicates that child sexual abuse cases are selectively prosecuted. See ABA2, *supra* note 21, at 12 (indicating that the majority of prosecutors stated in a telephone survey that they do not divert child sexual abuse offenders at any stage of the process). Another study that compared statutory penalties for sex offenses with child and adult victims found no difference in the sentencing provisions while finding that, in practice, offenders who victimized adults received harsher penalties than offenders who victimized children. Stranger molesters were substantially more likely to be incarcerated than nonstranger molesters. *Id.* at 25-27. This study appears to overrepresent strangers in its subjects in that perpetrators were strangers in 12% of the child victim cases and in almost half of the adult cases. See *id.*

29. Studies generally suggest that victims of sexual abuse in childhood report short-term and long-term sequelae. See Rachel Calam et al., *Psychological Disturbance and Child Sexual Abuse: A Follow-Up Study*, 22 CHILD ABUSE & NEGLECT 901, 905 (1998) (finding that the percentage of sexually abused children experiencing psychological problems increased over a two-year period of time). Victims who have experienced abuse involving attempted or actual intercourse as children report more marital disruption in adulthood, a lower level of satisfaction with their current heterosexual relationships, and a greater tendency not to practice any religion. See David Finkelhor et al., *Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion, and Attitudes*, 4 J. INTERPERSONAL VIOLENCE 379, 382 (1989). A national survey of adolescents indicates that 13% of females and 3.4% of males have experienced unwanted but actual sexual contact. Thirty percent of these sexual assault victims developed post-traumatic stress disorder. See DEAN KILPATRICK & BENJAMIN SAUNDERS, U.S. DEP'T OF JUSTICE., THE PREVALENCE AND CONSEQUENCES OF CHILD VICTIMIZATION 1, 2 (1997).

The preponderance of the child sexual abuse research assumes and indicates that child sexual abuse causes intense harm, regardless of the gender, pervasively in the population. A recent meta-analysis of the research casts some doubt on this generalization by finding that although college students who had been sexually abused, were, on average, slightly less well adjusted than controls. Rind et al., *supra* note 25, at 22, 31. This poorer adjustment could not be attributed to child sexual abuse alone because family environment was consistently confounded with child sexual abuse; family environment explained considerably more

offenses such as child sexual abuse are often of longer duration (some beginning with children in the first five years and continuing through the teens) and are more extensive (e.g., sexual intercourse instead of fondling) than stranger offenses, causing victims irreparable harm due to the betrayal of a trusted relationship.<sup>30</sup> Nevertheless, in some statutes, the targeting of stranger offenders is explicit. For example, the Washington sexual predator law defines predatory crime as "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization."<sup>31</sup> This would seem to exclude family members and acquaintances, although they constitute the majority of offenders in sex crimes. Another explicit discrimination against the stranger offender occurs by inclusion of a less serious category for incest offenders under family offenses<sup>32</sup> than the child rape offenses included under sex offenses.<sup>33</sup> A further example of differential legal treatment of stranger offenders occurs in states like Washington that have a sexual offender treatment alternative to sentencing that exhibits a preference for sentencing incest and other offenders who knew their victims to treatment, while sentencing the stranger offender to prison.<sup>34</sup> For instance, the statute requires that the

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adjustment variance than child sexual abuse; and child sexual abuse-adjustment relations generally became nonsignificant when studies controlled for family environment. *Id.* at 35–36. Self-reported reactions to and effects from child sexual abuse indicated that negative effects were neither pervasive nor typically intense and that men reacted much less negatively than women. Variables associated with more negative reactions and self-reported effects in both men and women were the presence of force and incest. *See id.* at 39.

30. *See* Conte & Schuerman, *supra* note 20, at 206–08 (describing that sexually abused children possess statistically significant differences in behavioral and psychological symptoms compared to non-abused children); Fischer & McDonald, *supra* note 21, at 919, 921–22 (finding that intrafamilial sexual abuse involved more serious and intrusive sexual behaviors of longer duration than extrafamilial sexual abuse); Leventhal, *supra* note 24, at 486 (summarizing the myriad short-term and long-term physical and mental health problems that have been associated with child sexual abuse). In one study, an individual recounted sexual abuse by her father that started when she was four and lasted until she was fifteen. FINKELHOR, *supra* note 23, at 59.

Childhood sexual victimization of girls increases the likelihood of rape as an adult. Women characterized by a background of childhood sexual abuse, liberal sexual attitudes, higher than average alcohol consumption, and a larger number of sexual partners are more likely to be raped or sexually assaulted as adults. *See* NATIONAL RESEARCH COUNCIL, UNDERSTANDING VIOLENCE AGAINST WOMEN 71 (Nancy A. Crowell & Ann W. Burgess eds., 1996); PATRICIA TJADEN & NANCY THOENNES, NATIONAL INST. OF JUST. & CENTER FOR DISEASE CONTROL & PREV., PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 6 (1998) (finding that 18% of the women who reported being raped before age 18 said they were also raped after the age of 18, compared with 9% of the women who did not report being raped before the age of 18). *Cf.* Catalina M. Arata, *Coping with Rape: The Roles of Prior Sexual Abuse and Attributions of Blame*, 14 J. INTERPERSONAL VIOLENCE 62, 70 (1999) (finding that rape victims with a history of sexual abuse engage in more self-blame, use more maladaptive coping strategies, and have greater trauma-related symptoms).

31. WASH. REV. CODE § 71.09.020(4) (Supp. 1998).

32. *See* WASH. REV. CODE § 9A.64.020 (Supp. 1998).

33. *See* WASH. REV. CODE § 9A.44.073. (Supp. 1998).

34. Washington law allows a judge to sentence a sex offender to the special sex

victim consent to the treatment alternative. In child molestation cases, the victim includes the child and her parents. In a family molestation, it is clear that the mother may have an economic interest in having the perpetrator working in the community to support the family instead of in prison. This is one of many ways in which the treatment alternative allows the state to express leniency toward in-family molestations in the interest of keeping the family together, although it is not clear that this is always in the best interest of the molested child or the other children in the family. Future research on this topic is needed to systematically study all state statutes to determine whether such preferential treatment of in-family molestation is made explicit in the majority of other states. Such research also could include a study of the actual legal processing of intra-family and extra-family child molestation cases.

### III. SEX CRIMES AGAINST WOMEN: RAPE AND SEXUAL ASSAULT

Sex offender legislation that targets strangers also has harmful effects on actual and prospective women victims of sexual assault and rape. Fear of the stranger rapist accounts for a large part of the fear of crime in women.<sup>35</sup> Such fear of the

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offender sentencing alternative that provides for treatment by a certified treatment provider. Offenders convicted of forcible rape are not eligible. The offender cannot have prior sex offense convictions to qualify. Also, the victim needs to consent to the post-conviction diversion of the offender in this treatment alternative. *See id.* at § 9.94A.120 (1998); This sentencing scheme favors nonstranger offenders, particularly incest offenders. *See* Berliner et al., *supra* note 21, at 493–94 (finding that child sexual abuse cases involving stepparents are more likely and stranger offenders are less likely to receive the treatment alternative).

35. *See* MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 25–26 (1989); NATIONAL RESEARCH COUNCIL, *supra* note 30, at 29–34. In the 1970s, the feminist movement focused attention on traditional rape laws and evidentiary rules that, in effect, put the rape victim on trial. As a result there has been significant change in the laws and the rules of evidence relevant to the crime of rape during the past two decades. *See* SUSAN ESTRICH, *REAL RAPE* 47–49 (1987); JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM* 11–24 (1982); CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 17–29 (1992); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 7–10 (1977); Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 171, 172–76 (1980); Patricia Searles & Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25, 26 (1987). One of the criticisms that rape law reform was designed to address was the differential legal processing of rape cases that hinged on the victim-offender relationship. Kalven, Zeisel, and Estrich distinguished between “simple” and “aggravated” rapes. Aggravated rapes were incidents involving extrinsic violence, multiple assailants, or no prior relationship between victim and offender; simple rapes were incidents with none of these aggravating circumstances. *See* ESTRICH, *supra*, at 4–7; HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 252 (1966). Kalven, Zeisel, and Estrich asserted that aggravated and simple rape cases were treated differently by the criminal justice system. Kalven and Zeisel, for example found jury conviction rates nearly four times higher in aggravated than in simple rapes. *See* KALVEN & ZEISEL, *supra*, at 253. They also found that judges were much more likely to disagree with jury verdicts in simple rape cases, believing that juries in these types of cases relied too heavily on victim characteristics and often acquitted in spite of sufficient evidence to convict. *See id.* Estrich argued that historically the processing of rape cases reflected a distrust of acquaintance rape victims. *See* ESTRICH, *supra*,

stranger rapist<sup>36</sup> belies the reality that over 80% of rapes and sexual assaults are committed by acquaintances.<sup>37</sup> Women who take preventive measures to guard against becoming victims of stranger rape and sexual assault may not take precautionary measures against victimization by acquaintances. Of all sexual assaults and rapes<sup>38</sup>

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at 29. For a thorough discussion of the social science evidence that examines the victim-offender relationship in the legal processing of rape cases, see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1214-18, 1230-38, 1251-84, 1379 (1997) (finding consistent evidence for prejudice toward acquaintance rape victims at all stages of the legal proceedings).

36. Although rape and sexual assault historically have had different meanings, the terms will be used interchangeably in this Article to refer to a man engaging in sexual contact (broadly defined) with any woman by the use of force or threatened use of force. This definition includes attempts as well as completed acts. Rape and sexual assault, as used in this Article, refers to acts that could be defined as crimes under most penal codes.

37. See RONET BACHMAN & LINDA SALTZMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 5-8 (1995). The National Victim's Center's survey data revealed that only 22% of rape victims had been raped by someone they did not know well or had never seen before; 9% by husbands or ex-husbands; 11% by fathers or stepfathers; 10% by boyfriends or ex-boyfriends; 16% by other relatives; 29% by other non-relatives such as friends and neighbors; and 3% were unsure or refused to answer. See RAPE IN AMERICA, *supra* note 25, at 4. Surveys to determine the proportion of rapes committed by acquaintances are likely to underestimate them, unless the survey methodology takes account of "hidden rape"—i.e., the fact that many women whose answers to survey questions reveal that they have in fact been raped do not label the experiences as such. See Mary P. Koss, *The Hidden Rape Victim: Personality, Attitudinal and Situational Characteristics*, 9 PSYCHOL. WOMEN Q. 193, 206 (1985). Victimization surveys that "require that a woman conceptualize and report her experience as rape" are therefore suspect. *Id.* In Koss's study of university women, 43% of the women whose answers revealed that they had been raped denied that they had been raped, and most of these women "were assaulted by an acquaintance or romantic intimate." *Id.*

38. Trying to retrieve statistics on sex offenses is often made difficult by many legal agencies' coding of sex offenses as one category instead of breaking up the statistics into what I consider more meaningful distinctions between crimes of rape and sexual assault against women and sex crimes against children. This is important in terms of examining the legal treatment of each type of crime. For example, the Department of Justice combines crimes of rape and sexual assault against adult women and crimes of rape and sexual assault against children when it indicates that the rate of incarceration in prisons for sex offenders has risen to close to 10% of the prison population whereas it is difficult to find convicted rapists in prison. See GREENFELD, *supra* note 21, at 17; Simon, *The Myth*, *supra* note 1, at 394. In fact, during the period from 1980 to 1994, state prison populations increased by 206% whereas the number of imprisoned sex offenders (mostly victimizers of children they knew) grew 330%. See GREENFELD, *supra* note 21, at 17, 19. For this period, the average annual growth in the number of prisoners was 7.6% generally, 18% for drug offenders, and 15% for inmates imprisoned for sexual assaults other than rape. See *id.* at 19. The largest category of sex offenders was composed of those serving time for molestation, fondling, or other related kinds of sexual assault. See *id.* The problem of separating out rape and sexual assault of adult women and child sexual abuse also occurs in studies of the impact of rape law reform where it is not immediately obvious that the findings may be confounded by the inclusion in the data of an unspecified number of child sexual abuse cases. For example, in a study of the impact of law reform on the legal processing of acquaintance and stranger rape cases, one study confounded its findings by inclusion of cases with child victims that were more numerous in the post-reform

committed against women age 12 and older,<sup>39</sup> 82% are perpetrated by people known to them.<sup>40</sup> Friends and acquaintances commit more than half (53%) of all rapes and

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era than in the pre-reform period. See Cassia C. Spohn & Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, 86 J. CRIM. L. & CRIMINOLOGY 861, 868-69 n.40, 876 (1996) (finding that case outcomes for simple and aggravated rapes in the post-reform period did not differ). Another problem that inheres in studies that examine the legal processing of rape cases is the failure to compare rape cases to other criminal cases. For example, it is not uncommon to find that the factors associated with the legal processing of rape and sexual assault cases may not be all that different from factors associated with the legal processing of general criminal cases. See *id.* at 878-79, 880 tbl.5, 881 tbl.6, 883 (finding that sentence severity and sentence length determined primarily by legal factors such as seriousness of the sexual assault and the defendant's prior criminal record). See generally Simon, *Sentence Length*, *supra* note 7, at 131, 140 tbl.5, 141 (finding that offense type, offense seriousness, and prior criminal record strong predictors of sentence length); Simon, *Legal Treatment*, *supra* note 7, at 102, 103 tbl.6 (finding offense seriousness, prior criminal record, and victim-offender relationship significantly predicted sentence length).

Because of existing data collection systems for information on sexual victimization of children and adults, there is some overlap in the statistics. The National Crime Victimization Survey ("NCVS") obtains information about crimes, including incidents not reported to the police, from a continuous, nationally representative sample of households in the United States. Approximately 50,000 households and 100,000 individuals age 12 or older are interviewed for the survey annually. Survey respondents include adolescents, but not children under the age of 12. The NCVS was redesigned and first used in 1992 to increase reporting of sexual assaults and intimate-perpetrated violence. The redesigned survey substantially increased the reporting of rape and sexual assault, particularly those assaults committed by nonstrangers including intimates. The survey found that 26% of rapes and sexual assaults of females age 12 or older are perpetrated by intimates, 3% by other relatives, and 53% by acquaintances or friends. See BACHMAN & SALTZMAN, *supra* note 37, at 5. The National Violence Against Women Survey conducted a nationally representative telephone survey of 8000 women and 8005 men 18 years and older and found that 25% of women, compared with 8% of men, said they were raped and/or physically assaulted by a current or former spouse, cohabiting partner or former spouse, or date at some time in their life. See TJADEN & THOENNES, *supra* note 30, at 6. No similar national data collection systems exists for crimes against children. The best statistics that exist on child victimization are generated, for the most part, by independent investigators. See Finkelhor, *supra* note 21, at 34 (concluding that attempts to collect national incidence data miss many cases of child sexual abuse that do not come to the attention of agencies or professionals).

39. Estimates of the prevalence and incidence of rape and sexual assault vary from study to study. In a survey of a national probability sample of 2008 women age 18 or older, The National Women's Study found that one out of every eight adult women has been the victim of forcible rape sometime in her life. Of the women surveyed, 39% of the rape victims had been raped more than once in their lifetimes. In 1990, 683,000 adult American women were forcibly raped. See RAPE IN AMERICA, *supra* note 25, at 2. Almost a third of women reporting having been raped (29.3%) were raped when they were younger than 11 years of age. See *id.* at 2-3. The NVAW study indicates that 18% of surveyed women and 3% of surveyed men said they experienced an attempted or completed rape at some time in their life. More than half (54%) of the female rape victims identified by the survey were under 18 years old when they experienced their first rape. See TJADEN & THOENNES, *supra* note 30, at 3, 6.

Although men are more likely than women to be victims of violent crimes, DIANE CRAVEN, U.S. DEP'T OF JUSTICE, SEX DIFFERENCES IN VIOLENT VICTIMIZATION 1994, at 2 (1997), women are more likely to be victimized by an intimate partner. See *id.* at 4 For example, for homicides in which the victim-offender relationship was known, an intimate killed

sexual assaults of females age 12 and older;<sup>41</sup> intimate partners commit an additional 26%, and other relatives commit 3%.<sup>42</sup> These statistics probably underestimate the proportion of nonstranger sexual assaults because a large proportion of them are not defined by the victim as a crime or reported to anyone.<sup>43</sup> The variability in rates of

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31% of female victims age 12 or older and 4% of male victims 12 or older. *See id.* at 6. Women are far more likely to be sexually assaulted than men, and the majority of these crimes are committed by someone the woman knows. *See* BACHMAN & SALTZMAN, *supra* note 37, at 5; TJADEN & THOENNES, *supra* note 30, at 8 (finding that 76% of women who were raped and/or physically assaulted since the age of 18 were assaulted by a current or ex-intimate partner).

40. Many statistics including the National Crime Victimization Survey ("NCVS") may underestimate this figure by the way they code the category of stranger. Simon, *Sentence Length*, *supra* note 7, at 132; Simon, *Legal Treatment*, *supra* note 7, at 95, 97, 98 tbl.1. The NCVS defines stranger as "[a]nyone not known previously by the victim." BACHMAN & SALTZMAN, *supra* note 37, at 6. Underestimation also may occur because many women do not define acquaintance rape as a sexual assault. *See* Koss, *supra* note 37, at 206.

41. *See* BACHMAN & SALTZMAN, *supra* note 37, at 5–6. The new redesigned survey of the National Crime Victimization Survey ("NCVS") has resulted in an estimate of 500,200 rapes and sexual assaults committed for the years 1992–1993, a substantial increase over previous estimates. *See id.* at 5. Under the old design, a woman was never actually asked whether she was raped. Nongovernmental surveys of the incidence of rape by researchers and scholars based on reports by women in private interviews and in response to anonymous questionnaires have generally yielded high rates of rape and sexual assault. The National Women's Study found that an estimated 683,000 adult women were raped in 1990. *See* RAPE IN AMERICA *supra* note 25, at 2. The NVAW survey finds that 302,100 women and 92,700 men are forcibly raped each year in the United States. Because some rape victims experience more than one rape in the 12 months preceding the survey, approximately 876,100 rapes were perpetrated against women and approximately 111,300 rapes were perpetrated against men in the United States during the 12 months preceding the survey. *See* TJADEN & THOENNES, *supra* note 30, at 4. Neither the National Women's Study nor the NVAW include attempted rapes or rapes of adolescents between the ages of 12 and 18 as does the NCVS suggesting that the number of rapes may actually be closer to a million rapes and attempted rapes a year.

42. *See* BACHMAN & SALTZMAN, *supra* note 37, at 5–6.

43. *See* RAPE IN AMERICA, *supra* note 25, at 6 (indicating that 84% of rapes go unreported); Dean G. Kilpatrick et al., *Criminal Victimization: Lifetime Prevalence, Reporting to Police, and Psychological Impact*, 33 CRIME & DELINQ. 479, 480 (1987) (showing that between 91.5% and 95% of rapes go unreported). The government estimates of the proportion of rapes that go unreported are the lowest. Some governmental estimates are that two-thirds of all rapes go unreported. *See* GREENFELD, *supra* note 21, at 2. The Sexual Experience Survey found that 13% of 2016 college women reported having experienced at some time in their life a victimization that involved sexual intercourse without their consent and obtained through the use of threat or actual force (this figure rose to 37% when women who reported having experienced sexual victimizations that met the legal definition of attempted rape). Mary P. Koss, *The Scope of Rape: Implications for the Clinical Treatment of Victims*, 36 CLINICAL PSYCHOLOGIST 88, 89 (1983). Most of the victims knew their offenders. "In fact, 31% of acknowledged victims [who conceptualized their experience as a rape] and 76% of unacknowledged victims [who did not conceptualize their experience as a rape] reported that they had been romantically involved with the man who assaulted them." *Id.* Among the unacknowledged victims, none of the women "reported their experience to police, rape crisis centers or professional counselors, and more than half did not reveal their assault to anyone." *Id.* These unacknowledged victims had experiences that would legally qualify as rape, but for various reasons they did not conceptualize their experiences as rape. *See id.*

rape and sexual assault obtained from different sources, with larger rates obtained from nongovernmental statistics, has led some scholars to conclude that sexual assault is commonplace and that women's fear of it is rational.<sup>44</sup>

#### IV. THE LEGAL PROCESSING OF RAPE AND SEXUAL ASSAULTS: IF SO MANY WOMEN EXPERIENCE RAPE, WHY ARE THERE SO FEW RAPISTS IN PRISON?

Sex offender legislation that stresses the stranger offender confuses the public, criminal justice system officials, victims and perpetrators about whether the nonstranger cases constitute rape and sexual assault. Many cases that fit the legal definition of rape are not treated as a crime by the criminal justice system<sup>45</sup> or even

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44. See generally Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 Nw. U. L. REV. 1271(1994) (suggesting that rape and sexual assault are a normal occurrence in the lives of women, with the worst victims ending up in psychiatric institutions, who are not counted in any statistics). For years, reliance on official statistics based on rapes reported to police suggested that rape and sexual assault was not a frequently occurring crime, and that women's fear of rape was irrational. Police reports are summarized in the FBI's Uniform Crime Reports that includes statistics for crimes reported to and believed by the police. See F.B.I., U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 23-25 (1994) [hereinafter 1994 UCR] (reporting the occurrence of 102,096 reported rapes and attempted rapes in 1994 resulting in 36,610 arrests for forcible rape). These official statistics based on rapes reported to the police are a far cry from the estimated 500,000 women victims who report rapes in a survey of victims. See BACHMAN & SALTZMAN, *supra* note 37, at 1. Mary P. Koss reports that 27.5% of a sample of 3187 students at 32 colleges across the country were victims of rape or attempted rape at some time in their lives. See Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 166 (1987). Diana Russell's survey found that 44% of women reported completed or attempted rapes. See Diana E.H. Russell, *The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females*, 7 VICTIMOLOGY 81, 84 (1982). After conducting interviews with 391 adult females, Dean Kilpatrick reported that 36.4% of a sample of 391 adult females had been the victims of at least one rape or attempted rape; 23% of the sample reported an attempted or completed child molestation. See Kilpatrick, *supra* note 43, at 479, 483-84. As Stefan suggests, the studies relied on to get estimates of rape and sexual assault typically fail to include women with psychiatric problems, the homeless, prostitutes, institutionalized women, and very poor women who can be expected to have probable higher base rates for sexual violence. See Stefan *supra*, at 1282. An additional understudied population at high risk for rape are women in the military. A survey of female Persian Gulf War army personnel found that 7.3% experienced sexual assault, 33.1% reported physical sexual harassment (of these, about 25% also experienced assault), 66.2% reported verbal sexual harassment (44% of whom also reported physical sexual harassment). See Jessica Wolfe et al., *Sexual Harassment and Assault as Predictors of PTSD Symptomatology Among U.S. Female Persian War Military Personnel*, 13 J. INTERPERSONAL VIOLENCE 40, 48 (1998).

45. Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 218-24 (1991); Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Laws Is Turned on Its Head*, 11 WIS. WOMEN'S L.J. 37, 56 (1996); see generally Stefan, *supra* note 44.

considered rape by the victim.<sup>46</sup> In these cases, the man is not the armed stranger jumping from the bushes. Instead, the man is a neighbor, an acquaintance, or a date. The man may have been offered a ride home or invited in. He does not have a weapon, and he acts alone. He is probably not reported or prosecuted. Deciding to report this type of rape, a simple rape, is a step most victims never take. If they do, it is only the first step. The road to charging, convicting, and sentencing a rapist is strewn with obstacles. For example, simple rapes are not only far less likely to be reported than aggravated rapes, but if they are reported, they are less likely to result in convictions.<sup>47</sup> For all rapes that are reported, the attrition rate is disconcerting. In 1994, there were 102,096 reported rapes and attempted rapes resulting in 36,610 arrests for forcible rape.<sup>48</sup> Such official statistics that base the number of rapes on the number reported to the police are a far cry from the estimated 500,000 women victims who report rapes on victim surveys.<sup>49</sup> According to governmental analyses, only 20% of those arrests can expect to result in a conviction.<sup>50</sup> Furthermore, only two-thirds of those convicted of rape can expect to be sentenced to prison.<sup>51</sup> Recognizing such obstacles, and drawing from the data of several jurisdictions, the Senate Judiciary Committee reported that 98% of rape victims "never see their attacker caught, tried and imprisoned."<sup>52</sup> The Senate Judiciary Committee warned that low rates of reporting and

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46. See ESTRICH, *supra*, note 35, at 12–15 (noting that some women who have been raped according to legal definitions of rape would not describe what happened to them as rape, or even abuse). A study of 6159 college students in 32 institutions found that 53.7% of the women surveyed had been forced into some type of sexual act since the age of 14. Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in RAPE AND SEXUAL ASSAULT II 3, 10 (Ann Wolbert Burgess ed., 1988) Of these women, 13% had been forced into some type of sexual act in the last year. *Id.* at 13. Women reported that 84% of the offenders were known to them, and that 57% of offenders were dates. *Id.* at 15–16. "Most offenders (73%) were thought to be drinking or using drugs at the time of the assault, while the victim admitted using intoxicants in 55% of the episodes." *Id.* at 15. Almost half of the victims (42%) told no one about their assault. *Id.* at 16. "Just 8% of the victims who told anyone reported to the police." *Id.* Those who reported the assault to the police rated the police reaction as "not all that supportive." *Id.* "Surprisingly, 42% of the women indicated that they had sex again with the offender on a later occasion." *Id.*

47. In the most sophisticated study of this subject, Spohn and Horney found no evidence that the percentage of indictments leading to conviction had changed after state rape law reforms in five of the six cities studied. See SPOHN & HORNEY, *supra* note 35, at 92–100. In Detroit, the sole exception, the authors found that the indictment rate had increased but the proportion of convictions (relative to indictments) had not. See *id.* at 103–04. Analyses of national data sets for different years indicate that in 1994 and 1995, one-third of rapes and sexual assault victimizations were reported to police. See GREENFELD, *supra* note 21, at 2. In 1992, only 20% of reported rapes resulted in conviction. See *id.* at 14. Although these data are for different years, such analyses suggest that out of a third of rape and sexual assault cases reported to police, only 20% result in conviction. The winnowing out process continues when out of the 20% of defendants who are convicted of rape, just two-thirds receive a prison sentence. *Id.*

48. See 1994 UCR, *supra* note 44, at 23–25.

49. See BACHMAN & SALTZMAN, *supra* note 37, at 1.

50. See GREENFELD, *supra* note 21, at 14.

51. See *id.*

52. STAFF OF SENATE COMM. ON THE JUDICIARY, 103D CONG., 1ST SESS., THE



processing of rape "provide dramatic testimony of the power of our stereotypes of crime—how these stereotypes distort our understanding of violence against women and deprive individuals of the equal protection of our laws."<sup>53</sup> Studies of individual jurisdictions have also found patterns of sharp case attrition for rape.<sup>54</sup> Case attrition is sharpest for nonstranger rapes.<sup>55</sup>

### A. Police Processing of Rape Cases

Rape case attrition begins in the decision by the victim to report the assault. The decision to report a rape requires that a woman conceptualize her experience as rape. If the offender was an acquaintance or used only moderate force, the victim might conclude that the label rape was not applicable to her assault and might respond negatively in a survey when asked if she had been raped.<sup>56</sup> If she sees the perpetrator again, she may subject herself to the risk of further sexual assaults. If she initiates a relationship with a new person, she may not recognize assaultive behavior if it occurs.

Even if a woman defines her assault as rape, she is highly unlikely to report the crime, particularly if the perpetrator is someone she knows. She is likely to think, "It's not like someone jumped out of the bushes and raped me," and will downplay the seriousness of her victimization. If the rape is reported, police make the initial decisions on whether a woman's complaint is founded or unfounded.<sup>57</sup> Although the official national unfounding rate for all rapes is about 8%,<sup>58</sup> the proportion of acquaintance rape complaints that are unfounded are between 65% and 75%.<sup>59</sup> The official unfounding rates are occasionally called into question by newspaper articles. One such article discusses an Oakland police department decision to reopen 90% of the cases that they unfounded in 1989 and 1990.<sup>60</sup> The department stated that among

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RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE iii (Comm. Print 1993) [hereinafter RESPONSE TO RAPE].

53. RESPONSE TO RAPE, *supra* note 52, at 13.

54. For a recent review of studies of rape case processing, see Ruth Triplett & Susan L. Miller, *Case Processing in the Harris County, Texas Criminal Justice System: A Comparison Across Crime Types*, 22 J. CRIM. JUST. 13, 13–15 (1994).

55. See Bryden & Lengnick, *supra* note 35, at 1214–18.

56. See Koss, *supra* note 43, at 88–89.

57. A case is "cleared" when a suspect is arrested. The clearance rate (over 50%) is much lower than the founding rate (92%). See 1994 UCR, *supra* note 44, at 24.

In the past, police tended to disbelieve between 10% and 20% of reports of rape, especially when the man accused was an acquaintance of the woman. See THOMAS W. McCahill et al., *THE AFTERMATH OF RAPE*, 103–22 (1979); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1171 (1986) (New York study found 24% of rape complaints in nonstranger cases judged to be without merit compared to 5% of stranger cases).

58. See 1994 UCR, *supra* note 44, at 24; GREENFELD, *supra* note 21, at 7.

59. See Duncan Chappell & Susan Singer, *Rape in New York City: A Study of Material in the Police Files and Its Meaning*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER* 245, 258, 261 (Duncan Chappell et al. eds., 1977) (noting that in 65% of rapes and 75% of attempted rapes, results of police investigation were deemed negative or inconclusive).

60. See Candy J. Cooper, *Oakland Admits 184 Rapes Ignored*, S.F. EXAMINER, Feb. 1, 1991, at A1.

their reasons for the unfoundings were victims who were uncooperative, difficult to locate, engaged in prostitution, or known to their assailants, and lack of time to conduct proper investigations.<sup>61</sup> More scientific studies of the police decision to found or unfound a rape complaint find that the existence of extralegal victim variables such as alcohol or drug use<sup>62</sup> and/or delay in reporting<sup>63</sup> strongly correlates with a decision to unfound, despite researcher conclusions that police rely solely on evidentiary factors.<sup>64</sup> Research that depicts the police decision to unfound rape cases in a favorable light uses phrases like "legitimate evidentiary concerns" to obscure such critical issues as whether the police give too much weight to, say, lack of physical injury to the woman or absence of corroboration, typical in acquaintance rapes,<sup>65</sup> in deciding whether to unfound a complaint.

Research that is more critical of the police stresses the role of extralegal variables in founding decisions. For instance, a study that tracked sexual assault victims treated at a large urban hospital during the years 1976-78 concluded that "[t]he behavior and lifestyle of the victim prior to the assault, as well as at the time of the assault, are often considered by the processing agents to be as important as the actions of the assailant during the crime."<sup>66</sup> Moreover, police often regard rape victims suspiciously. Police officers who participated in one study began with the expectation that three of every five rape complainants are either untruthful or mistaken.<sup>67</sup>

Factors associated with police unfounding decisions would, if known to victims, deter even more rape victims from reporting their victimization. They include a woman's sexual history<sup>68</sup> or sexual status (e.g., prostitute),<sup>69</sup> the victim's drinking

61. *See id.*

62. *See* Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 J. CRIM. L. & CRIMINOLOGY 267, 297 (1990). Studies of police unfounding find that in acquaintance rape cases, police are more likely to found in a case where the suspect was in custody or if the victim had injury to her sex organs. Conversely, police were more likely to unfound a complaint of rape where negative victim characteristics such as alcohol or drug use were present. *See id.*

63. *See* Gary D. LaFree, *Official Reactions to Social Problems: Police Decisions in Sexual Assault Cases*, 28 SOC. PROBS. 582, 588 (1981). As LaFree acknowledges, "none of the 31 cases which alleged [victim] misconduct resulted in arrest." *Id.*

64. *See id.* at 592; Kerstetter, *supra* note 62, at 302-06.

65. *See generally* Chappell & Singer, *supra* note 59, at 261, 267 (indicating that when a rapist used or threatened substantial violence to a victim or where there was presence of corroboration, the police were more likely to view the incident seriously and to investigate it); Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 590 (1980) (noting that police may give too much weight to the victim-offender relationship or the absence of physical force in determining that a rape case is baseless).

66. Susan Meyers Chandler & Martha Torney, *The Decisions and the Processing of Rape Victims Through the Criminal Justice System*, 4 CALIF. SOCIOLOGIST 155, 166 (1981).

67. *See* Shirley Feldman-Summers & Gayle C. Palmer, *Rape as Viewed by Judges, Prosecutors, and Police Officers*, 7 CRIM. JUST & BEHAV. 19, 36 (1980).

68. *See* LYNDA LYTLE HOLMSTROM & ANN WOLBERT BURGESS, *THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS* 40-43 (1978).

69. *See id.* at 41.

or drug use;<sup>70</sup> inconsistencies in the victim's story;<sup>71</sup> the absence of corroboration of victim's story, such as injuries to her sex organs;<sup>72</sup> risky behavior by the victim that may have exposed her to the risk of rape;<sup>73</sup> evidence that the victim has psychiatric problems;<sup>74</sup> evidence that the victim had run away from home;<sup>75</sup> the victim not appearing upset about the rape;<sup>76</sup> an unattractive victim;<sup>77</sup> prior acquaintance or voluntary sexual intimacy between the victim and the offender;<sup>78</sup> the offender not having a previous criminal record;<sup>79</sup> the victim having prior trouble with police;<sup>80</sup> no

70. See *id.* Cf. MCCAILL ET AL., *supra* note 57, at 116 (no finding concerning alcohol or drugs, but "victim-precipitated" rapes more likely to be unfounded); Kerstetter, *supra* note 62, at 297 (nonsexual discrediting information such as alcohol or drug use often led to unfounding). Kerstetter concluded, however, that police and prosecutors who take account of a woman's drinking are motivated by evidentiary considerations rather than their sex-role norms. See *id.* at 305.

71. See HOLMSTROM & BURGESS, *supra* note 68, at 40-42, 46 (noting that police were "most impressed" by "a consistent and unchanging story"). Cf. MCCAILL ET AL., *supra* note 57, at 116 (finding that 32.9% police mark as unfounded if social worker evaluated her story as partially incredible; otherwise 13.7%).

Even if the victim has lied in her report, she may have been raped. It is not unusual for a victim to be embarrassed over the fact that she accepted a ride from a stranger, so she may say that a car drew up beside her, the driver kidnapped her and raped her. She was raped but not kidnapped.

JOHN M. MACDONALD, RAPE: CONTROVERSIAL ISSUES 145 (1995).

72. See HOLMSTROM & BURGESS, *supra* note 68, at 42. Kerstetter found that in acquaintance rape, injury to a woman's sex organs was one of the major determinants of founding decisions. Kerstetter, *supra* note 62, at 297.

73. See HOLMSTROM & BURGESS, *supra* note 68, at 39-43. Cf. MCCAILL ET AL., *supra* note 57, at 116 (23% of cases that a social worker later evaluated as victim-precipitated were unfounded, versus 12.3% of other cases).

74. See HOLMSTROM & BURGESS, *supra* note 68, at 40 (noting negative police reaction to a "mental case" who kept changing her story and had a history of psychiatric problems); MCCAILL ET AL., *supra* note 57, at 116 (23.9% of cases in which victim reported to a social worker that she had seen a psychiatrist prior to the alleged rape were marked by police as unfounded versus 11.8% with no such report).

75. See HOLMSTROM & BURGESS, *supra* note 68, at 43; MCCAILL ET AL., *supra* note 57, at 116 (noting proportion unfounded for runaways was 24.1% versus 13.7% for others).

76. See HOLMSTROM & BURGESS, *supra* note 68, at 43.

77. See *id.* at 40-43, 67 (noting that police more sympathetic to "pretty and articulate" victims); MCCAILL ET AL., *supra* note 57, at 116 (noting 53.3% of rape reports by obese women unfounded, as opposed to 14.2% of reports by others).

78. See HOLMSTROM & BURGESS, *supra* note 68, at 40-43; Chappell & Singer, *supra* note 59, at 245-71 (finding that 24% of rape complaints in nonstranger cases were considered without merit compared with under 5% in stranger cases); John C. LeDoux & Robert R. Hazelwood, *Police Attitudes and Beliefs Toward Rape*, 13 J. POLICE SCI. & ADMIN. 211, 219 (1985). Cf. MARSH ET AL., *supra* note 35, at 98 (finding victim's sexual relations with accused rapist rated more important than drinking or use of force).

79. See HOLMSTROM & BURGESS, *supra* note 68, at 43 (noting that "[n]othing makes...[the police] more enthusiastic about a case than to find out the assailant has other charges against him or a prison record").

80. See MACDONALD, *supra* note 71, at 145 (noting that "[a] routine part of any [police] investigation, not just rape, is to check whether the victim or the suspect has a criminal record"); MCCAILL ET AL., *supra* note 57, at 116 (finding that 22% unfounded versus 13.9%).

woman other than the victim being present during the interrogation,<sup>81</sup> and the failure to promptly report the rape.<sup>82</sup> These factors suggest that founding decisions in rape cases, and particularly in acquaintance cases, are determined by the victim's contributory negligence or perceived bad character.<sup>83</sup> Unlike some of the other unfounding correlates, these recur in virtually every study of rape case processing, and police often consider these factors to be valid indicators of whether or not a rape occurred. Because of police insensitivity in founding decisions, the rape victim's trauma is likely to be exacerbated if she is told at the outset that nothing will be done because she brought it on herself or was not really raped.

In addition to unfounding a case, police sometimes try to persuade women to drop the complaint,<sup>84</sup> or they may lose the file.<sup>85</sup> Police also tend to see as more serious the stranger rapist. In New York, for example, researchers studying police records found that 24% of the rape complaints in nonstranger cases were judged by the police to be without merit, compared with fewer than 5% in stranger cases.<sup>86</sup> In Philadelphia, a study of police records in the mid-1970s led researchers to conclude that "the police appear to endorse an extralegal victim precipitation logic, declaring unfounded those cases in which the circumstances of the victim-offender relationship are not wholly uncompromising."<sup>87</sup> Although studies cited in this section may appear dated, there is no recent research on the police processing of rape cases. Occasional anecdotal accounts, however, suggest that negative police attitudes toward rape victims persist. For example, after a newspaper article on unfounding, Oakland police reexamined cases labeled unfounded and concluded that of 203 of the unfounded cases, 184 did in fact happen.<sup>88</sup> Clearly, this is an area where future systematic research is needed to examine prevailing police attitudes and practices in the processing of rape cases.

At the same time, it is important to note that the views of police and other legal actors toward rape victims may reflect community support for or tolerance of

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81. See MCCAILL ET AL., *supra* note 57, at 115-16 (finding that this was the most important of 13 variables associated with unfounding: with a police woman present, the unfounding rate dropped from 21.9% to 9.2%).

82. See LaFree, *supra* note 63, at 588. The National Women's Study found that, of the rapes that were reported to police, 25% were reported over 24 hours after the rape. See RAPE IN AMERICA, *supra* note 25, at 5.

83. See, e.g., HOLMSTROM & BURGESS, *supra* note 68, at 39-40, 42-43; MACDONALD, *supra* note 71, at 145; LeDoux & Hazelwood, *supra* note 78, at 219

84. See MCCAILL ET AL., *supra* note 57, at 88 (finding that police pressured complainant to drop charges in 19.3% of reported rapes).

85. See *id.* at 120-21. In one survey in Philadelphia based on data gathered between 1973 and 1974, the police simply lost 14% of cases of reported rapes, declared as unfounded or disbelieved another 18.2% of complaints, and gave a non-offense charge to an additional 11% of complaints. See *id.* After a newspaper article on unfounding, Oakland police reexamined cases labeled unfounded and concluded that of 203 of the unfounded cases, 184 did in fact happen and should not have been listed as unfounded. See *Oakland Cops Admit 'Failure' on Rape Cases*, S.F. CHRON., Feb. 2, 1991, at A4 [hereinafter *Oakland Cops*].

86. See Chappell & Singer, *supra* note 59, at 245-71.

87. MCCAILL ET AL., *supra* note 57, at 121.

88. See *Oakland Cops*, *supra* note 85, at A4.

violence against women. Attitudes such as acceptance of sex-role stereotypes, belief in rape myths, and beliefs that some circumstances justify violence against women help create a climate that gives rapists justifications for their actions, and a climate that is hostile to victims of rape. A wide variety of Americans, including citizens, police officers, and judges, have been shown to hold beliefs that can be used to justify rape.<sup>89</sup> These widely accepted rape myths—defined as prejudicial, stereotyped or false beliefs about rape, rape victims, and rapists—support and promote rape. Rape myths are part of the general culture, and people learn them in the same way they acquire other beliefs and attitudes—from parents, friends, newspapers, books, and television.<sup>90</sup> Attitudes which support violence against women create an environment that is hostile to victims. Rape-supportive attitudes are partly responsible for low levels of rape reporting<sup>91</sup> and for a blaming-the-victim mentality that makes it difficult for victims to seek help to recover from their assaults.<sup>92</sup> Belief in rape myths leads to a strict definition of rape and denies the reality of many actual rapes,<sup>93</sup> which makes it difficult to prosecute rapists and support victims. Rape victims are often victimized twice—once from the actual assault and a second time when they encounter negative, judgmental attitudes from the police, courts, and family and friends.<sup>94</sup>

### B. Prosecutor Processing of Rape Cases

It is clear that only if the case passes muster with the police, and they want the case to go forward, do police “found” the complaint and transmit the file to the prosecutor’s office. If the police do not unfound the complaint, and if an arrest is made, conviction is not guaranteed. Like police, prosecutors wield a great deal of discretion and are not required to state reasons when they decide to dismiss or downgrade a case.<sup>95</sup> Most of the time, prosecutors justify dismissing cases because

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89. See Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 223–29 (1980); Hubert S. Field, *Attitudes Toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors, and Citizens*, 36 J. PERSONALITY & SOC. PSYCHOL. 156, 157, 169 (1978); E.R. Mahoney et al., *Sexual Coercion and Assault: Male Socialization and Female Risk*, 1 SEXUAL COERCION & ASSAULT 2 (1986).

90. See Burt, *supra* note 89, at 218–19. Some of these myths include (1) women enjoy sexual violence; (2) sex is the primary motivation for rape; (3) women are responsible for rape prevention; (4) only bad women are raped; (5) women falsely report rape; and (6) rape may be justified. See Ilsa L. Lottes, *Sexual Socialization and Attitudes Toward Rape*, in RAPE AND SEXUAL ASSAULT II, 193, 212–12 (Ann W. Burgess ed., 1988).

91. See Russell, *supra* note 44, at 82–83.

92. See Stefan, *supra* note 44, at 1298, 1301–06, 1311.

93. See Martha R. Burt & Rochelle Semmel Albin, *Rape Myths, Rape Definitions, and Probability of Conviction*, 11 J. APPLIED SOC. PSYCHOL. 212 (1981).

94. See Stefan, *supra* note 44, at 1298; Joyce E. Williams, *Secondary Victimization: Confronting Public Attitudes about Rape*, 9 VICTIMOLOGY 66 (1984).

95. See, e.g., *Town of Newton et al., v. Rumery*, 480 U.S. 386 (1987); *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Goodwin*, 457 U.S. 368 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Oyler v. Boles*, 368 U.S. 448 (1962); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, *DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION* 72 (1988).

they would be lost at trial.<sup>96</sup> One study of prosecutorial discretion to reject rape cases in two West Coast communities in 1989 and 1990 concluded that prosecutors screen out "unwinnable" cases in order to improve their conviction rates and thus achieve political capital.<sup>97</sup> Compounding this effect, acquaintance rape cases are more difficult to win than stranger rape cases.<sup>98</sup> Thus, acquaintance rapes, especially those with unsympathetic victims, are less likely than stranger rapes to result in prosecution of the offender.<sup>99</sup>

Researchers have found several similarities between the attitudes of police and of prosecutors. Like the police, prosecutors are more likely to proceed with a case if the accused had a prior criminal record<sup>100</sup> and if the victim's account was consistent and unchanged.<sup>101</sup> Prosecutors look for medical evidence of force and penetration<sup>102</sup> and took into account the woman's appearance and demeanor.<sup>103</sup> Like all participants in the criminal justice system, the prosecutors give weight to the woman's character, for example, her alcoholism, and her relationship with the accused.<sup>104</sup> Prosecutors are disappointed to learn, for example, that she had invited the accused into her apartment.<sup>105</sup> Prosecutors, like police, also are more likely to justify rejecting a rape case for prosecution on the basis of eyewitness personal credibility and evidence sufficiency problems than in several other types of criminal cases.<sup>106</sup>

Like the police, prosecutors consider stranger rapes to be more serious than acquaintance rapes.<sup>107</sup> A national survey of prosecutors conducted by the Battelle

96. In rape cases, critics of prosecutors have focused mainly on their excessive use of "winnability" as a criterion for filing charges. See RESPONSE TO RAPE, *supra* note 52, at 11.

97. See Frohmann, *supra* note 45, at 217-24.

98. See LINDA A. FAIRSTEIN, SEXUAL VIOLENCE: OUR WAR AGAINST RAPE 133-36 (1993) (describing obstacles to conviction in acquaintance rape cases).

99. See *id.* at 151-52; ALICE VACHSS, SEX CRIMES 90-91, 231 (1993) (describing sympathetic and unsympathetic victims and conviction rates).

100. See HOLMSTROM & BURGESS, *supra* note 68, at 138.

101. See *id.* at 142, 145-46.

102. See *id.* at 144.

103. See *id.* at 143.

104. See *id.* at 144.

105. See *id.*

106. See KRISTEN WILLIAMS, PROSECUTION OF SEXUAL ASSAULTS 27 (1978).

107. See *id.*; Robert A. Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 VA. L. REV. 357, 369-70, 380 (1978) (finding that strangers were subject to grand jury indictment pursuant to prosecution recommendation more often than acquaintances). Defense lawyers also exploit myths and stereotypes in defending acquaintance rape cases. See Interview with Joy Smucker, Faculty Member of Highline Community College and Ex-Public Defender with King County, Seattle, Washington, in San Diego, California (Nov. 20, 1997). When they do it, it is understandable as they are trying to raise reasonable doubt in the trier of fact. See *id.* However, many a naive victim may view the prosecutor as her lawyer rather than seeing the prosecutor as representing the state. Cf. Weninger, *supra*, at 370 (describing victim distress over the lack of greater contact with prosecutors prior to, during, and after the grand jury proceeding). When prosecutors treat stranger rapes more seriously than acquaintance rapes, arguably trauma for the acquaintance victim is increased. See *id.* at 70, 80 (suggesting that prosecutors consciously or unconsciously may react to the societal belief that rape by a stranger is more serious than rape by an acquaintance).

Memorial Institute found both the relationship of the victim to the offender and the circumstances of their initial contact to be among the ten factors considered most important in screening rape cases and obtaining convictions.<sup>108</sup> In the state of Washington, a 1980 study found the social interaction of the victim and offender to be the second most important factor, behind the amount of force used, in predicting outcome.<sup>109</sup> In the District of Columbia, researchers found that the relationship between the victim and the accused was substantially more important than the seriousness of the incident in explaining conviction rates: the closer the relationship, the lower the conviction rate.<sup>110</sup> In Austin, Texas, a researcher found that 58% of all stranger cases resulted in indictments, compared to 29% of the cases among acquaintances and 47% among friends. Even more revealing, when the initial encounter between the victim and the defendant was voluntary, only one-third of the cases resulted in indictment; when it was involuntary, the indictment rate was 62%.<sup>111</sup>

Interacting with the victim-offender relationship is a second set of factors critical to conviction or dismissal rates: the amount of force used by the defendant and the level of resistance offered by the victim.<sup>112</sup> The existence of resistance is particularly critical in determining the outcome of cases when the initial encounter between the victim and her assailant was voluntary (she got into the car willingly or invited him in). In voluntary encounter cases, the probability of indictment is only 13% when little victim resistance was used; it jumps to 53% when resistance was substantial. When the initial encounter was involuntary, resistance is far less significant.<sup>113</sup>

### C. Juror Decisions in Rape Cases

Criticisms of police and prosecutors are more prominent in the rape literature than criticisms of jurors. The types of cases that police tend to unfound, in which prosecutors are reluctant to file charges, and in which appellate courts occasionally reverse a conviction, are the types in which most juries are unlikely to convict. For example, in a study of cases in which the police founded the complaint and requested a warrant, no conviction ensued, either because the prosecutor denied the request, or

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108. See BATTELLE MEMORIAL INSTITUTE, LAW AND JUSTICE STUDY CENTER, *FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS* 19 (1977).

109. See Loh, *supra* note 65, at 543-652.

110. See Williams, *supra* note 106, at 32.

111. See Weninger, *supra* note 107, at 379-82.

112. See BATTELLE MEMORIAL INSTITUTE, *supra* note 108; Loh, *supra* note 65.

113. See Weninger, *supra* note 107. The final set of factors predicting outcomes relates to the quality of the evidence itself; whether the prosecutor finds the victim's testimony plausible and whether her account can be corroborated. See BATTELLE MEMORIAL INSTITUTE, *supra* note 108; Loh, *supra* note 65; Weninger, *supra* note 107. In Indiana, researchers found that, despite the formal change in the law eliminating its necessity, corroboration remained an informal requirement, a conclusion reached as well by researchers who conducted interviews in Michigan. See Martha A. Myers & Gary D. LaFree, *Sexual Assault and Its Prosecution: A Comparison With Other Crimes*, 73 J. CRIM. L. & CRIMINOLOGY 1282 (1982).

because an acquittal, dismissal, or *nolle* ended the proceeding.<sup>114</sup> Thus, even in the cases in which the police believed the victim, the accused usually was not convicted.

Although very few rape cases proceed to a jury trial, decisions of jurors in these few cases provide some insight into public attitudes toward rape. Kalven and Zeisel's *The American Jury*<sup>115</sup> is the most comprehensive study of jury verdicts in American criminal cases. As part of the Chicago Jury Project, the authors analyzed a nationwide sample of criminal trials. For each trial, they asked the trial judge to indicate the jury's verdict and what the judge's own verdict would have been if the case had been tried without a jury. By comparing these hypothetical verdicts (and the judges' comments) with the juries' actual verdicts, Kalven and Zeisel were able to determine the types of cases in which judges tend to disagree with juries.

Of the 3576 trials studied in this project, 106 involved a charge of forcible rape.<sup>116</sup> Analyzing the 64 cases of "aggravated rape" (stranger rapes, gang rapes, and rapes in which the victim suffered an additional injury), Kalven and Zeisel found that the jury was more lenient than the judge in only 12% of the cases.<sup>117</sup> In the forty-two other rape cases,<sup>118</sup> acquaintance rapes with no aggravating factor, the jury returned a verdict of guilty of rape only three times (7%); the trial judges who heard these cases would have convicted seven times as often, in about half of the cases.<sup>119</sup>

The jury acquitted when the judge would have convicted in 60% of all the nonaggravated acquaintance rape cases.<sup>120</sup> This computation treated a conviction on a lesser charge as a conviction. If such convictions are treated as acquittals, the judge-jury disparity narrows somewhat, with the jury being more lenient than the judge in 49% of the nonaggravated acquaintance rape cases.<sup>121</sup> Bearing in mind that the 42 nonaggravated acquaintance rape complaints that went to trial survived scrutiny by victims themselves, who tend to report the relatively strong cases,<sup>122</sup> and by police and prosecutors,<sup>123</sup> two groups with a well-documented aversion to weak cases, the 7%

114. See Susan Caringella-MacDonald, *Sexual Assault Prosecution: An Examination of Model Rape Legislation in Michigan*, 4 WOMEN & POL. 65, 71 tbl.1 (1984).

115. See KALVEN & ZEISEL, *supra* note 35.

116. See *id.* at 67.

117. See *id.* at 253.

118. See *id.*

119. See *id.* at 253-54 & tbl.73.

120. See *id.* at 253-54.

121. See *id.* at 254.

122. See JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, RAPE: THE MISUNDERSTOOD CRIME 52 (1993) (stating that "more violent rapes are more likely to be reported to the police" and that "the greater the amount of physical violence used by the rapist, the more likely the attacker was to succeed and the more likely the rape was reported to the authorities"); Ronet Bachman, *Predicting the Reporting of Rape Victimization: Have Rape Reforms Made a Difference?*, 20 CRIM. JUST. & BEHAV. 254, 266 (1993) (concluding that victims are more likely to report rape if they experience severe physical force or are injured); Alan J. Lizotte, *The Uniqueness of Rape: Reporting Assaultive Violence to the Police*, 31 CRIME & DELINQ. 169, 181 (1985) (stating that "victims report rape to the police in response to factors that make the incident more serious and, hence, make prosecution easier").

123. For a discussion of factors affecting the decisions of police and prosecutors in rape cases, see *supra* text accompanying notes 56-113.



conviction rate suggests that public attitudes (as represented by jurors) toward acquaintance rape victims share the same suspicion of victims as legal actors.

For each of 42 crime categories, Kalven and Zeisel calculated the "net jury leniency," arrived at by subtracting the percentage of cases in which the judge was more lenient than the jury from the percentage in which the jury was more lenient than the judge.<sup>124</sup> The result was a positive figure for all 42 categories, reflecting the juries' consistently greater leniency.<sup>125</sup> However, there were large differences among crimes, ranging from game-laws cases, where the net jury leniency was highest (+43)<sup>126</sup> to "miscellaneous public disorders," where the net jury leniency was only +4.<sup>127</sup>

The net jury leniency for forcible rape was +18,<sup>128</sup> identical to simple assault,<sup>129</sup> and lower than murder (+29),<sup>130</sup> manslaughter (+29),<sup>131</sup> aggravated assault (+27)<sup>132</sup> and negligent homicide (+26),<sup>133</sup> as well as a number of less serious offenses.<sup>134</sup> However, this net jury leniency for forcible rape cases included both stranger rape and acquaintance rape. Using Kalven and Zeisel's data and methodology, forcible rape was broken down into aggravated rape (stranger rape plus aggravated acquaintance rapes) and simple rape (nonaggravated acquaintance rape).<sup>135</sup> The net jury leniency for simple rape (+32)<sup>136</sup> was higher than murder (+29) and other serious violent crimes, tied by statutory rape (+32), and surpassed by indecent exposure (+41), gambling (+35), and game-laws (+43).<sup>137</sup> The recalculation sent aggravated rape to the bottom of the list (+3). Thus, juries appear to be more lenient towards defendants in simple rape cases than in other comparable violent crimes.<sup>138</sup>

The comments of the trial judges about acquittals in simple rape cases fell into a consistent pattern.<sup>139</sup> Time after time the judge explained the jury's verdict by

124. See KALVEN & ZEISEL, *supra* note 35, at 28 n.28.

125. See *id.* at 69-75.

126. See *id.* at 74.

127. See *id.* at 71.

128. See *id.* at 70.

129. See *id.* at 69.

130. See *id.*

131. See *id.*

132. See *id.*

133. See *id.*

134. See *id.* at 70-75 (providing the following statistics Game Laws (+43); Indecent Exposure (+41); Gambling (+35); Statutory Rape (+32); Fraud (+25); Drunken Driving (+25); Petit Larceny (+25); Receiving Stolen Goods (+24); Molestation of a Minor (+21); Burglary (+21); Other Liquor Offenses (+20). See *id.* at 70-75.

135. See *id.* at 56-59, 253-54.

136. See *id.* at 70.

137. See *id.* at 69-75.

138. Kalven and Zeisel do not present data on which to compute differential net juror leniency scores for other violent crimes broken down by the victim-offender relationship, although they present anecdotal evidence that suggests that juries take into account contributory negligence on the part of the victim as well as the victim-offender relationship. See *id.* at 242-49.

139. Because of the design of the Kalven and Zeisel study, they relied on judicial self-report of not only what hypothetical decision they would have rendered, but also of

pointing to the victim's behavior prior to the rape.<sup>140</sup> Kalven and Zeisel concluded that juries in simple rape cases in effect rewrite the law of rape by importing the tort concept of contributory fault or assumption of risk, acquitting the defendant of rape when they perceive that the victim's conduct helped to precipitate the rape.<sup>141</sup>

Although Kalven and Zeisel's study is dated<sup>142</sup> and has several methodological weaknesses,<sup>143</sup> it remains the best available evidence, of national scope, about the performance of juries in rape cases. Most subsequent studies and anecdotal evidence have been at least broadly consistent with Kalven's & Zeisel's findings that jurors are likely to acquit acquaintance rapists. Experimental studies have found that if the rapist knew the victim, subjects are less likely to conceptualize the event as rape,<sup>144</sup> less likely to identify with the victim,<sup>145</sup> less likely to consider the offense as serious,<sup>146</sup> less likely to perceive the victim as truthful,<sup>147</sup> more likely to perceive the victim as having desired or enjoyed the rape,<sup>148</sup> and more likely to perceive the victim as responsible for the rape. In fact, with few exceptions, studies comparing victim responsibility in stranger and acquaintance rape cases overwhelmingly support the hypothesis that victims of acquaintance rapes are blamed

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interpretation of the jury results. Judges may themselves have shared the view that victims in acquaintance rape cases are responsible for their own rapes. As one researcher has remarked with respect to the disparity between jury and judicial decision making in the Kalven and Zeisel study, this is "an amazing statistic in light of demonstrated judicial skepticism toward complainants of sexual assault." Berger, *supra* note 35, at 30. See generally Carol Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303, 305 (1974) (finding that judges distinguish between stranger jumping out of the bushes rape from cases in which victims were "asking for it" or were being vindictive toward an intimate).

140. KALVEN & ZEISEL, *supra* note 35, at 250.

141. See *id.* at 249-51.

142. The trials in which Kalven and Zeisel's findings are based occurred between 1954 and 1958. See KALVEN & ZEISEL, *supra* note 35, at 33 n.1.

143. See Kalven and Zeisel asked 3500 judges to participate in the study, but only 555 did so. KALVEN & ZEISEL, *supra* note 35, at 35-36. The judges who chose to participate may have differed in some way from the larger group who were asked to participate, for instance by being more (or less) conviction-prone. Of the judges who participated, some judges were more conscientious in the number of trial reports they submitted. See *id.* at 39. For additional criticisms of the study's methodological flaws, see Michael H. Walsh, *The American Jury: A Reassessment*, 79 YALE L.J. 142 (1969).

144. See Susan H. Klemmack & David L. Klemmack, *The Social Definition of Rape*, in *SEXUAL ASSAULT* 135, 142 (Marcia J. Walker & Stanley L. Brodsky eds., 1976).

145. See HOLMSTROM & BURGESS, *supra* note 68, at 279; Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 812-905 (1986).

146. See Richard D. Stacy et al., *A Comparison of Attitudes Among College Students Toward Sexual Violence Committed by Strangers and by Acquaintances*, 18 J. SEX EDUC. & THERAPY 257, 259-61 (1992) (finding that both men and women consider stranger rape to be a more serious offense than acquaintance rape).

147. See Williams, *supra* note 94, at 70-71; Cynthia E. Willis, *The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions*, 26 SEX ROLES 213, 218-19 (1992).

148. See Burt & Albin, *supra* note 93, at 212 (finding that the contributory fault of the victim affects verdicts in stranger rape scenarios as well as in date rape).

more than those assaulted by strangers. This is true over a variety of measures of victim fault.<sup>149</sup> Moreover, experimental research supports the proposition that the victim's contributory fault affects subjects' likelihood of defining a situation as rape<sup>150</sup> and jurors' willingness to convict.<sup>151</sup> Subjects in experimental studies also blame victims of acquaintance rape more if their sexual history violates traditional norms of female restraint,<sup>152</sup> or if they are intoxicated<sup>153</sup> or provocatively dressed.<sup>154</sup>

A study that interviewed 331 actual jurors in Marion County (Indianapolis) and asked them the reasons for their verdicts in thirty-eight forcible rape cases is consistent with the findings of experimental studies.<sup>155</sup> Jurors were less likely to believe in the offender's guilt if the rape victim had been acquainted with the offender, however briefly, prior to the assault.<sup>156</sup> Other studies have found that subjects in experiments recommend a less severe sentence for a convicted rapist if there had been a prior dating relationship between the parties.<sup>157</sup>

In summary, the research literature indicates that the myth of the stranger offender works to the nonstranger victim's disadvantage in the few cases that go to a jury trial. Not only do jurors tend to be prejudiced against the prosecution in rape cases, but they will go to great lengths to be lenient with the defendants if there is any

149. See WILLIAMS, *supra* note 106, at 32; Susan T. Bell et al., *Understanding Attributions of Blame in Stranger Rape and Date Rape Situations: An Examination of Gender, Race, Identification, and Students' Social Perceptions of Rape Victims*, 24 J. APPLIED SOC. PSYCHOL. 1719, 1729 (1994); Judith S. Bridges & Christine A. McGrail, *Attributions of Responsibility for Date and Stranger Rape*, 21 SEX ROLES 273 (1989); James D. Johnson & Inger Russ, *Effects of Salience of Consciousness-Raising Information on Perceptions of Acquaintance versus Stranger Rape*, 19 J. APPLIED SOC. PSYCHOL. 1182, 1187 (1989); James D. Johnson, *The Effect of Rape Type and Information Admissibility on Perceptions of Rape Victims*, 30 SEX ROLES 781, 787 (1994); K. L'Armand & A. Pepitone, *Judgments of Rape: A Study of Victim-Rapist Relationship and Victim Sexual History*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 134 (1982); Cynthia E. Willis & Lawrence S. Wrightsman, *Effects of Victim Gaze Behavior and Prior Relationship on Rape Culpability Attributions*, 10 J. INTERPERSONAL VIOLENCE 367, 374 (1995).

150. See Burt & Albin, *supra* note 93, at 224 tbl.3.

151. See *id.*; M.D. Pugh, *Contributory Fault and Rape Convictions: Loglinear Models for Blaming the Victim*, 46 SOC. PSYCHOL. Q. 233, 238-40 (1983).

152. See, e.g., Jody Miller & Martin D. Schwartz, *Rape Myths and Violence Against Street Prostitutes*, 16 DEVIANT BEHAV. 1 (1995) (discussing attitudes toward prostitutes).

153. See, e.g., Deborah Richardson & Jennifer L. Campbell, *Alcohol and Rape: The Effect of Alcohol on Attributions of Blame for Rape*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 468, 472 (1982).

154. See, e.g., Deborah G. Schult & Lawrence J. Schneider, *The Role of Sexual Provocativeness, Rape History, and Observer Gender in Perceptions of Blame in Sexual Assault*, 6 J. INTERPERSONAL VIOLENCE 94, 97-100 (1991).

155. See Gary D. LaFree et al., *Juror's Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 393 (1985) (discussing methodology).

156. See *id.* at 397.

157. See Suresh Kanekar et al., *The Acquaintance Predicament of a Rape Victim*, 21 J. APPLIED SOC. PSYCHOL. 1524, 1537 (1991); L'Armand & Pepitone, *supra* note 149, at 135, 137 tbl.1 (finding that subjects imposed shorter sentences on offenders who had a prior sexual or dating relationship with the victim).

suggestion of “contributory behavior” on the part of the victim.<sup>158</sup> “Contributory behavior” warranting leniency includes the victim’s hitchhiking, dating, drinking, drug use, having sex outside of marriage, and talking with men at parties. Due to misconceptions about the prevalence and nature of rape, jurors are likely to think they are wasting their time with rape cases involving relationships when they should be stringing up all the stranger sexual predators lurking in the bushes and dark alleys. This juror behavior also appears to be anticipated by decisions of police and prosecutors<sup>159</sup> not to bring acquaintance rape charges, resulting in a vicious cycle that, at its core, represents public attitudes towards the majority of rape victims.

## V. THE FAILURE OF RAPE-LAW REFORM

Prior to the mid-1970s, rape and sexual assault cases were treated in a discriminatory fashion by the laws and legal actors. The perception that rape charges could be easily fabricated, and the image of women as seductive and untrustworthy, resulted in rules and procedures not required for other violent crimes. Reformers criticized traditional rape laws that defined rape narrowly. These laws would require both proof that the victim resisted her attacker and corroboration of the victim’s testimony.<sup>160</sup> For instance, special corroboration rules mandating that prosecutors produce evidence that verified the victim’s testimony were considered necessary because of the concern that women would deliberately lie about rape in order to explain premarital intercourse, infidelity, pregnancy, or disease, or would retaliate against an ex-lover or some other man.<sup>161</sup> Similarly, successful prosecution also required that a rape victim demonstrate that she had attempted to resist her assailant to a degree beyond what was expected of victims of other crimes. Special cautionary instructions to juries were used to warn jurors that rape was a charge that was easily made but difficult for the defendant to disprove, even if innocent. Evidence of the victim’s prior sexual history was admissible to impeach her testimony or show that she consented to intercourse, for it was assumed that chastity was a character trait and that women with premarital or extramarital experiences would be more likely to agree to sexual relations with the defendant.<sup>162</sup> Spouses were granted immunity from prosecution on the assumption that when a woman married she implicitly and irrevocably consented to sexual advances by her husband. Critics charged that these

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158. See KALVEN & ZEISEL, *supra* note 35, at 249–54. When Kalven and Zeisel asked judges if they agreed with the jury verdicts, the percentage of judges in disagreement with the jury jumped from 12% in the aggravated cases to 60% in the simple cases, with the bulk of the disagreement explained by the jury’s absolute determination not to convict of rape if there was any sign of contributory fault by the woman, despite enough evidence of guilt to satisfy the judge. See *id.* at 253.

In rape trials in which the defendant alleges that the victim consented or that there was no sex, jurors are less likely to believe a defendant’s guilt when the victim had reportedly engaged in sex outside of marriage, drank or used drugs, or had been acquainted with the defendant—however briefly—prior to the alleged assault. LaFree, *supra* note 155, at 397.

159. See KALVEN & ZEISEL, *supra* note 35, at 31.

160. See MARSH ET AL., *supra* note 35, at 21–23; SPOHN & HORNEY, *supra* note 35, at 17; Berger, *supra* note 35, at 7–10; Bienen, *supra* note 35, at 172–76.

161. See SPOHN & HORNEY, *supra* note 35, at 24.

162. See ESTRICH, *supra* note 35, at 47–49.

laws shifted the focus of a rape case from the behavior of the offender to the character and behavior of the victim. They argued that the laws discouraged rape victims from reporting the crime to the police and erected significant barriers to the successful prosecution of rape cases.<sup>163</sup>

In response to these concerns, states have generally reformed their rape laws to eliminate or modify some or all of these practices.<sup>164</sup> Some states replaced the single crime of rape with a series of gender-neutral offenses defined by the presence or absence of aggravating circumstances, such as the use of a weapon, injury to the victim, or commission of a contemporaneous felony.<sup>165</sup> Many states eliminated legal requirements that the victim physically resist her attacker and that her testimony be corroborated.<sup>166</sup> Most states also enacted rape shield laws restricting the use of evidence of the victim's reputation for past sexual behavior.<sup>167</sup> Reformers predicted that these legal changes would produce a number of instrumental effects. They expected the new laws to improve the treatment of rape victims and thus prompt more rape victims to report the crime to the police.<sup>168</sup> They also predicted that broadening the definition of rape and changing the rules of evidence applied in rape cases would make arrest, prosecution, conviction, and incarceration for rape more likely.<sup>169</sup>

Studies evaluating the impact of rape law reform suggest limited effects on the legal processing of rape cases. These studies allow for a partial assessment of the impact of the new legislation on the attitudes of criminal justice officials, and on rape statistics. Most of these studies have not found the anticipated effects on reports of rape or the processing of rape cases, although two studies found that reforms enacted in Michigan led to an increase in the number of arrests and convictions for rape.<sup>170</sup> Studies conducted in King County (Seattle), Washington,<sup>171</sup> and California<sup>172</sup> found that legal changes did not produce the expected results. A study of the impact of rape law reform in six jurisdictions (Detroit, Chicago, Philadelphia, Atlanta, Houston, and Washington, D.C.)<sup>173</sup> similarly found minimal effects. In the six city study, some changes were produced in Detroit, with an increase in the number of reports of rape

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163. See *id.* at 15–26; SPOHN & HORNEY, *supra* note 35, at 18.

164. See Searles & Berger, *supra* note 35, at 25.

165. See *id.* at 25–26; ESTRICH, *supra* note 35, at 81–91.

166. See SPOHN & HORNEY, *supra* note 35, at 23–25.

167. See Galvin, *supra* 145, at 765–66; Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1247–50 (1989).

168. See MARSH ET AL., *supra* note 35, at 4–6; Kenneth A. Cobb & Nancy R. Schauer, *Legislative Note: Michigan's Criminal Sexual Assault Law*, 8 U. MICH. J.L. REFORM 217, 236 (1974).

169. See Gerald D. Robin, *Forcible Rape: Institutionalized Sexism in the Criminal Justice System*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN: OFFENDERS, VICTIMS, WORKERS* 241, 256–58 (Barbara Raffel Price & Natalie J. Sokoloff eds., 1982); Cobb & Schauer, *supra* note 168, at 184.

170. See MARSH ET AL., *supra* note 35, at 30–31; Susan Caringella-MacDonald, *supra* note 114, at 71.

171. See Loh, *supra* note 65, at 613.

172. See Kenneth Polk, *Rape Law and Criminal Justice Processing*, 31 CRIME & DELINQ. 191, 195–97 (1985).

173. See SPOHN & HORNEY, *supra* note 35, at 77–105.

and in the percentage of cases bound over for trial, but no similar effect was found on the conviction rate or sentencing. The increases in reports and prosecution of rape cases in Detroit did not remedy many of the pre-reform problems, however. A follow-up study of rape cases in Detroit found a larger proportion of cases involving questions about the victim's moral character, evidence of risk-taking behavior by the victim, and a victim and offender who were acquainted than in the pre-reform period.<sup>174</sup> In fact, reforms in Detroit may have had an unexpected effect. Defendants convicted in the post-reform period are less likely to be sentenced to prison than those convicted in the pre-reform period.<sup>175</sup>

The consensus is that overall, the primary beneficiaries of rape law reform have been women who are raped by strangers.<sup>176</sup> Prosecutors continue to distinguish cases of "real" rape from "simple" rape, pursuing what they consider more serious stranger rape cases.<sup>177</sup> In addition, the probability of conviction for sexual assault cases remains lower than for nonsexual assault cases.<sup>178</sup> Punishment of offenders convicted of sexual assault in the post-reform era appears to be less severe than in the pre-reform era.<sup>179</sup> There appears to be a slight decrease in prison sentences and a substantial increase in commitments to sex offender treatment programs.<sup>180</sup>

Importantly, the rape-law impact studies suggest that many criminal justice officials continue to operate on the basis of traditional assumptions, and that they do not always comply with the statutes.<sup>181</sup> Decisions regarding sexual assault cases are

174. See Cassia Spohn & Julie Horney, *Rape Law Reform and the Effect of Victim Characteristics on Case Processing*, 9 J. QUANTITATIVE CRIMINOLOGY 383, 397-405 (1993). These results were interpreted by the researchers as indicating that rape law reform had increased the proportion of acquaintance rape cases entering the criminal justice system. See *id.*

175. See Spohn & Horney, *supra* note 38, at 878-79. In addition, simple rapes are not less likely to be dismissed or more likely to be convicted in the post-reform period. *Id.* at 876, 877 tbl.2.

176. See MARSH ET AL., *supra* note 35, at 99-100; SPOHN & HORNEY, *supra* note 35, at 167-68; Spohn & Horney, *supra* note 38, at 875-76, 875, 880 tbl.5, 882-83 (noting that defendants in simple rapes less likely to be sentenced to prison than defendants in aggravated rapes).

177. See MARSH ET AL., *supra* note 35, at 87-89; Spohn & Horney, *supra* note 38, at 883.

178. See GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 222 (1989) KALVEN & ZEISEL, *supra* note 35, at 253-54 & tbl.73; Caringella-MacDonald, *supra* note 114, at 72, 76 tbl.III, 78; Lizotte, *supra* note 122, at 185-86 (concluding that since only the most serious rapes are reported, studies showing comparable attrition rates for rape and other crimes do not rebut the theory that the system discriminates against rape complainants); Loh, *supra* note 65, at 593-94.

179. See Loh, *supra* note 65, at 598-600.

180. See KALVEN & ZEISEL, *supra* note 35, at 253-54 & tbl.73; LAFREE, *supra* note 178, at 222; Caringella-MacDonald, *supra* note 114, at 72, 76 tbl.III, 78; Loh, *supra* note 65, at 593-94.

181. See, e.g., MARSH ET AL., *supra* note 35, at 51-52, 59-60; SPOHN & HORNEY, *supra* note 35, at 68-69, 70-72, 159-60; Ronald J. Berger et al., *The Dimensions of Rape Reform Legislation*, 22 L. & SOC'Y REV. 329, 334-36 (1988); Bienen *supra* note 35, at 200-06, 210-13

still subject to a great deal of discretion, and the reforms do not necessarily affect the internal operations of the criminal justice system. For example, evidentiary reforms involving the victim's past sexual conduct contain loopholes that limit the admissibility of evidence regarding the complainant's past sexual conduct for some purposes (e.g., to prove the victim's consent) but continue to allow this evidence for other purposes (e.g., to challenge the victim's credibility or to show another possible source of semen).<sup>182</sup> And when evidence of the victim's past sexual conduct is admitted, juries continue to use it to mitigate the defendant's culpability.<sup>183</sup>

Many of the rape law reforms have also been based on untested assumptions regarding their potential impact. For instance, there is no evidence that lower sentences increase juries' propensity to convict.<sup>184</sup> Similarly, advocates of the "criminal circumstances" approach, which removes the term "consent" from the definition of sex offenses in order to preclude consent defenses, failed to anticipate that statutory silence on consent might allow defense attorneys to continue to use common law consent defenses or general definitions of criminal coercion that remained in other parts of the criminal code.<sup>185</sup> As one researcher has observed, "As a practical matter a prosecutor must prove nonconsent...[and] one cannot avoid the issue...or pretend it no longer exists because of semantic changes in the law."<sup>186</sup>

The rape law reform movement has had little or no impact on victims of nonstranger rape and sexual assault.<sup>187</sup> The current state of affairs in rape and sexual assault cases of the simple, nonstranger variety is that victims who seek help from the legal system have their complaints discounted and trivialized.<sup>188</sup> They continue to be accused of lying and of fabricating complaints to seek retribution against partners who have rejected them.<sup>189</sup> Thus, rape victims are often victimized twice—once from the actual assault and a second time when they encounter negative, judgmental attitudes from police, courts, and family and friends.<sup>190</sup> Research on criminal justice processing of rape and sexual assault finds that cases of aggravated rape (i.e., those involving strangers who use weapons or other means of clearly identifiable force or who inflict clearly identifiable injury beyond the rape itself) are in general more likely to evoke a serious response by police, prosecutors, judges, and juries than cases of simple rape.<sup>191</sup> When criminal justice officials are confronted with cases that deviate from

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182. See Berger et al., *supra* note 181, at 334–35, 344.

183. See LAFREE, *supra* note 178, at 217; LaFree et al., *supra* note 155, at 389.

184. See HUBERT S. FIELD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 119, 133–34, 180–88 (1980).

185. See *id.* at 159–62; Cf. Kasubhai, *supra* note 45, at 56 (arguing that lack of resistance by the victim is frequently used to establish the nonexistence of a rape despite the fact that the victim may have said "no").

186. Wallace D. Loh, *Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labeling*, 37 J. SOC. ISSUES 28, 45–46 (1981).

187. See Spohn & Horney, *supra* note 38, at 883.

188. See Frohman, *supra* note 45, at 217–18.

189. See *id.*

190. See JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 20 (1981); Williams, *supra* note 94, at 70–71.

191. See Spohn & Horney, *supra* note 38, at 876, 878; LAFREE, *supra* note 178, at 222.

aggravated rape, their response is especially likely to be influenced by their assessment of the victim's credibility and by their concern with establishing that the sexual interaction was, in fact, nonconsensual. Often the veracity of the victim's complaint is judged in terms of the personal characteristics of the victim and offender and the interpersonal context of the incident.<sup>192</sup> For example, complaints by women whose moral character is questioned or whose perceived carelessness made them vulnerable to attack are greeted with more skepticism.<sup>193</sup> Among those least likely to be believed are drug abusers, victims who have numerous sexual partners, or who go to bars by themselves.<sup>194</sup>

Although stereotypical and prejudicial attitudes toward rape victims are important factors in explaining case outcomes, so are constraints of legal criteria and pragmatic concerns regarding efficient allocation of scarce criminal justice resources.<sup>195</sup> At each stage of the system, officials are reluctant to pass on what they believe to be "weak" cases that will not stand up at trial or subsequent stages.<sup>196</sup> For example, prosecutors and police may distinguish between good victims and bad ones on the basis of their perception of how well the case is likely to stand up in court.<sup>197</sup> Other factors, such as the promptness of the victim's report, the consistency of her recounting of the rape, and how well the victim's account fits the prosecutor's profile of the typical case and victim, also influence case outcomes.<sup>198</sup>

## VI. THE IATROGENIC EFFECTS OF CURRENT SEX OFFENDER LAWS AND POLICIES

When the legal system places so much emphasis on the rare stranger sex offender, it undermines the ability of society to vindicate current victims of nonstranger assaults and protect prospective victims from future sex crimes. Focusing on the stranger offender is antitherapeutic in that policy makers are reacting to the sensational stranger sex crime while neglecting the daily reality of rape and sexual assault in the lives of women and children who are assaulted by nonstrangers.<sup>199</sup> Taking precautions against the stranger sex offender lulls society and prospective rape victims into a false sense of security.<sup>200</sup> In Vancouver, Washington, for example, police recently apprehended a suspect believed to have committed a series of stranger rapes dating back to 1989.<sup>201</sup> Prior to his capture, each time a rape was reported, many

192. See Spears & Spohn, *supra* note 45, at 510 tbl.1, 513 tbl.2 (discussing offender characteristics); *id.* at 511, 513 tbl.2 (discussing victim-offender relationship); Frohman, *supra* note 45, at 218-24; Vicki McNickle Rose & Susan Carol Randall, *The Impact of Investigator Perceptions of Victim Legitimacy on the Processing of Rape/Sexual Assault Cases*, 5 SYMBOLIC INTERACTIONS 23, 28-29 (1982).

193. See Spears & Spohn, *supra* note 45, at 515-19.

194. See *id.* at 519.

195. See Frohman, *supra* note 45 at 218-24.

196. See *id.*

197. See Spears & Spohn, *supra* note 45, at 519.

198. See Frohman, *supra* note, at 218-24.

199. See *supra* notes 10-14 and accompanying text.

200. See *supra* notes 10-14 and accompanying text.

201. See Thomas Ryll, *Criminologist Says Serial Offenders Sometimes Want to be*



women lived in fear.<sup>202</sup> The capture of the suspect was widely publicized in Vancouver and the Portland, Oregon, metropolitan region. Each stage of the legal proceedings led to more publicity. At the same time, the numerous cases of acquaintance rape seen by the rape crisis center were not publicized. As a result, society and women thought that because the "serial rapist" is in jail, they could let their guard down.<sup>203</sup> There are several other ways in which the exclusive focus on the stranger sex offender has iatrogenic effects for current and prospective victims of rape and sexual assault.

### A. Current Victims

Current victims, the majority of whom have been victimized by a nonstranger, are likely to suffer in several ways. First, they are unlikely to define their victimization as a crime.<sup>204</sup> This occurs because most individuals in society think of crime as a phenomenon that is perpetrated by strangers, and they tend to fear the stranger criminal. When they are victimized by someone they know, particularly in a sexual manner, victims often are confused about what happened to them. I think the Kathleen Willey case in the U.S. exemplifies the confusion and reaction by a victim when a man she knows and admires (here President Clinton) gropes and fondles her unexpectedly. Assuming events occurred as Ms. Willey recounted them, she was probably both embarrassed and shocked. It also may explain why she continued to write him letters seeking a job, as though nothing untoward had occurred. She was in denial and needed a job desperately. Like the Willey case, it is not uncommon for a woman who has been raped or sexually assaulted by a man she knows to continue to see him after the assault.<sup>205</sup> The confusion is more extreme in the case of children who are sexually abused by a family member or acquaintance. They have been admonished not to talk with strangers but generally have not been schooled in refusing their fathers' sexual advances. For example, assume a 11-year-old girl whose father has

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*Caught*, COLUMBIAN, Apr. 4, 1998, at A5.

202. Once the police had the suspect in custody there was some indication that the suspect could not be blamed for all the rapes of which he was initially accused. What police had done was attribute all unsolved stranger rapes to the same person. See Bruce Westfall, *Gallatin Charged With Other Rapes*, COLUMBIAN, May 15, 1998, at A1 [hereinafter Westfall, *Gallatin*]; Bruce Westfall, *DNA Implicates Gallatin in 5 Rapes, Murder*, COLUMBIAN, May 22, 1998, at B1 [hereinafter Westfall, *DNA*].

203. See Interview with Terri Lufkin, Director of SafeChoice Domestic Violence Program, YWCA of Clark County, Vancouver, Wash. (Sept. 15, 1998).

204. Fewer than a third of rapes and sexual assaults against females 12 and older are reported to the police. See GREENFELD, *supra* note 21, at 2. The most common reason cited by victims for not reporting is that they view the offense as a personal matter. See *id.* at 2. Only 17% of rapes and sexual assaults are committed in a public place such as a street, parking lot, or garage while at least 60% are committed in the victim's home or the home of a friend, relative, or neighbor. See *id.* at 3.

205. See Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 35, 44 (Patricia Searles & Ronald J. Berger eds., 1995) (finding that 42% of college women who reported in a survey that they had been raped in the last year indicated that they had sex again with the offender on a later occasion).

warned her to stay away from a strange man (e.g., pedophile) living down the block. One day when father and daughter are alone, the father fondles her breasts. The 11-year-old girl is made uncomfortable by this event but may not define the act as a sexual assault. In most cases, if the acts are not defined by the victim as a crime, they will not be reported, and there remains an increased likelihood of continuing and escalating risk of sexual assault by the perpetrator. In fact, in many of these cases, the perpetrator himself does not define his conduct as a crime by engaging in cognitive distortions that minimize or rationalize his behavior or that blame the victim.<sup>206</sup> Thus, by focusing attention on the stranger sex offender, current victims of nonstranger offenders remain at increased risk of revictimization by either the same offender or a different offender. Not defining an act or acts as sexual abuse may be one of the reasons that victims of childhood and adolescent sexual abuse are at increased risk to experience later victimization in adulthood.<sup>207</sup>

A second way current victims of sex crimes are adversely affected by sex offender legislation occurs after a sex offense is reported.<sup>208</sup> Police and prosecutors generally are more interested in going after the stranger offender because legal actors often do not define sex cases involving acquaintances or family members as crimes. A woman who reports that she has been raped by her boyfriend or ex-boyfriend raises legal eyebrows. In fact, I attended a sexual assault talk delivered by a sheriff's deputy who made the comment that frequently when he responded to the scene of a sexual assault report, he had reasons to doubt the credibility of the victim.<sup>209</sup> This was because the victim and the offender had a relationship.<sup>210</sup> If the victim resumes her relationship with the offender after the sexual assault (not an uncommon occurrence),<sup>211</sup> law enforcement and prosecutors may further doubt the victim's credibility. The same logic is not applied by police to the majority of aggravated assaults or attempted murders between males who resume their relationship with each other after the incident.<sup>212</sup> The credibility of these male victims is not an issue. Such

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206. See Simon, *Offenders Specialize*, *supra* note 1, at 41 (reviewing the literature of the psychological characteristics of offenders who commit sex crimes). Cf. Jane F. Gilgun & Teresa M. Connor, *How Perpetrators View Child Sexual Abuse*, 34 *SOCIAL WORK* 249, 250 (1989) (finding that perpetrators' accounts suggest that sexual abuse of children feels good to them and that, during the sexual act, perpetrators view the child victim as an object); Marnie E. Rice et al., *Empathy for the Victim and Sexual Arousal Among Rapists and Nonrapists*, 9 *J. INTERPERSONAL VIOLENCE* 435, 442, 445-47 (1994) (finding that rapists were less empathic than nonrapists).

207. See RUSSELL, *supra* note 21, at 12.

208. In 1995, out of the one-third of rapes and sexual assaults that are reported to police, only half of them were cleared by an arrest, and 8% were deemed by police to be unfounded. See GREENFELD, *supra* note 21, at 7. About 5 out of 10 rape defendants were released prior to trial. See *id.* at 12. In 1992, of those reported rapes that are cleared by an arrest and found to be valid by the police, only 20% result in convictions. See *id.* at 14. Of these convicted offenders, just over two-thirds receive a prison sentence. See *id.*

209. See Pat Vichas, Address at the Clark County Domestic Violence/Sexual Assault Task Force Meeting (June 27, 1997).

210. See *id.*

211. See Koss, *supra* note 205, at 44.

212. "Most assaults result in little if any physical injury to the victim. Many assaults and homicides involve disputes between people previously known to each other where it is

legal policies and double standards hinder the ability of current rape and sexual assault victims (particularly females) to receive satisfaction from the legal system. In addition, the victim's experience with legal actors in nonstranger rapes and sexual assaults results in further trauma because of the implicit and explicit victim-blaming that occurs. In fact, the legal and social response to women who are raped by nonstrangers can be so traumatic that psychological symptoms thought to be associated with the sexual assault may actually be a result of the lack of support a victim feels from others.<sup>213</sup> For example, acquaintances and family members of the victim may engage in unsupportive victim-blaming behavior. Consequently, to be a rape victim of a nonstranger usually results in a second trauma since the social and legal response to her victimization and impedes her ability to heal.

A third way in which current victims are adversely affected by legal policy is the availability of more lenient treatment of nonstranger perpetrators by the legal system. Nowhere is this more true than in the realm of child molestation cases within families. In Washington, as in many states, sex criminals are afforded treatment as a sentencing alternative.<sup>214</sup> This treatment, I may add, is of unproven effectiveness.<sup>215</sup> This legal policy presupposes that the crime was the result of a mental illness and can be treated with therapy. Evaluations of sex offender treatments find that treated and untreated sex offenders are equally likely to be convicted of a new offense.<sup>216</sup> The availability of treatment to offenders who commit sex crimes at a time when general criminal offenders do not have the option for treatment further reinforces everyone's perception that what occurred was not a real crime. Even if the offender goes to prison and treatment is available there, there is a preference among treatment providers for incest offenders who are believed to be more amenable to treatment. Consequently, the victim is left with the impression that her victimization was not as serious as it

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difficult to distinguish victim from offender in terms of provocation or responsibility." MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* 19 (1990). Both victims and offenders tend to have high rates of past criminal involvement. Almost 40% of aggravated assault victims do not report the incident to the police because the event is considered too trivial to be a concern of the criminal justice system. *See id.* "Victims of attempted homicide or aggravated assault rarely require police protection following the crime. In fact, the evidence suggests that most victims resume their prior relationship with the offender." *Id.* at 34 *Cf.* ALBERT J. REISS, JR. & JEFFREY A. ROTH, *UNDERSTANDING AND PREVENTING VIOLENCE* 61 (1993) (noting that rather than being distinct populations, there is great similarity between the demographic profiles of victims and offenders. Generally both groups—those at highest risk of violent victimization as well as those at highest risk of violent offending—tend to be young, black males of low socioeconomic status who live in the nation's central cities).

213. *See* Stefan, *supra* note 44, at 1298.

214. Even offenders incarcerated in prison for sexual assault are more likely than the rest of the prison population to have victimized an acquaintance, usually a child or stepchild. These molesters are more likely than the rest of the prison population to have a sentence condition that includes psychological or specialized sex offender treatment. *See* GREENFELD, *supra* note 21, at 21–23.

215. *See* Simon, *Offenders Specialize*, *supra* note 1, at 45.

216. *See, e.g.*, Marnie Rice et al., *Evaluating Treatment Programs for Child Molesters*, in *EVALUATING JUSTICE: CANADIAN POLICIES AND PROGRAMS* 189, 199 (Joe Hudson & Julian Roberts, eds., 1993).

would have been if it were committed by a “non-mentally ill” stranger.<sup>217</sup> In addition, the family is likely to be lulled into a false sense of security when the offender is in treatment, which is dangerous if the treatment is not effective.

A fourth way in which the current victims of sexual assault are underserved by legal policies is the focus on specialization. By this I mean the tendency, when investigating a rape, for example, of police to round up the registered sex offenders. I have seen this occur and backfire repeatedly in various jurisdictions.<sup>218</sup> Many times, the perpetrator is never apprehended. In cases where the rapist is arrested, it is often the case that he has no prior convictions for any sex crime but has a varied criminal history.<sup>219</sup> In the case of the Vancouver serial rapist, this turned out to be the case.<sup>220</sup> The perpetrator had been in prison for a robbery, had been convicted of various misdemeanors including domestic violence, and had been linked to the homicide of a woman in Portland.<sup>221</sup> The suspect now in custody was apprehended by luck near the vicinity of the most recent rape.<sup>222</sup> During all the years the police spent investigating the series of rapes, they only targeted offenders with past sex offender convictions.<sup>223</sup> Arguably, the needs of the victims in these rapes (who were raped in their own homes) would have been better served by a wider investigation beyond the registered sex offenders, with a higher likelihood of apprehending the rapist. Although there is a public and police misconception that offenders who commit sex crimes specialize in sex crimes, empirical evidence indicates that, like other types of offenders, sex offenders commit a wide variety of crimes.<sup>224</sup> When investigating a sex crime, restricting the focus to registered sex offenders is likely to miss suspects with no known criminal record for sex crimes. In the case of the Vancouver serial rapist, arguably, the longer police used this ineffective investigation strategy, the more trauma and fear the rapist’s victims experienced for fear that he might return to their homes again. The failed strategy also may have facilitated the rapist’s commission of additional rapes and possibly one murder due to the fact that he was at large.<sup>225</sup>

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217. There is no credible evidence that offenders commit sex crimes because they possess a mental disorder that differs from whatever ails offenders who commit other types of crimes. In fact, sex offenders are more likely to be diagnosed with an antisocial personality disorder than with pedophilia or any other mental disorder. See Simon, *The Myth*, *supra* note 1, at 397–98. There is currently no effective treatment available for antisocial personality disorder. See Simon, *supra* note 2, at 141–43. When the legal system orders sex offenders into treatment of unproven efficacy, it allows offenders to escape responsibility for their antisocial behavior by allowing them to blame it on a psychological problem.

218. See Leonore M.J. Simon, *The Rape Myth: The Rash of Sexual Assaults in Clark County Might Not Be as Mysterious as Police Suggest*, COLUMBIAN, July 27, 1997, at B7.

219. See Ryll, *supra* note 201, at A5; Simon, *supra* note 218, at B7.

220. See Ryll, *supra* note 201, at A5.

221. See Westfall, *DNA*, *supra* note 202, at B1.

222. See Westfall, *Gallatin*, *supra* note 202, at A1.

223. See Telephone interview with Gary Lucas, Sheriff of Clark County, Wash. (July 25, 1997).

224. See Simon, *Offenders Specialize*, *supra* note 1, at 42–44; Simon, *The Myth*, *supra* note 1, at 400–01.

225. See Westfall, *DNA*, *supra* note 202, at B1; Westfall, *Gallatin*, *supra* note 202, at A1.

Current victims of sexual offenses are neglected by current policies in yet another way. Efforts to reach out to individuals in high-risk situations in order to terminate what may be ongoing victimization are limited.<sup>226</sup> In the area of child sexual abuse, the 1980s saw the growth of sexual abuse prevention education programs for children.<sup>227</sup> The availability of such programs has been reduced since then due to cost-cutting measures affecting schools and community groups.<sup>228</sup> Although studies of the efficacy of child education prevention programs have been conducted,<sup>229</sup> very few evaluations examine the number of children who were being molested who used such outreach efforts to terminate their abuse by reporting it. In fact, many who question the effectiveness of the child education programs in preventing future victimization recognize the potential ability of these programs to elicit early disclosure of abuse, thereby preventing continued abuse.<sup>230</sup> Although the literature in the area has not addressed the issue, arguably programs that educate parents about the prevalence and incidence of child sexual abuse may lead parents to question their own parenting practices, as in the case of a mother who has acceded to her husband's demands to interact in inappropriate ways with her daughters from a previous marriage.<sup>231</sup> For parents who themselves were sexually abused or raised in troubled families, such

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226. See Patricia Searles & Ronald J. Berger, *Conclusion, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT*, supra note 205, at 266 (noting the need to expand educational programs that confront rape-supportive beliefs and attitudes, but not examining what could be done to intervene in ongoing situations); CROWELL & BURGESS, supra note 30, at 107–08 (reviewing rape crisis services offered after a woman has been raped, but not focusing on the need for intervention with individuals who do not seek help).

227. See Deborah A. Daro, *Prevention of Child Sexual Abuse*, 4 FUTURE CHILDREN 198, 202 (1994). Most of the programs for child education included teaching children the distinction between good, bad, and questionable touching; the rights of children to control who touches their bodies and where they are touched; the importance of the child's telling a responsible adult if someone inappropriately touches the child, even if the child was told not to reveal the incident; assertiveness skills, ranging from repeatedly saying "no" to the use of self-defense techniques and; the existence of support systems to help the child who has experienced any form of maltreatment. See *id.* at 203.

228. See Interview with Terri Lufkin, Director SafeChoice Domestic Violence Program, YWCA of Clark County, Vancouver, Wash. (Jan 29, 1998).

229. See Daro, supra note 227, at 203–15. Most studies measure success of these programs based on acquired knowledge and changed attitudes of children, parents, and teachers. *Id.*

230. See *id.* at 214.

231. During my clinical psychology internship, I was treating a woman and her two preteen daughters in such a situation. Both daughters had been molested by the stepfather during the evening when he would spend long periods of time in the daughters' bedrooms engaging in inappropriate sexual behavior with them. In addition to the trauma experienced by the daughters and the mother over these incidents, the mother experienced memories of her own sexual abuse as a child—experiences she had never told anyone about prior to relating them to me in the context of treating her daughters. It became clear that the mother needed treatment to deal with her own victimization issues. It is not uncommon to hear clinical or anecdotal accounts of women sexually abused as children who marry a sexual abuser who in turn molests her own daughters. It may be that reaching out to women such as these and providing them with treatment and education may go a long way to prevent their own children from being abused.

training could help them distinguish among appropriate, potentially troublesome, and inappropriate sexual interests or behaviors, leading them to better monitor their children's behaviors and activities.

### *B. Prospective Victims*

Current laws and policies toward sex offenders have antitherapeutic effects on prospective victims of nonstrangers. This is because as long as the public focus is on the stranger sex criminal, prevention of the majority of sex offense cases is probably not undertaken.<sup>232</sup> As long as parents are worried exclusively about the stranger child molester lurking in dark alleys, they are not as likely to be in a position to protect their children from the nonstranger.<sup>233</sup> This is presumably because most parents do not know that their children are at substantially higher risk of being sexually victimized by a family member or acquaintance.<sup>234</sup> It is not uncommon, then, for a mother whose child tells her about the sexual abuse perpetrated by her husband to react in denial.<sup>235</sup> This may be because her home is the last place she has been socialized to expect predatory behavior (or because if she admitted to herself that it did happen in her home, she would also have to admit that she failed to protect her child).<sup>236</sup>

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232. See Maggie Hoyal, *These Are the Things I Remember*, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT, *supra* note 205, at 119, 121, 123.

233. See *id.* at 121. Although the public and political emphasis on stranger sex crimes appears to be misplaced, it is important that individuals be educated about prevention of stranger and nonstranger crimes. However, much in the crime education and prevention area focuses primarily on stranger crime. See MARCUS FELSON, CRIME AND EVERYDAY LIFE: INSIGHTS AND IMPLICATIONS FOR SOCIETY 115–35 (1994) (devoting a chapter to prevention of different types of stranger crimes and omitting any mention of preventing sexual assault and rape).

Statistics of correctional populations indicate that 60% of all rape and sexual assault offenders are under conditional supervision in the community. See GREENFELD, *supra* note 21, at 15. Generally, probation and parole supervise about three-quarters of the correctional population. See *id.* at 15. Rape and sexual assault offenders constitute 4% of those on probation and about 10% of those serving time in state prisons. See *id.* at 17.

234. See Ellen Bass, *Child Sexual Abuse*, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT, *supra* note 205, at 115.

235. See Christina Glendenning, *When You Grow Up An Abused Child*, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT, *supra* note 205, at 246, 247; Hoyal, *supra* note 232, at 121, 123.

236. See Glendenning, *supra* note 235, at 248 (recounting that when she tried to tell her mother and a school counselor that she was being sexually abused by her father, both refused to hear her). A child's parents play a crucial role in affecting a girl's vulnerability to sexual victimization. Girls whose mothers are absent, sick, or poorly educated run a particularly high risk. Similarly, having a stepfather increases a girl's chances of being sexually abused, not just by the stepfather, but by other persons outside the family. When the parent's marriage is unhappy, rates are also high. See FINKELHOR, *supra* note 23, at 144. Compared to children whose families earn \$30,000 per year or more, children in families with annual incomes below \$15,000 per year are almost 18 times more likely to be sexually abused. See SEDLAK & BROADHURST, *supra* note 25, at 5–50.

There are several ways in which prevention opportunities are missed that would benefit prospective victims of nonstranger sex offenses. First, most people do not have accurate information on which to base their behavior. Without educating the public about the prevalence and incidence of sex crimes committed by nonstrangers, arguably the community is not in a position to prevent victimization from offenders they know.<sup>237</sup> In child sexual abuse cases, most parents may not know that the danger from nonstrangers greatly exceeds the danger from stranger sex crimes.<sup>238</sup> Since many nonstranger child sex abuse cases continue for a long period of time before they are reported<sup>239</sup> (if they are reported), the lack of a parent's vigilance not only fails to protect the child from the first abusive incident, but also from each subsequent incident.<sup>240</sup> In addition, sexual abuse as a child is a risk factor for further victimization by another perpetrator in childhood or adulthood.<sup>241</sup> Consequently, failure to protect a child from sexual abuse can doom that child to a lifetime of repeat victimization. Since a substantial proportion of molestation crimes are committed by fathers, stepfathers, and brothers,<sup>242</sup> it is not clear how educating the parents or the mothers can have preventive effects.<sup>243</sup> Theoretically, parent education efforts can strengthen parents' protective instincts and capacities so that they do not negligently or knowingly allow spouses or others to abuse their children.<sup>244</sup> Evaluations of existing parenting workshops have not been promising, largely because few parents attend these sessions, and those who do often have a prior interest or familiarity with the topic.<sup>245</sup> In addition to educating parents about inappropriate and appropriate sexual interests and behaviors, broader parenting issues can be addressed. Parent education programs can emphasize communication skills to create a context in which secrets or manipulation by another adult becomes more difficult.<sup>246</sup>

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237. Cf. ANDREW KARMEN, *CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY* 233 (2d ed. 1990) (noting that child sexual abuse cases that come to the attention of medical authorities are usually not turned over to the criminal justice system because families consider the incidents to be private matters). Treating intrafamilial child sexual abuse as a private matter ensures that it will not receive publicity and that the public will not know about these cases.

238. See KARMEN, *supra* note 237, at 231 (summarizing the all too common prevalence of child sexual abuse and omitting the fact that the vast majority of these cases are committed by family members and acquaintances). Thus, even one being educated about crime victims and sexual abuse would need to read between the lines to glean the threat to children posed by family members and acquaintances.

239. See *supra* note 30 and accompanying text.

240. See KARMEN, *supra* note 237, at 231.

241. See TJADEN & THOENNES, *supra* note 30, at 6.

242. See *supra* notes 21–23 and accompanying text.

243. Only by systematically implementing and evaluating education efforts of this type will we know if they work in reducing the prevalence and incidence of intrafamilial child sexual abuse. Arguably, children also can benefit from such education efforts if they are confused about the appropriateness of sexual behavior directed toward them in the home. See Hoyal, *supra* note 232, at 123 (recounting how much she wanted her mother to validate her feelings about her father's sexual behavior toward her being "wrong").

244. See Daro, *supra* note 227, at 216–17.

245. See *id.* at 217.

246. See *id.*

Public education and awareness efforts need to alter the public's perception of child sexual abuse, as well as strengthen parents' capacities to nurture their children. A specific targeted public education message is needed to demystify the nature and magnitude of the problem of sexual abuse in a community. Public awareness messages are needed to promote the notion that child sexual abuse, like all forms of child maltreatment, is everyone's responsibility and everyone's problem. "Beyond increasing the public recognition of the problem, such campaigns can be used to alter the normative standards that create an environment in which child sexual abuse can flourish."<sup>247</sup>

Policy makers should focus more on education and prevention to determine how the majority of these nonstranger cases can be averted. In the short term, these efforts should focus on the schools as victim advocates have done in the past. Victim advocates should continue to visit preschools and elementary schools to give a short presentation on "good touching" and "bad touching" and to discuss individual problems with children who volunteer to talk afterwards. Junior high and high schools are also places where victim advocates can educate students about sexual abuse and acquaintance rape.

The public generally has very little information on the prevalence of forcible rape by nonstrangers.<sup>248</sup> Parents do not educate their daughters (and sons) about the dangers of dating relationships or avoiding high risk situations such as alcohol with males who are known to them.<sup>249</sup> Parents probably do not educate their daughters about not finding themselves alone with a man in a place where no one can intervene.<sup>250</sup> Parents presumably may not educate their daughters about casual acquaintances or friends of the family who might look for an opportunity to victimize the daughters. Parents arguably also fail to educate their daughters about how to resist the pressure to have unwanted sex. Because sex is such an uncomfortable topic between parents and teenagers, if a rape occurs, the victim may be unable to tell her parents. Victims also may not tell their parents for fear of being blamed. All this is unfortunate because teenage girls have the highest rape victimization rate of any age group.<sup>251</sup>

Another way that current laws and policies toward sex crimes have antitherapeutic effects on prospective victims is the lack of focus on educating males and females to respect females. Our society is suffused with a great deal of misogyny. Not only do men often dislike women, but women frequently dislike each other and

247. See *id.* at 216.

248. See GORDON & RIGER, *supra* note 35, at 26.

249. See *id.* at 53–54 (describing how parents warn their daughters to stay away from strangers). There is no research on the majority of parenting practices recommended here. However, there is substantial research on risk factors for acquaintance rape. See Koss, *supra* note 205, at 43 (noting that most college date rape occurs in situations in which the offender and victim are drinking).

250. See Koss, *supra* note 205, at 43 (noting that 86% of the college rapes occurred off campus in either the man or woman's home or car).

251. See CROWELL & BURGESS, *supra* note 30, at 32 (noting that the highest rate of sexual assault and other forms of violent victimization are experienced by women aged 12–18).



themselves.<sup>252</sup> For example, I find, at the beginning of my violence toward women class, that the majority of females are not sympathetic to women victims, even if they have been victims themselves. There are many messages that children receive about the relative worth of their gender. This probably starts with the family where the mother is disparaged and abused. It arguably continues in the school system where females may be neglected and discouraged from intellectual achievement.<sup>253</sup> Occasionally, one reads an article about a boy in an elementary school who steals a kiss from a girl. This is dismissed as “boys will be boys,” as opposed to “assaultive behavior starts early.” Occasionally, one reads about the sexual harassment by male students of females in the schools.<sup>254</sup> Where females are undervalued by themselves and others, they are more prone to victimization.<sup>255</sup> Violence against women in the United States and the lukewarm legal response to it epitomizes the misogyny of our culture.

## VII. SOLUTIONS FOR FUTURE LAW REFORM TO ACHIEVE THERAPEUTIC EFFECTS ON VICTIMS

It is clear that current legal policy directed at stranger sex offenders adversely affects the majority of victims of sex crimes, i.e., nonstranger victims. Clearly, the rape law reform begun in the mid-1970s and the increased attention to child sexual abuse that peaked in the 1980s need to continue in a second generation of laws, policies, and public education strategies to target the reporting, prosecution, and conviction of nonstranger offenders. I propose an approach to law that integrates three perspectives—therapeutic jurisprudence, preventive law, and restorative justice, to restructure legal policy toward sex offenses against nonstrangers.

252. See GLORIA STEINEM, *REVOLUTION FROM WITHIN: A BOOK OF SELF-ESTEEM* 24–25 (1992); ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 158–63 (1987); Asta Bowen, *Misogyny May Be ‘Out’ but It’s Alive and Well In Many Guises*, SEATTLE POST-INTELLIGENCER, Aug. 14, 1998, at A16; Kate Stone Lombardi, *Girls Wrestle With Peer Pressure*, N.Y. TIMES, Nov. 29, 1998, at 15.

253. See STEINEM, *supra* note 252, at 120–21; Lombardi, *supra* note 252, at 15.

254. See Joan Biskupic, *A Big Test On Taunts at School; Justices Hear Case Over Harassment*, WASH. POST, Jan. 13, 1999, at A4 (noting that the justices of the Supreme Court, in a case before the Court on sexual harassment in the schools, suggested that because sexual harassment is so pervasive, complaints of students sexually taunting their classmates might best be left to school officials to sort out); Gerald W. Bracey, *The Culture of Sexual Harassment*, PHI DELTA KAPPAN (Bloomington), May 1997, at 725. The case discussed in the Biskupic article that is currently before the Supreme Court involves a lawsuit brought by Aurelia Davis against the school district, after her daughter LaShonda was sexually taunted by a boy in her fifth-grade class. See Biskupic, *supra*, at A4. He tried to grab at her breasts, rubbed against her in the hallways, and whispered that he wanted to “get in bed” with her. Despite repeated complaints from LaShonda’s mother, school officials in Forsyth, Georgia, failed to do anything to stop the boy. See *id.* The case referred to is *Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 119 S. Ct. 29 (1998).

255. See OLA W. BARNETT & ALYCE D. LAVIOLETTE, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 1–22 (1993); PLECK, *supra* note 252, at 49–66; Bracey, *supra* note 254, at 725.

One approach to law in these cases, therapeutic jurisprudence, investigates the law's impact on the emotional lives of participants in the legal system by encouraging sensitivity to therapeutic and iatrogenic consequences that may result from the legal rules, legal procedures, and the roles of legal actors.<sup>256</sup> One can see most glaringly the adverse effect of the victim-offender relationship on the legal processing of criminal cases in the area of domestic violence.<sup>257</sup> The area of sex offenses is analogous, in that victims who have a prior relationship with the offender are not treated seriously and respectfully by themselves, by social others, and by the legal system.<sup>258</sup> The legal system, in particular, further traumatizes victims of child molestation and forcible rape who have a relationship with the offender.<sup>259</sup> This Article extends the reach of earlier work by arguing for the use of the laws, legal procedures, and legal actors of the criminal justice system to treat childhood incest and acquaintance rape as seriously as (if not more seriously than) it does cases perpetrated by strangers. Only by treating acquaintance sex offenses as seriously as stranger cases can these victims begin the healing process.<sup>260</sup> By targeting nonstranger sex offenders for arrest, prosecution, and conviction, the victims will define what happened to them as a crime and perhaps prevent its recurrence by the same offender or by a different one.<sup>261</sup> Sensitive and empathic treatment by officials ranging from the police to the judges (and juries) in acquaintance rape cases will validate victims' often confused feelings about their victimization.<sup>262</sup> Legal authorities such as child protection agencies, as well as legal actors, can treat intrafamilial child sexual abuse as a crime instead of as a family problem. This would help children define their victimization and go far in preventing future victimization by the same or a different perpetrator.<sup>263</sup> Handing out sentences commensurate with stranger sex offenders will combat any distortions in the victim's mind that she was at fault.<sup>264</sup> Prosecuting nonstranger offenders to the fullest extent of the law may have the effect of changing public and jury attitudes about the victims in these cases.

Preventive law is a second perspective on law practice that seeks to minimize and avoid legal disputes and to increase life opportunities through legal planning.<sup>265</sup>

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256. See, e.g., LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43 (1995) (applying therapeutic jurisprudence to the legal processing of domestic violence cases); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law*, 39 ARIZ. L. REV. 25 (1997).

257. See Simon, *supra* note 256; PLECK, *supra* note 252, at 125-44.

258. See SEARLES & BERGER, *supra* note 226, at 1-6.

259. See *supra* notes 21-34 and accompanying text.

260. See SEARLES & BERGER, *supra* note 226, at 1-6.

261. See *id.*

262. See *id.*

263. See *id.*

264. See *id.*

265. See generally LOUIS M. BROWN & EDWARD A. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (1978); Edward P. Richards III, *Should Preventive Law, Like some Medicine, Be Mandated by Government?*, PREVENTIVE L. REP., June 1992, at 28. Helpful information may be obtained from The National Center for Preventive Law, 1900 Olive Street, Denver, Colorado 80220. Its web page is available at <<http://www.pacificrim.net/~ncpl>>.

A key tool of the preventive lawyer is the regular "legal checkup."<sup>266</sup> Although preventive law generally is designed for good private legal or business practice, it can be used by public legal actors to reassess the impact of nonstranger sex offending on the majority of sex offense victims. Such a reassessment could result in renewed law reform that takes into account the harm done by nonstranger offenders and the laws, policies, and rules that shield them from accountability. Legislators could re-write child molestation statutes to reflect the duration of the sexual abuse, the abuse of a trusted relationship, and the harm to the victim in assessing the seriousness of child sexual abuse cases. Legal actors could be given incentives to arrest, charge, prosecute, and incarcerate offenders who victimize nonstrangers with as much zeal as is devoted to the stranger sex offender. The use of preventive law here is for public lawyers and actors to enact and apply laws to nonstranger sex offenders in a manner calculated to validate the victims and prevent harm to current and prospective victims. The "legal checkup" idea could, in this context, be used on both an individual and a system basis.

On an individual basis, the "legal checkup" could consist of calendaring a case after sentencing for the victim to come to court and report on her progress in healing and her ability to get services such as therapy, compensation, and restitution. On a system basis, once a year, the police, prosecutors, judges, corrections officers, victim service advocates, and past victims could convene to determine how well the laws and policies are working to redress the problems of nonstranger victims. This would necessitate a scientific evaluation of whether the laws and policies are increasing convictions of nonstranger crimes and whether all levels of the criminal justice system are approaching these cases in a more welcoming manner. The "legal checkup" concept could extend to programs designed to educate the public about the magnitude of the problem of nonstranger sex crimes. Legal actors such as judges could visit schoolrooms and discuss the seriousness, in the eyes of the law, of incest and other forms of child molestation and nonstranger sexual assault and rape. Educating children and adolescents could build up an immunity of sorts to victimization by family and acquaintances.

Preventive law and therapeutic jurisprudence can work in tandem to encourage legal actors to conduct legal business with maximum attention to the well being of the nonstranger victim. This could involve identifying and counseling victims of nonstranger sex crimes. Methods should be devised to identify victims of child sexual abuse and forcible rape who do not report their victimization. Identifying victims and providing services to these victims necessitates public education efforts that reach them. Child protection agencies need to be funded generously to allow case workers to devote more resources to reported cases. Legal actors need to respond to incest offenders in the same way that they respond to stranger molestations. Police and prosecutors need to be sensitized to dispense with their suspicion and express empathy to rape victims. Legal actors from police and prosecutors to judges can depart from the more cynical, dispassionate, traditional roles of police, lawyers, and judges to the less emphasized role of empathic counselor.<sup>267</sup>

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266. See Edward A. Dauer, *Future of the Legal Profession Lies in Utilizing Preventive Law*, PREVENTIVE L. REP., Mar. 1990, at 25.

267. See Edward D. De, *The Causes of Popular Dissatisfaction with the Legal*

Restorative justice is the third paradigm that could be brought to bear on restructuring the legal system to be more therapeutic to rape and sexual assault victims.<sup>268</sup> Restorative justice advocates that victims should have more input into the proceedings, and that the State or the community should restore victims as far as possible to their former condition, through compensation and neighborly support.<sup>269</sup> A secondary goal in the schema of restorative justice is to hold the offender accountable.<sup>270</sup>

Although restorative justice appears to focus, in large part, on crimes between strangers (and to a large extent, it focuses on property offenses), its principles could work together with the principles of therapeutic jurisprudence and preventive law to restore the mental and physical well being of nonstranger sex crimes victims. This could include convicting and incarcerating the offender, providing mental and physical health services to the victim, compensating the victim for her expenses and lost time from work, and any other services that would help the recovery process.

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*Profession*, 68 ST. JOHN'S L. REV. 85, 116 (1994) (suggesting that the popular dissatisfaction with the legal profession is in part due to lawyers' overemphasis on litigation and underemphasis on counseling). See also Hon. Edward D. De, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685 (1982).

268. The history of the criminal law indicates that in early Anglo-Saxon times, victims received compensation from the offender and were directly involved in the criminal process. As the State took over that responsibility, the victim was removed as a party to a criminal action. This was due to a philosophical shift that reconceptualized harm done to an individual as harm done to the community or State. As a result of this historical shift, until the last two or three decades, victims' needs and wishes have not been considered in criminal prosecutions. See JOANNA SHAPLAND ET AL., *VICTIMS IN THE CRIMINAL JUSTICE SYSTEM* 1 (1985) (indicating that the historical shift from viewing a crime victim as an injured party to conceptualizing the injured party as the state resulted in neglect of the victim in criminal proceedings); MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS* 1, 14 (1991); HOWARD ZEHR, *MEDIATING THE VICTIM/OFFENDER CONFLICT* (1982); Gilbert Geis, *Victims of Crimes of Violence and the Criminal Justice System*, in *PERSPECTIVES ON CRIME VICTIMS* 62 (Burt Galaway & Joe Hudson eds., 1981); Daniel W. Van Hess, *Restorative Justice*, in *CRIMINAL JUSTICE RESTITUTION, AND RECONCILIATION* 5-8 (Burt Galaway & Joe Hudson eds., 1990) (noting that under Henry I, certain offenses became crimes against the king's peace); Howard Zehr & Mark Umbreit, *Victim/Offender Reconciliation: An Incarceration Substitute*, 46 *FED. PROBATION* 63 (1982) (noting that victims in general want more inclusion in the criminal process).

269. See JOANNA SHAPLAND ET AL., *supra* note 268; WRIGHT, *supra* note 268, at 14, 19, 20, 27, 116-119, 133; Geis, *supra* note 268, at 70; Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, in *PERSPECTIVES ON CRIME VICTIMS*, *supra* note 268, at 266. In the United States in the 1970s, in addition to rape-law reform, the general victim's rights movement made attempts to provide victims with input into decision making from arrests to sentencing in criminal cases. See Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, in *PERSPECTIVES ON CRIME VICTIMS*, *supra* note 268, at 318. The U.S. President's Task force on Victims of Crime suggested that the victim in every prosecution should have a constitutional right to be present and to be heard at all critical stages of judicial proceedings. See LOIS HAIGHT HERRINGTON ET AL., *U.S. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT* 17-36, 63-71, 72-82 (1982).

270. See Hall, *supra* note 269, at 318.

The principles of restorative justice could work in various ways with therapeutic jurisprudence and preventive law to effect positive outcomes for rape and sexual assault victims who are victimized by nonstrangers. The criminal justice system could focus as much on the victim's well being as it does on the offender's legal outcome. Victims of child sexual abuse could be appointed a guardian ad litem or separate attorney to safeguard their unique interests when legal parties and therapists propose to re-unify the family. Rape victims could be provided their own attorneys to represent their interests in criminal proceedings. This would empower the victim while at the same time ensuring that she participates in the prosecution of her tormentor. A rape victim's attorney could work in conjunction with the prosecutor while maintaining a degree of legal independence that safeguards the interests of the victim and not those of the state. Current victims could be scheduled to appear in court each year to chart their progress. Judges might want to inquire whether the child or woman has had any unwanted contact with the offender. Evaluators working with the court may want to measure victim satisfaction at each stage of the legal process, providing the system with essential feedback to further improve its response to sex crime victims. In rape cases, such evaluations could shift attention from conviction rates of prosecutors to victim satisfaction with the legal process at every stage.

In terms of prospective application of these three principles, changing the focus from stranger to nonstranger sex crimes in legislation, media coverage, and crime prevention strategies could educate the public and prospective victims about the hazards associated with nonstranger males.<sup>271</sup> Armed with information, women and children could plan their daily lives taking precautions against victimization. In particular, parents who frankly discussed the perils of dating with their daughters could encourage their daughters to explore and practice strategies to avoid victimization by rape. Similarly, mandatory education outreach programs in the schools can educate children about what are appropriate child-adult interactions. Similar interventions aimed at pre-teen and teenage girls in the school system can inform them about child sexual abuse and acquaintance rape.

Preventive law, therapeutic jurisprudence, and restorative justice can work together in other ways to encourage legal actors and policy makers to conduct legal business with maximum attention to the well being of victims of sexual assault and rape at the hands of nonstrangers. By shifting the legal focus from stranger to nonstranger sex offenses, therapeutic benefits can accrue to the majority of current and prospective victims of sex crimes.

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271. Some argue that a consequence of such crime prevention strategies may be the tainting of healthy relationships with paranoia or unfair suspicion toward a relative/acquaintance, based solely on his gender. Interview with Richard Lamma, Coach Operator for C-Tran Buses, in Vancouver, Wash. (Nov. 20, 1998). This was an accusation leveled against the child education programs in the schools designed to inform children about child sexual abuse. Interview with Terri Lufkin, Director SafeChoice Domestic Violence Program, YMCA of Clark County, in Vancouver, Wash. (Jan. 29, 1998). It is not clear whether this issue has been scientifically studied to determine if such programs instilled global suspiciousness in children or stifled normal male demonstrations of affection toward children.

### VIII. CONCLUSION

It is clear that current sex offender legislation has deleterious effects on current and prospective victims of sex crimes at the hands of acquaintances and relatives. Due to myths and misconceptions, the community, policy makers, and the media are afraid of the stranger while ignorant that danger to children and women resides closer to home. Educating the public about the nature and magnitude of sex crimes would be a first step in mitigating the trauma to current victims while protecting prospective victims. Public education is much more difficult than it may seem. When most people are made aware that someone they know or with whom they work is in jail for molesting his step-daughter, it is common for people to immediately engage in denial.<sup>272</sup> They will say, "he is not that type of guy," or "the step-daughter is lying," in order to protect themselves from the threatening fact that incidents like these happen and happen often.<sup>273</sup> If people find out that a woman they know has been raped, they become suspicious of the woman.<sup>274</sup> If the woman was raped by a stranger, they say she was negligent or should have known better than to walk alone to the parking lot at night.<sup>275</sup> If she was raped by her boyfriend or husband, they say "how is that possible?"<sup>276</sup> Thus, public education campaigns will encounter a great deal of resistance by people who want to believe they or their loved ones are immune to victimization.

An important step would be to encourage newspapers and television news programs to highlight the danger of nonstranger sex crimes by reporting them more frequently and downplaying the stranger crimes. Just recently in Vancouver, Washington, both the media and law enforcement officers were taken in by a woman's report that a stranger had abducted her two year old in a grocery store parking lot.<sup>277</sup> Within twenty-four hours and after stopping a hundred or more vehicles matching the imaginary description, it was clear that the mother had made up the story to conceal her own maltreatment of her son<sup>278</sup> (one version of her story is that her "other" personality threw the child out of the truck and left). The idea that a stranger was lurking in the parking lot for an opportunity to steal away a two year old boy galvanized the media, police, and community into action in a way that parental maltreatment rarely does (unless the child dies).<sup>279</sup>

Future research is needed on case processing of child molestation and rape cases in the criminal justice system. I have suggested previously that child molesters are being selectively prosecuted whereas rapists are being screened out of the criminal

272. See Interview with Richard Lamma, Coach Operator for C-Tran Buses, in Vancouver, Wash. (Nov. 20, 1998).

273. See *supra* notes 21-34 and accompanying text.

274. See Interview with Terri Lufkin, Director of SafeChoice Domestic Violence Program, YMCA of Clark County, in Vancouver, Wash. (Jan. 29, 1998).

275. See *id.*

276. See *id.*

277. See Michael Zuzel, *Abduction Hoax Illustrates Real Threat to Kids*, COLUMBIAN, Jan. 3, 1999, at B10.

278. See *id.*

279. See *id.*

justice system.<sup>280</sup> Data sets would need to distinguish between cases of child sexual abuse involving child victims and cases of forcible rape involving adult women. Future research would need to code for different types of victim-offender relationships, including brother-sister molestations, that may be processed in the juvenile justice system. It also would be useful to study the child molestation and incest statutes of each jurisdiction and their implementation with regard to the victim-offender relationship. If possible, it would be useful to follow child molestation and rape cases from first report through sentencing of offenders to determine if nonstranger offenders receive more lenient treatment than stranger offenders after controlling for crime seriousness and past criminal record of the offender.<sup>281</sup> A recent American Bar Association Report suggests that there may be selective prosecution of child molesters when it indicates that prosecutors "do not divert child sexual abuse cases at any stage in the process."<sup>282</sup> This is in sharp contrast to the research literature on legal processing of acquaintance rape cases indicating that police and prosecutors go out of their way to divert rapists.<sup>283</sup>

Rind et al.'s recent meta-analysis of the child sexual abuse literature raises thought-provoking questions about whether the majority of children are harmed by child sexual abuse after the negative family environment is taken into account.<sup>284</sup> It is clear that incest in homes often occurs in conjunction with alcoholism and other forms of child abuse and neglect.<sup>285</sup> Future research in this area may want to include measures of physical abuse and neglect, alcoholic and criminal parents, multiple traumas, and other factors found in problem and criminal families. Because Rind et al.'s study suggests that women are more likely to perceive the sexual abuse as having been harmful than men,<sup>286</sup> future research may want to explore the differential impact of childhood victimization on males and females. Increased attention to and funding of studies of male rape victimization also is warranted based on a recent report that shows that almost one-fourth of all rape victims are male.<sup>287</sup>

Further rape law reform should focus on acquaintance rape and educate the public about its prevalence and its link to physical and psychological violence in the

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280. See Simon, *The Myth*, *supra* note 1, at 400 (noting that "[u]nlike other offenders who are screened by the system because there is minimal evidence, minimal physical injury to the victim, problematic victim cooperation or competency, minimal offender criminal record, or a relationship to the victim, child molester cases may be selected out by prosecutors for prosecution").

281. See Simon, *Sentence Length*, *supra* note 7, at 141, 142-43 (finding that victim-offender relationship is, at most, a marginal predictor of sentence length after controlling for crime type, offense seriousness, and past offender criminal record).

282. ABA2, *supra* note 21, at 12.

283. See *supra* notes 56-111 and accompanying text.

284. See Rind et al., *supra* note 25.

285. See Simon, *Offenders Specialize*, *supra* note 1, at 41-42.

286. See Rind et al., *supra* note 25, at 35-38. The differential impact of sexual victimization on males and females is evident in other studies as well. For example, studies that follow prospectively substantiated and documented cases of child sexual abuse find that 16% of males and 64% of females considered their early experience to have been abusive. Widom, *supra* note 25, at 56.

287. See TJADEN & THOENNES, *supra* note 30, at 4 tbl.2.

relationship. The research literature on the limited gains made by rape law reform<sup>288</sup> suggest that changes in the law need to be accompanied by changes in public and official attitudes toward acquaintance rape victims, in particular, and toward women in general. In the past, the rape law reform literature has been studied separately from the domestic violence literature. Future studies that examine rape case processing, including jury research, may want to investigate other forms of abuse, such as physical violence, that may exist in nonstranger rape situations.<sup>289</sup> Would juries in acquaintance rape scenarios, for example, increase their likelihood of convicting the offender if evidence were introduced of the offender's pattern of physical violence and intimidation toward the victim?

Future research needs to focus on the links between different forms of violence toward women and the victim-offender relationship. For example, although stalking is generally conceptualized by the public as a stranger offense, a survey of 8000 American women and 8005 American men found that only 23% of females and 36% of males who are stalked are stalked by strangers.<sup>290</sup> The survey also found that women tend to be stalked by current or former intimate partners.<sup>291</sup> Overall, 59% of female victims, compared to 30% of male victims, were stalked by some type of intimate partner.<sup>292</sup> This study provides compelling evidence of a link between stalking and other forms of violence in intimate relationships. Eighty-one percent of the women who were stalked by an intimate were also physically assaulted by the same partner, and 31% of the women who were stalked by an intimate partner were also sexually assaulted by the same partner.<sup>293</sup> Consequently, in acquaintance rape victimizations, there are likely to be other forms of violence perpetrated by the same or different intimates. To fully understand the fear and terror instilled in many acquaintance victims, a more holistic picture of the relationship needs to be brought out at all stages of legal processing.

An encouraging development is the attention being paid to violence against women as a result, on the national level, of the enactment of the Violence Against Women Act<sup>294</sup> of 1994 ("VAWA") and the increased funding of worthwhile research projects that increase our knowledge of women's victimization issues. The VAWA, passed as part of the Violent Crime Control and Law Enforcement Act of 1994,<sup>295</sup> is a comprehensive effort to address the problems of violence against women through

288. See *supra* notes 160–98 and accompanying text.

289. See CROWELL & BURGESS, *supra* note 30, at 16 (noting that research has repeatedly shown a strong association between psychological abuse and physical and sexual violence).

290. See TJADEN & THOENNES, *supra* note 30, at 5–6.

291. See *id.* at 6 (finding that 38% of female stalking victims were stalked by current or former husbands, 10% by current or former cohabiting partners, and 14% by current or former dates or boyfriends).

292. See *id.*

293. See *id.* at 8.

294. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 18 and 42 U.S.C. (1994)).

295. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C. (1994)).



a variety of different mechanisms, including funding for women's shelters,<sup>296</sup> a national domestic abuse hotline,<sup>297</sup> rape education and prevention programs,<sup>298</sup> and training for federal and state judges.<sup>299</sup> The funding of research programs under VAWA on issues of violence toward women has produced a steady stream of useful research reports that confirms the problem of intimate and acquaintance violence.<sup>300</sup> It would be useful for the Violence Against Women Grants Office to fund a study that systematically examines the sex offender legislation in this country and how that impacts women and children victims of sex crimes. Additional evaluations of the effects of VAWA grants to local communities may want to measure institutional long-term changes in local practice and attitudes towards women victims.

Lastly, future law reform may want to integrate the three jurisprudential paradigms discussed in this Article and enact legislation that aims to achieve therapeutic outcomes for nonstranger sex crime victims. One way of accomplishing this goal is for policy makers and legislators to focus less on current sex offender legislation targeting strangers and more on laws to protect women and children from the people they know.

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296. See 42 U.S.C. § 10409 (1994).

297. See *id.* § 10416.

298. See *id.* § 10418.

299. See, e.g., *id.* §§ 13701, 13991, 13992, 14036.

300. See *supra* notes 35-44 and accompanying text.

