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## The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault

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# Article

## **The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault**

Michelle J. Anderson\*

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## Introduction

*Potiphar, an officer of the Egyptian Pharaoh, bought Joseph of the hands of the Ishmeelites. And it came to pass that his master's wife cast her eyes upon Joseph and said, "Lie with me." But Joseph refused, saying, "because thou art his wife: how then can I do this great wickedness, and sin against God?" And it came to pass, as she spake to Joseph day by day, he hearkened not unto her, to lie by her, or to be with her. One day she caught him by his garment, saying, "Lie with me," and he left his garment in her hand and fled. And she called unto the men of her house, and spake unto them, saying, "See, he hath brought a Hebrew unto us to mock us; he came in unto me to lie with me, and I cried with a loud voice. And when he heard that I lifted up my voice and cried, he left his garment with me, and fled." When Potiphar came home and heard the words of his wife, his wrath was kindled. And Potiphar took Joseph and put him into prison.<sup>1</sup>*

The Biblical tale of Potiphar's wife stands as a warning to the criminal justice system. It is one nightmare about rape: a spurned woman seeks revenge by falsely accusing an innocent man.<sup>2</sup> This nightmare terrifies because of the helplessness of the weak male—in this case, a Jewish servant—and the fear of a justice system governed by the emotions of an irrational woman.

There is another nightmare about rape, of course, one that recurs in waking life: a man rapes a woman or girl he knows, taking advantage of her proximity and vulnerability to satisfy a cruel desire for sexual dominance. Rape, the fear of which terrifies most women at some point in their lives, is dreadful enough. But then the legal bad dream begins. In great pain, the rape victim tells of her assault to police, prosecutors, judges, and jurors, but no one believes her. They suspect either that she fabricated the experience because she wanted it or that she caused it by her own bad behavior.<sup>3</sup> This nightmare should also stand as a warning to the criminal justice system, but we have no notorious parables, retold from ancient times, to sear it into our collective unconscious. As a result,

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<sup>1</sup> *Genesis* 39:1-23 (King James) (edited version of story).

<sup>2</sup> Susan Estrich calls this story the "male rape fantasy." See Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1140 (1986).

<sup>3</sup> In his treatise *Evidence*, Professor Wigmore of Northwestern used Freudian psychology to conclude that the psychic complexes of females are "multifarious, distorted partly by inherent defects, partly by bad social environment, partly by temporary physiological or emotional conditions." JOHN WIGMORE, *EVIDENCE* § 924a (3d. ed., 1940). He quoted a doctor who alleged that sexual assaults are frequently "charged or claimed with nothing more substantial supporting this belief than an unrealized wish or unconscious, deeply suppressed sex-longing or thwarting." *Id.* (quoting Dr. W. F. Lorenz). In their widely cited study, Harry Kalven and Hans Zeisel found that any so-called "contributory" behavior of the alleged rape victim (ranging from hitchhiking, to dating, to talking to men at parties) led jurors to believe that she assumed the risk and acquit the defendant or find him guilty of a lesser offense. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 249-54 (1966). This work has been confirmed in more recent studies. See GARY LAFREE, *RAPE & CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT*, 200 (1989).

the criminal justice system has not reacted to the cynical disbelief many feel toward rape victims who muster the courage to come forward with the truth.<sup>4</sup>

By contrast, the criminal justice system has overreacted to infamous anecdotes of men falsely accused. Three particular rules, designed to prevent irrational women from succeeding in levying false rape charges, arose in English common law. First, the prompt complaint requirement in rape law meant that a woman had to complain swiftly of rape to officials or she could not obtain legal redress for the crime. Henry de Bracton, an influential 13<sup>th</sup> century English legal scholar, explained:

When therefore a virgin has been so deflowered and overpowered against the peace of the lord the King, forthwith and whilst the act is fresh, she ought repair with hue and cry to the neighboring vills, and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the hundred and to the searjeant of the lord the King, and to the coroners and to the viscount and make her appeal at the first county court.<sup>5</sup>

Despite the humiliation a victim might feel about revealing a degrading, personal attack, the prompt complaint rule required that she “forthwith and whilst the act is fresh” complain of being raped to “honest men ... the provost ... the searjeant ... the coroners ... the viscount and ... the first county court.”<sup>6</sup> If she failed to do so, she was not allowed to bring a claim of rape in court.<sup>7</sup> In 1962, the Model Penal Code in the United States turned this rule into a strict statute of limitations, which it still contains:

*Prompt Complaint.* No prosecution may be instituted or maintained under this Article [for sexual offenses] unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence...<sup>8</sup>

No other crime in the Model Penal Code, from serious felonies to petty misdemeanors, requires a similar prompt complaint.<sup>9</sup>

Second, the corroboration requirement in rape law meant that a man could not be convicted of rape unless the complainant had corroborative evidence of the assault, such

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<sup>4</sup> Rape is a crime unique in its gender correlation. Rapists are overwhelmingly male and rape victims are overwhelmingly female. Ninety-nine out of 100 convicted rapists are male. LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT v (1997). Ninety-four percent of all completed rape victims are female. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION 1 (2002).

<sup>5</sup> H. DE BRACTON, 2 DELEGIBUS ANGILAE 483 (Sir Travers Twiss, ed. 1879). Bracton served as a justice for King Henry III and as a justice on the Coram Rege (which evolved into the Queen’s Bench). He incorporated Roman and canon law principles into English common law. 2 ENCYCLOPEDIA BRITANNICA 452 (1998).

<sup>6</sup> BRACTON, *supra* note 5, at 483.

<sup>7</sup> See *State v. Hill*, 578 A.2d 370 (N.J. 1990).

<sup>8</sup> MODEL PENAL CODE § 213.6(4) (1980).

<sup>9</sup> See Estrich, *supra* note 2, at 1139 (“The rule is unique to rape, and its justification is unique to women victims of sexual assault.”). A murder prosecution may be commenced at any time; other first degree felonies, within six years. MODEL PENAL CODE § 106.

as bruises or ripped clothing that proved a struggle. Bracton assumed a rape victim should be able to “display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress.”<sup>10</sup> The Model Penal Code turned this assumption into a requirement, which it still contains: “No person shall be convicted of any felony under this Article [for sexual offenses] upon the uncorroborated testimony of the alleged victim.”<sup>11</sup> A man may be convicted of burglary or homicide upon the credible but uncorroborated testimony of one person, but not so with rape.<sup>12</sup> If a rape victim does not have corroboration, she does not have a case.

Third, cautionary instructions in rape law warned jurors to weigh the testimony of a rape complainant with particular circumspection.<sup>13</sup> The 17<sup>th</sup> century English jurist Sir Matthew Hale believed that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho’ never so innocent.”<sup>14</sup> The risk of false accusers led Hale to admonish:

we may be the more cautious upon trials of this nature, wherein the court and the jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the accused thereof, by the confident testimony sometimes of malicious and false witnesses.<sup>15</sup>

Many jurisdictions responded to Hale’s admonition by requiring courts to issue cautionary instructions to juries warning them to assess the complainant’s testimony in rape cases with extra suspicion. The Model Penal Code continues to mandate such a warning:

In any prosecution before a jury for an offense under this Article [for sexual offenses], the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.<sup>16</sup>

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<sup>10</sup> BRACTON, *supra* note 5, at 483.

<sup>11</sup> MODEL PENAL CODE § 213.6(4).

<sup>12</sup> Perjury is the only other crime in the Model Penal Code that contains a corroboration requirement. MODEL PENAL CODE § 241.1(6).

<sup>13</sup> Although most people believe that they can effectively evaluate a witness’ demeanor to determine his or her credibility, there is little scientific support for this belief. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991). See also Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1162-63 (1993). Untrained individuals do not much better than chance in discerning lies under experimental conditions. Wellborn, *supra* at 1087 & 1104-1105.

<sup>14</sup> 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 635 (1st Am. Ed. 1847). Hale was an ardent believer in witchcraft. PEGGY REEVES SANDAY, *A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL* 62 (1997).

<sup>15</sup> *Id.* at 636.

<sup>16</sup> MODEL PENAL CODE § 213.6(4).

Again, no other crime in the Model Penal Code requires a similar cautionary jury instruction.<sup>17</sup>

Legal scholars and others have criticized the prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape for about three decades.<sup>18</sup> As a result, these three doctrines have been nearly banished from formal law. Only three states—California, Illinois, and South Carolina—continue to mandate prompt complaint, but only for spousal sexual offenses.<sup>19</sup> Only three states require corroboration: Texas requires corroboration unless the complainant makes a prompt outcry to authorities, New York requires corroboration when a complainant’s mental incapacity forms the basis of her non-consent, and Ohio requires corroboration for the crime of sexual imposition.<sup>20</sup> Eight states continue to require cautionary instructions when there is no corroboration of an alleged rape, but twenty-five other states and the District of Columbia prohibit judges from issuing these instructions.<sup>21</sup> The days of the prompt complaint requirement, corroboration requirement, and cautionary instructions in formal rape law appear to be numbered.

After scrubbing down the foul Model Penal Code and tidying up a dozen or so state codes on the bookshelf, one might toss these relics—prompt complaint, corroboration, and cautionary instructions—into the dustbin of historical misogyny, declare a victory for the second wave of feminism, and go home. The problem is that cultural dirt from the criminal law has drifted into an adjacent room assumed to be

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<sup>17</sup> See Estrich, *supra* note 2, at 1140.

<sup>18</sup> See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 369 (1975) (arguing against Hale’s analysis for caution in rape cases); SANDAY, *supra* note 14, at 23 (stating that cautionary instruction creates pro-defense bias); Estrich, *supra* note 2, at 1138-40 (arguing against prompt complaint requirement, corroboration requirement, and cautionary instruction); Rosemary Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN’S L.J. 127, 157 (1996) (proposing jury instruction reminding jury that it may convict solely on basis of alleged victim’s uncorroborated testimony); Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. REV. 441, 474-76 (1996) (supporting modified fresh complaint rule that protects victim and restores her credibility, but does not reinforce timing myth); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1065-66 (1991) (advocating abrogation of prompt complaint doctrine and arguing for jury instruction that states “absence of a prompt complaint does not suggest that a rape did not occur”); Georgia Wralstad Ulmschneider, *Rape and Battered Women’s Self-Defense Trials as “Political Trials”: New Perspectives on Feminists’ Legal Reform Efforts and Traditional “Political Trials” Concepts*, 29 SUFFOLK L. REV. 85, 102 (1995) (arguing that corroboration requirement and cautionary jury instruction are evidence of rape law “‘safeguarding’ men from rape accusations”); Dawn M. DuBois, Note, *A Matter of Time: Evidence of a Victim’s Prompt Complaint in New York*, 53 BROOKLYN L. REV. 1087, 1109-13 (1988) (presenting alternative methods of admitting prompt complaint evidence through narrative testimony, testimony for rehabilitation of witness under spontaneous utterance exception); Donald J. Friedman, Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972) (arguing against justifications for corroboration requirement); Christine Kenmore, Note, *The Admissibility of Extrajudicial Rape Complaints*, 64 B. U. L. REV. 199, 237 (1984) (rejecting hue and cry and corroboration theories behind prompt complaint doctrine); Cynthia Ann Wicktom, Note, *Focusing on the Offender’s Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 411-12 (1988) (arguing that prompt complaint doctrine should be abolished); Susan N. Williams, Comment, *Rape Reform Legislation and Evidentiary Concerns: The Law in Pennsylvania*, 44 U. PITT. L. REV. 955, 971 (1983) (arguing that there is no merit to historical justifications for corroboration requirement).

<sup>19</sup> See *infra* notes 100-115 and accompanying text.

<sup>20</sup> See *infra* notes 116-154 and accompanying text.

<sup>21</sup> See *infra* notes 155-192 and accompanying text.

uncontaminated. Despite the rejection of the prompt complaint requirement, corroboration requirement, and cautionary instructions in most formal state law, some colleges and universities are imposing new versions of these ancient doctrines on students who complain to campus authorities of having been sexually victimized by other students. Harvard College offers a recent example.<sup>22</sup>

In May of 2002, Harvard College adopted new procedures for complaints of sexual assault and other student infractions.<sup>23</sup> The procedures stated, “Complaints must ordinarily be brought to the College in a timely manner.”<sup>24</sup> If a preliminary investigation of a complaint indicated that the university was “unlikely to obtain information beyond students’ conflicting and credible accounts,” Harvard would likely “decline to pursue a complaint further.”<sup>25</sup> The 2002 procedures pointed out that Harvard “ordinarily will not consider a case unless allegations presented by the complaining party are supported by independent corroborating evidence.”<sup>26</sup> Harvard thus declared that it would “ordinarily” impose a prompt (“timely”) complaint requirement and an “independent corroborating evidence” requirement on those students who suffer sexual assault. It also cautioned officials against pursuing reports in which the complainant’s “credible account” of her sexual abuse was the only evidence she had. Harvard’s new rules will not only reduce the number of successful disciplinary proceedings against sexual assailants; they will deter the original complaints themselves.

The recent scandal at the Air Force Academy provides a different kind of example. Since February 2003, dozens of current and recent cadets have gone public with their stories of mistreatment when they reported to the Air Force Academy brass that they had been raped by male cadets.<sup>27</sup> Instead of investigating and punishing their reported attackers, the Academy often chose to discipline the female cadets for the minor infractions they committed on the incidents in question, such as drinking, fraternizing with upper class cadets, or even having sex in the dorms (referring to the alleged rape itself).<sup>28</sup> Many of these female cadets were forced to leave the Academy because of these infractions, which ended their military careers, while their alleged attackers marched toward graduation unscathed.<sup>29</sup> The suspicion that an alleged rape occurred because of the complainant’s bad behavior on the instance in question and the charges brought against a complainant does not appear to be unique to the Academy, deterring complaints of sexual assault on civilian campuses as well.<sup>30</sup>

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<sup>22</sup> Harvard College refers to the undergraduate program while Harvard University refers to the undergraduate college, graduate schools, other academic bodies, research centers, and affiliated institutions. See <http://www.harvard.edu/siteguide/faqs/faq110.html>.

<sup>23</sup> See *infra* notes 266-269 and accompanying text.

<sup>24</sup> See *infra* note 276 and accompanying text.

<sup>25</sup> See *infra* notes 278-280 and accompanying text.

<sup>26</sup> See *infra* note 276 and accompanying text.

<sup>27</sup> See T. R. Reid, *Academy Probes Assaults; Female Air Force Cadets Allegedly Punished for Reporting Rapes*, WASH. POST, Feb. 21, 2003, at A04; Dick Foster, *Ex-Cadets Keep Close Eye on Hearing*, ROCKY MTN. NEWS, July 12, 2003, at 1A.

<sup>28</sup> See Tillie Fong, *Legal Group Arrives at AFA; Probe to See Whether Women were Chided for Reporting Rape*, ROCKY MT. NEWS, Feb. 20, 2003, at 17A; Lee Hockstader & T.R. Reid, *Academy Culture Blamed in Handling of Rapes; Air Force School is Male-Dominated ‘Family’*, WASH. POST, Mar. 10, 2003, at A3.

<sup>29</sup> See Hockstader & Reid, *supra* note 28, at A3.

<sup>30</sup> See *infra* notes 350-369 and accompanying text.

These college and university practices may correlate with powerful institutional incentives to deter student complaints of sexual assault. First, campus sexual assault cases generate negative press. Federal law requires colleges and universities to report annually to the Secretary of Education the number of sexual assaults on campus and to publish these incidents to the wider public.<sup>31</sup> Second, these cases expose the institution to potential backlash. Colleges and universities may fear that a student disciplined for sexual misconduct will lodge a civil suit against the institution for procedural unfairness.<sup>32</sup> Third, these cases are tough. Reported complaints of rape on campus almost always involve acquaintances and alcohol.<sup>33</sup> Irrefutable evidence—such as guns, knives, or broken bones—is rare.<sup>34</sup> These cases are complicated and cumbersome to pursue, particularly by officials untrained in criminal procedure. From the perspective of a college administrator, one case of campus rape can collapse into a small black hole, extinguishing resources, time, and money like light across the event horizon.<sup>35</sup>

Regardless of their personal beliefs, then, college and university administrators may be motivated to capitalize on an underlying societal bias against women who complain of rape by importing discredited doctrines from the criminal law to deter or facilitate early disposal of difficult cases. If scholars continue to ignore university disciplinary proceedings as a site for this kind of gender bias, campus administrators may increasingly follow Harvard's lead.<sup>36</sup>

Before they are completely submerged in formal criminal law, then, it is time to re-examine the prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape in order to expel them fully from campus disciplinary policies and practices. Part I of this Article discusses the prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape. It traces a brief history of the three doctrines, discusses their intransigence in the Model Penal Code, and catalogs their weakened status in the formal criminal law of the fifty states and the District of Columbia.

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<sup>31</sup> See *infra* notes 390-396 and accompanying text.

<sup>32</sup> Fernand Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FL. COASTAL L.J. 243 (2001) (“In the process of enforcing their academic and disciplinary standards, colleges and Universities increasingly find themselves confronting the possibility and even the reality of litigation”); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 660 (2001) (“College administrators are faced with mounting pressure from both sides”); Lisa Swem, *Due Process Rights in Student Disciplinary Matters*, 14 J. COLL. & UNIV. L. 359 (1987) (“Students disciplinary proceedings frequently intimidate college and university officials”).

<sup>33</sup> See *infra* notes 381-387 and accompanying text.

<sup>34</sup> See *infra* notes 377-379 and accompanying text.

<sup>35</sup> CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS* 92-3 (1993). See also COMMITTEE TO ADDRESS SEXUAL ASSAULT AT HARVARD, PUBLIC REPORT 43 (April 2003) available at [http://www.fas.harvard.edu/~casah/files/CASAH\\_FinalReport.pdf](http://www.fas.harvard.edu/~casah/files/CASAH_FinalReport.pdf) (members of Harvard's disciplinary board say that “a case exacts a heavy price in terms of their own personal time and can lead to frustration on their part”).

<sup>36</sup> Theo Emery, *Harvard Faculty to Revisit Sexual Misconduct Policy on Campus*, AP story partially reprinted at *Harvard Handbook Becomes Hot Topic: New Sex Misconduct Policy Starts Uproar*, THE RECORD (Bergen County, NJ), June 13, 2002, at A30 (Sheldon Steinbach, general counsel for American Council on Education, says, “When a prominent institution tries something innovative, other institutions are likely to follow.”).



Part II analyzes the faulty assumptions behind the prompt complaint requirement, corroboration requirement, and cautionary instructions to help explain their rejection in the criminal law. Studies reveal that most victims of rape do not promptly complain to the police or other authorities, most rapes do not produce corroborating evidence, and most jurors are already cautioned by an underlying societal bias against those who claim rape. This Part also examines the empirical data on the incidence of false rape reports to police and concludes that, although there are no solid data to support the belief that false complaints of rape are more common than false complaints of any other crime, there are ample data proving that actual experiences of rape are vastly underreported to the police.

Part III discusses the emergence of prompt complaint, corroboration, and caution in campus sexual assault policies and practices. It begins by analyzing the current policy at Harvard College, and, after surveying other colleges' and universities' formal policies and informal practices, concludes that Harvard is not alone in its use of disreputable legal doctrines against rape victims. It then analyzes why campuses would adopt abandoned rules from the criminal law in their own disciplinary procedures. It describes the legal and institutional difficulties that campuses have policing sexual assault. Colleges and universities have reasons to want to bury difficult cases; ancient doctrines from the criminal law of rape afford them the opportunity to do so.

Part IV proposes a method to free disciplinary proceedings from the legacy of the prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape. It argues that, in rejecting a prompt complaint requirement, sexual assault policies should allow a complainant to pursue campus disciplinary proceedings against a student as long as that student remains enrolled at the institution. In rejecting the corroboration requirement, sexual assault policies should clarify that the standard of proof for finding a violation of the disciplinary code is "preponderance of the evidence" and that a complainant's testimony alone can be sufficient for such proof. In rejecting the norms of the cautionary instruction, policies should not subject rape complainants to extra scrutiny or procedural hurdles in bringing their claims to the campus disciplinary boards. Additionally, rape complainants should ordinarily be afforded amnesty for disciplinary infractions that occurred on the instance in question. This Part then offers model campus sexual assault provisions to effectuate these goals.

## **I. The Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions in the Criminal Law of Rape**

The prompt complaint requirement, corroboration requirement, and cautionary instructions were three adjacent bands in a spectrum of unique legal rules designed to make the crime of rape harder to prove than other felonies. The utmost resistance requirement,<sup>37</sup> a virtual chastity requirement,<sup>38</sup> and the marital rape exemption<sup>39</sup> contributed to the difficulty rape victims had with persuading legal actors that they had

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<sup>37</sup> See Michelle Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962 [hereinafter Anderson, *Reviving Resistance*].

<sup>38</sup> See Michelle Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 60-61 (2002) [hereinafter Anderson, *From Chastity Requirement to Sexuality License*].

<sup>39</sup> See Michelle Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. (forthcoming 2003).

suffered a criminal wrong. While these others doctrines were fairly independent of one another, prompt complaint, corroboration, and cautionary instructions were interdependent.<sup>40</sup> For example, in many jurisdictions, if a woman failed to promptly complain, she would be forgiven if she had corroborative evidence of having been raped.<sup>41</sup> If a woman suffered a rape that produced no corroborative evidence, a prompt complaint itself might serve as the necessary legal corroboration.<sup>42</sup> A judge was frequently required to issue cautionary instructions in a rape case unless the complainant proffered corroborative evidence of the offense.<sup>43</sup> In many jurisdictions, then, prompt complaint and corroboration substituted for one another and cautionary instructions were triggered by a complainant's failure to promptly complain or offer corroborative evidence of the crime.

The history in English common law of the prompt complaint requirement, corroboration requirement, and cautionary instructions indicates the extent to which suspicion and criticism of women who complain of rape was foundational to the doctrines' invention and continued vitality. The Model Penal Code re-inscribed the three doctrines in modern criminal law in the United States. However, an assessment of the current legal status of the three doctrines reveals the formal rejection of the Model Penal Code's rationales.

### A. History of the Three Doctrines

English common law required all victims of violent crime, including rape victims, to hue and cry.<sup>44</sup> "Hue and cry" referred to the "outcry calling for the pursuit of a felon, raised by the party aggrieved" or "the pursuit of a felon with such outcry."<sup>45</sup> Victims were thereby notifying their neighbors to pursue the evildoers.<sup>46</sup>

Even after "hue and cry" was rejected as a requirement for victims of other serious offenses in the 1700s, courts "continued to require hue and cry in rape cases, and

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<sup>40</sup> See Hunter, *supra* note 18, at 156. Hale discussed the complainant's credibility this way:

For instance, if the witness be of good fame, if she *presently discovered* the offense made pursuit after the offender, *shewed circumstances and signs of injury* . . . if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But on the other side, if she *concealed the injury for any considerable time after she had the opportunity to complain*, if the place, where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, *and she made no outcry* when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.

HALE, *supra* note 14, at 633. Note the centrality of prompt complaint and corroboration. A complainant was not credible if "she made no outcry," but she was credible if she "shewed circumstances and signs of injury." *Id.*

<sup>41</sup> See *infra* notes 119-121 and accompanying text.

<sup>42</sup> See *infra* notes 63-65 and accompanying text.

<sup>43</sup> See *infra* notes 74-75 and accompanying text.

<sup>44</sup> State v. Hill, 578 A.2d 370 (N.J. 1990).

<sup>45</sup> 7 OXFORD ENGLISH DICTIONARY 464 (1989).

<sup>46</sup> State v. Hill, 578 A.2d 370 (N.J. 1990).

held it against the State if the woman had not confided in anyone after the attack.”<sup>47</sup> By the early 1800s in the United States, courts allowed rape prosecutions to proceed despite the complainant’s failure to promptly hue and cry; however, they admitted evidence of her failure to hue and cry to discredit her testimony.<sup>48</sup> Although the prompt complaint requirement waned in 1800s, a victim’s failure to promptly complain remained powerful evidence that an alleged rape did not occur. Courts still accepted the common law notion that a complainant who was making a truthful allegation of rape would promptly cry out.<sup>49</sup> For example, in 1900, the Utah Supreme Court stated:

The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to a relative or friend who naturally has the deepest interest in her welfare; and the absence of such a disclosure tends to discredit her as a witness, and may raise an inference against the truth of the charge.<sup>50</sup>

Until the early 1980s, courts continued to rely on the notion that a victim who did not promptly complain was fabricating the accusation.<sup>51</sup>

In contrast to the early prompt complaint requirement, English common law did not require corroboration for a rape prosecution to proceed.<sup>52</sup> In explaining the lack of such a requirement, Sir Matthew Hale stated: “The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury.”<sup>53</sup> In his leading treatise on evidence, Prof. John Wigmore explained, “At common law, the testimony of the prosecutrix or injured person, in the trial of all *offences against the chastity of women*, was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary.”<sup>54</sup>

The first mention of the value of corroborative evidence in the United States in a published appeal of a rape case was in 1875 in *Boddie v. State*.<sup>55</sup> In that case, the Supreme Court of Alabama indicated its preference for corroborative evidence in rape cases, but did not make corroboration a prerequisite. The court stated: “No principal of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury is satisfied of its truth.”<sup>56</sup> According to this court, if the complainant could not present corroborative evidence, her testimony should be more closely scrutinized, but if, after such scrutiny, the jury found the testimony credible, the jury could convict.<sup>57</sup> Several jurisdictions followed the *Boddie* analysis in developing rules

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *State v. Neel*, 60 P. 510, 511 (Utah 1900).

<sup>51</sup> *See Hill*, 578 A.2d at 375-76.

<sup>52</sup> WIGMORE, *supra* note 3, at 273. Under English common law, the only crime that required corroboration was perjury, which required two witnesses. *See Estrich*, *supra* note 2, at 1137.

<sup>53</sup> HALE, *supra* note 14, at 635.

<sup>54</sup> WIGMORE, *supra* note 3, at 342 (emphasis in original).

<sup>55</sup> 52 Ala. 395, 398 (1875).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

by statute and case law that corroboration was not required, but in its absence, the judge should issue cautionary instructions warning the jury that the complainant's testimony should be more closely scrutinized.<sup>58</sup>

In 1886, the New York legislature became the first to enact a corroboration requirement for the prosecution of rape,<sup>59</sup> a provision designed, it was stated, to protect the defendant from an "untruthful, dishonest, or vicious complainant."<sup>60</sup> The statute read: "No conviction can be had for abduction, compulsory marriage, rape, or defilement upon the testimony of the female abducted, compelled or defiled, unsupported by other evidence."<sup>61</sup> At New York's lead, a number of other jurisdictions began requiring corroborative evidence in rape cases.<sup>62</sup>

One of the first courts to impose such a requirement was the Supreme Court of Georgia. In 1904, the court asserted, contrary to the historical record:

The law is well established, since the time of Lord Hale, that a man shall not be convicted of rape on the testimony of the woman alone, unless there are some concurrent circumstances which tend to corroborate her evidence.<sup>63</sup>

Underlying the Georgia court's decision to impose a corroboration requirement was its concern for false accusers. The court stated: "Without [a corroboration requirement], every man is in danger of being prosecuted and convicted on the testimony of a base woman in whose testimony there is no truth. The man is powerless."<sup>64</sup> The court gave examples of evidence that would satisfy the corroboration requirement: "some outcry or evidence that she told of the injury promptly, or her clothing was torn or disarranged, or her person showed signs of violence, or there were other circumstances which tend to corroborate her story."<sup>65</sup> A prompt complaint thus could function as corroborative evidence.

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<sup>58</sup> See *Curby v. Terr.*, 42 Pac. 953 (Ariz. 1895); *People v. Keith*, 75 Pac. 304, 305 (Cal. 1904); *People v. Polak*, 196 N.E. 513 (Ill. 1935); *State v. Anderson*, 59 Pac. 180 (Ida. 1899); *Ashbire v. State*, 158 N.E. 227 (Ind. 1927); *Ex parte Ledington*, 192 Pac. 595 (Okl. 1920); *Com. v. Oyler*, 197 A. 508 (Pa. 1938); *Addington v. Com.*, 170 S.E. 565 (Va. 1933); *O'Boyle v. State*, 75 N.W. 989 (Wis. 1898); *Strand v. State*, 252 Pac. 1030 (Wyo. 1927). See also *Doyle v. State*, 39 Fla. 155, 162 (1897) (holding that there is no law requiring corroboration in order for jury to convict defendant of rape, although court may instruct jury to view victim's testimony with extreme scrutiny); *Monroe v. State*, 13 So. 884 (Miss. 1893) (holding that while corroboration is not required, uncorroborated testimony of victim should be closely scrutinized for credibility and truthfulness).

<sup>59</sup> See Friedman, *supra* note 18, at 1367.

<sup>60</sup> *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (App. Div.2d Dep't 1939) (dictum), *rev'd on other grounds*, 238 N.Y. 546 (1940).

<sup>61</sup> Law of June 15, 1886, ch. 663 § 1 [1886], N.Y. Laws 109th Sess. 953. New York courts actually made the statutory requirement more stringent in the 1960s. See *People v. Tashman*, N.Y.S.2d 744 (Sup. Ct. Kings County 1962) (holding that victim's pregnancy was not sufficient corroboration); *Lore v. Smith*, 256 N.Y.S.2d 422 (New Rochelle City Ct. 1965) (holding that element of penetration must be corroborated); *People v. Perez*, 269 N.Y.S.2d 768 (App. Div. 2d Dep't. 1966) (holding that corroboration requirement could not be satisfied by confession from defendant).

<sup>62</sup> See Friedman, *supra* note 18, at 1367. See also WIGMORE, *supra* note 3, at 346 n. 2.

<sup>63</sup> 120 Ga. 433, 435 (1904).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

By the early 1970s, seven jurisdictions maintained a rule, either by statute or case law, requiring corroboration of a rape complainant's testimony.<sup>66</sup> By contrast, twenty-five states had rejected such a requirement.<sup>67</sup> In 1973, for example, the Pennsylvania rape code was amended to state: "The testimony of a complainant need not be corroborated in prosecutions under this chapter."<sup>68</sup>

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<sup>66</sup> See Friedman, *supra* note 18, at 1367. Five jurisdictions—Georgia, Idaho, Iowa, New York, and the Virgin Islands—imposed the corroboration requirement by enacting legislation, and the District of Columbia and Nebraska imposed the requirement in the prosecution of rape cases despite the absence of legislation. *Id.* at n.13-14.

<sup>67</sup> See *id.* at 1367 n.16 (citing *Boddie v. State*, 52 Ala. 395, 398 (1875); *Bakken v. State*, 489 P.2d 120, 127 (Ala. 1971); *Hodges v. State*, 197 S.W.2d 52, 53 (Ark. 1946); *People v. Stevenson*, 80 Cal. Rptr. 392, 395 (2d Dist., 5<sup>th</sup> Div. 1969), *cert denied*, 397 U.S. 1014 (1970); *McQueary v. People*, 110 P. 210, 212-13 (Colo. 1910); *State v. Chuchelow*, 37 A.2d 689 (Conn. 1944) (*dictum*); *Wilson v. State*, 109 A.2d 381, 393 (Del. 1954) (*dictum*); *State v. Smith*, 249 So.2d 16, 17 (Fla. 1971); *Yeary v. State*, 273 N.E.2d 96, 97-98 (Ind. 1971); *State v. Brown*, 116 P. 508, 509 (Kans. 1911); *Green v. State*, 220 A.2d 131, 135 (Md. 1966); *Commonwealth v. Bemis*, 136 N.E. 597, 598 (Mass. 1922); *People v. Inman*, 24 N.W.2d 176, 182 (Mich. 1946) (*dictum*); *Blade v. State*, 126 So.2d 278, 280 (Miss. 1961) (*dictum*); *State v. Bouldin*, 456 P.2d 830, 834 (Mont. 1969); *State v. Diamond*, 264 P. 697, 698 (Nev. 1928); *State v. Garcia*, 199 A.2d 860, 862 (N.J. App. Div. 1964); *State v. Johnson*, 227 N.W. 560, 564 (N.D. 1929); *State v. Fitzmaurice*, 475 P.2d 426, 428 (Ore. 1970); *State v. Wiggan*, 256 A.2d 219, 221-22 (R.I. 1969); *State v. Gatlin*, 38 S.E.2d 238, 240 (S.C. 1946) (*dictum*); *King v. State*, 357 S.W.2d 42, 45-46 (Tenn. 1962); *State v. Hodges*, 381 P.2d 81, 82 (Utah 1963); *State v. Thomas*, 324 P.2d 821, 822 (Wash. 1958) (*dictum*); *Tway v. State*, 50 P. 188-189 (Wyo. 1897) (*dictum*)).

Eight states developed, either by statute or judicial decision, doctrines in which corroboration was preferred, but not always mandated. See Friedman, *supra* note 18, at 1368. In some states, corroboration of a complainant's testimony was not necessary, but was helpful in establishing the credibility of her testimony. In other jurisdictions, corroboration was only required for certain charges, such as statutory rape, or cases in which the alleged victim failed to promptly complain. See *id.* Hawaii and New Mexico required corroboration that would help to establish the truth of the victim's complaints. *Id.* at n.17. Six other states, Massachusetts, Minnesota, Mississippi, Missouri, Tennessee, and Texas, required corroboration in specific factual circumstances, such as cases of statutory rape, a delayed complaint, or when the victim was a minor. *Id.* at n.18. Additionally, ten other states required corroborating evidence when the evidence in the case was not reasonably sufficient to sustain a rape conviction. See *Reidhead v. State*, 250 P.366 (1926) (corroboration is not required if witness's testimony is "reasonable, consistent and not inherently impossible or improbable to a degree that would make it incredible to the ordinary man"); *People v. White*, 186 N.E.2d 351, 352 (1962) (corroboration is not required if witness's testimony is "clear and convincing"); *Robinson v. Commonwealth*, 459 S.W.2d 147, 150 (Ky. 1970) (corroboration is not required if victim's testimony is "not contradictory or incredible or inherently improbable"); *State v. Field*, 170 A.2d 167, 169 (Me. 1971) (corroboration is not required, but without corroboration, victim's testimony "must be scrutinized and analyzed with great care"); *Bryant v. State*, 478 P.2d 907, 909 (Okla. Cr. 1970) (corroboration is not necessary if testimony is "not inherently improbable or unworthy of credence"); *Commonwealth v. Kretzitis*, 169 A. 417, 418 (Pa. 1933) (corroboration is not required unless testimony "is so indefinite, contradictory or unreliable that it would be unsafe to rest a conviction thereon"); *State v. Dachtler*, 179 N.W. 653 (S.D. 1920) (corroboration is not required unless testimony is "unreliable, improbable," or if victim has been "fairly impeached"); *Fogg v. Commonwealth*, 159 S.E.2d 616, 620 (Va. 1968) (corroboration is not required if testimony "is credible and the guilt of the accused is believed by the jury beyond a reasonable doubt"); *State v. Beacraft*, 30 S.E.2d 541, 544 (W.Va. 1944) (corroboration is not required "unless her testimony is inherently incredible"); *Gauthier v. State*, 137 N.W.2d 101, 105 (1965) (corroboration is not required if testimony is "convincing and not inherently incredible"). Those jurisdictions that retained a corroboration requirement in the 1970s began to reject it over the next decade or so. By 1990, the majority of U.S. jurisdictions had abolished the corroboration requirement. BURR W. JONES, JONES ON EVIDENCE, § 2.42 at 101 (Clifford S. Fishman, ed. 1992).

<sup>68</sup> See 18 Pa. C.S.A. § 3106 (West 2002).

Cautionary instructions in the English common law of rape arose out of statements made by Hale in the 17<sup>th</sup> century.<sup>69</sup> As a result of the conviction and execution of one rape defendant, Hale wrote, “some malicious people seeing how easy it was to make out such an accusation, and how difficult it was for the party accused to clear himself” brought forth “many indictments of rapes, wherein the parties accused with some difficulty escaped.”<sup>70</sup> Hale concluded by warning:

I only mention these instances that we may be the more cautious upon trials of this nature, wherein the court and the jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the accused thereof, by the confident testimony sometimes of malicious and false witnesses.<sup>71</sup>

Hale’s warning is comprehensible in light of the fact that, at the time he wrote, criminal defendants lacked the presumption of innocence, the standard of proof of guilt beyond a reasonable doubt, and other fundamental trial rights that the modern criminal justice system guarantees.<sup>72</sup>

Hale’s cautionary warning about rape complainants entered both the culture and common law of England and immigrated to the American legal system.<sup>73</sup> Exactly when

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<sup>69</sup> See *People v. Rincon-Pineda*, 538 P.2d 247, 254 (Cal. 1975).

<sup>70</sup> HALE, *supra* note 14, at 636. One example involved a 63-year-old “antient wealthy man” and a fourteen-year-old girl who accused him of rape. The man’s defense was that he was “afflicted with a rupture so hideous and great” making it impossible for him to “carnally know any woman.” *Id.* at 635, 636. Hale instructed the man and the jury into a private room to view this “unusual evidence.” *Id.* at 636. The jury confirmed “that it was impossible he should have to do with any woman in that kind, much less to commit a rape, for all his bowels seemed to be fallen down in those parts, that they could scarce discern his privities, the rupture being full as big as the crown of a hat.” *Id.* Thus, Hale concluded, the man had been falsely accused and was rightly acquitted. *Id.* Hale also briefly described another example. The case involved a man who was accused of raping two young girls. *Id.* Prior to the judgment, however, Hale noted, “it was apparently discovered, that it [the rape] was but a malicious contrivance, and the party innocent; he was therefore reprieved before judgment.” *Id.* at 635.

<sup>71</sup> *Id.* at 636.

<sup>72</sup> *People v. Rincon-Pineda*, 538 P.2d 247, 256 (Cal. 1975). Some historians maintain that rape was sometimes a “prelude to a marriage” because an unwed victim could save her assailant from serious punishment, including death, by agreeing to marry him. See 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 491 (2<sup>nd</sup> ed. 1899); BRACON *supra* note 5, at 491, n.148. One reason for widespread suspicion toward rape complainants was the concern that lower class women could use charges of rape to force wealthier men to marry them. POLLOCK & MAITLAND, *supra*, at 491 n.4. The concern for fabricated rape stories should be understood in the context of the traditional English preoccupation with the use of criminal charges as blackmail. *People v. Rincon-Pineda*, 538 P.2d 247, 257 (Cal. 1975). See also Antony E. Simpson, *The ‘Blackmail’ Myth and the Prosecution of Rape and Its Attempt in 18<sup>th</sup>-Century London: The Creation of a Legal Tradition*, 77 J. CRIM. L. & CRIMINOLOGY 101, 109 (1986)). Simpson found that defense lawyers of 18<sup>th</sup> century England used the blackmail myth quite effectively despite the fact that, after his examination of legal records between 1730 and 1830, however, he found few actual attempts of extortion. *Id.* at 121.

<sup>73</sup> Thomas Morris, Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154 (1988).

cautionary jury instructions in rape trials entered American law is unclear; however, by 1856 the California Supreme Court stated:

From the days of Lord Hale to the present time, no case has ever gone to the jury upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony.<sup>74</sup>

Throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries, courts cited Hale’s warnings of “the confident testimony sometimes of malicious and false witnesses” to justify requiring instructions cautioning juries to weigh rape complainants’ testimony with extra suspicion.<sup>75</sup> Hale’s concern with false accusers thus resonated with both legislatures and judges.

## B. Model Penal Code on the Three Doctrines

When the Model Penal Code was initially drafted in 1962, no jurisdiction continued to bar a rape prosecution for a lack of prompt complaint.<sup>76</sup> Nevertheless, the drafters of the Model Penal Code formulated the prompt complaint rule as a strict statute of limitations for sexual offense complaints.<sup>77</sup> That rule remains in the current version of the Code:

*Prompt Complaint.* No prosecution may be instituted or maintained under this Article [for sexual offenses] unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence....<sup>78</sup>

Therefore, no prosecutor may initiate a case against a defendant for rape, gross sexual imposition, deviate sexual intercourse by force or imposition, corruption of minors and seduction, sexual assault, or indecent exposure unless the victim made a complaint to authorities within three months of the occurrence.<sup>79</sup>

Under the Model Penal Code, a murder prosecution may be commenced at any time; other first degree felonies within six years; all other felonies within three years; misdemeanors within two years; and petty misdemeanors within six months.<sup>80</sup> The three-

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<sup>74</sup> *People v. Benson*, 6 Cal. 221, 223 (1856).

<sup>75</sup> Armand Arabian, *The Cautionary Instruction in Sex Cases: A Lingering Insult*, SW. U. L. REV 656, 686 (1978).

<sup>76</sup> See Estrich, *supra* note 2, at 1139.

<sup>77</sup> MODEL PENAL CODE §§ 213.1 (rape and gross sexual imposition), 213.2 (deviate sexual intercourse by force or imposition), 213.3. (corruption of minors and seduction), 213.4 (sexual assault), 213.5 (indecent exposure) (1980).

<sup>78</sup> *Id.* at § 213.6(4). The provision continues, “or where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense.” *Id.* Although an early draft of the Code put the proposed statute of limitations at 6 months, this time frame was halved in the 1962 Official Draft.

<sup>79</sup> *Id.* See also MODEL PENAL CODE §§ 213.1 (rape and gross sexual imposition), 213.2 (deviate sexual intercourse by force or imposition), 213.3. (corruption of minors and seduction), 213.4 (sexual assault), 213.5 (indecent exposure). See provisions for minor victims in previous footnote.

<sup>80</sup> MODEL PENAL CODE § 106 (1980).

month prompt complaint rule in the Model Penal Code, therefore, places forcible rape and other sexual offenses at about half the level of shoplifting.<sup>81</sup>

The Commentary to the 1962 Model Penal Code analyzed the prompt complaint requirement in this way:

The possibility that pregnancy might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing the offense to the attention of the authorities, are sufficient grounds for setting some time limit upon the right to complain. Likewise, the dangers of blackmail or psychopathy of the complainant make objective standards imperative.<sup>82</sup>

By 1980, the Model Penal Code's Commentary had modified its defense:

The requirement of prompt complaint springs in part from a fear that unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant. Barring prosecution if no report is made within a reasonable time is one way of guarding against such fabrication. Perhaps more importantly, the provision limits the opportunity for blackmailing another by threatening to bring a criminal charge of sexual aggression.<sup>83</sup>

Both the 1962 and 1980 commentaries thus relied on the fear of a false accuser to justify the prompt complaint rule.<sup>84</sup>

The Model Penal Code also includes a corroboration requirement for all sexual felonies.<sup>85</sup> It states: "No person shall be convicted of any felony under this Article [for sexual offenses] upon the uncorroborated testimony of the alleged victim."<sup>86</sup> Therefore, no person may be convicted of the felonies of rape, gross sexual imposition, deviate sexual intercourse by force or imposition, corruption of minors less than 16 years old, or seduction unless the complainant can corroborate her testimony with other evidence.<sup>87</sup> A man may be convicted of robbery or assault upon the credible but uncorroborated testimony of one person, but not so with rape.

The Commentary to the Model Penal Code argues that the "most persuasive" justification for the corroboration requirement, like the prompt complaint requirement, "is the difficulty of defending against false accusation of a sexual offense."<sup>88</sup> The Commentary continues: "In no other context is felony liability premised on conduct that

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<sup>81</sup> MODEL PENAL CODE § 223.1(2)(b) (1980).

<sup>82</sup> Comments, § 207.4(23) at 265.

<sup>83</sup> *Id.* at § 213.6 comment at 421.

<sup>84</sup> The commentaries even boasted that the prompt complaint requirement is a new "innovation in Anglo-American law" because before the Code, failure to make a prompt complaint did not bar prosecution for rape in any state. *Id.* at § 213.6 comment on prompt complaint requirement.

<sup>85</sup> *Id.* at § 213.6(5).

<sup>86</sup> MODEL PENAL CODE § 213.6(5), Part II, vol. 1, 412 (A.L.I. 1980).

<sup>87</sup> MODEL PENAL CODE §§ 213.1(1)-(2), 213.2, 213.3(1)(a) (A.L.I. 1980).

<sup>88</sup> Comments, § 207.4 (23) at 428.



under other circumstances may be welcomed by the ‘victim.’”<sup>89</sup> When proof comes down to conflicting accounts between the complainant and the defendant, “the corroboration requirement is an attempt to skew resolution of such disputes in favor of the defendant.”<sup>90</sup> The Commentary insists:

In short, the corroboration requirement should not be understood as an effort to discount female testimony or as an unsympathetic understanding of the female experience with sexual aggression. It is, rather, only a particular implementation of the general policy that uncertainty should be resolved in favor of the accused.<sup>91</sup>

The only other time that the Model Penal Code implements “the general policy that uncertainty should be resolved in favor of the accused” with this peculiar requirement of corroboration, however, is for the crime of perjury.<sup>92</sup> As the only statutory analogy to sexual offenses in terms of corroboration, perjury—the crime of making a false statement—is particularly revealing of the Model Penal Code’s concern that women falsely claim rape. For all other crimes, the rule of lenity and the standard of proof of guilt beyond a reasonable doubt satisfies the “general policy that uncertainty should be resolved in favor of the accused.”<sup>93</sup>

The Model Penal Code also includes special cautionary jury instructions that judges must administer in prosecutions for any sexual offense.<sup>94</sup> The Code indicates:

In any prosecution before a jury for an offense under this Article [for sexual offenses], the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.<sup>95</sup>

The Commentary to the 1962 Code analyzed the cautionary instruction in this way:

A general caution to the authorities against convicting on the bare testimony of the prosecutrix may be desirable in view of the probable special psychological involvement, conscious or unconscious, of judges and jurors in sex offenses charged against others. The only rational alternative would be to require corroboration as to every element of the crime, since there is no reason to believe that the complainant is more likely to lie or deceive herself on one point rather than another. A requirement as broad as that would impose an impracticable burden on the prosecutor.<sup>96</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 429.

<sup>92</sup> MODEL PENAL CODE § 241.1(6).

<sup>93</sup> Comments, § 207.4 (23) at 429.

<sup>94</sup> MODEL PENAL CODE § 213.6(5).

<sup>95</sup> *Id.*

<sup>96</sup> Comments, § 207.4 (23) at 429.

The Commentary thereby contrasted two possible legal rules in sexual offense cases in light of the conscious or unconscious “special psychological involvement” of both judges and jurors in offenses of a sexual nature. First, courts could require corroboration of every element of the crime because “there is no reason to believe that the complainant is more likely to lie or deceive herself on one point rather than another.”<sup>97</sup> This rule was rejected, however, as posing insurmountable obstacles for the state. Second, courts could issue cautionary instructions to warn jurors against the “bare testimony” of a potentially lying or self-delusional woman who complains of rape.<sup>98</sup> This rule was accepted as superior to its alternative. The two alternatives reveal the interplay between the corroboration requirement and cautionary instructions in rape law. Both are attempts to address the extraordinary problem in sexual offense crimes that the complainant might “lie or deceive herself.”<sup>99</sup>

Interestingly, it is unclear who is more at risk of suffering from feeling an irrational “involvement” in the crime—victims or judges and jurors. The Model Penal Code’s cautionary instruction itself warns against the “emotional involvement” of the “complaining witness,” while the 1962 Commentary warns against the “special psychological involvement” of judges and jurors. In any case, by 1980, the Code’s drafters deleted their involved defense of the instruction in the Commentary, although the cautionary instruction itself remained.

### C. Current Law on the Three Doctrines

Despite the vigor with which the Model Penal Code continues to embrace the prompt complaint requirement, corroboration requirement, and cautionary instructions for sexual offenses, the vast majority of American jurisdictions have formally spurned these three doctrines. A prompt complaint requirement, for example, remains today in only three states—California, Illinois and South Carolina—and in those jurisdictions it applies only to spousal sexual offenses.<sup>100</sup> The California code indicates:

no prosecution shall be commenced [for spousal rape] unless the violation was reported to medical personnel, a member of the clergy, an attorney, a shelter representative, a counselor, a judicial officer, a rape crisis agency, a prosecuting agency, a law enforcement officer, or a firefighter within one year after the date of the violation. This reporting requirement shall not apply if the victim’s allegation of the offense is corroborated by independent evidence that would otherwise be admissible during trial.<sup>101</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> CAL. PENAL CODE § 262 (West 2002); ILL. COMP. STAT. ANN. CH. 720 § 5/12-18(c) (West 2002); S.C. CODE ANN. § 16-3-615(B) (West 2001).

<sup>101</sup> CAL. PENAL CODE § 262 (5)(b) (West 1999 & Supp. 2003). Prompt complaint is also required in Texas, but only in situations where there is no corroborating evidence. TEX. CRIM. PROC. ANN. art. 38.07(a) (West 2001).

In California, therefore, failure to complain within one year of spousal rape may be offset by corroborating evidence of the offense. There is no prompt complaint requirement for non-spousal sexual offenses in California.<sup>102</sup>

Illinois has adopted a modified version of the Model Penal Code rule on prompt complaint and applied it to spousal offenses as well:

Prosecution of a spouse of a victim under this subsection for any violation by the victim's spouse of [criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse or aggravated criminal sexual abuse] is barred unless the victim reported such offense to a law enforcement agency or the State's Attorney's office within 30 days after the offense was committed, except when the court finds good cause for the delay.<sup>103</sup>

The thirty-day complaint provision is substantially more restrictive than California's time frame of one year, although it contains a "good cause" exception.<sup>104</sup> There is also no prompt complaint requirement for non-spousal sexual offenses in Illinois.<sup>105</sup>

The South Carolina code for sexual battery provides:

The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for this offense.<sup>106</sup>

South Carolina is even stricter than Illinois because it requires a complaint within thirty days but does not provide a "good cause" exception.<sup>107</sup> Like California and Illinois, South Carolina's code does not require a prompt complaint for non-spousal sexual offenses.<sup>108</sup>

Not only is prompt complaint for sexual offenses rarely formally required in contemporary law, a modern "fresh complaint" doctrine allows courts to admit evidence that a complainant promptly reported her victimization to bolster her testimony.<sup>109</sup> In *State v. Hill*,<sup>110</sup> the Supreme Court of New Jersey rejected the common law requirement

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<sup>102</sup> See generally CAL. PENAL CODE §§ 261-262 (West 2001).

<sup>103</sup> ILL. COMP. STAT. ANN. CH. 720 § 5/12-18(c) (West 2002) at § 5/12-18(c).

<sup>104</sup> *Id.* No case law in the state reveals exactly what "good cause" is.

<sup>105</sup> See generally ILL. COMP. STAT. ANN. CH. 720 § 5/12-18 (West 2002).

<sup>106</sup> S.C. CODE ANN. § 16-3-615(B), § 16-3-658 (West 2001). Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." *Id.* at § 16-3-651(h). Spousal sexual battery is sexual battery "accomplished through use of aggravated force, defined as the use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature, by one spouse against the other spouse if they are living together . . ." *Id.* at § 16-3-615(A).

<sup>107</sup> Compare S.C. CODE ANN. § 16-3-615(B), § 16-3-658 (West 2001) with ILL. COMP. STAT. ANN. CH. 720 § 5/12-18(c) (West 2002).

<sup>108</sup> See generally S.C. CODE ANN. §§ 16-3-651-658 (West 2001).

<sup>109</sup> See Stanchi, *supra* note 18, at 446.

<sup>110</sup> 578 A.2d 370, 377 (N.J. 1990).

of a prompt complaint, but concluded that a court could still admit evidence of a prompt complaint where it existed:

If we were to eliminate the fresh-complaint rule, rape victims would suffer whenever members of the jury held prejudices that women who do not complain have not really been raped.... Hence, until there is a clearer understanding of the perception of rape and its women victims, we think that the better solution is to allow fresh-complaint testimony to be admitted.<sup>111</sup>

As a result of similar analysis, states now usually allow for the admission of the fact of a rape victim's prompt complaint to corroborate the victim's testimony.<sup>112</sup> For example, the Virginia code states: "in any prosecution for criminal sexual assault . . . the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness."<sup>113</sup> Pennsylvania's criminal code states:

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<sup>111</sup> *Id.* at 378. The Supreme Court of California re-examined the fresh complaint doctrine in *People v. Brown*, 883 P.2d 949 (Cal. 1994). The court stated that the admissibility of fresh complaint evidence should not turn on whether the complaint was made in a timely manner following the alleged incident, as mandated by the traditional rule, but rather should turn on whether general evidentiary principles would permit such evidence to be admitted. *See id.* at 959. Because evidence of the *fact* of a complaint would not be barred by hearsay rules or any other principles, it should be admitted. *See id.*

<sup>112</sup> *See Aaron v. State*, 139 So. 2d 309 (Ala. 1961); *Greenway v. State*, 626 P.2d 1060 (Alaska 1980); *State v. Navarro*, 367 P.2d 227 (Ariz. 1961); *Gabbard v. State*, 285 S.W.2d 515 (Ark. 1956); *People v. Brown*, 883 P.2d 949 (Cal. 1994); *People v. Montague*, 508 P.2d 388 (Colo. 1973); *Connecticut v. Troupe*, 677 A.2d 917 (Conn. 1996); *State v. Brewer*, 114 A. 604 (Del. 1921); *Battle v. United States*, 630 A.2d 211 (D.C. App. 1993); *Lyles v. State*, 412 So. 2d 458 (Fla. App. 1982); *Epps v. State*, 118 S.E.2d 574 (Ga. 1961); *Territory v. Nishi*, 24 Haw. 677 (1919); *State v. Hall*, 397 P.2d 261 (Idaho 1964); *People v. Lawler*, 568 N.E.2d 895 (Ill. 1991); *Woods v. State*, 119 N.E.2d 558 (Ind. 1954); *State v. Ladehoff*, 122 N.W.2d 829 (Iowa 1963); *State v. Hoskinson*, 96 P. 138 (Kan. 1908); *Cook v. Commonwealth*, 351 S.W.2d 187 (Ky. 1961); *State v. Robertson*, 89 La. Ann. 618 (1886); *State v. Calor*, 585 A.2d 1385 (Me. 1991); *State v. Werner*, 489 A.2d 1119 (Md. 1985); *Commonwealth v. Licata*, 591 N.E.2d 672 (Mass. 1992); *People v. Taylor*, 239 N.W.2d 627 (Mich. App. 1976); *State v. Blohm*, N.W.2d 651 (Minn. 1979); *Carr v. State*, 208 So. 2d 886 (Miss. 1968); *State v. Van Doren*, 657 S.W.2d 708 (Mo. App. 1983); *State v. Peres*, 71 P. 162 (1903); *State v. Daniels*, 388 N.W.2d 446 (Neb. 1986); *State v. Campbell*, 17 P. 620 (Nev. 1888); *State v. Lynch*, 45 A.2d 885 (N.H. 1946); *State v. Hill*, 578 A.2d 370 (N.J. 1990); *State v. Baca*, 242 P.2d 1002 (N.M. 1952); *People v. McDaniel*, 611 N.E.2d 265 (N.Y. 1993); *State v. Freeman*, 5 S.E. 921 (N.C. 1888); *State v. Gebhard*, 13 N.W.2d 290 (N.D. 1944); *Johnson v. State*, 17 Ohio 593 (1848); *State v. Brown*, 1977 Ohio App. LEXIS 9839 (1977); *Roberts v. State*, 194 P.2d 219 (Okla. Crim. 1948); *State v. Campbell*, 705 P.2d 694 (Ore. 1985); *Commonwealth v. Green*, A.2d 371 (Pa. 1979); *State v. Russo*, 142 A. 543 (R.I. 1928); *Simpkins v. State*, 401 S.E.2d 142 (S.C. 1991); *State v. Twyford*, 186 N.W.2d 545 (S.D. 1971); *State v. Kendricks*, 891 S.W.2d 597 (Tenn. 1994); *Vera v. State*, 709 S.W.2d 681 (Tex. Crim. App. 1986); *State v. Martinez*, 326 P.2d 102 (Utah 1958); *State v. Willett*, 62 A. 48 (Vt. 1905); *Pepoon v. Commonwealth*, 66 S.E.2d 854 (Va. 1951); *State v. Ferguson*, 667 P.2d 68 (Wash. 1983); *State v. Golden*, 336 S.E.2d 198 (W.Va. 1985); *Hannon v. State*, 36 N.W. 1 (Wis. 1888); *Elliott v. State*, 600 P.2d 1044 (Wyo. 1979).

<sup>113</sup> VA. CODE ANN. § 19.2-268.2 (West 2002). Virginia courts have said that the only time constraint is, "the complaint have been made without a delay which is unexplained or is inconsistent with the occurrence of the offense." *Id.* The Court of Appeals of Virginia has identified possible reasonable explanations for delay, including fear of disbelief by others and fear of threat of further harm by the assailant. Whether to

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.<sup>114</sup>

The rule in most jurisdictions, then, is that evidence of prompt complaint may be admitted to bolster the victim's testimony and the defendant may attack its absence to discredit her testimony.<sup>115</sup>

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admit the complaint is a matter for the court, but once admitted, the timeliness of the complaint is a matter for the jury to consider when weighing evidence, including the credibility of the prosecutrix.

In 1993, the Court of Appeals for the District of Columbia examined the fresh complaint doctrine in *Battle v. U.S.*, 630 A.2d 211 (D.C.Cir. 1993). The court reasoned that the fresh complaint doctrine was necessary for the benefit of the complainant for several reasons:

First, evidence of a complaint of rape negates jurors' assumptions that if there is no evidence of a complaint, no complaint was made... Second, such evidence negates prejudices held by some jurors by showing that the victim behaved as society traditionally has expected sexual assault victims to act, i.e., by promptly telling someone of the crime... Third, such evidence rebuts an implied charge of recent fabrication, which springs from some jurors' assumptions that sexual offense victims are generally lying and that the victim's failure to report the crime promptly is inconsistent with the victim's current statement that the assault occurred.

*Id.* at 217. The *Battle* court explained that the prosecution was allowed to present fresh complaint evidence to corroborate the complainant's testimony, and to rebut any inferences that the complainant's testimony was not credible. *See id.*

<sup>114</sup> 18 PA. CONS. STAT. ANN. § 3105 (West 2002). The Pennsylvania Supreme Court has explained that prompt complaint is:

competent evidence, properly admitted when limited to establish that a complaint was made . . . . Conversely, unexplained lack of evidence of hue and cry that one might expect to ensue from rape casts doubt on the existence of the rape itself.

*Commonwealth v. Freeman*, 441 A.2d 1327, 1331-32 (Pa. 1982). *Freeman* contended that the trial court improperly admitted evidence of the victim's prior complaints of the rape to third parties. *See id.* at 1331. The court explained that, while the Pennsylvania Crimes Code no longer requires prompt complaint evidence, it allows the evidence in as long as it is limited to the fact that a complaint was made. *Id.*

<sup>115</sup> The Massachusetts Supreme Court in *Commonwealth v. Licata*, 591 N.E.2d 672 (Mass. 1992), adopted a somewhat unique variation on the fresh complaint doctrine: not only is the *fact* of a fresh complaint admissible, the *details* of that complaint are also admissible. *See id.* at 675. Almost all other states consider the details of the complaint inadmissible. *See Aaron v. State*, 139 So.2d 309, 316 (Ala. 1961); *Greenway v. State*, 626 P.2d 1060, 1061 n.4 (Alaska 1980); *Bing v. State*, 740 S.W.2d 156, 157-58 (Ark. 1987); *People v. Burton*, 359 P.2d 433, 444 (Cal. 1961); *People v. Montague*, 508 P.2d 388, 389 (Colo. 1973); *Connecticut v. Troupe*, 677 A.2d 917, 928-29 (Conn. 1996); *Fitzgerald v. United States*, 443 A.2d 1295, 1305 (D.C. 1982); *Custer v. State*, 34 So.2d 100, 110 (Fla. 1947); *Epps v. State*, 118 S.E.2d 574, 578 (Ga. 1961); *State v. Hall*, 397 P.2d 261, 267 (Id. 1964); *People v. Robinson*, 383 N.E.2d 164, 168 (Ill. 1978); *Woods v. State*, 119 N.E.2d 558, 562 (Ind. 1954); *State v. Grady*, 183 N.W.2d 707, 718 (Iowa 1971); *Cook v. Commonwealth*, 351 S.W.2d 187, 189 (Ky. 1961); *State v. Calor*, 585 A.2d 1385, 1387 (Me. 1968); *Carr v. State*, 208 So.2d 886, 888 (Miss. 1968); *State v. Van Doren*, 657 S.W.2d 708, 716 (Mo. Ct. App. 1983); *State v. Daniels*, 388 N.W.2d 446, 450 (Neb. 1986); *State v. Baca*, 242 P.2d 1002, 1004 (N.M. 1952); *People v. Stripling*, 162 A.D.2d 1029 (N.Y. 1990); *State v. Campbell*, 705 P.2d 694, 699-700 (Or. 1985); *Commonwealth v. Green*, 409 A.2d 371, 374-75 (Pa. 1979); *State v. Harrison*, 113 S.E.2d 783, 784 (S.C. 1960); *State v. Twyford*, 186 N.W.2d 545, 548 (S.D. 1971); *Vera v. State*, 709 S.W.2d 681, 685 (Tex. Ct. App. 1986); *Moore v. Commonwealth*, 278 S.E.2d 822, 826 (Va. 1981); *State v. Ferguson*, 667 P.2d 68, 72 (Wash. 1983); *State v. Golden*, 336 S.E.2d 198, 203 (W.Va. 1985)

Like the traditional prompt complaint requirement, the corroboration requirement has also been almost eradicated from formal rape law. Only three states—New York, Ohio, and Texas—continue to impose a corroboration requirement in their criminal codes for certain sexual offenses. New York requires corroboration of the complainant’s testimony only when her lack of consent is due to her mental defect or incapacity.<sup>116</sup> Ohio requires corroboration of the complainant’s testimony for the crime of “sexual imposition,”<sup>117</sup> but not for other sexual offenses.<sup>118</sup> The Texas code states:

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<sup>116</sup> N.Y. PENAL LAW § 130.16 (West 2002). The relevant statute provides that a person may not be convicted, solely on the testimony of the victim, for a sexual offense of which lack of consent is an element when that lack of consent “results solely from incapacity to consent because of the victim’s mental defect, or mental incapacity.” *Id.* See N.Y. PENAL LAW § 130.05 (West 2002) (stating that lack of consent is an element of every offense in Article 130, except for consensual sodomy). The offenses in Article 130 (sexual offenses) that require lack of consent as an element include the following: N.Y. PENAL LAW § 130.20 (West 2002) (sexual misconduct); N.Y. PENAL LAW § 130.25 (West 2002) (rape in third degree); N.Y. PENAL LAW § 130.30 (West 2002) (rape in second degree); N.Y. PENAL LAW § 130.35 (West 2002) (rape in first degree); N.Y. PENAL LAW § 130.40 (West 2002) (sodomy in third degree); N.Y. PENAL LAW § 130.45 (West 2002) (sodomy in second degree); N.Y. PENAL LAW § 130.50 (West 2002) (sodomy in first degree); N.Y. PENAL LAW § 130.55 (West 2002) (sexual abuse in third degree); N.Y. PENAL LAW § 130.60 (West 2002) (sexual abuse in second degree); N.Y. PENAL LAW § 130.65 (West 2002) (sexual abuse in third degree). There are no corroboration requirements for testimony by victims in sexual offense cases in which lack of consent does not result from mental incapacity or defect. *People v. Soulia*, 695 N.Y.S.2d 179, 182-83 (N.Y. App. Div. 1999) (discussing corroboration requirements in cases in which lack of consent results from mental incapacity and how that was not at issue in instant case); *People v. Miller*, 640 N.Y.S.2d 904 (N.Y.A.D. 3 Dept., 1996) (holding that corroboration is not required to establish crime of sexual abused when predicated upon allegation of forcible compulsion).

<sup>117</sup> OHIO REV. CODE ANN. § 2907.06(B) (West 2002). The required corroboration does not have to be independently sufficient to convict the defendant and need not go to every element of the crime of sexual imposition. See *State v. Economo*, 666 N.E.2d 225, 228 (Oh. 1996). Rather, only slight circumstances are required to support the victim’s testimony. *Id.* One court defined the required evidence to be “minimal.” See *City of Avon Lake v. Pinson*, 695 N.E.2d 1178, 1179 (Ohio App. 1997). “Minimal evidence” was defined as “slight circumstances or evidence which tends to support the victim’s testimony.” *Id.* Sexual imposition is defined as:

No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

- (1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.
- (2) The offender knows that the other person’s, or one of the other person’s, ability to appraise the the nature of or control the offender’s or touching person’s conduct is substantially impaired.
- (3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.
- (4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.
- (5) The offender is a mental health professional, the other person or one of the other persons is a mental health client or patient of the offender, and the offender induces the other person who is the client or patient to submit by falsely representing to the other person who is the client or patient that the sexual contact is necessary for mental health treatment purposes.

<sup>118</sup> OHIO REV. CODE ANN. § 2907.02 (West 2002) (rape); OHIO REV. CODE ANN. § 2907.03 (West 2002) (sexual battery); OHIO REV. CODE ANN. § 2907.05 (West 2002) (gross sexual imposition).

A conviction [for sexual assault or aggravated sexual assault] is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred.<sup>119</sup>

Texas thus allows corroboration and prompt complaint to offset one another in sexual assault cases. In *McBride v. State*, for example, a Texas appellate court did not require corroboration of the rape complainant's testimony because she made a prompt outcry.<sup>120</sup> In *Friedel v. State*, by contrast, a Texas appellate court reversed a rape conviction because the complainant did not present corroborating evidence or promptly complain.<sup>121</sup>

Fourteen other state codes indicate that corroboration of a sexual offense complainant's testimony is not required.<sup>122</sup> The remaining thirty-three states' codes are

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<sup>119</sup> TEX. CRIM. PROC. CODE ANN. § 38.07(a) (West 2001). The one year reporting requirement does not apply if the victim was, at the time of the offense, seventeen years of age or younger, sixty-five years of age or older, or eighteen years of age or older but "by reason of age or physical or mental disease, defect, or injury was substantially unable to satisfy the person's need for food, shelter, medical care, or protection from harm." *Id.* § 38.07(b)(1)-(3).

Sexual assault is when "[a] person commits an offense if the person: (1) intentionally or knowingly: (A) causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent; (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor...." TEX. PENAL CODE § 22.011(a).

Aggravated sexual assault is sexual assault when the person "(i) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode; (ii) by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted on any person; (iii) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury, or kidnapping of any person; (iv) uses or exhibits a deadly weapon in the course of the same criminal episode; (v) acts in concert with another who engages in conduct described by Subdivision (1) directed toward the same victim and occurring during the course of the same criminal episode; or (vi) administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense; . . ." *Id.* at § 22.021(2)(A).

<sup>120</sup> 1997 Tex. App. LEXIS 1284 (Tex. Ct. App. 1997) at \*17.

<sup>121</sup> 832 S.W.2d 420, 421-22 (Tex. Ct. App. 1992).

<sup>122</sup> FLA. STAT. ANN. § 794.022 (West 2002) *amended by* 2002 FLA. SESS. LAW SERV. CH. 2002-211 (H.B. 1399) (West) (testimony of victim need not be corroborated in prosecution for sexual battery); ILL. COMP. STAT. ANN. CH. 720 §16-3-657 (West 2002) (testimony of victim need not be corroborated for criminal sexual conduct); MICH. COMP. LAWS ANN. § 750.520(h) (West 2002) (testimony of victim need not be corroborated in prosecutions for non-statutory sexual offenses); MINN. STAT. ANN. § 609.347 (1) (West 2002) *amended by* 2002 MINN. SESS. LAW. SERV. CH. 381 (S.B. 2433) (West) (testimony of victim need not be corroborated); NEB. REV. STAT. § 29-2028 (West 2002) (requiring no corroboration for testimony of sexual assault victims); N.H. REV. STAT. ANN. § 632-A:6 (West 2002) (no requirement of corroboration for victim's testimony in prosecutions for sexual offenses under same chapter); N.M. STAT. ANN. § 30-9-15 (West 2002) (indicating corroboration of victim's testimony not required for § 30-9-11 Criminal Sexual Penetration, § 30-9-12 Criminal Sexual Contact, § 30-9-13 Criminal Sexual Contact of a Minor, and § 30-9-14 Indecent Exposure); 18 PA. CONS. STAT. ANN. § 3106 (West 2002) (testimony by complainants does not need corroboration in prosecutions of sexual offenses); R.I. GEN. LAWS. § 11-37-11 (West 2001) (testimony of victim is not required to be corroborated in prosecutions for sexual assault); S.C. CODE ANN. § 16-3-657 (West 2001) (no corroboration required for prosecution of criminal sexual conduct in first, second, and third degrees, and criminal sexual conduct with a minor), S.D. CODIFIED LAWS § 23A-22-15.1

silent on the issue of corroboration. However, case law from each of these states indicates that corroboration of the complainant's testimony is not ordinarily required. Twenty-two states—Alabama,<sup>123</sup> Arkansas,<sup>124</sup> California,<sup>125</sup> Colorado,<sup>126</sup> Delaware,<sup>127</sup> Georgia,<sup>128</sup> Hawaii,<sup>129</sup> Idaho,<sup>130</sup> Illinois,<sup>131</sup> Indiana,<sup>132</sup> Iowa,<sup>133</sup> Louisiana,<sup>134</sup> Maine,<sup>135</sup> Maryland,<sup>136</sup> Nevada,<sup>137</sup> New Jersey,<sup>138</sup> North Carolina,<sup>139</sup> North Dakota,<sup>140</sup> Oregon,<sup>141</sup>

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(West 2002) (testimony of complainant in sex offense case may not be treated differently than complainant's testimony in any other criminal case); VT. STAT. ANN. tit. 13 § 3255 (West 2002) (corroborative evidence not required for rape); WASH. REV. CODE ANN. § 9A.44.020 (1) (West 2002) (no requirement of corroboration of victim's testimony for convictions of sex offenses); WYO. STAT. ANN. § 6-2-311 (West 2002) (no requirement of corroboration for sexual assault).

<sup>123</sup> *Myers v. State*, 677 So.2d 807 (Ala. Crim. App. 1995) (“[I]t is well settled that a conviction for rape may be had on the uncorroborated testimony of the victim.”).

<sup>124</sup> *Freeman v. State*, 959 S.W.2d 400 (Ark. 1998) (uncorroborated testimony of rape victim is sufficient to sustain conviction of rape).

<sup>125</sup> *People v. Poggi*, 753 P.2d 1082 (Cal. 1988) (conviction of sex crime may be sustained on uncorroborated testimony of complainant).

<sup>126</sup> *People v. Fierro*, 606 P.2d 1291 (Colo. 1980) (corroboration of victim's testimony is not essential in criminal prosecution for unlawful sexual acts and that need for corroboration should be assessed by jury).

<sup>127</sup> *State v. Stewart*, 1987 Del. Super. LEXIS 990 (Del. Super. Ct. 1987) (Delaware law does not require corroborating evidence).

<sup>128</sup> *Hutchison v. State*, 522 S.E.2d 56 (Ga. Ct. App. 1999) (corroboration no longer necessary to establish rape).

<sup>129</sup> *State v. Jones*, 617 P.2d 1214 (Haw. 1980) (law does not require corroboration of complaining witness in rape prosecution).

<sup>130</sup> *State v. Allen*, 929 P.2d 118 (Idaho 1996) (Idaho does not require corroboration of testimony in rape cases); *State v. DeGrat*, 913 P.2d 568 (Idaho 1996) (no longer requires corroboration in sexual crime trials).

<sup>131</sup> *People v. Carlson*, 663 N.E.2d 32 (Ill. App. Ct. 1996) (in sex offense cases law does not require victim's testimony to be substantially corroborated to prove guilt beyond reasonable doubt).

<sup>132</sup> *Browning v. State*, 775 N.E.2d 1222 (Ind. Ct. App. 2002) (conviction for rape can rest solely on uncorroborated testimony of victim).

<sup>133</sup> *State v. Knox*, 536 N.W.2d 735 (Iowa 1995) (law has abandoned notion that rape victim's accusation must be corroborated).

<sup>134</sup> *State v. Zornes*, 774 So.2d 1062 (La. Ct. App. 2000) (victim's testimony alone is sufficient to establish elements of offense).

<sup>135</sup> In Maine, uncorroborated testimony will be scrutinized more carefully, however, corroboration is not required. In *State v. Palmer*, 624 A.2d 469 (Me. 1993) (corroboration beyond testimony of prosecutrix is not required to prove crime of rape); *State v. Field*, 170 A.2d 167 (Me. 1961) (in absence of corroboration testimony must be scrutinized and analyzed with great care – if the testimony is contradictory, unreasonable or incredible, it is not sufficient).

<sup>136</sup> *Moore v. State*, 329 A.2d 48 (Md. Ct. Spec. App. 1974) (victim's testimony standing alone, if believed, is sufficient to sustain conviction).

<sup>137</sup> *State v. Gomes*, 930 P.2d 701 (Nev. 1996) (sexual assault victim's uncorroborated testimony is sufficient to convict).

<sup>138</sup> *State v. Garcia*, 199 A.2d 860, 862 (N.J. Super. Ct. App. Div. 1964) (“It is clear that in our jurisdiction a conviction for a morals or sex offense may be sustained on the uncorroborated testimony of the victim”) (citing *State v. Fleckenstein*, 159 A.2d 411, 414 (N.J. Super. Ct. App. Div. 1960)).

<sup>139</sup> *State v. Henderson*, 2003 WL 138272 (N.C. App. Jan. 21, 2003) (“[T]he law does not require medical evidence to corroborate a victim's story as the victim's word alone is sufficient evidence upon which a jury can convict.”); *State v. Rogers*, 366 S.E.2d 474 (1988) (same).

<sup>140</sup> *State v. Kringstad*, 353 N.W.2d 302, 306 (N.D. 1984) (stating general rule and finding uncorroborated testimony of victim had established all of elements of gross sexual imposition).

<sup>141</sup> *State v. Fitzmaurice*, 475 P.2d 426 (Or. App. 1970) (holding that rape conviction may be had on uncorroborated testimony of prosecutrix); *State v. Morrow*, 75 P.2d 737 (Or., 1938) (stating that, in prosecution for rape corroboration is not required).



Tennessee,<sup>142</sup> Utah,<sup>143</sup> and Virginia<sup>144</sup>—allow a defendant to be convicted of rape based on the uncorroborated testimony of the complainant. Twelve states and the District of Columbia appear to qualify a general rule that no corroboration is required.<sup>145</sup> For example, in Alaska, when a complainant of sexual abuse later recants her allegation, the state must produce corroborating evidence to support the original allegation.<sup>146</sup> In Arizona, corroboration may be needed when the witness’ story is physically impossible or incredible.<sup>147</sup> Oklahoma and West Virginia require corroboration only when the complainant’s testimony is inherently improbable.<sup>148</sup> In Kansas and Kentucky, the complainant’s testimony need not be corroborated if it is clear and convincing and not unbelievable.<sup>149</sup> In Mississippi,<sup>150</sup> Missouri,<sup>151</sup> Montana,<sup>152</sup> and the District of

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<sup>142</sup> *Montgomery v. State*, 556 S.W.2d 559, 560 (Tenn. Crim. App. 1977) (“The rape statute . . . does not require that the testimony of the violated female be corroborated.”).

<sup>143</sup> *State v. Archuleta*, 747 P.2d 1019, 1021 (Utah 1987) (declining to adopt position that testimony of rape victim alone cannot support a conviction).

<sup>144</sup> *Moore v. Com.*, 491 S.E.2d 739 (Va. 1997) (stating that conviction of rape may be sustained solely upon victim’s testimony).

<sup>145</sup> Alaska, Arizona, Hawaii, Kansas, Kentucky, Massachusetts, Mississippi, Missouri, Montana, Oklahoma, West Virginia, Wisconsin. *See* citations in next notes.

<sup>146</sup> *See Henry v. State*, 861 P.2d 582 (Alaska Ct. App. 1993) (when victim of sexual abuse recants allegation, state must show corroborating evidence to support prior allegations); *Brower v. State*, 728 P.2d 645 (Alaska Ct. App. 1986) (conviction can only be based on complaining witness’ prior inconsistent statements only if corroborating evidence existed).

In Massachusetts, corroborative evidence is required to support a prior inconsistent statement. *See Commonwealth v. Sineiro*, 740 N.E.2d 602 (Mass. 2000) (corroborative evidence required when there is “prior inconsistent Grand Jury testimony that contains an essential element of the crime”).

<sup>147</sup> *State v. Williams*, 526 P.2d 714 (Ariz. 1974) (conviction may be had on basis of uncorroborated testimony of prosecutrix unless story is physically impossible or so incredible that no reasonable person could believe it).

<sup>148</sup> *Remine v. State*, 759 P.2d 230, 232 (Okla. Crim. App. 1988) (corroboration of the victim’s testimony is “only necessary when [the] prosecutrix’s testimony is too inherently improbable to support a conviction”).

*State v. McPherson*, 371 S.E.2d 333, 337 (W. Va. 1988) (allowing sex offense convictions to rest solely on the uncorroborated testimony of the victim, unless the testimony is “inherently incredible”). West Virginia also allows the court to give a cautionary instruction when testimony is uncorroborated. *See State v. McPherson*, 371 S.E.2d 333, 337 (W. Va. 1988).

<sup>149</sup> *State v. Borthwick*, 880 P.2d 1261 (Kan. 1994) (testimony of prosecutrix alone could be sufficient to sustain rape conviction without further corroboration as long as it is clear and convincing); *State v. Mitchell*, 771 P.2d 73 (Kan. 1989) (when uncorroborated testimony of prosecutrix is unbelievable, testimony alone is insufficient to sustain rape conviction); *State v. Matlock*, 660 P.2d 945 (Kan. 1983) (conviction of rape can be upheld without corroboration as long as there is clear and convincing evidence and as long as testimony is not so incredible and improbable as to defy belief); *Carrier v. Commonwealth*, 356 S.W.2d 752 (Ken. 1962) (stating that uncorroborated testimony of prosecutrix may be sufficient to sustain conviction if proof is clear and convincing, but insufficient if prosecutrix’s story is intrinsically improbable or her actions before and after alleged offense indicate that offense did not happen).

<sup>150</sup> *Williams v. State*, 757 So.2d 953 (Miss. 1999) (stating that unsupported word of victim of sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence).

<sup>151</sup> *State v. Gilyard*, 979 S.W.2d 138 (Mo. 1998) (corroborative evidence can be highly probative of victim credibility and may even be essential, such as where victim’s testimony is unconvincing or contradictory).

<sup>152</sup> *State v. Olson*, 951 P.2d 571, 576-77 (Mont. 1997) (reversing previous case law insofar as cases required victim’s testimony be consistent with other evidence to support a conviction of sexual assault); *State v. Howie*, 744 P.2d 156, 159 (Mont. 1987) (“Conviction of a sexual assault may be based entirely on the uncorroborated testimony of the victim.”).

Columbia,<sup>153</sup> corroboration is not required except to explain inconsistencies within the complainant's testimony. Wisconsin requires corroboration when the complainant's testimony is unreliable.<sup>154</sup>

Like the prompt complaint requirement and the corroboration requirement, cautionary instructions have also greatly waned in formal rape law.<sup>155</sup> Cautionary instructions for rape are prohibited in more than half of the states. Codes in seven states prohibit the judge from issuing jury instructions that the complainant's testimony should be reviewed with special caution given the nature of sexual crimes.<sup>156</sup> In addition, a

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<sup>153</sup> *Battle v. United States*, 630 A.2d 211 (D.C. 1993) (recognizing that corroboration requirement has been abolished but that corroboration might still be necessary, not to ascertain truth of statement but to explain inconsistencies).

<sup>154</sup> *See Thomas v. State*, 284 N.W.2d 917, 924 (Wis. 1979) (stating victim's testimony was unreliable because she "stated that she did not remember the incident of sexual intercourse and only testified as to what she had been told to say"). ("[T]his court has held that ' . . . [w]here the testimony of the prosecuting witness bears upon its face evidence of its unreliability, to sustain a conviction there should be corroboration by other evidence as to the principal facts relied on to constitute the crime.'").

<sup>155</sup> Cautionary instructions are regularly employed for the testimony of accomplices, individuals who are or could have been indicted for the same crime as the defendant, arising out of the same events, who testify against the defendant in return for immunity or a lesser charge against them. Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 786 (1990). Unlike rape victims, accomplices as a routine matter may have self-interested motives for lying or exaggerating on the witness stand. In Hawaii, the cautionary instruction for accomplice testimony reads:

The testimony of an alleged accomplice should be examined and weighed by you with greater care and caution than the testimony of ordinary witnesses. You should decide whether the witness's testimony has been affected by the witness's interest in the outcome of the case, or by prejudice against the defendant, or by the benefits that the witness stands to receive because of his/her testimony, or by the witness's fear of retaliation from the government.

Hawaii Criminal Jury Instructions 6.01(A). In Oklahoma, the accomplice cautionary instruction states: "No person may be convicted on the testimony of an accomplice unless the testimony of such a witness is corroborated by other evidence." Vernon's Okla. Forms 2d, OUJI-CR 9-25. *See also* Colo. Jury Instr.. Criminal 4:06, CO-JICRIM 4:06; 10 Minn. Prac. Jury Instr. Guides – Criminal CRIMJIG 3.18 (4<sup>th</sup> ed.).

Cautionary instructions have sometimes been issued with child and alibi witnesses. *See, e.g.,* Carol J. Miller, Annotation, *Instructions to Jury as to Credibility of Child's Testimony in Criminal Case*, 32 A.L.R.4<sup>th</sup> 1196 (2003); Frank D. Wagner, Annotation, *Propriety and Prejudicial Effect of Instructions on Credibility of Alibi Witnesses*, 72 A.L.R.3d 617 (2003).

<sup>156</sup> COLO. REV. STAT. ANN. § 18-3-408 (West 2002) ("In any criminal prosecution [for a sexual offense], or for attempt or conspiracy to commit any [sexual offense crime], the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given."); IOWA CODE ANN. § 709.6 West 2002 (stating that no instruction is permitted that tells jury to use different standard for victim's testimony than that of another witness to that offense or another offense); MD. CRIM. LAW § 3-320 (West 2002) (prohibiting jury instruction telling jury to examine victim's testimony with caution solely because of nature of charge); MINN. STAT. ANN. § 609.347 (5)(d) (West 2002) *amended by* 2002 MINN. SESS. LAW. SERV. CH. 381 (S.B. 2433) (West) (prohibiting instruction for jury to scrutinize victim's testimony more closely than in other prosecutions); NEV. REV. STAT. ANN. § 175.186(2) (Michie 2002) (prohibiting instruction that states that rape is difficult to prove or establish beyond a reasonable doubt); 18 PA. CONS. STAT. ANN. § 3106 (West) ("The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions [for sexual offenses]. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed."); S.D.

Florida statute generally prohibits judges from commenting to the jury on the credibility of witnesses, which has been applied in rape cases to reject cautionary instructions.<sup>157</sup> Cautionary instructions in rape cases have also been prohibited by case law in the District of Columbia<sup>158</sup> and twenty other states—Alaska,<sup>159</sup> Arizona,<sup>160</sup> California,<sup>161</sup> Florida,<sup>162</sup> Georgia,<sup>163</sup> Idaho,<sup>164</sup> Indiana,<sup>165</sup> Iowa,<sup>166</sup> Louisiana,<sup>167</sup> Missouri,<sup>168</sup> Montana,<sup>169</sup> Nevada,<sup>170</sup> North Dakota,<sup>171</sup> Ohio,<sup>172</sup> Oregon,<sup>173</sup> Rhode Island,<sup>174</sup> Utah,<sup>175</sup> Virginia,<sup>176</sup> Washington,<sup>177</sup> and Wyoming.<sup>178</sup>

The remaining thirteen states do not always require cautionary instructions but have not prohibited them.<sup>179</sup> For example, Nebraska courts have ruled that it was not error to refuse to issue the traditional cautionary instruction when an instruction emphasizing “the grave importance of its fact-finding function in the administration of justice” was given.<sup>180</sup> Texas has not prohibited cautionary instructions, but there is no rule requiring them.<sup>181</sup> The courts of Arkansas,<sup>182</sup> Connecticut<sup>183</sup> and Mississippi<sup>184</sup>

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CODIFIED LAWS § 23A-22-15.1 (Michie) (“The testimony of the complaining witness in a trial for a charge of rape shall not, merely because of the nature of that charge, be treated in any different manner than the testimony of a complaining witness in any other criminal case.”).

<sup>157</sup> See FLA. STAT. § 90.106 (2000); *Marr v. State*, 470 So.2d 703 (Fla. Ct. App. 1985).

<sup>158</sup> See *Arnold v. United States*, 358 A.2d 335 (D.C. Ct. App. 1976).

<sup>159</sup> See *Burke v. State*, 624 P.2d 1240 (Alaska 1980).

<sup>160</sup> See *State v. Settle*, 531 P.2d 151 (Ariz. 1975).

<sup>161</sup> See *People v. Rincon-Pineda*, 538 P.2d 247 (Cal. 1975).

<sup>162</sup> See *Marr v. State*, 494 So.2d 1139, 1140 (Fla. 1986).

<sup>163</sup> See *Black v. State*, 47 S.E. 370, 371-72 (Ga. 1904).

<sup>164</sup> See *State v. Smoot*, 590 P.2d 1001 (Idaho 1978).

<sup>165</sup> See *Taylor v. State*, 278 N.E.2d 273 (Ind. 1972).

<sup>166</sup> See *State v. Fedderson*, 230 N.W.2d 510, 514 (Iowa 1975).

<sup>167</sup> See *State v. Selman*, 300 So.2d 467, 470 (La. 1974).

<sup>168</sup> See *State v. Dalrymple*, 270 S.W. 675, 679 (Mo. 1925).

<sup>169</sup> See *State v. Liddell*, 685 P.2d 918, 922 (Mont. 1984).

<sup>170</sup> See *Turner v. State*, 892 P.2d 579 (Nev. 1995).

<sup>171</sup> See *State v. Gross*, 351 N.W.2d 428, 434 (N.D. 1984).

<sup>172</sup> See *State v. Tuttle*, 66 N.E. 524, 526 (Ohio 1903).

<sup>173</sup> See *State v. Bashaw*, 672 P.2d 48 (Or. 1983).

<sup>174</sup> See *State v. Farlett*, 490 A.2d 52 (R.I. 1985).

<sup>175</sup> See *State v. Studham*, 572 P.2d 700 (Utah 1977).

<sup>176</sup> See *Crump v. Commonwealth*, 23 S.E. 760, 761 (Va. 1895).

<sup>177</sup> See *State v. Wilder*, 486 P.2d 319 (Wash. Ct. App. 1971).

<sup>178</sup> See *Story v. State*, 721 P.2d 1020, 1044-46 (Wyo. 1986).

<sup>179</sup> See *Morris*, *supra* note 73, at 156.

<sup>180</sup> In *State v. Vicars*, rather than instructing specifically for rape, the jury instruction stated: “Consider the importance of your function as jurors. You are the sole judges of the facts. Your decision on these facts is final. Thus, your position is of grave importance in the proper functioning of the court in the administration of justice. Your primary desire must be to reach a fair and just conclusion only from facts and circumstances in evidence. A consideration of facts and circumstances in evidence excludes sympathy or prejudice in reaching a conclusion.” Oklahoma courts have also been unwilling to mandate cautionary instructions, especially when testimony is corroborated, although they have not completely banned them. See *Maxwell v. State*, 148 P.2d 214 (Okla. Ct. Crim. App. 1944). A Tennessee appellate court likewise upheld the trial court’s rejection of an instruction that both explained that rape is “hard to disprove” and generally disparaged the complainant’s testimony. See *State v. Holcumb*, 643 S.W.2d 336, 343 (Tenn. Crim. App. 1982).

<sup>181</sup> See *Hamilton v. State*, 58 S.W. 93 (Tex. Crim. App. 1900) (“[W]e know of no rule that requires the judge to so instruct them.”).

retain the discretion to use cautionary instructions in rape cases. In eight other states—Delaware,<sup>185</sup> Hawaii,<sup>186</sup> Kansas,<sup>187</sup> Maine,<sup>188</sup> New Hampshire,<sup>189</sup> New Mexico,<sup>190</sup> West Virginia,<sup>191</sup> and Wisconsin<sup>192</sup>—although corroboration is not required, some courts have issued cautionary jury instructions in rape cases.

The formal prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape have been rejected in most jurisdictions. There are good reasons that states have repudiated these doctrines, for each is based on faulty assumptions.

## II. The Faulty Assumptions Behind the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions

One obvious problem with the prompt complaint requirement, corroboration requirement, and cautionary instructions in rape law is that they will not thwart a shrewd manipulator. Take Potiphar's wife, for example. She made a point of promptly complaining. After Joseph rejected her sexual advances, she immediately called the men of her house together and claimed, "See, he came in unto me to lie with me, and I cried with a loud voice."<sup>193</sup> Potiphar's wife gathered corroborative evidence for her false claim. She produced the garment Joseph shed to flee her clutches and capitalized on that

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<sup>182</sup> See *Beasley v. State*, 522 S.W.2d 365, 368 (Ark. 1975) ("While this instruction could have been given, the refusal is not grounds for reversal. We have held that a trial court's refusal to give a cautionary instruction is not reversible error, this being discretionary, unless an abuse of discretion is shown.").

<sup>183</sup> See *Arabian*, *supra* note 75, at 613 (citing *State v. Braundeis*, 79 A. 70 (Conn. 1911)).

<sup>184</sup> See *Watkins v. State*, 98 So. 537, 538-39 (Miss. 1923). In the case law of Alabama, Illinois, Kentucky, Michigan, and South Carolina the theory behind the cautionary instruction is mentioned briefly; however, its use is not discussed. See *Barnett v. State*, 3 So. 612, 615 (Ala. 1887); *People v. Appleby*, 244 N.E.2d 395, 398 (Ill. App. 1968); *Holland v. Commonwealth*, 272 S.W.2d 458, 459 (Ky. Ct. App. 1954); *People v. Jordan*, 178 N.W.2d 659, 663 (Mich. App. 1970); *State v. Floyd*, 177 S.E. 375, 385-86 (S.C. 1934).

Massachusetts, New Jersey, New York, North Carolina, and Vermont make no mention of the cautionary instruction; however, these states do not explicitly prohibit its use. See *Commonwealth v. Mayfield*, 500 N.E.2d 774 (Mass. 1986); *Arabian*, *supra* note 75, at 612-614.

<sup>185</sup> See *Thompson v. State*, 399 A.2d 194, 197-98 (Del. 1979) (holding that, because there was evidence that corroborated complainant's testimony and there was no conflict in evidence to cast doubt on her credibility, trial court was not required to give cautionary instruction).

<sup>186</sup> See *State v. Dizon*, 390 P.2d 759, 770 (Haw. 1964) (cautionary instruction may be given when complainant did not have corroborating evidence of rape).

<sup>187</sup> See *State v. Loomer*, 184 P. 723, 724 (Kan. 1919) ("No case has even gone to the jury upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the court warning them of the danger of a conviction on such testimony").

<sup>188</sup> See *State v. McFarland*, 369 A.2d 227, 230 (Me. 1977) (cautionary instruction is given for jury to scrutinize victims' testimony with greater care when there is no corroboration).

<sup>189</sup> See *State v. Blake*, 305 A.2d 300, 305-06 (N.H. 1973) (cautionary instruction appropriate for jury to know weight to be given to uncorroborated testimony).

<sup>190</sup> See *State v. Dodson*, 353 P.2d 364, 365-66 (N.M. 1960), *State v. Clevenger*, 202 P. 687, 689-90 (N.M. 1921).

<sup>191</sup> See *State v. McPherson*, 371 S.E.2d 333, 337 (W.Va. 1988) (affirming trial judge's decision to deny motion for acquittal and issue cautionary jury instruction stating that complainant's testimony was subject to closer scrutiny to determine whether it was credible because it was uncorroborated).

<sup>192</sup> See *Connors v. State*, 2 N.W. 1143, 1146-47 (Wis. 1879), *Abaly v. State*, 158 N.W. 308, 309-10 (Wis. 1916), *Cobb v. State*, 211 N.W. 785, 789-90 (Wis. 1927).

<sup>193</sup> *Genesis* 39:14 (King James).

evidence, claiming to the assembled crowd, “And when he heard that I lifted up my voice and cried, he left his garment with me, and fled.”<sup>194</sup> Finally, even if someone had cautioned Potiphar of the risk of a wrongful conviction, he would probably have thrown Joseph in prison anyway.

Independent of their ineffectiveness at stopping false rape complaints, the prompt complaint requirement, corroboration requirement, and cautionary instructions are based on a series of false assumptions. The prompt complaint rule assumes that, if a woman were really raped, she would promptly complain to authorities, and that the failure to promptly complain to authorities means that she was not really raped.<sup>195</sup> As Wigmore surmised:

It was entirely natural, after becoming a victim of assault against her will, that she should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done.<sup>196</sup>

The reality of victims’ experiences, however, is quite different. Most rape victims do not promptly report the crimes they suffer to police or other authorities. In fact, most do not ever report. According to the 1992-2000 Bureau of Justice Statistics’ National Crime Victimization Survey, 63 percent of rapes, 65 percent of attempted rapes, and 74 percent of sexual assaults were not reported to the police.<sup>197</sup> A 1997 Bureau of Justice Statistics random sample survey of 4,446 college-aged women found that, although about one in ten had been raped and another one in ten had experienced an attempted rape, fewer than five percent reported their rapes or attempted rapes to police or other campus authorities.<sup>198</sup> Of those rape victims who do tell police or other authorities of having

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<sup>194</sup> *Genesis* 39:15 (King James).

<sup>195</sup> See Torrey, *supra* note 18, at 1042.

<sup>196</sup> WIGMORE, *supra* note 3, at 219.

<sup>197</sup> RENNISON, *supra* note 4, at 2. Sexual assault likely refers to non-penetrative sexual contact. SEE BONNIE S. FISCHER, FRANCIS T. CULLEN, & MICHAEL G. TURNER, NATIONAL INSTITUTE OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 17, 23-24 (2000).

<sup>198</sup> FISCHER, CULLEN & TURNER, *supra* note 197, at 23. The survey used detailed, graphic, behaviorally specific screen questions to eliminate the ambiguity of asking the respondent if she had been raped. *Id.* at 5. A different study found that 6 percent of first-year female students experienced a sexual assault by force; 12 percent experienced a sexual assault involving alcohol; 15 percent experienced a sexual assault by either force or alcohol; 16 percent experienced sexual intercourse under psychological pressure; 20 percent experienced any nonconsensual sexual penetration; and 9 percent experienced attempted forceful sexual assault. Colleen Finley & Eric Corty, *Rape on Campus: The Prevalence of Sexual Assault While Enrolled in College*, 34 J.C. STUDENT DEV. 113, 114 (1993). Other studies have obtained comparable results. For example, a 1993 survey of 3,472 undergraduate and graduate students from 12 schools indicated that 8 percent of women had been raped and 22 percent had been sexually assaulted. Bonnie S. Fischer, John J. Sloan, Francis T. Cullen & Chunmeng Lu, *Crime in the Ivory Tower: The Level and Sources of Student Victimization*, 36 CRIMINOLOGY 671, 683, 691 at Table 1 (1998).

The Bureau of Justice Statistics notes, “The closer the relationship between the female victim and the offender, the greater the likelihood that the police would not be told about the rape or sexual assault.” RENNISON, *supra* note 1, at 3. Given the inverse relationship between intimacy and likelihood of reporting, it is significant that the vast majority of rapes involve an intimate partner, relative, or acquaintance of the victim. Intimate partners (which include current and former spouses, cohabiting partners, boyfriends, and dates) comprise 62 percent of the perpetrators against adult female rape victims. PATRICIA TJADEN & NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND

been sexually attacked, a substantial percentage delays reporting for a period of time.<sup>199</sup> Most women who are raped, therefore, do not promptly complain.

The corroboration requirement assumes that, if a woman were really raped, she would have corroborative evidence of the assault, and that her failure to produce corroboration means that she was not really raped. Again, the reality of rape victims' experiences is quite different. Corroboration in a rape case usually refers to physical injuries from the assault, torn clothing, or other evidence of a physical struggle.<sup>200</sup>

Contrary to popular belief, however, non-genital, physical injury from rape is uncommon.<sup>201</sup> The Department of Justice studied victims admitted to hospital emergency rooms for rape, a population that one would assume suffers from more serious and numerous physical injuries than victims not admitted to emergency rooms post-rape. Sixty-eight percent of these admitted emergency room rape victims suffered no non-genital physical injuries, just 26 percent suffered mild non-genital physical injuries, only 5 percent suffered moderate non-genital physical injuries, and just .02 percent suffered severe non-genital physical injuries.<sup>202</sup> Even genital physical injuries are rare. Most rape victims do not suffer the kind of genital trauma that is detectable by hospital staff.<sup>203</sup>

The other type of corroborative evidence frequently thought valid is torn clothes or other evidence of a serious physical battle between the assailant and the victim. The reality, however, is that most rapes do not involve a fight that would produce this kind of evidence.<sup>204</sup> Most rapists, particularly acquaintance rapists, are able to subdue their victims with verbal coercion and pinning and need not resort to overt physical

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CONSEQUENCES OF VIOLENCE AGAINST WOMEN 44 exh.22 (2000). Other relatives and acquaintances comprise another 28 percent of perpetrators. *Id.* Thus, only 17 percent of perpetrators are strangers to their victims. *Id.*

<sup>199</sup> Of the rape victims who reported their attacks to the police, 25 percent delayed reporting more than 24 hours. NATIONAL VICTIM CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 5-6 tbl.7 (1992). Studies indicate that the greater the prior intimacy between the victim and the attacker, the longer the delay in reporting. Aviva Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 201 n.158 (1997). Victims who do not report or who delay reporting choose to do so because they fear that no one will believe them, or they may harbor tremendous feelings of embarrassment or guilt about the incident. See RENNISON, *supra* note 4, at 3.

<sup>200</sup> BRACON, *supra* note 5, at 483. ("When therefore a virgin has been so deflowered and overpowered against the peace of the lord the King, forthwith and whilst the act is fresh, she ought repair with hue and cry to the neighboring vills, and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress").

<sup>201</sup> LINDA E. LEDRAY, DEPT. OF JUSTICE, SEXUAL ASSAULT NURSE EXAMINER SANE DEVELOPMENT AND OPERATION GUIDE 69 (1999). See also HEATHER KARJANE ET AL., NATIONAL INSTITUTE OF JUSTICE, CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 72 (2002).

<sup>202</sup> LEDRAY, *supra* note 203, at 69, 70. Another Bureau of Justice Statistics study indicated that only 38 percent of female rape victims who sought treatment from a hospital emergency room post-rape suffered from extrinsic physical injury: 33 percent suffered minor injuries, and 5 percent suffered serious injury. See RENNISON, *supra* note 4, at 2. These findings are consistent with the findings of injuries among all reported and unreported rape victims from 1992 to 2000 of females over the age of 12. *Id.* at 1.

<sup>203</sup> LEDRAY, *supra* note 202, at 70. One study showed that only 19 percent of the victims had vaginal injuries and these injuries were always accompanied by the victim complaining of related pain, discomfort or bleeding. *Id.* Two other studies found that 22 out of 83 (27 percent) of rape victims had genital injuries and the second study found that only 1 percent of rape victims had genital injuries that required surgery for repair. *Id.*

<sup>204</sup> Anderson, *Reviving Resistance*, *supra* note 37, at 999. See also Hunter, *supra* note 37, at 127.

violence.<sup>205</sup> Additionally, some women become frozen with fear once an attack begins, which prevents them from physically resisting their assailants.<sup>206</sup>

Cautionary instructions for juries in rape cases assume that jurors are ordinarily biased in favor of an alleged rape victim and so should be cautioned against this natural inclination. As Hale explained, in rape cases, “the heinousness of the offense many times” transports the judge and jury to hastily convict.<sup>207</sup> Given our country’s racial history after the Civil War in which whites used rape allegations to terrorize the black community and inspire lynchings, Hale’s admonition may be relevant to black on white stranger rapes today.<sup>208</sup> In those relatively rare circumstances, it is quite possible that the judge and jury may be transported to hastily convict. In most rape cases—which are intra-racial and committed by acquaintances—however, social science literature documents quite the opposite. Studies indicate that jurors go out of their way to scrutinize the victim’s behavior and use it to excuse the defendant’s behavior. The cautionary instructions both derive from and exacerbate this expansive societal prejudice against rape victims.

It has become a cliché to say that the legal proceedings in a rape case (and the media circus that occasionally accompanies them) put the victim on trial.<sup>209</sup> However, this notion is more real than rhetorical. Juries are hyper-critical of a victim’s behavior and tend to blame her for the rape itself.<sup>210</sup> Studies indicate that the outcome of an

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<sup>205</sup> See *infra* notes 377-379 and accompanying text.

<sup>206</sup> Anderson, *Reviving Resistance*, *supra* note 37, at 994 n.260.

<sup>207</sup> HALE, *supra* note 14, at 636.

<sup>208</sup> The period of Reconstruction after the Civil War in the United States brought with it decades of terror lodged against the black community by white southerners who sought to re-impose slavery. A central mechanism of the terror campaign was lynching. Between 1889 and 1940, at least 3,800 blacks were lynched in former Confederate and bordering states. JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 216 (1988). Lynching was justified by a belief that the “honor and sanctity of white womanhood” needed to be protected from the black rapist. W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH* 58 (1993). Despite this justification, most lynchings had little to do with rape. D’EMILIO & FREEDMAN, *supra*, at 217. Between 1882 and 1946, just 23 percent of lynching victims were accused of rape or attempted rape. BETTINA APTHEKER, *WOMAN’S LEGACY* 61 (1982). See also NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES 1889-1918* 10 (1919). In those few cases in which a lynch mob did charge rape, these allegations had a variety of sources. Sometimes they rested on nothing more than a black man entering the room of a white woman or brushing against her; in other cases, there was evidence of an actual attack. *Id.* at 10. Other times alleged rapes were interracial love affairs detected by the white community. SANDRA GUNNING, *RACE, RAPE, & LYNCHING* 27 (1996). Moreover, sometimes whites used the accusation of a rape as mechanism to seek revenge. BRUNDAGE, *supra*, at 62. For example, two black farmhands, Albert Royal and Charlie Jackson, were in a dispute with white planters over some debts. One of the planters falsely accused Jackson of an assault of a white woman. He was arrested, but the lie was exposed and Jackson was released. After his release, a small group of white men rounded up Royal and Jackson, tied them to a tree and shot them to death. *Id.* at 62, 63.

<sup>209</sup> JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE THE MISUNDERSTOOD CRIME* 174 (1993) (“It is not an exaggeration to say that in the minds of each of the legal system’s operative- the prosecuting attorney, the defense attorney, the judge and the jury—the victim is *on* trial.”). See also LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM* 102 (1989); STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW* (1998), ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 6 (1999); Anderson, *From Chastity Requirement to Sexuality License*, *supra* note 37, at 60.

<sup>210</sup> One reason jurors blame the victim and immunize her assailant from punishment is to preserve the comforting but imaginary notion of a “just world.” Toni M. Massaro, *Experts, Psychology, Credibility, and*

average rape trial has more to do with the jury's assessment of the complainant's guilt than it has to do with its assessment of the defendant's guilt.<sup>211</sup>

A complainant's perceived promiscuity,<sup>212</sup> less-than-chaste clothing style,<sup>213</sup> and failure to conform to gender norms negatively affect jurors' assessment of whether a rape has occurred.<sup>214</sup> Any victim behavior that increases the risk for sexual assault (from hitchhiking to dating to just talking to a man at a party) leads to leniency with the defendant.<sup>215</sup> As one study concluded:

Any evidence of [the victim's] drinking, drug use, or sexual activity outside of marriage led jurors to doubt defendants' guilt, as did any prior acquaintance between victim and defendant. In fact . . . measures of victims' gender-role behavior were more important than measures of physical evidence and seriousness of offense in predicting jurors' case evaluations.<sup>216</sup>

Jurors thus often blur the distinction between a complainant's behavior that may increase her *risk* of being raped with a *justification* for the rape itself.<sup>217</sup> In rape cases, juries frequently make a victim's negligence tantamount to her consent to the sex alleged to

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*Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 409 (1985). People want to believe that the world is predictable and operates according to a set of rules and that people deserve what they get. Karen S. Calhoun & Ruth M. Townsley, *Attributions of Responsibility for Acquaintance Rape*, in ACQUAINTANCE RAPE THE HIDDEN CRIME 61 (Andrea Parrot & Laurie Bechhofer ed., 1991).

<sup>211</sup> Anderson, *From Chastity Requirement to Sexuality License*, *supra* note 37, at 249.

<sup>212</sup> In a 1982 study in which mock jurors heard identical rape scenarios except that (1) the victim was promiscuous; or (2) the victim was sexually inexperienced; or (3) nothing about the victim's past sexual history was told, the jurors rated the rape as "most serious when the victim's past was not mentioned, less serious if she had limited experience, and least serious when she was promiscuous." *Id.* at 104-105 (citing study).

<sup>213</sup> In a 1999 study, college students were more likely to blame the victim, consider the rapist justified, and label the attack something less than rape when the victim in the rape scenario wore a shorter skirt. *Id.* at 141 (citing study). A 1991 survey of 500 Americans found that 53 percent of adults over the age of 50 and 31 percent of adults between the age of 35 and 50 believe that a woman is responsible for her rape if she dresses provocatively. *Id.* at n.572 (citing study).

<sup>214</sup> See KALVEN & ZEISEL, *supra* note 3 at 251 (explaining that juries are more likely to acquit defendant of rape if victim engaged in certain behaviors, such as prior sexual relations with defendant, prostitution, or having illegitimate children); LAFREE, *supra* note 3, at 217-218 (explaining that juries were less likely to convict defendant of rape if victim engaged in such non-gender-conforming behavior as leaving home without male, hitchhiking, walking outside alone, engaging in sex outside of marriage, working in "disreputable occupations" (such as being a cocktail waitress), or engaging in traditionally male activities such as riding motorcycles or spending time at bars).

<sup>215</sup> See KALVEN & ZEISEL, *supra* note 3, at 249.

<sup>216</sup> LAFREE, *supra* note 3, at 226.

<sup>217</sup> Calhoun & Townsley, *supra* note 210, at 58-60. No one would suggest acquitting the house thief or the mugger because of the simple negligence of these victims. *Id.* at 60. A similar blaming the victim for his or her contributory negligence or assumption of the risk was discovered in homicide prosecutions involving drag racing accidents or Russian roulette. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. & CRIMINOLOGY 1298, 1334 (1997). Perhaps jurors equate courtship to these games and the "loser" deserves what they got for playing the game and the victor deserves the spoils of not being blamed.



have been rape.<sup>218</sup> Jurors can thereby nullify rape law “by importing the tort concept of contributory negligence or assumption of risk into the criminal case, acquitting the defendant when they believe that the victim behaved carelessly.”<sup>219</sup> Although neither a rape victim’s “contributory negligence” nor her “assumption of the risk” is a defense in rape law, jurors employ these doctrines to excuse the defendant’s conduct.<sup>220</sup>

Cautionary instructions that warn juries to “to evaluate the testimony of a victim or complaining witness with special care in view of” her “emotional involvement” in the crime<sup>221</sup> do not mitigate societal bias in favor of rape complainants. Instead, such cautionary instructions aggravate substantial societal bias against rape complainants. They are both an expression of and an exacerbating factor in that widespread bias.

The modern incarnation of the erroneous notion that women and girls are prone to lie about sexual assault derives at least in part from the misogyny Sigmund Freud brought to the burgeoning field of psychoanalysis he founded in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Freud asserted that women unconsciously desire sexual assault because they are inherently masochistic.<sup>222</sup> Courts and legal scholars used the assertions of Freud and his contemporaries to support their view that women are apt to fabricate accusations of rape.<sup>223</sup> Wigmore argued:

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however,

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<sup>218</sup> Bryden & Lengnick, *supra* note 217, at 1337.

<sup>219</sup> *Id.* at 1333, 1334.

<sup>220</sup> For example, a victim’s potentially risky behavior may make her rape more likely; however, it does not follow that the defendant should not be blamed for his own behavior. Calhoun & Townsley, *supra* note 210, at 60.

<sup>221</sup> MODEL PENAL CODE § 213.6(4).

<sup>222</sup> SIGMUND FREUD, *PSYCHOPATHOLOGY OF EVERYDAY LIFE* chap. 8, n.7 (Trans. A. A. Brill, 1901) (“The case [of suicide] is then identical with a sexual attack on a woman, in whom the attack of the man cannot be warded off through the full muscular strength of the woman because a portion of the unconscious feelings of the one attacked meets it with ready acceptance”). *See also* 1H. D EUTSCH, *THE PSYCHOLOGY OF WOMEN* 274 (1944) (proposing theory that women fantasize rape because of “penis envy” and female attraction to suffering).

<sup>223</sup> JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE THE MISUNDERSTOOD CRIME* 207 (1993). *See, e.g.,* Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967) (“Surely the simplest, and perhaps the most important reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false”); Note, *Forcible and Statutory Rape: An Exploration of the Operation of Objectives of the Consent Standard*, 62 YALE. L.J. 55, 67 (1952) (“a woman’s need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation”). The psychological literature asserting that women want to be violently sexually possessed is summarized in MENACHEM AMIR, *PATTERN OF FORCIBLE RAPE* 253-57 (1971).

too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.<sup>224</sup>

The fields of psychology and psychiatry have since rejected Wigmore and Freud's argument that the female psyche is inherently defective.<sup>225</sup>

To be sure, there are personality disorders that might lead a man or woman to lie in any number of outrageous ways, including lodging a false report of a crime.<sup>226</sup> There is, however, no specific empirical research connecting any of these personality disorders with false complaints of rape to the police. In fact, there is no good empirical data on false rape complaints either historically or currently. A debate over the number of false complaints nevertheless continues.

One side of the debate maintains that only two percent of rape complaints made to the police are false.<sup>227</sup> In her popular 1975 book on rape, *Against Our Will*, Susan Brownmiller wrote, "When New York City instituted a special sex crimes analysis squad and put police women (instead of men) in charge of interviewing complaints, the number of false charges in New York dropped dramatically to 2 percent, a figure that corresponds

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<sup>224</sup> WIGMORE, *supra* note 3, at 459. Wigmore's suggestion for cautioning juries about the threat of a false accusation was: "No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." *Id.* at 460.

<sup>225</sup> See generally MILTON BERGER, *WOMEN BEYOND FREUD: NEW CONCEPTS OF FEMININE PSYCHOLOGY* (1994); NANCY CHODOROW, *FREUD ON WOMEN* (1992); EDWARD TIMMS & NAOMI SEGAL, *FREUD AND THE QUESTION OF WOMEN* (1988); ELI SAGAN, *FREUD, WOMEN AND MORALITY: THE PSYCHOLOGY OF GOOD AND EVIL* (1988); JEFFERY MOUSSAIEFF MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984).

<sup>226</sup> Antisocial, borderline, histrionic, narcissistic, and compulsive personalities have all been associated with lying. See Charles Ford et al., *Lies and Liars: Psychiatric Aspects of Prevarication*, 145 *AMER. J. PSYCHIATRY* 554 (1988). Antisocial Personality Disorder, in particular, may cause one to lie chronically. *AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 702 (4<sup>th</sup> ed. 2000). This disorder is characterized by a pattern of irresponsible and antisocial behavior that may include repeated lying, using aliases, or conning others. *Id.* It may also include being promiscuous and cheating, stealing, or engaging in other criminal behavior. *Id.* About three percent of American males have Antisocial Personality Disorder and one percent of females have it. *Id.* at 704.

Individuals with Borderline Personality Disorder have "a pervasive pattern of instability of interpersonal relationships, self-image, and affects," coupled with an intense fear of abandonment. *Id.* at 706. Borderline individuals may engage in pathological lying. See, e.g., Scott Snyder, *Pseudologia Fantastica in the Borderline Patient*, 143 *AMER. J. PSYCHIATRY* 1287 (1987). About two percent of the general population is estimated to suffer from Borderline Personality Disorder and it is diagnosed predominately in females. *AMERICAN PSYCHIATRIC ASSOCIATION, supra* at 708.

Histrionic Personality Disorder is characterized by "pervasive and excessive emotionality and attention-seeking behavior," and individuals with it "they often act out a role (e.g., 'victim' or 'princess') in their relationships to others." *Id.* at 712. About two to three percent of people suffer from it, but it is unclear whether men or women suffer from it more often because the diagnosis may be influenced by sex-role stereotyping. *Id.* at 712-13.

Someone with Narcissistic Personality Disorder has "a pervasive pattern of grandiosity, need for admiration, and lack of empathy." *Id.* at 714. It appears that more males than females are diagnosed with this disorder, which affects less than one percent of the general population. *Id.* at 716.

<sup>227</sup> ALLISON & WRIGHTSMAN, *supra* note 209, at 11.

exactly to the rate of false reports for other violent crimes.”<sup>228</sup> Over time and perhaps through repetition,<sup>229</sup> this two percent false rate has come to constitute the “conventional scholarly wisdom” on the matter.<sup>230</sup> The United States Justice Department appears to side with this camp, stating, “False accusations of sexual assault are estimated to occur at the low rate of two percent—similar to the rate of false accusations for other crimes.”<sup>231</sup>

The other side of the debate claims that eight percent or more of rape complaints made to the police are false, a percentage disproportionate to other crimes.<sup>232</sup> The FBI Uniform Crime Reports have in the past indicated that, overall, about eight percent of forcible rape complaints reported to police are “unfounded;”<sup>233</sup> however, “unfounded” does not mean false.<sup>234</sup> Police may code a case “unfounded” when they conclude that it is unverifiable, not serious, or not prosecutable.<sup>235</sup> Various factors can increase a city’s percentage of “unfounded” rape complaints, such as police incompetence, bias, or insensitivity to rape victims.<sup>236</sup> The Department of Justice reports:

Some police officers incorrectly think that a rape report is unfounded or false if any of the following conditions apply:

- the victim has a prior relationship with the offender (including having previously been intimate with him);
- the victim used alcohol or drugs at the time of the assault;

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<sup>228</sup> BROWNMILLER, *supra* note 18, at 387. Her figure was based on remarks by a New York Appellate Division Justice, Lawrence H. Cooke. *Id.* at 444. The 2 percent claim also emerged in a 1979 book. SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM 205-214 (1979). Based on their review of the literature, Katz and Mazur concluded that the frequency of false rape reports is probably small and the myth that women frequently lie is not accurate. *Id.* at 214.

<sup>229</sup> One law review article footnotes an expansive list of legal scholarship citing the 2 percent claim based on Brownmiller or Katz and Mazur or based on other works that cite Brownmiller or Katz and Mazur. Edward Greer, *The Truth Behind Legal Dominance Feminism’s “Two Percent False Rape Claim” Figure*, 33 LOY. L.A. L. REV. 947, 949 (2000). As Greer points out, “As far as can be ascertained, no study has ever been published which sets forth an evidentiary basis for the ‘two percent false rape complaint’ thesis.” *Id.* at 951.

<sup>230</sup> David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L.R. 317, 377 (2000). He however qualifies his statement in its footnote because “[i]t is unclear whether this is true; the subject is more complex than scholars usually acknowledge.” *Id.* at 377 n.221.

<sup>231</sup> OFFICE FOR VICTIMS OF CRIME, UNITED STATES DEPT. OF JUSTICE, FIRST RESPONSE TO VICTIMS OF CRIME 2001 10 (2001).

<sup>232</sup> ALLISON & WRIGHTSMAN, *supra* note 209, at 10-11.

<sup>233</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 26 (1997), FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 24 (1996), FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 24 (1995).

The FBI Uniform Crime Reports since 1998 have not mentioned this difference in unfounding rates. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1998), FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1999), FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES (2000), FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES (2001).

<sup>234</sup> RANA SAMPSON, U.S. DEPT. OF JUSTICE, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 9 (2002).

<sup>235</sup> Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN’S L. REV. 979, 1010 (1993).

<sup>236</sup> Michelle Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 928-931 (2001).

—there is no visible evidence of injury;  
—the victim delays disclosure to the police and/or others  
and does not undergo a rape medical exam; and/or  
—the victim fails to immediately label her assault as rape  
and/or blames herself.<sup>237</sup>

Neither side's numbers in the debate over false complaints of rape lodged with the police appear, therefore, to be supported by the kind of empirical evidence upon which one might feel confident.<sup>238</sup> As a scientific matter, the frequency of false rape complaints to police or other legal authorities remains unknown.

While there is very little empirical evidence on false rape complaints to the police, there are ample data indicating that real rapes remain vastly underreported to the police.<sup>239</sup> Rape is, in fact, one of the most underreported serious crimes.<sup>240</sup> Although decades of studies document the great reluctance of true rape victims to report their attacks to the police, many continue to fixate on the risk of false rape complainants, a risk that does not enjoy empirical support.

Most rape victims not only do not *promptly* complain, they do not *ever* complain to police or other legal authorities of having been sexually victimized. Corroborative evidence of sexual assault—such as torn clothes or injuries—is not only uncommon, it is downright rare. Instead of exhibiting a bias *in favor* of rape victims that jurors need to be cautioned against, jurors tend to be biased *against* rape victims and traditional cautionary instructions in rape cases only exacerbate that bias. Instead of warding off false claims, then, these three legal doctrines greatly hinder the prosecution of truthful claims. Because they are based on faulty assumptions, the criminal rape law in most jurisdictions has formally rejected the prompt complaint requirement, corroboration requirement, and cautionary instructions.<sup>241</sup>

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<sup>237</sup> SAMPSON, *supra* note 234, at 5.

<sup>238</sup> David Bryden and Sonja Lengnick argue, “Any advantage the woman might derive from a false accusation seems to be greatly outweighed by the potential adverse consequences of this type of deceit.” Bryden & Lengnick, *supra* note 217, at 1298. However, they do not find this argument entirely convincing because a false rape charge may provide a “convenient explanation” for an embarrassing affair, a pregnancy, or adultery. *Id.* at 1299. Interestingly, they argue that more false rape reports would not necessarily mean more innocent men convicted because the false accuser could accomplish her goal by just making the claim and not going to trial. *Id.* at 1313-14. They conclude that wrongful convictions for rape will also be low because of:

The high pre-trial case attrition rate, the skepticism of some police toward acquaintance rape accusations, the large numbers of women who eventually decide not to cooperate with the prosecution, the reluctance of prosecutors to take on weak cases, and the historic reluctance of jurors to convict men charged with acquaintance rape...

*Id.* at 1314.

<sup>239</sup> RENNISON, *supra* note 4, at 1.

<sup>240</sup> In 2001, for example, only 39 percent of rapes and sexual assaults were reported, as compared to 61 percent of robberies and 59 percent of aggravated assaults. CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 2001 10 (2002). Most female college students who have an experience that meets the legal definition of rape do not even define that experience as rape, and so never recount it as such to the authorities. Fischer, Cullen, & Turner, *supra* note 197, at 15.

<sup>241</sup> *See, e.g.*, State v. Hill, 578 A.2d 370 (N.J. 1990) (noting that prompt complaint requirement “is rooted in sexist notions about how the ‘normal’ women responds to rape” and must be rejected in an “attempt to cure the defects underlying the rule that could infect rape proceedings with anti-female bias”); MODEL PENAL

### III. Campus Sexual Assault Policies and Practices

In the early 19<sup>th</sup> century, the newly created American institutions of higher education were rampant with student disorder.<sup>242</sup> In general, colleges and universities policed crime on campus institutionally rather than referring students to the outside criminal justice system.<sup>243</sup> After a student riot at Harvard in 1818, for example, John Adams suggested flogging to discipline the unruly undergraduates.<sup>244</sup> Disavowing corporal punishment, Thomas Jefferson established a student government at the University of Virginia in the hopes that its undergraduates would thereby control themselves.<sup>245</sup> Less than a year later, however, campus disorder had only escalated and the faculty threatened to resign.<sup>246</sup> After a violent altercation involving fourteen students and two professors at the University of Virginia, Jefferson dissolved the student government and constructed a new disciplinary code.<sup>247</sup>

Student discipline in the early republic involved only male student behavior because women were forbidden from attending college.<sup>248</sup> Despite Oberlin's first foray into coeducation at its founding in 1833, women remained but a small minority of the collegiate student body through most of the century.<sup>249</sup> By the beginning of the 20<sup>th</sup> century, however, (and despite the resistance of many prestigious institutions, particularly in the Northeast and South) coeducation became the predominant form of higher education in America.<sup>250</sup> The issue of sexual assault on campus, however, did not arise until much later in 20<sup>th</sup> century.

During the past few decades, many factors led colleges and universities to change their disciplinary codes to address student sexual assault.<sup>251</sup> In the 1960s, attitudes toward college students changed when states lowered the age of majority and the 26<sup>th</sup>

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CODE § 213.6(6), 425 (A.L.I. 1980) ("New York's corroboration requirement was amended substantially in 1972 and revised completely in 1974" because "it was thought to reflect an official policy of suspicion towards female complainants and an overzealous attitude toward protecting male defendants") (footnotes omitted).

<sup>242</sup> Rodney Hessinger, "The Most Powerful Instrument of College Discipline": *Student Disorder and the Growth of Meritocracy in the Colleges of the Early Republic*, 39 HIST. EDUC. Q. 237, 239 (1999).

<sup>243</sup> Michael Griffaton, Note, *Forewarned Is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimitizations*, 43 CASE W. RES. L. REV. 525, 529 (1993).

<sup>244</sup> Hessinger, *supra* note 242, at 241.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* Jefferson called the student body before the Board of Visitors to take responsibility for their actions. Before Jefferson, James Madison, James Monroe, and the rest of the Board, Jefferson asked the fourteen students responsible for the fight to step forward and was astonished when his nephew did. *Id.*

When both corporal punishment and student self-government came to be viewed as incorrect, Provost Federic Beasley at the University of Pennsylvania proposed the meritocracy as a way to prevent student disorder. *Id.* at 250-51. Competitive grades and class rankings were to convince students to work hard to gain their professors' approval. *Id.* at 251. A new model of academic hierarchy in America was born. *Id.* at 262.

<sup>248</sup> Rosalind Rosenberg, *The Limits of Access: The History of Coeducation in America*, in WOMEN AND HIGHER EDUCATION IN AMERICAN HISTORY 107 (John Mack Faragher & Florence Howe, eds., 1988).

<sup>249</sup> *Id.* at 115. See also <http://www.oberlin.edu/external/EOG/womenshist/women.html>.

<sup>250</sup> Rosenberg, *supra* note 248, at 109.

<sup>251</sup> BOHMER & PARROT, *supra* note 35, at 94.

Amendment reduced the voting age to 18.<sup>252</sup> The sexual revolution of the 1960s and 1970s meant that young adults were more likely to engage in sexual interactions.<sup>253</sup> Student curfews were repealed and mixed-sex dorms opened.<sup>254</sup> In the 1970s, criminal reform of rape law became a central item on the feminist agenda.<sup>255</sup> In the 1980s, Dr. Mary Koss published a nationwide survey of 6,100 college students on rape, and her research sparked widespread interest in campus sexual assault.<sup>256</sup> In the 1990s, media then became interested in colleges' disciplinary responses to sexual assault on campus.<sup>257</sup> As a result of these changes, colleges and universities have implemented a variety of sexual assault codes. Penalties for violations of these codes can include fines, reprimands, negative notations on one's record, probation, suspension, or expulsion.<sup>258</sup>

There are a number of reasons a woman raped on campus might choose to avail herself of these codes and pursue a campus disciplinary proceeding instead of a criminal proceeding against her attacker. Victims often harbor substantial fear of the publicity and emotional trauma attendant to a trial process.<sup>259</sup> If a rape victim can obtain some recourse at a more local level, she often feels more comfortable pursuing it.<sup>260</sup> A victim may also simply want to have her attacker suspended or expelled so she does not have to face him in calculus class, for instance. Finally and most importantly, the criminal justice system, with its standard of proof of guilt beyond a reasonable doubt, rarely provides relief to acquaintance rape victims, so a campus disciplinary proceeding may appear to be a more advantageous avenue of potential relief.<sup>261</sup> The legacy of the prompt complaint requirement, corroboration requirement, and cautionary instructions as they now affect campus sexual assault policies and practices are making disciplinary proceedings less advantageous, however.

### **A. Emergence of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions in Campus Sexual Assault Policies and Practices**

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<sup>252</sup> *Id.* at 95.

<sup>253</sup> *Id.* at 96.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 8, Table 1-1.

<sup>256</sup> COMMITTEE TO ADDRESS SEXUAL ASSAULT AT HARVARD, *supra* note 35, at 21. Despite the criticism it has suffered (*see, e.g.*, Neil Gilbert, *Advocacy Research Overstates the Incidence of Date and Acquaintance Rape*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 120 (Richard Gelles & Donileen Loseke, eds. 1993)), Mary Koss' research on sexual assault on campus remains leading in the field.

<sup>257</sup> Tenerowicz, *supra* note 32, at 658-59.

<sup>258</sup> Swem, *supra* note 32, at 365. Expulsion may prevent a student from transferring to another university because a transfer student ordinarily must be in good standing at his previous institution. Tenerowicz, *supra* note 32, at 683.

<sup>259</sup> Paul Rosenthal, Note, *The Accused Student's Right To Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1247-48 (1997).

<sup>260</sup> *Id.* at 1247.

<sup>261</sup> ANDREA PARROT & LAURIE BECHOFER, ACQUAINTANCE RAPE: THE HIDDEN CRIME 125 (1991) ("a woman's not consenting to sex is not enough [for a rape conviction] in the eyes of most jurors, especially if the rapist was acquainted with the victim and did not use a weapon."). When a complainant does decide to pursue criminal charges, often the school will put its disciplinary proceedings in abeyance pending resolution of the criminal proceedings.

In response to the growing concern over sexual assault and rape on campus, a disturbing development has emerged at some colleges and universities. Some institutions of higher learning are imposing versions of the ancient corroboration and prompt complaint requirements on victims through informal practice and even through formal policies laid out in campus disciplinary procedures. These antiquated tactics, rejected by the vast majority of criminal law jurisdictions in the United States decades ago, tend to deter sexual assault victims from coming forward and, in those cases that do come to light, to resolve them hastily in favor of the accused.

In 1993, the Faculty of Arts and Sciences at Harvard College, the undergraduate division of Harvard University, adopted a strong statement against sexual misconduct.<sup>262</sup> The 1993 statement granted students “the right to bodily safety and integrity” and affirmed that the institution was “committed to creating and maintaining an environment” in which all individuals “are treated with dignity and feel safe and secure in their persons.”<sup>263</sup> It said:

In accordance with these principles, the Faculty of Arts and Sciences will not tolerate sexual misconduct including rape and sexual assault, whether affecting a man or a woman, perpetrated by an acquaintance or a stranger, by someone of the same sex or someone of the opposite sex. Such behavior is unacceptable in our community. A student who commits rape, sexual assault, or other sexual misconduct is subject to severe penalties under the rules of the Faculty of Arts and Sciences. Rape and sexual assault are serious crimes under the laws of the Commonwealth of Massachusetts and the individuals responsible for such acts are subject to prosecution and legal penalties.

The statement indicated that a victim could “initiate disciplinary or remedial action for sexual misconduct, including rape and sexual assault, through Harvard College in accordance with the procedures for adjudicating peer disputes.”<sup>264</sup> A victim could pursue such a disciplinary action at the campus level whether or not she chose to report to the local police and pursue the case criminally.<sup>265</sup> The 1993 statement was a strong policy in favor of victims’ rights.

Nine years later, the Faculty of Arts and Sciences at Harvard College adopted a new set of procedures for complaints of sexual assault.<sup>266</sup> Newspaper reports indicated

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<sup>262</sup> Standards of Conduct in the Harvard Community, Faculty of Arts and Sciences: Student Handbook, ch. 4, available at <http://www.registrar.fas.harvard.edu/handbooks/student.2002-2003/chapter4/conduct.html> (last visited Nov. 4, 2002). It was the first time the school implemented such a policy. COMMITTEE TO ADDRESS SEXUAL ASSAULT AT HARVARD, *supra* note 35, at 12.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* The 1993 statement noted that being intoxicated was not an excuse or a defense to a sexual offense, in that it did “not diminish a student’s responsibility in perpetrating rape, sexual assault, or other sexual misconduct.” *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> See Office of Civil Rights, *Ruling on Title IX Investigation of Harvard’s New Sexual Assault Policy*, 2, April 1, 2003. [hereinafter *OCR Ruling*]. The 2002 Procedures indicate:

The Administrative Board of Harvard College has this year adopted a new procedure for responding to complaints of peer-on-peer misconduct, including sexual misconduct. This

that a “spike in accusations” of student rape motivated the changes.<sup>267</sup> Harvard officials indicated that the school disciplinary system failed to reach satisfactory results in these recent cases.<sup>268</sup> When he recommended the new procedures, Harry Lewis, the Dean of Harvard College, said that the Administrative Board at Harvard, the body responsible for resolving peer disputes, was not equipped to deal with what he characterized as “he said/she said” rape complaints.<sup>269</sup>

The previous academic year was representative of Harvard’s inadequacy in disciplining campus rape. During the 2000-01 academic term the Administrative Board handled seven student complaints of sexual assault.<sup>270</sup> In six of the seven cases, the Board chose to take no disciplinary action against the accused. In the one case in which the Board did take disciplinary action, the Board found the complainant and the accused equally responsible for the assault and required them both to withdraw from the college.<sup>271</sup>

In one of the six cases in which the Board chose to take no disciplinary action, a sophomore complained of having been raped in the fall of her first year at Harvard by a male student.<sup>272</sup> According to the complainant, he sexually assaulted her twice as she lapsed in and out of consciousness due to heavy intoxication. The complainant submitted a list of fifteen witnesses to the Administrative Board. The Board concluded there was not enough evidence to resolve the case in the complainant’s favor and so took no disciplinary action against the accused.<sup>273</sup>

Harvard administrators believed that, despite the complainant’s fifteen witnesses, this case was emblematic of the so-called “he said/she said” rape complaints that the Board did not have the capacity to resolve.<sup>274</sup> Harvard administrators did not indicate a problem with the disciplinary board itself. They asserted, instead, that the problem was with female students who, they alleged, had “unrealistic expectations” in bringing their complaints of having been sexual assaulted to the Administration Board.<sup>275</sup>

The 2002 Procedures were a way to eliminate those complaints from the Board’s docket. The Procedures said:

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procedural change does not alter the College’s policies regarding rape, sexual assault, or other sexual misconduct as voted by the Faculty in 1993.

*See* New Procedure for Peer Disputes: Administrative Board of Harvard College, 2002-2003, *available at* [http://www.college.harvard.edu/academic/adboard/peer\\_dispute\\_procedure.html](http://www.college.harvard.edu/academic/adboard/peer_dispute_procedure.html) (last visited Nov. 4, 2002) [hereinafter *New Procedure*].

<sup>267</sup> Kate Zernike, *Campus Court at Harvard Alters Policy on Evidence*, N.Y. TIMES, May 9, 2002, at A36.

<sup>268</sup> Nancy Traver, *A Harvard Policy Under Fire*, CHIC. TRIB., Oct. 23, 2002, at 3C.

<sup>269</sup> Jessica Vascellaro, *Faculty To Revisit Assault Policy*, HARVARD CRIMSON ONLINE, April 25, 2003, at <http://www.thecrimson.com/article.aspx?ref=347828>.

<sup>270</sup> Zernike, *supra* note 267, at A36.

<sup>271</sup> Marie Szaniszló, *Colleges Caught in Sex-Assault Dilemma*, BOST. HERALD, Oct. 13, 2002, at 1.

Because the former boyfriend did not appeal the Board’s decision, he was allowed to promptly reapply to Harvard, was re-admitted, and was awarded his degree retroactively. Because the complainant appealed, however, her degree remained “in limbo.” *Id.*

<sup>272</sup> Anne Kofol, *Burden of Proof*, HARV. CRIMSON ONLINE, June 5, 2003 at

<http://www.thecrimson.com/article.aspx?ref=348210>. She had waited almost a year to bring charges to the Board because she had heard of its ineffectiveness. *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* *See also* Zernike, *supra* note 267, at A36 (“Officials feared that the existing procedures had raised expectations [among students]”).



Complaints must ordinarily be brought to the College in a timely manner. The Board typically cannot resolve peer dispute cases in which there is little evidence except the conflicting statements of the principals. Therefore, the Board ordinarily will not consider a case unless the allegations presented by the complaining party are supported by independent corroborating evidence. Based on the information provided at the time of the complaint, the Board will decide whether or not there appears to be sufficient corroborating evidence to pursue the complaint.<sup>276</sup>

These new procedures not only implemented an explicit prompt complaint requirement and a corroboration requirement under ordinary circumstances, they also implied a cautionary rule. Complaints needed to be “timely,” allegations needed to be supported by “sufficient corroborating evidence,” and Harvard cautioned the Board against pursuing cases in which the victim had “little evidence” but her own testimony.<sup>277</sup>

A preliminary investigation would “assess whether the complaint has the potential to be resolved through the College’s judicial process.”<sup>278</sup> If the Board was “unlikely to obtain information beyond students’ conflicting and credible accounts,” the Board might “decline to pursue a complaint further.”<sup>279</sup> Harvard thereby cautioned officials against pursuing grievances in which the complainant’s “credible account” of her sexual abuse was the only evidence she had.

A student grievance would proceed as follows. First, the complainant would give “the College a detailed written statement summarizing his or her complaint along with a descriptive list of all sources of information (persons, correspondence, records, actions taken, etc.) that may help to corroborate the allegations.”<sup>280</sup> The sources of information could include “virtually anything that helps to corroborate a student’s account, including, for example, diary entries or conversations with roommates or friends; it is not limited to eyewitnesses, confessions, or forensic evidence.”<sup>281</sup> The accused was then asked to “prepare a detailed written statement along with a descriptive list of sources of supporting information.”<sup>282</sup>

The Secretary of the Administrative Board would review “the statements and lists of supporting information and collect any other statements or documents that help to corroborate the students’ accounts.”<sup>283</sup> The Secretary would then present the information to the Chair of the Board. The Chair took one of two actions. If “responsibility for the alleged misconduct can likely be established or corroborated,” the Chair might refer the

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<sup>276</sup> The Administrative Board of Harvard College and the Student-Faculty Judicial Board, Faculty of Arts and Sciences: Student Handbook, ch. 4, *available at* <http://www.registrar.fas.harvard.edu/handbooks/student.2002-2003/chapter4/adboard.html> (last visited Nov. 4, 2002) [hereinafter *Ad Board*].

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> The accused student would be “advised to seek legal counsel,” whereas advice to the complainant to obtain legal counsel was optional. *Id.*

<sup>283</sup> *Id.*

matter to a subcommittee of the Board for a full investigation.<sup>284</sup> If, however, “the essential facts of an allegation are contested” or if “responsibility for the alleged conduct cannot be clearly established from the statements or other preliminary documents, the Chair will refer the matter to the full Administrative Board.”<sup>285</sup> The Board would then choose to “refer the matter to a subcommittee for further investigation, bracket or postpone a decision on the matter pending receipt of additional specific information, or decline to pursue the complaint further and instead refer to students to other avenues of possible resolution.”<sup>286</sup> A complainant’s ability to meet the ancient corroboration and prompt complaint requirements would determine which outcome she obtained.

Ironically, the Commonwealth of Massachusetts has never imposed a prompt complaint requirement, corroboration requirement, or cautionary instructions in its rules for the criminal prosecution of sexual offenses.<sup>287</sup> As a result, in theory at least, it is harder to be disciplined at Harvard College for having raped a student under the 2002 Procedures than it is to be convicted in the Commonwealth and incarcerated in a Massachusetts prison for the same act.

In June 2002, an anonymous Harvard student filed a complaint with the Office of Civil Rights (“OCR”) at the Department of Justice. The student claimed that Harvard’s 2002 Procedures violated Title IX of the Education Amendments of 1972 because they did not provide students “access to a prompt and equitable resolution of complaints.”<sup>288</sup> The complaint alleged that, because the 2002 Procedures required sexual assault victims to provide “sufficient independent corroboration” before a formal investigation into the complaint would be launched, the policy discriminated against the (mostly female) victims of sexual assault on campus.<sup>289</sup>

OCR investigated the complaint and concluded that there was no Title IX violation.<sup>290</sup> It determined that Harvard’s 2002 Procedures, including the “sufficient independent corroboration” requirement and the preliminary investigation stage, did not deny sexual assault victims a “prompt and equitable process” for resolving their complaints.<sup>291</sup> OCR concluded, “Title IX does not prohibit a process that limits the

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> See DuBois, *supra* note 18, at 1089; Friedman, *supra* note 18, at 1367 n.16; Arabian, *supra* note 75, at 585.

<sup>288</sup> See *OCR Ruling*, *supra* note 266 at 1. The revisions to sexual assault policy at issue became effective in September 2002, and were published in *The Administrative Board of Harvard College Guide for Students 2002-2003*. *Id.* at 2.

<sup>289</sup> See *id.* at 1. The complaint also alleged that all other types of discrimination complaints among peers are handled differently, through a process that does not have the additional requirement of “sufficient independent corroboration” in order to investigate the allegation. *Id.*

<sup>290</sup> See *id.*

<sup>291</sup> See *id.* at 3. “Based on the above [findings], OCR did not find sufficient evidence to establish that the changes to the grievance procedures...deprive students of access to a process providing a prompt and equitable resolution of this complaints.” Because the policy’s requirement of “sufficient independent corroboration” was the same for cases of racial or sexual harassment and assault between peers, the requirement did not impose “additional burdens” on students who filed complaints of peer sexual assault. See *id.* (citing Harvard’s *Handbook for Students*). There are different procedures, called “formal complaint” procedures, for students to follow when filing a student complaint against a faculty member. *Id.* These procedures are also outlined in the *Handbook for Students*; however, they only apply if a faculty or staff member is the person against whom the complaint was filed. *Id.* The complaint procedures that were

proceedings if it appears from a reasonable preliminary inquiry that further investigation would not produce evidence that could resolve the complaint.”<sup>292</sup>

In 2003, the Harvard faculty revised some of the language in the 2002 Procedures. The relevant passage now states:

Complaints must ordinarily be brought to the College in a timely manner. The Board typically cannot resolve peer dispute cases in which there is little evidence except the conflicting statements of the principals. Therefore, students are asked to provide as much information as possible to support their allegations. Based on that information and any other information obtained through investigation, the Board will decide whether to issue a charge.<sup>293</sup>

This revision failed to alter the prompt complaint requirement. Harvard’s insistence that the Board “cannot resolve peer disputes in which there is little evidence except the conflicting statements of the principals” remains the same. Instead of being told that the Board will “not consider a case unless the allegations ... are supported by independent corroborating evidence,” complainants are “asked to provide as much information as possible to support their allegations.” Based on the information provided, the Board will decide whether to issue a charge and continue with investigation. Although the troubling word “corroborating” has been erased from the policy, the revision is one of form and not substance. Robert Mitchell, director of communications for the Faculty of Arts and Sciences at Harvard, stated that nothing in the revision changed the way Harvard handles sexual assaults and the revision of the policy is “purely for clarification.”<sup>294</sup> The Dean of Harvard College agreed, indicating that the revision to the 2002 Procedures is “not substantial.”<sup>295</sup>

Robert Iuliano, Harvard’s deputy general counsel, now suggests that victims of acquaintance rape turn to the Massachusetts criminal justice system for relief since the Harvard Administrative Board can no longer help them. He asserts, “The courts, or at least the police, are in a better position to conduct an investigation. They have access to investigative tools that we don’t have.”<sup>296</sup> Dean Harry Lewis concurs, “I want to encourage women to take cases to the criminal justice system where something can be done. We don’t have forensic laboratories, we don’t have subpoenas.”<sup>297</sup> There is no evidence, however, that the trouble with rape cases at Harvard was that the Board lacked subpoena power or a place to conduct DNA analysis. In campus acquaintance rape cases in which the defense is almost always consent neither investigative tool is often used.<sup>298</sup>

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challenged in the *OCR Ruling* were those that were to be followed by a student bringing a complaint against another student. *See id.* “Title IX does not prohibit the use of due process. Nor does it set specific standards of how much process is required.”

<sup>292</sup> *See id.*

<sup>293</sup> *Ad Board, supra* note 276.

<sup>294</sup> Marcella Bombardieri & Jenna Russell, *School Bends Gender Rules*, BOST. GLOBE, May 25, 2003, at A31.

<sup>295</sup> Vascellaro, *supra* note 269.

<sup>296</sup> Zernike, *supra* note 267, at A36.

<sup>297</sup> Vascellaro, *supra* note 269.

<sup>298</sup> KARJANE ET AL., *supra* note 201, at 72.

Iuliano and Lewis are no doubt aware that the criminal justice system, with its standard of proof of guilt beyond a reasonable doubt, rarely provides relief to acquaintance rape victims.<sup>299</sup>

Sheldon Steinbach, general counsel for the American Council on Education, an umbrella organization of 1,800 colleges, nevertheless heralded Harvard College's new sexual assault procedures as "creative, innovative, and an attempt to try and insert a degree of fairness in a process that is, because of the nature of the allegations of sexual assault, unduly complicated."<sup>300</sup> Harvey Silverglate, an attorney who has represented a number of students accused of rape, agrees: "The new policy is one of the best things to happen to the campus judicial system in years."<sup>301</sup> Because the OCR at the Department of Justice has now given Harvard College the green light in its sexual assault policy, other schools may imitate the institution. Mr. Steinbach predicts: "When a prominent institution tries something innovative, other institutions are likely to follow."<sup>302</sup>

To analyze the sexual assault policies at the other top colleges and universities in the country, I attempted to contact what *U.S. News & World Report* listed in its 2003 survey as the top 50 national universities<sup>303</sup> and the top 50 liberal arts colleges.<sup>304</sup> I received hard copies of sexual assault policies from 31 institutions<sup>305</sup> and obtained sexual assault policies from 33 other institutions' websites.<sup>306</sup> In total, I reviewed 64 campus sexual assault policies.<sup>307</sup>

Like Harvard's 1993 Policy, the majority of these institutions have sexual assault policies that are victim-friendly in some respects. A number of policies list the

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<sup>299</sup> PARROT & BECHOFER, *supra* note 261, at 125 ("a woman's not consenting to sex is not enough [for a rape conviction] in the eyes of most jurors, especially if the rapist was acquainted with the victim and did not use a weapon.").

<sup>300</sup> Emery, *supra* note 36.

<sup>301</sup> Harvey Silverglate & Josh Gewolb, *Rape Charges: It's Time To End "He Said/She Said" Justice*, CHRON. HIGHER ED., Ap. 16, 2002, at 20.

<sup>302</sup> *Id.*

<sup>303</sup> See [http://www.usnews.com/usnews/edu/college/rankings/brief/natudoc/tier1/t1natudoc\\_brief.php](http://www.usnews.com/usnews/edu/college/rankings/brief/natudoc/tier1/t1natudoc_brief.php).

<sup>304</sup> See [http://www.usnews.com/usnews/edu/college/rankings/brief/libartco/tier1/t1libartco\\_brief.php](http://www.usnews.com/usnews/edu/college/rankings/brief/libartco/tier1/t1libartco_brief.php).

<sup>305</sup> Amherst College, Brandeis University, Bryn Mawr College, Carnegie Mellon University, Colby College, College of the Holy Cross, Connecticut College, Cornell University, Dartmouth College, Georgetown University, Georgia Institute of Technology, Macalester College, Mount Holyoke College, Pomona College, Rennselaer Polytechnic Institute, Rhodes College, Sarah Lawrence College, Stanford University, Union College, University of California-Irvine, University of California-Los Angeles, University of Chicago, University of Notre Dame, University of Texas at Austin, Vanderbilt University, Wake Forest, Washington and Lee University, Washington University in St. Louis, Wesleyan University, Whitman College, Yale University.

<sup>306</sup> Boston College, Bowdoin College, Brown University, California Institute of Technology, Carleton College, Case Western Reserve University, Claremont McKenna College, Columbia University, Davidson College, DePauw University, Duke University, Franklin and Marshall College, Gettysburg College, Grinnell College, Hamilton College, Harvard College, Kenyon College, Massachusetts Institute of Technology, Middlebury College, New York University, Northwestern University, Oberlin College, Occidental College, Pennsylvania State University, Pepperdine University, Princeton University, Rice University, Smith College, University of Michigan, University of North Carolina, University of Pennsylvania, University of Virginia, Williams College.

<sup>307</sup> The National Institute of Justice recently surveyed the sexual assault policies of 2,438 institutions of higher learning but did not cite or quote the policies specifically. See generally KARJANE ET AL., *supra* note 201. It found that only 7 in 10 schools mentioned having disciplinary procedures in their sexual assault policies. *Id.* at 105.

complainant's rights,<sup>308</sup> emphasize the institution's commitment to confidentiality,<sup>309</sup> instruct students about what to do if they are sexually assaulted,<sup>310</sup> state that pursuing disciplinary procedures is up to the complainant,<sup>311</sup> give examples of what is and is not considered sexual assault,<sup>312</sup> or provide other consoling and helpful suggestions.<sup>313</sup>

In terms of prompt complaint, campus policies routinely urge victims to report having been sexually assaulted as soon as possible. For example, Amherst College's policy states:

You are encouraged to report immediately any incidents of this nature . . . even if you do not wish to pursue the matter further. Keep in mind that an assailant who is allowed to go unpursued is a potential future danger, not only to you but also to other members of the community.<sup>314</sup>

The Georgia Institute of Technology states simply, "Time is of the essence when a sexual assault has occurred. The sooner an assault is reported, the easier it is to collect valuable evidence."<sup>315</sup>

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<sup>308</sup> For examples see UNIVERSITY OF CALIFORNIA POLICIES APPLYING TO CAMPUS ACTIVITIES, ORGANIZATIONS, AND STUDENTS for University of California-Irvine on page 33, Cornell's sexual assault policy located at <http://www.univco.cornell.edu/policy/SA.html>, and University of Michigan's "rights of the survivor" located at <http://www.umich.edu/~sapac/umassault.html>.

<sup>309</sup> Occidental College thoroughly explains their commitment to confidentiality and directs students to the right people to report a sexual assault so that the incident can remain confidential. See <http://departments.oxy.edu/safety/assault.html>.

<sup>310</sup> For example, see University of Virginia's options and procedures for sexual assault victims located at <http://www.student.virginia.edu/~judic/opt.html>.

<sup>311</sup> For example, see the RHODES COLLEGE FRATERNIZATION POLICY AND SEXUAL HARASSMENT AND ASSAULT POLICY that states on page 3 that "You are the one who decides whether or not to report a sexual assault. Deciding whether or not to report an assault is one of the steps you will take to regain a sense of control over your life." Also, in the Whitman College Sexual Misconduct Policy, all of the options that a complainant can seek through college discipline are tailored to give the complainant the power to decide his or her option. For example, the policy states "If the complainant wishes to proceed with a Formal Hearing..." Also, Carnegie Mellon's sexual assault policy states that "[n]o disciplinary or other action is taken in such cases without the clear, informed agreement of the individual bringing the charge forward. CARNEGIE MELLON UNIVERSITY, THE WORD 188 (2003).

<sup>312</sup> For example, see Duke University's Sexual Misconduct Policy at <http://deanofstudents.studentaffairs.duke.edu/scmscondt.html>, and see COLBY COLLEGE, IMPORTANT INFORMATION FOR THE COLBY COLLEGE COMMUNITY ABOUT SEXUAL ASSAULT 8-9.

<sup>313</sup> For example, in the Pepperdine student handbook (which can be located on the school's website), there are reassuring and informative statements, such as "Rape and assault are never the victim's fault" (pg. 42) and "Seeking medical help is an important step that should be taken as soon as possible. (The Santa Monica Rape Crisis Center at (310) 319-4000 will arrange a medical examination at no charge.) Victims should not shower, douche, bathe or use mouthwash before receiving a medical examination. Doing so may destroy evidence. If the victim wishes to change clothes, the removed clothes should be saved. All clothing and bed linens should not be washed. Going to the doctor or the Rape Crisis Center does not mean the victim will have to press charges. . . . *The reporting party will not be subject to disciplinary sanction as a result of her or his involvement in the circumstances leading up to the occurrence of a sexual offense.*" (pg. 43). In addition, many of the institutions provide instruction on seeking medical attention.

<sup>314</sup> AMHERST COLLEGE, STUDENT HANDBOOK 35.

<sup>315</sup> GEORGIA INSTITUTE OF TECHNOLOGY, GEORGIA TECH STUDENT POLICY ON SEXUAL HARASSMENT AND SEXUAL MISCONDUCT. Likewise, Macalester College states, "All victims are encouraged to report the incident immediately to one of the College Grievance Officers (the Assistant Dean of Students for students)

In a number of campus policies, it appears that the failure to promptly complain may be held against the alleged victim. For example, one policy declares, “Any student of Occidental College who feels that he or she has been the subject of sexual assault or any person witnessing sexual assault should promptly report the incident.”<sup>316</sup> Pepperdine University’s policy urges, “Victims understandably find rape and sexual assault upsetting and painful to discuss. However, it is important to report the incident as soon as possible.”<sup>317</sup> Washington and Lee University states, “Because it is often difficult to determine the facts of an incident long after it occurred, complaints should be filed as soon as possible.”<sup>318</sup>

By contrast, a number of schools make explicit that, although students are urged to promptly report, there is no prompt complaint requirement. For example, the California Institute of Technology’s policy states: “Students who wish to file a complaint against another student should do so as soon as possible after the assault, although complaints may be filed at any time.”<sup>319</sup> Many institutions make clear that there is no time limit for complaints of sexual assault when both the complainant and the accused are students. Wake Forest, for example, notes, “While students are encouraged to report any sexual assault as soon as possible, they may initiate University judicial proceedings at any time while the individuals involved are students at the University.”<sup>320</sup>

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or Campus Security. Reporting the incident allows College personnel to assist with providing services for psychological and medical attention, and other available support.” MACALESTER COLLEGE, STUDENT HANDBOOK 47 (2002). Bowdoin College’s policy states that reporting as soon as possible benefits a victim’s case against the accused, “Remember, delayed reporting makes it harder on you and more difficult to find and convict the attacker.” BOWDOIN COLLEGE, STUDENT HANDBOOK 65 (2003) located at <http://www.bowdoin.edu/communications/publications/pdf/studentHandbook.pdf>.

<sup>316</sup> Occidental Sexual Assault Policy (see under “Policy Enforcement”) located at <http://departments.oxy.edu/safety/assault.html>.

<sup>317</sup> PEPPERDINE UNIVERSITY, STUDENT HANDBOOK 42, located at <http://seaver.pepperdine.edu/studentaffairs/content/handbook/FullHandbook.pdf>.

<sup>318</sup> WASHINGTON AND LEE UNIVERSITY, STUDENT HANDBOOK 25-26 (2003).

<sup>319</sup> California Institute of Technology, Sexual Assault Policy for Students, located at [http://pr.caltech.edu/catalog/01\\_02/geninfo/sassault.html](http://pr.caltech.edu/catalog/01_02/geninfo/sassault.html). Likewise, Smith College’s policy states, “There is no established time frame for filing a complaint; however survivors are urged to file a complaint as soon as possible.” SMITH COLLEGE, STUDENT HANDBOOK, under “Policies, Procedures & Guidelines: Smith College Sexual Assault Policy,” located at <http://www.smith.edu/sao/handbook/policies/sexassault.php>. Similarly, Colby College’s policy states: “If you have been a victim of unwanted sexual attention or activity, talk to someone immediately. Students are also urged to seek immediate medical attention, including possible counseling. Students are also encouraged to explore the ways in which the matter can be addressed, either through the disciplinary process on campus, or the criminal process off campus, or both.” COLBY COLLEGE, IMPORTANT INFORMATION FOR THE COLBY COLLEGE COMMUNITY ABOUT SEXUAL ASSAULT 4.

<sup>320</sup> WAKE FOREST, STUDENT BOOK 49 (2002). Georgetown University likewise notes, “There is no time limit imposed as to when a formal complaint of misconduct may be initiated against any student currently registered at Georgetown University.” GEORGETOWN UNIVERSITY, STUDENT HANDBOOK (SECTION 4) 5 (2002). Sarah Lawrence College insists, “There is no deadline for filing complaints, but in order for a hearing to occur both parties must be currently enrolled at the College throughout the hearing process. The College, however, encourages any student who wishes to file a complaint to do so promptly.” Sarah Lawrence College Sexual Harassment/ Assault Policy pg. 103. Whitman College states, “Any Whitman student may bring charges of sexual misconduct against any other Whitman student at any time.” Whitman Sexual Misconduct Policy (see under “Procedures”). Kenyon College declares, “There is no statute of limitations for sexual misconduct at Kenyon. A student can bring charges against another student as long as both are currently enrolled in the College.” KENYON COLLEGE, STUDENT HANDBOOK 90.

A minority of campus policies limits the time period within which a sexual assault must be reported. Columbia University, for example, requires an incident to be reported within five years.<sup>321</sup> Duke University requires a report within two years.<sup>322</sup> Northwestern University requires a report within one year.<sup>323</sup> Stanford University grants accused students the right: “To have charges filed no more than six months after the alleged misconduct occurred or should reasonably have been discovered.”<sup>324</sup> Wesleyan University states, “Reports should be submitted as soon as possible, but preferably within five (5) days of the incident.”<sup>325</sup> In terms of a prompt complaint requirement, then, college and university sexual assault policies are widely diverse. Many strongly encourage rape victims to promptly complain, a few suggest that the failure to do so will be held against the complainant, and a few maintain a prompt complaint rule as statutes of limitations.

By contrast, none of the campus sexual assault policies reviewed besides Harvard’s contains language about a corroboration requirement or cautionary instructions. This silence is not surprising given that very few policies even articulate what the standard of proof is for the finding of a disciplinary infraction. A recent National Institute of Justice survey of the sexual assault policies of 2,438 institutions of higher learning found that just one in five articulated a standard of proof.<sup>326</sup> The standard of proof is explicit in only 22 out of the 64 policies from the top institutions I reviewed.

The National Institute of Justice found that, in those policies in which it was explicit, eight of ten used “preponderance of the evidence.” Among top universities and colleges I reviewed, a majority also used a “preponderance of the evidence” or “more

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<sup>321</sup> Columbia University’s Policy on Sexual Misconduct (see under “Disciplinary Procedure for Sexual Misconduct”) located at <http://www.columbia.edu/cu/sexualmisconduct/univPolicy.htm>.

<sup>322</sup> Duke University, Sexual Misconduct Policy, located at <http://deanofstudents.studentaffairs.duke.edu/scmscondt.html>. This policy applies to all allegations of campus disciplinary code violations, not just sexual assault.

<sup>323</sup> NORTHWESTERN UNIVERSITY, STUDENT HANDBOOK, RULES AND REGULATIONS OF STUDENT CONDUCT 123 (listed under “Sexual Assault Hearing and Appeals System” section) (“To file a complaint against another student under SAHAS, contact the Sexual Assault Hearing and Appeals System executive secretary (Scott Hall, 491-8430) as soon as possible, but not later than one year following the incident.”).

<sup>324</sup> Stanford University, Student Judicial Charter of 1997 (amended Fall 2002) at 4.

<sup>325</sup> Wesleyan University (Standards of Conduct, The Code of Non-Academic Conduct, located at [http://www.wesleyan.edu/acaf/policy/sc\\_non-academic\\_conduct.ctt](http://www.wesleyan.edu/acaf/policy/sc_non-academic_conduct.ctt)).

A few colleges and universities give those who report sexual assault more time to report than those who report other disciplinary infractions. At Claremont McKenna College, for example, student complaints “must be filed no later than ninety (90) days following the incident” but “Complaints involving allegations of sexual offenses, harassment or assault should be filed as promptly as possible, but no later than one hundred eighty (180) days following the incident.” Claremont McKenna College (Claremont McKenna College Basic Rule of Conduct and Judicial Procedures, under Section V. “Reporting Complaints,” located at <http://dos.claremontmckenna.edu/pdf/BasicRule2002.pdf>

At Connecticut College complaints other than sexual assault must be filed within 45 days, but “allegations of sexual misconduct . . . may be submitted within one year.” CONNECTICUT COLLEGE, STUDENT HANDBOOK 20 (2003). Hamilton College states, “Within two years of an incident of harassment, and five years of an incident of sexual assault, including rape, an individual may choose to file a formal complaint.” Hamilton College Harassment, Sexual Harassment and Assault Policy located at [http://www.hamilton.edu/college/Student\\_Handbook/2002-2003/HarassmentPolicy.html](http://www.hamilton.edu/college/Student_Handbook/2002-2003/HarassmentPolicy.html). (see under II.C. Formal Complaint).

<sup>326</sup> KARJANE ET AL., *supra* note 201, at 120. Where it was addressed, 8 in 10 used a “preponderance of evidence” standard. *Id.* Only 3 percent used “beyond a reasonable doubt.” *Id.*

likely than not” standard.<sup>327</sup> Five required clear and convincing evidence.<sup>328</sup> A few developed their own standards. Northwestern University required “sufficient evidence,”<sup>329</sup> Whitman College required “highly probable” evidence,<sup>330</sup> and Washington and Lee University indicated that the finding of a disciplinary infraction “must be supported by reasonable evidence.”<sup>331</sup> The broad range of standards of proof for disciplinary infractions indicates that there is no uniformly accepted method for evaluating these claims. The problem with silence on the standard of proof is that the age-old theories of rape regarding corroboration and caution that have largely been discredited in criminal law may unduly influence disciplinary tribunals’ perceptions of what is required for a finding of sexual assault.

Independent of the formal sexual assault policies that colleges and universities maintain, informal practices by higher educational institutions in response to campus sexual assault suggest a matching concern with false accusations and a belief that women provoke or cause rape with their bad behavior. The recent scandal at the Air Force Academy (“AFA”) provides one example.

In the past year, more than 50 current and former AFA cadets have recounted publicly their stories of mistreatment when they reported having been raped to campus

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<sup>327</sup> These institutions are: Boston College (see under “Student Judicial Procedure” section VII. Basis for Findings located at <http://www.bc.edu/offices/odsd/services/guide/part4/>), Bowdoin College (BOWDOIN COLLEGE, STUDENT HANDBOOK 60 (2003) located at <http://www.bowdoin.edu/communications/publications/pdf/studentHandbook.pdf>), Claremont McKenna College (Claremont McKenna College Basic Rule of Conduct and Judicial Procedures, under Appendix C V. located at <http://dos.claremontmckenna.edu/pdf/BasicRule2002.pdf>), Connecticut College (CONNECTICUT COLLEGE, STUDENT HANDBOOK 23 (2003)), Dartmouth College (DARTMOUTH COLLEGE, STUDENT HANDBOOK 138 (2002)), Georgetown University (GEORGETOWN UNIVERSITY, STUDENT HANDBOOK (SECTION 4) 27 (2002)), Franklin and Marshall College (see under “Committee of Student Conduct Hearing Procedures” located at <http://www.fandm.edu/collegelife/rights.html>), Massachusetts Institute of Technology (Student Conflict Resolution and Discipline, under VI. B. located at <http://www.mit.edu/afs/athena/org/r/resolution/procedures.html>), Middlebury College (Middlebury College Handbook, Under Chapter V, Section III B, located at <http://www.middlebury.edu/~publish/hdbk/Discip.html>), Oberlin College (OBERLIN COLLEGE, STUDENT HANDBOOK 224, located at [http://www.oberlin.edu/stlife/Resources/Sexual\\_Offense\\_Policy.html](http://www.oberlin.edu/stlife/Resources/Sexual_Offense_Policy.html)), Occidental College (under “Formal Proceedings” located at <http://departments.oxy.edu/safety/assault.html>), University of California-Irvine (UNIVERSITY OF CALIFORNIA, UNIVERSITY OF CALIFORNIA POLICIES APPLYING TO CAMPUS ACTIVITIES, ORGANIZATIONS, AND STUDENTS 11 (2002)), University of California-Los Angeles (UNIVERSITY OF CALIFORNIA- LOS ANGELES, STUDENT CONDUCT CODE 29 (2003)), Wesleyan University (Standards of Conduct, The Code of Non-Academic Conduct, located at [http://www.wesleyan.edu/acaf/policy/sc\\_non-academic\\_conduct.ctt](http://www.wesleyan.edu/acaf/policy/sc_non-academic_conduct.ctt)).

<sup>328</sup> These institutions are: Cornell University (CORNELL UNIVERSITY, POLICY NOTEBOOK FOR CORNELL COMMUNITY 32 (2002)), Davidson College (see under “Disciplinary Action: Rights and Power” located at <http://www.davidson.edu/student/redbook/honorgeneral.html>), Duke University (Resolution of Student Conflict & Alleged Violations of University Policy, under “Accused Students,” located at <http://deanofstudents.studentaffairs.duke.edu/judicialprocess.html>), Penn State (PENN STATE, JUDICIAL AFFAIRS TRAINING AND REFERENCE MANUAL 69 (2002) located at [http://www.sa.psu.edu/ja/PDF/jamanual\\_02\\_03.pdf](http://www.sa.psu.edu/ja/PDF/jamanual_02_03.pdf)), University of Pennsylvania (see under “Resolving Charges by Disciplinary Hearing” 5a. located at <http://www.upenn.edu/osc/Charter.htm>).

<sup>329</sup> NORTHWESTERN UNIVERSITY, STUDENT HANDBOOK, RULES AND REGULATIONS OF STUDENT CONDUCT 124 (listed under “Sexual Assault Hearing and Appeals System” section).

<sup>330</sup> Whitman Sexual Misconduct Policy (see under “Procedures for Formal Hearing” #8).

<sup>331</sup> WASHINGTON AND LEE UNIVERSITY, STUDENT HANDBOOK 39 (2003).



officials.<sup>332</sup> In response to these reports, the AFA often ignored the male perpetrators but disciplined the female complainants for the minor infractions they committed on the incidents in question, such as drinking, fraternizing with upper class cadets, or having sex in the dorms (referring to the alleged rape itself).<sup>333</sup>

When Sharon enrolled in the AFA, older female cadets told her, “If you’re a woman and you graduate and this hasn’t happened to you, you’re one of the select few. So expect [rape] to happen.”<sup>334</sup> She still did not believe she was in danger. One night in 1999, Sharon got a ride home from a movie from a male cadet.<sup>335</sup> He pulled the car over and raped her.<sup>336</sup> When Sharon reported having been raped to her military superiors, two AFA officers grilled her for four hours in a windowless basement room and told her she was a liar.<sup>337</sup> Thereafter they closed the case against her attacker.<sup>338</sup>

After a party drinking and playing strip poker, a male AFA cadet raped Lisa in a bathroom.<sup>339</sup> Lisa reported the rape to her commanding officer, and supported her claim with testimony from witnesses who saw her crying and saw blood on the bathroom floor, as well as a medical exam that noted several abrasions, contusions, and tears inside and outside her vagina.<sup>340</sup> When she went to the Commandant of students to ask that her attacker be court-martialed, General S. Taco Gilbert III told her, “I want the cadet wing to know that your behavior that night was wrong and unacceptable” and that, if he had his way, he would see Lisa marching alongside her attacker as punishment.<sup>341</sup> Lisa reported that Gen. Gilbert told her she “didn’t have to go to that party. Didn’t have to drink that night, didn’t have to play the card game and didn’t have to follow him back into that

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<sup>332</sup> See Reid, *supra* note 27, at A4; Foster, *supra* note 27, at 1A.

<sup>333</sup> See Fong, *supra* note 28, at 17A; Hockstader & Reid, *supra* note 28, at A03.

<sup>334</sup> Susan Dominus, *Rape Crisis at the Academy*, GLAMOUR, July 2003, at 202.

<sup>335</sup> Lisa Levitt Ryckman, *Rape, Betrayal Ruin Cadet’s Dream*, ROCKY MT. NEWS, Mar. 1, 2003, at 1A.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> Dominus, *supra* note 334, at 202.

<sup>340</sup> Julie Jargon, *The War Within: As America Prepares To Invade Iraq, Female Air Force Cadets Wage Their Own Battle*, DENVER WESTWORD (CO), Jan. 30, 2003, at A1. Defense counsel jumped on the fact that Lisa had earlier commented that the attack was as much her fault as her assailant’s and that she did not think they had sex. The defense attorneys also claimed that since Lisa was a Catholic and a virgin she was having regrets about the night in question and made up the accusation. *Id.* Lastly, they also attacked the fact she could not remember every detail of the incident. *Id.* Even those on “her side” of the case did not fully represent her interests. Major Vladimir Shifrin, the academy’s chief of military justice, stated that the prosecuting attorney represents the AFA and not the victim; therefore, “I would prosecute the case in the best interest of the government, not necessarily the best interest of the victim...” *Id.* Lisa also wondered why the prosecution neither brought in experts to talk about post-traumatic stress to rebut the defense’s claim about Lisa’s selective memory nor focused on the fact that consent is not given when a person is alcohol-impaired under the AFA’s sexual assault regulations. *Id.*

<sup>341</sup> Dominus, *supra* note 334, at 254. Since August 2001, when General Gilbert became Commandant of the Cadets, the AFA instituted a tough new anti-crime policy. Michael Moss, *General’s Crackdown Faulted in Rapes*, N.Y. TIMES, Mar. 26, 2003, at A10. The policy voided a previous amnesty program and led to more problems for victims of sexual assault. Every minor infraction that rape victims had engaged in became a shield for those who had attacked them. While Gilbert cracked down on drug and alcohol use, sexual assaults were rarely investigated or punished. *Id.*

bathroom.”<sup>342</sup> Lisa responded to him by saying, “You know what, Sir? He didn’t have to rape me.”<sup>343</sup> Gilbert analyzed the case in writing:

[Lisa] did engage in some very high-risk behavior that night. Again, the behavior in no way justifies what happened to her, but when you put yourself in situations with increased risk, you have to take increased precautions to mitigate those risks. For example, if I walk down a dark alley with hundred-dollar bills hanging out of my pockets, it doesn’t justify my being attacked or robbed, but I certainly increased the risks by doing what I did. The behavior she engaged in is not behavior we condone for our cadets or our officers in the Air Force. This standard isn’t just for the Air Force Academy; it’s an Air Force standard.<sup>344</sup>

The AFA chose not to court-martial Lisa’s attacker.<sup>345</sup> Like Harvard officials who blamed their own inability to discipline campus rape on the victims’ “unrealistic expectations” about the process, the Air Force working group charged with investigating the AFA asserted that the sexual abuse scandal may have been caused by “unrealistic expectations for prosecutions in the minds of victims.”<sup>346</sup>

As a result of the sexual abuse scandal that Sharon and Lisa’s stories typify, the Air Force ushered in new policies at the AFA. While offering complainants “amnesty from Academy discipline arising in connection with the alleged offense,” the new sexual

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<sup>342</sup> Jargon, *supra* note 340.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* Despite the case not going to court martial, an administrative hearing will take place concerning whether her attacker will be honorably or dishonorably discharged. *Id.*

<sup>346</sup> DEPT. OF THE AIR FORCE, THE REPORT OF THE WORKING GROUP CONCERNING THE DETERRENCE OF AND RESPONSE TO INCIDENTS OF SEXUAL ASSAULT AT THE U.S. AIR FORCE ACADEMY 22 (2003). The AFA grouped the crimes of rape, forcible sodomy, indecent assault, assault with intent to commit rape or sodomy, carnal knowledge, and indecent acts or liberties with a child (separate crimes under the Uniform Code of Military Justice) under the term “sexual assault” and defined it as:

[T]he unlawful touching of another in a sexual manner, including attempts, in order to arouse, appeal to, or gratify the lust or sexual desires of the accused, the victim or both, and which is without justification, excuse, or consent. Sexual assault includes, but is not limited to rape, sodomy, fondling, unwanted touching of a sexual nature, and indecent sexual acts that the victim does not consent to, or is explicitly or implicitly forced into. Consent is not given where there is force, threat of force, coercion, or when the person is alcohol impaired, underage, or unconscious. It is immaterial whether the touching is directly upon the body of another or is committed through the person’s clothing.

*Id.* at 23. Although this definition appeared to equate alcohol impairment with non-consent, the working group was concerned that alcohol impairment short of intoxication is not enough to negate consent under the UCMJ. *Id.* The working group was also concerned that the consent definition did not make clear that, “If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called by the circumstances, the inference may be drawn that the victim did consent.” *Id.* at 24. It thus concluded, “By using an expansive definition not linked to specific crimes, with misinformation regarding alcohol impairment on the issue of consent, and a general lack of information regarding consent issues, cadets can be misled regarding the ability of command to respond to their reports.” *Id.* at iv. The working group cited no evidence, however, that any female cadet who reported sexual misconduct and was shunned by her superiors was misled by the AFA definition of sexual assault.

assault policy also mandated prompt disclosure: “All allegations of sexual assault will be reported to the officer chain of command immediately.”<sup>347</sup> When a rape victim confers with a therapist at the Counseling Center or calls the campus rape crisis line, then, her name and narrative of having been sexually assaulted must immediately be reported to the Vice Commandant of the AFA.<sup>348</sup> The AFA thus publishes a victim’s complaint at an early stage, requiring her to make an involuntary prompt complaint to her commanders before she may be emotionally and psychologically ready. This rule will deter victims from coming forward with complaints.<sup>349</sup>

About one in three civilian institutions of higher learning maintain a policy similar to the AFA’s mandatory reporting rule.<sup>350</sup> They maintain “designated mandatory reporters,” school officials who are required to report (sometimes confidentially) all instances of rape or sexual assault to the police.<sup>351</sup> One in three campuses similarly mandates that students who report rape or sexual assault must participate in the adjudication process.<sup>352</sup> These policies also deter complaints because rape victims do not want their families or friends to find out and they distrust even confidential procedures for mandatory reporting, where they exist.<sup>353</sup>

Anecdotal evidence suggests that a similar mentality that blames the victim for her rape in the disciplinary infractions she engaged in on the instance in question may also be found at some civilian institutions. Kristin, a former Boston University student, was raped on campus one night after she drank heavily.<sup>354</sup> She and her attacker engaged in consensual petting but Kristin told him she did not want to engage in intercourse because she was a virgin.<sup>355</sup> Despite her protests, he pinned her down and penetrated her.<sup>356</sup> Kristin reported the rape to Boston University officials. Instead of punishing her alleged attacker, university officials suspended Kristin and fined her \$250 for violating the school’s alcohol policy and \$250 for sexually assaulting her assailant.<sup>357</sup> Robert B. Smith, Boston University’s general counsel, sent a letter to Kristin’s attorney, stating that the institution:

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<sup>347</sup> United States Air Force Academy, *Agenda for Change*, at <http://www.usafa.af.mil/agenda.cfm>.

<sup>348</sup> See Diana Jean Schemo, *Academy Cadet Chief Backs Rape Report Disclosures*, N.Y. TIMES, July 7, 2003, at A6.

<sup>349</sup> Erin Emery, “*False*” *Confidence Blinded Academy Leader*, DENVER POST, July 13, 2003, at B6 (quoting one former raped cadet commenting on new policy, “There’s no way anyone will say they were raped. The reporting will go down.”). See also KARJANE ET AL., *supra* note 201, at xi (“Any policy or procedure that compromises, or worse, eliminates the student victim’s ability to make her or his own informed choices about proceeding through the reporting and adjudication process—such as mandatory reporting requirements that do not include an anonymous reporting option or require a victim to participate in the adjudication process if the report is filed—not only reduces reporting rates but may be counterproductive to the victim’s healing process”).

<sup>350</sup> KARJANE ET AL., *supra* note 201 at 77.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 81, 83, 85, & 93.

<sup>354</sup> Tom Farmer, *Alleged Rape Victim: BU Hiding Sex Crimes*, BOST. HERALD, Nov.28, 2001, at 1.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* Because she did not appear at her disciplinary hearing, Daryl J. DeLuca, director of Boston University’s Judicial Affairs, sent a letter to Kristin, her parents and other university officials, about it and used descriptions and quotes from the incident that were so sexually graphic that *The Boston Herald* could not include them into its story about this case. *Id.*

cannot guarantee the safety of students from their own irresponsibility or voluntary conduct. We cannot prevent them from making poor choices. Your client made poor choices, drank and behaved badly earlier in the evening.<sup>358</sup>

Although the Boston University Board of Student Conduct eventually exonerated Kristin of the sexual assault charge, it upheld her fine for underage drinking.<sup>359</sup>

Another Boston University student, Meghann was raped after smoking marijuana with her attacker.<sup>360</sup> When she reported the rape, she was charged with drug possession, placed on probation, and fined \$250.<sup>361</sup> Boston University informed both Meghann and Kristin that there was insufficient evidence to discipline the male students they accused of rape.<sup>362</sup>

In a 2000 study on campus sexual assault adjudication, the Association for Student Judicial Affairs found that the majority of colleges and universities did not provide rape victims who come forward to report their victimization protection from charges of alcohol or drug use.<sup>363</sup> Victims at a number of colleges and universities may be deterred from proceeding with complaints of a sexual assault if they were drinking at the time of the incident.<sup>364</sup> Officials at some colleges and universities even tell the victim that, because she was drinking during the incident, no crime occurred.<sup>365</sup> Despite the lack of a legal basis for this assertion, officials can convince many victims that their intoxication is a seriously mitigating circumstance in the crime.<sup>366</sup> Catherine Bath, program director at the nonprofit group Security on Campus, says that some colleges and universities now employ an array of informal but aggressive tactics to decrease rape

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<sup>358</sup> *Id.*

<sup>359</sup> Tom Farmer, *Student Claims BU Blamed Her for Being Raped*, BOST. HERALD, May 20, 2002, at 19, Marie Szaniszlo, *Backlash Said To Keep Rapes Under Wraps*, BOST. HERALD, Apr. 21, 2002, at 17.

<sup>360</sup> Szaniszlo, *supra* note 359.

<sup>361</sup> *Id.* Eventually the Boston University Board of Student Conduct overturned Meghann's conviction on the drug charges. Tom Farmer, *Alleged BU Rape Victim Cleared of Pot Charges*, BOST. HERALD, Oct. 16, 2002, at 3.

<sup>362</sup> *Id.* Both women filed civil rights complaints against Boston University with the Office of Civil Rights for the U.S. Department of Education. Alice Dembner, *US Dismisses Rights Complaints Against BU Cases Centered on Rape Charges*, BOST. GLOBE, Apr. 26, 2003, at B2. The Office of Civil Rights found, however, that there was not enough evidence to show that BU failed to investigate the complaints fairly or that its "zero tolerance" policy on alcohol and drugs had a chilling effect on the filing of sexual assault complaints. *Id.* The Office of Civil Rights explained that, because the anti-alcohol and drug policy was applied uniformly, it was not discriminatory. Tom Mashberg, *BU cleared in handling of student rape claims*, BOSTON HERALD, Apr. 26, 2003, at 008. It did however criticize the university for releasing information about the case to the media. Dembner, *supra*. Such a "zero tolerance" policy is, however, contrary to what is done by law enforcement and prosecutors. Farmer, *supra* note 361.

<sup>363</sup> ASSOCIATION FOR STUDENT JUDICIAL AFFAIRS, NATIONAL BASELINE STUDY ON CAMPUS SEXUAL ASSAULT: ADJUDICATING SEXUAL ASSAULT CASES (2000), at [http://asja.tamu.edu/news/baseline\\_study.asp](http://asja.tamu.edu/news/baseline_study.asp) (53% of institutions do not afford rape victims such immunity). The study did not address other charges against victims who come forward, such as sexual misconduct or having sex in the dorms, which typically are levied at private schools).

<sup>364</sup> BOHMER & PARROT, *supra* note 35, at 133-34.

<sup>365</sup> *See id.*

<sup>366</sup> *See* PARROT & BECHOFER, *supra* note 261, at 83.

reports.<sup>367</sup> “We’ve seen victims outright discouraged from reporting rape because they’ve been told they could be found guilty of drinking or having sex in the dorms.”<sup>368</sup> As a result, she says many campus victims “are afraid of even going through the campus judicial system for fear of being sanctioned.”<sup>369</sup>

## B. Motivation to Deter Complaints of Campus Sexual Assault

Campus officials may be motivated to deter complaints of campus sexual assault for three reasons: 1) officials may not want to be bothered with most campus rapes because they do not conform to the stereotype of violent stranger rape, 2) officials may fear substantial negative press because federal law obligates campus administrators to disseminate reports of campus rape widely, and 3) officials may fear civil suits from students disciplined for campus rape. Tools derived from the discredited prompt complaint requirement, corroboration requirement, and cautionary instructions from the criminal law of rape can allow campus administrators to deter reports of campus rape and to dispose swiftly of those reports that do come to light.

When people think about rape, most imagine a stereotypical scenario. They picture a black stranger jumping out of the bushes, dragging an innocent white woman into a dark alley, beating her viciously, and raping her.<sup>370</sup> They also imagine rape to be a rare occurrence. These racist and sexist stereotypes are misleading and inaccurate, particularly in terms of campus rape. Rape is not a rare occurrence. One in four women of college age have suffered from an attempted or completed rape.<sup>371</sup> One in five female college students suffer a rape or attempted rape during their college years.<sup>372</sup> Typically, rapes are committed not by black men on white women but by men on women of the

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<sup>367</sup> Gretchen Cook, *Campuses May Be Developing New Tactics To Hide Rapes*, WOMEN’S ENEWS, May 25, 2003.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* See also KARJANE ET AL., *supra* note 201, at 81.

<sup>370</sup> SAMPSON, *supra* note 234, at 9. See also Kimberle Crenshaw, *Mapping the Margins*, 43 STAN. L. REV. 1241 (1991) (referring to the “dominant conceptualization of rape as quintessentially Black offender/white victim”); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 596 (1990) (critiquing Catharine MacKinnon’s “general account” of rape as “a strange (read Black)” offender, for forgetting that the victim’s race is implicitly white).

As a result of a cultural and media focus on the exceptional, violent, reported cases of black on white rape, fear of stranger rape among college women is much more widespread, although acquaintance rape is much more common. SAMPSON, *supra* note 234, at 8. College policies may exacerbate that misplaced fear. A recent National Institute of Justice study of more than two thousand institutions of higher learning indicated, “Institutional authorities may (unintentionally) condone victim-blaming (for example by circulating materials that focus on the victim’s responsibility to avoid sexual assault rather than on the perpetrator).” KARJANE ET AL., *supra* note 201, at 83. The study continues, “target-hardening crime prevention strategies are problematic, as they may inadvertently reinforce stranger-rape myths, overstate the risk of such victimization, and alleviate people’s fear of being raped or sexually assaulted by someone they know.” KARJANE ET AL., *supra* note 201, at 97.

<sup>371</sup> SAMPSON, *supra* note 234, at 2. See also PARROT & BECHOFER, *supra* note 261, at 19-20 (citing Mary P. Koss, *Hidden Rape: Incidence, Prevalence, and Descriptive Characteristics of Sexual Aggression and Victimization in a National Sample of College Students*, 2 SEXUAL ASSAULT 1-25 (Burgess ed. 1988); Christine A. Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING AND CLINICAL PSYCHOL. 162, 166-69 (1987)).

<sup>372</sup> KARJANE ET AL., *supra* note 201, at 4.

same race.<sup>373</sup> Campus rapes rarely involve strangers; they are committed by acquaintances: classmates, friends, fraternity brothers.<sup>374</sup> Campus rapes tend to happen in dorm rooms or during parties, not in the dark alleys of city streets.<sup>375</sup> They happen to women who are not “innocent,” but who have prior sexual experiences as varied as any other college students their age.<sup>376</sup> Rapes on campus rarely involve weapons, vicious beatings, or other indisputable evidence of force.<sup>377</sup> Acquaintance rapists do not need to employ those tools; they ply with alcohol, pin with their body weight, and verbally and physically coerce.<sup>378</sup> As a result, campus acquaintance rapes often lack corroborative evidence of a violent physical struggle.<sup>379</sup> Often there are no witnesses to corroborate the victim’s testimony.<sup>380</sup> Moreover, because many believe that students will and perhaps should engage in a certain amount of sexual experimentation at college, people may be predisposed to believe that a questionable sexual encounter on campus was not a transgression.

Alcohol use by college students has a sizable impact on sexual assaults on campus.<sup>381</sup> Increased drinking frequency and intensity are both associated with sexually aggressive behavior by white male college students.<sup>382</sup> In one study, 16 percent of male college students admitted giving or encouraging the use of drugs or alcohol to obtain sex.<sup>383</sup> Some men stereotypically believe women who drink are more sexually available.<sup>384</sup> Others may use their own inebriation to justify or excuse their sexually aggressive behavior.<sup>385</sup> As many as 75 percent of perpetrators and 50 percent of victims of acquaintance rapes on campus were consuming alcohol at the time of the attacks.<sup>386</sup> Importantly, the intoxication of both parties makes people more willing to shift blame from the perpetrator to the victim of sexual assault. When the victim and the assailant are both moderately or highly intoxicated, individuals assign the victim significantly more blame and the perpetrator significantly less.<sup>387</sup>

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<sup>373</sup> GREENFELD, *supra* note 4, at 11 (victims of rape were evenly divided between white and blacks; in 88% of rapes, the victim and the offender were of the same race).

<sup>374</sup> See BOHMER & PARROT, *supra* note 35, at 2 & 26. See also SAMPSON, *supra* note 234, at 9; KARJANE, *supra* note 201 (84-97.8 percent of campus rapes committed by acquaintances).

<sup>375</sup> SAMPSON, *supra* note 234, at 7 (“Almost 60 percent of the completed campus rapes that take place on campus occur in the victim’s residence, 31 percent occur in another residence, and 10 percent occur in a fraternity”).

<sup>376</sup> *Id.* at 9.

<sup>377</sup> See PARROT & BECHOFER, *supra* note 261, at 3, 116, 125 (explaining that acquaintance rape occurs as a result of nonviolent coercion). See also SAMPSON, *supra* note 234, at 9.

<sup>378</sup> See PARROT & BECHOFER, *supra* note 261, at 124.

<sup>379</sup> SAMPSON, *supra* note 234, at 9. See also *id.* at 7 (“Only 20 percent of college rape victims have additional injuries, most often bruises, black eyes, cuts, swelling, or chipped teeth.”).

<sup>380</sup> *Id.* at 7.

<sup>381</sup> *Id.* at 13.

<sup>382</sup> Mary Koss, et al., *The Prediction of Sexual Aggression by Alcohol Use, Athletic Participation, and Fraternity Affiliation*, 8 J. INTERPERS. VIOL. 94 (1993).

<sup>383</sup> C. Mills et al., *Date and Acquaintance Rape among a Sample of College Students*, 37 SOC. WORK 504 (1992).

<sup>384</sup> SAMPSON, *supra* note 234, at 13.

<sup>385</sup> *Id.*

<sup>386</sup> See BOHMER & PARROT, *supra* note 35, at 198.

<sup>387</sup> Karla J. Stormo, Alan R. Lang, & Werner G. K. Stritzke, *Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences*, 27 J. APPLIED SOC. PSYCHOL. 279, 299 (FEB. 1997). However,

In the typical campus rape, then, male and female classmates consume alcohol at a party and then go to a dorm room alone. There, he pins and penetrates her, despite her cries or alcohol-induced incapacitation. There are no strangers, no bushes, no knives, and no innocence. Because campus rape does not conform to stereotypical rape, campus officials often dismiss the serious psychological, emotional, and social harm it causes.<sup>388</sup> One motivation to deter complaints of campus rape, then, is that administrators are in the dark about the extent of the problem and fail to grasp the real harm of this kind of rape.<sup>389</sup>

Another motivation to deter complaints of campus rape is that administrators may be trying to protect their institutional reputations, massaging campus-wide numbers to make them look good.<sup>390</sup> The Clery Act requires colleges and universities to provide annual reports to the Secretary of Education on the number of sexual crimes that occur on campus.<sup>391</sup> The college or university must make these reports available to “all current students and employees” as well as to prospective students.<sup>392</sup> The Clery Act requires

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when the victim was more intoxicated than the perpetrator, the perpetrator was blamed more. Participants may blame the perpetrator in that case because he takes advantage of her intoxication. *Id.*

<sup>388</sup> SAMPSON, *supra* note 234, at 9.

<sup>389</sup> *Id.* at 3 (“most offenders are neither confronted nor prosecuted, and colleges are left in the dark about the extent of the problem [of campus rape]”).

<sup>390</sup> Michael Griffaton, Note, *Forewarned Is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimitizations*, 43 CASE W. RES. L. REV. 525, 532 (1993).

<sup>391</sup> Jeanne Clery, a student at Lehigh University, was raped and murdered in her dorm room in 1986. *See* 20 U.S.C.S. § 1092 (f) (2003) (citing historical notes on amendments, citing Act of July 23, 1992, sec. 486(3)(c), Pub. L. No. 102-325, § 1092(f)(1)(F)). When her parents learned that the crime rate at Lehigh was high—38 assaults and other violent crimes over a three-year period—they contended that their daughter would never have attended the university had she known of that rate. Mark Fritz, *The Politics of Personal Grieving*, L.A. TIMES, June 3, 1999. As a result, they lobbied Congress to pass federal legislation to require colleges to make their sexual crime statistics public. Mike Kennedy, *Safety by the Numbers*, AM. SCH. & U., Oct. 2000.

The Crime Awareness and Campus Security Act was the first federal legislation to require institutions of higher learning that participated in government financial assistance programs to report to the Secretary of Education crimes that occurred on campus. *See* 20 U.S.C.S. § 1092 (2003) (historical notes on amendments, citing Crime Awareness and Campus Security Act of Nov. 8, 1990, sec. 204(c), Pub. L. No. 101-542 (effective Sept. 1, 1991)). In 1992, Congress passed the Clery Act, which added sexual assaults to the list of crimes institutions were required to report. *See* 20 U.S.C.S. § 1092 (f) (2003) (citing historical notes on amendments, citing Act of July 23, 1992, sec. 486(3)(c), Pub. L. No. 102-325, § 1092(f)(1)(F)). In 1998, the statute was amended to require that colleges and universities keep a daily log, in plain language, of all crimes reported to campus police departments and to make the log available to the public. *See id.* (citing historical notes on amendments, citing Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Act of Oct. 7, 1998 sec. 486(e)). The Act then became known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”).

<sup>392</sup> The Act also requires that institutions include in these reports “a statement of current policies concerning security and access to campus facilities,” “a statement of current policies concerning campus law enforcement,” and “a description of programs designed to inform students and employees about the prevention of crimes.” *Id.* The information must include “policies for making timely warning reports to members of the campus community” when one of the specific crimes does occur, “policies for preparing the annual disclosure of crime statistics,” and a statement of “whether the institution has any policies or procedures that allow victims or witnesses to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics,” as well as a description of these procedures where they exist. 34 C.F.R. § 668.46(b)(2)(i-iii) (2002). There is one exception to the timely warning requirement—“An institution is not required to provide a timely warning with respect to crimes reported to a pastoral or professional counselor.” *Id.*

colleges and universities to “maintain a daily log” of “all crimes reported to such police or security department.”<sup>393</sup> The log must contain the time, location, and nature of the crime, as well as “the disposition of the complaint, if known.”<sup>394</sup> The log must “be open to public inspection within two business days of the initial report being made to the department or a campus security authority.”<sup>395</sup> Only 36.5 percent of colleges and universities report their crime statistics in a manner fully consistent with the Clery Act.<sup>396</sup>

Because federal law requires that colleges and universities widely distribute information about reported rapes on campus, campus officials may be more driven by a concern for the image of their institutions than by protecting sexual assault victims on campus.<sup>397</sup> The Department of Justice has noted, “campus police may be influenced by college administrators who fear that too strong an emphasis on the problem [of acquaintance rape] may lead potential students and their parents to believe that rape occurs more often at their college than at others.”<sup>398</sup> As a result, campus officials may be motivated to deter such reports.

Another reason colleges and universities may try to deter complaints of campus rape is that they fear civil lawsuits from students disciplined as a result of these complaints.<sup>399</sup> In assessing students’ rights vis-à-vis campus disciplinary proceedings, courts have held that students have the due process right to notice and the opportunity to be heard before they can be expelled from public universities.<sup>400</sup> However, they have few due process rights against private universities.<sup>401</sup> In private college and university settings, courts have mostly applied contract theories to review student disciplinary proceedings, sometimes incorporating a quasi-requirement of “fundamental” or “basic”

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<sup>393</sup> See *id.* at (4)(A).

<sup>394</sup> See *id.* at (4)(A)(i) & (ii).

<sup>395</sup> See 20 U.S.C.S. § 1092(f) at (4)(B)(i). The log must be “for the most recent 60-day period open to public inspection during normal business hours.” 34 C.F.R. § 668.46 at (f)(5). The Clery Act also requires participating colleges and universities to publicize their policies regarding their “campus sexual assault programs, which shall be aimed at prevention of sex offenses; and the procedures followed once a sex offense has occurred.” See 20 U.S.C.S. § 1092(f) at 8(A)(i) & (ii). Colleges and universities must also report possible sanctions for committing a sexual assault, disciplinary procedures for sexual assault, and procedures that victims of campus sexual assault should follow. See *id.* at 8(B). Seventeen states require state colleges and universities to engage in further information gathering and distribution. KARJANE ET AL., *supra* note x at Table 3.2.

<sup>396</sup> KARJANE ET AL., *supra* note 201 at viii.

<sup>397</sup> *Id.* at 93. See also Fritz, *supra* note 391 (“the Clerys and their supporters point out that many schools have a long record of opposing anything that might poison their ivy-covered marketing image”); Debbie Goldberg, *Crime on Campus: How Safe Are Students?*, WASH. POST, Apr. 10, 1988 (“Traditionally parents and students have considered course offerings, research capabilities, faculty credentials and social activities when choosing a college. Now, some may be looking at another factor: crime”).

<sup>398</sup> KARJANE ET AL., *supra* note 201 at 1.

<sup>399</sup> BOHMER & PARROT, *supra* note 35, at 141.

<sup>400</sup> *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975); *Dixon v. Alabama*, 294 F.2d 150, 151 (5<sup>th</sup> Cir. 1961).

<sup>401</sup> Curtis Berger & Vivian Berger, *Academic Discipline: A Guide To Fair Process for the University Student*, 99 COLUM. L. REV. 289, 309 (1999). The range of students’ procedural rights in disciplinary hearings is beyond the scope of this article. For an interesting assessment of students’ rights in university proceedings for academic discipline, see *generally id.*



fairness.<sup>402</sup> In general, courts have concluded that private universities must comply with their own procedures and act reasonably.<sup>403</sup>

There are about thirty five written decisions in state and federal courts involving students who have sued their colleges or universities as a result of being disciplined for sexual assault. Ordinarily, disciplined students are only successful when colleges or universities are found to have deviated from the procedures outlined in their own disciplinary policies. When a student wins such a lawsuit, a court then orders that the college or university grant the student a new disciplinary hearing untainted by the procedural anomaly. Two examples are representative.

Travis Marshall sued the State University of New York College at Old Westbury (“SUNY”) after he was expelled for rape.<sup>404</sup> The SUNY disciplinary code provided for a hearing by a Judicial Review Committee and appeal to the Judicial Council.<sup>405</sup> The disciplinary code indicated that no person “shall serve simultaneously on the Judicial Council and the Judicial Review Committee;”<sup>406</sup> however, one associate dean at SUNY served on both Marshall’s Judicial Review Committee and his Judicial Council.<sup>407</sup>

Marshall sued on the basis of this procedural irregularity and the courts found that the dean’s dual service violated Marshall’s due process rights.<sup>408</sup> The New York Supreme Court explained, “The violation by an agency of its own regulations even where they are more generous than the Constitution requires may, in and of itself, constitute a violation of a student’s due process rights.”<sup>409</sup> The court then annulled Marshall’s expulsion and remanded the matter for a hearing before a new judicial council that was properly constituted according to SUNY’s code of judicial conduct.<sup>410</sup>

A Middlebury College student accused Ethan Fellheimer of rape.<sup>411</sup> Middlebury told Fellheimer that the college disciplinary committee would investigate him on the charge of rape, but after finding him not guilty of rape, the committee adjudicated him guilty of “disrespect of persons” and suspended him for a year for “engaging in inappropriate sexual activity.”<sup>412</sup> The Middlebury College Handbook for Students

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<sup>402</sup> Tenerowicz, *supra* note 32, at 656-58.

<sup>403</sup> *Id.* at 675. There has also been a traditional distinction between academic and disciplinary matters in terms of the process due. Academic violations require no notice and opportunity to be heard; whereas, disciplinary violations require notice and an opportunity to be heard. Swem, *supra* note 32, at 364. *See also* Dutile, *supra* note 32, at 243 (“Academic sanctions have occasioned greater deference from the courts”).

<sup>404</sup> 424 N.Y.S.2d 89 (S.Ct. N.Y. 1980).

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 91 (quoting judicial process section of code of student conduct at SUNY).

<sup>407</sup> *Id.*

<sup>408</sup> *See id.* at 92 (holding that requirement of impartiality in disciplinary proceedings and appeals is necessary to make hearing fair, and that having same person on both committees violated fairness).

<sup>409</sup> *Id.* (citing *Hupart v. Board of Higher Ed. of City of N.Y.*, 420 F.Supp. 1087, 1107).

<sup>410</sup> *See id.* at 92.

<sup>411</sup> *Fellheimer v. Middlebury College*, 869 F.Supp. 238 (D.Vt. 1994). Although criminal charges were also filed with the state, Vermont eventually dropped the charges. *See id.* at 240. After Fellheimer was suspended, he appealed his suspension to the Judicial Review Board, but the suspension was upheld. *Id.*

<sup>412</sup> *Id.* Fellheimer claimed to be unaware that “rape” and “disrespect of persons” were two separate charges, he thought instead that “disrespect of persons” was the provision under which “rape” was categorized. *See id.* at 246. Further, the confirmation form confirming the judicial hearing that was sent to Fellheimer referred to “Rape/Disrespect of Persons,” but gave no indication that those were actually two

indicated that the committee would “state the nature of the charges with sufficient particularity to permit the accused to meet the charges.”<sup>413</sup> Fellheimer sued Middlebury College in federal court for breach of contract and violation of due process. The District Court determined that Middlebury had created a contractual obligation that required it to “conduct its hearings in a manner consistent with the terms of the Handbook.”<sup>414</sup> The court concluded that Middlebury breached its contract with Fellheimer because it provided him notice only of the rape charge and did not warn him of the “disrespect of persons” charge.<sup>415</sup> Middlebury’s deviation from the procedures outlined in its Handbook rendered the hearing fundamentally unfair so the court granted Fellheimer’s motion for summary judgment on the breach of contract claim.<sup>416</sup>

If colleges and universities scrupulously follow their own procedures, they have little to worry about in terms of suits from disciplined students. They should perhaps be more concerned with federal civil suits when they receive and ignore complaints from women who were sexually assaulted. Title IX requires:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>417</sup>

Title IX may provide sexually victimized students with a cause of action against colleges and universities that know about and fail to redress sexually hostile environments caused by peers. Federal courts are only beginning to articulate the contours of the application of Title IX to colleges and universities;<sup>418</sup> however, the claim that colleges may be liable to sexually victimized students has enjoyed some success.<sup>419</sup>

#### **IV. Freedom from the Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions**

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separate and distinct charges. *Id.* at 245. *See id.* at 241. The state of Vermont, as well as the college disciplinary board, found Fellheimer not guilty of rape, which was the original charge. *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* at 242.

<sup>415</sup> *Id.* at 245. Fellheimer claimed to be unaware that “rape” and “disrespect of persons” were two separate charges, he thought instead that “disrespect of persons” was the provision under which “rape” was categorized. *See id.* at 246. The confirmation form confirming the judicial hearing that was sent to Fellheimer referred to “Rape/Disrespect of Persons,” but gave no indication that those were actually two separate and distinct charges. *Id.* at 245.

<sup>416</sup> *See id.* The court stated:

Fellheimer defended, successfully, against a charge of rape or sexual assault. He was never told that he was being charged with a separate offense of disrespect of persons, or what conduct, if proven at the hearing, would constitute that offense. As such, it was impossible for him to defend against that charge.

*Id.*

<sup>417</sup> 20 U.S.C. 1681(a) (1994).

<sup>418</sup> Verna Williams & Deborah Brake, *When a Kiss Isn’t Just a Kiss: Title IX and Student-To-Student Harassment*, 30 CREIGHTON L. REV. 423, 424 (1997).

<sup>419</sup> *See generally id.* *See also* Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH & LEE L. REV. 55 (1998).

As we have seen, new versions of the prompt complaint rule, the corroboration requirement, and cautionary instructions are now infecting disciplinary proceedings in the academic world. The prompt complaint requirement unduly influences the timing and mandatory reporting rules that various colleges and universities have enacted for claims of sexual misconduct. Harvard's new policy indicates that a "timely" complaint is ordinarily required. Some top schools suggest that a prompt complaint of sexual assault is necessary; others mandate it. Those that are silent on the issue may still discourage complaints on the basis that they are not reported immediately.

Additionally, the Air Force Academy's new sexual assault policy mandates prompt disclosure of any allegation to superior officers: "All allegations of sexual assault will be reported to the officer chain of command immediately."<sup>420</sup> One in three civilian institutions of higher learning employs "designated mandatory reporters," school officials who are required to report (sometimes confidentially) instances of rape or sexual assault to the police.<sup>421</sup>

The corroboration requirement from the criminal law of rape now influences the amount of evidence of sexual misconduct colleges and universities require for a violation of their disciplinary codes. Harvard adopted a strong corroboration requirement in its formal sexual misconduct policy that it recently converted to a quieter demand: "students are asked to provide as much information as possible to support their allegations." Harvard has indicated that it will not take disciplinary action against those students accused of rape unless the complainant provides such support. Other schools may soon follow Harvard's lead.

Four out of five campus disciplinary codes do not contain a standard of proof for the finding of sexual assault.<sup>422</sup> This deficiency does not prevent an institution from informally holding sexual assault complaints to a higher standard of proof than other disciplinary complaints. Because of the traditional bias against those who lodge claims of sexual assault generally, as well as the bias against those who bring claims of campus acquaintance rape specifically, there is reason to suspect that a double standard might infect the way some campus officials treat complaints of sexual assault.

The cautionary instruction from the criminal law has paved the way for campuses to react with extra suspicion to reports of sexual assault. Sexual assault is widespread on college campuses yet it is vastly under-reported. Victims who come forward have been subjected to intense counter-scrutiny and even scorn from both their peers and campus officials to whom they reported having been violated. One manifestation of this counter-scrutiny is the counter charges filed against victims who come forward with allegations of rape. Both the Air Force Academy and Boston University have struggled with substantial negative publicity regarding the practice of disciplining students who come forward with allegations of rape on the basis of other (often alcohol or drug-related) disciplinary infractions. A majority of colleges and universities do not provide rape victims who come forward to report their victimization amnesty from charges of alcohol or drug use.<sup>423</sup>

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<sup>420</sup> *Agenda for Change*, *supra* note 347

<sup>421</sup> KARJANE ET AL., *supra* note 201, at 77.

<sup>422</sup> *Id.* at 120.

<sup>423</sup> ASSOCIATION FOR STUDENT JUDICIAL AFFAIRS, *supra* note 363.

As a result, I propose the following provisions for campus sexual assault policies. My proposal is not a comprehensive policy on sexual assault; it is simply a set of three model provisions in areas of particular concern, given the influence of the prompt complaint requirement, corroboration requirement, and cautionary instructions from the criminal law of rape.

1. Complaint Timing. Victims are encouraged to report instances of sexual assault to campus authorities anonymously, confidentially, or publicly at any time. Students may initiate disciplinary proceedings on the basis of sexual assault against any student currently enrolled at [applicable institution's name].
2. Standard of Proof. The standard of proof for a violation of the disciplinary code for sexual assault shall be a preponderance of the evidence. This standard requires that the complainant prove that an allegation is more probable than not. A student who complains of sexual assault need not present additional evidence to corroborate the complaint. The complainant's testimony alone may be sufficient to prove that an allegation is more probable than not.
3. Amnesty for Disciplinary Infractions. Ordinarily, a student who reports an instance of sexual assault to campus authorities shall be granted amnesty for other disciplinary infractions committed by that student on the instance in question.

The first model provision on complaint timing would abolish the influence of the criminal law's prompt complaint requirement by encouraging reports of sexual assault at any time. It emphasizes that the complainant can make a report anonymously, confidentially, or publicly, which would abolish non-confidential mandatory reporting rules in place at some institutions of higher learning. The provision would grant the raped student, who has often had her sense of control destroyed, control over the amount of information she will reveal to authorities in terms of her identity and experience. The first provision would also allow school disciplinary boards to curtail their jurisdiction in sexual assault cases to those circumstances that most affect campus life by authorizing disciplinary proceedings only against those who are currently enrolled.

The second model provision would abolish the influence that the corroboration requirement has on campus sexual assault policies and procedures by stating that a complainant need not present additional evidence to corroborate her complaint. No external corroboration of the complainant's testimony should be required at any stage of the process. As we have seen, acquaintance rape victims often have few eyewitnesses, bruises, or other evidence to corroborate their assaults.<sup>424</sup> None should be required. A credible narrative that convinces the fact finder should be enough for a disciplinary adjudication in favor of the complainant.

The second model provision also prevents institutions from holding sexual assault complaints to a higher standard of proof than other disciplinary complaints. The burden

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<sup>424</sup> See *supra* notes 377-379 and accompanying text.

of proof for a disciplinary violation on campus should not mimic the criminal law's standard of proof of guilt beyond a reasonable doubt. The privilege of an education from an institution of higher learning should be denied to students on evidence less serious than would subject them to criminal sanctions. Being thrown out of the Air Force Academy is not the same as being thrown into the brig. It should be easier to be expelled from Harvard than to be placed in a prison in the state of Massachusetts.

Since eight of ten sexual assault policies on university campuses that include a standard of proof employ a "preponderance of the evidence" standard, I have included that level of proof as the appropriate one here. Preponderance of the evidence, the burden of proof in civil cases, requires "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it."<sup>425</sup> A small minority of campuses maintains a "clear and convincing" standard of proof for disciplinary proceedings. Clear and convincing evidence requires proof of a "reasonable certainty" or high probability—something more than preponderance of the evidence, but less than beyond a reasonable doubt.<sup>426</sup> Should an institution of higher learning maintain a clear and convincing standard of proof for other disciplinary infractions, it would be appropriate to include the same standard of proof in this provision.

Assuming that an institution adopts "preponderance of the evidence," such a standard would allocate burdens to each side in a disciplinary action for sexual assault the same way that the burdens are allocated in a regular civil suit. As in a civil suit, it is up to the decision-makers to assess the credibility of the witnesses. If the only evidence submitted is the testimonies of the complainant and the accused (the so-called "he said/she said" circumstance), and the complainant's story is more credible than the accused student's story, the complainant should prevail. If the narratives are equally credible, the accused student should prevail because the complainant would not have proven that the sexual assault was more probable than not.

The second model provision would also abolish the influence that the cautionary instruction has on campus sexual assault policies and procedures. The testimony of a student who brings a claim of sexual assault against another student should not, merely because of the nature of that charge, be treated in any different manner than the testimony of a complaining witness in any other case. The testimony should not be subject to extra scrutiny or additional burdens beyond that which regularly attend the evaluation of student charges. This analysis is consonant with state criminal codes that have abolished the traditional cautionary instruction in rape cases. South Dakota's criminal law states: "The testimony of the complaining witness in a trial for a charge of a sex offense ... may not, merely because of the nature of that charge, be treated in any different manner than the testimony of a complaining witness in any other criminal case."<sup>427</sup> Pennsylvania's criminal code is similar: "The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. ... No instruction shall be given cautioning the jury to view the

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<sup>425</sup> BLACK'S LAW DICTIONARY 819 (6<sup>th</sup> ed. 1991).

<sup>426</sup> *Id.* at 172.

<sup>427</sup> S.D. CODIFIED LAWS § 23A-22-15.1 (Michie 2003)).

complainant's testimony in any other way than that in which all complainants' testimony is viewed."<sup>428</sup>

The third and final model provision curtails the ability of campus sexual officials to counter-scrutinize students who come forward with allegations of rape. As we have seen, most colleges and universities do not provide raped students with immunity from disciplinary charges related to the incident in question. This provision grants those who complain to campus authorities of sexual assault routine amnesty for the (usually alcohol or drug-related) disciplinary infractions they engaged in on the instance in question. The term "ordinarily" simply allows the campus some discretion to pursue disciplinary infractions related to the complainant's actions on the instance in question if those actions were particularly egregious or otherwise extraordinary. In the normal course of events, however, campus authorities should not pursue alcohol infractions against college students who are raped.

Some might worry that such an amnesty provision would create an incentive for false rape complaints. To assuage such a concern, one might look to the practice of police departments that receive complaints of crimes from the general public. Police departments tend to ignore the relatively minor criminal infractions that a woman who reports a rape engaged in on the instance in question. If a woman comes forward to report that she was raped by a man with whom she smoked marijuana on the instance in question, police do not respond by charging her with possession of a controlled substance. They pursue the rape report. Police understand that women are very unlikely to report rape if police prosecuted those women for any criminal offenses engaged in on the instance in question. As a result, the third model provision removes a powerful tool campus administrators can use to deter and dismiss complaints of sexual assault.

### *Conclusion*

Danielle Bauer won five academic scholarships to attend Erskine College, a small, private, Presbyterian institution in Due West, South Carolina.<sup>429</sup> In the fall of

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<sup>428</sup> 18 PA. CONST. STAT. ANN. §3106 (West 2002). Colorado's criminal code perhaps goes the furthest, stating:

In any criminal prosecution [for sexual assault, unlawful sexual contact, sexual assault on a child, or attempt of these crimes], the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given. However, the jury shall be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury.

COLO. REV. STAT. ANN. § 18-3-408 (WEST 2002). Colorado courts have held that this statute is constitutional and allowed the following jury instructions to be issued. In *People v. Fierro*, the Supreme Court of Colorado stated that the prohibition of the traditional cautionary instruction for rape cases does not deprive the defendant of "any right of constitutional dimensions, particularly in light of the fact that the jury in this case was correctly instructed concerning its duty to examine the credibility of each witness who testified at trial." 606 P.2d 1291, 1295 (Colo. 1980). The applicable jury instruction on gender bias in Colorado is: "You are not to allow bias or prejudice, including gender bias, or any kind of prejudice based upon gender, to influence your decisions in this case." COLO. JURY INSTRUCTIONS, CRIMINAL CH. 12(14).

<sup>429</sup> Summary Report of Psychological Counseling Services for Danielle Bauer from Dr. Joanne Armstrong of May 16, 2003, at 1 (on file with author) [hereinafter Summary Report]. Danielle Bauer disclosed her experiences to me and agreed to have me recount her story herein. Telephone Interview with Danielle

2002, she enrolled in her first semester of classes. One afternoon in November, her chemistry tutor Mark Ridgeway asked her to come to his dorm room and, after she arrived, they began kissing. He asked Danielle for sex but she refused. He then maneuvered his way on top of her and leaned his shoulder deeply into her neck. Danielle lost consciousness and he raped her.<sup>430</sup>

Danielle went to the hospital emergency room that night. She asked for a rape kit examination, but the attending nurse told her that the hospital would only perform such an exam if Danielle knew for sure that she was going to press charges against her assailant.<sup>431</sup> Danielle, confused and traumatized, was not sure what to do. Although the attending nurse gave Danielle the phone number of the Rape Crisis hotline, she refused to give her an exam.<sup>432</sup>

According to the psychologist she had to see as a result of the attack, Danielle suffered “significant psychological distress and a loss of daily functioning.”<sup>433</sup> Although Danielle had “no previous history of depression or anxiety,” she suffered from “a drastic decline in her academic, emotional, and social functioning immediately following the rape attack.”<sup>434</sup> She “experienced suicidal thoughts, repetitive intrusive thoughts about the assault, self-mutilating behavior, feeling dirty and worthless, severe sleep disturbance, anxiety attacks, shaking, crying spells, weight loss, impaired concentration, mood swings, intense anger, loss of self-confidence, and social withdrawal.”<sup>435</sup>

When Danielle mustered the courage to report her rape to Erskine College officials, they ignored the situation for months, insisting that they could not be expected to handle a sexual assault case.<sup>436</sup> It was not until Danielle reported the rape to the local police department in April of 2003 and her assailant was indicted for first-degree sexual assault that Erskine officials relented to Danielle’s repeated requests for a school hearing.<sup>437</sup>

At the hearing on the matter, Erskine officials found her assailant not guilty of sexual assault. They then put Danielle on trial, introducing witnesses who said she was a sorority girl who wore provocative clothing and drank.<sup>438</sup> A dean then argued that Danielle had perhaps made up the whole story because she was doing poorly in a biology class and wanted a medical leave from school to maintain her scholarships.<sup>439</sup> Officials then found both Danielle and her assailant guilty of “sexual misconduct.”<sup>440</sup>

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Bauer, sophomore student at Erskine College (March 2, 2004) (notes on file with author) [hereinafter Telephone Interview].

<sup>430</sup> Telephone Interview, *supra* note 429.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> Summary Report, *supra* note 429, at 1.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> Telephone Interview, *supra* note 429.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> Letter from John Wingard, Chairman of the Erskine College Discipline and Appeals Committee, to Danielle Bauer of Aug. 12, 2003 (on file with author). Sexual misconduct” was defined as conduct that was “detrimental to the spiritual, physical, emotional, or moral well-being of members of the Erskine College Community.” *Id.*

Danielle appealed. Her first appeal affirmed the decisions made the hearing.<sup>441</sup> Danielle appealed again. At this final appeal, the president of Erskine College, John Carson, affirmed the determination that her assailant was not guilty of sexual assault.<sup>442</sup> Carson noted, “neither I nor any other human being can look within the heart of another human being let alone two human beings and determine what motives are there, we can only look at the limited evidence which can be produced.”<sup>443</sup>

Carson then decided to reverse the sexual misconduct findings against both parties. He felt the need to emphasize, however, that he was “especially grieved” to have to do so.<sup>444</sup> Referring to the kissing that preceded the rape, he noted, “I can in no way condone the sexual involvement which was consensual up to the point of debate between the two parties.”<sup>445</sup> Carson wrote to Danielle:

I grieve that this decision is contrary to my personal beliefs with respect to upholding a standard of conduct which is appropriate between a man and a woman and contrary to the standard of conduct of the Erskine community. Your actions not only affect you but also every member of the Erskine community—whether student, faculty, or staff. I pray that all of us will consider the serious nature of our decisions and seek God’s forgiveness.<sup>446</sup>

One might be tempted to conclude that Danielle’s story is exceptional. But other colleges and universities have responded to women’s reports of having been raped by charging them with a variety of disciplinary infractions, making Danielle’s story far from unique. Set aside their sanctimony and Erskine College officials echo General Gilbert at the Air Force Academy, who insisted:

[I]f I walk down a dark alley with hundred-dollar bills hanging out of my pockets, it doesn’t justify my being attacked or robbed, but I certainly increased the risks by doing what I did. The behavior [Lisa] engaged in is not behavior we condone for our cadets or our officers in the Air Force.<sup>447</sup>

Officials at both institutions mimic the Boston University’s general counsel Robert Smith who declared that his school:

cannot guarantee the safety of students from their own irresponsibility or voluntary conduct. We cannot prevent them from making poor choices.

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<sup>441</sup> *Id.* Wingard informed Danielle in writing that the appeals committee affirmed the finding that she was guilty of sexual misconduct. He opined, “It is our hope and prayer that this very trying experience will result ultimately in your growth in grace.” *Id.*

<sup>442</sup> Letter from John Carson, President of Erskine College, to Danielle Bauer of Oct. 14, 2003 (on file with author) [hereinafter Letter from John Carson].

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> Jargon, *supra* note 340.



[Kristin] made poor choices, drank and behaved badly earlier in the evening.<sup>448</sup>

Each of these officials, deeply suspicious of women who allege sexual assault, acts as if chastising Potiphar's wife. He seeks to place the blame for the incident squarely on the woman's shoulders. She failed to personify a model of sexual virtue and so should be held responsible for the attack. She failed to report the rape to the police promptly enough. She failed to present hard, corroborating evidence. School officials cannot be expected to plumb the depths of the human heart. They "can only look at the limited evidence which can be produced."<sup>449</sup>

The prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape evinced the belief that, because women lie about rape, men accused of it need special legal protection beyond that which the law affords defendants accused of other crimes. Officials at some colleges and universities have now adopted similar beliefs about female students who come forward with allegations of campus rape. Importing new versions of these ancient policies from the criminal law institutionalizes their grave skepticism of women. It is important to connect these retrograde policies with their discredited past and reject them both in the remaining state laws in which they withstand old age and in campus disciplinary procedures in which they are just being born.

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<sup>448</sup> Farmer, *supra* note 354, at 1.

<sup>449</sup> Letter from John Carson, *supra* note 442.